RIGHTS, EMERGENCIES AND JUDICIAL REVIEW

Kazi Imtiaz Nazr Omar

A Thesis submitted for the degree of Doctor of Philosophy of The Australian National University

March 1992

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STATEMENT

I declare this Thesis to be my original work.

........................................
Kazi Imtiaz Nazr Omar
3 March 1992
ABSTRACT

Recurrent periods of Emergency rule in Malaysia, Sri Lanka and Bangladesh provide the background for a comparative examination of constitutional emergency powers, individual rights, and judicial review. The basic premise of this study is that the invocation of a state of emergency can never justify an abrogation of constitutional government and, in this regard, the role of the Court is crucial. This work examines the extent to which the Court has performed its expected role, identifies problems in the approaches to interpretation which have been adopted, and explores alternative approaches to constitutional interpretation and judicial review.

The first part of the thesis examines the operation of constitutional rights, their derogations during an Emergency, and the mechanisms of Emergency rule. Following this, three chapters examine, in detail, the approaches of the Courts in adjudicating issues of rights during states of emergency. The last part subjects conventional jurisprudence to a critical inquiry and explores alternative judicial techniques. An approach to constitutional adjudication based on a radical exposition of "law", the nature of citizens' rights, and a proper theory of judicial review is advocated in the concluding chapter.
ACKNOWLEDGEMENTS

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Port Moresby, PNG
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ABBREVIATIONS

A.C. = Appeal Cases.
A.I.R. = All India Reporter.
All E.R. = All England Reports.
C.L.R. = Commonwealth Law Reports.
D.L.R. = Dacca/Dhaka Law Reports.
E.R. = English Reports.
L.R. Ind. App. = Law Reports, Indian Appeals.
N.L.R. = New Law Reports.
N.Z.L.R. = New Zealand Law Reports.
P.L.D. = Pakistan Legal Decisions.
Q.B. = Law Reports, Queen's Bench Division.
S.C.C. = Supreme Court Cases, India.
S.C.R. = Supreme Court Reports, Canada.
S.C.R. = Supreme Court Reports, India.
Sri L.R. = Sri Lanka Law Reports.
U.S. = U.S. Supreme Court Reports.
W.L.R. = Weekly Law Reports.
INTRODUCTION

A great many of those Constitutions promulgated over the past forty years were produced in the wake of the hectic constitution-making activity which accompanied the process of decolonisation and the emergence of new States. In the great majority of these new States' Constitutions, a catalogue of citizens' rights are entrenched. In conformity with the exhaustive quality of post-colonial constitutional documents, the entrenched Bills of Rights are also detailed, not so much in the sense of clarifying these rights, as for the purpose to reducing in writing the myriad exceptions to the articulated rights. The constitution-makers strived to allow for measures to meet all kinds of contingencies.

In addition to those clauses which restrict the entrenched rights, many of the Constitutions of the post-colonial states entrench powers of preventive detention. On its face, this seems anomalous. It might have been thought that, on the attainment of independent status, the constitution-makers in the emergent states would be committed to guarantee rights to the citizens, and not to sanction the making of laws to deprive them of their rights through preventive detention.

Yet another, and by far the major potential obstacle to the protection of rights in the new States is the constitutional sanction of an ability in the executive to invoke emergency powers. Experience has shown that during a constitutional emergency, individual rights are virtually negated. Preventive detention powers, which are available at all times, are used extensively during states of emergency.

The practical working of the newer constitutional orders, and the challenges thereby posed to the basic notions of constitutionalism, are best perceived in observing the operation of emergency powers and preventive detention under these new Constitutions. In a large number of post-colonial states, states of emergency have tended to become more the norm than the exception.¹

¹ In States Of Emergency: Their Impact on Human Rights, A Study prepared by the International Commission of Jurists, Geneva, 1983, it has been commented that:

[s]tates of emergency are encountered with surprising frequency throughout the world. The chapters [in this Study] on states of emergency in India, Malaysia and Thailand might have been followed by chapters on states of emergency in Bangladesh, Pakistan, The Philippines, Singapore, South Korea, Sri Lanka and Taiwan. In Africa, states of emergency have been reported recently in Kenya,
Emergency regimes are, however, not confined to countries of the Third World. A recent study of emergency powers in fifteen countries by the International Commission of Jurists (ICJ) observed that:

[i]t is probably no exaggeration to say that at any given time in recent history a considerable part of humanity has been living under a state of emergency.\(^2\)

The ICJ study also noted:

the disturbing tendency observed in many ... [countries] for a state of emergency to become perpetual or to effect far-reaching authoritarian changes in the ordinary legal norms.\(^3\)

Experience in the new polities has shown that the detailed constitutional rules and norms have been manipulated over the years by political authorities to incrementally enhance governmental powers to the detriment of the rights of the citizens. The vague restrictive clauses qualifying the constitutional guarantees of individual rights have allowed governments of the day to encroach upon citizens' liberties. Instead of ensuring workable legal restraints on the government, the elaborate provisions of the new constitutions have frequently facilitated the assumption of unbridled power on the part of the ruling government. The result has been an absence of constitutionalism and the negation of effective individual rights.

This thesis is a study of emergency powers, constitutional rights, and judicial review in three countries - Malaysia, Sri Lanka and Bangladesh. The Constitutions of all three countries entrench both individual rights and emergency powers. Powers of preventive detention are also available under these Constitutions. These powers of preventive detention are available not only during states of emergency, but in normal times as well. A Proclamation of Emergency under the Constitution of each of these countries enables the

\(^2\) *Ibid.*. The countries surveyed were, Argentina, Canada, Colombia, Eastern Europe, Ghana, Greece, India, Malaysia, Northern Ireland, Peru, Syria, Thailand, Turkey, Uruguay, and Zaire.

\(^3\) *Ibid.*, at 415.
promulgation of extra-ordinary executive decrees and legislative enactments. Emergency executive action and legislative measures provide not only for preventive detention, but also enable the exercise of other extraordinary powers encroaching on almost all aspects of the constitutional rights of citizens.

The justification for the use of extra-ordinary state powers during an Emergency is provided by the maxim, salus populi suprema lex - the welfare of the people is the paramount law. It is generally assumed that the rights which citizens in normal times enjoy should, in times of crisis yield to the maxim salus populi suprema lex. Relying on the principle of necessity, encompassed by this maxim, Courts in common law countries have consistently been prepared to condone draconic executive action during times of national emergency. Although constitutional systems of the common law world have long recognised the maxim salus populi suprema lex, the tendency to entrench emergency powers in a constitution is recent.

One of the primary reasons for the incorporation of emergency powers in Constitutions such as those of Malaysia, Sri Lanka, or Bangladesh is to offset the operation of constitutional rights during an Emergency. The thrust of the argument in this regard has been that, "the existence of fundamental rights ... ought [not] to be permitted to imperil the safety of the State". A second reason for detailed provisions on emergency powers is a concern to restrict judicial creativity in the determination of the extent to which such powers can be exercised. The general objective of constitutional emergency powers is to bring about a re-allocation of state power in a manner inconsistent with the constitutional limitations which ordinarily prevail.

While it can be accepted that constitutional emergency provisions might modify the limitations on state power, the invocation of a state of emergency should not wholly suspend or abrogate constitutional government. In countries which do not have entrenched emergency powers, any law designed to deal with an emergency must be clearly related to the circumstances said to constitute the emergency, and it would be only in a very extreme case that a


complete abrogation of constitutional limitations would be justified. Yet in countries such as Malaysia, Sri Lanka and Bangladesh, this fundamental premise often appear to be forgotten.

This situation results in part from the fact that included within the scope of the explicit emergency powers is provision for all manner of situations which might conceivably justify the temporary re-distribution of constitutional power. Thus in Malaysia, Sri Lanka and Bangladesh, the constitutionally prescribed legal consequences of an Emergency, designed to enable the State to cope with crisis situations, take effect irrespective of the actual nature of the crisis. There thus appears an irreconcilable conflict between the constitutionally conferred, and apparently unfettered, emergency powers of the State and the concept of constitutionalism on the other. This gives rise to a number of basic problems regarding the nature of constitutional rights, the permissible encroachments on such rights during an Emergency and the power of the courts to enforce the rights in emergency situations.

The basic premise of this thesis is that the invocation of a state of emergency can never justify a complete abrogation of constitutional government, or a complete suspension of constitutional rights. This proposition derives from the very existence and nature of a written constitution and the significance of entrenched rights. The principal function of a written constitution is to ensure limited government by articulating limitations to the exercise of state power. This is the essence of constitutionalism. That being so, an inquiry into the exercise of governmental powers to the detriment of citizens' rights must be concerned with whether government is in this sense constitutional. Ultimately, the courts are called to make this inquiry, and the constitutional power of the court must be invoked to enforce compliance with the requirements of constitutionalism. The entrenched powers of judicial review under the Constitutions of Malaysia, Sri Lanka and Bangladesh do facilitate the assumption of this kind of judicial power. This judicial power must remain available even during an Emergency, for otherwise there is no means to ensure that governmental action is constitutional.

The objective of this study is to examine the operation of emergency powers, the derogations from constitutional rights and the role of the Courts in

---

INTRODUCTION

Malaysia, Sri Lanka and Bangladesh. Its thrust is directed to examine the reaction of the Courts when they are confronted with the issues presented by a Proclamation of Emergency and its constitutionally predefined legal consequences. The techniques of judicial inquiry into infringements of constitutional rights during an Emergency are investigated and alternate theories of judicial review are explored. In examining derogations from rights during an Emergency and the responses of the Courts, the right to personal liberty is highlighted and discussed in detail. The question of rights during an Emergency is discussed in the broader context of the political-moral rights of citizens against the State.

It is not the purpose of this study to undertake an exhaustive examination of all the legal aspects of constitutional emergency powers in Malaysia, Sri Lanka and Bangladesh. The principal focus will be on those aspects of the law of constitutional emergency which have determined the manner in which the Courts in these countries have perceived their own constitutional role. In this regard, the curtailment of rights during an Emergency and the Courts' techniques of interpretation will be discussed in detail. The evaluation of the role of the Courts will then form the basis of suggesting alternate premises of articulating rights and explicating the function of judicial review.

The thesis is divided into three parts and a conclusion. The first part, Chapters I to V, is concerned with an examination of constitutional rights, the mechanisms of preventive detention, and the framework of constitutional emergency powers. Chapter I examines briefly the colonial context of the rights of citizens, and follows the transition to guaranteed constitutional rights in the post-colonial Constitutions. Selective judicial decisions on citizens' rights are included to highlight the approaches of the Courts in adjudicating constitutional rights. Preventive detention during the colonial period, and peace-time detention without trial since Independence is the subject of Chapter II. Colonial instruments of preventive detention, and decisions of the Court during this period are discussed. This is followed by an examination of constitutional provisions of preventive detention since Independence, as well as the provisions of preventive detention statutes. Case-law on preventive detention of the latter period are also discussed.

Chapter III examines the colonial background of emergency powers, and the emergence of emergency powers as a constitutional norm in the post-colonial
state. The mechanisms for the invocation of a state of emergency, the executive and legislative powers available under a Proclamation of Emergency, and the other legal consequences of a Proclamation are discussed. A Proclamation of Martial Law as an instance of extra-constitutional emergency is also discussed briefly in Chapter III. The power to proclaim an Emergency and its justiciability is considered in Chapter IV. Chapter V is devoted exclusively to the effect of a Proclamation of Emergency on constitutional rights. Two techniques of curtailment of rights during an Emergency are discussed in some detail in this Chapter.

The second part - Chapters VI, VII and VIII - discuss the jurisprudence of the Courts of Malaysia, Sri Lanka and Bangladesh with regard to the right of personal liberty during an Emergency. The difference in the approaches of the Courts is significant enough to justify a classification according to the modes of inquiry and the conclusions reached.

The subject of the third part of the thesis - Chapters IX and X is an evaluation of the judicial techniques employed by the Courts in the three countries, and alternative approaches to interpretation. In this part, it is argued that the problems of emergency powers, constitutional rights and judicial review cannot be resolved by a formal style of constitutional interpretation. These issues, it is suggested, must be addressed in the context of the basic premises which underlie the constitutional system, and the implications of the rights of citizens. Chapter IX concentrates on techniques of legal interpretation in general. The trends of constitutional interpretation pursued by the Courts in Malaysia, Sri Lanka and Bangladesh are identified as inadequate, and alternative approaches are discussed. Chapter X focuses entirely on the Courts' interpretation of constitutional rights. Judicial review of constitutional rights by the Courts in the three countries are portrayed as inappropriate. In this regard, two contemporary theories of judicial review and constitutional rights are discussed, and a new approach to the interpretation of rights and judicial review is suggested.

The conclusion - Chapter XI - examines the implications of recurrent states of emergency in Malaysia, Sri Lanka, and Bangladesh, reviews the requirements of constitutionalism, and re-appraises the function of the Court under the...
Constitution. On the basis of some of the conclusions reached in Chapters IX and X, a new jurisprudence of rights, emergency powers and judicial review is suggested.

**The Formal Style of Interpretation**

Throughout the analysis in the succeeding Chapters, the comment will recur that the dominant judicial technique of the Courts in Malaysia, Sri Lanka and Bangladesh reflects a formal style of interpretation. This formal style may also be characterised as Legal Formalism or Legalism.

At the heart of the word formalism in many of its numerous uses, lies the concept of decisionmaking according to rule. Formalism is the way in which rules achieve their ruleness precisely by doing what is supposed to be the failing of formalism: screening off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account. Moreover it appears that this screening off takes place largely through the force of the language in which rules are written.

The underlying characteristics of the formal style of legal reasoning are:

[...]

and

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In a recent essay, *Formalism*, (1988) 97 *Yale Law Journal* 509, F. Schauer notes the "widely divergent uses of the term [Formalism]", *id.* at 510, and concludes that the formal style, as he comprehends it, "ought to be seen as a tool to be used in some parts of the legal system and not in others", *id.* at 547. Schauer however, does not specify the areas of the law in which the formal style could be meaningfully applied.

9 F. Schauer, *op. cit.*, at 510.
[a] precise and narrow demarcation of the legal from the non-legal, requiring limited appraisal of the social, political and economic realities, and a striking inability to theorise about purposes and effects of law.\textsuperscript{10}

The Chief Justice of the High Court of Australia has said that:

[in its most extreme form legalism required a complete separation of law from policy, partly on the ground that the law is a self-contained discipline and partly on the ground that exposure to politics and policy would subject the law to controversy.]\textsuperscript{11}

Advocates of legal formalism would argue that this approach ensures:

continuity, objectivity and absence of controversy, attributes calculated to induce confidence in the administration of justice and respect for the law.\textsuperscript{12}

But, as the Chief Justice puts it:

[legalism, when coupled with the doctrine of \textit{stare decisis}, has a subtle and formidable conservative influence. When judges fail to discuss the underlying values influencing a judgement, it is difficult to debate the appropriateness of those values. As judges who are unaware of the original underlying values, subsequently apply that precedent in accordance with the doctrine of \textit{stare decisis}, those hidden values are reproduced in the new judgement - even though community values may have changed.\textsuperscript{13}]


\textsuperscript{12} Sir Anthony Mason, \textit{op. cit.}, at 156. The writer here is summing up the position of the proponents of legal formalism.


\textit{Cf. F. Schauer, op. cit.}, at 542:

Because rule-bound decisionmaking is inherently stabilising, it is inherently conservative, in the non-political sense of the word ... Yet this conservatism, suboptimization, and inflexibility in the face of a changing future need not be universally condemned. We achieve stability ... by relinquishing some part of our ability to improve on yesterday.
INTRODUCTION

From the point of view of legal technique, what then are the more specific components of the formal style? Firstly, an adherence to precedent without regard to the values underlying them, which therefore avoids the question of which of the precedents are of continuing relevance. This is especially problematic where the precedents are from a colonial era or from another jurisdiction. Secondly, in the interpretation of statutes, one finds the isolation of legal questions from questions of value by techniques which (a) read in common law values, and (b) focuses close attention on the words of the relevant statute read in the light of maxims of interpretation which emphasize semantic and syntactical considerations.  

Understood in this way, Legal Formalism is a broader category than Interpretivism. Interpretivism as a judicial technique means that:

judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written Constitution ...

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14 E.g. expressio unius est exclusio alterius, ejusdem generis.

15 Recent debates in the U.S.A. on theories of judicial review have identified two distinct techniques of judicial interpretation, interpretivism and noninterpretivism. See for example, John Hart Ely, Democracy and Distrust, Cambridge, Mass., Harvard University Press, 1981, at 1; Thomas Grey, Do We Have An Unwritten Constitution?, (1975) 27 Stanford Law Review 703; R. Bork, Neutral Principles and Some First Amendment Problems, (1971) 47 Indiana Law Journal 1; Michael J. Perry, The Constitution, the Courts, and Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary, Yale University Press, 1982; Paul Brest, The Misconceived Quest For The Original Understanding, (1980) 60 Boston University Law Review 204, 204-205. Through interpretivism and noninterpretivism are the terms commonly used, other expressions like interpretive and noninterpretive, originalism and nonoriginalism, have also been used. Ronald Dworkin argues that the interpretivist/non-interpretivist debate is misleading, for it:

suggest[s] a distinction between judges who believe constitutional decisions should be made only or mainly by interpreting the Constitution itself and others who think they should be based on extraconstitutional grounds. This is an academic form of the crude popular mistake that some judges obey the Constitution and others disregard it. It ignores the philosophical character of law as interpretive.


INTRODUCTION

Noninterpretivism, or a noninterpretive technique of judicial interpretation, connotes that the explication of constitutional provisions:

presupposes a prior commitment to certain principles of political justice which ... must ... be reflected in the way the Constitution is read and enforced.\(^1\)

This thesis will not attempt to evaluate the case-law from Malaysia, Sri Lanka and Bangladesh in terms of the interpretivism/noninterpretivism debate in the U.S.A. Firstly, that debate is cast in historical references, a dimension that is absent in countries which were former British jurisdictions. Secondly, the language of the American debate is not found in the case-law of the countries examined in this thesis. It is now necessary to make some references to the styles of interpretation adopted by the Privy Council.

There has been a debate in Privy Council decisions regarding the formal style of interpretation. A survey shows that the dominant technique of interpretation of the Privy Council has been the formal style. In construing constitutional provisions, the Privy Council has tended "to approach the question of interpretation as if the document in question were an ordinary statute and therefore subject to the same literal construction."\(^2\)

In Herman King \textit{v} The Queen,\(^3\) an appeal from Jamaica, the issue to be decided was whether a common law discretion of the courts to admit or exclude illegally obtained evidence prevailed over the constitutional guarantee against search of persons or property without consent. In this regard, the Privy Council observed:

This constitutional right may or may not be enshrined in a written constitution, but it seems to their Lordships that it matters not whether it depends on such enshrinement or simply upon the common law as it would do in this country. In either event the discretion of the court must be exercised and has not

\(^1\) Ronald Dworkin, \textit{A Matter of Principle}, op. cit., at 35.


\(^3\) [1969] 1 A.C. 304.
been taken away by the declaration of the right in written form.\textsuperscript{20}

In a later case, \textit{Riley v Attorney General of Jamaica},\textsuperscript{21} the Privy Council declined to examine whether a delay of three years in the execution of the death sentences of the five applicants infringed the right against cruel and degrading punishment guaranteed by section 17 (1) of the Jamaican Constitution. Instead, the majority decision based their finding only on the language of section 17(2) of the Constitution which was directed to legalize certain descriptions of punishment under the law. The majority was not concerned with the question of treatment which was impugned as inhuman because of the long delay in execution of the sentence of death.

\[\text{[W]}\text{hatever the reasons for or length of delay in executing a sentence of death lawfully imposed, the delay can afford no ground for holding the execution to be a contravention of section 17(1).}\textsuperscript{22}\]

In other cases, some judges who have sat on the Privy Council have also suggested a "generous interpretation" avoiding the "austerity of tabulated legalism".\textsuperscript{23} However, despite this kind of assertion, the Privy Council has not been able to develop any realistic and consistent principle of interpretation as an alternative to the formal style. It is to this task of evolving approaches to interpretation other than the formal style that this thesis is principally directed.

It has been suggested that the "formalism [of the Privy Council] is ... consistent with the policy perspective which underpins the work of the Privy Council ...
Two possible reasons for the Privy Council's policy of deference to the executive and legislative branches of government are firstly, cultural ignorance of the place from which the appeal arose and secondly, perceptions about the proper role of the judiciary in a Constitution under a Westminster system of government. Neither of these factors are relevant to the national courts of the countries under study in this thesis. These courts need not therefore be as restrained as the Privy Council. To what extent this assertion is, however, borne out in practice will be seen in the discussion of the jurisprudence of the Courts in Malaysia, Sri Lanka and Bangladesh in later Chapters of this thesis.

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24 K.D. Ewing, *op. cit.*, at 236. See also at 241:

for the most part the Privy Council has adopted principles of constitutional interpretation in such a way as to implement its policy of deference. The practical result ... is that the constitutional rights themselves are often puny and insubstantial, offering the bare minimum of protection, if even that, from oppressive governmental action. Given the choice between a narrow and wide reading of constitutional guarantees, the Privy Council, it seems will almost always choose the former.

CHAPTER I
THE OPERATION OF THE CONSTITUTIONAL RIGHTS OF CITIZENS -
A GENERAL OVERVIEW OF THE THREE SYSTEMS

An examination of emergency powers, the impact of such powers on the operation of constitutional rights and the role of the Court in this regard should appropriately begin with a discussion of the context of the entrenchment of rights in the Constitution and the nature and operation of these constitutional rights.

The purpose of this Chapter is to describe briefly the situation in pre-Independence Malaysia, Sri Lanka and Bangladesh as regards liberties of the people, the background to the entrenchment of constitutional rights in these post-colonial States, the general parameters of these rights, and the prevailing trend of interpretation by the Court. In order to identify, in general terms, the judicial techniques of interpretation of constitutional rights in each of the countries, some selected cases are discussed. While the cases examined in this Chapter relate primarily to those constitutional rights which are of significance to states of emergency, others are of relevance to the interpretation of the rights in general.

Pre-Independence Period

During the colonial phase of the evolution of these countries, rights of the colonial people against the colonial State were not recognized as such. "Colonial territories were administered on the basis that the indigenous inhabitants did not enjoy equality of legal rights with the colonisers".\(^1\) While in the Metropolitan State, government and administration were sought to be modelled on the basic principles of the Rule of Law, there was a complete negation of these principles in the colonies.

The colonial administrative authorities, supported by the Colonial Office, were primarily responsible for the exclusion of

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political liberties from the received English law ... [in the colonial territories].

The attitude of the colonial administrators and the broad powers of discretion of the colonial judge entailed arbitrariness in deciding questions of liberties of the colonial subjects. Whatever little effort might have been directed towards ensuring a semblance of justice and fairness in the colonial State was done by seeking to impose a rigid and artificial rule of law in situations which were primarily out of context. It is sometimes suggested, in an obscure and subtle way, that the colonial power introduced Rule of Law in the colonial territories. It has, however, been pointed out that:

[despite constant rhetoric ... of the Rule of Law, in fact the essential political and judicial protections which made viable the Rule of Law - whatever that vague term may mean - were eviscerated by the activities of the Colonial administrators.]

It is true that occasionally there were some declarations made by the metropolitan government pledging such rights as "non-discrimination" and "equal protection of laws" in the colonial territories. Thus, with respect to British India, the Crown, acting under the Charter Act, 1833, declared a right

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The law and practice of colonial administration showed little respect for the personal integrity of the colonised.

3 Weeramantry, op. cit., at 41-42:

Many of the colonial judges and administrators were ... inexperienced officials, who in their own societies, would scarcely have had the responsibility of deciding matters of the importance or complexity of the cases before them. It is not surprising that several generations of this kind of rule tended to obscure the customs which, within those societies, preserved the means of achieving just and acceptable solutions to disputes.

4 Weeramantry, op. cit., for example, despite his observations quoted above, suggests that:

on the credit side [of colonial rule, is] the introduction of a system of justice which has left behind a legacy of the rule-of-law concepts ...

Ibid at 66.

5 Robert B. Seidman, op. cit., at 114.
to private property, religious freedom, and equal protection of law. But these were mere declarations, not enforceable in Courts. The *Government of India Act*, 1935, placed some restrictions on executive and legislative action forbidding discrimination, but no remedies were provided to enforce such rights.6

There were some rights accorded by colonial legislation to accused persons under the criminal law. The most important of these was the writ of *habeas corpus*. The British Indian *Code of Criminal Procedure*, 1898, by section 491 provided for this remedy.

Any High Court may, whenever it thinks fit, direct...that a person illegally or improperly detained in public or private custody within such limits be set at liberty.7

The *Criminal Procedure Code* of British Malaya and the *Courts Ordinance* of colonial Ceylon (Sri Lanka) provided for similar remedies.8 In the absence of other comparable remedies, political and other detainees had to rely on this remedy. Unlike the subsequent post-colonial constitutional orders where the remedy of *habeas corpus* came to be available under constitutional provisions as a *writ of right*, the statutory writ of *habeas corpus* was discretionary. This

6 F.K.M.A. Munim, *Rights of the Citizen under the Constitution and Law*, Dacca, Bangladesh Institute of Law and International Affairs, 1975, 8-9. The *Government of India Act*, 1935, 26 Geo. 5 & 1 Edw. 8, c. 2, was the governing instrument of British India immediately before Pakistan and India became independent in 1947. The British Joint Parliamentary Committee, on whose recommendations the Government of India Act, 1935 was based, refused the Indian request to include a list of rights in the Act. The *Report of the Joint Parliamentary Committee*, 1934, H.C. 5 (1 Part 1) observed at para 366 of the Report:

[T]here are ... strong political 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 number of laws may be declared invalid by the Courts because inconsistent with one or other of the rights so declared.


7 Section 491 (1) (b) of the *Code of Criminal Procedure*, 1898, Act No 5 of 1898.

8 Section 365, Federated Malay States (F.M.S.) *Criminal Procedure Code*, 1927 (The Laws of the Federated Malay States, Vol I, Cap 6); Section 45, *Courts Ordinance*, 1889, Ordinance No. 1 of 1889 (Legislative Enactments of Ceylon, Cap. 6). In addition to the FMS *Criminal Procedure Code*, there were separate Codes in the Settlements of Penang and Malacca, Sabah, and Sarawak. In 1976, the Codes were consolidated into a single one.
CHAPTER I

statutory remedy which survives in the post-colonial states of Malaysia, Sri Lanka and Bangladesh has been explained by the Court in Bangladesh in this way.

The expression "whenever it thinks fit" [in Section 491 of the Code of Criminal Procedure] confers an absolute discretion on the court to exercise its power thereunder or not to do so, having regard to the circumstances of each case.9

The negation of civil, political and economic rights during the colonial era moulded the desire of the nationalist leaders and the informed sections of people in the emergent polities to have rights entrenched in the Constitutions of the new States. With the beginnings of the process of decolonisation since the late 1940s, constitution-makers and public opinion were informed by international instruments such as the Universal Declaration of Human Rights10 and the European Convention of Human Rights.11 There were also the precedents of Bills of Rights in older Constitutions like those of the U.S.A. and the Republic of Ireland. The remainder of this Chapter is taken up in presenting the provisions on citizens' rights under the Constitutions of independent Malaysia, Sri Lanka and Bangladesh, as well as in discussing, in outline, the trends of the Courts in these countries in adjudicating constitutional rights.

Post-Independence Period

A. Malaysia

Fundamental Liberties12


12 Part II of the Federal Constitution of Malaysia, providing for constitutional rights, is titled, "Fundamental Liberties".
CHAPTER I

During the process of framing of the Independence Constitution for Malaya (Malaysia since 1963)\(^\text{13}\) by an appointed Commission, the Reid Commission,\(^\text{14}\) there was some controversy as to whether guarantees of individual liberties should be included in the proposed Constitution.\(^\text{15}\) The Commission’s recommendation for inclusion of entrenched rights was rationalised in the following way.

A federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life.\(^\text{16}\)

The Commission allayed the fears of those objecting to the inclusion of justiciable rights in the Constitution with the following observations.

We believe such apprehensions to be unfounded, but there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency and we recommend that this should be done.\(^\text{17}\)

The Constitution of the newly independent Federation of Malaya was drawn up principally in accordance with the recommendations of the Reid

\(^{13}\) In 1963, the British colonial territories of Singapore, North Borneo (Sabah), and Sarawak joined the Federation of Malaya under the *Malaysia Agreement, 1963* (Agreement Between the United Kingdom, the Federation of Malaya, North Borneo, Sarawak and Singapore Concerning the Establishment of the Federation of Malaysia). The *Malaysia Act, 1963*, Act No. 26 of 1963, amending the Constitution, was drawn up accordingly, and the Federation of Malaya was renamed Malaysia. In 1965, Singapore separated from Malaysia to become an independent republic. See *Constitution and Malaysia (Singapore Amendment) Act*, 1965.

\(^{14}\) The Commission was headed by Lord Reid; hence the reference to the Commission as the Reid Commission. Other members were Sir Ivor Jennings, Sir William McKell, former Governor-General of Australia, Mr Justice Abdul Hamid of the West Pakistan High Court, and Mr B. Malik, a former High Court judge from India, see *Report of the Federation of Malaya Constitutional Commission*, London, Her Majesty's Stationery Office, 1957.


\(^{16}\) *Report, op. cit.*, at 69.

\(^{17}\) *Ibid.*, at 70.
Commission and was promulgated on August 31, 1957, the day when the independent Federation of Malaya came into being.

Part II of the Constitution of Malaysia contains a catalogue of Fundamental Liberties. The rights include:

- (a) right to life and personal liberty;
- (b) freedom from slavery and forced labour;
- (c) protection against retrospective criminal laws and double jeopardy;
- (d) equality;
- (e) freedom of movement and prohibition of "banishment" from the Federation;
- (f) freedom of speech, assembly and association;
- (g) freedom of religion.

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19 The relevant instruments in this regard were the *Federation of Malaya Agreement, 1957, Agreement Between Her Majesty and Their Highnesses the Rulers*), the *Federation of Malaya Independence Act, 1957, 5 & 6 Eliz. 2, c. 60*, the *Federation of Malaya Independence Order in Council, 1957*, and the *Federal Constitution Ordinance, Ordinance No. LV of 1957*.

20 Article 5, Constitution of Malaysia. See Appendix I.

21 Article 6, *ibid*.

22 Article 7, *ibid*.

23 Article 8, *ibid*.

24 Article 9, *ibid*.

25 Article 10, *ibid*.

26 Article 11, *ibid*. 
(h) non-discrimination and other rights in respect of education;\(^{27}\)

(i) rights of property.\(^{28}\)

Suggestions made to the Reid Commission that a set of principles of state policy be provided in the Constitution were not accepted. The Commission said:

Any guarantee with regard to such matters would be illusory because it would be unenforceable in law and would have to be in such general terms as to give no real security. Moreover, we do not think that it is either right or practicable to attempt to limit developments of public opinion on political, social or economic policy.\(^{29}\)

The entrenched liberties in the Constitution of Malaysia are variously expressed to be limitations on executive acts and/or legislative action. Some of these rights are expressed in \textit{absolute} terms, while others are framed in qualified terms. The prohibition of slavery\(^{30}\) and the prohibition of expropriation of property without adequate compensation,\(^{31}\) for example, are "unrestricted" rights. Most of the other Fundamental Liberties in the Constitution of Malaysia enumerate a host of qualifying and restrictive clauses. These restrictive clauses refer to such considerations as "public order", "security of the Federation", "public health" or "morality".

\section*{The Malaysian Court and Constitutional Rights}

The High Courts in Malaysia have been empowered to issue to any person or authority, orders or writs, including writs of the nature of \textit{habeas corpus}, \textit{mandamus}, prohibition, \textit{quo warranto} and \textit{certiorari}, or any others, for the

\begin{footnotesize}
\begin{enumerate}
\item\(^{27}\) Article 12, \textit{ibid.}
\item\(^{28}\) Article 13, \textit{ibid.}
\item\(^{29}\) \textit{Report, op.cit.}, at 70.
\item\(^{30}\) Article 6, Constitution of Malaysia.
\item\(^{31}\) Article 13(2), \textit{ibid.}
\end{enumerate}
\end{footnotesize}
enforcement of any of the fundamental liberties guaranteed by the Constitution.\textsuperscript{32}

Decisions of the Malaysian Court display a marked tendency to interpret the entrenched rights in a way that is focussed on the mere language of the constitutional provisions, rather than on the philosophical basis of the rights in the post-colonial constitutional system. The result has been a restrictive interpretation with the effect that constitutional rights in post-colonial Malaysia have proved illusory to citizens’ perceptions.

\textbf{(a) Right to Life & Liberty}

The most important individual right under the Constitution of Malaysia for the purposes of this study is the right to "life" and "liberty". Article 5(1) provides:

No person shall be deprived of his life or personal liberty save in accordance with law.

The exact phrase "save in accordance with law" in Article 5(1) of the Malaysian Constitution appears in the Constitutions of Pakistan, 1956,\textsuperscript{33} 1962,\textsuperscript{34} and 1973,\textsuperscript{35} and in the Constitution of Bangladesh.\textsuperscript{36} The corresponding provision in the Indian Constitution contains the clause "except according to procedure established by law".\textsuperscript{37} This difference in phraseology between the provisions of the right to life and personal liberty in the

\textsuperscript{32} Section 1, First Schedule, read with Section 25, \textit{Courts of Judicature Act}, 1964, Act No. 7 of 1964. Article 5 (2) of the Constitution reiterates this position in respect of the right to personal liberty.

By Article 121 (1) of the Constitution, there are two High Courts in Malaysia - the High Court in Malaya and the High Court in Borneo.

\textsuperscript{33} Article 5(2), Constitution of the Islamic Republic of Pakistan, 1956.

\textsuperscript{34} Para. 1, Fundamental Rights, Constitution of the Republic of Pakistan, 1962.


\textsuperscript{36} Article 32, Constitution of the People’s Republic of Bangladesh (henceforth Constitution of Bangladesh).

\textsuperscript{37} Article 21, Constitution of India.
Constitutions of Malaysia and India led the Malaysian Federal Court, in *Karam Singh v Menteri Hal Ehwal Dalam Negeri*, to assert that Article 5(1) of the Malaysian Constitution refers only to the substantive provisions of law without regard to the procedural aspects. That being the case, the Court found that an order of detention was valid even though there were procedural defects in the order of detention. After noting that Article 5(1) of the Malaysian Constitution made "no mention of the word *procedure* ...", Suffian F.J., (as he was then), in his concurring opinion in *Karam Singh*, observed that:

[in Malaysia,] ... detention, in order to be lawful, must be in accordance with law, not as in India where it must be in accordance with *procedure* established by law.

It has been pointed out that:

the Malaysian courts have interpreted ‘law’ to mean enacted law, and therefore, ... Articles 5 and 13 impose restrictions only on the executive and not on the legislature ...

(b) *Right to counsel*

The right of an arrested person in Malaysia to consult and be defended by a legal practitioner as provided by the Constitution, has been interpreted in this way:

A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoing by

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38 The Federal Court has since been renamed the “Supreme Court” (Mahkamah Agung) by Constitution (Amendment) Act, 1983, Act No. A566 of 1983, in force from 1-1-1985.


40 Ibid., at 148.

41 Ibid., at 150.


43 Article 5(3), Constitution of Malaysia.
apprehending them and collecting whatever evidence exists against them.\textsuperscript{44}

\textbf{(c) Right to equality}

A fundamental qualification to the right to equality under the Constitution of Malaysia\textsuperscript{45} is the protective discrimination in favour of the Malays and the natives of the states of Sabah and Sarawak.\textsuperscript{46} In elaborating on the principles of "equality" under the Constitution of Malaysia, Suffian L.P. observed:

The equality provision is qualified. Specifically, discrimination is permitted within clause (5) of Article 8 and within Article 153.3 \textsuperscript{46} ... In considering Article 8 there is a presumption that an impugned law is constitutional, a presumption stemming from the wide power of classification which the legislature must have in making laws operating differently as regards different groups of persons to give effect to its policy ... \textsuperscript{47}

The central fact of the \textit{Merdeka University} case\textsuperscript{48} was that the Minister for Education rejected a petition to incorporate a private university in Malaysia, Merdeka University Berhad, which would principally use Chinese as the medium of instruction for entrants from Chinese independent secondary schools. The petitioners asked the High Court of Malaya for a declaration that the refusal of their petition by the Minister was an unreasonable and improper exercise of the discretion conferred by section 6 of the \textit{Universities and University Colleges Act}, 1971.\textsuperscript{49} The petitioners contended that under Article 152 of the Malaysian Constitution, using, teaching or learning any language other than the national Malay language was permitted.\textsuperscript{50} Abdoolcader J.,

\begin{itemize}
\item \textsuperscript{44} \textit{Ooi Ah Phua v Officer-in-Charge, Criminal Investigation, Kedah/Perlis}, [1975] 2 M.L.J. 198, at 200 (per Suffian L.P.) quoting with approval \textit{Raml\textsc{\textregistered} bin Salleh v Inspector Yahya bin Hashim}, [1973] 1 M.L.J. 54.
\item \textsuperscript{45} Article 8, Constitution of Malaysia.
\item \textsuperscript{46} Article 153, \textit{ibid}.
\item \textsuperscript{47} \textit{Datuk Haji Harun bin Haji Idris v Public Prosecutor}, [1977] 2 M.L.J. 155, 165.
\item \textsuperscript{48} \textit{Merdeka University Berhad v Government of Malaysia}, [1981] 2 M.L.J. 356.
\item \textsuperscript{49} Act No. A30 of 1971.
\item \textsuperscript{50} Article 152(1)(a) excludes the use of other languages from "official purposes".
\end{itemize}
giving the opinion of the High Court, came to the finding that the proposed university would be a "public authority" within the meaning of the Constitution and its purpose would be a "official purpose". The learned Judge concluded:

I am of the view that "using" [other languages as contemplated by Article 152(1)(a) of the Constitution] is in fact confined to use as a medium of expression or communication within the language or ethnic groups concerned and cannot extend as a medium of instruction as such.

In deciding the appeal from the High Court decision in the Merdeka University case, the majority of the Federal Court Judges (Seah J. dissenting) upheld the decision of Abdoolcader J. Suffian L.P. concluded:

As there is no right to use the Chinese language for an official purpose ... it was not unconstitutional and unlawful of Government to reject the plaintiff's petition to establish [Merdeka University].

(d) Right to free speech

The rights to free speech, assembly and association in the Constitution of Malaysia are qualified by the right of Parliament to impose restrictions for considerations of "security of the Federation", "public order or morality" and other interests of state. The validity of such laws imposing restrictions cannot be questioned. Under a pre-Independence Ordinance, a "licence" from the local police is required for holding a procession or meeting in public

51 Article 160, Constitution of Malaysia.


54 Ibid., at 252.

55 Article 10, Constitution of Malaysia.

56 Article 4(2)(b), ibid.

57 Police Ordinance, 1952, Ordinance No. XIV of 1952.
places. In *Madhavan Nair v Public Prosecutor*, the issue was the contravention, during a public speech of the applicant, of a condition of the police licence which proscribed speaking on the status of the official Malay language. The High Court, while agreeing that a police officer, acting under statutory powers, could not impose such conditions as would contravene a constitutional right, held that the circumstances in that case, under which the proscription was made, did not contravene the constitutional right of free speech.

Like *Madhavan Nair*, the issue in *Lau Dak Kee v Public Prosecutor* was the restrictive condition, imposed by the police, in the matter of public speech. In deciding this case along the lines of the previous decision, Mohamed Azmi J. remarked that:

> these rights [to free speech, assembly and association] are, however, subject to *any law* passed by Parliament.

(e) *Right to property*

Although the Constitution of Malaysia prohibits the expropriation of property without adequate compensation, the "deprivation" of property by "legislation" has been held to be unchallengeable. In *Arumugan Pillai v Government of Malaysia*, which involved taxation assessment and recovery by the government, the Federal Court of Malaysia went so far as to say that:

whenever a competent legislature enacts a law in the exercise of any of its legislative powers, destroying or otherwise depriving a man of his property, the latter is precluded from questioning its

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61 Article 23, Constitution of Malaysia.

62 Article 13(1), *ibid.* Article 13(1) is framed in the following way:

> No person shall be deprived of property save in accordance with the law.

reasonableness by invoking Article 13(1) of the Constitution, however arbitrary the law might palpably be.\textsuperscript{64} In an earlier decision, it was held that Article 13(1) does not restrict legislative powers but declares unconstitutional or prohibits executive acts of unlawful deprivation of property.\textsuperscript{65} However, it has been observed that Article 13(1) is unlikely to be a ground for a decision of a court even in respect of executive acts.\textsuperscript{66}

\textbf{B. Sri Lanka}

\textbf{Constitutional evolution since Independence and the question of Rights}

Sri Lanka’s Independence Constitution was an adaptation of the colonial Constitution Order-in Council, 1946, based on the recommendations of a British Constitutional Commission of Inquiry, the Soulbury Commission.\textsuperscript{67} This Commission had been appointed in 1943 pursuant to a Declaration of the British Government pledging the establishment in Sri Lanka, then known as Ceylon, of full responsible government under the British Crown in matters of civil administration, with defence and external relations continuing to remain under the control of the British government. The Declaration had invited proposals for a new Constitution from the Board of Ministers in Ceylon for examination by the Constitutional Commission.\textsuperscript{68}

In 1944, the Ceylonese Board of Ministers presented to the British government a draft constitutional scheme along the lines of a Dominion status for Ceylon. The draft scheme was later withdrawn because of differences with the British government on the scope of the terms of the proposed Constitutional

\begin{thebibliography}{9}
\bibitem{64} \textit{Ibid.}, at 30, per Gill C.J.
\bibitem{65} \textit{Philip Hoailim v State Commissioner, Penang}, [1974] 2 M.L.J. 100, at 103, per Ali FJ.
\bibitem{67} The Commission was headed by Lord Soulbury; hence the reference to the Commission as the Soulbury Commission. The other members of the Commission were Sir Frederick Rees and Sir Federick Burrows.
\end{thebibliography}
Commission. Despite the withdrawal of the draft scheme, the Soulbury Commission was appointed to examine the ministerial and any other constitutional scheme, consult various interests in Ceylon, and submit its recommendations. The Commission recommended, inter alia, that certain powers be reserved for the Governor-General in the proposed constitutional scheme. The concept of reserve powers of the Governor-General proposed by the Soulbury Commission was, however, not acceptable to politicians and the public in Ceylon.69

The unfavourable reaction in Ceylon prompted the British government to modify the recommendations of the Commission through a White Paper in October 1945, incorporating a modified Constitution. In presenting the White Paper, modifying the Commission's recommendations, the British Government expressed the hope that the proposed constitutional scheme of the Soulbury Commission would be acceptable to Ceylon as the basis for attaining Dominion status. In November 1945, the State Council in Ceylon accepted this Constitution as an interim scheme, and accordingly an Order in Council embodying the new Constitution was issued in May 1946.70 Upon attainment of Independence in February 1948, the 1946 Order in Council was modified by the Ceylon Independence Order in Council, 1947, and the Ceylon Independence Act, 1947.71

Rights of citizens were not entrenched in Ceylon's Independence Constitution. During the process of drawing up a draft constitutional scheme by the Board of Ministers in Ceylon, for consideration by the Constitutional Commission of Inquiry, there was general agreement among the Board Ministers that there was to be a comprehensive Bill of Rights in the proposed scheme. Sir Ivor Jennings, who at that time was the principal constitutional adviser (unofficial) to the Ministers had "strong views" against the incorporation of the Bill of Rights in the proposals. It was his views that prevailed and the draft scheme of the Ministers, which was presented to the British government and considered

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69 See ibid., at 55-56.

70 Ceylon (Constitution) Order in Council, 1946.

71 11 & 12 G. 6, c.7. For a brief account of this period see J. A. L. Cooray, op. cit., at 56-59.
by the Soulbury Commission did not contain proposals for entrenched rights in the future Constitution.\textsuperscript{72}

After the initial problems of transition in the new Dominion of Ceylon, a Parliamentary Committee, headed by the then Prime Minister, S.W.R.D. Bandaranaike, was formed in 1957 to consider, \textit{inter alia}, the revision of the Independence Constitution to establish a Republic and to provide for guaranteed rights. The Committee, in 1959, approved the inclusion of a catalogue of justiciable \textit{rights} in the Constitution. The death by assassination of Prime Minister Bandaranaike soon after the decision of the Committee hindered the implementation of the Committee's recommendations. In 1965 there was an attempt by the ruling government to re-establish the 1957 Parliamentary Committee, but by then political opinion was in favour of a new Constitution.\textsuperscript{73}

In 1970, the Parliament of Ceylon (Sri Lanka) elected in the May 1970 national elections, constituted themselves the Constituent Assembly of the people of Sri Lanka, and in May, 1972 adopted an autochthonous Constitution for the Republic of Sri Lanka.\textsuperscript{74} It has been observed that the framers of the (1972) Republican Constitution of Sri Lanka were not inclined to incorporate a Bill of Rights in the proposed Constitution.\textsuperscript{75} \textit{Rights} were, however, provided in the 1972 Constitution under pressure of public and political opinion. But although a number of constitutional rights were declared, there was no reference in the Constitution as to the specific machinery for the enforcement of these \textit{rights}. The guaranteed rights were thus non-justiciable in a court of law.\textsuperscript{76}

\begin{itemize}
\item \textsuperscript{72} J. A. L. Cooray, \textit{op. cit.}, at 508-509.
\item \textsuperscript{73} See \textit{ibid.}, at 66-71.
\item \textsuperscript{74} See \textit{ibid.}, at 72-89.
\item \textsuperscript{76} The rationale for this position was that:
\begin{quote}
the protection of Fundamental rights could not ... be allowed to 'prevail absolutely'; ... in other words, fundamental rights could constitutionally be safeguarded only in so far as the supremacy of the National State Assembly was not unduly curtailed thereby.
\end{quote}
\end{itemize}
Under the scheme of the 1972 Constitution, repugnancy of legislative measures to provisions of the declared *rights* could be raised before a specially-constituted *Constitutional Court*, but only before the legislation in question was passed by the National State Assembly (Parliament). A number of Bills were challenged before the Constitutional Court during its six odd years of existence, for inconsistency with the *rights* under the 1972 Constitution.

The "Fundamental Rights and Freedoms" in the Constitution of 1972 included equality, non-discrimination, right to life and liberty, freedom of thought, conscience, religion and culture, freedom of speech and expression, and freedom of movement. These rights were made subject to restrictions in the interests of, *inter alia*, of "national unity and integrity", "national security", "public safety" and "public order", or for considerations of "Principles of State Policy" declared in the Constitution.

In the manner of the Constitution of the Republic of Ireland, the Sri Lankan Constitution of 1972 had set down certain "Principles of State Policy" for guiding the State in the making of laws. These State Principles related in general to the social, economic and general welfare of the people. In addition the Principles declared, *inter alia*, that the objectives of the state

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For more details on this point, see *J.A.L. Cooray, op. cit.*, at 193-200.

77 Section 54, Constitution of Sri Lanka, 1972. The "Constitutional Court" of Sri Lanka under the 1972 Constitution was modelled on the Constitutional Council of France. It consisted of five members appointed for four-year terms. For a description of the composition and operation of Sri Lanka's Constitutional Court, see *J.A.L. Cooray, op.cit.*, 191-196; also *M.J.A. Cooray, op.cit.*, 239-267.


80 Section 18(2), *ibid*.


82 Section 16(1), Constitution of Sri Lanka, 1972.

83 Section 16(2), *ibid*.
included national unity, elimination of economic and social disparities, democratization of the administration, and the guaranteeing of social security.  


"Fundamental Rights"

The 1978 Constitution contains a catalogue of justiciable rights. The rights in the present Constitution are more elaborate and comprehensive than those declared in the previous Constitution. The "Fundamental Rights" include:

(a) freedom of thought, conscience and religion;  
(b) equality;  
(c) right to life and liberty;  
(d) freedom of speech, expression, assembly, association, movement.

While some rights under the Constitution of 1978, such as the freedom of thought, conscience and religion have been expressed in absolute terms, most of the other rights have been qualified by restrictions in the interests of "national security", "public security", "public order", "public health or morality", "racial and religious harmony" and "national economy".

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84 Section 16(3) to Section 16(10), ibid.
86 Article 10, Constitution of Sri Lanka, 1978; Appendix II.
87 Article 12, ibid.
88 Article 13, ibid.
89 Article 14, ibid.
90 Article 15, clauses (1) to (8), ibid.
Principles of State Policy

Like the previous Constitution of 1972, the present Constitution of Sri Lanka (1978) declares some "Directive Principles of State Policy and Fundamental Duties" which are expressed to be a guide "in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society".\textsuperscript{91} The Constitution mentions that these Principles "do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal".\textsuperscript{92}

The Sri Lankan Court and Rights

Under Article 17 of the present Constitution of Sri Lanka, there is a guarantee of the right to petition the Supreme Court for any infringement, or even imminent infringement of a "fundamental right" by executive or administrative action. An affected person must, however, petition the Supreme Court for redress, within a period of one month of the act of infringement or threatened infringement of the right.\textsuperscript{93} The Supreme Court of Sri Lanka has held this one-month rule is mandatory, and in a good number of cases alleging violation of rights, the Court has rejected the petitions because they were out of time.\textsuperscript{94}

The present Constitution, like its predecessor Constitution of 1972, excludes judicial review of any legislation which may be inconsistent with any provision of the Constitution, including the entrenched rights.\textsuperscript{95} However, like the defunct Constitutional Court in the previous constitutional scheme, the

\textsuperscript{91} Article 27, \textit{ibid.}

\textsuperscript{92} Article 29, \textit{ibid.}

\textsuperscript{93} Article 126, \textit{ibid.}


\textsuperscript{95} Article 124, Constitution of Sri Lanka, 1978.
Supreme Court has been vested with the power to determine whether a legislative Bill is inconsistent with any constitutional provision. The jurisdiction of the Supreme Court in this regard can be invoked by the President or any citizen.

Decisions of the Supreme Court of Sri Lanka relating to constitutional rights do not display a consistent approach. On the one hand, there are decisions which interpret the provisions on constitutional rights in a formal style, without regard to the ethical and moral dimensions of citizens' rights. On the other hand, there are decisions of the Supreme Court which indicate that the Court has, on occasion, risen above that trend. The decisions of the Sri Lankan Supreme Court discussed here are from the early years of the operation of the Constitution of 1978 which contained Sri Lanka's first justiciable Bill of Rights. The cases were decided in normal times before the declaration of the 1982 state of emergency. While some of the decisions during this period are praiseworthy, several among these like *Vivienne Goonewardene* were decided on technical grounds.

(a) **Right to equality**

Initially, the "equality" and "equal protection" clauses of the 1978 Constitution of Sri Lanka were interpreted in broad terms by the Supreme Court. For example, where the University Grants Commission adopted a certain basis for admission of students in the University, the Court found that the policy infringed an entrant's fundamental right of equality of opportunity. The Court interpreted the equality provisions of the Constitution to mean that:

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96 Article 120, *ibid.*

97 Article 121(1), *ibid.* The various clauses of Articles 120-123 contain elaborate provisions of procedure, exemptions of certain categories of legislation, and the scheme of referendum to be approved by the Court for purposes of amendment of any provision of the Constitution. For a brief interpretation of these various provisions, see M.J.A. Cooray, *op. cit.*, at 276 - 279.


[w]here ... discrimination is not based on any rational ground bearing upon the subject dealt with, ... [the action in this regard] will offend the principle of equality and will be void.\textsuperscript{100}

In the case before it, the Supreme Court found that:

[the application of any ratio [by the University Grants commission] based on any consideration other than merit [merit of the candidates] ... would infringe the rule of 'equality of treatment' protected as a fundamental right in the Constitution. ... The policy decision of the [UGC would further infringe] ... the petitioner's fundamental right of equality of opportunity.\textsuperscript{101}

(b) \textit{Right to liberty}

The arrest and detention of the petitioner in \textit{Vivienne Goonewardene v Hector Perera},\textsuperscript{102} in connection with procession and demonstrations before the Embassy of the U.S.A. in Colombo on International Women's' Day, was set aside by the Supreme Court, because the arrest was conducted by an unauthorized junior police officer, and thus did not conform to the requirement that an arrest must be "according to procedure establishment by law", enjoined by the constitutional right to liberty.\textsuperscript{103}

While in \textit{Vivienne Goonewardene}, the constitutional right to liberty of the petitioner was vindicated by the Court on a formalistic interpretation of the relevant statute,\textsuperscript{104} a similar approach by the Supreme Court denied any relief to the applicant in \textit{M.A. Dayananda v Weerasinghe & Others}.\textsuperscript{105} The petitioner in \textit{M. A. Dayananda} contended that his constitutional right to liberty

\textsuperscript{100} Ibid., at 114.
\textsuperscript{101} Ibid., at 127.
\textsuperscript{102} Supreme Court Application No. 20 of 1983, reported in \textit{Fundamental Rights, Vol 2, op. cit.}, 426-440.
\textsuperscript{103} Ibid., at 436; the right to liberty is guaranteed by Article 13(1), Constitution of Sri Lanka, 1978.
\textsuperscript{105} Supreme Court Application No. 97 of 1982, reported in \textit{Fundamental Rights, Vol 2, op. cit.}, 292-299.
was violated by successive remand orders of the Magistrate. The Supreme Court adopted a formal style of interpretation of Article 126 of the Constitution under which the petitioner sought relief.

The fact remains that the remand orders were made by the Magistrate in the exercise of his judicial discretion. Even if such orders were made on false or misleading reports it does not help the petitioner in this case because orders made by a Judge in the exercise of his judicial discretion do not come within the purview of the special jurisdiction of the Supreme Court under Article 126 of the Constitution, even though such orders may be the result of a wrongful exercise of the Judge's judicial discretion. In such an event an aggrieved person's remedy is to invoke the appellate or revisionary powers of the Appellate Courts.106

(c) Right to free speech

In *Darmitipola Ratnesara Thero v P. Udugampola & Others*,107 a member of a clergy association was awarded damages for confiscation by the police of copies of pamphlets opposing the 1982 Sri Lankan referendum for extension of the life of Parliament beyond the usual term. The Supreme Court held that the act of the police in seizing the pamphlets from the printing press was:

\begin{quote}
... a serious violation of the fundamental rights [of speech, expression and publication] ... which calls for the award of substantial damages.\end{quote}

C. Bangladesh

Bangladesh, formerly the province of East Pakistan in united Pakistan, became an independent state on December 16, 1971. The task of framing a

\footnote{106 Ibid., at 298.}
\footnote{107 Supreme Court Application No. 125 of 1982, reported in *Fundamental Rights*, Vol 2, op. cit., 364-372.}
\footnote{108 Ibid., at 372.}
constitution for the new state was entrusted to a Constituent Assembly established by a Presidential decree.\textsuperscript{109}

The process of Constitution-making in Bangladesh was very hurried.\textsuperscript{110} The Constituent Assembly was called to session on April 10, 1972, and on the next day, a 34-member Constitution Drafting Committee was formed.\textsuperscript{111} The Committee was required to submit its Report to the Constituent Assembly by June of the same year.\textsuperscript{112} The Drafting Committee invited proposals from members of the public, but only three weeks’ time was allowed to send in proposals.\textsuperscript{113} The Constitution Bill was finally approved by the Committee on October 12, 1972, and placed before the Constituent Assembly on October 19 of the same year.\textsuperscript{114} General discussion on the Bill was held in the Assembly between October 19 and October 31, 1972, and the Constitution of the People’s Republic of Bangladesh was adopted by the Assembly on November 4, 1972.\textsuperscript{115}

Principles of State Policy

The Constitution of Bangladesh, like the 1956 and 1962 Constitutions in the predecessor state of Pakistan, declared some "Fundamental Principles of State Policy".\textsuperscript{116} Among the Principles of State Policy are:

(a) Nationalism;\textsuperscript{117}

\textsuperscript{109} Constituent Assembly of Bangladesh Order, President’s Order No. 22 of 1972, Bangladesh Gazette Extraordinary, March 23, 1972. The Assembly was to be comprised of elected representatives at elections held in united Pakistan before the civil war.

\textsuperscript{110} A general account of the constitution-making process in Bangladesh is given in Abul Fazl Huq, Constitution-making in Bangladesh, (1973) 46 Pacific Affairs 59.

\textsuperscript{111} Abul Fazl Huq, op. cit., at 60.

\textsuperscript{112} Ibid.

\textsuperscript{113} Ibid., at 61.

\textsuperscript{114} Ibid., at 61, 67.

\textsuperscript{115} Ibid., at 68-69.

\textsuperscript{116} Part II, Articles 8-25, Constitution of Bangladesh. See Appendix III.

\textsuperscript{117} Article 8, Constitution of Bangladesh.
(b) Democracy, meaning the guarantee of "fundamental human rights and freedoms and respect for the dignity and worth of the human person";\(^\text{118}\) and

(c) Socialism, meaning economic and social justice.\(^\text{119}\)

The Principles of State Policy in the Constitution of Bangladesh are to be "a guide in the interpretation of the Constitution and of the other laws of Bangladesh" but are not "judicially enforceable."\(^\text{120}\) "In case of conflict between [the entrenched] Fundamental Rights and [the] Fundamental Principles of State Policy, the Fundamental Rights shall prevail ... ".\(^\text{121}\)

"Fundamental Rights"

The basic principles of the chapter on Fundamental Rights in the Constitution of Bangladesh\(^\text{122}\) have been described in the following way.

The chapter ... begins by adopting [in Article 26], the doctrine of *ultra vires*, for it expressly declares that all existing law inconsistent with those rights as enumerated therein shall be void to the extent of inconsistency; it incorporates a prohibition to the effect that the State shall not make any laws inconsistent with those rights, and if so made they would also be void. It is clear that an order made by the State, if challenged, has to be referable to some law of the land, and if there is no law supporting the executive order, or even if there is one and that law is inconsistent with fundamental law, the law must be declared void, and the executive order set aside.\(^\text{123}\)

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\(^\text{118}\) Articles 8 and 11, *ibid.*

\(^\text{119}\) Article 8, *ibid.*

\(^\text{120}\) Article 8(2), *ibid.*


\(^\text{122}\) Part III, Constitution of Bangladesh.


*Cf.* Article 16(1), Constitution of Sri Lanka, 1978, which provides:
By an Amendment,\textsuperscript{124} made soon after the adoption of the Constitution, the overriding effect of Article 26 has been qualified so that the powers of Parliament to amend provisions of the Constitution\textsuperscript{125} included the provisions of the entrenched rights as well.

Among the rights incorporated in the Constitution of Bangladesh are the following:

(a) equality;\textsuperscript{126}

(b) non-discrimination;\textsuperscript{127}

(c) right to life and liberty;\textsuperscript{128}

(d) right to protection of the law;\textsuperscript{129}

(e) safeguards as to arrest and detention;\textsuperscript{130}

(f) prohibition of forced labour;\textsuperscript{131}

(f) freedom of movement;\textsuperscript{132}

\begin{center}
All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the ... provisions of ... [fundamental rights].
\end{center}

\textsuperscript{124} Constitution (Second Amendment) Act, 1973, Act No. 24 of 1973. The newly introduced provision, inserted as Clause (3) to Article 26 read:

\begin{center}
Nothing in ... [Article 26] shall apply to any amendment of this Constitution made under Article 142.
\end{center}

\textsuperscript{125} Article 142, Constitution of Bangladesh.

\textsuperscript{126} Articles 27 and 29, Constitution of Bangladesh.

\textsuperscript{127} Article 28, \textit{ibid}.

\textsuperscript{128} Article 32, \textit{ibid}.

\textsuperscript{129} Article 31, \textit{ibid}.

\textsuperscript{130} Article 33, \textit{ibid}.

\textsuperscript{131} Article 34, \textit{ibid}.

\textsuperscript{132} Article 36, \textit{ibid}.
(g) freedom of speech,\textsuperscript{133} assembly,\textsuperscript{134} and association;\textsuperscript{135} and the
(h) right to property.\textsuperscript{136}

In addition to these rights, the Constitution of Bangladesh also provides for the following guarantee.

To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.\textsuperscript{137}

**The Bangladesh Court and Constitutional Rights**

The right to move the High Court Division of the Supreme Court of Bangladesh for enforcement of the constitutional rights has been guaranteed by the Constitution.\textsuperscript{138} In its task of interpreting the rights of citizens under the Constitution, the Court in Bangladesh has endeavoured to lay down expansive parameters for the functioning of the rights. The Bangladesh Court has not sought to restrict itself to a formal style of interpretation of the constitutional rights. On the contrary, the Court has taken upon itself the task of explicating the rights in the context of the political, moral and ethical standards posed by the relationship between the citizen and state.

(a) *Right to equality*

\textsuperscript{133} Article 39, \textit{ibid}.

\textsuperscript{134} Article 37, \textit{ibid}.

\textsuperscript{135} Article 38, \textit{ibid}.

\textsuperscript{136} Article 42, \textit{ibid}.

\textsuperscript{137} Article 31, \textit{ibid}.

\textsuperscript{138} Article 44, \textit{ibid}.
The Constitution of Bangladesh declares equality of citizens before the law and equal protection of law. These constitutional guarantees were relied upon by the majority of the Appellate Division of the Supreme Court of Bangladesh, in *Dr. Nurul Islam v Bangladesh*, to hold that certain provisions of the *Bangladesh Public Servants Retirement Act* were *ultra vires* the Constitution as being violative of the guaranteed equality rights. One of the majority, Ruhul Islam J., while holding section 9(2) of the *Act* unconstitutional, offered the following reasons, amongst others.

In view of the protections under ... [Articles 27 and 29 of the Constitution] a law vesting an arbitrary discretion in ... [a governmental authority] without prescribing ... [a] uniform rule of action or laying down a guideline or standard by which the exercise of discretion may be measured, offends against the equality of law doctrine. A law without being controlled or guided by any defined rule or specified conditions to which all similarly situated persons may conform is unconstitutional and void.

(b) Right to liberty

On an application alleging infringement of the constitutional right to liberty by an aggrieved person, the High Court Division in Bangladesh has been enjoined to "satisfy itself that [the person] ... is not being held in custody

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139 Article 27, *ibid.*

140 Article 29, *ibid.*

141 (1981) 33 D.L.R. (A.D.) 201. See also *Hamidul Huq Chowdhury v Bangladesh*, (1982) 34 D.L.R. 190, where the singling out of the petitioner-companies for taking over by the government was held to be a violation of the equality rights under the Constitution of Bangladesh.


143 Section 9(2) of the *Public Servants Retirement Act* provided that:

[the Government may, at any time, retire from service a public servant who has completed twenty years of service without assigning any reason.

144 *Dr Nurul Islam*, op. cit., at 242.
without lawful authority or in an unlawful manner. The phrases without lawful authority and in an unlawful manner, though seemingly tautologous, have been interpreted by the Appellate Division of the Bangladesh Supreme Court as having separate connotations.

The expression 'without lawful authority' comprehends all questions of the competency or the vires of an enactment ... [This means that] there must be a ... [valid] law empowering an authority to detain a person, and the empowered authority acting under the conferred powers must be vested with that power by law. ... [The latter phrase, 'in an unlawful manner'] refers to acts of an authority acting under statutory powers. ... [The phrase embodies the cardinal principles of 'due process' as understood in the American Constitution.]

The right to personal liberty has been articulated and reiterated under two different heads in the chapter on "Fundamental Rights" in the Constitution of Bangladesh. In a major decision setting aside an order of detention, the High Court Division in Bangladesh emphasized that:

personal liberty being the subject of more than one fundamental right ... guaranteed by the Constitution, a heavy onus is cast by the Constitution ... upon ... [any] authority seeking to ... [infringe upon the personal liberty of a citizen] to justify such action strictly according to law and the Constitution.

The safeguards concerning arrest and detention as articulated in the Constitution of Bangladesh relate to procedural safeguards in matters of "preventive detention". These will be discussed in Chapter 2 infra.

(c) Right to freedom of assembly

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145 Article 102(2)(b), Constitution of Bangladesh, Appendix III, emphasis added.
147 Articles 31 and 32, Constitution of Bangladesh.
149 Article 33, Constitution of Bangladesh.
As in the Constitutions of Malaysia and Sri Lanka, most of the entrenched rights in the Constitution of Bangladesh are qualified by such considerations as "public interest", "public order" "security of state" and "morality". Unlike the position in Malaysia, however, the restrictions to citizens' rights under the Constitution of Bangladesh, for purposes of these considerations, must be reasonable. For example, freedom of assembly is expressed in this way.

Every person shall have the right to assemble and to participate in public meetings and processions peacefully and without arms, subject to any reasonable restrictions imposed by law in the interests of public order and public health.\(^{150}\)

The use of the expression reasonable ensures that the restrictions to the constitutional rights, as may be sought to be imposed by the State, are justiciable.\(^{151}\) The permissible restriction of the constitutional right to freedom of assembly has interpreted by the Court in Bangladesh to require an objective standard.

What is a reasonable restriction shall depend upon the facts and circumstances of each case ... It must however be an objective standard which, in ... given circumstances, an average prudent man will employ.\(^{152}\)

The reasonableness of any statutory classification relating to all the other rights entrenched in the Constitution is justiciable before the superior courts in Bangladesh.\(^{153}\)

The Code of Criminal Procedure in Bangladesh\(^{154}\) empowers the Executive, by order, and for two months at a time, to prohibit public meetings,

\(^{150}\) Article 37. *ibid.*, emphasis added.

\(^{151}\) In the 1956 and 1962 Constitutions of Pakistan and the Constitution of India, restrictive clauses to the entrenched rights are similarly preceded by the word "reasonable". An examination of the proceedings of the Indian Constituent Assembly reveal that the expression "reasonable" was accepted by amendment to ensure justiciability of the restrictions. See P.K. Tripathi, *Perspectives on the American Constitutional Influence on the Constitution of India* in L.W. Beer (Ed), *Constitutionalism in Asia*, University of California Press, 1979, 56-98, at 86-87.


\(^{154}\) *Code of Criminal Procedure*, 1898, Act No. 5 of 1898.
demonstrations, rallies or processions so as to prevent disturbance of public tranquility, riot or affray. In *Oali Ahad v Government of Bangladesh*, the plaintiff, who was an executive member of a political parties' combine, asked the High Court Division for a declaration that the successive orders of the executive magistrate banning political meetings were made *mala fide*. The Court declared that the successive orders banning political meetings infringed the constitutional right to freedom of assembly. The Court observed that:

> the total ban on holding any meeting for ... an indefinite period seems to be completely unreasonable. ... [T]he impugned order [prohibiting the holding of meetings] is violative of the fundamental right [of freedom of assembly] and as such liable to be struck down.

(d) Right to property

Certain presidential decrees promulgated soon after the independence of Bangladesh brought about changes in the law of real property (which was contained principally in the pre-independence *State Acquisition and Tenancy Act*). A large number of petitions challenging certain provisions of these executive decrees were heard by the High Court Division in *Ali Ekabbar Farazi v Bangladesh*. One of the provisions in one of the decrees under challenge was declared unconstitutional by the Court. According to the Court:

> a vested right to property cannot be extinguished except in the manner ... [provided in the Constitution by] Article 42(1) and Article 47(1) ... [The retrospective operation of the provision in the presidential decree under challenge] is likely to extinguish or

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155 *Section 144, Code of Criminal Procedure*, 1898.


159 *East Bengal Act* No. 28 of 1951.

affect certain vested rights to property, and to that extent, the said President's Order will be unconstitutional.\textsuperscript{161}

**The Judiciary, Rights and Interpretative Methods**

This brief review of the performance of the Courts in Malaysia, Sri Lanka and Bangladesh, in adjudicating issues of constitutional rights, reveals different styles of judicial interpretation in the three countries. The Malaysian Court has been identified as pursuing a formal style of interpretation of the constitutional provisions on the rights of citizens. The judicial style of the Sri Lankan Court on the other hand indicates a somewhat inconsistent approach. While some decisions of the Court in Sri Lanka are characterized by a somewhat broad-based approach towards constitutional rights, other decisions display a formal style of interpretation. In contrast to the judicial techniques in Malaysia and Sri Lanka, the Court in Bangladesh has attempted to explicate constitutional rights in the broader context of a constitutional system and limited government. The same trends of judicial interpretation identified here will be discernable in the review, in later Chapters, of the Courts' roles in matters relating to preventive detention and the use of emergency powers.

\textsuperscript{161} Ibid., at 418.
CHAPTER II
PREVENTIVE DETENTION IN THE LEGAL-CONSTITUTIONAL SYSTEMS OF THE THREE COUNTRIES

The entrenchment of citizens' rights in the Constitutions of Malaysia, Sri Lanka and Bangladesh has been accompanied by explicit provision for preventive detention. Such provision is either in the texts of the Constitutions, as in the case of Malaysia and Bangladesh, or in statutes, as in Sri Lanka. An examination of these powers of detention without trial in the constitutional-legal systems of these countries reveals a close identity with similar powers of executive detention in the colonial stages of the evolution of these States. The mechanisms of preventive detention in the constitutional-legal systems of Malaysia, Sri Lanka and Bangladesh afford opportunities for wide ranging encroachments by state authorities on the operation of the constitutionally entrenched rights of the citizens.

Beginning with some general remarks about the nature of preventive detention, this Chapter discusses briefly the powers of detention without trial available during colonial times, and where applicable, the interpretation of these powers by the Court. This provides the background for a discussion of the powers of preventive detention since Independence and their exercise in non-emergency times. Selected case-law on the general parameters of the interpretation, by the superior courts, of the exercise of peace-time preventive detention powers is also discussed. Later, in Chapter V, the issues of preventive detention during states of emergency will be examined in the broader context of the deprivation of personal liberty and derogations from rights. Case-law on suspension of constitutional rights and preventive detention during states of emergency will be examined and analysed, in detail, in Chapters VI to VIII.

The Nature of Preventive Detention

The principal object of preventive detention is not to inflict punishment upon a person for any act done but rather to prevent him from doing it. In Halliday,¹ Lord Atkinson characterised preventive justice as that:

¹ The King v Halliday, [1917] A.C. 260.
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 the community which he may do but has not yet done.\(^2\)

In the same case Lord Finlay described preventive detention in the following terms.

One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be reason to suspect of being disposed to help the enemy ... The measure is not punitive but precautionary.\(^3\)

With regard to the nature of preventive detention, it is a fiction to designate a person as being "detained", rather than being charged and imprisoned. It has been pointed out that:

"[c]ontrol" which may go on indefinitely without accusation or defence, is a far worse experience than imprisonment of defined duration, and suspicion is often more damaging than indictment.\(^4\)

Referring to the pernicious effects of preventive detention on society and politics, President Julius Nyerere of Tanzania has observed that:

[it means that you are imprisoning a man when he has not broken any written law, when you cannot be sure of proving beyond reasonable doubt that he has done so. You are restricting his liberty, and making him suffer materially and spiritually, for what you think he intends to do, or is trying to do, or for what you believe he has done. Few things are more dangerous to the freedom of a society than that.\(^5\)

\(^2\) Ibid., at 273.

\(^3\) Ibid., at 269.


In the British colonial territories in South and South-East Asia, detention by executive action, without trial, was first given statutory sanction in the Presidency of Bengal by the promulgation of the *Bengal State Prisoners' Regulation* in 1818. The Bengal Regulation together with Regulations of a similar nature in the other Presidencies of British India empowered the Governor-General or State Governors to order the detention of any person for reasons such as security of state or maintenance of public order. Though the promulgation of these various Regulations was no doubt motivated by the common law principle that no one is to be deprived of his liberty without the sanction of law, the instruments granted an uncontrolled discretionary power to the head of government. Moreover, no provision was made for any advisory panels, nor were the detained persons given any right to be heard or even informed of the grounds for the detention.

Regulations for preventive detention during colonial times formally legitimized incarceration by executive fiat and inaugurated a legal policy which proved itself an efficient instrument for the suppression of political dissent during the colonial era. In the metropolitan state, recourse to detention without trial was taken only during periods of national crisis. By contrast, in the colonial state, the phenomenon of preventive detention became a permanent feature of the constitutional-legal system.

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6 The greater part of the colonial Presidency of Bengal now forms Bangladesh. Penang and Malacca in Malaysia, together with Singapore were originally part of the Bengal Presidency and administered by the British Governor of Bengal.

7 Regulation III of 1818. The regulation provided for detention for "reasons of state, embracing the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquility in the territories entitled to its protection and the security of the British dominions from foreign hostility and from internal commotion." The Regulations did not specify any time-limit for the continuation of the detention. Regarding the legal nature of "legislative regulations" like Regulation III of 1818, see H. Cowell, *The History and Constitution of the Courts and Legislative Authorities in India*, Calcutta, Thaker, Spink and Co., 2nd Ed., 1884, Lecture IV.

The basic design of preventive detention enactments in the closing phases of colonial rule in Malaysia, Sri Lanka and Bangladesh was inspired by the wartime Regulations promulgated in Britain.9

Preventive Detention in the Colonial Period

A. Malaysia

In the period immediately preceding independence,10 detention without trial was principally sanctioned by the Emergency Regulations Ordinance, 1948.11 Under this Ordinance, the High Commissioner of the Federation of Malaya was empowered, during an Emergency, to make Regulations, which were "desirable in the public interest".12 Among the classes of subjects on which Regulations could be made included, "arrest, detention, exclusion and deportation".13 The Ordinance declared that detention under Emergency Regulations was not to exceed two years, but could be extended by further order.14 Regulations were also to provide for "periodic review" of individual cases of detention.15 Although an individual person might have been detained under Emergency Regulations, the detention would not be terminated automatically upon the expiry of the Emergency.16

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10 In the nin-year period prior to Independence (1948-1957), Malaysia was under Emergency rule. The state of emergency was continued after Independence.


12 Section 4(1), ibid; also s. 4(2)(v).

13 Section 4(2)(b), ibid.

14 Section 4(3)(a), ibid.

15 Section 4(3)(b), ibid.

16 Proviso to s. 4(3), ibid.
Regulation 17 of the *Emergency Regulations* 1948,\(^{17}\) made under the *Emergency Regulations Ordinance*, decreed that the Chief Secretary of the Federation of Malaya:

may by order ... direct that any person named in such order shall be detained for any period not exceeding one year in such place of detention as may be specified by the Chief Secretary in the order.

Provisions were made in the 1948 Regulations for the constitution, by the High Commissioner, of one or more "Advisory Committees" to consider objections made by detainees against their detention orders.\(^{18}\) The Advisory Committee was to make recommendations to the High Commissioner with respect to these objections of the detained persons and the Committee’s considerations in this regard.\(^{19}\)

Initially the Emergency Regulations did not specify the number of persons who would constitute an Advisory Committee, nor the effect of a finding by it against an order of detention. By amendment of the principal Regulations soon after their promulgation,\(^{20}\) a chairman and two other members constituted a quorum of an Advisory Committee.\(^{21}\) By the same Amendment, a body superior to the Advisory Committee, called a Commission, had powers to vary the period of detention or order the discharge of a detainee, after consideration the recommendations of the Advisory Committee.\(^{22}\)

**B. Sri Lanka**


\(^{18}\) Paragraphs 2 and 4 of Regulation 17, *ibid*.

\(^{19}\) Paragraph 3, *ibid*.


\(^{21}\) Clause (a), *ibid*.

\(^{22}\) Clause (b), *ibid*. 
Provisions granting powers of preventive detention in Ceylon (Sri Lanka) in the period immediately before Independence in 1948 were contained in the Public Security Ordinance, 1947.\textsuperscript{23} Prior to the promulgation of this Ordinance, powers of detention without trial were exercised under the Ceylon Defence (Miscellaneous) Regulations 1940. These Regulations were made pursuant to Imperial Order in Council by which the British Emergency Powers (Defence) Act, 1939,\textsuperscript{24} were made applicable to Sri Lanka.\textsuperscript{25} Regulation 1(1) of the Ceylon Regulations provided:

If the Governor [of Ceylon] has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defence of the Island or in the preparation or instigation of such acts and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained.\textsuperscript{26}

In Gunawardena v Kandy Police,\textsuperscript{27} the appellant, who had escaped from custody while undergoing detention under the Ceylon Regulations, contended that the custody from which he escaped was not lawful. The appellant, a Member of the State Council of Ceylon, maintained that the Governor’s order of detention did not contain a recital to the effect that the detention was necessary for one or more objects of the Regulation in question. The Supreme Court of Ceylon rejected the appellant’s contention on these grounds.

\begin{quote}
[S]tarting from the hypothesis that the appellant knew that the Governor thought it necessary to exercise control over him, the reference to the regulation under which the order was made would convey to the appellant that the Governor had reasonable cause to believe that he was of hostile origin or associations or had recently been concerned in acts prejudicial to the public safety or the defence of the Island.
\end{quote}

\textsuperscript{23} Ordinance No. XXV of 1947.
\textsuperscript{24} 2 & 3 Geo. 6, c. 62.
\textsuperscript{26} Quoted in Gunawardena v Kandy Police, (1944) 45 N.L.R. 399, at 400.
\textsuperscript{27} Ibid.
CHAPTER II

safety or the defence of the Island or in the preparation or instigation of such acts.\(^28\)

The Court concluded that "omission of such a statement ... [was not] fatal to the validity of the [Governor's] order [of detention]."\(^29\)

The *Public Security Ordinance*, 1947,\(^30\) which contained provisions for preventive detention during an Emergency, was promulgated a year before the British colony of Ceylon became an independent Dominion. Under the *Ordinance*, the Governor of Ceylon was empowered to make Emergency Regulations during a state of public emergency.\(^31\) In addition to other heads of competence, the Governor could make regulations for preventive detention.\(^32\) By section 8 of the *Ordinance*, no Emergency Regulation or orders, rules or directions under the Regulations could be called into question in any court.

C. Bangladesh

Bangladesh was a part of British India till 1947, forming the greater part of the province of Bengal. In the period immediately preceding independence of the predecessor state of Pakistan, of which Bangladesh then formed the province of East Pakistan, the governing document was the *Government of India Act*, 1935.\(^33\) Under this *Act*, which transformed British India into a Federal Dominion, power to make laws with respect to preventive detention was specifically granted to both the Federal and the Provincial Legislatures.\(^34\) The *Act* restricted the subject-matter in relation to which the Federal and Provincial Legislatures were respectively competent to enact preventive

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30 Ordinance No. XXV of 1947.


32 Section 5(2)(a), *ibid*.

33 *Government of India Act*, 1935, 26 Geo. 5 & Edw. 8, c. 2 (2-8-1935).

34 *Government of India Act*, 1935, Seventh Schedule, List I, Entry 1 and List II, Entry 1, read with Part V.
detention laws. The Provincial Legislatures were empowered to make provision for preventive detention only in respect to the maintenance of public order, while the Federal Legislature was specifically granted the power solely in relation to reasons of State connected with defence or external affairs.

Subsequent to the Proclamation of Emergency by the Governor-General of colonial India in 1939, the Federal Legislature of India, acting under Section 102 of the *Government of India Act*, enacted the *Defence of India Act*, 1939. Under the *Defence of India Act*, the Central Government of British India could make "Rules" for the purposes of:

- securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community.

Rule 26(1) of the *Defence of India Rules* made under the *Defence of India Act* provided that:

> The Central Government or the Provincial Government, if it is satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to ... it is necessary so to do, may make an order ... (b) directing that he be detained ... .

Rule 129(1) empowered any police officer or any other central or provincial government officer to arrest without warrant. The Rule was to the following effect:

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35 *Ibid.*, Seventh Schedule, List II, Entry 1: "preventive detention for reasons connected with the maintenance of public order; persons subjected to such detention."

36 *Ibid.*, Seventh Schedule, List II, Entry 1: "preventive detention in British India for reasons of State connected with defence, external affairs, or the discharge of the functions of the Crown in its relations with Indian States."


38 Section 2(1), *Defence of India Act*, 1939.

Any police officer or any other officer of government empowered in this behalf ... may arrest without warrant any person whom he reasonably suspects of having acted, of acting, or of being about to act, - (a) ... in a manner prejudicial to the public safety or to the efficient prosecution of war ... 40

Comparing the power of detention accorded by Rule 26 made under the Defence of India Act, 1939, and Regulation 18B made under the British Emergency Powers (Defence) Act, 1939, Gwyer C.J. of the Indian Federal Court made the following observations.

There is in the Indian Act no trace of an intention that any particular person or authority should exercise the power of detention. ... [T]he wholly different problems of Government ... [in colonial India] made it a more difficult task to select in advance an individual or individuals in whom these powers might be vested, as was done in the United Kingdom ... It is one thing to confer a power to make a regulation empowering the Home Secretary [in the U.K.] to detain any person if he thinks it expedient to do so for a number of specified reasons; it is another thing altogether to confer a similar power on any person whom the Central Government [of India] may by rule choose to select, or to whom the Central Government may by rule give powers for the purpose.41

In Emperor v Sibnath Banerjee,42 it was held that the Court was not competent to investigate the sufficiency of the materials or the reasonableness of the grounds of satisfaction of the Government for detaining a person under Rule 26(1) of the Defence of India Rules.43 In the appeal to the Privy Council in the same case,44 it was held that:

the orders of detention ... must be taken as ex facie regular and proper ... 45

40 See Keshav Talpade, op. cit., at 3.

41 Ibid., at 6-7.


43 Ibid., at 84.


45 Ibid., at 163.
Rule 26(1) of the *Defence of India Rules* permitted the exercise of powers of preventive detention, if the Government was *satisfied* with regard to a number of matters. Interpreting this power the Privy Council, in *Emperor v Vimlabai Deshpande*, agreed that for a detention under this Rule to be valid, the Government must be *satisfied* and that mere *suspicion* was not enough. But at the same time the Privy Council noted that:

\[
\text{there is no qualifying adverb such as reasonably or honestly attached to the word satisfied.}\]

This *obiter* remark of the Privy Council suggests that the expression *satisfied* in Rule 26(1) of the Defence of India Rules "must receive a subjective interpretation and the discretion of the ... [Government] making the detention order could not be questioned in a court of law". In connection with the Privy Council observation, it has been pointed out that:

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\text{the presence or absence of the adverbs reasonably and honestly in this context are of little importance, for the legislature assumes that powers of this kind will be reasonably and honestly used. The question is whether the legislature intended the exercise of such powers to be subject to judicial control.}\]

* * *

Preventive detention had been a potent and effective mechanism to contain political dissent in the colonial State. Far from doing away with the scheme of detention by executive process, the constitutional systems of the post-colonial states have expressly recognized and legitimised powers of preventive detention. Further, as in the colonial State, powers of detention without trial in independent Malaysia, Sri Lanka and Bangladesh are available both during states of emergency and in normal times.

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47 Ibid., at 126.
48 Ibid.
50 Ibid.
Preventive Detention since Independence

There are provisions enabling the exercise of preventive detention powers in the Constitutions of both Malaysia and Bangladesh. These Constitutions also contain a number of safeguards\(^{51}\) for the detainee, but these safeguards, which are repeated in the preventive detention statutes, are essentially procedural in nature and it is left to the legislatures to determine the substantive content of the exercise of these powers. The legislatures have responded to this by enacting enabling statutes which define the purpose of the power in broad categories such as "maintenance of public order", "security of the State", and such like. The Sri Lankan Constitution of 1978 has entrenched the pre-Independence *Public Security Ordinance, 1947*,\(^{52}\) which provides for powers of preventive detention.

A. Malaysia

Constitutional provisions on Preventive Detention

The Constitutional Commission\(^{53}\) which drew up proposals for the Constitution of independent Malaya (Malaysia) recommended specific provisions with regard to preventive detention. The Emergency proclaimed in 1948 was still in force when the Constitutional Commission began work in 1957, and it was the understanding of the Commission that the Emergency would still be in force when the Constitution was adopted. These circumstances motivated the Commission to recommend the inclusion of powers of preventive detention in the Independence Constitution of Malaya.\(^{54}\)

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\(^{51}\) Some of the safeguards, discussed *infra*, include the communication to the detainee of the grounds of detention, opportunity of representation to an advisory committee, and periodic review of the length of detention.

\(^{52}\) Ordinance No. XXV of 1947.


\(^{54}\) *Report, op. cit.*, at 75.
The Commission designated as "wholly unsatisfactory" the then existing Emergency Regulations, which, among other things provided for exercise of the powers of preventive detention.\textsuperscript{55} In accordance with the recommendations of the Constitutional Commission, powers of preventive detention were sanctioned by the Constitution of independent Malaya,\textsuperscript{56} accompanied by the enumeration of some procedural safeguards for detainees.

The few safeguards have, however, been successively whittled away by constitutional amendments. A person detained without trial in Malaysia has the right to be informed of the grounds and allegations of fact on which s/he has been detained,\textsuperscript{57} subject to the right of the detaining authority to refuse to disclose facts when disclosure would be contrary to national interests.\textsuperscript{58} An Advisory Board, comprised of persons appointed by the Yang di-Pertuan Agong (King), has been entrusted with the responsibility to review cases of preventive detention.\textsuperscript{59} The chairman of the Advisory Board must be a serving or retired judge of a superior court or a person qualified for that position.\textsuperscript{60} In the original Constitution, the determination of the Board with regard to the continuation or discontinuation of the detention was final and conclusive. By the Constitution (Amendment) Act, 1960,\textsuperscript{61} the role of the Advisory Board, in matters of review of detention, was reduced only to the making of "recommendations" to the Yang di-Pertuan Agong.\textsuperscript{62}

Prior to 1976, no person could be detained beyond three months unless his/her representations were considered and the Advisory Board had made its

\textsuperscript{55} Ibid.

\textsuperscript{56} Article 151, Constitution of Malaysia, Appendix I.

\textsuperscript{57} Article 151(1)(a), ibid.

\textsuperscript{58} Article 151(3), ibid.

\textsuperscript{59} Article 151(1)(b), ibid.

\textsuperscript{60} Article 151(2), ibid. Previously, members of the Board other than the chairman were appointed after consultation with the Lord President of the Federal/Supreme Court of Malaysia. Since the Constitution (Amendment Act, 1990, Act No. A767 of 1990, appointment of the other members are made by the Yang di-Pertuan Agaong without consultation with the Lord President.

\textsuperscript{61} Act 10 of 1960.

\textsuperscript{62} Article 151(1)(b), Constitution of Malaysia, as amended by s. 30, Act 10 of 1960.
recommendations. By the Constitution (Amendment) Act, 1976, the three-month period no longer referred to the duration of detention, but to the time period within which representations by the detainee must be considered by the Advisory Board, counting from the date of submission of the representation. The same Amendment provided that this period of three months could be extended. It has been suggested that this change was dictated by practical considerations.

Obviously, it would be unrealistic to expect the [Advisory] Board to conduct any meaningful enquiry and make suitable recommendations within three months of the detention, if the detainee were to choose to make his representations, say, only two weeks before the expiry of his detention.67

The Constitutional Commission of Malaya's recommendation to provide for powers of preventive detention in the proposed Constitution of independent Malaya were made in the context of the colonial Emergency Regulations Ordinance, 1948, which authorized preventive detention. In the Draft Constitution presented by the Commission, the provisions for preventive detention were bracketed with the provisions for Emergency and other Special Powers of the Government, an arrangement which was unchanged in the final form of the Constitution. These factors initially led to some assertions that preventive detention could only be lawful under emergency legislation. In this regard, it has been pointed out that:

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63 This was in conformity with the recommendations of the Constitutional Commission, see Report, op. cit., at 76.

64 Act No A354 of 1976.


66 Ibid.


At the time of writing, Salleh bin Abas was Solicitor General of Malaysia. He was elevated to the bench afterwards and subsequently became Lord President of the Federal Court/Supreme Court. He was dismissed from office in 1988.

[t]here is no express provision of the Constitution which states that preventive detention is permissible only when enacted under Part XI [of the Constitution] on Emergency Powers. Article 151 [of the Constitution] purports to apply 'where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention' but does not state that preventive detention outside Part XI is prohibited. 69

Internal Security Act, 1960

The Emergency Regulations Ordinance, 1948, which sanctioned preventive detention in Malaysia in the period prior to Independence in 1957, was continued under the provisions of the Independence Constitution for several years. 70 In 1960, the Malaysian Parliament passed the Internal Security Act, 1960, 71 which provided for powers relating to "internal security", preventive detention and related matters. 72 The Act was enacted under Article 149 of the Constitution of Malaysia which provides for extraordinary legislation against "subversion" and other related activities. 73

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70 Article 163 of the Constitution, which was repealed by the Constitution (Amendment) Act, 1963, Act No. No 25 of 1963, provided in clause (1) that:

The Emergency Regulations Ordinance, 1948, and all subsidiary legislation made thereunder shall, if not sooner ended by a Proclamation ... cease to have effect on the expiration of one year beginning with ... [Independence Day] or, if continued under this Article, on the expiration of a period of one year from the date on which it would ceased to have effect but for the continuation or last continuation.

From 1957 to 1963, Article 163 was kept in force by annual resolutions of the Federal Legislative Assembly of Malaya.


72 See the recital to the Act.

73 Article 149, Constitution of Malaysia, Appendix I. The powers under Article 149 will be discussed in Chapter III infra.
The Malaysian *Internal Security Act*, and the parallel legislation in Sri Lanka\(^7^4\) and Bangladesh\(^7^5\) providing for preventive detention have been modelled along the lines of the colonial instruments for preventive detention.\(^7^6\) The condition precedent for the issue of a detention order is the *subjective satisfaction* of an executive officer or authority that the incarceration of the detainee is necessary in order to achieve the objects of the enabling legislation. In the Chapter on the "Powers of Preventive Detention"\(^7^7\) in the Malaysian *Internal Security Act*, 1960, s. 8(1), as amended, provides:

> If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order ... directing that person be detained for any period not exceeding two years.\(^7^8\)

The constitutional safeguards relating to preventive detention are repeated in the *Act*.\(^7^9\) The major safeguard in this regard is the requirement that, ordinarily, no preventive detention may extend beyond a specified period unless an Advisory Board (consisting of members with prescribed qualifications) determines or recommends that there is sufficient cause for a detention beyond that period. The *Act* provides that a determination on an order of detention reached after consideration of the recommendations of the Advisory Board "shall not be called into question in any court".\(^8^0\)

### The Malaysian Court’s approach to Preventive Detention


\(^7^6\) Discussed supra.


\(^7^8\) By s. 8 (7) of the *Act*, however, the length of detention can be successively extended beyond the initial period of two years.


\(^8^0\) Section 12(b), *ibid.*
In deciding cases arising out of preventive detention, the Federal Court of Malaysia has customarily relied upon British war-time decisions on preventive detention.81

(a) Judicial review of "subjective satisfaction"

In Karam Singh v Menteri Hal Ehwal Dalam Negari, Malaysia,82 the appellant, a lawyer detained under the Internal Security Act, 1960, challenged his detention on several grounds. The position of the Malaysian Federal Court with regard to judicial review of the executive power of preventive detention was summed up in Karam Singh in categorical terms.

The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.83

This position was reiterated in the concurring opinion of Ali F.J.

81 Some of the important decisions relied upon are, Greene v Secretary of State for Home Affairs, [1942] A.C. 284, Liversidge v Anderson, [1942] A.C. 206, The King v Secretary of State for Home Affairs, Ex Parte Lees, [1941] 1 K.B. 72. All of these cases were quoted with approval by the Malaysian Court in Karam Singh, infra. Decisions of the Indian Court on preventive detention are also cited and considered by the Court in Malaysia. In this regard Suffian F.J. (as he was then) observed:

Judgements of the Indian Supreme Court are of great persuasive here, particularly on the Constitution because to a great extent the Indian Constitution was the model for our own Constitution. But having given the matter anxious consideration, I have come to the conclusion that with deep respect the Indian Supreme Court should not in this matter be followed.

Karam Singh, infra, at 147.


83 Ibid., at 151, per Suffian F.J. (as he was then), emphasis.
[T]he question [as to] whether it is necessary that a person be detained under section 8(1)(a) of the Internal Security Act is a matter for the personal or subjective satisfaction of the executive authority.84

The rule of subjective satisfaction laid down in *Karam Singh* has been consistently followed in later cases. In *Minister for Home Affairs v Karpal Singh*85 (henceforth *Karpal Singh* 2), the respondent, a well-known defence lawyer, was arrested and detained under the *Internal Security Act*, on allegations of promoting racial disharmony. In the first instance, the High Court at Ipoh had found some of the allegations of fact on which the detention order was based to be erroneous, and had ordered the release of the detainee.86 The Minister for Home Affairs appealed to the Supreme Court87 against the decision of the High Court.

The Supreme Court in *Karpal Singh* 2 distinguished between the grounds for detention and the allegations of fact on which the detention order was based. According to the Supreme Court, the High Court was in error for basing its decision on a scrutiny of the allegations of fact on which the detention order was based.

> Whilst the *grounds of detention* stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the *allegations of fact* upon which the subjective satisfaction of the Minister was based are not.88

84 *Ibid.*, at 159; Ong Hock Thye C.J. observed:

> Once we accept that the Cabinet did satisfy themselves as to the propriety of the [detention] order that is the end of the matter.


87 The Federal Court has been renamed the "Supreme Court" (Mahkamah Agung) by the *Constitution (Amendment) Act*, 1983, Act No. A566 of 1983, in force from 1-1-1985.

The Supreme Court emphasized that "reasonable cause", which was the basis of the *subjective satisfaction* of the detaining authority, was beyond judicial review.

[R]easonable cause is something which exists *solely* in the mind of the Minister of Home Affairs and that he alone can decide and it is not subject to challenge or judicial review unless it can be shown that he does not hold the opinion which he professes to hold.\(^{89}\)

In *Theresa Lim Chin Chin v Inspector General of Police*,\(^{90}\) Salleh Abas L.P. justified the rule of subjective satisfaction by relying on the "clear words" of the Constitution and the *Internal Security Act*, 1960. Citing relevant provisions, Salleh Abas L.P. observed that:

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\text{[i]t is clear from these provisions of the Constitution, and the ISA [Internal Security Act], that the intention of the framers of the Constitution is that the judges in the matter of preventive detention relating to the security of the Federation are the executive.}^{91}\]

(b) *Detention & procedural irregularities*

The principal ground of challenge in *Karam Singh* was that the detention was not "in accordance with law" as enjoined under Article 5(1) of the Malaysian Constitution, and was consequently illegal and *mala fide*. The appellant contended that there were procedural irregularities in the manner in which his detention was brought about. The order of detention enumerated several alternate reasons for the arrest and detention of the appellant, whereas the particulars of his grounds of detention supplied to him afterwards, to enable him to make a representation to the Advisory Board, listed only one classification of "prejudicial activities".

\(^{89}\) *Ibid.*, at 32, emphasis added.

\(^{90}\) [1988] 1 M.L.J. 293.

\(^{91}\) *Ibid.*, at 295. The reference here was to Articles 149 and 151 of the Constitution, and ss. 8 and 73 of the *Internal Security Act*, 1960.
Azmi L.P., Ong Hock Thye C.J. (Malaya) and Gill F.J. were of the opinion that the discrepancy between the order of detention and the grounds of detention was a "technical defect" of "form" or "procedure" and not of "substance". In this regard, Suffian F.J. (as he was then) pointed out that in Malaysia, the constitutional guarantee of the right to personal liberty referred only to substantive law and not to procedural law, implying thereby that procedural irregularities were not to be taken into account in deciding cases on preventive detention. The learned judge compared the relevant provisions of the Indian and Malaysian Constitutions relating to personal liberty and observed that:

[in Malaysia,] ... detention, in order to be lawful, must be in accordance with law, not as in India where it must be in accordance with procedure established by law.

In Karam Singh, the appellant also contended that the grounds of detention containing the allegations of fact supplied to him were vague and indefinite, thereby prejudicing his representation before the Advisory Board. The Court

92 Karam Singh, op. cit., at 140 (per Azmi L.P.), at 142 (per Ong Hock Thye C.J. (Malaya)), at 154 (per Gill F.J.). Instead of treating the discrepancy as a defect, Suffian F.J. felt that:

there is no need for the grounds to be identical with any or all of the purposes of detention. The grounds supplied could be in words totally different from the statement of the purposes of detention.

Ibid., at 147.

93 Article 21 of the Constitution of India provides:

No person shall be deprived of his life or personal liberty except according to procedure established by law.

Emphasis added.

The Malaysian Constitution provides in Article 5(1):

No person shall be deprived of his life and personal liberty save in accordance with law.

Emphasis added.

The comparison was made in view of a number of decisions of the Indian Supreme Court relied upon by the appellant.

94 Karpal Singh v Menteri Hal Ehwal Dalam Negari, Malaysia, [1988] 1 M.L.J. 468, at 150, emphasis in original. See also at 153.
adopted the position that vague, insufficient or irrelevant grounds did not vitiate the detention order. Suffian F.J. explained:

I do not see any justification for reading into the Constitution or into the [Internal Security Act] any provision to the effect that any imperfection in the allegations of fact supplied to the detainee relates, as it were, to the original order of detention, and goes to its root, so as to render illegal the detention.\(^95\)

(c) **Inviolability of detention order**

The inviolability of an executive order of detention as asserted in *Karam Singh* was reiterated even when the order in question could not be enforced. In *Minister of Home Affairs v Chu Choon Yong and Another*,\(^96\) the respondents, originally detained under the *Internal Security Act*, were subsequently issued with orders under the *Banishment Ordinance, 1959*,\(^97\) banishing them from Malaysia forever. When no country was found to accept the banished persons, even after the elapsing of three years in one case and six years in another, the High Court of Malaya ordered their release. In so doing, the High Court agreed with the contention of the respondents that although their detention under the *Banishment Ordinance* was originally lawful, it subsequently became unlawful because it could not be enforced. The Federal Court of Malaysia allowed the appeal of the State against the High Court's decision. Suffian L.P. offered the following reason for allowing the appeal.

A valid detention order under the Banishment Order remains valid until revoked. It is true that the Minister may suspend that order or may instead make an expulsion order so that the banishee may make his own arrangements to leave the country, but ... the making of these orders is a matter of discretion for the

\(^95\) *Ibid.*, at 150.


\(^97\) Revised as the *Banishment Act, 1972*, Act No. 79 of 1972. The Act provides for the banishment or expulsion from Malaysia, *inter alia*, of persons who are not citizens. In the instant case, one of the respondents, a citizen of Malaysia and a local politician in Johor Bahru, was deprived of his citizenship while in detention. It was alleged that the other respondent, who was born and had lived in Malaysia all his life, had failed to prove that he was a citizen.
Minister, and his refusal to do so does not affect the validity of the orders of detention that are impugned.98

A. Sri Lanka

The Constitution, Public Security Ordinance, and Preventive Detention

The Constitutions of Malaysia and Bangladesh expressly provide for general powers of preventive detention which are not restricted to emergency situations only. In Sri Lanka, powers of detention without trial are sanctioned by the 1978 Constitution in a somewhat less direct way. By Article 155(1) of the Sri Lankan Constitution, the pre-Independence Public Security Ordinance, 1947,99 which provides, inter alia, for the making of preventive detention and enabling other measures during an Emergency, has been continued.100 Article 155(1) of the Constitution reads:

The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament.

The Constitution specifies that Emergency Regulations under the Public Security Ordinance, which includes Regulations for preventive detention, are to be operative only during an Emergency.101 These Emergency Regulations have an over-riding effect on other laws "except the provisions of the Constitution".102 But by Article 15(7) of the Constitution, the guaranteed


99 Ordinance No. XXV of 1947, enacted by the colonial Governor of Ceylon (Sri Lanka), "with the advice and consent of the State Council" of Ceylon.

100 The 1972 Constitution, by Section 134(1) had similarly provided for the continuation of the Public Security Ordinance.

101 Article 155(3), Constitution of Sri Lanka, 1978. This is a reiteration of the basic provision in the Public Security Ordinance that preventive detention and other Regulations could only be enacted upon a Proclamation of Emergency. See ss. 2 and 5 of the Ordinance.

102 Article 155(2), Constitution of Sri Lanka, 1978:

The power to make emergency regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of any law, except the provisions of the Constitution.
right to personal liberty, and freedom from arbitrary arrest and detention may be restricted by Emergency Regulations under the *Public Security Ordinance* providing for preventive detention.\textsuperscript{103}

The indirect and obscure way in which the Constitution of Sri Lanka has sanctioned the exercise of powers of preventive detention has been confusing. In *Wijaya Kumaranatunga v G.V.P. Samarasinghe and Others*,\textsuperscript{104} Emergency Regulations for preventive detention, promulgated under the *Public Security Ordinance* were challenged as being *ultra vires* the Constitution.

The applicant before before the Court in *Wijaya Kumaranatunga* was arrested and detained under Emergency Regulation 17 (1) of the *Emergency Regulations* 1982.\textsuperscript{105} On behalf of the applicant, it was pointed out that Article 13(1) of the Constitution of Sri Lanka enjoined that no person could be arrested except according to procedure established by law.\textsuperscript{106} It was further argued that by Article 13(2) of the Constitution, every arrested or detained person was to be produced before a competent court, and that detention or other deprivation of personal liberty must be on judicial authority.\textsuperscript{107}

\textsuperscript{103} Article 15(7) provides:

\begin{quotation}
The exercise and operation of ... the fundamental rights [to equality, personal liberty, and of freedom of speech, expression and assembly] declared and recognized by ... [the Constitution] shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order ... [etc.] ...
\end{quotation}


\textsuperscript{105} *Emergency (Miscellaneous Provisions and Powers) Regulations* of 1982, promulgated by the President pursuant to a Proclamation of Emergency on 20 October 1982. See Chapter VII *infra*.

\textsuperscript{106} Article 13(1), Constitution of Sri Lanka, 1978:

\begin{quotation}
No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason of his arrest.
\end{quotation}

\textsuperscript{107} Article 13(2), *ibid*:

\begin{quotation}
Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.
\end{quotation}
being the constitutional imperatives, the applicant claimed that the Regulations under which he was detained were *ultra vires* the Constitution, being in conflict with the provisions of the constitutional right to personal liberty.

With respect to these contentions, the Supreme Court noted the diversity of the relevant constitutional provisions at issue.

Under Article 155(2) [of the Constitution.] no regulations can be made which have the legal effect of overriding, amending or suspending the provisions of the Constitution. The Constitution itself, however, by Article 15(7) provides that the exercise and operation of the fundamental rights declared and recognized by Articles 13(1), and 13(2) shall be subject to such restrictions as may be prescribed by law in the interest, *inter alia*, of national security and public order.108

The Court concluded:

Preventive detention ... can be used to restrict the fundamental rights [of personal liberty and freedom from arrest and detention] guaranteed by Articles 13(1) and (2) [of the Constitution] ... Regulation 17 (1) is not *ultra vires* the Constitution.109

The result of the Court's decision was that, although the right to freedom from arrest and detention was guaranteed by the Constitution, the guarantee was subject to restrictions. Among those restrictions was the privilege to the State to resort to the use of powers of preventive detention to derogate from this constitutional right.

**Prevention of Terrorism (Temporary Provisions) Act, 1979**

Until 1979, powers of preventive detention in Sri Lanka could only be exercised in except during an Emergency.110 Under the provisions of the

108 *Wijaya Kumaranatunga, op. cit.*, at 350, per Soza J.

109 Ibid., at 352, per Soza J.

Prevention of Terrorism (Temporary Provisions) Act, 1979,\textsuperscript{111} powers of preventive detention are now available in non-emergency situations as well. The provisions of the Act were expressed to have effect notwithstanding anything contained in any other law.\textsuperscript{112} By s. 29, this new Act was to operate for a period of three years only.\textsuperscript{113} But by an amendment to the Act in 1982, the Act was given unlimited duration.\textsuperscript{114}

Section 9(1) of the Prevention of Terrorism Act provides:

Where the Minister has reason to believe or suspect that any person is connected with or concerned in any unlawful activity the Minister may order that such person be detained ...

The Malaysian Internal Security Act, 1960, as amended, permits preventive detention for up to two years in the first instance, and its continuation for periods of two years by subsequent orders, without reference to the maximum cumulative period of detention.\textsuperscript{115} The Sri Lankan Prevention of Terrorism Act, on the other hand provides for detention for three months at a time, and limits the aggregate period of such detention to a total of eighteen months.\textsuperscript{116}

Unlike the provisions of the Malaysian Internal Security Act, 1960, where a detainee is supplied with the grounds of detention, the allegations of fact and other particulars,\textsuperscript{117} the Sri Lankan Act requires only that the detainee be informed of the "unlawful activity" for which s/he is detained.\textsuperscript{118} There is also

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\end{flushleft}

\textsuperscript{111} Act No. 48 of 1979.

\textsuperscript{112} Section 28, \textit{ibid}.

\textsuperscript{113} Section 29, \textit{ibid}:

\begin{quote}
The provisions of this Act shall be in operation for a period of three years from the date of its commencement.
\end{quote}


\textsuperscript{115} Sections 8(1) and 8(7), Internal Security Act, 1960.

\textsuperscript{116} Section 9(1) and Proviso, \textit{ibid}.

\textsuperscript{117} Section 11, Internal Security Act, 1960.

\textsuperscript{118} Section 13(2), Prevention of Terrorism Act, 1979.
no stipulation as to the qualifications of the members of the Advisory Board which considers representations by detainees.119 Although provisions for an Advisory Board have been made in the Sri Lankan Act, the powers of the Board with regard to the review of orders of detention have not been provided in the Act itself. It is only enacted that:

> [t]he Minister may make rules in relation to the hearing and disposal of any representations that may be made by any person in respect of any such order.120

An order of detention under the *Prevention of Terrorism Act* has been expressed to be non-justiciable. The Act declares that:

> [a]n order [of preventive detention] made by the Minister ... shall be final and shall not be called into question in any court or tribunal by way of writ or otherwise.121

### The Sri Lankan Court's approach to Preventive Detention

In matters arising out of preventive detention under the *Prevention of Terrorism (Temporary Provisions) Act*, 1979, the Supreme Court of Sri Lanka has tended to require an objective basis for detention. Thus, in *Senthilnayagam and Others v Seneviratne and Another*,122 the Court proposed that the reasonableness of the belief of the Executive as to the necessity of detaining a person must be based on objective facts. The initial detention orders in *Senthilnayagam* had stated "terrorist activity" as the ground for detention. During the pendency of the detention, new orders were served on the

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119 Section 13, *ibid.* It is only provided that the chairman and other members of the Advisory Board are to be appointed by the President. Under the Constitution of Malaysia, the chairmen of the Advisory Board must be, or have been, or qualified to be a judge of the superior courts.


121 Section 11(5), *ibid.* Cf. Section 12(2) of the Malaysian *Internal Security Act*, 1960, where an order of detention has been made non-justiciable only after a determination on the order of detention has been reached after consideration of the recommendations of the Advisory Board.

detainees which specified some facts on which the detention orders were based.

In the process of deciding *Senthilnayagam*, the Sri Lankan Supreme Court noted with approval the dissenting opinion of Lord Atkin in the *Liversidge* case, advocating the test of *reasonableness* in the exercise of powers of detention. It also reviewed several recent decisions of the House of Lords and the Court of Appeal in England in which the *Liversidge* doctrine of non-justiciability of the rule of subjective satisfaction was rejected. On these bases, the Supreme Court held:

> It is accepted now that expressions like 'has reasonable cause to believe' impose an objective condition precedent of fact on which a person detained would be entitled to challenge the grounds of the executive's honest belief. There is no unfettered power vested in the Minister and no unconditional authority to detain a person.

Since the initial detention orders in *Senthilnayagam* mentioned only "terrorist activity" as the ground for detention, the Court found "the detention orders ... invalid ab initio". However, at the same time, the Court found the subsequent orders of detention, which rectified the *defects* of the initial orders, "valid ex facie". As to the question whether infirmities in detention orders can be overcome by fresh orders, the Sri Lankan Court quoted several precedents of the Indian Supreme Court to come to the following conclusion.

> In the instant applications the [fresh] detention orders ... rectify the defects in the earlier detention orders ... made by the Minister of Internal Security.

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125 *Senthilanayagam*, op. cit., at 208.


As the decision in *Senthilanayagam* suggests, the approach of the Court in Sri Lanka, in matters of detention without trial in normal times, has been inconsistent, superficial and ineffective. In later Chapters, it will be seen that the Sri Lankan Court has decided questions of preventive detention during an Emergency in a similarly inconsistent way.

C. Bangladesh

The Pakistan period

Since the withdrawal of colonial authority from South Asia in 1947, Bangladesh passed through the intermediate state of Pakistan. In united Pakistan, Bangladesh formed the province of East Pakistan until 1971, when it became an independent state following a civil war. In the predecessor state of Pakistan, there were several preventive non-emergency detention statutes, in addition to the *Defence of Pakistan Ordinance*, 1965,\(^ {129} \) which provided for powers of detention without trial during an Emergency. These were the *Pakistan Public Safety Ordinance*, 1949,\(^ {130} \) *Pakistan Public Safety (Amendment) Act*, 1950,\(^ {131} \) *Pakistan Public Safety Ordinance*, 1952,\(^ {132} \) and the *Security of Pakistan Act*, 1952.\(^ {133} \) Besides these Central statutes, there were also enactments which had application in the respective Provinces in Pakistan. Of these, the *East Pakistan Public Safety Ordinance*, 1958,\(^ {134} \) had application in what is now Bangladesh.

**The Pakistan Court and Preventive Detention: Government of East Pakistan v R. B. S. A. Khan**

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\(^ {129} \) Ordinance No. XXIII of 1965.

\(^ {130} \) Ordinance No. XIV of 1949.

\(^ {131} \) Act No. 36 of 1950.

\(^ {132} \) Ordinance No. VI of 1952.

\(^ {133} \) Act No. 35 of 1952.

\(^ {134} \) Ordinance No. LXXVIII of 1958.
In the major decision of *Government of East Pakistan v Rowshan Bijaya Shaukat Ali Khan*, the Government of East Pakistan appealed to the Supreme Court of Pakistan against an order of the High Court of East Pakistan which had invalidated the detention order of the respondent. The order had been made under the provisions of the *East Pakistan Public Safety Ordinance*. There was close similarity between this *Ordinance* and the colonial *Defence of India Rules 1940.* Under s. 41 of the *Ordinance*, a police officer was empowered to arrest without warrant any person whom he reasonably suspected of activities prejudicial to public safety. An arrest under the *Ordinance* was to be reported to the Provincial Government of East Pakistan, and pending receipt of final orders, the arresting officer could detain a person for up to thirty days. Upon the passing of final orders by the Government, a detained person could be held in detention for up to two months. The *Ordinance* was enacted in the interregnum after the abrogation of the 1956 Constitution of Pakistan and the adoption of the 1962 Constitution, and did not contain any provision for the communication of the grounds of detention to a detainee or provide for other safeguards.

In *Rowshan Bijaya Shaukat Ali Khan*, the Supreme Court discussed the general issues of preventive detention and the validity of the detention order under the *East Pakistan Public Safety Ordinance*, in terms of the constitutional safeguards as to arrest and detention. Among the safeguards to preventive detention under the 1962 Constitution of Pakistan were the requirement that the grounds of detention be communicated to the detainee. This was not provided for in the *Ordinance*. The detainee in this case was not supplied with any grounds for detention until five days after the event. In his leading judgement, S.A. Rahman J. observed that:

[t]he determination of grounds had to precede the order of detention and *ex hypothesi* no such determination had taken place before the Government had applied its mind to the report of the [Police] Inspector. This would ... be sufficient to invalidate

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136 See the observations of S.A. Rahman J. in *Rowshan Bijaya Shaukat Ali Khan, op. cit.*, 311-312.

the first arrest and detention in custody, in the circumstances of this case.\textsuperscript{138}

The appellant, the Government of East Pakistan claimed that the subsequent order was independent of the previous detention. This contention was not acceptable to the Court.

[T]here is a substantial distinction between a fresh order of detention and one extending a previous illegal order of detention ... On the face of it the order of detention [in question] purports merely to extend the previous detention which has been found to be illegal and consequently the subsequent order of detention must also be held to be vitiating. The detaining authority must be held bound by its own expressly avowed purpose in passing the order.\textsuperscript{139}

The appellant also relied on British war-time decisions on preventive detention\textsuperscript{140} in support of the claim that grounds of detention communicated to the detainee in the case were not exceptionable. In this regard, it was pointed out by the Court:

We are here dealing with peace-time legislation and though questions of the security of the State or public order may involve at times, considerations of a confidential character and of the greatest urgency, yet it would be difficult to uphold a construction which jeopardises the precious right of personal liberty of a citizen during peace-time on the mere \textit{ipse dixit} of a police officer.\textsuperscript{141}

The appeal was dismissed by majority opinion.\textsuperscript{142} One of the majority, Hamoodur Rahman J. (as he was then), further found the relevant provisions in the \textit{Ordinance} permitting arrest and detention without the constitutional safeguards to be void.

\textsuperscript{138} Rowshan Bijaya Shaukat Ali Khan, op. cit., at 313.


\textsuperscript{141} Rowshan Bijaya Shaukat Ali Khan, op. cit., at 312.

\textsuperscript{142} Cornelius, C.J. dissenting.
The 1972 Constitution of Bangladesh

At adoption in 1972, the Constitution of Bangladesh did not provide for powers of preventive detention. The non-inclusion of these powers was not deliberate but a case of omission by mistake. However, despite the absence of powers of detention without trial in the unamended Constitution of Bangladesh, preventive detention laws of the predecessor state of Pakistan like the Security of Pakistan Act, 1952, and the East Pakistan Public Safety Ordinance, 1958, were continued in the new state of Bangladesh by Article 149 of the Constitution. In addition, the Bangladesh Collaborators (Special Tribunals) Order 1972, a pre-Constitution executive ordinance, provided for summary detention of persons suspected of collaborating with the Pakistani government during the civil war.

Provisions for preventive detention were introduced in the Constitution of Bangladesh by the Constitution (Second Amendment) Act, passed within a year of the adoption of the Constitution. During debate in Parliament on

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144 Act No. 35 of 1952, referred to as the Security Act, 1952, by convention.

145 East Pakistan Ordinance No. LXXVIII of 1958, referred to variously as the Public Safety Ordinance, 1958, or the Bangladesh Public Safety Ordinance, 1958.

146 Article 149, Constitution of Bangladesh:

Subject to the provisions of this Constitution all existing laws shall continue to have effect but may be amended or repealed by law made under this Constitution.

147 President's Order No. 8 of 1972. The Collaborators Order was repealed in 1975 by a decree of the President and Chief Martial Law Administrator, the Second Proclamation Order No. III, 1975, reproduced in Appendix X, Constitution of Bangladesh.

148 Article 47 and First Schedule, Constitution of Bangladesh.


151 The Constitution was adopted on November 4, 1972, and the Second Amendment was passed on September 22, 1973.
the Bill for this Amendment, there was some resistance to the introduction of preventive detention powers in the Constitution. It was pointed out by Opposition in Parliament that in the past the Pakistani government had used preventive detention powers to stifle political opposition, and it was apprehended that the same will be done in Bangladesh if the Constitution sanctioned such powers. The provisions for preventive detention were justified, on behalf of the ruling government, on the basis that democratic countries provide for similar powers either in express form or impliedly.

Under the Constitution of Bangladesh, as amended, preventive detention is authorized for an initial period of six months. The detainee is to be furnished with the grounds of detention "as soon as may be", subject to the claim of the State that the disclosure of facts would be "against the public interest to disclose". The Constitution provides for an Advisory Board for considering representations by the detainees. Of the three members of the Board, two must be, or have been, or qualified to be Judges of the Supreme Court of Bangladesh. No detention can continue for a period exceeding six months, unless the Advisory Board reports its "opinion" on the matter.

**The Special Powers Act 1974**

The *Special Powers Act*, 1974 was passed by the Bangladesh Parliament soon after the Second Amendment to the Constitution. By section 3(1) of the Act:

> [t]he Government may, if satisfied with respect to any person that with a view to preventing him from doing any prejudicial act

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153 Ibid., at 177.

154 Article 33(4), Constitution of Bangladesh.

155 Article 33(5), *ibid*.

156 Article 33(4), *ibid*.

157 Act No. 14 of 1974. The Act has been amended over the years.
it is necessary to do so, make an order ... directing that such person be detained ...

Some of the constitutional provisions relating to the communication of grounds of detention to a detainee and the powers of the Advisory Board have been made more specific in the Act. A person who has been served with a detention order must be informed of the allegations against him within fifteen days.\textsuperscript{158} The \textit{Special Powers Act} provides for reference, by the Government, to the Advisory Board of detention orders and related information within one hundred and twenty days of the detentions.\textsuperscript{159} The Advisory Board is enjoined to submit its report to the Government within one hundred and seventy days "from the date of detention".\textsuperscript{160} The report of the Advisory Board is not just advisory, for if the Board reports that the detention of a particular person is unjustified, the Government must revoke the detention order.\textsuperscript{161} In case of continuation of detention beyond the initial six months, the Advisory Board is to review the detention every six months.\textsuperscript{162}

\textbf{The attitude of the judiciary}

In deciding cases on preventive detention, the Court in Bangladesh continued the jurisprudence of the predecessor Supreme Court of Pakistan in this regard. The decision in \textit{Rowshan Bijaya Shaukat Ali Khan} discussed above, and several other precedents of the Supreme Court of Pakistan\textsuperscript{163} under the emergency \textit{Defence of Pakistan Ordinance, 1965},\textsuperscript{164} assisted the Court in Bangladesh to lay the framework of a jurisprudence of \textit{legality} in the early years of its operation. Two early decisions of the High Court Division have been

\textsuperscript{158} Section 8(2), \textit{ibid.}

\textsuperscript{159} Section 10, \textit{ibid.}

\textsuperscript{160} Section 11, \textit{ibid.}

\textsuperscript{161} Section 12(1), \textit{ibid.}

\textsuperscript{162} Section 12(1).


\textsuperscript{164} Ordinance No. XXIII of 1965.
significant in this regard. Both of these cases involved detention under the *East Pakistan Public Safety Ordinance, 1958*, which after Bangladesh’s Independence, continued to be used for preventive detention.

In *Tafur Uddin v The State*, the applicant, who was initially arrested on suspicion of criminal activities, was afterwards served with a detention order under the *East Pakistan Public Safety Ordinance, 1958*. The Court found that the successive orders of detention passed while the applicant was incarcerated were not based on fresh materials and there was no *reasonable satisfaction* as to the need for detention. With regard to the *reasonableness of satisfaction* of the detaining authority and the justiciability of a detention order, Justice F.K.M.A. Munim, later Chief Justice, observed that:

[i]f ... an order of detention is challenged as illegal, *mala fide* or without any basis, the authority who has passed the order must produce before the court the materials which led to the satisfaction necessary for exercising the power of detaining a person. It will be the duty of the Court to examine such materials upon which the grounds are based and see whether the detaining authority could, upon such materials, be reasonably satisfied.

The major case on preventive detention to come before the High Court Division of Bangladesh, after the entrenchment of preventive detention powers in the Constitution, and soon after the passing of the *Special Powers Act, 1974*, was *Aruna Sen v Government of Bangladesh*. In *Aruna Sen*, the Court discussed some comparative decisional law on preventive detention, preferring the decisions of the Supreme Court of Pakistan, rather than the

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165 *Tafur Uddin v The State*, (1975) 27 D.L.R.18, and *Habibur Rahman v Government of Bangladesh*, (1974) 26 D.L.R. 201. The same principles that had guided the Court in *Tafur Uddin* were reiterated in *Habibur Rahman* decided very soon thereafter.

166 Ordinance No. LXXVIII of 1958. The Ordinance was continued under the provisions of the Constitution with some cosmetic changes principally in the nomenclature.


case-law from India. Applying the precedents, the High Court Division concluded that:

under the settled principles of law ... any person charged with the authority of taking decisions affecting the rights and liberties of the citizens ... has the corresponding duty of acting judicially ... [T]he superior courts have the power to see whether the said person has conformed to the judicial norms applicable to the case.

From these general premises, the Court co-related its judicial power under the Constitution of Bangladesh to the requirement of an objective basis for the deprivation of personal liberty by way of detention without trial.

[T]he constitutional obligation imposed upon the High Court Division under Article 102(2)(b) of the Constitution ... is clearly to make an objective assessment of the materials on which the necessary satisfaction of the detaining authority has been based and to be satisfied that an average prudent man could reasonably be so satisfied.

Referring to the procedural rights of the detainees under the Special Powers Act, 1974, the Court in a subsequent decision pointed out that:

[t]hese statutory rights ... which give expression to the fundamental rights of the citizen, cannot be defeated or reduced to [a] meaningless [facade] ... by the communication of [vague and indefinite] grounds .... [which would preclude the detainee from getting] any reasonable opportunity of making ... effective representation against his detention order.

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170 See F.K.M.A. Munim, Rights of the Citizen under the Constitution and Law, Dacca, Bangladesh Institute of Law and International Affairs, 1975, at 337:

[T]he Supreme Court [of Bangladesh] did not, as it might well have done, reproduce the prepositions of the Indian Supreme Court in several decisions ... [I]t rather preferred to accept the principles stated by the Supreme Court of Pakistan ... which set admirable examples of judicial statesmanship, particularly in a regime which could by no means be called democratic.

171 Aruna Sen, op. cit., at 147.

172 Ibid., emphasis added.

In the same decision, the Court stressed that:

> [t]he right given to the detainee to make representation makes [it] all the more necessary to make detention order on reasonable and valid grounds [that would be] sufficient to satisfy the judicial conscience.\(^\text{174}\)

In *Abdul Latif Mirza v Government of Bangladesh*,\(^\text{175}\) the appellant before the Court was detained under the *Special Powers Act*, 1974, on political grounds. The detention was continued for several years by successive detention orders, although the political situation in the country had changed in the meantime and the initial grounds of detention were not subsequently valid. In allowing the appeal, the Appellate Division of the Supreme Court emphasized the judicial power under the Constitution to examine the legality of action of the detaining authority, notwithstanding any provision of the detaining statute to the contrary.

> The Special Powers Act standing by itself emphasises that the opinion of the detaining authority to act is purely subjective, but the Constitution has given a mandate to the High Court to satisfy itself, as a judicial authority, that the detention is a lawful detention.\(^\text{176}\)

These decisions indicate that the Bangladesh Court has consistently demanded that there must be an *objective* basis for detention without trial. This contrasts to judicial sanctioning of preventive detention on the *subjective* satisfaction of the Executive in Malaysia, and the inconsistent approach of the Sri Lankan Court on this matter. It will be seen in later Chapters that the approach of the Court in Bangladesh with regard to questions of the rights of the citizens vis-à-vis preventive detention powers during normal times was continued during periods of Emergency.

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\(^{174}\) *Ibid.*, at 279, emphasis added.

\(^{175}\) (1979) 31 D.L.R. (A.D.) 1.

CHAPTER III
EMERGENCY POWERS AND MARTIAL LAW

The most widespread use of powers of detention without trial occurs during periods of Emergency. A Proclamation of Emergency, under each of the Constitutions of Malaysia, Sri Lanka and Bangladesh, enables the promulgation of special executive decrees and legislative enactments, providing not only for preventive detention, but also other extraordinary powers encroaching on almost all aspects of the constitutional rights of citizens. Since by a Proclamation of Emergency under the Constitutions of these countries the Executive and the Legislature are freed from the restrictions by way of the constitutional rights, even the slender constitutional safeguards as to preventive detention are liable to be removed. Before discussing these dimensions of preventive detention during an Emergency, it is necessary to examine the nature and operation of emergency powers under the Constitutions of Malaysia, Sri Lanka, and Bangladesh.

The framework of constitutional emergency powers under the Constitutions of the three countries is presented in this Chapter and the next. The issues examined in these two Chapters are the doctrinal basis of emergency powers in the colonial period, the constitutional provisions enabling resort to emergency powers in the post-colonial phase, the consequences of a Proclamation of Emergency, the question of legislative control over executive emergency powers, and the revocation of a state of emergency. Chapter V then takes up the provisions of emergency laws relating to preventive detention and other derogations from constitutional rights, the use of these laws, and the Court's role in regard to some of the basic issues of suspension of rights.

**Constitutional and Statutory Emergency Powers**

Legislation which confers emergency powers on the executive may be enacted as a temporary measure intended to deal with a specific crisis. The special defence legislation enacted by the British Parliament during the two World

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1 This occurs as a result of the suspension, during an Emergency, of the constitutional safeguards relating to preventive detention. See Chapter V, *infra.*
Wars provides an example of this type of legislation. Emergency legislation may also be passed in the form of a permanent statute, authorising the executive to assume special powers in order to cope with a special class of crisis situation. Thus in Britain, for instance, the *Emergency Powers Act, 1920*, as amended by the *Emergency Powers Act, 1964*, empowers the Executive to proclaim an emergency in situations of serious social or economic conflict.


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2 10 & 11 Geo. 5, c. 55.

3 c. 38.


The Canadian *War Measures Act*, first enacted in 1914, is another example of a permanent statute which authorises the Executive to declare an Emergency.

Since its promulgation in 1947, the *Public Security Ordinance* of Sri Lanka has been a permanent emergency statute like the British *Emergency Powers Act, 1920*, and the Canadian *War Measures Act*. The Ordinance was continued by the Independence (1948) and the 1972 Constitution. The 1978 Constitution entrenched the *Public Security Ordinance* and elaborated major provisions of the Ordinance, relating to its applicability and parliamentary control. Under the present constitutional framework therefore, Emergency in Sri Lanka is no longer a statutory norm.


In substance, there is no real difference between the Northern Ireland legislation and its mainland counterpart. However, the proclamation of emergency continues in force, without time limit or periodic Parliamentary scrutiny, until revoked by the Secretary of State ...

6 16 & 17 Geo. 5, c. 8.

7 C. 34.

8 C. 5.

9 C. 8. For a discussion on the provisions of these Acts see David Bonner, *op. cit.*, Chapter 3.
Emergency Powers Act, 1920 has been a model for emergency statutes in some of the Australian States.¹⁰

When compared to the temporary emergency legislation, such as was enacted in wartime Britain, the permanent enabling statutes reveal one distinctive feature. Where the power to proclaim an Emergency has been conferred on the Executive, it is not Parliament which determines the actual existence of the factual circumstances which justify the assumption of special powers. The initiative for identifying a given crisis as an Emergency has been surrendered to the Executive. In consequence various safeguards have been devised to prevent the abuse of this delegated power, the most important of which is the requirement that a declaration of emergency and, in most instances, the specific measures taken under it, be subjected to parliamentary control.

In the absence of constitutional limitations on the exercise of legislative power, the Courts cannot question the competence of Parliament to enact emergency legislation; hence the judicial review of executive action taken under emergency powers is confined to ascertaining the scope of the power conferred by the enabling legislation.¹¹ Thus the judicial control of emergency power is not, in essence, an issue of constitutional law, but rather a matter of statutory interpretation.¹²


¹¹ During the continuance of the (1948) Independence Constitution of Sri Lanka, the authority of the Governor-General to promulgate emergency regulations under the Public Security Ordinance, 1947, and to delegate powers of detention under those regulations to the Permanent Secretary, Ministry of Defence, was challenged in S. Weerasinghe v G. V. P. Samarasinghe, (1966) 68 N.L.R. 361, as being ultra vires the Constitution. It was contended in Weerasinghe that under s. 45 of the Constitution, the Governor-General had only executive functions, not "legislative" function like the making of emergency regulations. The Supreme Court held that:

it is perfectly constitutional for the Governor-General to make Emergency Regulations when he is empowered to do so by an Act of Parliament, [i.e. the Public Security Ordinance, which under the provisions of the Independence Constitution, was to be deemed to be a law passed by Parliament] for such a power does not conflict with the exercise of his executive power.

Ibid., at 366.

¹² In Chapters IV and V it will be observed that despite the elaborate scheme of constitutional emergency powers and the articulated restrictions, the Courts in Malaysia and Sri Lanka have
CHAPTER III

Emergency Powers in the Colonial Period

In the colonial era, the entrenchment of explicit emergency powers in constitutional documents provided a convenient solution to the doctrinal inconsistency between the notions of local representative government patterned on the British model, and the needs of centralised imperial control. Thus the statutory instruments which structured the system of government in British colonial territories regularly linked the establishment of representative institutions with the reservation of special "emergency" powers to the Representative of the Crown.  

A. Malaysia

The governing instrument of Malaysia prior to Independence in 1957 was the Federation of Malaya Order in Council, 1948. The Federation comprised of the Malay States and the "Settlements". The Order was based on the Federation of Malaya Agreement of 1948 between the Crown and the Rulers of the nine Malay States jointly, and upon a series of State Agreements between the Crown and the Rulers individually. Under the Federation of Malaya Order, the executive authority of the Federation was vested in the High Commissioner.

continued to employ rules of interpretation with regard to the use of emergency powers which are more suited to a statute than to a Constitution.

13 A comparable situation is brought about, for instance, in Britain under the Emergency Powers Act, 1920, or in Canada under the War Measures Act. Both statutes contemplate the assumption of extraordinary executive power, contingent upon a formal declaration as required under the respective statutes. Although with respect to both enactments, provision is made for (subsequent) parliamentary control, the invocation of the special powers is a matter solely for the Executive.


15 These were the nine "protected" Malay Sultanates: Johore, Kedah, Kelantan, Selangor, Negri Sembilan, Pahang, Perak, Perlis and Trengannu.

16 The "Settlements" of Malacca and Penang, which, together with Singapore and other British possessions in South-East Asia, previously formed the Straits Settlements.
The Emergency Regulations Ordinance, 1948,\(^{17}\) enacted by the High Commissioner,\(^{18}\) under the Federation of Malaya Order in Council, 1948, provided:

The High Commissioner in Council, whenever it appears to him that an occasion of emergency or public danger has arisen, or that any action has been taken or is immediately threatened by any persons or body of persons of such a nature or on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, may, by proclamation, declare that a state of emergency exists.\(^{19}\)

A Proclamation of Emergency could be made for the whole or any part of the Federation, and the Proclamation was to remain in force either for a specified period or until revoked by the High Commissioner in Council.\(^{20}\) During the continuance of Emergency, the High Commissioner could make "any regulations whatsoever" which were considered desirable by him "in the public interest".\(^{21}\) The powers of the High Commissioner to make Emergency Regulations included the powers to make Regulations for "arrest, detention, exclusion and deportation".\(^{22}\)

B. Sri Lanka

The 1931 Order-in-Council

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\(^{17}\) Ordinance No. 10 of 1948, Malayan Union and Federal Ordinances of 1948, 211-216.

\(^{18}\) The exact source of legislative power for enacting this Ordinance is not specified. The Ordinance was expressed to be "enacted by the High Commissioner of the Federation of Malaya and Their Highnesses the Rulers of the Malay States with the advice and consent of the Legislative Council ... ".

\(^{19}\) Section 3(1), Emergency Regulations Ordinance, 1948.

\(^{20}\) Section 3(2), ibid.

\(^{21}\) Section 4(1), ibid.

\(^{22}\) Section 4(2)(b), ibid.
The colonial Governor of Ceylon/Sri Lanka under the *Ceylon (State Council) Order in Council*, 1931, had certain reserve powers. Special legislative powers were accorded to the Governor in matters of "paramount importance to the public interest, or [in matters which were] essential to give effect to any of the provisions of ... [the Order in Council]." In respect of these matters the Governor could declare Bills or other legislative instruments passed by the State Council, notwithstanding any provisions of the *Order in Council* itself.

The emergency powers of the Governor were pervasive. It was provided in the Order that:

whenever the Governor shall consider that a state of emergency has arisen or is imminent, whether from the danger of enemy action or of civil disorder, or from any grave cause, he may by Proclamation assume control of any Government department and issue such orders to that department as he may see fit ...

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23 This *Order in Council* is popularly referred to as the Donoughmore Constitution after the Earl of Donoughmore who headed the "Special Commission on the Constitution of Ceylon" that recommended the provisions of the 1931 *Order in Council*. The Donoughmore Constitution preceded the 1946 *Ceylon (Constitution) Order in Council* which, with suitable amendments was adopted as the Independence Constitution in 1948.

Under the Donoughmore Constitution, the State Council of Ceylon was concerned with Administration as well as Legislation. The Council sat in Executive and Legislative Sessions. The Council was constituted with 65 elected members, 3 ex-officio and 12 (maximum) members. There were a number of Executive Committees in the Council, in charge of the various heads of administration. The Board of Ministers was formed with the Chairmen of the Executive Committees and three Officers of State.

24 In its Report, the Donoughmore Commission rationalised its proposals for reserve powers for the Governor in this way:

[W]ith every transference of responsibility to representative organs the Governor must be given additional reserve powers as will enable him to see that this responsibility is not wrongly exercised.


The Report characterised the functions of the Governor as being, "in general ... negative rather than positive". (*Ibid.*, at 78).

25 Section 22(1), *Ceylon (State Council) Order in Council*, 1931.

26 Section 22(1)(b), *ibid*.

27 Section 49(1), *ibid*.
By a Declaration in 1943, the British government pledged internal self-government in Ceylon.\textsuperscript{28} The Constitutional Commission\textsuperscript{29} appointed by the British Government in 1943 to draw up proposals for a new Constitution for Ceylon along the lines of self-government recommended the reservation of emergency powers to the Crown. After proposing the exercise of ordinance-making power in matters relating to Defence by the Governor-General,\textsuperscript{30} the Commission said:

We refer to the emergency of war or a grave national emergency in which normal constitutional machinery has either broken down or become ineffective. In order to deal with either of these contingencies it may be necessary for His Majesty in Council to legislate by Order in Council. We recommend, therefore, that this power be reserved to His Majesty in Council and that an express provision to this effect be inserted in the Constitution.\textsuperscript{31}

The 1946 Order-in-Council and the 1947 Public Security Ordinance

The recommendations of the Soulbury Commission relating to the reservation of defence, external affairs, emergency powers and constitutional amendments

\textsuperscript{28} See Chapter I, \textit{supra}.

\textsuperscript{29} The Soulbury Commission., see Chapter I.

\textsuperscript{30} The proposal of the Soulbury Commission relating to the ordinance-making power of the Governor-General was omitted in the \textit{Ceylon Constitution Order in Council}, 1946, in accordance with the suggestion of the Board of Ministers of Ceylon. Instead the Crown was given the power to legislate with respect to defence and external affairs by order in council.

Although the power to legislate by Order in Council in respect of these matters was retained, this power was quite a different matter from the Governor's powers of enactment, for the former was a distant power wielded after considerable delay by a burdened institution, while the latter was a power readily exercisable and close at hand.


The change from "Governor" to "Governor-General" was in accordance of the Ceylonese Board of Ministers. See \textit{Report, infra}, at 93 and Appendix I.

in the proposed Constitution of Ceylon, to the British Crown were inserted as Section 30 of the *Ceylon (Constitution) Order in Council*, 1946. Before the coming into force of s. 30 of this *Order in Council*, the *Public Security Ordinance*, 1947, empowering the Governor of Ceylon to promulgate Emergency Regulations, was "enacted by the Governor of Ceylon, with the aid and advice of the State Council". This *Ordinance* was continued by the Independence (1948) Constitution of Ceylon/Sri Lanka, the 1972 Republican Constitution and the present (1978) Constitution of Sri Lanka.

The reserve powers of the British Crown, relating to emergency powers, defence and external affairs in the 1946 *Order in Council* were in operation for only three months between the time of coming into operation of these provisions and Ceylon's Independence.

C. Bangladesh

The last governing instrument of colonial mainland South Asia, of which Bangladesh was a part, was the *Government of India Act*, 1935. This Act was designed to transform the British Empire of India into a Dominion with responsible government. But consistent with the colonial tradition of reserving special emergency powers to the Representative of the Crown, certain discretionary powers, including the power to proclaim a state of emergency, were reserved for the Governor-General of British India. The incorporation of the notion of a formal state of emergency was primarily motivated by the federal structure of the system of government. The principal object of the emergency provisions was to subordinate, in times of crisis, the legislative and executive competence of the provinces to that of the federal government.

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32 See *Report, op. cit.*, at 90-91 and at 93-95.


34 Ordinance No. XXV of 1947; date of commencement June 16, 1947.

35 Section 30 was revoked by s. 4 of the *Ceylon Independence Order*, 1947.

36 *Government of India Act*, 1935, 26 Geo. 5 & 1 Edw. 8, c. 2 (2-8-1935).
Under the *Government of India Act* the Governor-General was authorised, at his discretion, to issue a Proclamation that "a grave emergency exists whereby the security of India is threatened, whether by war or internal disturbance". As a direct legal consequence of such a Proclamation the federal legislature acquired the power to legislate with respect to any matter, even if it was a subject otherwise falling within exclusive provincial legislative competence.

**Emergency as a Constitutional Norm in the Post-Colonial State**

Both the Independence Constitution of Malaysia, and the Constitution of Bangladesh entrench emergency powers which in many respects are modelled on similar provisions in the colonial governing instruments discussed in the previous section. In Sri Lanka, the pre-Independence *Public Security Ordinance*, 1947, has been continued as an "Act of Parliament" by the Constitution of 1972 and by the present (1978) Constitution.

**A. Malaysia**

The Constitutional Commission which drew up proposals for the Independence Constitution of Malaysia was of the opinion that:

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38 The Governor-General had also extensive powers of intervention at either the federal or provincial level where he "is satisfied that a situation has arisen in which the government cannot be carried on in accordance with the provisions of this Act". (Section 45, *Government of India Act*, 1935).

39 Part XI, Constitution of Malaysia; Part IXA, Constitution of Bangladesh. In the case of Bangladesh, the "intermediate" State of Pakistan, had similar emergency powers under the Constitutions of 1956 and 1962.

40 Ordinance No. XXV of 1947.

41 Section 134, Constitution of Sri Lanka, 1972; Article 155(1), Constitution of Sri Lanka, 1978. Article 155(1) provides:

> The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament.

42 See Chapter I for the constitution of this Commission.
neither the existence of fundamental rights nor the division of powers between the Federation and the States ought to be permitted to imperil the safety of the State or the preservation of a democratic way of life.\footnote{Report of the Federation of Malaya Constitutional Commission, 1957, London, Stationery Office, 1957, at 74.}

The Commission recommended that the proposed Constitution should authorize the use of emergency powers in situations:

such as war, or internal disturbance, which constitute an immediate threat to the security or economic life of the country or any part of it ... \footnote{Report, op. cit., at 75.}

In addition to emergency powers, it was proposed that the Constitution of Malaysia also grant certain other special powers to Parliament to deal with "subversion" and other related activities.\footnote{Adopted as Article 149, Constitution of Malaysia, see Appendix I.} These non-emergency special powers were to enable Parliament to enact legislation during normal times in derogation of the guaranteed rights in the Constitution. No proclamation of emergency would be necessary for recourse to the proposed special powers; instead Parliament would be authorized to make a declaration that extraordinary legislative measures are required to deal with serious situations.

The recommendations of the Constitutional Commission with respect to these provisions were not unanimous. One of the Commissioners, Justice Abdul Hamid of the High Court of West Pakistan in Pakistan disagreed with these proposals. Justice Hamid's note of dissent in this regard also touched upon the scheme of entrenched emergency powers generally. He pointed out that:

no request has been made from any quarter for inserting a part relating to Emergency provisions of this nature in the Constitution and no constitution of the Commonwealth countries except India and Pakistan has a chapter of this kind. In other countries where the constitution is bare of fundamental guarantees ... if a serious situation arises for which ordinary law of the land is found to be inadequate special legislation for the suppression of those extraordinary conditions is enacted by Parliament. As this Constitution contains constitutional
guarantees ordinary legislation in contravention of those guarantees would no doubt be ultra vires. But the object can be achieved if power is conferred on Parliament by engrafting exceptions to the relevant guarantees. ... Under that device it would not be necessary to have an Emergency Part in the Constitution at all.\textsuperscript{46}

With reference specifically to the proposed special powers of legislation in non-emergency times to suppress "subversion" and related problems, Justice Hamid felt that it would be:

unsafe to leave in the hands of Parliament power to suspend constitutional guarantees only by making a recital in the Preamble [of the special Act] that conditions in the country are beyond the reach of the ordinary law.\textsuperscript{47}

The proposals of the Constitutional Commission, with regard to emergency powers of the State, were adopted almost entirely by Malaysia's Independence Constitution. The provisions of the original Constitution have, however, been amended several times since Independence to give more extensive emergency powers to the executive and the legislature. These powers will be discussed in the next three sections of this Chapter, together with similar powers available under the Constitutions of Sri Lanka and Bangladesh.

\textbf{B. Sri Lanka}

The present Constitution of Sri Lanka, in addition to entrenching the \textit{Public Security Ordinance, 1947}, in the Constitution,\textsuperscript{48} has added other provisions relating to the operation of an Emergency and action during the pendency of it. These will be discussed below along with similar provisions in the Constitutions of Malaysia and Bangladesh.

\textbf{C. Bangladesh}

\textsuperscript{46} \textit{Report, op. cit.}, at 103-104.

\textsuperscript{47} \textit{Ibid.}

At adoption in 1972, the Constitution of Bangladesh did not provide for entrenched emergency powers like those of the Constitution of Malaysia. The State was not, however, without the possession of extraordinary powers. The *ultima ratio* of the nascent Bangladeshi nation was expressed in the "Defence Power" under the Constitution. Articles 63(2) and (3) of the original Constitution provided:

(2) In case of actual or imminent invasion of Bangladesh by land, sea or air, the President may take whatever steps he considers necessary for the protection and defence of Bangladesh, and Parliament if not sitting shall be summoned forthwith.

(3) Nothing in this Constitution shall invalidate any law enacted by Parliament which is expressed to be for the purpose of securing the *public safety* and preservation of the State in times of war, invasion or *armed rebellion*.49

Barely a year after the Constitution was adopted, elaborate emergency provisions, like those in the Malaysian Constitution, were inserted in the Constitution of Bangladesh by the Second Amendment.50 Defending the Second Amendment Bill, the government pointed out that:

during a state of emergency, ... fundamental rights will be compromised. There is no other way. The Constitutions of all countries have similar provisions.51

It was, however, pointed out by the Opposition that the proposed emergency provisions were redundant in view of the "Defence Power" under Article 63.52 The government rebutted that the categories of emergency situations in the Bill were not analogous to those covered by the "Defence Power".53

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49 Emphasis added.


53 Ibid., 179-180. The references here were to the expressions, "armed rebellion" in the "Defence Power" and "internal disturbance" in the emergency provisions which were sought to be introduced in the Constitution.
CHAPTER III

The emergency powers of the amended Constitution of Bangladesh will be discussed in the following three sections, together with the analogous provisions of the Malaysian and Sri Lankan Constitutions.

Emergency Powers and the Executive

Grounds for a Proclamation of Emergency

In Malaysia, Sri Lanka and Bangladesh, a declaration of a state of emergency may be made on the grounds of security or economic life of the state. "Public order" is an additional ground for a declaration of Emergency in Malaysia and Sri Lanka. The Constitution of Bangladesh specifies that the threat to the security or economic life of the State must be one arising out of "war or external aggression" or "internal disturbance".

The Executive authority empowered to declare an Emergency

The Yang di-Pertuan Agong (King) in Malaysia, and the President in Sri Lanka and Bangladesh can declare a constitutional Emergency. In this respect this kind of Emergency bears some resemblance to the permanent sub-constitutional emergency statutes frequently encountered in Commonwealth countries. Like such permanent emergency statutes, the constitutional

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54 The issues relating to the justiciability of the power of the Executive to declare an Emergency will be examined critically in the next Chapter.

55 Article 150 (1), Constitution of Malaysia; Section 2 (1), Public Security Ordinance, 1947, Sri Lanka; Article 141A (1), Constitution of Bangladesh. The Sri Lankan Public Security Ordinance mentions the categories as "public security and the preservation of public order", and "maintenance of supplies and services essential to the life of the community".


57 Article 141A (1), Constitution of Bangladesh. A similar provision in the original Constitution of Malaysia was omitted by Constitution (Amendment) Act, 1963, Act No. 25 of 1963, s. 39(1).

58 Article 150(1), Constitution of Malaysia; Section 2(1) Public Security Ordinance, 1947, Sri Lanka; Article 141A(1), Constitution of Bangladesh.

59 E.g., the Canadian War Measures Act, the British Emergency Powers Act, 1920. The Sri Lankan Public Security Ordinance, 1947, does not strictly fall into this category since the
emergency provisions in Malaysia, Sri Lanka and Bangladesh are essentially designed to empower the Executive to react promptly to a sudden national crisis, without the need for intervention by the Legislature. There is, however, one crucial distinction. Where the emergency powers of the executive are derived exclusively from statute, the competence of the legislative branch to control the abuse of such powers extends not only to the exercise of the emergency powers by the Executive but also to their very existence, since the scope of executive power can easily be redefined by amending or repealing the relevant legislation. Where, however, as in these countries, the emergency powers are derived wholly or substantially from the Constitution, the ability of the Legislature to effectively control the use of the emergency power is seriously curtailed.

The time at which a Proclamation may be made

The significance of the grounds which are expressly recognized by the Constitutions of Malaysia, Sri Lanka and Bangladesh, as justifying a Proclamation of Emergency, is weakened by the fact that the King or President (as the case may be) is authorised to issue a Proclamation before the actual occurrence of the circumstances constituting a threat to national life, if he is satisfied that there is an imminent danger of these circumstances. In Malaysia, additionally, the Yang di-Pertuan Agong can issue different Proclamations of Emergency on different grounds or in different circumstances regardless of whether a Proclamation or Proclamations are already in operation.

provisions relating to the operation of an Emergency have been substantially modified by the provisions of the present (1978) Constitution of Sri Lanka.


61 Article 150(2), Constitution of Malaysia; Section 2(1) Public Security Ordinance 1947, Sri Lanka; Article 141A(3), Constitution of Bangladesh.

62 Article 150(2A), Constitution of Malaysia. This is a new provision, introduced by the Constitution Amendment Act, 1981, Act No. A514 of 1981.
CHAPTER III

Emergency Powers and the Legislature

All three Constitutions make provisions for the communication of a Proclamation of Emergency to the Legislature. A Proclamation of Emergency under the Constitutions of Sri Lanka and Bangladesh must be approved by the Legislature before the expiration of a specified period.63 The Constitution of Malaysia originally stipulated approval of a Proclamation by the Legislature, but since 1960, it is merely required that the Proclamation of Emergency be "laid before both Houses of Parliament".64 A Proclamation of Emergency made under the Constitution of Malaysia continues to be in operation until revoked or annulled by resolutions of both Houses of Parliament.65

Although the Constitution of Bangladesh stipulates parliamentary approval of a Proclamation of Emergency as a condition for the operation of a Proclamation for a period longer than one hundred and twenty days, there is no provision as to the effect of a parliamentary disapproval of a Proclamation. Thus, under the Constitution of Bangladesh, parliamentary disapproval would clearly not affect the operation of a Proclamation until after the expiration of a period of one hundred and twenty days. The Sri Lankan Constitution gives immediate effect to a resolution of Parliament disapproving a Proclamation.66

A more serious problem arises in Bangladesh from the fact that, once a Proclamation receives the requisite parliamentary approval it can only be revoked by a subsequent Proclamation issued by the Executive.67 In Sri Lanka, a Proclamation of Emergency is in force for one month at a time and is renewable successively.68 An innovative feature of the present Sri Lankan

63 Article 155(6), Constitution of Sri Lanka, and Section 2 (4), Public Security Ordinance, 1947, inserted by Public Security (Amendment) Law, 1978, Act No. 6 of 1978 (within fourteen days); Article 141A (2) (c), Constitution of Bangladesh.

64 Article 150 (3), Constitution of Malaysia. Prior to the Constitution Amendment Act, 1960, Act 10 of 1960, a Proclamation of Emergency was to be approved within two months.

65 Ibid.


67 Article 141A (2) (a), Constitution of Bangladesh.

Constitution is the inclusion of a stipulation that a two-third majority vote in Parliament will be required for continuance of Emergency if a Proclamation had already been in existence for ninety days within a six-month period.69

**Legal Consequences of a Proclamation of Emergency**

**Legislative powers of the Executive**

The Yang di-Pertuan in Malaysia has been authorised to promulgate necessary Emergency Ordinances if at any time during a state of emergency, the Houses of Parliament are not sitting concurrently.70 These executive Emergency Ordinances may be with respect to any matter on which Parliament has legislative authority and the Ordinances continue in force until revoked or annulled.71

In Sri Lanka, the President is empowered to make Emergency Regulations under the *Public Security Ordinance*, 1947. The Regulation-making power of the President during an Emergency can be exercised "in the interests of public security and the preservation of public order and the suppression of mutiny, riot or civil commotion, or for the maintenance of supplies and services essential to the life of the community".72 These Emergency Regulations have the legal effect of overriding, amending or suspending the operation of any law, but not the provisions of the Constitution.73

Although the monthly renewal of Emergency appears to be cumbersome, it had been possible in the past to keep a proclamation of emergency in operation for years together.


70 Article 150 (2B), Constitution of Malaysia. The original provision which empowered the Yang di-Pertuan Agong to promulgate ordinances only until Parliament convened after a Proclamation [original Article 150(2)], was amended to this effect by the *Constitution Amendment Act*, 1981, Act No. A514 of 1981. The Amendment was a reaction to the decision of the Privy Council in *Teh Cheng Poh v Public Prosecutor*, [1979] 1 M.L.J. 50, discussed infra in Chapter IV.


73 Article 155 (2), Constitution of Sri Lanka, 1978. This is a little misleading, since by Article 15 (7) of the Constitution, most of the important constitutional rights could be restricted by "regulations ... relating to public security".
No specific powers are granted to the President under the Constitution of Bangladesh to promulgate Emergency Ordinances, although under the general constitutional power of Ordinance-making,\textsuperscript{74} the President can make Emergency Ordinances when Parliament is either dissolved or not in session during the operation of an Emergency.\textsuperscript{75}

**Derogations of constitutional guarantees\textsuperscript{76}**

Under the Constitutions of Sri Lanka and Bangladesh the Legislatures may, during the operation of an Emergency, enact laws and the Executive may undertake action, which would otherwise be inconsistent with specified constitutional rights. Under the Sri Lankan Constitution, the rights which may be derogated from are, equality, right to liberty and protection of the law, and the rights of speech, assembly, association, profession and movement.\textsuperscript{77} In Bangladesh, the Constitution permits derogations from the rights to freedom of speech, movement, assembly, association, profession and the right to property.\textsuperscript{78} During an Emergency, the Constitution of Malaysia permits derogations not only from all constitutional rights, but also from any other provision of the Constitution.\textsuperscript{79}

In Bangladesh, the emergency power which probably has the most drastic impact on the lives of ordinary citizens, is the power of the President to suspend, by Order, the right of any person to move any court for the enforcement of the constitutional rights which are guaranteed by such Articles

\textsuperscript{74} Article 93, Constitution of Bangladesh.

\textsuperscript{75} The *Emergency Powers Ordinance, 1974*, Ordinance No. XXVII of 1974, was promulgated by the President under Article 93 of the Constitution of Bangladesh on the same day that Emergency was proclaimed on December 28, 1974.

\textsuperscript{76} Derogations of constitutional guarantees during an Emergency is examined in detail in Chapter V.

\textsuperscript{77} Articles 15 (1) and 15 (7), Constitution of Sri Lanka, 1978.

\textsuperscript{78} Article 141B, Constitution of Bangladesh.

\textsuperscript{79} Article 150 (6), Constitution of Malaysia. The original provisions in the Constitution of Malaysia in this regard were similar to those of the Constitutions of Sri Lanka and Bangladesh. The power was broadened by the *Constitution Amendment Act, 1963*, Act No. 26 of 1963.
as may be specified in the Order.\(^{80}\) The Constitution does not subject the exercise of this power to the control of the Parliament. It is merely required that the Order suspending the enforcement of constitutional rights "be laid before Parliament".\(^{81}\)

**Distinctive nature of the legal consequences**

The distinctive feature of the constitutional emergency provisions in Malaysia, Sri Lanka and Bangladesh is that the legal effect of the Proclamation with respect to legislative and executive competence is not expressly confined to matters which have any nexus to the Emergency. Nor are the legal consequences which arise from a Proclamation of Emergency dependent on the nature of the crisis, but are predefined results which directly flow from the Proclamation itself. In the case of Malaysia, the federal structure of the State is also affected by an Emergency.\(^{82}\)

**Martial Law as Extra-Constitutional Emergency**

**Common Law**

According to Dicey, Martial Law is the common law right of the Crown and its servants to deal with extraordinary situations.

Martial Law is sometimes employed as a name for the common law right of the Crown and its servants to repel force by force in the case of invasion, insurrection, riot or generally of any violent resistance to the law. This right or power is essential to the very

\(^{80}\) Article 141C (1), Constitution of Bangladesh.

\(^{81}\) Article 141C (3), *ibid*.

\(^{82}\) During the operation of an Emergency in Malaysia, the Federal Parliament has the power to legislate with respect to matters which are otherwise within the competence of the state legislatures - Article 150 (5), Constitution of Malaysia. In *Stephen Kalong Ningkan v Government of Malaysia*, [1986] 2 M.L.J. 238, the Privy Council held that this power could be extended to amendments of a State Constitution, in this case, the State Constitution of Sarawak, *ibid.*, 243-244. Moreover the executive authority of the federal government is vastly enhanced, permitting that Government to interfere with almost all aspects of the internal administration of a state - Article 150(4), Constitution of Malaysia.
existence of orderly government, and is most assuredly recognized in the most ample manner by the law of England.\(^8^3\)

In this sense, Martial Law "is a state of affairs, not a settled body of rules, though rules and orders will be promulgated and enforced by the military authorities as they see fit".\(^8^4\)

The consequences of a common law declaration of Martial Law have been summed up in the following way:

Martial law is the assumption by officers of the Crown of absolute power, exercised by military force, for the suppression of an insurrection, and the restoration of order and lawful authority ...

The officers of the Crown are justified in any exertion of physical force, extending to the destruction of life and property to any extent, and in any manner that may be required for the purpose. They are not justified in the use of cruel and excessive means, but are liable civilly and criminally for such excess. They are not justified in inflicting punishment after resistance is suppressed, and after the ordinary courts can be reopened.\(^8^5\)

**Sri Lanka: the 1947 Public Security Ordinance**

Under Sri Lanka's *Public Security Ordinance*, 1947, the President is empowered to call out the armed forces in any part of Sri Lanka where the police are inadequate to deal with the maintenance of public order.\(^8^6\)

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Stephen's views on Martial Law were formulated in the context of excesses committed by the colonial Governor in dealing with black plantation workers in Jamaica, subsequent to a Proclamation of Martial Law in accordance with the provisions of a local Act. See Munim, *op.cit.*, at 35.

Members of the armed forces so called out have powers of search and arrest.\textsuperscript{87} The kind of emergency situation contemplated by some of the provisions in Part III of this Ordinance bears similarity with the common law doctrine of Martial Law and may thus displace it.\textsuperscript{88}

**Bangladesh: Coup d' Etat and Martial Law**

The common law doctrine of Martial Law is invoked by a government in a "legal" constitutional order. A Martial Law of a different kind was invoked in several common law countries (including Bangladesh, Pakistan, Nigeria and Ghana) when military personnel took over state power through a *coup d' Etat* and proclaimed a "state of Martial Law".\textsuperscript{89} A state of Martial Law of this kind was given judicial sanction in Pakistan by relying on the doctrine of necessity.\textsuperscript{90} The Supreme Court of Pakistan classified the Proclamation of Martial Law in 1977 as an "extra-constitutional measure", and as a temporary constitutional deviation. It was said to be justified on the principle of state necessity, and by reference in the circumstances to the breakdown of the normal constitutional machinery. Describing the situation, Chief Justice Anwarul Huq observed that:

\begin{quote}
[t]here was ... a serious political crisis in the country leading to a breakdown of the constitutional machinery in so far as the executive and legislative organs of the State were concerned. A situation had arisen for which the Constitution provided no solution.\textsuperscript{91}
\end{quote}

Bangladesh has in the past witnessed two states of Martial Law. Both periods of Martial Law was initiated by *coup d' Etat*. The first was proclaimed in 1975 and continued till 1979. The second was from 1982 to 1986. The imposition of

\textsuperscript{87} Section 12 (2), *ibid.*

\textsuperscript{88} See *Attorney-General v De Keyser's Royal Hotel Ltd*, [1920] A. C. 508.

\textsuperscript{89} See *Harry Street & Rodney Brazier*, *op.cit.*, at 524.


\textsuperscript{91} *Ibid.*, at 703.
a state of Martial Law in 1982 was expressly sought to be justified on grounds of state necessity. The Proclamation of Martial Law stated that:

in the greater national interest and also in the interest of national security it has become necessary to place ... [the] country under Martial Law ... .

In neither of the two instances was the Constitution abrogated as had previously been the custom with Martial Law regimes in the predecessor state of Pakistan. During the 1975-1979 Martial Law, the Constitution was kept "operative", subject to the Proclamation and other Martial Law decrees. The Proclamation provided that:

the Constitution of the People's Republic of Bangladesh shall, subject to this Proclamation and the Martial Law Regulations and Orders ... continue to remain in force ...

The 1975 Proclamation emphasised that:

[the] Proclamations and the Martial Law Regulations and Orders ... shall have effect notwithstanding anything contained in the Constitution of the People's Republic of Bangladesh or in any law for the time being in force ...

The 1982 Proclamation fully suspended the operation of the Constitution.

Like the previous Proclamation, that of 1982 gave an overriding effect to the Proclamation and to all other decrees under it. Both Proclamations expressly


93 In united Pakistan, The Constitutions of 1956 and 1962 were abrogated in 1958 and 1968 respectively by Martial Law regimes.

94 Proclamation, August 20, 1975, clause (e). The Proclamation is reproduced in the decision of the Appellate Division of the Supreme Court of Bangladesh in Halima Khatun v Bangladesh, (1978) 30 D.L.R. (S.C.) 207, at 213-214. Martial Law in 1975 was proclaimed by a civilian figure who assumed the office of President of Bangladesh after a coup d'Etat by a section of the armed forces. The provisions of the Constitution of Bangladesh relating to the election of the President were suspended by the incumbent President.

95 Ibid., clause (d).

96 Proclamation of Martial Law, 1982, op. cit., clause (f). Prior to the withdrawal of this state of Martial Law, the Constitution was "revived" in phases. See for example, the Constitution (Partial Revival) (Second) Order, 1985, The Bangladesh Gazette Extraordinary, January 15, 1985, selectively "reviving" some of the constitutional rights.
forbade the Supreme Court and other courts to question the Proclamation or any action taken under it.\textsuperscript{97}

Under both the 1975 and 1982 Proclamations, special Martial Law tribunals were created, primarily for the trial and punishment of offences under Martial Law decrees, but also for offences under other laws.\textsuperscript{98}

The states of Martial Law in Bangladesh can be categorized as incidents of extra-constitutional Emergency. Like the invocation of a state of emergency under the Constitution, a state of Martial Law is brought about by a Proclamation and revoked in a manner similar to the ending of a constitutional emergency. The Proclamation of Martial Law embodies and describes in legal form the extra-constitutional actions which the extraordinary regime seeks to justify on grounds of \textit{necessity}. The challenges to Martial Law decrees and the justiciability of orders of Martial Law tribunals will be discussed in the following Chapter.

\textsuperscript{97} Proclamation of 1975, clause (g); Proclamation of 1982, clause (h).

\textsuperscript{98} Proclamation of 1975, clause (b); Proclamation of 1982, clause (c).
CHAPTER IV
EMERGENCY POWERS, THE EXECUTIVE AND THE COURT

This Chapter examines critically the constitutional power of the Executive to proclaim an Emergency, the consequences of such a Proclamation and the Court's role in this regard. This evaluation of the emergency powers of the Executive in Malaysia, Sri Lanka and Bangladesh provides the parameters for examining, in the next Chapter, the techniques of suspension of constitutional rights during an Emergency.

The responsibility for the declaration of an Emergency in Malaysia, Sri Lanka and Bangladesh is expressly vested in the Executive: the Yang di-Pertuan Agong (King) in Malaysia, and the President in Sri Lanka and Bangladesh.1 Since a limited power of control by the Legislature comes into operation only after the legal consequences of a Proclamation have already taken effect, the question as to the scope of judicial review in relation to the emergency powers of the Executive acquires a special significance.

The Power to Proclaim an Emergency

The Constitution of Malaysia permit the issue of a Proclamation of Emergency when the Yang di-Pertuan is satisfied, first, that there is a grave emergency and, second, that the gravity of the emergency is such as to threaten the security or the economic life or public order in the Federation or any part of it.2 The Yang

1 Chapter III, supra.

2 Article 150 (1), Constitution of Malaysia. The clause "public order" was inserted in Article 150 (1) by the Constitution Amendment Act, 1981, Act No. A514 of 1981.

By the Constitution Amendment Act, 1983, Act No. A566, the provisions of the Malaysian Constitution relating to the "satisfaction" of the Yang di-Pertuan Agong in declaring an emergency were changed so that it was the Prime Minister who was to be "satisfied" about the necessity of proclaiming an emergency. The amended Article 150 (1) read:

If the Prime Minister is satisfied that a grave emergency exists ..., he shall advise the Yang di-Pertuan Agong accordingly and the Yang di-Pertuan Agong shall then issue a Proclamation of Emergency making therein a declaration to that effect.

This change, together with other changes touching upon the prerogatives of the Malaysian King precipitated a constitutional crisis in Malaysia. The crisis was resolved when these changes were retracted by the Constitution Amendment Act, 1984, Act No. A584.
di-Pertuan Agong is also authorized to issue multiple Proclamations of Emergency, at different times and on different grounds, to operate simultaneously.\(^{3}\) In Sri Lanka, a Proclamation may be made if the President is of the opinion that there is a public emergency where the interests of public security, public order or maintenance of supplies and services is endangered.\(^{4}\) Under the Constitution of Bangladesh, the President is empowered to make a Proclamation of Emergency if s/he is satisfied that a grave emergency exists, in which the security or economic life of the nation or any part of it is imperilled.\(^{5}\) In the Constitution of Bangladesh, the kinds of emergency which would justify a


Interesting to note in this context are the provisions of the 1972 Constitution of Sri Lanka and the original Constitution of Bangladesh (before the change of the form of government from "parliamentary" to "presidential", by the Fourth Amendment to the Constitution in 1975) when parliamentary forms of government existed in both countries. Article 134 (2) of the 1972 Constitution of Sri Lanka provided:

> Upon the Prime Minister advising the President of the existence or the imminence of a state of public emergency, the President shall declare a state of public emergency. The President shall act on the advice of the Prime Minister in all matters legally required or authorised to be done by the President in relation to a state of emergency.

A Proclamation of Emergency in Bangladesh previously required the counter-signature of the Prime Minister for its validity. [Proviso to Article 141A (1) Constitution of Bangladesh, deleted by the *Constitution (Fourth Amendment) Act*, 1975].

*Cf.* Article 352 (3), Constitution of India, which prohibits the President from proclaiming an Emergency unless a decision of the Central Cabinet to this effect has been communicated to him in writing.

\(^{3}\) Article 150 (2A), Constitution of Malaysia:

> The power conferred on the Yang di-Pertuan Agong by this article shall include the power to issue different Proclamations on different grounds or in different circumstances, whether or not there is a Proclamation or Proclamations already issued by the Yang di-Pertuan Agong under Clause (1) and such Proclamation or Proclamations are in operation.

See *infra* for comments on multiple proclamations of emergency.


\(^{5}\) Article 141A, Constitution of Bangladesh.
Proclamation are further specified to be crises arising from *war or external aggression* or *internal disturbance*.\(^6\)

It is not, however, the factual circumstances which threaten the security or economic life of the nation that, by itself, bring about a state of emergency in Malaysia, Sri Lanka, or Bangladesh. The only legal condition precedent for a proclamation of emergency is the *satisfaction* of the Yang di-Pertuan Agong or the President in Malaysia and Bangladesh respectively, or the *opinion* of the President in Sri Lanka, as to the gravity of the threat to the security of the nation. There may be wars and armed insurrections but if the Yang di-Pertuan Agong or the President is not satisfied or of the positive opinion as to the gravity of the threat and does not issue the requisite proclamation, there will be no *Emergency*.

On the other hand of course, even though the expressions, *security* or *economic life* or *public order* are explicit, their relevance as substantive criteria for the purpose of evaluating the limitations on the power of the Executive in these countries to proclaim an Emergency is largely negated by the fact that the apprehension of an imminent threat is expressly mentioned as sufficient to permit the issue of a Proclamation.\(^7\) Thus, even a mild disturbance may, in the subjective opinion of the Yang di-Pertuan or President, be reasonably regarded as constituting an *imminent threat* to the security of the state and justify the imposition of an emergency regime.

In Malaysia, the question had arisen as to the whether in declaring Emergency, the Yang di-Pertuan Agong acts in his personal discretion. One commentator has argued that the Yang di-Pertuan Agong possesses a range of prerogative powers, the power to proclaim an emergency being one of them.\(^8\) These views have, in turn, been disputed by another commentator who has forcefully

\(^6\) Article 141A (1), Constitution of Bangladesh. Similar provisions in the Malaysian Constitution were deleted by the *Constitution (Amendment) Act*, 1963, Act No. A26 of 1963.

\(^7\) Article 150 (2), Constitution of Malaysia, as amended; Section 2 (1), *Public Security Ordinance*, 1947; Article 141A (3), Constitution of Bangladesh.

\(^8\) R.H. Hickling, *The Prerogative in Malaysia*, (1975) 17 *Malaya Law Review* 207, at 222-223, 232. Hickling's views has been influenced by the majority views of the Federal Court decision in *Stephen Kalong Ningkan v Government of Malaysia*, [1968] 1 M.L.J. 119, where the Yang di-Pertuan Agong was held to be the *sole judge* of deciding whether to issue a Proclamation of Emergency. See *infra*. 
argued on the basis of constitutional and statutory principles of interpretation, the views of the Constitutional Commission, and precedents that the Yang di-Pertuan Agong acts on Cabinet advice in proclaiming an Emergency.\(^9\) In *Teh Cheng Poh v Public Prosecutor*,\(^{10}\) the Privy Council sought to determine this controversy conclusively.

Although ... [emergency ordinance-making power] like other powers under the Constitution [of Malaysia], is conferred nominally upon the Yang di-Pertuan Agong ... and is expressed to be exercisable if he is satisfied of a particular matter, his functions are those of a constitutional monarch and except on certain matters ... he does not exercise any of his functions under the Constitution on his own initiative but is required by ... [the Constitution] to act in accordance with the advice of the Cabinet.\(^{11}\)

Subsequent to the Privy Council’s decision in *Teh Cheng Poh*, an Amendment to the Malaysian Constitution in 1983, substituted the *satisfaction* of the Yang di-Pertuan Agong as to the necessity of proclaiming an Emergency with that of the Prime Minister. This Amendment was in turn superseded a year later, and the original provisions of the Constitution in this regard were restored.\(^{12}\) The sequence of events seems to suggest that the Yang di-Pertuan Agong does have a residual discretionary power of declaring Emergency in extraordinary circumstances.

**Reviewability/Justiciability of a Proclamation of Emergency**

Challenges to a Proclamation of Emergency or Martial Law before the Courts in Malaysia, Sri Lanka, and Bangladesh have been unsuccessful. Of the three countries, the question of the justiciability of a Proclamation of Emergency has in the past arisen recurrently in Malaysia. In recent years the controversies in Malaysia relating to a Proclamation’s justiciability have been sought to be put


\(^{10}\) [1979] 1 M.L.J. 50.

\(^{11}\) *Ibid.*, at 52.

\(^{12}\) See n. 2, *supra*. 
to rest by an Amendment to the Constitution.\(^\text{13}\) This Amendment declares that the *satisfaction* of the Yang di-Pertuan in proclaiming an emergency to be "final and conclusive" and not challengable "in any court on any ground".\(^\text{14}\) By the same Amendment, it was also declared that the Courts did not have any jurisdiction to determine questions relating to the continued operation of a Proclamation of Emergency.\(^\text{15}\)

Even before this Amendment, Courts in Malaysia did not entertain challenges to a Proclamation of Emergency. The question of justiciability of a Proclamation featured prominently in the series of cases that ensured following the controversial dismissal of the Chief Minister of Sarawak, Stephen Kalong Ningkan, by the State Governor in September, 1966, and the Proclamation of Emergency in that State by the Yang di-Pertuan Agong in the same month. The Governor of Sarawak had initially called upon Chief Minister Ningkan to resign on the dubious ground that a majority of the members of the State Legislature had represented to the Governor that the Chief Minister had lost the *confidence* of the House. The Chief Minister refused to resign, asking instead that the Governor reconvene the State Legislature so that the question of *confidence* could be constitutionally tested. The Governor thereupon dismissed the Chief Minister and his Cabinet. The Chief Minister then resorted to the Court to challenge the action of the Governor.

In the first of the cases, *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No. 2)*,\(^\text{16}\) before the High Court in Borneo, the dismissed Chief

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\(^\text{13}\) *Constitution Amendment Act*, 1981, Act No. A514 of 1981, inserting several new provisions in Article 150, including Clause (8). The Amendment also provided for the making of a "declaration" by the Yang di-Pertuan Agong relating to the emergency. The new constitutional rule in the Malaysian Constitution relating to the non-justiciability of a Proclamation was a reaction to the Privy Council decision in *Teh Cheng Poh v Public Prosecutor*, [1979] 1 M.L.J. 50, discussed *infra*.

In India, a similar rule was inserted in the Constitution by the *Constitution (Thirty-Eighth Amendment) Act*, 1975, with retrospective effect, during a period of "internal" emergency (1975-1977). The provision was omitted by the *Constitution (Forty-Fourth Amendment) Act*, 1978, which brought about extensive changes in the emergency provisions of the Indian Constitution.

\(^\text{14}\) Article 150 (8), Constitution of Malaysia.

\(^\text{15}\) *Ibid*.

Minister sought certain declarations relating to his dismissal from office. Among the grounds relied upon for these declarations by the plaintiff was the contention that the Proclamation of Emergency in Sarawak had not been made *bona fide* but was made in *fraudem legis*. Chief Justice Pike referred to the Privy Council decision in *King Emperor v Benoari Lal Sarma and others*, an appeal from British India, to hold that:

it is not open to a court to enquire into the sufficiency of the reasons for a declaration of emergency provided it was made *bona fide*. If, therefore, the declaration appears *ex facie* to have been made in the manner required ... and the *bona fides* of the making of the declaration is not impugned, it is not open to the Court to inquire into it.\(^\text{18}\)

On appeal before the Federal Court of Malaysia, the non-justiciability of a Proclamation of Emergency was re-affirmed by majority. Lord President Barakbah decided that:

\[^\text{17}\ 1945\text{ A.I.R. (P.C.) 48; 1945 A.C. 14.}\]

\[^\text{18}\ Stephen Kalong Ningkan, op. cit., at 47.}\]

In addition to *Benoari Lal Sarma*, the other precedents referred to by the Chief Justice were *Bhagat Singh and others v King Emperor*, [1931] A.I.R. (P.C.) 111; [1931] L.R. 58 Ind. App. 169, another appeal from British India, and the English decisions of *Regina v Governor of Brixton Prison* [1962] 2 Q. B. 243, and *Liversidge v Anderson*, [1942] A.C. 206. The equation of the "subjective satisfaction" relating to deportation and detention orders, which were the subject of the Court's findings in the English cases, with the "satisfaction" of the Yang di-Pertuan Agong in Malaysia in declaring an Emergency is erroneous.

In *Benoari Lal Sarma*, The Crown appealed to the Privy Council against the decision of the Federal Court of India which had held invalid an emergency ordinance promulgated by the Governor General pursuant to a Proclamation of Emergency by him under the *Government of India Act*, 1935, 26 Geo. 5 & Edw. 8, c.2. The Privy Council held that the Governor General's decision was final as to whether an Emergency existed and whether an ordinance issued was conducive to the "peace and good government of British India". Referring to Para 72 of Schedule IX of the *Government of India Act*, 1935, under which the Governor General exercised his emergency ordinance-making power, the Privy Council held that the provision did not require:

the Governor General to state that there is an emergency, or what the emergency is, either in the text of the Ordinance or at all, and assuming that he acts *bona fide* and in accordance with his statutory powers, it cannot rest with the Courts to challenge his view that the emergency exists.

\[^\text{Ibid.}, at 50. Emphasis added.}\]

\[^\text{19}\ Stephen Kalong Ningkan v Government of Malaysia, [1968] 1 M.L.J. 119.\]
the Yang di-Pertuan Agong is the sole judge and once His Majesty is satisfied that a state of emergency exists it is not for the court to enquire as to whether or not he should have been satisfied.\textsuperscript{20}

Azmi C.J. (Malaya), the other majority judge, agreed with the Lord President that a Proclamation was non-justiciable.\textsuperscript{21} Referring to the discretion of the Governor General of British India in proclaiming an Emergency, Azmi C.J. (Malaya) concluded that the same discretion should apply to the Yang di-Pertuan Agong.\textsuperscript{22} For the learned judge:

\begin{quote}
the Yang di-Pertuan Agong in exercise of his [emergency] power
... must be regarded as the \textit{sole judge} of that [power].\textsuperscript{23}
\end{quote}

In his perceptive dissenting judgement\textsuperscript{24} in the Federal Court stage of the \textit{Stephen Kalong Ningkan} cases, Ong Hock Thye F.J. pointed out that the constitutional position of the Yang di-Pertuan Agong in Malaysia was not comparable to that of the position of the Governor General of British India under the \textit{Government of India Act, 1935}.\textsuperscript{25} Neither, according to Thye F.J., could the emergency powers of the British Indian Governor-General be equated to the \textit{controlled} emergency powers of the Yang di-Pertuan Agong. For Thye F.J. therefore:

\begin{quote}
it ... [was] quite erroneous to argue by analogy from the Government of India Act to ...[the Malaysian] Constitution as if those authorities were unquestionably conclusive.\textsuperscript{26}
\end{quote}

Justice Thye strongly asserted that the invocation of a state of emergency in Malaysia could be justified only on genuine circumstances.

\textsuperscript{20} \textit{Ibid.}, at 122.

\textsuperscript{21} \textit{Ibid.}, at 124.

\textsuperscript{22} \textit{Ibid.}

\textsuperscript{23} \textit{Ibid.}, emphasis added.

\textsuperscript{24} The dissent was on the question of reviewability of a Proclamation of Emergency. The final conclusion reached by Thye F.J. was similar to those of the other judges, i.e. the Proclamation in the instant case was not \textit{in fraudem legis} as alleged by the petitioner.

\textsuperscript{25} 26 Geo. 5 & 1 Edw. 8, c. 2.

\textsuperscript{26} \textit{Ibid.}, at 126.
[T]he inbuilt safeguards against indiscriminate or frivolous recourse to emergency legislation contained in article 150 [of the Constitution] provide that the emergency must be one 'whereby the security or economic life of the Federation or any part thereof is threatened.' If those words of limitation are not meaningless verbiage, they must be taken to mean exactly what they say ... [A]rticle 150 does not confer on the cabinet an untrammelled discretion to cause an emergency to be declared at their mere whim and fancy.  

In the Privy Council appeal of Stephen Kalong Ningkan, the question of the justiciability of a Proclamation of Emergency was left undecided. The importance of the issue was highlighted in the following observation of the Privy Council:

[The question as to the justiciability of a Proclamation of Emergency] is a constitutional question of far-reaching importance which, on the present state of authorities, remains unsettled and debatable.

Since the Federal Court decision in Stephen Kalong Ningkan, Courts in Malaysia have continued to invoke the precedents from British India to hold that a Proclamation of Emergency was non-justiciable.

In Sri Lanka and Bangladesh, a Proclamation of Emergency or Martial Law has not been impugned in Court as often as it has been in Malaysia. The primary factor discouraging challenges to a Proclamation in Sri Lanka is the provision of the Public Security Ordinance, 1947 which, like the present Malaysian position, makes a declaration of emergency non-justiciable. Section 3 of the Ordinance provides that:

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27 Ibid.


29 Ibid., at 242.

30 See for example, Public Prosecutor v Ooi Kee Saik, [1971] 2 M.L.J. 108, at 113, where the precedents of Bhagat Singh and Benoari Lal Sarma are cited to hold the Proclamation of Emergency non-justiciable.

31 Ordinance No. XXV of 1947.
the fact of the existence or imminence ... of a state of public emergency shall not be called in question in any court.

This rule was reiterated by the Supreme Court of Ceylon (Sri Lanka) in S. Weerasinghe v G.V.P. Samarasinghe[^32] where the Sri Lankan Court, like the Federal Court of Malaysia, described the Governor-General to be the *sole judge* as to the necessity for a declaration of emergency. Of the two conditions laid down by the *Public Security Ordinance* for the exercise of emergency powers by the Governor-General, the Court said:

One is 'the existence or imminence of a state of public emergency' of which the Governor-General is the *sole judge*; and the other is that the Regulations he makes must be such as appear to him to be necessary or expedient.[^33]

Under the present Constitution of Sri Lanka, it is the President who is the *sole judge* as to the necessity of a Proclamation of Emergency. In *J.A. Yasapala v Ranil Wickremesinghe & Others*,[^34] Sharvananda J., delivering the opinion of the Court pointed out that:

> [t]he language of section 2 of the Public Security Ordinance shows clearly that the President is the *sole judge* of the existence or imminence of a state of Emergency and of the expediency of declaring by Proclamation that the provisions of Part II of the Ordinance shall come into operation ... The existence of a state of Emergency is not a ... [justiciable] matter which the Court could be called upon to determine by applying an objective test. ... The President is not bound as a matter of law to disclose the reasons for the Proclamation. Proclamation of Emergency is thus conclusive and is not assailable on any ground.[^35]


States of Emergency in Bangladesh had not been as extensive as in Malaysia or Sri Lanka, but the country was under states of Martial Law for a total of nearly ten years. During the continuance of the first state of Martial Law (1975-1979), the Constitution was allowed to operate subject to the Proclamation of Martial Law and other Martial Law decrees. In Mrs Halima Khatun v Bangladesh, the Appellate Division of the Supreme Court of Bangladesh described the inviolability of the Proclamation of Martial Law and other Martial Law decrees in the following way.

On reference to Clause (g) of the Proclamation of August 24, 1975, it is seen that no Court including the Supreme Court has any power to call in question in any manner whatsoever or declare illegal or void the Proclamation or any Regulation or Order. Further Clause (g) also gives immunity from challenge in a Court of law to any declaration made or action taken by or under the Proclamation. There is no vagueness or ambiguity in the meaning of the words used in this clause as regards the total ouster of jurisdiction of this Court.

**Justiciability of the continuance of a State of Emergency**

Taking together the number of occasions in the past on which Proclamations of Emergency had been issued in Malaysia, Sri Lanka and Bangladesh, it is seen that in a majority of those instances, the initial Proclamations had been made on constitutionally valid grounds. Hence challenges to the initial Proclamations of Emergency were not seriously entertained by the Court. However, the continuance of a state of emergency long after the crisis which had originally justified the Proclamation of Emergency exposes the continued operation of a Proclamation to serious challenges as to its justification. But even in such circumstances, Courts in these countries have been reluctant to question the validity of the continued operation of an Emergency.

A typical example of the Court’s reluctance to the question the continuance of a state of emergency is the observation of the Sri Lankan Supreme Court in

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37 Ibid., at 219.

38 See for example the Stephen Kalong Ningkan cases in Malaysia, op. cit.
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Gunasekera v Ratnavale. Referring to the provision for monthly renewals of the Proclamation of Emergency as required by the Public Security Ordinance, 1947, and later also by the Constitution of 1978, the Court held that:

[the very fact that the Emergency has been continued from month to month is indicative of the fact that conditions have not returned to normal ...]

The long continuance of the 1969 Emergency in Malaysia was challenged before the Privy Council in Teh Cheng Poh v Public Prosecutor. Since the principal ground of appeal in that case was the validity of the subsidiary emergency legislative power of the Executive, which were held invalid by the Privy Council, the question of invalidity of the Proclamation by effluxion of time was not decided. Referring to its invalidation of the Essential (Security Cases) (Amendment) Regulations 1975, the Privy Council held that:

it is unnecessary to decide whether or not ... [the Essential Regulations 1975] were invalid on the alternative and more far-reaching ground advanced by the appellant: namely, that by the time the Regulation was made the emergency proclaimed on May 15, 1969 was over and the Emergency Proclamation of that date had ceased to be in force.

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39 (1973) 76 N.L.R. 316.
40 Section 2 (2).
42 Gunasekera, op. cit., at 326.
43 See infra n. 47.
45 The decision of the Privy Council on this ground is discussed in the next section of this Chapter.
46 The Essential (Security Cases) Regulations 1975 and the Essential (Security Cases) (Amendment) Regulations 1975 were made under the Emergency (Essential Powers) Ordinance, 1969, Ordinance No I of 1969. The nature of these Regulations is discussed infra.
47 Teh Cheng Poh, op. cit., at 54.
Since none of the Proclamations of Emergency in Malaysia had been revoked, the question arose in Teh Cheng Poh, whether a later Proclamation operated to revoke a previous one. The Privy Council decided this question in the affirmative.

[A] proclamation of a new emergency declared to be threatening the security of the Federation as a whole must by necessary implication be intended to operate as a revocation of a previous Proclamation, if one is still in force.

In Teh Cheng Poh, the continued operation of a Security Area Proclamation throughout the whole of Malaysia, by virtue of a Proclamation of the Yang di-Pertuan Agong under Section 47 of the Internal Security Act, 1960, was also

48 Since Independence there has been four Proclamations of Emergency in Malaysia of which none has been revoked so far. Of these four, two had been proclaimed locally, one in the State of Sarawak in 1966 and the other in the State of Kelantan in 1977. States of Emergency were proclaimed throughout Malaysia in 1964, on account of the Malaysia-Indonesia 'Confrontation', and in 1969 in the wake of ethnic violence.

In the case of the two nationwide states of emergency, the question as to the necessity of proclaiming the 1969 Emergency, when the 1964 Emergency was still in force, has not been answered by commentators. It could perhaps be said that the previous emergency was an "external emergency" occasioned by an external threat, while the latter one was an "internal emergency". The original Constitution [Article 150 (1)] had specified the types of emergency as those arising from 'war or external aggression or internal disturbance'. It is to be noted, however, that the consequences of a Proclamation of Emergency are the same, regardless of whether the Proclamation was based on 'internal' or 'external' circumstances.

49 Teh Cheng Poh, op. cit., at 53. The Privy Council's findings in this regard prompted the insertion of a new constitutional provision by the Constitution Amendment Act, 1981, Act No. A514 of 1981. Under the new provision, Article 150 (2A), different Proclamations of Emergency may be issued on different grounds or circumstances, regardless of whether a Proclamation is already in force.

50 Federation of Malaya Act No. 18 of 1960, revised in 1972 as Malaysia Act No. 82 of 1972. The Act was passed under Article 149 of the Constitution for "the prevention of subversion, the suppression of organised violence ...". Section 47 of the Internal Security Act, 1960 provides:

(1) If in the opinion of the Yang di-Pertuan Agong public security in any area in the Federation is seriously disturbed or threatened by reason of any action taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause or to cause a substantial number of citizens, to fear organized violence against persons or property, he may, if he considers it to be necessary for the purpose of suppressing such organised violence, proclaim such area as a security area ...

(2) Every proclamation ... shall remain in force until it is revoked by the Yang di-Pertuan Agong or is annulled by resolutions passed by both Houses of Parliament ...".
challenged. It was contended that since the causes which gave rise to the Proclamation of Security Area had long subsided, the Proclamation must be treated in law as having lapsed. The Privy Council denied that the Security Area Proclamation could lapse *ipso facto* without express revocation by the Yang di-Pertuan Agong or its annulment by Parliament. But in *obiter* remarks, the Privy Council suggested that courts could grant a remedy in cases:

in which it can be established that a failure to exercise ... [the Yang di-Pertuan's] power of revocation would be an abuse of his discretion.51

The Yang di-Pertuan Agong's constitutional immunity from proceedings in Court52 prompted the Privy Council to suggest that:

since ... [the Yang di-Pertuan Agong] is required in all executive functions to act in accordance with the advice of the Cabinet, mandamus could ... be sought against the members of the Cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the Proclamation.53

If, as is suggested in the *dictum* of the Privy Council in *Teh Cheng Poh*, it is possible to institute *mandamus* proceedings against the Executive to compel it to revoke a Security Area Proclamation, then by analogy, the same course could be taken for bringing an end to a Proclamation of Emergency. Remote though the possibilities of success in such proceedings may have been, the potential effect of the holding of the Privy Council in this regard has been sought to be foreclosed by amending the emergency provisions of the Malaysian Constitution so that a Proclamation of Emergency and its continued operation is non-justiciable.54

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51 *Teh Cheng Poh*, op. cit., at 55.

52 Article 32 (1), Constitution of Malaysia.

53 *Teh Cheng Poh*, op. cit., at 55.

Emergency Legislative Powers of the Executive

Extensive legislative powers are afforded to the Executive under the Constitutions of Malaysia and Sri Lanka during a state of emergency.\(^{55}\) The Constitution of Malaysia and Sri Lanka's *Public Security Ordinance*, 1947, expressly declare that emergency *ordinances* and *regulations* are non-justiciable.\(^{56}\) In the Constitution of Bangladesh, there is no separate head for legislative powers of the Executive during Emergency but the general legislative powers of the President under the Constitution of Bangladesh\(^{57}\) are applicable to emergency situations as well.\(^{58}\)

In Malaysia, an Emergency Ordinance promulgated by the Yang di-Pertuan, like a Proclamation of Emergency, is merely required to be "laid before" Parliament, without any stipulation for Parliament's "approval" for the ordinance's continued operation. An Emergency Ordinance in Malaysia can, however, be annulled by resolutions of both Houses of Parliament.\(^{59}\) In the event that an Emergency Ordinance is annulled at any time by resolutions of Parliament, the Yang di-Pertuan Agong is empowered to issue fresh *ordinances*.\(^{60}\) The power of the Yang di-Pertuan to promulgate emergency *ordinances* is not only co-extensive with the powers of the Malaysian Parliament, but in a sense even more pervasive for this power is declared to be unencumbered by any extraordinary legislative procedures that may be required.\(^{61}\)

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\(^{56}\) Article 150 (8), Constitution of Malaysia; Section 8, *Public Security Ordinance*, 1947.

\(^{57}\) Article 93, Constitution of Bangladesh.

\(^{58}\) The *Emergency Powers Ordinance*, 1974, Ordinance No. XXVII of 1974, and the *Emergency Powers Ordinance*, 1987, Ordinance No. XXII of 1987, were promulgated under this general power.

\(^{59}\) Article 150 (3), Constitution of Malaysia.

\(^{60}\) Ibid. The phrase used in Article 150 (3) is "any ordinance". This implies that the Yang di-Pertuan Agong is authorized to issue a fresh emergency *ordinance* on the same topic as that annulled by Parliament, and in the same way as the annulled ordinance was promulgated.

\(^{61}\) Article 150 (2C), Constitution of Malaysia. This amended (1981) provision seems to imply that the Executive's emergency legislative powers extends to constitutional amendments as well.
Under the Sri Lankan Constitution, no parliamentary approval is required for the validity and operation of Emergency Regulations made by the President. But these Regulations may be added to, or altered, or revoked by Parliament.\footnote{Section 5 (3), \textit{Public Security Ordinance}, 1947.}

\textit{Ordinances} promulgated by the President of Bangladesh, which includes Emergency Ordinances, must be approved by Parliament within thirty days.\footnote{Article 93(2), Constitution of Bangladesh.} The legislative powers of the Executive in Bangladesh extends to all matters on which Parliament has competence, but no authority is given to the Executive for altering or repealing any provision of the Constitution, or for continuing any provision of a previous \textit{ordinance}.\footnote{Proviso to Article 93(1), \textit{Ibid.}}

In the remainder of this section, selected case-law on the emergency legislative powers of the executive will be examined with reference to each of the countries.

\textbf{A. Malaysia}

Under the original provisions of the Constitution of Malaysia, the Yang di-Pertuan Agong was competent to promulgate Emergency Ordinances on grounds of necessity \textit{until} Parliament reconvened.\footnote{Original Article 150 (2), Constitution of Malaysia.} Courts in Malaysia have interpretated this emergency legislative power of the Yang di-Pertuan Agong in expansive terms. In \textit{Johnson Tan Han Seng v Public Prosecutor},\footnote{[1977] 2 M.L.J. 66; \textit{sub nom.} Soon Seng Sia Heng v Public Prosecutor, \textit{Public Prosecutor v Chea Soon Hoong, Teh Cheng Poh v Public Prosecutor.}} the Federal Court of Malaysia observed that:

\begin{quote}
[the Yang di-Pertuan Agong] has, and is intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. ... If ... [the emergency ordinance] is legislation, within the ambit of the affirmative words [of the Constitution] which gives the power, and if it does not violate
\end{quote}
any express condition or restriction by which that power is limited, it is not for this court, or for that matter any court, to inquire further, or to enlarge constructively those conditions or restrictions.\(^{67}\)

The Courts have been prepared to uphold, in similar terms, delegated regulation-making authority under an emergency ordinance.\(^{68}\) Since under the original provisions of the Malaysian Constitution, the Yang di-Pertuan Agong could promulgate Emergency Ordinances only until Parliament resumes sitting, the defence in *Public Prosecutor v Khong Teng Khen & Another*\(^{69}\) challenged the continued emergency regulation-making authority of the Executive even after Parliament had reconvened. In this regard, Suffian L.P., giving the majority opinion of the Federal Court asserted that:

> [the emergency regulations in question] were made ... not under clause (2) of Article 150 [of the Constitution] but under section 2 of the ... [Emergency (Essential Powers) Ordinance, 1969,] and in my judgement the fact whether or not at the time they were made Parliament was in existence or was sitting is irrelevant. His Majesty has power to make Ordinances under clause (2) of Article 150 only when Parliament is not sitting. In the case of regulations under section 2 of the Ordinance they may be made by His Majesty whether or not Parliament is sitting.\(^{70}\)

Under the Malaysian Constitution, emergency *laws* and *ordinances* are valid notwithstanding any inconsistency with the guaranteed constitutional rights or with any other provision of the Constitution.\(^{71}\) Another question for

\(^{67}\) *Ibid.*, at 75, per Raja Azlan Shah F.J.

\(^{68}\) The emergency regulation-making power was delegated to himself by the Yang di-Pertuan Agong. By Section 2(1) of the *Emergency (Essential Powers) Ordinance, 1969*:

> the Yang di-Pertuan Agong may make any regulations whatsoever (in this Ordinance referred to as "Essential Regulations") which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community.

\(^{69}\) [1976] 2 M.L.J. 166.


\(^{71}\) Article 150 (6), Constitution of Malaysia, as amended by the *Constitution Amendment Act, 1963*, Act No. 26 of 1963. The original provision exempted only inconsistencies with the constitutional rights. By Article 150 (6A) Emergency Acts of Parliament may not derogate from Islamic Law, Malay custom, and the native law or custom of the States of Sabah and Sarawak.
determination in *Khong Teng Khen* was whether the Yang di-Pertuan Agong's power to promulgate an Emergency Ordinance, inconsistent with the Constitution could be delegated,\(^\text{72}\) so that Rules/Regulations made under an Emergency Ordinance could also derogate from constitutional provisions. The defence in *Khong Teng Khen* contended that it was only the *Emergency (Essential Powers) Ordinance, 1969*,\(^\text{73}\) and not the *Essential (Security Cases) Regulations, 1975*, made under the *Ordinance*, that may be inconsistent with the Constitution. Sufian L.P., giving the majority opinion, rejected the contention on the grounds that the provisions of the *Ordinance* itself enabled the making of Emergency Regulations which could be inconsistent with the Constitution. The learned Judge concluded that:

> [because of ... [Section 2 (4) of the Emergency (Essential Powers) Ordinance, 1969,] it is lawful in my view for His Majesty to make essential regulations that are inconsistent with the Federal Constitution.\(^\text{74}\)

The question of the continued exercise of delegated emergency regulation-making power by the Yang di-Pertuan Agong assumed far-reaching significance in the landmark decision of the Privy Council in *Teh Cheng Poh v Public Prosecutor.\(^\text{75}\) The significance of this question was foreshadowed, albeit in an ambiguous manner,\(^\text{76}\) in the dissenting opinion of Ong Hock Sim F.J. in *Public Prosecutor v Khong Teng Khen & Another.\(^\text{77}\) Referring pointedly to the subversion of parliamentary process and constitutional rule that was entailed by the continued operation of the emergency rule-making power of the Yang di-Pertuan Agong, the learned Judge had observed that:

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Further, neither emergency laws nor ordinances may be inconsistent with the constitutional provisions on religion, citizenship, or language.

\(^\text{72}\) Delegation in this context meant the Yang di-Pertuan Agong "delegating" the power to himself.

\(^\text{73}\) Ordinance I of 1969, published as P.U. (A) 146/69.

\(^\text{74}\) *Khong Teng Khen, op. cit.*, at 170.

\(^\text{75}\) [1979] 1 M.L.J. 50.

\(^\text{76}\) The ambiguity was because of the learned Judge's reference to the termination of the emergency because of resumption of Parliament's sitting.

[i]f these regulations are held valid, there appears no control as to the regulations the Executive may issue under the guise of an Emergency which had ceased to exist when Parliament was reconvened .... 78

In Teh Cheng Poh, the Privy Council examined the implications of the two alternative sources of the Executive's emergency law-making power. Of the constitutional source, the Privy Council observed that:

[s]o far as ... [the Yang di-Pertuan Agong's] power to make written laws is derived from Article 150 (2) of the Constitution itself, in which they are described as 'ordinances', it comes to an end as soon as Parliament first sits after the Proclamation of an Emergency; ... [the Yang di-Pertuan Agong] cannot prolong it, of his own volition, by purporting to empower himself to go on making written laws, whatever description he may apply to them. That would be tantamount to the Cabinet's lifting itself up by its own boot straps.79

The claim by the State that the Executive's emergency regulation-making power may be derived from the Emergency (Essential Powers) Ordinance, 1969, was similarly unacceptable to the Privy Council.

To the extent ... that the ... Ordinance purports to authorise the Yang di-Pertuan Agong to continue to make instruments having the force of law notwithstanding that Parliament had sat, it suffers from the fatal constitutional flaw that such exercise of legislative power by the ... [Yang di-Pertuan Agong] after Parliament has sat, is not authorised by the Constitution itself nor has it been delegated to him by Parliament in whom the legislative authority of the Federation is vested.80

The decision of the Privy Council in Teh Cheng Poh meant that all subsidiary emergency regulations made by the Yang di-Pertuan Agong since Parliament reconvened in 1971, after the Proclamation of Emergency in 1969,81 were

78 Ibid., at 175.
79 Teh Cheng Poh, op. cit., at 53.
80 Ibid.
81 The state of emergency in question was declared on May 15, 1969, as a result of ethnic rioting. The Proclamation of Emergency is published as P.U. (A) 145/69. After this Proclamation, Parliament first reconvened about two years later, on 20 February 1971.
invalid and void. In order to overcome the far-reaching legal consequences of the Privy Council decision, the Malaysian Parliament re-enacted the controversial *Emergency (Essential Powers) Ordinance*, 1969, as the *Emergency (Essential Powers) Act*, 1979, with retrospective effect from 1971. By s. 9 (1) of the new Act, all subsidiary legislation made under the previous Ordinance were to have effect as if they were made under the Act.

Every subsidiary legislation whatsoever made or purporting to have been made under the *Emergency (Essential Powers) Ordinance*, 1969, ... on or after the 20th February 1971, shall be valid and have effect as if the said subsidiary legislation has been made under the appropriate provision of this Act ...

82 Writing extra-judicially, Tun Suffian F.J. has remarked that:

it meant not only that the trial of Teh Cheng Poh was a nullity. There were hundreds of other trials held under the regulations. They too were a nullity. In some of them persons had been sentenced to imprisonment or even death, though fortunately nobody had yet been executed.

83 Act No. 216 of 1979.

84 In their decision in *Teh Cheng Poh*, the Privy Council indicated that such a course was possible.

If it be thought expedient that after Parliament has first sat the Yang di-Pertuan agong should continue to exercise a power to make written laws equivalent to that to which he was entitled during the ... period [when Parliament was not sitting] to exercise under Article 150(2) of the Constitution, the only source from which he could derive such powers would be an Act of Parliament delegating them to him.

The *Teh Cheng Poh* decision also prompted substantial changes in the emergency provisions of the Malaysian Constitution. Some of the changes which have been referred to above, include:

(a) the authority of the Yang di-Pertuan Agong to issue different Proclamations at different times, irrespective of whether a Proclamation of Emergency is already in existence;  

(b) the emergency legislative power of the Yang di-Pertuan Agong to operate at all times when Houses of Parliament are not sitting concurrently;  

(c) the *satisfaction* of the Yang di-Pertuan Agong in proclaiming Emergency and in promulgating emergency ordinances is *final, conclusive* and non-justiciable;  

(d) the continued operation of the state of emergency and of emergency ordinances are likewise non-justiciable.

B. Sri Lanka

Unlike the position under the Malaysian Constitution where the Executive has emergency legislative powers only when Parliament is not in session, the President in Sri Lanka can promulgate Emergency Regulations at all times during the operation of a state of emergency. The power of the Sri Lankan President to make Emergency Regulations pursuant to a Proclamation of Emergency includes the making of such Regulation:

as appear to him to be necessary or expedient in the interests of *public security* and the preservation of *public order* and the suppression of *mutiny, riot or civil commotion*, or for the

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87 Article 150(2A), Constitution of Malaysia.
88 Article 150 (2B), *Ibid*.
89 Article 150 (8), *Ibid*.
90 *Ibid*.
maintenance of supplies and services essential to the life of the community. 92

In addition to these general enabling categories, Emergency Regulations are also sanctioned for the purposes, inter alia, of preventive detention, search and entry, and special courts. 93 Emergency Regulations may also provide for the making of subsidiary legislation in the form of orders and rules by subordinate authorities. 94

Under the Constitution of Sri Lanka, executive emergency regulations have the legal effect of:

over-riding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution. 95

However, by Article 15(7) of the Constitution, Emergency Regulations can derogate from most of the guaranteed constitutional rights. Like the amended emergency provisions of the Malaysian Constitution, 96 Emergency Regulations in Sri Lanka have been declared to be non-justiciable.

No emergency regulation, and no order, rule or direction made or given thereunder shall be called in question in any court. 97

The delegation, to the Executive in Sri Lanka, of emergency legislative powers under the provisions of the Public Security Ordinance, 1947, was challenged, in a number of cases, as being ultra vires the powers of Parliament. In Gunasekera v Ratnavale, 98 decided during the operation of the Independence Constitution of 1948, the Supreme Court of Ceylon (Sri Lanka) examined the origins of the Public Security Ordinance as an Ordinance promulgated by the colonial

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92 Section 5(1), Public Security Ordinance, 1947, emphasis added.

93 Section 5(2), Ibid.

94 Section 6, Ibid.


96 Article 150(8), Constitution of Malaysia.

97 Section 8, Public Security Ordinance, 1947.

98 (1973) 76 N.L.R. 316.
Governor "with the advice and consent" of the State Council of Ceylon, and its continuation by the Independence Constitution. Without any further deliberations with respect to the constitutional position of a sovereign legislature, the Court concluded that:

[the] preamble to the ... [Ordinance] states that it was passed with the advice and consent of the [State] Council. This ... [Ordinance] which had been passed by the Council is therefore good law and continues to operate as such by virtue of Section 91 of the present Constitution.\(^99\)

This decision re-affirmed the findings of the same Court in an earlier decision where the question of delegation of emergency legislative powers was discussed at some length. In that decision, \(S. \text{ Weerasinghe} \ v \ G. \text{V.P. Samarasinghe,}\) Sansoni C.J. undertook a comparative survey of several cases on delegated legislation from Canada, Australia and India and concluded that:

the Public Security Ordinance is intra vires, and the Regulations, as well as the orders and rules made under the authority of such Regulations, are also valid.\(^{101}\)

The delegation of emergency legislative powers to the Executive by s. 5 of the Public Security Ordinance, 1947, has been reiterated by Article 155(2) of the present (1978) Constitution. Explaining this constitutional source of the President's emergency legislative power, the Sri Lankan Court has observed that:

[the President's power of making Emergency Regulations is ... co-extensive with that of Parliament, except for the limitation as

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\(^99\) Ibid., at 329.

\(^{100}\) (1966) 68 N.L.R. 361.

\(^{101}\) Ibid., at 365. Among the cases discussed by the Chief Justice were, \(Reference \ as \ to \ the \ Validity \ of \ Certain \ Chemical \ Regulations\) [1943] S.C.R. 1, \(Victorian \ Stevedoring \ and \ General \ Contracting \ Co. \ Pty. \ Ltd \ and \ Meakes \ v \ Dignan,\) (1931) 46 C.L.R. 73, \(Attorney-General \ (Commonwealth) \ v \ The \ Queen; \ Ex \ Parte \ The \ Boilermakers \ Society \ of \ Australia,\) [1957] A.C. 228, (1957) C.L.R. (P.C.) 529, and \(In \ Re \ Art. \ 143, \ Constitution \ of \ India \ and \ Delhi \ Laws \ Act,\) [1951] A.I.R. (S.C.) 332.
to the period during which the Regulations made by him can operate.\textsuperscript{102}

The breadth of the Sri Lankan President's emergency legislative powers, and issues as to the justiciability of such powers were summed up by the Court in this way.

Part II [of the Public Security Ordinance] vests the President with wide and extensive powers [for promulgating regulations] to deal with the emergency situation. The President's view of the necessity and expediency of the regulations needed to combat the situation is conclusive of their necessity; and, in formulating them for the purposes of Sec. 5 [of the Ordinance, that is, for the purposes, amongst others, of "public security", and "public order"], he is bound only by the provisions of Article 155(2) of the Constitution. He is the \textit{sole judge} of the necessity for the regulations. It is the subjective opinion of the President that matters; and in the absence of bad faith or ulterior motive, the jurisdiction of the Court is excluded.\textsuperscript{103}

Despite the Sri Lankan Supreme Court’s virtual moratorium on challenges to Emergency Regulations promulgated by the Executive, the Court had, in some instances, appeared to assert its right to review executive orders made under Emergency Regulations which infringed upon constitutional rights. These will be discussed in the next Chapter.

C. Bangladesh

Like the amended emergency provisions of the Malaysian Constitution,\textsuperscript{104} the ordinance-making power of the President of Bangladesh is operative "at any time" when Parliament is not in session or is dissolved. Article 93 (1) of the Constitution of Bangladesh provides:

\begin{flushright}
\footnotesize
\textsuperscript{104} Article 150 (2B), Constitution of Malaysia.
\end{flushright}
At any time when Parliament stands dissolved or is not in session, if the President is satisfied that circumstances exist which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall, as from its promulgation have the like force of law as an Act of Parliament.

In addition, Emergency Ordinances in Bangladesh have granted subsidiary legislative powers to the Executive in a way similar to those granted to the Malaysian Executive in emergency situations. Section 2 (1) of the Emergency Powers Ordinance, 1974, for example, afforded extensive powers to the Executive to make subsidiary emergency rules.

The Government may, by notification in the official Gazette, make such rules as appear to it to be necessary or expedient for ensuring the security, the public safety and interest and for protecting the economic life of Bangladesh, or for securing the maintenance of public order, or for maintaining supplies and services essential to the life of the community.

In Bangladesh, the thrust of litigation concerning executive emergency powers has been in relation to actions taken under Executive emergency ordinances and rules, not in relation to the vires to the ordinances or rules themselves, as have been the case in Malaysia and Sri Lanka. Since, in Bangladesh, most of the decided cases on emergency powers relate to infringements of rights by executive emergency orders taken under emergency ordinances and rules, these will be considered in the next Chapter.

**Revocation/Termination of a State of Emergency**

A Proclamation of Emergency in Malaysia, Sri Lanka or Bangladesh continues in force until revoked by the Executive or annulled or disapproved by Parliament. Executive actions taken during an Emergency are protected,

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105 Ordinance No. XXVII of 1974.

106 Similar powers were accorded to the Executive by Section 3 of the Emergency Powers Ordinance, 1987, Ordinance No. XXII of 1987.

107 Article 150 (3), Constitution of Malaysia; Section 2 (2), Public Security Ordinance, 1947, and Articles 155 (6) & (8), Constitution of Sri Lanka; Article 141A (2), Constitution of Bangladesh.
upon the expiry of a state of emergency, by indemnifying provisions in the Constitutions of Malaysia and Bangladesh\textsuperscript{108} and in Sri Lanka's \textit{Public Security Ordinance}.\textsuperscript{109} In Malaysia, the indemnity continues for a further period of six months after the termination of a Proclamation of Emergency, during which time, emergency laws are declared to be operative.\textsuperscript{110}

\textbf{* * *}

The discussion in the previous sections of this Chapter, on the justiciability of a Proclamation of Emergency and its continued operation, has indicated that it may be theoretically possible to challenge the validity of a Proclamation of Emergency. However, the procedural difficulties of demonstrating in a manner, which can be judicially determined, that the power of declaring an Emergency has been exercised in bad faith, deprive this proposition of practical importance. The more important dimension in the examination and interpretation of emergency powers is the manner and extent to which these powers may be permissibly applied. It is to these aspects that the discussion in the Chapters following this one will be directed.

\textsuperscript{108} Article 150 (7), Constitution of Malaysia; Article 141B, Constitution of Bangladesh.

\textsuperscript{109} Section 4, Public Security Ordinance, 1947.

\textsuperscript{110} Article 150 (7), Constitution of Malaysia.
CHAPTER V

CONSTITUTIONAL RIGHTS AND EMERGENCY: SOME BASIC ISSUES

The kind of legislative or executive action that is required to deal with the exigencies of a national crisis often involves some degree of interference with the normal civil and political rights. In countries where the Constitution restricts the power of the State to infringe on the constitutional rights of the individual, an Emergency presupposes a curtailment of these rights. Even in the absence of express restrictions, the courts have responded by limiting the scope of individual rights in times of national crisis. While generally upholding state restrictions on the rights of citizens in emergency situations, the courts have been careful to retain some power to limit the scope of remedial state action. This position is predicated on the premise that the nature of the crisis may be a relevant factor in a judicial determination of the reasonableness of the restrictions resulting from state action.

1 Even in the absence of express restrictions on the constitutional rights, the United States courts have frequently imposed them during wartime as a matter of necessary implication. See, for example United States v McIntosh, 283 U.S. 605 (1930), especially at 622. For an extreme position see Miller v United States, 78 U.S. (11 Wall.) 268 (1870), where the Supreme Court categorically stated that the Fifth and Sixth Amendments did not apply to action resulting from an exercise of the war power (ibid., at 304-05).

In Britain, the prerogative writ of habeas corpus which safeguards the liberty of the subject had not been suspended in either the first or second world wars. However, executive power of detention in wartime was so broadly interpreted by the Court that challenges to preventive detention by habeas corpus or otherwise were almost wholly excluded. See The King v Halliday, [1917] A.C. 260; Liversidge v Anderson, [1942] A.C. 201; Greene v Home Secretary, [1942] A.C. 284.

In Australia, the High Court has upheld derogation from the constitutional guarantee of religious freedom in times of war. See Adelaide Company of Jehovah's Witnesses Inc. v Commonwealth, (1943) 67 C.L.R. 116.

2 The High Court of Australia, for example, has held that the exercise of emergency powers (under the defence power as conferred by Section 51 (vi) of the Australian Constitution) must "be really, not fancifully, colourably, or ostensibly, referable to the defence of the Commonwealth. ... [T]here must be a nexus between the object of the particular regulation and the subject of defence." - Shimpton v Commonwealth, (1944) 69 C.L.R. 613, at 623-24, per Rich J. See also Victoria v Commonwealth, (1942) 66 C.L.R. 488.

The "defence power" under the Australian Constitution has a variable scope of application - it expands during wartime and permits preventive detention. See for example, Lloyd v Wallach, (1915) 20 C.L.R. 299; Little v The Commonwealth, (1947) 75 C.L.R. 94.
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In apparent distrust of the judiciary, and in order to protect the executive and the legislative organs of the state against judicial interference in times of crisis, Constitutions like those of Malaysia, Sri Lanka and Bangladesh, which include a catalogue of entrenched rights, often make express provisions for restricting the operative effect of these rights during times of Emergency.\[^3\]

From the perspective of legal effect, the curtailment of constitutionally entrenched rights during an Emergency may be effectuated either by suspending all or some of the rights themselves, or by suspending the judicial remedies for the enforcement of the rights. The former technique has the effect of legalizing emergency measures which, in normal times, would constitute an infringement of the constitutional rights\[^4\]. The latter approach which suspends only the remedy, does not purport to legalize governmental action but rather has the effect that the citizen's access to a judicial forum (in which he could normally challenge the legality of the governmental action) is barred.\[^5\]

**Technique 1: The Suspension of Constitutional Rights**

The impact of a Proclamation of Emergency on the operation of the constitutional rights of citizens in Malaysia, Sri Lanka and Bangladesh has been briefly outlined in Chapters III and IV. This Chapter examines critically the techniques of the suspension of these rights during an Emergency. The

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\[^3\] The two techniques of curtailment of constitutional rights have been discussed in the context of the Constitutions of India and Pakistan in K.I. Omar, *Emergency Personal Liberty and the Courts in India and Pakistan*, Unpublished LL.M. Thesis, University of Saskatchewan, Canada, 1985, at 65-85.

\[^4\] An example of this technique is represented by the *Canadian Bill of Rights*, 1960, a statutory Bill of Rights, which provides that anything done under the *War Measures Act*, 1914, shall be deemed not to be an infringement of the Bill. The Bill has now been superseded by the *Charter of Rights and Freedom*, which is contained in the *Constitution Act*, 1982. The *Charter* does not contain any comparable restriction. Nevertheless the same result may be achieved by amending the *War Measures Act* in accordance with Section 33 of the *Charter*.

\[^5\] The most notable example of this in common law countries is the suspension of the writ of *habeas corpus*, as was done by the British Parliament on several occasions during the 17th and 18th centuries and as is explicitly contemplated by the United States Constitution. Modern and less obtrusive methods of curtailing the civil liberties of citizens in countries which do not provide for constitutionally entrenched rights, include express privative clauses, the careful statutory formulation of executive discretionary powers and the enactment of conclusive rules of evidence.
inquiry begins with a review of the relevant provisions in the Constitutions of the three countries. Two fundamental issues relating to the implications of suspension of constitutional rights during an Emergency are then examined.

The constitutional provisions on suspension of rights

As a consequence of a Proclamation of Emergency, certain entrenched rights under the Constitutions of Malaysia, Sri Lanka and Bangladesh are wholly suspended.

A. Malaysia

Under the original provisions of the Malaysian Constitution, emergency laws and executive ordinances could derogate from any of the guaranteed rights contained in Part II of the Constitution.

No provision of any law or ordinance made or promulgated in pursuance of ... Article [150] shall be invalid on the ground of any inconsistency with the provisions of Part II ... [relating to Fundamental Liberties].

Since 1963, emergency laws and ordinances in Malaysia can be inconsistent, not only with the constitutional rights, but with any other provision of the Constitution.

[No provision of any ordinance promulgated under ... Article [150], and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of any inconsistency with any provision of this Constitution... .

6 Original Article 150 (6), Constitution of Malaysia.

7 Article 150 (6), Constitution of Malaysia, as amended by Constitution (Amendment) Act, 1963, Act No. 26 of 1963. This means that the constitutional safeguards in respect of preventive detention [Article 151] can also be overridden by emergency laws.
The overriding effect of emergency *laws* and *ordinances* on constitutional provisions do not, however, extend to the right to freedom of religion. The constitutional rights and other safeguards relating to personal liberty, which stand suspended as a result of a Proclamation of Emergency are:

(a) liberty of the person;
(b) safeguards in relation to preventive detention;
(c) freedom from slavery and forced labour;
(d) protection against retrospective criminal laws;
(e) right to equality;
(f) freedom of movement;
(g) freedom of speech, assembly and association;
(h) rights in respect of education; and
(i) right to property.

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9 Article 5, Constitution of Malaysia.

10 Article 151, *ibid*. The provisions of Article 151 enact some safeguards in respect of preventive detention in the form of certain procedural rights of a detainee. Article 151 is not, however, categorized as one of the "Fundamental Liberties" under the Constitution of Malaysia; rather it appears in the Part on Special and Emergency Powers.

11 Article 6, *ibid*.

12 Article 7, *ibid*.

13 Article 8, *ibid*.

14 Article 9, *ibid*.

15 Article 10, *ibid*.

16 Article 12, *ibid*.

17 Article 13, *ibid*.
B. Sri Lanka

In Sri Lanka emergency laws can derogate from almost all of the entrenched constitutional rights including the safeguards in respect of preventive detention. Articles 15 (1) and 15 (7) of the 1978 Constitution specifies the rights which are suspended during a state of emergency:

(1) The exercise and operation of the fundamental rights declared and recognized by Articles 13 (5) and 13 (6) [relating to the protection in respect of trial and punishment] shall be subject only to such restrictions as may be prescribed by law in the interests of national security. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

(7) The exercise and operation of all the fundamental rights declared and recognized by Articles 12 [right to equality], 13 (1), 13 (2) [right to liberty, and freedom from arbitrary arrest and detention] and 14 [rights to free speech, association and movement] shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health and morality ... For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

The following guaranteed rights are thus overridden during an Emergency in Sri Lanka:

(a) equality and equal protection of the law;\(^{18}\)

(b) right to liberty, and freedom from arbitrary arrest and detention;\(^{19}\)

(c) right to freedom of speech, expression and association;\(^{20}\)

and the

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\(^{18}\) Article 12, *ibid.*

\(^{19}\) Article 13 (1), (2), (5) and (6), *ibid.*

\(^{20}\) Article 14 (1), *ibid.*
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(d) right to freedom of movement. 21

C. Bangladesh

In Bangladesh, the suspension of rights is sanctioned by Article 141B of the Constitution:

While a Proclamation of Emergency is in operation, nothing in articles 36, 37, 38, 39, 40 and 42 [all relating to citizens' rights] shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III of this Constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases to operate, except as respects things done or omitted to be done before the law so ceases to have effect.

As a consequence of the operation of Article 141B, the following rights are suspended during an Emergency in Bangladesh:

(a) right to freedom of movement; 22

(b) right to freedom of assembly; 23

(c) right to freedom of association; 24

(d) right to freedom of speech, expression, thought and conscience; 25

(e) right to freedom of profession and occupation; 26 and

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21 Ibid

22 Article 36, ibid.

23 Article 37, ibid.

24 Article 38, ibid.

25 Article 39, ibid.

26 Article 40, ibid.
(f) right to property.27

Two basic issues relating to the suspension of constitutional rights

(a) "Suspension" or "restriction" of rights?

In Janatha Finance and Investments v D.J.F.D. Liyanage,28 it was contended before the Supreme Court of Sri Lanka that executive Emergency Regulations can only restrict the operation of constitutional rights, but not suspend the rights altogether. The case arose out of the closure of the applicants' printing press by the government, acting under the provisions of Emergency Regulation 14 (7).29 The owners of the press, who belonged to the political opposition, challenged the order of closure as violating the constitutional rights to equality.30 It was contended by the applicants that Article 15 (7) of the Constitution of Sri Lanka only sanctions restrictions on constitutional rights, but the Emergency Regulation in question went beyond restriction to suspending the rights themselves.

The Supreme Court of Sri Lanka in Janatha Finance did not discuss the implications of the suspension of constitutional rights as raised by the applicants. The Court observed only that action under Emergency Regulation 14 (7) "would not amount to a total denial of any of the rights set out in Article 12 (1) and (2) [of the Sri Lankan Constitution]."31

Like the Sri Lankan Court in Janatha Finance, the Courts in Bangladesh and Malaysia do not appear to have had the occasion to deliberate on the

27 Article 42, ibid.


29 Emergency Regulation 14 (7) was directed to ordering the closure of any printing press, the operation of which the government considered to be prejudicial to the interests of national security, public order etc. The Regulation is quoted in full in the judgement of the Court in Janatha Finance, op. cit., at 381.

30 Articles 12 (1) and (2), Constitution of Sri Lanka, 1978.

31 Janatha Finance, op. cit., at 381.
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restriction/suspension issue. This issue also arose in Pakistan where the Constitution entrench rights and emergency powers in a way similar to the Constitutions under study in this thesis. With regard to suspension of rights, the Lahore High Court of Pakistan, in *Province of Punjab v Gulzar Hassan*,32 held that Article 233 (1) of the Constitution of Pakistan did not provide for the suspension of constitutional rights, but permitted only the Legislature, during an Emergency, to make laws inconsistent with the specified fundamental rights.33

(b) Does "suspension" of rights revive invalid laws?34

Another important question that arises in the context of suspension of rights is whether pre-existing laws, which were void for conflicting with the entrenched rights, revive on account of the suspension of constitutional rights during an Emergency. This question was not addressed by the Court in any of the countries under study. The issue is discussed with reference to India and Pakistan.

In *State of Madhya Pradesh v Thakur Bharat Singh*,35 the question arose whether a preventive detention statute, which was void for restricting the constitutional right to freedom of movement before the declaration of an Emergency, became operative, when, after the Proclamation of Emergency, the State acquired the right to legislate contrary to entrenched rights.36 The Supreme Court of India observed that:

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34 The discussion is based on K.I. Omar, *op. cit.*, at 68-74.


36 The legislation in question was a state preventive detention statute, the *Madhya Pradesh Public Security Act*, passed in 1959, three years before India's first Proclamation of Emergency in 1962. The freedom of movement of the petitioner was restricted by an order under s. 3 (1) (b) of the Act after the Proclamation of Emergency in 1962. The High Court held this section of the Act void under Article 13 (2) of the Indian Constitution as an unreasonable restriction on the freedom of movement guaranteed by Article 19. On appeal to the Supreme Court the decision was affirmed.
Article 358 [of the Indian Constitution] which suspends the
provisions of [the constitutional rights enumerated in] Art. 19
during an emergency declared by the President under Art. 352 is
in terms prospective: after the proclamation of emergency
nothing in Article 19 restricts the power of the State to make
laws or to take any executive action which the State but for the
provisions [of fundamental rights] contained in part III [of the
Constitution] was competent to make or take. Article 358,
however, does not operate to validate a legislative provision
which was invalid because of the constitutional inhibition
before the proclamation of emergency.\(^7\)

In *Gulzar Hassan*,\(^8\) the Lahore High Court of Pakistan was confronted with
the question whether an invalid law revived when those constitutional rights
which it contravened were suspended under a Proclamation of Emergency.\(^9\)
The Divisional Bench of the High Court, affirming the conclusion of the single
Judge of the same Court, held that a suspension of constitutional, rights during
the operation of a Proclamation of Emergency, would not revive pre-existing
laws which were void under Article 8 (1) of the Constitution of Pakistan, 1973,
for conflicting with the entrenched rights.

**Technique 2: The Suspension of Means for the enforcement of Constitutional Rights**

In addition to the suspension of most of the entrenched rights during an
Emergency in Bangladesh, an emergency Presidential Order can suspend the
means for the enforcement of specified constitutional rights.

**Constitutional provision**

\(^7\) Thakur Bharat Singh, op. cit., at 1173.


\(^9\) The case arose in connection with the declaring the Freemasons an unlawful association
under the provisions of the *Criminal Law Amendment Act*, 1908. The Act had previously been
declared void, as conflicting with the entrenched constitutional rights, and the question in *Gulzar Hassan*
was whether the effect of suspension of guaranteed rights during an Emergency would
be the revival of the Act.
The issuing of such a Presidential Order is sanctioned by Article 141C of the Constitution:

While a Proclamation of Emergency is in operation, the President may, by order, declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the rights so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order ...

After the first Proclamation of Emergency in Bangladesh in 1974, for example, the Presidential Order issued simultaneously with the Proclamation, suspended the means for the enforcement of almost all of the guaranteed rights. The 1974 Order stated:

In exercise of the powers conferred by clause (1) of Article 141C of the Constitution ... the President is pleased hereby to declare the right of any person to move any court for the enforcement of the rights conferred by articles 27, 31, 32, 33, 35, 36, 37, 38, 39, 40, 42, 43 of that Constitution, and all proceedings pending in any court for the enforcement of the said rights, shall remain suspended for the period during which the Proclamation of Emergency ... is in force.

Among those constitutional rights, the means for the enforcement of which were suspended by the 1974 emergency Presidential Order were, the right to life and liberty, right to protection of the law, safeguards as to preventive detention, right to equality, freedom of speech and expression and the

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40 Proclamation of Emergency, Notification No. 3 (50)/74-CD (CS), dated December 28, 1974, reprinted in (1975) 27 D.L.R. 76 (Statutes Section).
41 Order, Notification No. 3 (51)/74-CD (CS), dated December 28, 1974, reprinted in (1975) 27 D.L.R. 76 (Statutes Section).
42 Ibid.
43 Article 32, Constitution of Bangladesh.
44 Article 31, ibid.
45 Article 33, ibid.
46 Article 27, ibid.
freedom of movement, assembly and association. Emergency Presidential Orders suspending the means for the enforcement of constitutional rights were not issued during the Emergencies of 1981 and 1987.

During states of emergencies under the 1948 and 1972 Constitutions of Sri Lanka, a similar suspending effect, with regard to the means for enforcing the right to personal liberty, was brought about by promulgation of emergency regulations which barred the remedy of the writ of habeas corpus.

The basic issues arising from the suspension of means for the enforcement of rights

Two crucial questions arise with regard to this technique of curtailing citizens' rights. First, is the Court's power under the Constitution to issue writs in the nature of habeas corpus affected by the suspension of means for the enforcement of constitutional rights? Second, does suspension of means for the enforcement of rights also suspend the rights themselves?

The Court in Bangladesh has not, in any decision, attempted to examine the issues raised by the exercise of the power of the Executive to suspend by Order the means for the enforcement of constitutional rights during an Emergency. Because of the significance of these questions, it is instructive to consider the judicial interpretation of almost similar constitutional provisions relating to

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47 Article 39, ibid.
48 Articles 36, 37 and 38, ibid.
51 The remedy of the writ of habeas corpus was provided by s. 45 of the Courts Ordinance, 1889, Ordinance No. I of 1889, Legislative Enactments of Ceylon, Cap. 6, and later by the Administration of Justice Law, 1973, Act No. 44 of 1973.

Regulation 55 of the 1971 Emergency Regulations was in the following terms:

Section 45 of the Courts Ordinance shall not apply in regard to any person detained or held in custody under any emergency regulation.
the suspension of enforcement of rights during an Emergency in Pakistan and India.\textsuperscript{52}

(a) \textit{Suspension of Means for enforcement of rights and the Court's power}

In \textit{Mohan Chowdhury v Chief Commissioner, Union Territory of Tripura},\textsuperscript{53} the Supreme Court of India held that:

the [Supreme] Court's power [under Article 32 of the Indian Constitution] to issue a writ in the nature of Habeas Corpus has not been ... [affected] by the President's Order [under Article 359, suspending the enforcement of specified fundamental rights.] ... [T]he petitioner's right to move this Court, but not this Court's power ... has been suspended during the operation of the Emergency, with the result that the petitioner has no \textit{locus standi} to enforce his right, if any, during the Emergency.\textsuperscript{54}

The Indian Supreme Court concluded that, due to the right to move the Court being suspended, it was "manifest" that the petitioner could not question the \textit{vires} of the emergency preventive detention legislation under which he was detained.

(b) \textit{Suspension of rights and Suspension of Means for enforcement of rights}

The Court in Pakistan had originally taken a stance similar to that of the Indian Supreme Court, in \textit{Mohan Chowdhury}, with regard to the suspension of means for the enforcement of constitutional rights during an Emergency.\textsuperscript{55}

\textsuperscript{52} The discussion is based on K. I. Omar, \textit{Emergency, Personal Liberty and the Courts in India and Pakistan}, Unpublished LL.M. Thesis, University of Saskatchewan, Canada, 1985, 75-82.


\textsuperscript{54} \textit{Ibid.}, at 177, per Sinha C.J., delivering the judgement of the Court.

\textsuperscript{55} See \textit{Abdul Baqi Baluch v Government of Pakistan}, [1968] P.L.D. (S.C.) 313, where the Supreme Court of Pakistan held that:

so long as the Fundamental Rights remain suspended, this question cannot be agitated in the Courts. For to declare the Ordinance invalid would be tantamount to enforcing a Fundamental Right, which cannot be done as long as the ... [Presidential Order suspending the enforcement of Fundamental
But in later decisions, the Court drew a distinction between the constitutional rights which were suspended during an Emergency, and those rights which were either not suspended at all, or in respect to which only the means for enforcement was suspended. In *Manzoor Elahi v Federation of Pakistan*, the Supreme Court of Pakistan, by a majority, held that the State did not have the competence to enact laws which were in contravention of those constitutional rights which were not suspended during an Emergency. Justice Yakub Ali (as he was then), stressed that:

> [t]his result will follow even if the President has by Order declared [under Article 233 (2)] that the right to move any Court for the enjoyment of these Fundamental Rights shall remain suspended while the Proclamation of Emergency is in force ... [This is because] Article 233 [(1) of the Constitution of Pakistan, 1973] does not permit the State to make laws which are inconsistent with the Fundamental Rights other than ... [those] Rights specified ... [for suspension under Article 233 (1)].

Justice Salahuddin Ahmed who concurred with this view observed that:

> [a] Fundamental Right not suspended under Article 233 of the Constitution remains fully operative, and everybody ... is under an obligation to respect it. The mere fact that an aggrieved person is temporarily prevented from moving any Court for the enforcement of a Fundamental Right does not relieve an authority of its obligation to comply with it.

The majority of the Court in Pakistan in *Manzoor Elahi* concluded that a Presidential Order during an Emergency, suspending the means for the enforcement of rights, would only be effective if such rights themselves were already suspended by virtue of Article 233 (1).

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Rights] ... are in force. Therefore what cannot be done directly cannot be allowed to be done indirectly.

*Ibid.*, at 329


57 *Ibid.*, at 84.


59 Under Article 233 (2) of the Constitution of Pakistan.
CHAPTER V

Suspension of Rights and the legislative power of the Executive

What now falls for consideration is the scope of the Executive to make laws in derogation of constitutional rights. The enabling circumstances in which the Executive can promulgate emergency legislation is different in each of the countries under study.

As noted in Chapter IV, the President in Sri Lanka can promulgate Emergency Regulations at all times during a state of emergency, regardless of whether Parliament is in session or not. These Emergency Regulations can be in derogation of most of the constitutional rights. The ordinance-making power of the President in Bangladesh, which includes emergency legislative powers, is operative "at any time" when Parliament is not in session or is dissolved. The picture in Malaysia is more complicated. It is necessary to distinguish the situation before and after the 1981 amendment to the Constitution. Prior to 1981, the Yang di-Pertuan Agong in Malaysia was empowered to make Emergency Ordinances "until both Houses of Parliament are sitting". By the Constitution (Amendment) Act, 1981, the emergency legislative power of the Yang di-Pertuan Agong was given operative effect "at any time ... except when both Houses of Parliament are sitting concurrently". The change meant that the executive power of emergency ordinance-making revived every time Parliament was adjourned.

The emergency ordinance-making power of the Yang di-Pertuan Agong, in derogation of citizens' rights, was the subject of challenge in a number of

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60 In Chapter IV, the emergency legislative powers of the Executive in each of the three countries were examined in general terms. Here, some issues arising from the resort to emergency legislative powers of the Executive in Malaysia, relating to matters affecting citizens' liberties are highlighted.


63 Article 93 (1), Constitution of Bangladesh.

64 Original Article 150 (2), Constitution of Malaysia.

65 Article 150 (2) as amended, ibid.
cases. In order to better understand the range of issues involved, it is helpful to summarize the sequence of events giving rise to the court proceedings.

The 1969 Proclamation of Emergency

On May 15, 1969, in the face of ethnic riots in Malaysia, the Yang di-Pertuan issued a Proclamation of Emergency under Article 150 (1) of the Malaysian Constitution. He also simultaneously promulgated the Emergency (Essential Powers) Ordinance, 1969 (henceforth Emergency Ordinance, 1969), under Article 150 (2) of the Constitution. Section 2 of the Ordinance provided:

Section 2 (1): "... [T]he Yang di-Pertuan may make any regulations whatsoever (in this Ordinance referred to as 'Essential Regulations') which he considers desirable or expedient for securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community."

Section 2 (2): "... Essential Regulations may, so far as appear to the Yang di-Pertuan Agong to be necessary or expedient for any of the purposes mentioned ... [in Section 2 (1)]

... (c) provide for the trial by such courts as may be specified in such regulations, of persons guilty of any offence against the regulations;

... .

By Section 2 (4) of the Ordinance:

[a]n Essential Regulation, and any order, rule, or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the Constitution ... .

Proclamation of Security Area

66 Proclamation of Emergency, published as P.U. (A) 145/69.

On the same day as the Proclamation of Emergency was made, the Yang di-Pertuan Agong declared the whole of Malaysia to be a "Security Area" in accordance with the provisions of s. 47 of the *Internal Security Act*, 1960. Enacted under the provisions of Article 149 of the Malaysian Constitution, the *Internal Security Act*, provided for the Proclamation of "Security Areas" by the Yang di-Pertuan Agong in places where "public security" could be threatened by "organised violence". The Act also provided for death sentences in arms-related offences in "Security Areas".

The *Essential (Security Cases) (Amendment) Regulations 1975*: Extraordinary powers affecting citizens' rights

Several years after the Proclamation of Emergency in May, 1969, but while the Emergency was still continuing, the Yang di-Pertuan Agong promulgated the *Essential (Security Cases) (Amendment) Regulations 1975* (henceforth the *Security Cases Regulations 1975*), under the authority of the *Emergency (Essential Powers) Ordinance*, 1969. The *Security Cases Regulations 1975*, provided for special rules of procedure in court for arms-related offences in "Security Areas" under the *Internal Security Act*, 1960. The *Security Cases Regulations 1975*, provided, *inter alia*, for the trial of these offences by a single High Court judge, not preceded by preliminary inquiry before a magistrate. Regulations 6 (1) and 7 of the *Security Cases Regulations 1975*, provided:

Regulation 6 (1): "Where a security case is triable by the High Court, no preliminary inquiry shall be held in respect thereof and the Magistrate before whom the accused is produced shall forthwith commit the accused for trial by the High Court at such place (whether within the same State or one as the Public

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68 The Proclamation of Security Area is published as P.U. (A) 148/69.

69 Federation of Malaya Act No. 18 of 1960, revised in 1972 as Laws of Malaysia Act No. 82.

70 Article 149, Constitution of Malaysia, "Legislation against subversion, action prejudicial to public order ... ".


72 Section 57, *ibid*.

73 Published as P.U. (A) 320, amended by P.U. (A) 362, 1975.
Prosecutor may specify) and upon such charges as the Public Prosecutor may prefer."

Regulation 7: "A person who has been committed for trial under regulation 6 shall not be tried by a jury or by a Judge with the aid of assessors but shall be tried by a Judge sitting alone in accordance with the provisions of these Regulations."

The extraordinary procedure of trial detailed by the provisions of the Security Cases Regulations 1975, was in derogation of the constitutional rights of liberty and equality under Articles 5 and 8 of the Malaysian Constitution. The procedure of trial under the Regulations was also contrary to the statutory rights of an accused person under the Malaysian Criminal Procedure Code.74

Court challenges to the continued operation of emergency executive legislation affecting rights

In Johnson Tan Seng v Public Prosecutor,75 one of the appellants, Teh Cheng Poh had been sentenced to death by a single Judge of the High Court (Malaya), in accordance with the provisions of the Security Cases Regulations 1975, for offences under the Internal Security Act, 1960. On appeal before the Federal Court, it was argued on behalf of the appellant that the Emergency (Essential Powers) Ordinance, 1969, had lapsed and ceased to be law by effluxion of time and by force of changed circumstances. It was contended that as a result of this, the Security Cases Regulations 1975, made under the authority of the Emergency Ordinance, 1969, were void. The challenge, in Johnson Tan Han Seng, to the continuing use of the Emergency Ordinance, 1969, was made in this way because the decision in a previous appeal before the same Court, in Public Prosecutor v Khong Teng Khen & Another,76 had made it impossible to argue otherwise about the validity of the Security Cases Regulations 1975.77


77 See Chapter IV for discussion on this case. In Khong Teng Khen, Suffian L.P. had held that:
Refuting the contentions of the appellants in *Johnson Tan Han Seng*, Suffian L.P., in his leading opinion observed that an Emergency Ordinance could not lapse automatically. The Lord President pointed out that according to the provisions of the Malaysian Constitution, such an Ordinance could only be revoked by the Executive or annulled by Parliament. Otherwise, an Emergency Ordinance ceased to have effect six months after the termination of an Emergency. In his concurring opinion, Raja Azlan Shah F.J. explained the nature of the *Security Cases Regulations 1975*:

*The ... [Security Cases Regulations 1975,] derive their force from ... [Emergency Ordinance, 1969] by which the legislative power is given and not from the authority by which the power is exercised. Within the limits prescribed by Article 150 (2), ... [the Yang di-Pertuan] has promulgated ... [the Emergency Ordinance, 1969], which by its essential nature is an enabling instrument giving to himself power to make ... [the Security Cases Regulations, 1975]...*  

**Erroneous premises of the Federal Court decisions**

The Federal Court of Malaysia in *Johnson Tan Han Seng* and in *Khong Teng Khen* appear not to have fully appreciated the limitations on the emergency

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78 *Johnson Tan Han Seng, op. cit.,* at 68. Suffian L.P. was citing Article 150 (3) of the Malaysian Constitution, as it then was. It provided that:

> [a] Proclamation and any [emergency] ordinance ... if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or [emergency] ordinance ...

Since the adoption of the *Constitution (Amendment) Act, 1981*, Act No. A514 of 1981, similar provisions are contained in Article 150 (2C).

79 The reference here is to Article 150 (7), Constitution of Malaysia.

80 *Johnson Tan Han Seng, op. cit.,* at 75.
legislative powers of the Yang di-Pertuan Agong. In terms of Article 150 (2) of the Malaysian Constitution as then subsisting, the emergency legislative powers of the Yang di-Pertuan Agong were available only until Parliament reconvened. In the present case, the Emergency was proclaimed on May 15, 1969, and Parliament reconvened on February 20, 1971. The Security Cases Regulations were promulgated in 1975 under the authority of the Emergency (Essential Powers) Ordinance, 1969. The Regulations were therefore made long after the Parliament resumed sitting, when the Yang di-Pertuan Agong had no further legislative authority. Writing extra-judicially about this omission, and comparing the past statutory emergency powers of the Executive with those provided by the Constitution, Tun Suffian has observed that:

I must confess that when I sat in the Federal Court in Teh Cheng Poh and in the earlier case, P.P. v Khong Teng Khen and Another ... in which the same argument was advanced and rejected, I had not given sufficient attention to the significance of the word 'until' in the phrase 'until both Houses of Parliament are sitting', and that I should have drawn a distinction between it and the word 'when'; and that perhaps I have been influenced by my memory of the fact that during the first emergency (1948-1960) [a carry-over from pre-Independence days,] the Executive had ample power to make, and frequently made, emergency regulations whether or not the legislature was sitting. I should have realized of course that the Executive was then using its power of making regulations delegated to it by the [pre-independence] Emergency Powers Ordinance, No. 10 of 1948,

81 Article 150 (2), Constitution of Malaysia, previously provided:

If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required.

Emphasis added

By the Constitution (Amendment) Act, 1981, Act No. A514 of 1981, the ordinance-making power of the Yang di-Pertuan Agong was expanded. The new Article 150 (2A) provided:

If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.

Emphasis added.
which [unlike the present constitutional provisions] did not restrict its power of making delegated legislation to any particular period.\textsuperscript{82}

The Privy Council decision in Teh Cheng Poh v Public Prosecutor

This flawed decisions of the Federal Court in \textit{Khong Teng Khen} and \textit{Johnson Tan Han Seng} were rectified by the Privy Council in \textit{Teh Cheng Poh v Public Prosecutor},\textsuperscript{83} an appeal by one of the parties to the Federal Court decision in \textit{Johnson Tan Han Seng}. The decision of the Privy Council in \textit{Teh Cheng Poh} has been discussed in Chapter IV.

The 1981 amendment of the Malaysian Constitution

It is clear from the preceding discussion that the emergency legislative power of the Executive in Malaysia, to promulgate Ordinances and Regulations, derogatory of constitutional and statutory rights, was at the time of the decisions in \textit{Khong Teng Khen, Johnson Tan Han Seng and Teh Cheng Poh} limited to the period between the Proclamation of Emergency and the reconvening of Parliament. But as pointed out in the earlier Chapter, the Constitution was amended in 1981 and the Yang di-Pertuan Agong was accorded emergency legislative powers to be exercised "at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently".\textsuperscript{84} The new constitutional provision would mean that the emergency legislative power of the Executive in Malaysia potentially revives even during a weekend recess of Parliament.\textsuperscript{85}


\textsuperscript{83} [1979] 1 M.L.J. 50.


\textsuperscript{85} "This would mean that the Yang di-Pertuan Agong’s power to promulgate Ordinances revives during a week-end recess of Parliament." (H.P.Lee, \textit{Emergency Powers in Malaysia}, in F.A.
The examination, in this Chapter, of the techniques of curtailing constitutional rights during an Emergency leads to a critical appraisal of the role of the Courts in Malaysia, Sri Lanka and Bangladesh on issues arising from the operation of these techniques. Chapters VI, VII, and VIII will be directed to examine how each of the Courts in the three countries has endeavoured to adjudicate on issues of derogation of rights, which flow as a consequence of the suspension, and the suspension of means for the enforcement of constitutional rights during an Emergency.

CHAPTER VI

MALAYSIA:
JURISPRUDENCE OF THE FORMAL STYLE

In this Chapter, the trend of interpretation of the Malaysian Court, on questions of the rights of citizens during states of emergency, is characterized as the Formal Style. The discussion of the case-law in Malaysia reveals a propensity on the part of the Court to be bound to the text of the Constitution and the emergency legislation considered in isolation from questions of value. It is also found that the Court has applied precedents, including those from other jurisdictions, in a rigid and mechanical manner, without considering the relevance of those in the context of the decisions. The Malaysian Court's approach is therefore found to adhere to the elements of the formal style of interpretation.

States of Emergency in Malaysia

Malaysia achieved Independence in 1957 during the pendency of an Emergency imposed in 1948 by the British Administration in the face of armed Communist movement. This state of emergency continued until 1960.

1 The formal style of interpretation, or formalism is discussed in the Introduction, supra.

2 The name of the country at Independence was the Federation of Malaya. In 1963, the British colonial territories of Sarawak, Sabah (North Borneo), and Singapore was transferred to the Federation of Malaya. The Federation has since then been called Malaysia. Singapore left the Federation in 1965 to become an independent republic.

3 Emergency was declared on July 12, 1948, by a Proclamation under the Emergency Regulations Ordinance, 1948. The Proclamation by the British "Officer Administering the Government" of Malaya, and published as Gazette Notification No. 1921, July 13, 1948, No. 12, Vol. I, read:

Whereas section 3 of the Emergency Regulations Ordinance, 1948, provides inter alia, that the High Commissioner in Council, whenever it appears to him that an occasion of emergency or public danger had arisen, may, by proclamation, declare that a state of emergency exists, and that such proclamation may apply to the whole or any specified part of the Federation:

Now therefore, I, being satisfied that an occasion of emergency had arisen, do hereby declare that a state of emergency exists, and that this Proclamation shall apply to the whole of the Federation.

4 The twelve-year old Emergency was terminated on July 31, 1960, per Legal Notice 185 of 1960. Most of the Regulations made under the Emergency Regulations Ordinance, 1948, which were
Malaysia's first Proclamation of Emergency after Independence, made in accordance with the provisions of the Constitution, was in September, 1964 on account of the 'Confrontation' with Indonesia. The Emergency was made applicable throughout the whole country. Two years later, in September, 1966, an Emergency was proclaimed in the State of Sarawak on account of irreconcilable conflict of interests between the Federal Government and the State Government of Sarawak. A second country-wide Emergency was proclaimed on May 15, 1969, in the face of ethnic rioting on controversial issues of electioneering in the federal and state elections. Yet another localised Emergency was declared in the State of Kelantan in 1977 owing to ruptures in the Federal-State relationship.

Although the Constitution of Malaysia explicitly provides for the revocation of a Proclamation of Emergency, none of the four Proclamations of Emergency made in Malaysia since Independence have to date been terminated. Faced with issues arising out of the multiplicity of Proclamations of Emergency, the Privy Council in *Teh Cheng Poh v Public Prosecutor*, observed that:

continued after Independence of Malaysia would have been unconstitutional if they were made after the Independence Constitution had come into force.

5 Article 150, Constitution of Malaysia.

6 The Proclamation of Emergency is published as L.N. 271/3.9.64.

7 The *Confrontation* with Indonesia was occasioned by Indonesia’s opposition to the transfer of the colonial territories of Sabah and Sarawak to Malaysia.


9 The 1977 Proclamation, applicable only to the State of Kelantan, is published as P.U. (A) 358/8.11.1977.

10 Article 150 (3), Constitution of Malaysia. Article 150 (3) provides for the revocation of a Proclamation of Emergency by the Yang di-Pertuan Agong or the annulment of a Proclamation by the Parliament. There is, however, no reference to a definite time-frame for the revocation of a Proclamation.

a proclamation of a new emergency declared to be threatening the security of the Federation as a whole must by necessary implication be intended to operate as a revocation of a previous Proclamation, if one is still in force.\textsuperscript{12}

But to overcome any effect of the implied revocation of an existing Proclamation of Emergency by a later Proclamation, as proposed by the Privy Council in \textit{Teh Cheng Poh}, the Malaysian Constitution was amended in 1981 so that different Proclamations of Emergency can operate concurrently.\textsuperscript{13}

\textbf{The 1969 Emergency}

Of the two country-wide states of emergency proclaimed in 1964 and 1969, the latter Proclamation is more important in a study of the effects of emergency powers on citizens' rights. This is because of the wide-ranging emergency legislation, restrictive of rights, adopted subsequent to the Proclamation of Emergency in 1969, and the constitutional amendments precipitated in the process.

\textbf{The Proclamation}

The Proclamation of Emergency issued by the Yang di-Pertuan Agong on May 15, 1969, amidst violent ethnic clashes, cited the danger to the security of the country as being the reason for the declaration of Emergency. The Proclamation was in the following terms:

Whereas We are satisfied that a grave Emergency exists whereby the security of the Federation is threatened;

And Whereas Article 150 of the Constitution provides that in the said circumstances We may issue a Proclamation of Emergency:

Now Therefore, We, ... Yang di-Pertuan Agong in exercise of the powers aforesaid do hereby proclaim that a State of

\textsuperscript{12} \textit{Ibid.}, at 53.

CHAPTER VI

Emergency exists, and that this Proclamation shall extend throughout the Federation... 14

Emergency Ordinances

On the same day as the Proclamation of Emergency was made, the Yang di-Pertuan Agong promulgated the *Emergency (Essential Powers) Ordinance*, 1969. 15 In terms of this *Ordinance*, the Yang di-Pertuan Agong could make *Essential Regulations* aimed at "securing the public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community". 16 More specifically, the *Essential Regulations* could provide for "the detention, exclusion and deportation of persons whose detention, exclusion and deportation ... [appeared] to the Minister for Home affairs to be expedient in the interests of the public safety or the defence of Malaysia ... ". 17

On May 16, 1969, a day after the Proclamation of Emergency, the Yang di-Pertuan Agong also promulgated the *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969. 18 Section 4 (1) of the *Ordinance* stated:

If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order ... directing that that person be detained for any period not exceeding two years. 19

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14 The Proclamation is published as P.U. (A) 145/69.

15 Ordinance No. I of 1969, published as P.U. (A) 146/69. Since its promulgation in 1969, the *Ordinance* had been amended a number of times. In 1979, in the wake of the Privy Council decision in *Teh Chang Poh v Public Prosecutor*, [1979] 1 M.L.J. 50, the *Ordinance* was re-enacted as the *Emergency (Essential Powers) Act*, 1979, Act No. 216 of 1979. The reasons for the conversion of the *Ordinance* into an *Act* are discussed in Chapter IV, *supra*.


17 Section 2 (2) (a), *ibid*.

18 Ordinance No. V of 1969, published as P.U. (A) 187/1969, subsequently amended a number of times.

19 Cf. Section 3 of the *Ordinance* under which any police officer may without warrant arrest and detain a person for upto sixty days without an order of detention for purposes of inquiry.
In addition to the sweeping emergency powers available under these two Ordinances, powers under the permanent Internal Security Act, 1960, were also available to the Executive during the Emergency. An exhaustive piece of legislation passed under Article 149 of the Constitution of Malaysia, for the security of Malaysia, the long title to the Internal Security Act states:

An Act to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia, and for matters incidental thereto.

**Judicial Review of Emergency Powers affecting Citizens' Liberties**

**General Approach of the Court**

In the face of this vast array of emergency powers in the hands of the Executive in Malaysia, one would have expected that the Court in Malaysia would ensure proper exercise of these powers, especially when the Emergency has been continuing for an extended period of time, long after the circumstances which had initially justified the Proclamation had ceased. On the contrary, as will be presently seen, the Court in Malaysia has persisted in a formal style of interpretation of the constitutional and statutory provisions relating to citizens' rights and liberties.

As will be noticed in the following discussion, the Malaysian Court in reaching decisions on questions of liberty of the citizen during an Emergency, has relied on decisions of the English Courts given in circumstances of active war, as well as on decisions of the Privy Council on appeals from British India, pertaining to the emergency powers of the colonial Governor-General.

It will be remembered that in *Karam Singh v Menteri Hal Ehwal Dalam Negert*, Suffian F.J. (as he was then), pointed out that the Constitution of

20 Federation of Malaya Act No. 18 of 1960, revised in 1972 as Laws of Malaysia Act No. 82.

21 See Chapter 3, supra.

Malaysia did not lay down any *procedural* requirement for the deprivation of life or personal liberty guaranteed in Article 5 of the Malaysian Constitution. In that decision, the learned Judge had contrasted the clause, "except according to procedure established by law", occurring in Article 22 of the Indian Constitution with the clause, "save in accordance with law" in Article 5 of the Malaysian Constitution. On the basis of this linguistic technicality, Suffian F.J. had held that technical errors in a detention order did not render a detention order invalid. This kind of formal interpretation on technical and narrow grounds, as exemplified by the *Karam Singh* decision, has permeated in the overwhelmingly majority of the decisions of the Malaysian Court on questions of the liberty of citizens during times of Emergency.

**Successive orders of detention**

In *Chu Su Binti Shafie v Superintendent of Prisons, Pulau Jerejak, Penang*, the applicant, who had previously been detained under a technically *defective* order, was served with a fresh order of detention under Section 4 (1) of the

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In his concurring judgement in *Re: Tan Boon Liat @ Allen & Another Et Al.*, [1977] 2 M.L.J. 108, Lee Hun Hoe C.J. (Borneo) observed that:

> [i]f the expression 'in accordance with law' [in Article 5 of the Malaysian Constitution] were to be construed as to exclude procedure then it would make nonsense of Article 5.


In saying this, Lee Hun Hoe C.J. (Borneo) tried to give a different interpretation of Suffian F.J.'s holding in this regard in *Karam Singh*. But Suffian L.P. in the instant case of *Tan Boon Liat* reiterated his stand in *Karam Singh* saying that:

the courts will take a serious view of failure to comply with substantive law but not of failure to comply with procedural law.


Lee Hun Hoe C.J.'s interpretation of Article 5 of the Malaysian Constitution does not appear to have any other support.

Emergency (Public Order and Prevention of Crime) Ordinance, 1969. In support of her application for habeas corpus, the applicant in Chu Su Binte Shafie raised three issues. The first related to the detainee taking advantage of any technical defect in the detention order. This meant that if the relevant authority was responsible for any irregularities in exercising the powers of detention, the detainee was entitled to capitalize on those lapses, even though the detention may have been justified on valid grounds.

The second issue raised by the applicant was the implication of *mala fides* in successive orders of detention. It was the position of the applicant that if a detention order was found defective, the order should be rescinded. A second detention order issued to overcome the defects of the first order showed, according to the applicant, that the authorities wanted her detained at any cost. The third issue was the non-observance of Section 5 (2) (b) of the detaining Ordinance relating to the furnishing of the grounds of detention to the detainee. In as much as this was a technical defect, the first and the third issues were similar.

In support of the first contention, the applicant in *Chu Su Binte Shafie* relied on a *dictum* of Suffian L.P. in *Musa bin Salleh v Public Prosecutor*\(^\text{26}\) which concerned a detention under the *Internal Security Act*, 1960. In that case, the Lord President had observed that:

> if there is any ambiguity in the law the court should lean in favour of the liberty of the subject which should in no way be diminished except by the clearest of language in the law.\(^\text{27}\)

In *Chu Su Binte Shafie*, the Court felt that whatever defect might have been present in the earlier detention order, the subsequent order was valid and, as such, the implications of Suffian L.P.'s *dictum* in the earlier case was inapplicable.\(^\text{28}\)

As to the contention of *mala fides* on the part of the Minister in passing successive orders of detention, the Court found:


\(^{27}\) *Ibid.*, at 169.

\(^{28}\) *Chu Su Binte Shafie*, op. cit., at 194.
The relevant authorities now concede that the original order might well be defective but for the same reasons as moved the then Minister to make the first order, the present incumbent has made another similar order ... It is always open to the authorities to cure a defective order in the proceedings.29

Concerning the third issue, the Court refused to examine whether the requirements of Section 5 (2) (b) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, relating to the grounds of detention, were properly met in the case. For the Court:

the failure, if any, to observe in full ... [the requirements of s. 5 (2) (b) of the Ordinance] cannot ... invalidate the order [of detention] made by the Minister under section 4 (1) [of the Ordinance].30

In support of the conclusions reached in Chu Su Binte Shafie, the Court quoted with approval Lord Macmillan's observations relating to the authencity of a detention order in the English war-time case of Greene v Secretary of State for Home Affairs.31 In this regard, Lord Macmillan had observed that:

the production of the Secretary of State's order, the authencity and good faith of which is in no way impugned, constitutes a complete and peremptory answer to the appellant's application. It justifies in law his detention in the absence of any relevant challenge of its validity, and there is no such challenge.32

Yeap Hock Seng v Minister for Home Affairs

Several important issues relating to preventive detention were discussed in Yeap Hock Seng v Minister for Home Affairs,33 concerning a habeas corpus application in respect of a detention under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. The applicant had denied the

29 Ibid., at 195.

30 Ibid.


32 Ibid., at 297, quoted in Chu Su Binte Shafie, op. cit., at 195.

allegations against him contained in the statement of the grounds for his detention and the allegations of fact on which the detention order was made. This denial gave rise to a number of issues for determination by the Court. If the allegations were unfounded, as the applicant asserted they were, could the subjective determination of the Minister, to have the petitioner detained, be successfully challenged?

(a) Judicial review of "subjective satisfaction"

The Court in Yeap Hock Seng categorically stated its premises for the determination of this issue in the following terms.

It is, of course, settled law that the subjective determination of the Minister is not justiciable ... The courts have consistently declined to review the exercise of ministerial discretion when its validity is impugned in habeas corpus proceedings ... 34

The Court admitted that it could examine the grounds of detention as disclosed by the Minister to determine their relevance to the objects of the Emergency (Public Order and Prevention of Crime) Ordinance under which the applicant was detained. But while saying this, the Court added that:

[t]he court cannot be invited to undertake an investigation into the sufficiency of the matters upon which the satisfaction of the Minister purports to be grounded ... The court does not examine the adequacy or truth of these materials and cannot interfere with the [executive] decision on the ground that if the court had examined them it would have come to a different conclusion.35

The rule of subjective satisfaction laid down in the non-emergency preventive detention case of Karam Singh v Menteri Hal Ehwal Dalam Negari, Malaysia,36


35 Yeap Hock Seng, op. cit., at 282.

and upheld by the Court in *Yeap Hock Seng* has occasionnally been the subject of critical *obiter* remarks by some Judges of the Court in Malaysia. In *Yit Hon Kit v Minister of Home Affairs*, for example, Justice Edgar Joseph Jr., of the High Court at Penang felt that:

> time is now ripe for the Supreme Court to consider if the statement of the law in *Karam Singh* that the subjective satisfaction of the Minister in cases of preventive detention is not justiciable, is, after all good law regard being had to recent English decisions of the highest authority ...

The learned Judge's observation does not seem to have had any impact on the prevailing trend of judicial interpretation of the Court in Malaysia. In decisions of the Supreme Court subsequent to *Yit Hon Kit*, the non-justiciability of the subjective satisfaction of the detaining authority laid down in *Karam Singh* has been reiterated and re-inforced.

(b) *Emergency law and the circumvention of the ordinary criminal process*

The allegations of *mala fides* on the part of the detaining authority, as imputed by the applicant in *Yeap Hock Seng*, related to the use of the mechanism of preventive detention under the *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969, in circumvention of the ordinary criminal law in the country. The petitioner contended that he was discharged at committal hearing on alleged charges of murder on the advice of the prosecution, but that he was re-arrested and detained under the *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969. This circumvention of the ordinary criminal process, the applicant contended, showed *mala fide* intention on the part of the detaining authority.

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To resolve the allegation of *mala fides* in the circumstances of the issues presented in *Yeap Hock Seng*, the Malaysian Court invoked a large number of Indian precedents, mainly of the Supreme Court of India,\(^40\) as there did not "seem to be any local authority" on the disputed question. Powers of preventive detention were exercised in all of the Indian cases cited, despite the fact that provisions of the ordinary criminal law would ordinarily have been applicable. In several instances, the Indian Supreme Court condoned the exercise of preventive detention powers in the midst of pending criminal proceedings, or by way of dropping criminal charges and then passing detention orders. In addition to the Indian case-law, the Malaysian Court also cited the Irish case of *The State (Walsh and Others) v Lennon and Others*,\(^41\) where the Irish Supreme Court upheld detention orders passed against the appellants after *nolle prosequi* was entered in respect of them by the State. With these precedents to support its conclusion, the Malaysian Court in *Yeap Hock Seng* held that:

\[
\text{[m]ere circumvention of the ordinary process of law cannot by itself amount to *mala fides* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purposes.}\(^42\)
\]

**Statutory rights of a detainee**

The formal style of interpretation of the Malaysian Court with regard to the subjective satisfaction of the detaining authority, and on questions of the sufficiency of the grounds of detention supplied to the detainee, is apparent even when statutory and constitutional rights of a detainee are infringed. The applicant for *habeas corpus*, before the High Court in *Subramaniam v Menteri Hal Ehwal Dalam Negari & Others*\(^43\) was detained for a period of two years


\(^{41}\) [1942] I.R. 112.

\(^{42}\) *Yeap Hock Seng*, op. cit., at 284.

\(^{43}\) [1977] 2 M.L.J. 82.
under the provisions of the *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969. Under the original provisions of Article 151 (1) (b) of the Constitution of Malaysia, which were in operation when the application in *Subramaniam* was heard, no citizen could have been detained beyond a period of three months unless an Advisory Board had considered representations made by the detainee and recommended further detention. The *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969 provided for this safeguard in similar terms. Although written representations were made by the applicant in *Subramaniam* to the Advisory Board regarding his detention, those were not considered by the Board within three months. The applicant therefore contended that his continued detention was in breach of the statutory provisions of the *Emergency (Public Order and Prevention of Crime) Ordinance* and the mandatory requirements of Article 151 (1) (b) of the Constitution, and was thus unconstitutional.

The High Court in *Subramaniam* was of the opinion that non-compliance with the statutory provisions relating to the review of applicant's detention did not make the detention unlawful. The Court implicitly accepted the argument of

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44 Original Article 151 (1) (b), Constitution of Malaysia:

> Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention -
>
> ... 
>
> (b) no citizen shall be detained under the law or ordinance for a period exceeding three months unless an advisory board ... has considered any representations made by him ... and has reported, before the expiration of that period, that there is in its opinion sufficient cause for the detention.
>
> Emphasis added.

Article 151 (1) (b) was subsequently amended, by the *Constitution (Amendment) Act*, 1976, Act No. A354 of 1976, so that the review by the Advisory Board was to be made within within three months of receiving representations from detainees, and not within three months of the detention. For a discussion of the reasons for this Amendment, see Chapter II, *supra*.

45 Section 6 (1), *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969:

> Whenever any person has made any representations under section 5 (1) to an Advisory Board, the Advisory Board, shall within three months of the date on which such person was detained, consider such representations and make recommendations thereon to the Yang di-Pertuan Agong.
>
> Emphasis added.
the respondents that the right of a detainee, under Article 151 (1) (b) of the
Malaysian Constitution, to have his representations heard was a substantive
right, whereas a delay in hearing the representations related only to a matter
affecting procedure. With regard to the contentions of the applicant bearing
on his constitutional rights, it was observed that:

[t]he courts are equally anxious to see that fundamental liberty
of the subject is safeguarded ... [Nevertheless, the courts] must
not readily lend their jurisdiction to unnecessarily interfere
unless an infringement alleged to have been occasioned relates
to an infringement of a real and substantive right of that
individual as guaranteed by the Constitution. The courts must
not be blinded by legal niceties that their approach to the whole
issue will become very unrealistic.\(^46\)

The Court characterised the *Emergency (Public Order and Prevention of Crime)*
Ordinance as an instrument directed solely to provide for "miscellaneous
matters essential for the proper enforcement and execution of duties and
functions connected with preventive detention".\(^47\) It was in this spirit of
interpretation that the Court felt that the rights of detainees in the form of
safeguards articulated in the *Emergency (Public Order and Prevention of Crime)*
Ordinance were merely "directory" and could not be regarded as "real and
substantial" rights. That being so, the Court reasoned that non-compliance
with these "directive" provisions would not make a detention bad in law. The
Court's reasoning was as follows.

[S]ection 6 (1) of the ... *Emergency (Public Order and Prevention of Crime)*
Ordinance, 1969] is in effect in the nature of a
statutory direction to the Advisory Board. It is probably open to
a ... [detainee] to say that by right the Advisory Board should
hear his representations and make recommendations thereon
within three months but it .. [is] obvious ... that such right cannot
be held to be a real and substantive right of a citizen guaranteed
by the Constitution an infringement of which may justify the
Court to award a Writ of *Habeas Corpus*.\(^48\)

The Court agreed that:

\(^46\) Subramaniam, *op. cit.*, at 83-84.

\(^47\) Ibid., at 84.

\(^48\) Ibid, emphasis added.
there has been a failure to comply with the statutory direction but ... it ... [was not] open to ... the court to go behind such failure to inquire [into] the causes of it. In the final analysis ... mere non-compliance with the directory provision, so long as the Advisory Board considers the representations and makes its recommendations, should not ... render unlawful a detention lawfully made. 49

Constitutional rights of a detainee

The High Court in *Subramanium* characterized the right of a detainee under Article 151 (1) (b) of the original Constitution of Malaysia, to have his case reviewed by the Advisory Board, as a substantive right. The Court, however, did not examine the implications of this substantive right and its co-relation with the statutory right under the *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969. In the appeal before the Federal Court, reported as *Re Tan Boon Liat @ Allen & Another Et Al.* 50 (henceforth, *Tan Boon Liat 1*) it was held that the requirement of Article 151 (1) (b) of the Constitution was mandatory. During the pendency of appeal, however, the Advisory Board had considered the representations of the detainees and made recommendations to the Yang di-Pertuan Agong for continuation of their detentions. The Yang di-Pertuan Agong had accordingly confirmed the detention orders. But all this happened after the expiry of three months.

Before the Federal Court, the State argued that the detainees in *Tan Boon Liat 1* could not challenge their detentions even though their detention orders were confirmed and continued by the Yang di-Pertuan Agong after the expiry of three months. Counsel for the State tried to impress upon the Court that under s. 6 (2) of *Emergency (Public Order and Prevention of Crime) Ordinance*, the decision of the Yang di-Pertuan Agong, as to the continuation or otherwise of detention, reached after consideration of the Advisory Board's


The @ symbol refers to alias.
recommendation, was final and could not be "called into question in any Court". The Federal Court did not accept the arguments of the State counsel and reversed the decision of the High Court.

Lord President Suffian felt that the inviolability of the Yang di-Pertuan Agong's decision referred to in s. 6 (2) of the Emergency (Public Order and Prevention of Crime) Ordinance, referred only to "real decisions" and not to "ultra vires decisions". Since in this case, the requirements of Constitution and the Ordinance were not met, the decision of the Yang di-Pertuan to confirm the detentions was ultra vires. On the basis of this reasoning, Suffian L.P. held that:

the court is free to order the release of the appellants.

In his concurring opinion in Tan Boon Liat 1, Lee Hun Hoe C.J. (Borneo), spoke of "strict compliance" with the provisions of the Constitution and the Law.

In such matter as fundamental as the liberty of the subject, it is of utmost importance that there should be strict compliance with the requirement of the Constitution and any law resulting in the deprivation of personal liberty. ... [T]he failure of the Advisory Board [in this case] to carry out its duty within the prescribed time renders the continued detention after the three month period to be unlawful as it cannot be said to be in accordance with law.

In Yit Hon Kit v Minister of Home Affairs, the applicant was initially arrested in December, 1985, on suspicion of complicity in a murder case. While being held in detention, he was re-arrested under s. 3 (1) of the Emergency (Public Order and Prevention of Crime) Ordinance.

51 Section 6 (2), Emergency (Public Order and Prevention of Crime) Ordinance, 1969:

Upon considering the the recommendations of the Advisory Board under this section the Yang di-Pertuan Agong may give the Minister such directions, if any, as he shall think fit regarding the order made by the Minister; and every decision of the Yang di-Pertuan thereon shall, subject to the provisions of section 7, be final, and shall not be called into question in any Court.

52 Tan Boon Liat 1, op. cit., at 109.

53 Ibid., at 114.

Order and Prevention of Crime) Ordinance, 1969. In February 1986, while the applicant was still incarcerated, the Minister for Home Affairs passed an order of detention under s. 4 (1) of the Ordinance. This detention order together with the grounds of detention was served on the detainee in the same month. Before the High Court at Penang it was contended on behalf of the applicant that the long delay in the communication of the grounds for his detention was a violation of Article 5 (3) of the Constitution which enjoined that:

Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

In Yit Hon Kit, there was a delay of 57 days in communicating the grounds of detention by the detaining authority to the applicant. On examination of the provisions of Article 5 (3) of the Constitution, the Court observed that "the imprecision of the phrase as soon as may be in Article 5 (3) makes the determination of each case turn upon its own facts". Regarding the case in issue, the Court was quite categorical in maintaining that:

it is impossible to hold, having regard to the inordinate delay of 57 days, that there has been a sufficient compliance with the first limb of ... [the] requirements [of Article 5 (3) of the Constitution].

On this finding the Court concluded that:

there was an improper arrest and detention under section 3 (1) [of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, provided that:

Any police officer may without warrant arrest and detain any person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 4 (1).

Section 3 (3) of the Ordinance provided a person arrested under s. 3 (1) could be detained in police custody for up to sixty days without a detention order being made under s. 4 (1).

Section 4 (1) of the Ordinance, quoted supra, empowered the Minister to pass detention orders.

Article 5 (3)," Constitution of Malaysia, emphasis added.

Yit Hon Kit, op. cit., at 641.

Ibid.
Ordinance, 1969] for non-compliance with the first limb of Article 5 (3) [of the Constitution] and, that in any event, the applicant's detention during the period when enquiries under section 3 (1) ended and detention under section 4 (1) [of the Ordinance] began was unlawful.59

* * *

It should be noted that Tan Boon Liat 1 and Yit Hon Kit are two of those few decisions in Malaysia where emergency powers of the state have been strictly construed.60

Scope and application of Emergency Ordinances

The formal style of interpretation of the Malaysian Court is quite obvious when the Court is seen to inquire into the general scope and application of emergency legislation. In Re Application of Tan Boon Liat @ A. Allen61 (henceforth, Tan Boon Liat 2), the applicant was detained under s. 4 (1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, for being a "drug dealer" and thereby causing an increase in criminal activities. Section 4 (1) of the Ordinance empowered the Minister to pass orders of detention to prevent persons from acting in any manner prejudicial to "public order" or for the suppression of "violence" or the prevention of "crimes involving violence".62 The statement of the grounds on which the detention order was passed against the applicant in this case stated:

That you are an active local 'infra-structure' member of an international drug distribution syndicate. Your activities have not only damaged the international image of Malaysia but have also caused an increase in criminal activities involving violence

59 Ibid., at 644.


62 The text of s. 4 (1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969, is quoted supra.
On behalf of the applicant in *Tan Boon Liat 2*, it was argued that the charges of "drug trafficking" were related to the *Dangerous Drugs Ordinance*, 1952, and not to the *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969. The scope of the latter *Ordinance*, it was argued, was limited; it applied, and was intended to apply only for the purposes of suppressing activities involving violence and preventing crimes of violence. In support of these arguments, the applicant relied on the *Preamble* to the *Emergency (Public Order and Prevention of Crime) Ordinance*, which was in the following terms:

Whereas by reason of the existence of a grave emergency threatening the security of Malaysia, a Proclamation of Emergency has been issued by the Yang di-Pertuan Agong under Article 150 of the Constitution;

... And whereas the Yang di-Pertuan Agong is satisfied that immediate action is required for securing public order, the suppression of violence and the prevention of crimes involving violence;

...

The applicant in *Tan Boon Liat 2* stressed that the necessity of *immediate action* highlighted in the *Preamble* meant that the *Ordinance* was directed to restore "order" in the immediate aftermath of the Proclamation of Emergency. Therefore the *Emergency (Public Order and Prevention of Crime) Ordinance*, according to the applicant, could only have contemplated acts or crimes of violence committed within a reasonable period after the Emergency was declared in May, 1969, and was obviously intended to operate only until "public order" was restored.

The Court in *Tan Boon Liat 2* rejected these arguments and held that the scope of the power of detention available under s. 4 of the *Ordinance* was to be determined by the express provisions of that section alone. The Court observed that:

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63 A statement of the "grounds of detention" was required to be made under s. 5 (2) (b) of the *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969. The "grounds of detention" are reproduced in the judgment of *Tan Boon Liat 2* at 83.

64 Ordinance No. XXX of 1952.
the preamble to the *Emergency (Public Order and Prevention of Crime) Ordinance, 1969* is not relevant for the purposes of construing or considering the scope of the provisions of section 4 (1) thereof as there is no ambiguity whatsoever in the latter.\(^5\)

According to the Court, the need for "immediate action" for securing "public order", the "suppression of violence" and the "prevention of crimes involving violence", specified in the *Preamble*, were a generalised expression of the objective of the *Ordinance*. The introductory expressions in the recital to the *Ordinance*, could not, so the Court felt, control, qualify or restrict the provisions contained in the *Ordinance*. Referring to the wide powers of the State to pass orders of preventive detention under the enacted provisions of the *Ordinance* notwithstanding the recital in the *Preamble*, the Court observed that:

> [the Preamble recites] general and wide words projecting the purpose and purport of the Ordinance and ... the enacting provisions of section 4 elaborate and provide for that purpose and purport in much wider terms, as they empower the Minister to order the detention of a person with a view to preventing him from acting *in any manner prejudicial to public order* ... - an amplification of the phrase 'for securing public order' appearing in the preamble.\(^6\)

The conclusion of the Malaysian Court in *Tan Boon Liat 2* that "drug trafficking" was an activity that endangered "public security" was sought to be supported by several decisions of the Supreme Court of India.\(^7\) In most of the Indian precedents cited by the Malaysian Court, detention for purposes extraneous to the stated objectives of prevention detention statutes, such as smuggling and black-marketeering, were generally sanctioned by the Indian Court. The Malaysian Court’s conclusion that "drug dealing" and "public order" were related, was summed up in the following way.

\(^{5}\) *Tan boon Liat 2*, op. cit., at 85.

\(^{6}\) *Ibid.*, emphasis in original.

[Traffic in drugs ... strikes at the very core of public order and any person indulging in such activities must necessarily be acting in a manner prejudicial to public order. ... Trafficking in drugs ... [breeds crimes] that ultimately result in violence or at least have a shattering effect on public tranquillity and society generally.]

The Preamble to the Emergency (Public Order and Prevention of Crime) Ordinance was also relied upon by the applicants in Re: P.E. Long @ Jimmy & Others, concerning detentions on allegations of "drug trafficking". Here, the Malaysian Court adopted the technical argument that the Preamble was not part of the statute. The Court observed that:

the preamble is not part of the Ordinance although one can look into it to understand the scope of the Ordinance ...

On behalf of the detainees in P.E. Long, it was contended that "drug trafficking" did not come within the scope of the Ordinance. Instead of trying to relate "drug trafficking" to the declared objective of the Ordinance, the Court felt that the expression, "securing public order" in the recital to the Emergency (Public Order and Prevention of Crime) Ordinance encompassed a wide variety of offences, which could not be listed in the Preamble. A very wide application of the expression "securing public order" was suggested by the Court.

[T]he words 'securing public order' contemplated dealing with all acts which were a threat to peace, order and good Government.

Foreclosing court challenges to detention

The conclusions reached by the Malaysian Court on matters of preventive detention by a formal interpretation of the relevant constitutional and

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68 Tan boon Liat 2, op. cit., at 88.


70 Ibid., at 136.

71 Ibid., emphasis added.
statutory provisions, were sometimes sought to be directed to foreclose future challenges to detention on similar grounds. In *Tan Boon Liat* 2,\(^{72}\) for example, the learned Judge deciding the case made the following observations.

I would ... express the hope that my judgement in this matter will have served a purpose, if for nothing else, at least perhaps in providing a sufficient contraceptive against the proliferation of like applications for habeas corpus founded on the identical contention.\(^{73}\)

* * *

In the Introduction, it was indicated that the formal style of interpretation stressed a rigid precedent-oriented approach to legal issues and the isolation of legal questions from any consideration of values. Both of these characteristics of the formal style are attendant in judicial decision-making in Malaysia in quite a pronounced way.

The jurisprudence of Formalism of the Malaysian Court, as illustrated by the judicial decisions discussed in this Chapter will be critically examined in Chapters IX and X. In these later Chapters, the implications of the Malaysian Court's jurisprudence as regards the basic concerns of citizens' rights, and the principles of *limited government* will be addressed. Chapters IX and X will also be directed to study the nature of citizens' rights and examine theories of judicial review opposed to the formal style of interpretation.

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\(^{72}\) *Re Application of Tan Boon Liat @ A. Allen*, [1976] 2 M.L.J. 83.

CHAPTER VII
SRI LANKA:
UNCOORDINATED JURISPRUDENCE

At Independence in 1948, the Constitution of Ceylon did not contain a Bill of Rights. Even after the adoption of an autochthonous Constitution for the Republic of Sri Lanka in 1972, citizens' rights were merely declared, and were stated to be non-justiciable. Rights of citizens in Sri Lanka were entrenched for the first time under the Constitution of 1978. Prior to 1978, therefore, Emergency rule in Ceylon/Sri Lanka was not impeded in any way by the operation of constitutional guarantees.

In the pre-1978 period, the Court in Sri Lanka adopted a formal style of interpretation to questions concerning the exercise of emergency powers of the State and its impact on the liberties of citizens. The Sri Lankan Court, during this period, persisted in a text-bound inquiry of emergency legislation in its interpretation of the powers available to the State under such laws.

Although the new constitutional order introduced by the Constitution of 1978 differed significantly from the previous orders, the Supreme Court of Sri Lanka has failed to evolve any distinct approach to constitutional interpretation and in particular to the resolution of questions of the operation of constitutional rights. On the one hand, the Court has persisted in an enquiry based on the formal style of interpretation which characterized the earlier era of its decision-making. On the other hand, one finds the Supreme Court occasionally critical of State power derogating from citizens' rights. The significance of such attempts is, however, by and large rendered illusory when the Supreme Court at the same time bases its reasoning on precedents from other jurisdictions concerned with different contexts. On the whole, the jurisprudence of the Court in Sri Lanka during this period can be

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1 Prior to the adoption of an autochthonous Constitution in 1972, Sri Lanka was known as Ceylon. Ceylon's Independence Constitution (1948) was based on the pre-Independence Ceylon (Constitution) Order in Council, 1946, as modified by the Ceylon Independence Order in Council, 1947 and the Ceylon Independence Act, 1947, 11 & 12 G. 6, c. 7. See Chapter I, supra.

2 A brief account of the controversy relating to a Bill of Rights in the Ceylon (Constitution) Order in Council, 1946 is given in Chapter I.

3 See Chapter I, supra.
characterized as "Uncoordinated Jurisprudence" or a "Jurisprudence of Discordance".

**States of Emergency in Sri Lanka**

Since Independence in 1948, Sri Lanka experienced numerous states of emergency. Proclamations of Emergency under the *Public Security Ordinance*, 1947, were made in 1953, 1958, 1961, 1962, 1966, 1971, 1978, 1980, 1982, 1983. The longest of these states of emergency have been the ones declared in 1971 and 1983. This Chapter will examine the use of emergency powers and the jurisprudence of the Sri Lankan Court in this regard during these two states of emergency.

**The Remedy of Habeas Corpus prior to 1978**

During the period preceding the entrenchment of constitutional rights in the Constitution of 1978, personal liberty in Sri Lanka was safeguarded by a statutory guarantee of the writ of *habeas corpus*. Until 1973, this guarantee was provided by the *Courts Ordinance*, 1889. By section 45 of this *Ordinance*, the Supreme Court of Ceylon was granted the power to issue a mandate in the

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4 Ordinance No. XXV of 1947, Legislative Enactments of Ceylon, Cap. 40.


The 1980 Proclamation issued on 16 July 1980 (Government Gazette Extraordinary No 97/6) was directed to deal with widespread trade union "strikes".

The 1982 Emergency was declared on 20 October 1982 (Government Gazette Extraordinary No 215/7) was for political reasons in connection with presidential elections.

The 1971 and 1983 Proclamations of Emergency are discussed *infra*.

6 Ordinance No I of 1889, Legislative Enactments of Ceylon, Cap. 6.
nature of a writ of *habeas corpus* which might be directed to a person to produce before the Court, "the body of any person to be dealt with according to law ... [or] the body of any person illegally or improperly detained in public or private custody". In 1973, the *Courts Ordinance, 1889*, was repealed, and the remedy of *habeas corpus* came to be provided by the *Administration of Justice Law, 1973.* The provisions relating to the grant and issue of mandates in the nature of writs of *habeas corpus*, contained in section 12 of this 1973 Act were similar to those of section 45 of the *Courts Ordinance, 1889*.

Upon a Proclamation of Emergency in Ceylon/Sri Lanka under the previous constitutional orders of 1948 and 1972, it was usual to suspend the safeguard to personal liberty, by way of the remedy of *habeas corpus*. This was done by Emergency Regulations. Thus, after the Proclamation of Emergency in 1971, Regulation 55 of the *Emergency Regulations 1971* declared:

Section 45 of the Courts Ordinance shall not apply in regard to any person detained or held in custody under any emergency regulation.

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8 Section 12 (2), *Administration of Justice Law, 1973*:

The Supreme Court may grant and issue mandates in the nature of writs of *habeas corpus* to bring up before such court -

(a) the body of any person to be dealt with according to law; or

(b) the body of any person illegally or improperly detained in public or private custody;

and to discharge or remand any person so brought up or otherwise deal with such person according to law ....

9 A Proclamation of Emergency was made in accordance with the powers available under the *Public Security Ordinance, 1947*, Ordinance No. XXV of 1947. The 1972 Constitution included some provisions relating to the mode of declaration of an Emergency by the President. See Section 134, Constitution of Sri Lanka, 1972.

10 The text of Regulation 55 is quoted in the opinion of H.N.G. Fernando C.J. in *Janak Hirdaramani v A.R. Ratnavale*, (1972) 75 N.L.R. 67, at 87.

It was during the Emergency of 1958 that the operation of the remedy of *habeas corpus* provided by section 45 of the *Courts Ordinance, 1889*, was excluded for the first time. Regulation 18 (10) of the *Emergency Regulations* of 1958 was phrased in the same language as Regulation 55 of the *Emergency Regulations* of 1971. See the concurring judgement of G.P.A. Silva S.P.J. in *Janak Hirdaramani*, at 92.
In \textit{S. Gunasekera v A. Ratnavale},\footnote{(1973) 76 N.L.R. 316.} the mechanism for the suspension of the writ of \textit{habeas corpus} during an Emergency in Sri Lanka was justified by reference to similar techniques in other constitutional systems. Referring to the provision for the suspension of the writ of \textit{habeas corpus} under the Constitution of the U.S.A.\footnote{Constitution of the United States of America, Article I, Section 9, Paragraph 2:} and under the emergency provisions of the Indian Constitution,\footnote{Under Article 359 (1) of the Indian Constitution, the President, consequent to a Proclamation of Emergency can, by Order, suspend the enforcement of specified constitutional rights. Until the \textit{Constitution (Forty-Fourth Amendment) Act}, 1978 (with effect from 20-6-1979), a Presidential Order Article 359 (1) could suspend the enforcement of the right to life and liberty guaranteed by Article 21 of the Constitution. This was in fact done during the States of Emergency of 1962-1969 and 1971-1977. Suspension of enforcement of the right to liberty meant that applications for the writ of \textit{habeas corpus} was effectively suspended. After the passage of the \textit{Constitution (Forty-Fourth Amendment) Act}, 1978, Article 359 (1) of the Indian Constitution reads:}

\begin{quote}
Where a Proclamation of Emergency is in operation, may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.
\end{quote}

Alles J. in \textit{Gunasekera} observed that

\begin{quote}
[i]f written Constitutions like those of the United States and India, which recognize the liberty of the subject as a fundamental right, can make provision for the suspension of Habeas Corpus in their Constitutions in certain circumstances, I see no reason why our Sovereign Parliament cannot make such a provision by legislation and call for such a suspension in times of grave emergency.\footnote{Cf. Article 141C, Constitution of Bangladesh.}
\end{quote}

\textbf{Post 1978 - The Constitutional Remedy}
Under the present, 1978 Constitution of Sri Lanka, the "Fundamental Rights" in Chapter III of the Constitution have been declared to be enforceable by petitioning the Supreme Court. Article 17 of the Constitution, which is itself a "Fundamental Right", provides:

Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter.

By Article 126 of the Constitution of Sri Lanka, the Supreme Court has been vested with the "sole and exclusive jurisdiction" to determine questions relating to the operation of the constitutional rights of citizens. An application alleging infringement of a constitutional right is heard by the Supreme Court, after "leave" on the matter has been granted. The Court of Appeal in Sri Lanka may also refer cases of infringement of constitutional rights to the Supreme Court, where during hearing of applications for the writ of habeas corpus, there is prima facie evidence for such infringement.


16 Article 126, Constitution of Sri Lanka, 1978. Article 126 (1) states:

The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

17 Article 126 (2), Constitution of Sri Lanka, 1978:

Where any person alleges that any fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by a attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two judges.

18 Article 126 (3), Constitution of Sri Lanka, 1978:

Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ of habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such
Unlike the statutory remedy of *habeas corpus*, Articles 17 and 126 of the present Constitution of Sri Lanka are constitutional remedies and are not directly affected by a Proclamation of Emergency. However, most of the guaranteed constitutional rights for the protection of which this remedy exists are "suspended" during an Emergency. By Article 15 (7) of the Constitution, the right to liberty and freedom from arbitrary arrest and detention, the rights to speech, expression, assembly and movement, and the rights to equality, have been made subject to restrictions in the interests of "national security" and "public order".

**Pre 1978 - Judicial Review of Detention**

Before an examination of the role of the Sri Lankan Court during a state of emergency under the present Constitution is undertaken, it will be useful to discuss how the Court had performed in times of Emergency under the previous constitutional orders. Of the several periods of emergency rule in Ceylon/Sri Lanka since Independence till the adoption of the 1978 Constitution, this discussion will focus on the Emergency proclaimed in 1971. In deciding questions of encroachment on the liberties of citizens by the operation of emergency laws during this Emergency, the Supreme Court of Sri Lanka is found to pursue an formal style of interpretation. The role of the Sri Lankan Court during this period is found to be similar to that of the Malaysian Court as discussed in the last Chapter.

**The Proclamation of Emergency in 1971**

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22 See Chapter V, *supra*. 
An Emergency was declared in Ceylon (Sri Lanka) on March 16, 1971\(^{23}\) in the wake of some incidents of political violence by left revolutionaries.\(^{24}\) The Proclamation of Emergency by the Governor-General under section 2 of the *Public Security Ordinance*, 1947, brought into force the provisions of Part II of the Ordinance.\(^{25}\) Emergency Regulations made by the Governor-General under section 5 in Part II of the *Public Security Ordinance* enabled, among a wide range of other stringent controls, the detention of persons.\(^{26}\) By section 9 of the *Public Security Ordinance*, Emergency Regulations could not be called into question in any Court:

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\(^{25}\) Section 2 (1) of the *Public Security Ordinance*, 1947, (as at 1971) provided:

Where, in view of the existence or imminence of a state of public emergency, the Governor-General is of opinion that it is expedient so to do in the interests of public security and the preservation of public order or the maintenance of supplies and services essential to the life of the community, the Governor-General may, by Proclamation published in the Gazette, declare that the provisions of Part II of this Ordinance shall come into operation forthwith or on such date as may be specified in the Proclamation.

\(^{26}\) Section 5 (1) of the *Public Security Ordinance*, 1947, authorised the making of Emergency Regulations for safeguarding "public security", "preservation of public order", "suppression of mutiny, riot or civil commotion" or "maintenance of supplies and services essential to the life of the community". Among several broad categories enumerated in section 5 (2), necessitating the making of Emergency Regulations are preventive detention, search and seizure, and special procedure for trial of offenders. By section 5 (2) (d), Emergency Regulations may provide for amending any law or for suspending the operation of any law. See below, Regulation 18 of *Emergency (Miscellaneous Provisions and Powers) Regulations*, No 6 of 1971.

More than 16,000 people were detained under the Emergency Regulations of 1971. Of this figure, nearly 15,000 were youths. See, A.J. Wilson, *op. cit.*, at 163; also J. Jupp, *op. cit.*, at 317.
No emergency regulation, and no order, rule or direction made or given thereunder shall be called into question in any court.

In accordance with this immunity, Regulation 18 (10) of the Emergency (Miscellaneous Provisions and Powers) Regulations, No. 6 of 1971 (henceforth Emergency Regulations 1971) provided for the exemption from Court, the scrutiny on any ground whatsoever, of detention orders made under that Regulation.27

The Janak Hirdaramani case

Regulation 18 (1) of the Emergency Regulations 1971 authorized the Permanent Secretary to the Ministry of Defence and External Affairs of the Government of Ceylon to make an order for the taking into custody and detention of a person if he was of the opinion that such order was necessary with a view to preventing that person from acting in any manner prejudicial to the "public safety" and to the maintenance of "public order".28

In Janak Hirdaramani v Ratnavale,29 the petitioner was detained under Regulation 18 (1) of the Emergency Regulations 1971 on the belief that he was


28 Regulation 18 (1) of the Emergency (Miscellaneous Provisions and Powers) Regulations, No 6 of 1971 read:

Where the Permanent Secretary to the Ministry of Defence and External Affairs is of opinion with respect to any person, that, with a view to preventing such person -

(a) from acting in any manner prejudicial to the public safety, or to the maintenance of public order, or to the maintenance of essential services; or

(b) from acting in any manner contrary to any of the provisions of sub-paragraph (a) or paragraph (2) of regulation 38 or regulation 24 of these regulations,

it is necessary to do so, the Permanent Secretary may make order that such person be taken into custody and detained in custody.

The text of Regulation 18 (1) is given in the concurring judgement of Samerawickrame J. in Janak Hirdaramani v Ratnavale, (1972) 75 N.L.R. 67, at 112.

29 (1972) 75 N.L.R. 67.
connected with a foreign exchange smuggling operation, which was under investigation. The petitioner applied to the Supreme Court for a writ of *habeas corpus* under section 45 of the *Courts Ordinance*, 1889, despite the suspension of the writ by Regulation 55 of the *Emergency Regulations* 1971. The Court had therefore to decide whether it was competent on its part to issue a writ on the grounds argued by the petitioner, notwithstanding the intended effect of Regulation 55.

It was contended on behalf of the State in *Janak Hirdaramani*, that the unlawful financial transactions of the petitioner helped finance, directly or indirectly, insurgent activities in Ceylon. On behalf of the petitioner, it was contended that the petitioner's detention was not directed towards securing the purposes of Regulation 18, namely to prevent him from acting in any manner prejudicial to "public safety" or the maintenance of "public order", but was for the "ulterior motive" of facilitating interrogation and investigation relating to foreign exchange smuggling. Having thus impugned the "good faith" of the Permanent Secretary who ordered the detention of the petitioner, it was contended that the detaining authority could not properly be "of opinion" under Regulation 18 that the detention was necessary for the purposes of that Regulation.

(a) "Good faith" of the detaining authority

To rebut the allegations of impropriety of the detaining authority made by the petitioner in *Janak Hirdaramani*, Fernando C.J., in his leading opinion, relied on several observations in the English war-time decisions of *Liversidge v Anderson*[^30] and *Greene v Secretary of State*.[^31] On the basis of these

[^30]: [1942] A.C. 206. Regulation 18B of the British *Defence (General) Regulations* 1939, authorised the Secretary of State to order the detention of any person if he had "reasonable cause to believe any person to be of hostile origin or associations or to have been recently in acts prejudicial to the public safety or the defence of the realm ... ". The *Defence Regulations* were made by the King in Council as provided by the *Emergency Powers (Defence) Act*, 1939. Of these Defence Regulations in general, and Regulation 18B in particular, Lord Maugham had remarked in *Liversidge*:

> I cannot myself believe that those responsible for the Order in Council could have contemplated for a moment the possibility of the action of the Secretary of State being subject to the discussion, criticism and control of a judge in a court of law.

precedents, the learned Chief Justice concluded that the scope of an investigation into the question whether the Permanent Secretary did in fact form an opinion stated in his order under Regulation 18 would be "narrow and purposeless". The Chief Justice upheld the detention order by presuming the "good faith" of the detaining authority.

The Court ... [has] to commence by presuming the good faith of the Permanent Secretary [in ordering the detention]. ... Even if the fact that intensive investigation and interrogations did take place, could have led the Court to an inference that the Detention Order was made for an ulterior purpose, the affidavit [of the Secretary of State] serves to explain what had in the first instance to be presumed from the order itself, namely that the

In the same case, Lord Macmillan posed the question:

But how can a court of law deal with the question whether the was reasonable cause to believe that it was necessary to exercise control over the person proposed to be detained, which is a matter of opinion and policy, not of fact?

Ibid., at 253.

In answer to this question, Lord Macmillan quoted Lord Parker in The Zamora, [1916] 2 A.C. 77 at 107:

Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public.

Quoted Ibid., at 253.

[1942] A.C. 284. In Greene, Viscount Maugham had remarked:

It would be useless to attempt to examine the truth of the fact alleged in the order in a case where the fact relates to the personal belief of the Secretary of State, formed partly at least on grounds which he is not bound to disclose.

Ibid., at 296.

In the same case Lord Wright had concluded:

The order made by the Home Secretary in the terms of reg. 18B speaks for itself. It is admissible as a public executive document to show a good cause of the detention and needs no extrinsic justification. It is good on its face unless and until it is falsified.

Ibid., at 306.

Janak Hirdaramani, op. cit., at 78.
Permanent secretary entertained some suspicion that the activities of the detainee may directly or indirectly be connected with the prevailing conditions of insurgency.\(^{33}\)

Chief Justice Fernando noted the assertion of the Permanent Secretary that the materials on the basis of which petitioner in *Janak Hirdaramami* was detained were confidential, and observed that the Court would assume that this claim was genuine.

[The Permanent Secretary] has ... stated on oath ... that the material upon which he formed his opinion cannot be disclosed in the public interest. These statements relate to matters the correctness of which the Court could ordinarily assume.\(^{34}\)

Although the Permanent Secretary was prepared to make the relevant materials available for the perusal of the Court, the Court declined the offer. The offer of disclosure by the Permanent Secretary was regarded "as a mark of good faith."\(^{35}\) Chief Justice Fernando suggested that there could be cases in which the Court may inquire into the "good faith" of an executive order.

If it is *prima facie* shown that an official who makes a particular executive order had an antecedent motive against the person affected by the order, or had an antecedent bias in favour of a person benefited by the order, then I think the Court may call upon the official to disprove the existence of bias or to establish that his action was not influenced by bias.\(^{36}\)

Having said this, the Chief Justice pointed to the extraordinary circumstances of the case being decided, and upheld the non-disclosure of the facts upon which the detention was ordered.

[Even if such antecedent bias was to be shown in the circumstances of the instant case, the special feature of the Permanent Secretary's inability to disclose facts leading to the

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\(^{33}\) *Ibid.*, at 85.

\(^{34}\) *Ibid.*, at 86, per H.N.G. Fernando C.J.

\(^{35}\) *Ibid*.

\(^{36}\) *Ibid.*, at 79.
formation of his opinion might well be a reason why a proper investigation cannot be held.\(^{37}\)

Chief Justice Fernando went to the extent of saying that:

> [e]ven a mistaken opinion [on the part of the Permanent Secretary in ordering a detention] will not invalidate a detention order, and want of good faith can be established only by positive proof that the Permanent Secretary did not indeed form that opinion.\(^{38}\)

(b) Communication of Grounds of Detention to a Detainee

Regulation 18 (4) of the *Emergency Regulations* 1971 made provision for a person aggrieved by a detention order to make objections to an Advisory Committee, consisting of persons appointed by the Governor-General. By Regulation 18 (5), the Advisory Committee was to communicate the grounds of detention to a detainee who filed an objection to his detention.\(^{39}\) Although in *Janak Hirdaramani*, the Court was not asked "to consider any ground stated by an Advisory Committee",\(^{40}\) the petitioner contended before the Court that the grounds stated in the affidavit of the detaining authority, on which the detention order was based were "vague" and "uncertain". The petitioner relied on several precedents of the Indian Supreme Court,\(^{41}\) where detentions under the prevention detention statute were challenged as contravening the

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\(^{37}\) *Ibid.* The Chief Justice felt that the "Permanent Secretary may be virtually unable to defend himself" if the Court undertook an investigation whether the relevant facts existed for him to form an "opinion" as to the need for detention.

\(^{38}\) *Ibid.*, at 77, per Fernando C.J.

\(^{39}\) The mechanism of the working of an Advisory Committee is discussed by G.P.A. Silva S.P.J. in *Janak Hirdaramani*, at 107. Regulation 18 (6), (7) and (8) prescribed the procedure to be followed by an Advisory Committee and empowered the Permanent Secretary to revoke an order of detention made by him after consideration of the report of the Advisory Committee.

\(^{40}\) The Court was "not aware that objections were made to an Advisory Committee" by the petitioner in *Janak Hirdaramani*, or that the Committee had communicated any "grounds of detention" to him, *ibid.*, at 82-83, per Fernando C.J.

\(^{41}\) These were non-Emergency preventive detention cases. The detentions were under the *Preventive Detention Act*, 1950, Act 4 of 1950. The principal case in this regard discussed by the Sri Lankan Court was *Bombay v Atma Ram*, [1951] A.I.R. (S.C.) 157.
constitutional guarantee for communication of the grounds of detention to the detainees.\(^{42}\)

In dealing with this contention, Fernando C.J. drew a distinction between the "conditional" requirement of an Emergency Regulation and the mandatory prerequisite of an entrenched constitutional provision.

\[\text{Any resemblance between the purely conditional requirement in our Regulation 18 for a statement of grounds by an Advisory Committee, and the peremptory constitutional requirement contained in Article 22 of the Constitution of India, is only superficial...} \text{[A]ny omission of the Permanent Secretary (even if there be such an omission in the instant case) to furnish grounds for detention in an affidavit ... cannot be compared with the failure on the part of a detaining authority in India to comply with a provision of the Constitution designed for the protection of a fundamental right.}^{43}\]

\((c)\) Alternative remedy of a Detainee

In \textit{Janak Hirdaramani}, Chief Justice Fernando was confident of the efficacy of the remedy of representation by a detainee to the Prime Minister.

It is also significant that Regulation 18 itself requires a detainee to be informed of his right to make representations to the Prime Minister; this is presumably in order that the Prime Minister will

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\(^{42}\) Article 22, Constitution of India:

(1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by a legal practitioner of his choice.

\[\ldots\]

(5) When a person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity to make a representation against the order.

\[\ldots\]

\(^{43}\) \textit{Janak Hirdaramani, op.cit.}, at 84. Emphasis in original.
consider any such representations, and that in an appropriate case such representations can result in the release of the detainee.\footnote{Ibid.}

(d) \textit{Personal Liberty during an Emergency}

In his leading opinion in \textit{Janak Hirdaramani}, the Chief Justice argued strongly that the right to personal liberty should justifiably be superseded by considerations of the security of the State in times of Emergency. It was also felt that inquiries into questions of personal liberty during an Emergency were not the same as they were in normal times. In the words of Chief Justice Fernando:

This Court cannot ignore the fact that there had been early this year an actual armed insurrection in Ceylon, in an attempt to wrest power by force, that this attempt was put into action in numerous areas, that it had to be resisted by the Armed Forces of the State with foreign assistance, and that many lives were lost during these operations. When such conditions actually prevail, considerations of liberty have necessarily to be outweighed by the interests of the security of the State. And when action is taken by the authority entrusted with the protection of those interests, in purported pursuance of Emergency powers, such action does not fall to be tested by the Courts with the meticulous care and anxiety ordinarily devoted to cases of personal liberty.\footnote{Ibid., at 84.}

(e) \textit{Regulation 55 and the Court's jurisdiction}

Although all three Judges in \textit{Janak Hirdaramani} upheld the detention order, there was a difference of opinion between the Chief Justice and the other two judges as to the applicability of Regulation 55 to preclude a challenge to a detention order. It will be remembered that Regulation 55 of the \textit{Emergency Regulations} 1971 had suspended the remedy of the writ of \textit{habeas corpus} provided by section 45 of the \textit{Courts Ordinance}, 1889. With regard to
Regulation 55 Fernando C.J. argued for a complete ouster of jurisdiction of the Supreme Court with regard to orders of detention issued under Regulation 18.

I am compelled to the conclusion that the jurisdiction conferred by s. 45 of the Courts Ordinance [to issue a writ of habeas corpus] is ousted by Regulation 55, in the case of a Detention Order purporting to be made by the Permanent Secretary under Regulation 18.46

Justices Silva and Samerawickrame differed with the Chief Justice as to the scope of Regulation 55. Justice Silva premised his approach to Regulation 55 by stressing the importance of the right to personal liberty.

It is a well established rule of construction that statutes as well as subsidiary legislation which have the effect of infringing on the liberty of the subject must be very strictly construed.47

Justice Silva felt that the presence or absence of "good faith" on the part of the detaining authority would determine whether or not the Court would abide by the injunction of Regulation 55, by which the remedy of habeas corpus was superseded, or the provisions of Regulation 18 (10) by which a detention order was made immune from court scrutiny. If the decision by the Permanent Secretary to make a detention order was actuated by an opinion made in good faith, even "an incorrect decision by reason of wrong judgement" on the part of the Permanent Secretary, would not make the order "justiciable by reason of the provisions ... of Regulation 18 (10) and ... Regulation 55". But, in a case of "bad faith" or mala fides on the part of the detaining authority:

the provisions taking away the right of the court to call the order in question would not apply.48

In such situations:

[w]hen a subject complains to court of an order restraining his liberty ... a court is obliged not merely to take a look at the face

46 Ibid., at 93.
47 Ibid., at 104.
48 Ibid., at 105.
of the order but to go behind it and satisfy itself whether it has been validity made.\textsuperscript{49}

The anomaly of upholding the complete ouster of the Court's jurisdiction was characterized by Silva S.P.J. in the following way.

If one were to give Regulation 55 the meaning that the power of the Supreme Court to issue a writ of Habeas Corpus in terms of section 45 of the Courts Ordinance is taken away in the case of a person detained or held in custody under any emergency regulation, irrespective of whether he is detained under a valid order or not, or in consequence of a wrongful arrest or not, the resulting position would be that such person will be indefinitely denied access to a court to secure his liberty even though his detention is illegal.\textsuperscript{50}

Justice Silva therefore concluded that:

Regulation 55 is intended to remove the court's jurisdiction to issue a writ of Habeas Corpus only in respect of a lawful detention under any emergency regulation and not otherwise.\textsuperscript{51}

Justice Samerawickrame agreed with Silva S.P.J. that the right to personal liberty safeguarded by section 45 of \textit{Courts Ordinance}, 1889, was a "valuable right" and cannot be completely denied in all cases.\textsuperscript{52} The learned Judge pointed to the phrase "illegally or improperly detained" occurring in section 45 of the \textit{Ordinance} and suggested that:

[t]he use of the word 'improperly' [in section 45 of the \textit{Courts Ordinance}, 1889] might be regarded as authorising a court to inquire into the propriety of a legal and otherwise lawful detention.\textsuperscript{53}

\textsuperscript{49} \textit{Ibid.}, at 106.

\textsuperscript{50} \textit{Ibid.}, at 109.

\textsuperscript{51} \textit{Ibid.}, at 110.

\textsuperscript{52} \textit{Ibid.}, at 120. With regard to Regulation 55 Samerawickrame J. observed that:

[a] provision which restricts rights of this kind must be given no greater effect than the plain meaning of the words require.

\textsuperscript{53} \textit{Janak Hirdaramani, op.cit.}, at 120.
On these premises, Samerawickrame J. concluded that:

Regulation 55 will not apply to the case of a person unlawfully detained under an invalid detention order made in abuse of the powers conferred by Regulation 18 (1).\footnote{Ibid.}

The argument for the non-application of Regulation 55 in cases of "unlawful" detention under an invalid order, as asserted by Silva S.P.J. and Samerawickrame J. was rejected by Fernando C.J. on the grounds that such a stand would mean the scrutiny of every order of detention by the Court.

\[I\]f it be correct that the Court does have power to review an invalid Detention Order, the Court must inquire into \textit{every Order which is challenged} and decide whether or not it is invalid.\footnote{Ibid., at 93, emphasis in original. Chief Justice Fernando, however, admitted that this was precisely what was done in the present case.}

The reasonings of Silva S.P.J. and Samerawickrame J. on the scope of Regulation 55 appear to be inconsistent. On the one hand, it has been proposed that a detention order made in "good faith" ousts the jurisdiction of the Court by the operation of Regulation 55. But on the other hand, it has been suggested that Regulation 55 is intended to oust the jurisdiction of the Court in cases of "lawful" detention only. The scope of an inquiry into questions of the legality of a detention order is much wider than the issue of "good faith" of the detaining authority.

\textbf{Gunasekera v Ratnavale}

The detainee in \textit{S. Gunasekera v A. Ratnavale}\footnote{(1973) 76 N.L.R. 316.} was originally arrested on March 18, 1971, two days after the Proclamation of Emergency, but was released by the police for insufficient evidence.\footnote{The local Superintendent of Police realized that "the evidence was insufficient at the time to establish that the detainee had committed an offence under the Emergency Regulations". \textit{(Gunasekera, op. cit., at 318)}.} He was again arrested in December 1971, for association with the outlawed JVP, the party promoting the armed insurgency that precipitated the Proclamation of Emergency in

1971. Gunasekera was arrested under Regulation 19 of the Emotional Regulations 1971, but the Supreme Court held the arrest and subsequent detention was unlawful for non-compliance with the procedure set out in Regulation 19. On the same day as his release however, Gunasekera was again arrested, this time under Regulation 18 (1).

(a) Regulation 55 and the invalidity of a Detention Order

Before the Supreme Court, it was contended on behalf of the detainee in Gunasekera that despite the bar of Regulation 55, the Court was competent to issue a writ of habeas corpus, because the detention order had not been made in "good faith". In deciding this plea, the majority in Gunasekera adopted the minority opinion of Fernando C.J. in Janak Hirdaramani that Regulation 55 of the Emergency Regulations 1971 effectively ousted the Supreme Court's jurisdiction to issue a writ of habeas corpus. Of the three Judges who heard the case, both Alles and Thamotheram JJ. upheld Chief Justice Fernando's view that no exceptions can be made to the operation of Regulation 55.

Referring to the opinions of Silva S.P.J. and Samerawickrame J. in Janak Hirdaramani that Regulation 55 did not apply in cases of invalid detention orders, Alles J. observed that:

[i]f the invalidity is confined to the authenticity of the [Detention] Order or to the identity of the detainee I would agree [that Regulation 55 did not apply], because in such a case the Permanent Secretary could not have entertained the opinion that is a condition precedent to the exercise of powers under Regulation 18 (1), but in regard to the issue of good faith, I am in entire agreement with the conclusion of the Chief Justice [in Janak Hirdaramani] that in the case of a Detention Order, which is ex facie valid, it is not a justiciable matter.  

In construing Regulation 55, Alles J. relied upon the intention of the Prime Minister in recommending, to the Governor-General, the enactment of the

58 Reported as Gunasekera v De Fonseka, (1972) 75 N.L.R. 246 (Gunasekera 2). This case is discussed infra.

59 Gunasekera, op. cit., at 336.
Regulation in question. For Alles J., that intention was apparent from the language of the Regulation.

If plain words have to be given their plain meaning the conclusion is irresistible that the Prime Minister in recommending to the Governor-General the enactment of Regulation 55 intended to oust the jurisdiction of the Courts in regard to Section 45 of the Courts Ordinance in respect of Detention Orders issued under Regulation 18 (1).60

Justice Alles categorically ruled out any jurisdiction of the Court with respect to detention orders under Regulation 18 (1), in view of the operation of Emergency Regulation 55.

Regulation 55 ... in my view, ousts the jurisdiction of the Court even on the issue of good faith.61

(b) "Opinion" and "reasonable belief" of the detaining authority

In Gunasekera, Alles J. reviewed the same British war-time detention cases that Fernando C.J. considered in Janak Hirdaramani,62 and compared the requirement of opinion on the part of the Permanent Secretary under Emergency Regulation 18 (1) with the condition of reasonable belief in Regulation 18B of the British Defence (General) Regulations 1939.63 This technical difference between two emergency detention provisions led the learned Judge to hold that:

[the use of the word ‘opinion’ in our Regulation 18 (1) is narrower than the words of the English Regulation. ... [Under

60 Ibid., at 337.
61 Ibid.
63 Regulation 18B of the British Defence (General) Regulations 1939, authorised the Secretary of State to order the detention of any person if he had "reasonable cause to believe any person to be of hostile origin or associations or to have been recently in acts prejudicial to the public safety or the defence of the realm ... ". [Emphasis added] The Defence Regulations were made by the King in Council as provided by the Emergency Powers (Defence) Act, 1939.
the English Regulation] the Home Secretary would [have] to be reasonably satisfied that the detention was necessary.  

For Justice Alles, the absence of any criterion of reasonableness in determining the necessity to order detention under Regulation 18 (1) meant that:

[un]der Regulation 18 (1) even a dishonest or wrong opinion is not justiciable.  

(c) Successive Orders of Detention

It was argued before the Court in Gunasekera that the successive detention orders issued to the detainee revealed malice on the part of the detaining authority. In the leading opinion, Alles J. rejected the contention that successive orders of detention could be a proof of mala fides. In this regard, the learned Judge drew support from several Indian precedents, which in effect had held that successive detention orders were permissible.  

The Court in Gunasekera unanimously accepted the contention on behalf of the State that the Permanent Secretary, in ordering the second detention under Regulation 18 (1), had acted bona fide in the "interests of public security". Justice Alles stated that after the discharge of the detainee under the previous order of detention under Regulation 19:

the Permanent Secretary may well have come to the honest opinion, on the material available to him that it was necessary in the interests of public security that he should be detained forthwith.

64 Gunasekera, op. cit., at 323.

65 Ibid., emphasis added.


[i]t[he mere fact that the detention order is passed during the pendency of habeas corpus proceedings cannot by itself lead to the conclusion that the order is vitiated by malice in law ....

Ibid., at 1407.

This observation in the Indian decision was quoted by Alles J. in Gunasekera, op.cit., at 327.

67 Gunasekera, op.cit., at 326, emphasis added.
Detention under Regulation 19 and the Court’s stand: Gunasekera v De Fonseka

The inviolability of a detention order under Regulation 18 (1) of the Emergency Regulations 1971, upheld by the minority and majority Judges in Janak Hirdaramani and Gunasekera respectively was, however, not extended to detentions under Regulation 19. Regulation 19 empowered a large number of persons to search, detain and arrest without warrant. Included among these persons were police officers, military personnel and prison officers and guards. Search, detention and arrest under Regulation 19 could be made in respect of an individual for any offence under the Emergency Regulations 1971 or, in cases where there was a reasonable ground for suspecting that an individual was involved in committing an offence under any Emergency Regulation.68

(a) Justiciability of a Detention Order under Regulation 19

The nature and impact of Regulation 19 was discussed at some length in Gunasekera v De Fonseka69 (henceforth Gunasekera 2), where the detainee was the same person as the detainee in S. Gunasekera v A. Ratnavale,70 discussed above. The detainee had been ordered to be arrested, under Emergency Regulation 19, by the Superintendent of Police, who later stated by affidavit provided to the Court that he had grounds for suspicion that the applicant had been involved in a conspiracy to overthrow the Government. Gunasekera was, however, arrested and detained not by the Superintendent of the Police, but by an Assistant Superintendent of Police. The Court in Gunasekera 2 unanimously held that the arrest of the detainee was not in accordance with the provisions of Regulation 19, and was therefore unlawful. Chief Justice Fernando, in his leading opinion observed that:

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68 The provisions of Regulation 19 of the Emergency Regulations 1971 are summarized in Gunasekera v De Fonseka, (1972) 75 N.L.R. 246 (Gunasekera 2), at 248-249.

69 (1972) 75 N.L.R. 246.

70 (1973) 76 N.L.R. 316.
[t]he language of Regulation 19 has the plain meaning that ... [one of the instances in which] the Regulation empowers an officer to arrest is where ... [he, himself] reasonably suspects something concerning an individual. On the facts of the present case therefore, Regulation 19, according to its plain meaning, did not authorize the A.S.P. [that is, the Assistant Commissioner of Police] to arrest Gunasekera, because on the averments in the affidavits it was the Superintendent, and not the A.S.P. himself, who suspected that Gunasekera had been concerned in some offence under the Emergency Regulations.71

In his concurring judgment, Silva S.P.J. pointed to the injustice that would ensue if the arresting officer was himself not personally aware of the grounds on which the arrest was being made.

The arresting person will not be able to inform the person arrested of the reasons for the arrest unless he is himself aware of the facts leading up to the arrest which produced in his own mind reasonable grounds for suspicion that the person arrested had committed an offence which would warrant the latter's arrest without warrant.72

On behalf of the State in Gunasekera 2 it was argued that Regulation 19 empowered a police officer not only to arrest a person on reasonable suspicion, but also "to cause a person to be arrested". In rejecting this contention, Fernando C.J. referred to his observations in this regard in Janak Hirdaramani73 and drew attention to the implications for such a construction of Regulation 19.

71 Gunasekera 2, op. cit., at 249.
72 Ibid., at 255. Chief Justice Fernando also held in similar terms.

I do not say that the omission to inform a person of the grounds for his arrest will necessarily render a arrest unlawful. But the existence of the requirement that in a case such as the present one a person must be informed of the grounds for his arrest confirms the plain meaning of the relevant language in Regulation 19, namely that the officer who arrests a person suspected of an offence must himself entertain the suspicion.

Ibid at 251.

In this decision, Fernando C.J. compared the implications of the provisions of Regulations 18 and 19 of the Emergency Regulations 1971:
Regulation 19 confers powers of arrest on literally thousands of members of the Police, Prisons or the Armed Services. But the Deputy Solicitor-General's construction means that, in addition, any person whosoever can lawfully make an arrest if any of the thousands of the members of those Services orders or requests the arrest to be made. I am quite unable to agree that Regulation 19 was enacted with any such drastic intention.

It may be recalled that in Janak Hirdaramani, the Supreme court of Sri Lanka unanimously held that the satisfaction of the Permanent Secretary in ordering detention under Regulation 18 of the Emergency Regulations 1971 was subjective, and was not subject to Court scrutiny. But with regard to the grounds for detention under Regulation 19, which was not an issue in Janak Hirdaramani, Fernando C.J. and Silva S.P.J., in obiter remarks, were quite emphatic in their opinion that the Court should adopt an objective test. This conclusion was reiterated in Gunasekera 2.

The power of detention is conferred by Regulation 18 on a single officer of high rank, who is required by the Constitution to act under the immediate direction of the Prime Minister; whereas the power of arrest under Regulation 19 is conferred on literally thousands of members of the Services who are subject only to some remote control ... [A] Court has no power to inquire into the reasonableness or validity of the opinion which induces the making of a Detention Order under Regulation 18; whereas the language of Regulation 19 clearly predicates that the Courts will apply an objective test in determining whether or not an arrest referred to in that Regulation is valid. Further, Regulation 18 gives to a detainee a statutory right of recourse to the Prime Minister; whereas the right of course implicit in Regulation 19 is to the Courts.

Ibid., at 92.

Gunasekera 2, op. cit., at 252.


Chief Justice Fernando had observed that:

the language of Regulation 19 clearly predicates that the Courts will apply an objective test in determining whether or not an arrest referred to in that Regulation is valid.

Janak Hirdaramani, op. cit., at 92.

Justice Silva had agreed that:

the test in regulation 19 is clearly objective and is justiciable.

Ibid., at 109.
[W]hile there was a difference of opinion [among the Judges, in Janak Hirdaramani] as to the justiciability of a detention order under Regulation 18 of the Emergency Regulations, the full Court expressed the view that the detention of a person under the powers conferred by Regulation 19 was justiciable and that the test to be applied under that Regulation was an objective test. ... [There is ] no reason to deviate from that view in regard to Regulation 19 which we are concerned with in the present application.  

(b) Detention under Regulation 19 and the operation of Regulation 55

In Gunasekera 2, the application to the Court on behalf of detainee for his release was brought under the provisions of section 45 of the Courts Ordinance, 1889. These provisions, which permitted the Court to issue a writ of habeas corpus, were suspended during the Emergency by Regulation 55 of the Emergency Regulations 1971. In deciding Gunasekera 2, the Supreme Court did not discuss the general impact of Regulation 55 on issues arising out of the arrest and detention under Regulation 19. In the earlier case of Janak Hirdaramani,78 however, the remarks of Fernando C.J. and Silva S.P.J. clearly indicated that Regulation 55 did not preclude scrutiny of detention orders under Regulation 19. In Janak Hirdaramani, Fernando C.J. observed that:

Regulation 55 could not have been intended to cover cases of arrests under Regulation 19... .79

The conclusion of Silva S.P.J. in Janak Hirdaramani that Regulation 55 did not operate so as to exclude judicial examination of invalid detention orders under Regulation 18, was partially grounded on his interpretation of Regulation 19. Pointing to the large number of persons who had powers of search, arrest and detention under Regulation 19, the absence of any provisions of representation available to detainees under Regulation 18, and the differences in the provisions between Regulations 18 and 19, Silva S.P.J. held that:

77 Gunasekera 2, op. cit., at 253, per G.P.A. Silva, S.P.J.


79 Ibid., at 93.
[these factors make] the conclusion irresistible that it could never have been the intention of regulation 55 to exclude the jurisdiction of the court to issue a writ of Habeas Corpus in terms of section 45 of the Courts Ordinance in respect of a person who is the victim of an unlawful detention [under Regulation 19].

Post 1978 Judicial Review of Detention

Introduction

Since the adoption of the 1978 Constitution, there have been four Proclamations of Emergency in Sri Lanka. The first of these Proclamations in December 1978, was directed to deal with a natural disaster. Proclamations of Emergency were then made in July, 1980, in October, 1982, and in May, 1983. The 1980 Proclamation was made to deal with widespread trade union "strikes", while the Emergency in 1982 was declared for political reasons in connection with presidential elections. The Proclamation of Emergency in 1983 was declared in the wake of incidents of violence generated by ethnic tensions.

During previous Proclamations of Emergency in Sri Lanka, there were no justiciable constitutional rights which might fetter legislative or executive action. The Constitution of 1978 entrenched a Bill of Rights, but the guaranteed rights have been made subject to restrictions during an Emergency. The constitutional jurisdiction of the Supreme Court to inquire

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80 Ibid., at 109.
82 Proclamation issued on 16 July 1980, published in Government Gazette Extraordinary No 97/6 of same date.
83 Proclamation of Emergency issued on 20 October 1982, published in Government Gazette Extraordinary No 215/7 of same date.
84 The 1983 Emergency was declared on May 18, 1983. See the Asian Recorder, Vol XXIX, No 29, July 16-22, 1983.
into allegations of violation of constitutional rights is, however, not restricted during an Emergency.\textsuperscript{86} The right of a citizen, under the 1978 Constitution, to seek redress for infringement of his/her constitutional right, is also not curtailed during an Emergency by any law such as Regulation 55 of the \textit{Emergency Regulations} 1971.\textsuperscript{87}

The Court's role in reviewing the exercise of emergency powers in derogation of constitutional liberties in the post-1978 period, is examined here in the context of the states of emergency declared in 1982 and 1983.

**Emergency (Miscellaneous Provisions and Powers) Regulations of 1982**

As was the case under the previous constitutional orders, the Proclamation of Emergency in 1982 brought into force Part II of the \textit{Public Security Ordinance}, 1947,\textsuperscript{88} by which the President has the right to promulgate Emergency Regulations.\textsuperscript{89} On the same day that Emergency was proclaimed in 1982, the President of Sri Lanka promulgated the \textit{Emergency (Miscellaneous Provisions and Powers) Regulations}, No 2 of 1982. The same Regulations were renewed as \textit{Emergency (Miscellaneous Provisions and Powers) Regulations}, No 3 of 1982, a month later.\textsuperscript{90}


\textsuperscript{86} Article 126, \textit{ibid}.

\textsuperscript{87} Article 17, \textit{ibid}.

\textsuperscript{88} Ordinance No. XXV of 1947, Legislative Enactments of Ceylon, Cap. 40.


\textsuperscript{90} As pointed out in Chapter IV, the renewal of Emergency Regulations on a monthly basis is required under the provisions of section 2 (2) of the \textit{Public Security Ordinance}, 1947.

Regulation 17 of the *Emergency Regulations* 1982 empowered the Secretary to the Ministry of Defence to pass orders of arrest and preventive detention, if s/he was "of [the] opinion" that the detention was necessary to safeguard "national security", or "public order", or "supplies and services". By an amendment to Regulation 17, the Additional Secretary to the Ministry of Defence was also vested with the same powers.

**The Wijaya Kumaranatunga case**

(a) *Facts and Issues*

In *Wijaya Kumaranatunga v G.V.P. Samarasinghe and Others*, the petitioner invoked the Supreme Court's jurisdiction under Article 126 of the Constitution of Sri Lanka, for a declaration, *inter alia*, that his arrest and continued detention, under Regulation 17 (1) of the *Emergency Regulations* 1982 was unlawful. Two different orders of detention were passed in respect of the petitioner. The first order of detention was made on October 19, 1982 and was in the following terms:

> By virtue of the powers vested in me in terms of Regulation 17 (1) [of the Emergency Regulations 1982] ... I, ... Additional Secretary/Defence is (sic) of the opinion that Wijaya Kumaranatunga ... acted in a manner prejudicial to the national security and to the maintenance of public order and thereby committed offences in contravention of Regulations 23 and 24

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91 Regulation 17 (1) of the *Emergency Regulations* 1982 read:

> Where the secretary to the Ministry of Defence is of opinion with respect to any person that, with a view to preventing such person - (a) from acting in any manner prejudicial to the national security, or to the maintenance of public order, or to the maintenance of essential services; or ...

> It is necessary so to do, the Secretary may make order that such person be taken into custody and detained in custody.

92 Two major issues came up for decision by the Court in *Wijaya Kumaranatunga*. One was the permissibility of preventive detention under the 1978 Constitution, and the other was the legality of arrest and detention of the petitioner. The question as to the whether preventive detention under the Emergency Regulations is permissible, in view of the provisions of Article 13 of the Constitution, has been discussed in Chapter II *supra*. The discussion here centres on the legality of arrest and detention under Emergency Regulation 17.

93 Supreme Court Application No 121 of 1982, reported in *Fundamental Rights, Vol 2, op. cit.*, 347-363, at 348-349.
[of the Emergency Regulations] ... In terms of Regulation 17 (3) I hereby authorize the detention of Wijaya Kumaranatunga ... 

The second order of detention purported to have been made a day later, while the petitioner was in detention, and denied to have been received by him, read:

By virtue of the powers vested in me by paragraph (1) of Regulation 17 ... I, ... Additional Secretary to the Ministry of Defence being of opinion that, with a view to preventing [Wijaya Kumaranatunga] ... from acting in any manner prejudicial to the national security or to the maintenance of public order, it is necessary so to do, do hereby order that such person be taken to custody and detained in custody.

The police had arrested and detained the petitioner under the authority of the first detention order, which was later found to have issued upon a misconception of the scope of the relevant Emergency Regulation. The detention was therefore sought to be legalized by the second order.

The issues that arose for consideration by the Court in Wijaya Kumaranatunga were, the proper scope of the exercise of power of the detaining authority, the justiciability of subjective satisfaction, and the justifiability of relying on alternate bases of authority in case of an invalid exercise of power.

(b) The exercise of the Power of Detention and Rules of Statutory Construction

On behalf of the petitioner in Wijaya Kumaranatunga, it was pointed out that the first detention order referred to the past misconduct of the detainee, whereas Regulation 17 was framed as a precautionary measure, authorizing preventive detention, in anticipation of future prejudicial acts. It was also pointed out that the order authorized detention, instead of ordering the detention. These basic mistakes, it was contended on behalf of the detainee, made the first detention order invalid. The majority of the Supreme Court of

94 Ibid., at 352. Emphasis added.

95 Ibid., at 357. Emphasis added.

96 On this point, see infra under sub-head, Preventive Detention and Criminal Law.
Sri Lanka agreed that the detention order of November 19, 1982 was bad for these mistakes. But the majority reasoned that the arrest and detention of the petitioner did not become invalid because of these mistakes.

Delivering judgement for the majority, Ranasinghe and Soza JJ., Soza J. resorted to applying the technical rules of statutory construction to questions affecting the constitutional right to personal liberty. Justice Soza referred to several reported Indian decisions concerned with the law of contract and the law of income tax. One of those decisions, *Deviprasad Khandelwal and Sons v Union of India*,97 involved the interpretation of certain terms of a contract of sale of scrap iron and steel. Subsequent to the agreement between the government of India and the private purchaser, a dispute arose as to the price of the goods, in relation to which the Controller of Iron and Steel passed an order with reference to the wrong provision of the applicable law. In *Wijaya Kumararatunga*, Soza J. quoted with approval the following observation of the Supreme Court of India in *Deviprasad Khandelwal*:

> It is a well-settled principle of interpretation that as long as an authority has the power to do a thing, it does not matter if he purports to do it by reference to a wrong provision of law. The order can always be justified by reference to the correct provision of law empowering the authority making the order to make such order.98

Another Indian precedent cited by Soza J. in upholding the validity of arrest and detention of the petitioner in *Wijaya Kumararatunga* was *Hazari Mal Kuthiala v Income Tax Officer, Ambala*.99 The controversy in this case was in regard to a reassessment of the income of a business firm by the taxing authority. In the circumstances of the territorial readjustment of taxing zones and the supersession of regional taxation statutes, the relevant taxation authority referred to the old statute while reassessing the income of the petitioner firm. The Supreme Court of India rejected the argument of lack of jurisdiction of the taxing authority, and Soza J. quoted with approval the following observation of the Indian Court.

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98 Ibid., at 173, quoted in *Wijaya Kumararatunga, op. cit.*, at 354.
[T]he exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory.\textsuperscript{100}

Following these precedents, Soza J. observed:

[D]o the arrest and detention [of Wijaya Kumaranatunga] become invalid by the mistake in terms of the [first] ‘detention order’...? I think not.\textsuperscript{101}

(c) "Subjective satisfaction" and successive Orders of Detention

On behalf of the petitioner in \textit{Wijaya Kumaranatunga}, it was contended that the successive orders of detention issued within a day of one another clearly proved \textit{mala fides} on the part of the detaining authority. It was put to the Court by counsel on behalf of the detainee that the detaining authority could not come by any fresh or additional materials within the span of twenty-four hours to justify making the second order of detention. It was argued that the forming of an \textit{opinion} by the detaining authority, which was a condition precedent to ordering a detention under Emergency Regulation 17 (1), could not have come about without new compelling grounds for the detention.

For the majority of the Court, however, there was no inherent contradiction between the first and second detention orders. The majority proceeded on the grounds that the first detention order, although mistaken, was actually directed at preventive detention under Emergency Regulation 17, and that the same considerations prompted both the first and second detention orders. \textit{Honesty of opinion} of the detaining authority or the \textit{adequacy of materials} on which the detention orders were founded were immaterial for the majority of the Court. Justice Soza explained that:

\textit{when the [Additional Defence Secretary] made the ... [first detention order,] he made express reference to Regulation 17 (1) of the Emergency Regulations showing that he really wanted}

\textsuperscript{100} \textit{Ibid.}, at 202, quoted in \textit{Wijaya Kumaranatunga, op. cit.}, at 353. The Supreme Court of Ceylon, in a revenue adjudication, \textit{Peiris v The Commissioner of Inland Revenue}, (1963) 65 N.L.R. 457, based its decision on the holding in \textit{Hazari Mal Kuthiala}.

\textsuperscript{101} \textit{Wijaya Kumaranatutunga, op. cit.}, at 353.
to make an order of preventive detention. He did not, however, achieve this object. But this has very little bearing on the honesty of his opinion or the adequacy of the material on which he formed it. There is nothing before us to say that the material on which he alleged past misconduct by the ... [detainee] in the [first detention] order ... was insufficient also to found the opinion he declared in [the second detention] order... 102

With regard to the justification of the opinion of the authority to preventively detain a person, Soza J. observed that:

[t]he question of whether an order of preventive detention should be made or not is a matter for the subjective decision of the authority competent to make it. It cannot be subjected to objective tests in a Court of law.103

In this regard, Soza J. quoted with approval Fernando C.J.'s opinion in Janak Hirdaramani v Ratnavale104 that even a mistaken opinion on the part of the detaining authority would not invalidate a detention order.105 The plea of mala fide intention of the detention authority, taken on behalf of the petitioner in Wijaya Kumaranatunga, although accepted by Soza J. to be the "only justiciable issue", failed because there was no "positive proof of mala fides".

(d) Preventive Detention and Criminal Law

Having held that the first detention order was invalid, Soza J. had to reconcile the validity of the second detention order with the initial arrest and detention of the petitioner under the first order. In this regard, the learned Judge considered whether the validity of the arrest and detention of the petitioner by

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102 Ibid., at 358, emphasis added.
103 Ibid.
105 In Janak Hirdaramani, Chief Justice Fernando had observed that:

even a mistaken opinion will not invalidate a detention order, and want of good faith can be established only by positive proof that the Permanent Secretary did not indeed form that opinion.

Ibid., at 77, quoted by Soza J. in Wijaya Kumaranatunga, at 358.
the police could be justified under Regulation 18 (1) of the *Emergency Regulations* 1982. Under Regulation 18 (1), any police officer could arrest any person on "reasonable grounds" for suspecting the person to be engaged in offences under the Emergency Regulations. The police officer who arrested the petitioner had, however, acted on order of his superior officer, in terms of the first order of detention. The arresting officer had thus not been personally satisfied about the necessity of the arrest, which was a condition precedent for arrest under Regulation 18 (1).\(^6\) Justice Soza therefore agreed that the initial arrest and detention of the petitioner "[could not] be justified under Regulation 18 (1)."\(^7\) For the learned Judge, however:

> [s]uch an arrest without a warrant and detention [for] up to twenty hours ... [could] be justified under Sections 23 and 37 of the Code of Criminal Procedure Act No 15 of 1979.\(^8\)

Justice Soza's reasoning in this regard was strengthened by the fact that some of the offences specified in Regulations 23 and 24 of the *Emergency Regulations* 1982, which were mentioned as grounds in the first detention order of the Additional Defence Secretary under Regulation 17 (1), were also "offences" under the criminal law. In respect of those criminal offences, arrest without a warrant was justifiable under the *Code of Criminal Procedure*, 1979.\(^9\) The conclusion of Soza J. was, therefore, that:

> [the petitioner was arrested] by a Police Officer with reasons given and despite the fact that he was acting under the authority of the [first] 'detention order' [of the Additional Defence Secretary, acting under Emergency Regulation 17,]his action can be justified under the powers vested in him under the Code of Criminal Procedure Act. Such an arrest is in accord with the provisions of Article 13 (1) of the Constitution.\(^10\)

\(^6\) The provisions of Regulation 18 of the *Emergency Regulations* 1982 were similar to those of Regulation 19 of the *Emergency Regulations* 1971. A discussion of the powers available under the 1971 Emergency Regulation 19 is found in *Gunasekera v De Fonseka*, (1972) 75 N.L.R. 246, discussed above.

\(^7\) *Wijaya Kumaratunga*, op. cit., at 354.

\(^8\) *Ibid.*


The second detention order by the Additional Defence Secretary, under Regulation 17 (1), which rectified the mistakes of the first order, came into operation the next day. Justice Soza calculated that there was a lapse of some ten hours since the petitioner was arrested by the combined operation of the first detention order and the provisions of the *Code of Criminal Procedure*, and the passing of the second order. Such a delay was acceptable to Soza J.

In the circumstances under which the petitioner was first arrested and detained and the preliminaries that would have had to be attended to like recording of statements a ten hour detention accountable under the Code of Criminal Procedure Act cannot be said to be longer than reasonable.\(^\text{111}\)

\section*{(e) Service of Detention Order}

The petitioner in *Wijaya Kumaranatunga* denied that the new detention order was ever served on him, and the respondents failed to produce the original order in Court. Justice Soza felt it "reasonable to infer that a detention order ... [of which the copy produced in Court was the office copy] was in fact made".\(^\text{112}\) On behalf of the majority, Soza J. accepted the affidavit of the police officer in charge, that the fact of the new detention order was communicated to the detainee. The mode of communication noted by the Court was a conversation of the police officer with the detainee, during which the petitioner was appraised that a new detention order was made against him.\(^\text{113}\) Upon examination of the relevant provisions of the *Emergency Regulations* 1982, Soza J. was unable to locate any provision relating to the service of the detention order on the detainee.

Nowhere is service of the detention order made imperative by any rule of law. The order really serves as authority for the person putting it into effect.\(^\text{114}\)


\(^{112}\) *Ibid.*

\(^{113}\) This was recorded in the notes of the police officer, *ibid.*, at 356.

\(^{114}\) *Wijaya Kumaranatunga*, op. cit., at 360. Justice Soza compared the procedure for arrest and detention under the Emergency Regulations with the relevant provisions for arrest with warrant under the *Code of Criminal Procedure*, 1979, and observed that:
(f) Chief Justice Samarakoon's dissent

Chief Justice Samarakoon vigourously dissented from the conclusions reached by the majority in *Wijaya Kumaranatunga*. For Samarakoon C.J., since the first detention order was bad in law, "the arrest and detention of the petitioner ... was wholly illegal". Chief Justice Samarakoon's strong exception to the arrest and detention of the petitioner was based on three grounds. There was firstly, according to the Chief Justice, no power conferred on the Additional Defence Secretary to order detention under Emergency Regulation 17 for past offences, as was mentioned in the first detention order. Secondly, with respect to the recourse to the criminal law provisions of arrest and detention sanctioned by the majority as the basis for justifying the detention of the petitioner under Regulation 17, Samarakoon C.J. found that:

[the Additional Defence Secretary] had no power to make an order of arrest and detention under any other law - or even to 'authorize', such arrest and detention. He cannot seek refuge under the Criminal Procedure Code.

The third ground of Samarakoon C.J. for holding the detention unlawful was the illegality of the arrest and detention of the applicant by the police. This was because, "no police officer ... [had] been given ... [the] power of preventive arrest and detention under the Criminal Procedure Code". Chief Justice

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115 *Wijaya Kumaranatunga, op. cit.*, at 362.

116 Chief Justice Samarakoon was implicitly referring to the very concept of preventive detention which was a precautionary measure and not an indictment for the past activities of a person. Regulation 17 of the *Emergency Regulations 1982* provided a mechanism for enabling preventive detention.

117 *Wijaya Kumaranatunga, op. cit.*, at 362.

Samarakoon censured the repeated efforts of the state authorities to keep the applicant in detention and emphasized the overriding importance of the constitutional right to personal liberty, guaranteed by Article 13 of the Constitution of Sri Lanka.

When provisions affecting the liberty of the subject are in question inroads into them must be strictly scrutinized and construed. What is lost on the roundabouts cannot always be made up on the swings.\(^{119}\)

**The Article 14 cases**

It appears that about the same time as *Wijaya Kumaranatunga* was decided, the Supreme Court of Sri Lanka began attempting to assert some degree of control over executive emergency measures. The extent to which such assertion of control facilitated the operation of constitutional rights, if at all, is examined below. The three decisions to be discussed in this regard were not concerned with the constitutional right to personal liberty guaranteed under Article 13 of the 1978 Constitution of Sri Lanka, but with the freedom of speech and expression under Article 14 of the Constitution. In these cases, a question arose concerning the nature of the *satisfaction* of the competent government authority in ordering the closure of newspapers under the provisions of the *Emergency Regulations* 1982. This in turn raised the issue of the justiciability of the *satisfaction* of executive decisions during an Emergency, and is similar to such issues in respect of the right to personal liberty. A discussion of these decisions will therefore facilitate the proper portrayal of the Sri Lankan Court's jurisprudence.

*(a) Subjective & Objective Satisfaction: The Siriwardena case*

Regulation 14 (3) of the *Emergency Regulation* 1982 provided for the closure of newspapers and the confiscation of printing presses in the interests of "national security", "public order" and similar other considerations.\(^{120}\) Empowered by...

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\(^{119}\) *Ibid.*, per Samarakoon C.J.

\(^{120}\) Regulation 14 (3) of the *Emergency (Miscellaneous Provisions and Powers) Regulations*, No 3 of 1982 was in the following terms.
this Regulation, the Secretary to the Ministry of State, the first respondent in
*B. A. Siriwardena & Others v D.J.F. Liyanage and Others*,
ordered the closure of the petitioner's newspaper and printing press. By the same
order, the Inspector General of Police was authorized to take possession of the
printing press which was publishing the newspaper. By an application under
Article 126 of the Constitution, the petitioners complained to the Supreme
Court of the violation, by the impugned order, of their constitutional rights to
the freedom of speech and expression under Article 14 (1) of the
Constitution.

If a competent authority is of opinion that there is or has been or is likely to be
in any newspaper, ... which is, in his opinion, calculated to be prejudicial to the
interests of national security or the preservation of public order or the
maintenance of the supplies and services essential to the life of the community
or matter inciting or encouraging persons to mutiny, riot or civil commotion,
he may -

(a) by order direct that no person shall print, publish or distribute ... such
newspaper for such period as may be specified in the order, ... and authorize
any person specified ... [in the order] to take ... steps ... [for] taking possession
of any printing presses ... for securing compliance with the order; or

(b) take such [other] measures ... [as provided by this Regulation], in respect of
such newspaper.

121 Supreme Court Application No 120 of 1982, reported in *Fundamental Rights, Vol 2, op. cit.,
310-346.

122 The order of the Secretary to the Ministry of State dated 20.11.1982 is reproduced in
*Siriwardena, op. cit.*

There were two orders dated 2.11.1982 and 20.11.1982. The Court dealt with the second of these
two orders, which was operative at the time when the applications challenging the actions were
filed in Court.

123 The petitioners also contended the right to the freedom of trade, profession and business
guaranteed by Article 14 (1) (g) was violated by the Order. Articles 14 (1) (a) and (g) of the
Constitution of Sri Lanka, 1978, provides:

Every citizen is entitled to -

(a) the freedom of speech and expression including publication;

(g) the freedom to engage by himself or in association with others in any lawful
occupation, profession, trade, business or enterprise;
The petitioners' newspaper and printing press were closed down about a month after the presidential elections in 1982. Soon after those elections, it was declared by the President that instead of parliamentary elections, which were due, there would be Referendum to extend the term of the sitting Parliament. The petitioners maintained that their newspaper and press was closed down because during the presidential elections they had supported an opposition presidential candidate. They had moreover strongly campaigned against the proposed Referendum. It was alleged by the petitioners that the order of the Secretary to the Ministry of State under Emergency Regulation 14 (3) was unlawful and mala fide for these reasons.124

On behalf of the State in Siriwardena, it was contended that "the publications [of the petitioners] were ... calculated to be prejudicial to the preservation of public order and calculated also to incite persons to riot or civil commotion or to breaches of the peace. Apart from directly inciting people to violence the [published] articles could have provoked the supporters of the ruling party which could lead to public disorder..."125. After noting the "change in the attitude of the [English] Courts" with regard to discretionary powers,126 Wimlaratne J., giving the leading opinion of the majority in Siriwardena, summarized his views with regard to nature of the discretionary power available under Emergency Regulation 14 (3).

Emergency Regulation 14 (3) is framed not entirely in subjective terms. The competent authority is empowered to make an order under that Regulation only if he is satisfied of the existence of certain facts. The Court can inquire whether it was reasonable for the authority to be satisfied of the existence of those facts.127

124 The allegations of mala fides by the petitioners are noted in the judgement of Wimlaratne J. in Siriwardena, op. cit., at 314-315.

125 Siriwardena, op. cit., at 318.


127 Siriwardena, op. cit., at 330.

Of the five Judges of the Supreme Court who decided Siriwardena, Rodrigo J. held that:

orders under Emergency Regulations ... [were] not reviewable by Courts ... .
Justice Wimlaratne held that this approach was justified in situations like those presented in the case under discussion.

[W]here the opinion of the competent authority [to totally prohibit publications] is one that is formed on something that has already been published, then the opinion is in my view, not a purely subjective opinion. The opinion can be formed only if ... [the authority] is satisfied of the existence of certain facts, namely, the existence of publications which are calculated to be prejudicial to the interests of national security or the preservation of public order etc. ... [I]n such a situation the Court can inquire into the circumstances, not in order to substitute its own opinion for that of the [competent] authority, but in order to ascertain whether the authority was reasonable in ... [its] opinion that the publications were calculated to be prejudicial. 128

But, Wimlaratne J. continued, this objective test for the exercise of restrictive measures during an Emergency was not applicable where:

[t]he opinion [of the competent authority to take action under Emergency Regulation 14 (3) is based upon] a publication [that] is likely to be ... prejudicial ... [In such a case] the opinion is a subjective opinion. 129

Justice Wimlaratne said also that the objective test was inapplicable in cases of preventive detention under the Emergency Regulations.

[A detention order under Emergency Regulation 17] is one made to prevent a person from acting [in a prejudicial manner] and is one made merely on the opinion of the ... [detaining

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Ibid., at 346.

For the learned Judge this was because:

[t]he constitutional machinery ... [was] not geared to meet ... [challenges to orders under Emergency Regulations] during an emergency when state officers ought to be more usefully left alone to deal with urgent matters needing prompt attention and decisions ....

Ibid.

128 Ibid., at 329, per Wimlaratne J.
129 Ibid.
CHAPTER VII

[...] that unless ... [the person] is so detained he would act in that manner.130

Having applied the objective test to a consideration of the materials upon which the Secretary to the Ministry of State ordered the closure of the petitioners' newspaper and printing press in Siriwardena, the Court upheld the action of the State authority. Justice Wimlaratne remarked that:

[s]ome of ... [the publications of the petitioners] could have incited persons to breaches of the ... [peace]. Some others were highly defamatory, while others are scurrilous and in extremely bad language. Taking also into account the history of escalating post-election violence in this country, and the mounting tension prior to the Referendum I am of the view that the decision of the Competent Authority was not unreasonable, for the publications taken as a whole were certainly calculated to be prejudicial of public order.131

(b) "Omnia praesumuntur rite et solemniter esse acta": The Janatha Finance case

The observations of Wimlaratne J. in Siriwardena were generally upheld by the Supreme Court in Janatha Finance and Investments v D.J.F.D. Liyanage.132 Acting under Regulation 14 (7) of the Emergency Regulations 1982,133 the Secretary to the Ministry of State ordered the closure of the printing press of the petitioner, Janatha Finance.134 The Chairman of the Board of Directors of the petitioner was Dr Neville Fernando, who had until recently belonged to the ruling party and had been a Member of the Sri Lankan Parliament. Upon expulsion from the ruling party and resigning from Parliament, Dr Fernando joined an opposition party.

130 Ibid.
131 Ibid., at 332.
133 The text of Regulation 14 (7) is given in the judgement of the Court in Janatha Finance, op. cit., at 381.
134 There were two such orders, of which one was impugned in this case. The text of this order is given in the judgement of the Court in Janatha Finance, op. cit., at 385-386.
The petitioner alleged that the order of closure of their press was directed "to victimise, punish and/or to take revenge on Dr Fernando for actively campaigning against ... [the ruling government] ... ". The order of closure was further said to be directed "to deter, discourage and prevent Dr Fernando from campaigning against the Government in the ... [forthcoming] Referendum, and also to cause financial loss and damage to ... [him] ... ". Consequently, according to the petitioner, the relevant authority, in ordering the closure of the press, "acted wrongfully, unlawfully and maliciously ... ".

In affidavits before the Court, the Secretary to the Ministry of State claimed that the order of closure of the petitioners' printing press was passed on the basis of "credible information". The agencies who had supplied these information to the Secretary were the police and the civil and military intelligence authorities. The information, according to the Secretary, revealed that:

pamphlets and other material printed at the ... [petitioners' press] prior to and after the Presidential election [of] 1982 were calculated to cause racial disharmony between the Sinhala and Tamil communities and also to incite the masses to resort to violence against the state ... .

After a lengthy review of recent English precedents and text-books, Ranasinghe J. delivering the opinion of the Court in *Janatha Finance* agreed that:

all discretion, even where there is a subjective element in it, must be exercised reasonably, and in good faith and upon proper grounds.

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135 *Janatha Finance, op. cit.*, at 377.


140 Some of the decisions cited by the Court were common to those examined by the Court in *Siriwardena, op. cit.*

141 *Janatha Finance, op. cit.*, at 389.
However, for the learned Judge:

there are situations, in which such words are used, where it is clear both from the subjective language and the context that the discretion granted is exceptionally wide. Such instances are most common in powers granted to meet emergency situations.\textsuperscript{142}

In addition, Ranasinghe J. also noted the common law doctrine of \textit{omnia praesumuntur rite et solemniter esse acta}, by which all acts are presumed to have been done rightly and regularly. In this regard, Ranasinghe J. observed that:

\[\text{[i]n considering the facts [of this case,] it has also to be borne in mind that the respondents are entitled to call in aid the maxim \textit{omnia praesumuntur rite esse acta} and that where an Order regular on the face of it - such as ... [the order of closure of the petitioners' press] - is produced the burden is on the petitioner to rebut the presumption.}\textsuperscript{143}

Upon considering the facts of the case and noting the statements in the affidavits on behalf of the respondents, Ranasinghe J. upheld the order of closure of the petitioners' printing press. Referring to the materials which were made available to the Secretary to the Ministry of State, on the basis of which the order was made, Ranasinghe J. noted that:

\[\text{[i]t has to be remembered that the material placed before the ... [the Secretary] was so placed before him by senior responsible officers, officers whose sense of responsibility and \textit{bona fides}, the ... [the Secretary] would have no reason to doubt.}\textsuperscript{144}

On the basis of these materials:

\[\text{[the Secretary] cannot be said to have done what no reasonable person would have ever done in such circumstances.}\textsuperscript{145}

\textsuperscript{142} \textit{Ibid.}

\textsuperscript{143} \textit{Janatha Finance, op. cit.}, at 390.

\textsuperscript{144} \textit{Ibid.}, at 396.

\textsuperscript{145} \textit{Ibid.}
Regarding charges of *mala fides* on the part of the Secretary, the Court found that:

> [t]he good faith of the ... [the Secretary], though attacked on the grounds of political vengeance, improper motives, failure to exercise his discretion, acting on the dictation of the President, and partiality has not been shaken.\textsuperscript{146}

(c) *Latitude of executive emergency decision-making*

The last of the three decisions concerning the freedom of the press in which the Sri Lankan Supreme Court discussed the issue of *reasonableness* of the subjective decisions of State authorities during an Emergency is *K. Visvalingam & Others v D.J.F. Liyanage and Others*.\textsuperscript{147} In *Visvalingam*, powers under Emergency Regulation 14 (3) of the *Emergency (Miscellaneous Provisions and Powers) Regulations*, Numbers 1, 2 and 3 of 1983\textsuperscript{148} (henceforth *Emergency Regulations 1983*) were invoked, following the Proclamation of Emergency on May 18, 1983, to close down the newspaper, "Saturday Review".\textsuperscript{149} One of the express objects of this publication "was to highlight the grievances of the

\textsuperscript{146} Ibid.

\textsuperscript{147} Supreme Court Application Numbers 47, 53 and 61 of 1983, reported in *Fundamental Rights, Vol 2*, op. cit., 529-601.

\textsuperscript{148} Regulation 14 (3) of the *Emergency Regulations 1983* was identical to Regulation 14 (3) of the *Emergency Regulations 1982*. It was phrased in the following terms:

> If a competent authority is of opinion that there is or has been or is likely to be in any newspaper, ... which is, in his opinion, calculated to be prejudicial to the interests of national security or the preservation of public order or the maintenance of the supplies and services essential to the life of the community or matter inciting or encouraging persons to mutiny, riot or civil commotion, he may -

> (a) by order direct that no person shall print, publish or distribute ... such newspaper for such period as may be specified in the order, ... and authorize any person specified ... [in the order] to take ... steps ... [for] taking possession of any printing presses ... for securing compliance with the order; or

> (b) take such [other] measures ... [as provided by this Regulation], in respect of such newspaper.

\textsuperscript{149} Details of the Order are given in the judgements of Wanasundera J. and Soza J. in *Visvalingam, op. cit.*, at 533-534 and 552-553 respectively.
[minority ethnic] Tamil [community in Sri Lanka] by laying bare the atrocities and excesses of the police and the armed forces [towards members of that community]". The applicants in *Visvalingam* were the shareholders and directors of the newspaper company as well as the company itself. Before the Supreme Court, the petitioners in *Visvalingam* alleged the infringement of their constitutional rights to equality and freedom of expression by the order of closure of their newspaper.

Although there was some controversy among the Judges who decided *Visvalingam* as to the standing of the petitioner-company, as distinct from the shareholder petitioners, the allegations of infringement of constitutional rights by the petitioners were unanimously rejected by the Supreme Court. In his concurring opinion in *Visvalingam*, Soza J. examined the meaning of the

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150 *Visvalingam*, op. cit., at 549.
152 Article 14, ibid.
153 This controversy was generated by two previous decisions of the Supreme Court, *Dr S. Neville A. Fernando and Others v D.J.F.D. Liyanage and Others*, S.C. Application No. 116 of 1982, and *Dr S. Neville A. Fernando and Others v D.J.F.D. Liyanage & Others*, S.C. Application No. 134 of 1982, reported in *Fundamental Rights*, Vol 2, op. cit., at 300-309, and 409-417 respectively. The same questions of law were involved in these two cases, the second case being concerned with a plea of *per incuriam* in the previous decision. With regard to the closure of printing press, in these cases, by order under Emergency Regulation, the question arose whether the action encroached upon the constitutional rights of the shareholders of the company as well as the company itself.

The petitioners in the *Fernando* cases had complained to the Court that the order of closure of the press denied to the petitioner-company the right to the freedom of the press guaranteed under Article 14 (a) of the Constitution of Sri Lanka. The petitioner-shareholders also alleged that their constitutional right to engage in trade, profession or business was infringed by the closure of the press. The Court found that the rights under Article 14 of the Constitution of Sri Lanka were available only to "citizens", so that the petitioner-company cannot complain of violation of any constitutional right under Article 14. With regard to the allegation of the infringement of the constitutional rights of the shareholders, the Court was of the opinion that there has been no infringement since they had not suffered any "distinct and separate injury".

The decisions in two *Fernando* cases above, proceeded on the assumption that the company was an entity, distinct from its shareholders. In *Visvalingam*, the Court was concerned with similar questions of law as to the respective standing of the shareholder-petitioners and the petitioner-company publishing the "Saturday Review". Wanasundera and Ratwatte JJ. denied that the company publishing the newspaper had a personality distinct from that of its shareholders. The majority of the Court in *Visvalingam*, Soza, Ranasinghe and Rodrigo JJ., however, upheld the holdings in the two *Fernando* cases.
phrase "if it appears to the Secretary of State", which occurred in Regulation 14 (3) of the *Emergency Regulations* 1983 and observed:

[this phrase,] in my opinion, does not mean that the Minister's decision is put beyond challenge.\(^{154}\)

According to the learned Judge, the scope of the challenge to a Minister's decision would depend on the subject-matter of the Minister's action. In situations like those presented in *Visvalingam*:

if the Minister does not act in good faith, or ... acts on extraneous consideration which ought not to influence him, or if he plainly misdirects himself if fact or in law, it may well be that a court would interfere ... [B]ut when ... [the Minister] *honestly* takes a view ... which could reasonably be entertained, then his decision is not to be set aside simply because ... someone [else] thinks that his view was wrong.\(^{155}\)

Since *Visvalingam* was concerned with executive decision during an Emergency, Soza J. reiterated that:

emergency procedure[s] ... [would have] to be set in motion quickly, when there ... [would be] no time for minute analysis or of law. The whole process would be ... [ineffectual] if the Minister’s decision was afterwards to be ... [scrutinized] word by word, letter by letter, to see if he has in any way misdirected himself.\(^{156}\)

Wanasundera J. also spoke of this attitude of the Court during an Emergency.

In dealing with an Emergency situation, courts have always been prepared to give the Executive sufficient leeway in making decisions affecting the safety of the people and the security of the country. These decisions have to be made rapidly and in the light of information then available and under the constraint of available resources.\(^{157}\)

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\(^{154}\) *Visvalingam, op. cit.*, at 586.


\(^{156}\) *Ibid.*

\(^{157}\) *Ibid.*, at 550, per Wanasundera J.
The Edirisuriya case

The attitude to judicial scrutiny of the reasonableness of emergency executive action reflected in the cases just discussed was applied to preventive detention action in *Edirisuriya v Navaratnam and Others*. It will be remembered that in *Wijaya Kumaranatunga v Samarasinghe*, it was held that preventive detention was a *subjective* decision of the competent authority. In *B.A. Siriwardena and Others v D.J.F.Liyange and Others*, it was indicated that although an *objective* evaluation of certain emergency action could be made by the Court, a similar approach will be inapplicable in cases of emergency preventive detention. The decision of the Sri Lankan Supreme Court in *Edirisuriya* is, however, different from the earlier stand on the Court on preventive detention.

The petitioner in *Edirisuriya*, a lawyer and former Member of Parliament, was arrested and detained by the Deputy Inspector General of Police. Prior to his arrest, the petitioner's house was searched and the petitioner was taken away to the police station on the basis that he was wanted by the Deputy Inspector General of Police. A day later, while the petitioner was still in detention at the police station, the Deputy Inspector General of Police, acting under the provisions of Regulation 19 (2) of the *Emergency (Miscellaneous Provisions and Powers) Regulations*, No. 7 of 1984 (henceforth *Emergency Regulations 1984*), authorized the officer-in-charge of the police station to detain the petitioner.

Emergency Regulation 19 (2) of the *Emergency Regulations 1984* did not, as such, provide for any powers of detention. Regulation 19 (2) merely provided that:

*any person detained in pursuance of the provisions of Regulation 18 [of the *Emergency Regulations 1984*] in a place*

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158 [1985] 1 Sri L.R. 100.

159 Supreme Court Application 121 of 1981, reported in *Fundamental Rights, Vol 2, op. cit.*, at 347-363.

160 Supreme Court Application No 120 of 1982, reported in *Fundamental Rights, Vol 2, op. cit.*, at 310-346.

161 The order of detention is reproduced in *Edirisuriya, op. cit.*, at 110.
authorized by the Inspector-General of Police may be so detained for a period not exceeding ninety days...  

It is clear that in order for the provisions of Regulation 19 (2) to be applied, there had to be a valid detention under Regulation 18 of the Emergency Regulations 1984. Under Regulation 18 (1), any police officer was empowered:

[to] search, detain for purposes of such search or arrest without warrant any person ... whom he has reasonable ground for suspecting to be concerned in or to be committing or to have committed an offence under any emergency regulation ...

The petitioner in Edirisuriya contended that his constitutional right, not to be arrested "except according to procedure established by law" under Article 13 (1) of the Constitution, was infringed by the illegal order of detention under Emergency Regulation 19 (2). It was pointed out to the Court that the condition precedent to the order of detention under Regulation 19 (2), namely an order of detention under Regulation 18 (1), was not fulfilled. The order of detention under Regulation 19 (2) could not thus, according to the detainee, have been legally made. In delivering the leading opinion of Court in Edirisuriya, Ranasinghe J. summed up the position correctly.

A person who can ... be detained in ... an authorized place [as provided by Emergency Regulation 19 (2)] is a person who has either been detained for purposes of search or has been arrested without a warrant under [Emergency] Regulation 18. The pre-requisites of a detention extending up to ninety days empowered by paragraph (2) of Regulation 19 are: a person who has already been taken in for detention under paragraph (1) of Regulation 18, either for the purposes of search or by way of arrest without a warrant, and a place authorized for such detention by the Inspector-General of Police (or a Deputy Inspector-General of Police).

Since Emergency Regulation 18 (1) empowered any police officer to arrest and detain any person, the Deputy Inspector General of Police in this case

162 Regulation 19 (2) of the Emergency Regulations 1984 is quoted by Ranasinghe J. in Edirisuriya, at 110-111.

163 Regulation 18 (1) of the Emergency Regulations 1984 is quoted by Ranasinghe J. in Edirisuriya, at 110.

164 Edirisuriya, op. cit., at 111.
could have first ordered the detention of petitioner under that power and then
made the order under Regulation 19 (2). That, however, was not done.
Notwithstanding this basic flaw, the Supreme Court held the detention valid
on the reasoning that the Deputy Inspector General of Police had the power to
detain under Regulation 18 (1). The issue was therefore similar to that which
arose in Wijaya Kumaranatunga, where the Court had applied rules of
interpretation derived from contract and revenue laws to decide questions of
the constitutional right to personal liberty. In Edirisuriya, Ranasinghe J.
referred to these holdings to conclude that:

as long as an authority has the power to do a thing, it does not
matter if he purports to do it by reference to a wrong provision
of law ... [T]he order can always be justified by reference to the
correct provision of law empowering the authority making the
order to make such order ... .

Although the detention in Edirisuriya was not in pursuance of an order under
Regulation 18 of the Emergency Regulations 1984, Ranasinghe J. dwelt at some
length on the judicial approach to detentions under this Regulation. As
already noted, there was similarity in regard to certain aspects of emergency
detention, in the respective approaches of the majority in Wijaya
Kumaranatunga and Ranasinghe J.'s opinion in Edirisuriya. However,
Ranasinghe J., who wrote for the majority in Wijaya Kumaranatunga, appears
to have taken a different approach in Edirisuriya with regard to the
justiciability of executive orders of detention. In Wijaya Kumaranatunga, Soza J.,
with whom Ranasinghe J. concurred, had observed that an order of
preventive detention could not be "subjected to objective tests in a Court of
law". In Edirisuriya however, Ranasinghe J. proposed an objective test for
determining the validity of the exercise of the power of preventive detention.
With regard to the powers of detention available under Emergency Regulation
18 (1), the learned Judge observed that:

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165 Wijaya Kumaranatunga v G.V.P. Samarasinghe and Others, Supreme Court Application No

166 Wijaya Kumaranatunga, op. cit., at 353.

167 Edirisuriya, op. cit., at 114. In reaching this conclusion, Ranasinghe J. also referred to some
of the Indian precedents cited by Soza J. in Wijaya Kumaranatunga.

168 Wijaya Kumaranatunga op. cit., at 358.
[Emergency Regulation 18 (1)] does not confer a power to arrest [or detain] arbitrarily. It is a power to be exercised only upon the existence of the circumstances expressly stated therein. When the exercise of such powers is challenged it is open to the Court to go into it and see whether or not the impugned power has been exercised as required by law in circumstances under which alone such power could have been exercised.\(^{169}\)

The justification for the intervention of the Court in this regard was, however, apologetic. The Court’s role was seen by Ranasinghe J. as an intrusio.

Once the existence of facts and circumstances, upon which a reasonable man could have ... acted [in a manner similar to the detaining authority] is established to the satisfaction of the Court, the ‘judicial intrusion’ should then come to an end. ... It is only if the facts and circumstances, upon which ... [a detention order under Regulation 18 (1)] is sought to be justified by those who have exercised the powers in question, are such that it is clear that no reasonable man could have ... done what has been done, that the court can justifiably intervene.\(^{170}\)

The objective approach, in deciding the validity of preventive detention under Regulation 18 (1), suggested by Ranasinghe J. was, however, not applied to the patently unjustified detention of the petitioner in Edirisuriya. In the absence of proper application of the new premises in the jurisprudence of emergency and preventive detention, articulated by Ranasinghe J., \textit{albeit} in the form of \textit{obiter} remarks, the utility of such an approach is not apparent. Also, as has been already seen, Ranasinghe J. also resorted to applying the incongruous rules of commercial law to uphold the invalid detention of the petitioner in Edirisuriya, despite upholding the justiciability of a detention on grounds of reasonableness.

In addition to such inconsistencies, Ranasinghe J. overruled the application of the safeguards to arrest and detention provided by the Sri Lankan \textit{Code of Criminal Procedure, 1979},\(^{171}\) in the case of the detainee in Edirisuriya.\(^{172}\)

\(^{169}\) \textit{Edirisuriya, op. cit.}, at 112. Emphasis added.

\(^{170}\) \textit{Ibid.}, per Ranasinghe J. Emphasis added.


\(^{172}\) Sections 36, 37 and 38 of the \textit{Code of Criminal Procedure, 1979}, provided for the following:
Under Emergency Regulation 19 (1) of the *Emergency Regulations* 1984, the provisions of the *Code of Criminal Procedure*, relating to magisterial authority for detention beyond twenty-four hours, and for detention without warrant, were inapplicable to a person arrested and detained under Regulation 18 (1). As has been pointed out earlier, there was, in *Edirisuriya*, no order of detention under Regulation 18 (1). Ranasinghe J. nevertheless discussed the non-application of these rules of the *Code of Criminal Procedure*, and then concluded that even if those rules applied, the provisions of the *Code* would not be attracted in any case. This conclusion was predicated on a technical interpretation of the date of the detention order served on the petitioner.\(^\text{173}\) The date of the detention order was July 21, which according to Ranasinghe J. meant the midnight of July 20-21. Since the applicant was arrested in the afternoon of July 20, it was less than twenty-four hours from his initial arrest until the service of his order of detention under Regulation 19 (2), which although invalid, was *deemed* to be valid by the learned Judge.

The discordance between Justice Ranasinghe's stand in upholding the justiciability of a detention order under Emergency Regulation 18 (1) and his actual grounds for decision in *Edirisuriya* is also revealed in another important aspect. Under Article 126 of the Constitution of Sri Lanka, 1978, an application alleging infringement or alleged infringement of a constitutional right is to filed in Court within a month of the cause of action.\(^\text{174}\) Although

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1. An arrested person was to be sent before a Magistrate without unnecessary delay;
2. An arrested person was not to be detained in any event for a period longer than 24 hours; and
3. Arrests without warrant were to be reported to a Magistrate.

These sections of *Code* are reproduced in full in the judgement of Wanasundera J. in *Edirisuriya*, op. cit., at 119.


\(^\text{174}\) Article 126, Constitution of Sri Lanka 1978:

(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive and administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

(2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by
the Sri Lankan Supreme Court has generally held the one month time-limit in Article 126 as mandatory, yet in some decisions it was observed that the Court, in its discretion, might entertain applications which were out the time.¹⁷⁵ In *Edirisuriya*, Ranasinghe J. noted that in *Hewakuruppa*¹⁷⁶ and *Vadivel Mahenthiran*,¹⁷⁷ the Supreme Court had expressed its willingness to waive the time-limit of one month provided by Article 126 in fit cases where there were adequate grounds for the waiver.¹⁷⁸ But in the case of the detainee in *Edirisuriya*, Ranasinghe J. was unprepared to waive the time-limit of one month for submitting an application to the Supreme Court under Article 126 for infringement of the detainee’s constitutional right to liberty under Article 13. The grounds for the non-waiver of the one-month rule in Article 126, according to the learned Judge, was that:

[although the petitioner mentioned the difficulties of access to legal advice because of restrictions imposed by the detaining authority, he had not specifically] referred to his inability to have presented his petition to this Court within the time limit of one month set out in ... Article 126 (2) ... [The applicant had also not] pleaded any excuse or explanation regarding the failure to comply with the ... requirement of Article 126(2).¹⁷⁹

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¹⁷⁶ *Hewakuruppa v G.A. de Silva, Tea Commissioner et al*, Supreme Court Application No 118/84 - S.C. Minutes of 10.11.84.


¹⁷⁸ *Edirisuriya*, op. cit., at 106.

The result of Justice Ranasinghe’s decision in *Edirisuriya* does not in any way mark a change in the attitude of the Sri Lankan Court towards the operation of emergency laws and consequent denial of constitutional rights. The jurisprudence of the Supreme Court of Sri Lanka since the coming into force of the new Constitution of 1978 has been discordant. In *Edirisuriya*, while an objective basis for resorting to preventive detention was suggested, the detention of the petitioner was upheld by applying the incongruous rules of other branches of law. The discordance manifest in other decisions on emergency powers was thus continued in *Edirisuriya*.

**The Discordant Approach of the Sri Lankan Court**

The examination of the jurisprudence of the Sri Lankan Court, relating to issues of emergency powers and citizens’ liberties in the pre-1978 and post-1978 periods has revealed that the Court’s approach to those issues has not been consistent. In the earlier cases, the Court’s technique can be identified as one based wholly on the formal style of interpretation. In the latter cases, the Court has not been found to deviate from its previous approach to questions of individual liberties in any meaningful way. Nevertheless, during this later period, certain observations in some decisions have indicated a willingness on the part of the Court to change its formal approach. But the potential impact of those holdings has been found to be negated when other disparate rules of interpretation, inappropriate for a consideration of the rights of citizens, were upheld by the Court. The consequences of this uncoordinated jurisprudence of the Sri Lankan Court will be critically analysed in Chapters IX and X.
CHAPTER VIII

BANGLADESH:
JURISPRUDENCE OF LEGALITY

In contrast to the approaches of the Courts in Malaysia and Sri Lanka, identified in Chapters VI and VII as the "jurisprudence of the formal style" and "uncoordinated jurisprudence" respectively, the Court in Bangladesh had endeavoured to uphold basic notions of legality\(^1\) during Emergency rule. The Court in Bangladesh sought to prescribe "objective" criteria of evaluation in examining actions of the State authorities directed to deprive citizens of their constitutional rights during an Emergency. The provisions of emergency preventive detention statutes were strictly interpreted by the Court, so that any lapses on the part of the detaining authorities were held to have rendered the detention invalid. During a state of Martial Law, the jurisdiction of the Court was expressly curtailed. But even during this period, the Court sought to provide some relief for unjust deprivation of personal liberty, whenever possible. The role of the Court in Bangladesh can generally be described as one which has endeavoured to uphold a jurisprudence based on principles of legality.

States of Emergency and Martial Law in Bangladesh

As noted earlier in Chapter III, there were no provisions granting emergency powers to the Executive in the Constitution of Bangladesh as adopted. There were, likewise no provisions relating to preventive detention in the original

\begin{itemize}
\item \textit{The principle of legality:}

- demands that government be conducted in accordance with well established and performable norms ... Rule must be by law and not discretion. Also, and especially, the lawmaker itself must be under the law ... [The principle of legality] is targeted against arbitrary government and palm tree justice.


In \textit{The Morality of Law}, New Haven, Yale University Press, Rev. Ed., 1969, L. Fuller put forward eight principles of legality which are inherent in the idea of law. They are (a) generality, (b) promulgation, (c) non-retroactivity, (d) clarity, (e) non-contradiction, (f) capacity of compliance, (g) constancy, and (h) congruence between official action and declared rule. \textit{Ibid.}, at 46-91.
\end{itemize}
Constitution. Within a year of the adoption of the Constitution, however, provisions relating to emergency powers and preventive detention were entrenched in the Constitution by the Constitution (Second Amendment) Act, 1973.\(^2\) A year later, on December 28, 1974, a Proclamation of Emergency was issued by the President.\(^3\)

During the pendency of the 1974 Proclamation of Emergency, Martial Law was declared in Bangladesh on August 15, 1975.\(^4\) The Emergency co-existed with the state of Martial Law until the Proclamation of Emergency was revoked by a Martial Law decree in 1979.\(^5\) Another state of emergency was declared in 1981 following the assassination of the President.\(^6\) Bangladesh

\(^2\) Act No 24 of 1973. For a discussion on other extraordinary powers of the State available under the Constitution prior to the Constitution (Second Amendment) Act, 1973, and the process of introduction of the new emergency powers, see supra, Chapter III.

The Constitution (Second Amendment) Act, 1973 introduced into the Constitution, the following new Articles:

Article 141A, relating to a Proclamation of Emergency by the President; Article 141B, providing for the suspension of constitutional rights while a Proclamation of Emergency was in force; and Article 141C, by which the means for the enforcement of specified rights could be suspended during an Emergency.

\(^3\) Notification No. 3 (50)/74-CD (CS), dated December 28, 1974, reprinted in (1975) 27 D.L.R. 76 (Statutes Section).

\(^4\) Martial Law was declared on August 15, 1975 following a military coup d’Etat. The declaration of Martial Law by radio broadcast was followed by a gazetted Proclamation dated August 20, 1975. The text of the Proclamation is quoted in full in F.K.M.A. Munim, Legal Aspects of Martial Law, Dhaka, Bangladesh Institute of Law and International Affairs, 1989, at 234-236; also in Halima Khatun v Bangladesh, (1980) 30 D.L.R. (S.C.) 207, at 213-314. A second Proclamation was made on November 8, 1975, continuing the Martial Law declared earlier. This second Proclamation is also quoted in F.K.M.A. Munim, op. cit., at 274-275 (Appendix VIII), and in Halima Khatun, op. cit., at 215.


\(^6\) The Proclamation of Emergency was made on May 30, 1981 and published in the Bangladesh Gazette Extraordinary on July 10, 1981. The text of the Proclamation is reprinted in (1981) 33 D.L.R. 119-120 (Statutes Section). The Emergency was, however, short-lived; it was withdrawn on September 21, 1981. See A.B.M. Mafizul Islam Patwari, op. cit., at 140. For the political context of the withdrawal of this Emergency see Marcus Franda, Bangladesh: The First Decade, India, South Asian Publishers, 1982, at 324.
experienced a third declaration of Emergency in 1987.\(^7\) A distinctive feature of the Proclamations of Emergency in 1981 and 1987 was that, during their pendency, there was no invocation of the constitutional provision permitting the suspension of means for the enforcement of constitutional rights during an Emergency.\(^8\)

Bangladesh had in the past witnessed two states of Martial Law. Both periods of Martial Law was initiated by coups d' Etat. The first was proclaimed in 1975 and continued till 1979. The state of Martial Law declared on August 15, 1975 continued till 1979 when it was withdrawn by a Proclamation of the President.\(^9\) A second state of Martial Law was proclaimed in 1982.\(^10\) It continued for about five years until its revocation on November 11, 1986.\(^11\)

**The Remedy of 'Habeas Corpus' during an Emergency: Constitutional and Statutory Provisions**

Included among the powers of the High Court Division in Bangladesh to enforce the rights of citizens, entrenched by the Constitution, is the power to pass an order analogous to the writ of habeas corpus. Article 102 of the Constitution provides:

\[
\text{(1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental rights conferred by Part III of this Constitution.}
\]

\(^7\) The Emergency was proclaimed on November 27, 1987 amidst a confrontation between a military-turned-civilian government and the political opposition. The Proclamation is published in the Bangladesh Gazette Extraordinary of November 27, 1987.

\(^8\) Article 141C, Constitution of Bangladesh.


(2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law -

... (b) on the application of any person, make an order -

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner ...

A statutory guarantee of the writ of habeas corpus is also available in Bangladesh under the Code of Criminal Procedure, 1898. Section 491 (1) of the Code of Criminal Procedure provides:

[The] High Court may, whenever it thinks fit, direct

... (b) that a person illegally or improperly detained in public or private custody ... be set at liberty.

During an Emergency in Bangladesh, certain constitutional rights are wholly suspended. The Constitution also provides for the suspension of means for the enforcement of rights by the operation of a Presidential Order during an Emergency. Notwithstanding the suspension, and the suspension of the means for the enforcement of constitutional rights, the power of the Court, under Article 102 of the Constitution, to grant the remedy of habeas corpus is not affected during an Emergency. Also, measures taken during an Emergency do not suspend the statutory remedy of habeas corpus available under the Code of Criminal Procedure.

Judicial Review of Detention during the 1974-1979 Emergency

Because of the suspension of constitutional rights, and the suspension of means for the enforcement of rights during the 1974-1979 Emergency in Bangladesh, detainees resorted to petitioning the High Court Division for the remedy of habeas corpus under the Code of Criminal Procedure (henceforth, Act No. 5 of 1898, as amended to date.

12 Article 141B, Constitution of Bangladesh. See Chapter V supra for a discussion on the provisions of this Article.
13 Article 141C, Constitution of Bangladesh. See Chapter V.
the Code). It is not clear from the decisions of the Court in this regard whether the statutory remedy of habeas corpus under the Code continues to operate after the suspension of means for the enforcement of the constitutional right to personal liberty. It appears that the rationale of the detainees for seeking the remedy of habeas corpus under the Code proceeded on the basis that the suspension of the constitutional remedy could not bar the statutory redress for illegal or improper detention.

During the 1974-1979 Emergency, the Court in Bangladesh also readily invoked its jurisdiction under Article 102 of the Constitution to inquire into the legality of an emergency detention, notwithstanding the bar on citizens to enforce their rights during the Emergency. The approach of the Supreme Court of India, on the potential effect of the suspension of the means for the enforcement of the constitutional right to liberty during an Emergency, has been different. The Indian Supreme Court's stand has been that although the power of the Court was not affected during an Emergency, a detainee had no locus standi to enforce his/her right to liberty.

[T]he petitioner’s right to move this Court, but not this Court’s power ... has been suspended during the operation of the Emergency, with the result that the petitioner has no locus standi to enforce his right, if any, during the Emergency.15

In taking a different approach on the matter of the standing of a detainee, the Court in Bangladesh has not examined the jurisprudential issues relating to the suspension of means for the enforcement of rights. The Bangladesh Supreme Court simply invoked its jurisdiction to examine the propriety of detention during the Emergency. Detentions during the Emergency were challenged before the Court on the procedural grounds of, inter alia, impropriety, mala fides, and breach of process. These grounds enabled the detainees to argue that the suspension of means for the enforcement of the constitutional right to personal liberty was not attracted.

The 1974 Proclamation of Emergency

The Proclamation of Emergency in 1974 was issued on dubious grounds. Sectarian political objectives were intended to be attained by recourse to the emergency provisions of the Constitution. The reason for the invocation of the state of emergency in 1974, was stated to be considerations of the "security" and "economic life" of Bangladesh, which were purportedly threatened by "internal disturbance". The Proclamation of Emergency, under the provisions of Article 141A of the Constitution of Bangladesh, issued by the President and countersigned by the Prime Minister, read:

Whereas the President is satisfied that a grave emergency exists in which the security and economic life of Bangladesh are threatened by internal disturbance;

Now Therefore, in exercise of the powers conferred by clause (1) of Article 141 of the Constitution ... the President is pleased hereby to issue this Proclamation of Emergency...

On the same day, the President, by Order under Article 141C of the Constitution, suspended the means for the enforcement of nearly all of the

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17 Article 141A (1), Constitution of Bangladesh:

If the President is satisfied that a grave emergency exists in which the security or economic life of Bangladesh or any part thereof, is threatened by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency...

18 Notification No. 3 (50)/74-CD (CS), dated December 28, 1974, reprinted in (1975) 27 D.L.R. 76 (Statutes Section).

The original Constitution of Bangladesh required that the Presidential Order proclaiming Emergency must be countersigned by the Prime Minister. That provision was omitted by the Constitution (Fourth Amendment) Act, 1975, Act No. 2 of 1975.

The original provision of the Constitution of Bangladesh, requiring the countersignature of the Prime Minister in the Presidential Order declaring an Emergency, was similar to the provisions of Article 134 (2) of the 1972 Constitution of Sri Lanka, and Clause (20) of the Malaysian Constitution (Amendment) Act, 1983, which was superseded a year later by the Constitution (Amendment) Act, 1984.

19 Article 141C (1), Constitution of Bangladesh:

While a Proclamation of Emergency is in operation, the President may, by order, declare that the right to move any court for the enforcement of such of
constitutional rights, including the right to life and personal liberty. The Presidential Order read:

In exercise of the powers conferred by clause (1) of Article 141C of the Constitution ..., the President is pleased hereby to declare that the right of any person to move any court for the enforcement of the rights conferred by articles 27, 31, 32, 33, 35, 36, 37, 38, 39, 40, 42 and 43 of that Constitution, and all proceedings pending in any court for the enforcement of the said rights, shall remain suspended for the period during which the Proclamation of Emergency ... is in force.

Acting under the provisions of Article 93 (1) of the Constitution of Bangladesh, the President also promulgated the Emergency Powers Ordinance, 1974, which was soon superseded by the Emergency Powers Act, 1975. Section 2 of the Emergency Powers Act, 1975 delegated to the government very broad powers to make Emergency Rules on a wide variety of subjects. The Emergency Rules could, in addition to other matters, provide for:

| the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order. |

20 Under the Constitution of Bangladesh, the right to life and personal liberty is guaranteed by Article 32:

No person shall be deprived of life and personal liberty save in accordance with law.

21 Notification No 3 (51)/74-CD (CS), dated December 28, 1974, reprinted in (1975) 27 DLR 76 (Statutes Section).

22 Article 93 (1), Constitution of Bangladesh (as at 1974):

At any time when Parliament is not in session, if the President is satisfied that circumstances which render immediate action necessary, he may make and promulgate such Ordinances as the circumstances appear to him to require, and any Ordinance so made shall, as from its promulgation have the like force of law as an Act of Parliament ....


24 Act No. 1 of 1975, passed by Parliament on January 25, 1975, and published in the Bangladesh Gazette Extraordinary of the same date.
the apprehension and detention of any person with respect to whom the authority empowered by or under the rules to apprehend and detain is of the opinion that his apprehension and detention are necessary for the purpose of preventing him from acting in a manner prejudicial to Bangladesh's relation with foreign powers, or to the security, the public safety or interest of Bangladesh, the maintenance of supplies and services essential to the life of the community or the maintenance of peaceful condition in any part of Bangladesh...

The Court's general approach to Preventive Detention during an Emergency

The attitude of the Court in Bangladesh towards preventive detention during an Emergency was summed up by the High Court Division in its decision in *Farida Rahman v Bangladesh,* concerning a detention order under the *Emergency Powers Rules 1975.* Delivering the opinion of the Court in *Farida Rahman,* Masud J. observed:

It is a well-settled principle that preventive detention which makes an inroad on the personal liberty of a citizen, without the safeguards inherent in a formal trial before a judicial tribunal, must be zealously kept within the bounds fixed by the constitution and the relevant law. It is also a settled principle that the requirements of law providing for preventive detention must be strictly followed and scrupulously complied with.

Scope of Court's power to issue a Writ of Habeas Corpus during an Emergency

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28 *Farida Rahman,* op. cit., at 133-134.
In decisions concerning emergency preventive detention, there appears to have been some controversy in the High Court Division, regarding its respective powers under Article 102 of the Constitution, and those available under section 491 (1) of the *Code of Criminal Procedure*, 1898. In *Mukhlesur Rahman v The State*, it was held that the scope of Article 102 of the Constitution was much wider than section 491 of the *Code*.

Under Article 102, the Court has got constitutional powers to examine the facts of a ... [detention] in order 'to satisfy itself that the ... [detainee] is not being detained without lawful authority or in an unlawful manner. But under ... [section 491 of the *Code of Criminal Procedure,*] what the court is required to do is to see whether a person has been illegally or improperly detained.

In *Kripa Shindu Hazra v The State*, on the other hand, it was asserted that the scope of section 491 of the *Code of Criminal Procedure* in granting relief to a detainee was wider than the constitutional jurisdiction of the High Court Division under Article 102 of the Constitution of Bangladesh. Justice B.H. Chowdhury delivering the opinion of the Court, observed that:

29 Act No. 5 of 1898.


31 Ibid., at 177, per Shahabuddin Ahmed J. In coming to this conclusion, the learned Judge quoted with approval a similar distinction made by Hamoodur Rahman J. (later Chief Justice) of the Supreme Court of Pakistan in *Government of West Pakistan v Begum Agha Abdul Karim Shorish Kashmiri*, (1969) 21 D.L.R. (S.C.) 1. The provisions of Article 98 of the 1962 Constitution of Pakistan were almost identical with those of Article 102 of the Bangladesh Constitution, while the provisions of section 491 of the *Code of Criminal Procedure*, 1898, were the same in Pakistan and Bangladesh. Comparing the powers of the Court in Pakistan under the *Code*, the Constitution, and in respect of the old prerogative writs, Hamoodur Rahman J. had observed in *Begum Agha Abdul Karim Shorish Kashmiri* that:

so far as the deprivation of the liberty of a citizen was concerned, the Constitution-makers [in Pakistan] intended that this most cherished right should not be taken away in an arbitrary manner ... [H]ence by sub-clause (b) of clause (2) of Article 98 ... [of the Constitution, the constitution-makers] left it to the High Courts to review the actions of the detaining authority, untrammelled by the formalities of either section 491 of the Criminal Procedure Code or the old prerogative writ of *habeas corpus* ...


the contention that [the] scope of ... [judicial inquiry under section 491 of the Code of Criminal Procedure] is limited and narrower than ... [that available under] Article 102 of the Constitution has no force. ... [The scope of judicial inquiry under section 491 of the Code] is not hedged by constitutional limitations ... The expression, "whenever it thinks fit" [in Section 491 of the Code] confers an absolute discretion on the court to exercise its power thereunder ... , having regard to the circumstances of each case ... [T]he expression "whenever it thinks fit" does not warrant any ... limitation on ... [the Court's] absolute discretion.\textsuperscript{33}

It must be admitted that the premises of Justice Chowdhury's assertion that the statutory basis of the High Court's jurisdiction was wider than that afforded by the Constitution, are erroneous.\textsuperscript{34} However, the manner in which the learned Judge proceeded to use this basis to give relief to the detainee in \textit{Kripa Shindu Hazra} is interesting. With regard to the enforcement of constitutional rights during an Emergency, Chowdhury J. observed that:

\begin{quote}
during Emergency, when the fundamental rights are suspended and the right to move the court for the enforcement of the same has been taken away, neither Article 102 [of the Constitution,] nor ... [section 491 of the Code of Criminal Procedure] is available to seek ... [remedy for infringement of constitutional rights].\textsuperscript{35}
\end{quote}

Justice Chowdhury characterized section 491 of the Code of Criminal Procedure as encompassing a remedial process which was discretionary in nature.

\begin{quote}
Under ... [section] 491 of the Code, there is neither a right ... [available to a] person detained, to move the High Court for the enforcement of the fundamental right [to personal liberty,] nor there is an obligation on the part of the High Court to give the relief ... [Section 491 confers] only a discretionary jurisdiction, conceived as a check on arbitrary action ... . \textsuperscript{36}
\end{quote}


\textsuperscript{34} This is discussed in Chapter IX \textit{infra}.

\textsuperscript{35} \textit{Kripa Shindu Hazra}, op. cit., at 114.

\textsuperscript{36} \textit{Ibid.}, at 115, per Chowdhury J.
Justice Chowdhury's conclusion is stated to be based on the minority opinion of Subba Rao J. in the Indian Supreme Court decision in *Makhan Singh Tarsikka v State of Punjab*. Justice Subba Rao argued that section 491 of the Code, though remedial in form, postulated the existence of a substantive right, and went on to identify that substantive right as the common law principle that no person could be deprived of his liberty except in the manner prescribed by law. In *Kripa Shindu Hazra*, Chowdhury J. did not discuss the questions relating to the locus standi of a petitioner in seeking relief under the Code for the infringement of his right of personal liberty. It is however to be assumed that the premises of the learned Judge would be the same as Indian Judge's dissenting opinion in *Makhan Singh Tarsikka*.

**Compliance with provisions of Emergency Legislation**

Under the *Emergency Powers Rules* 1975, as originally framed, there was no provision for the communication, to the detainee, of the grounds on which the detention order was based. In this situation, the Court in Bangladesh scrutinized strictly the compliance by the detention authority of the mandatory provisions of the *Rules*. By such a course, the effort of the Court was directed to uphold the right to personal liberty during the Emergency. Referring to the absence of any provision for communicating the grounds of detention to the detainee, who was detained under Rule 5 (1) of the *Emergency Rules* 1975,

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37 [1964] A.I.R. (S.C.) 381. In *Kripa Shindu Hazra*, it is, however, not mentioned that the opinion in *Makhan Singh Tarsikka*, which was relied upon was a minority opinion. The majority in the Indian case held that all actions before the Court for the enforcement of "rights" during Emergency, whether by constitutional writs or under statutes, were barred. See K.I. Omar, *Emergency, Personal Liberty and the Courts in India and Pakistan*, Unpublished LL.M. Thesis, University of Saskatchewan, 1985, at 91-92.

38 The *Code of Criminal Procedure*, 1898, Act No. 5 of 1898, was passed during the colonial phase of South Asia, so that the provisions of the *Code* were identical in Pakistan, India and Bangladesh.


40 Rule 5 (1), *Emergency Powers Rules* 1975:

The Government, if satisfied with respect to any person that with a view to preventing him from acting in a manner prejudicial to the security, the public safety or interest of Bangladesh, Bangladesh's relation with any foreign power,
the Appellate Division of the Supreme Court of Bangladesh, in *Krishna Gopal Bhowmick v Secretary, Ministry of Home Affairs, Bangladesh*,\(^{41}\) observed:

The position is that a man can be deprived of his liberty under ... [Emergency Rule 5(1)] simply on the making of an order by the authority and the only protection, albeit a precarious one, that can be given is that, unless there is strict compliance with the essential provisions of ... [Rule 5 (1)], the detention order cannot be sustained.\(^{42}\)

On behalf of the Court in *Krishna Gopal Bhowmick*, Kemaluddin Hossain C.J. continued:

If there be any doubt as to whether the *Rules* have been substantially complied with, the doubt must be resolved in favour of the ... [detainee].\(^{43}\)

**Communication of the Grounds for Detention**

The *Emergency Powers Rules* 1975 were amended in 1977 to provide for the communication to the detainee of the grounds for his/her detention within two weeks.\(^{44}\) Since then, the Court has insisted on strict compliance with these provisions. In *Farida Rahman v Government of Bangladesh*,\(^{45}\) the detainee was...

(a) directing that such person be detained...

\(^{41}\) (1979) 31 D.L.R. (A.D.) 145.

\(^{42}\) Ibid., at 148, per Kemaluddin Hossain C.J.

\(^{43}\) Ibid.

\(^{44}\) The *Emergency Powers Rules* 1975, were amended in 1977 by the Martial Law government, vide the Ministry of Home Affairs’ Notification No S.R.O. 278-L/77, dated August 18, 1977. Among the changes made in 1977 was the requirement for the communication of the grounds for detention to a detainee within two weeks (Rule 5A), and provisions for the establishment of Advisory Board for reviewing detentions.

The newly introduced Rule 5A of the *Emergency Powers Rules* 1975 was almost identical to Section 8 (2) of the *Special Powers Act*, 1974, a non-emergency statute providing for preventive detention and other measures for special offences.

not supplied with the grounds for detention until nearly a month after the order of detention became effective. The Court was not prepared to condone the delay.

When the law providing for preventive detention has made specific provision that the grounds of detention should be furnished within a time limit prescribed, then it should be done within that time limit. It is a right of the ... [detainee] and an obligation upon the detaining authority who must scrupulously follow it. This is a mandatory requirement of law and non-compliance with the same would definitely invalidate the detention ... 46

Specificity of Grounds of Detention

The Court in Bangladesh has consistently required that the grounds on which an order of detention was based must be specific. The order of detention in *Krishna Gopal Bhowmick v Secretary, Ministry of Home Affairs, Bangladesh* 47 stated several alternate grounds as justifying the detention. The order stated:

Whereas the Government is satisfied with a view to preventing ... [the detainee] from acting in a manner prejudicial to the security or interest of Bangladesh or the public safety or the maintenance of law and order, it is necessary to make an order for his detention. 48

The Appellate Division pointed out that in passing this detention order in *Krishna Gopal Bhowmick*, the detaining authority relied on four discrete grounds, all drawn from the same set of materials available to the detaining authority. Since, for the Court, it was not possible to be sure which of the four grounds prevailed on the authority to order the detention, the order was held to have been passed without a proper basis of satisfaction. The Appellate Division also found that one of the alternate grounds mentioned in the detention order, "maintenance of law and order", was not within the scope of

46 *Farida Rahman, op. cit.*, at 133, per Masud J.


48 This order (emphasis added) is quoted in the judgement in *Krishna Gopal Bhowmick, op. cit.*, at 148.
Emergency Rule 5 (1), on which the detention order was based. On the basis of these findings, the detention order in *Krishna Gopal Bhowmick* was held invalid and the detainee ordered to be released.

The Appellate Division's requirement in *Krishna Gopal Bhowmick* of the specificity of grounds on the basis of which detention is being ordered was subsequently applied in a number of decisions. In *Akram Hossain Mondal v Government of Bangladesh*, the order of detention read:

> Whereas ... [the detainee] is likely to prejudice the security of Bangladesh and/or to endanger public safety and/or the maintenance of the public order within the meaning of Rule 2 (e) of the Emergency Powers Rules ... Now, in exercise of the powers conferred by ... direct that [the detainee] be detained ... [under Rule] 5 (1) (a) of the Emergency Powers Rules, 1975...  

On the basis of the precedent in *Krishna Gopal Bhowmick*, the High Court Division held that the order of detention in *Akram Hossain Mondal* was illegal.

> The conclusion of the detaining authority that the ... [detainee] is likely to act in a manner prejudicial to the security of Bangladesh and/or to endanger public safety and/or ... have been drawn from the same set of facts. The detaining authority was, therefore, not quite sure as to which of the prejudicial acts the ... [detainee] was likely to ... [commit, and thus,] the grounds of detention [have been mentioned] disjunctively ... This shows that the detaining authority passed the order without due application of mind ... [and in a casual manner] ...

The detaining authority in *Amaresh Chandra v Bangladesh*, instead of referring to any of the specific heads of prejudicial activities specified in Emergency Rule 5 (1) as grounds for detention, referred to the Rule itself in the detention order. Chief Justice Kemaluddin Hossain recalled his earlier opinion in *Krishna Gopal Bhowmick* and observed:

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49 (1979) 31 D.L.R. 127.  
50 The order of detention is quoted in the judgement in *Akram Hossain Mondal*, op. cit., at 138.  
51 *Akram Hossain Mondal*, op. cit., at 139.  
The ... [detaining authority] refers to Rule 2 (e) of the Emergency Power Rules and then invokes the powers under Rule 5 (1) (a) in passing the order of detention against the ... [detainee] ... [E]xcepting ... [this] casual and careless reference to the numbers of the two clauses [of the Emergency Power Rules] nothing has been mentioned in the detention order which could at all be said to be an order passed under Rule 5 (1) of the Emergency Power Rules ... [O]n this ground alone ... the order of detention must be struck down as invalid...  

Successive petitions for Habeas Corpus

In addition to infirmity on account of the grounds in the detention order, the High Court Division in *Akram Hossain Mondal v Government of Bangladesh* had also to decide whether successive petitions by the detainee to the Court against the same order of detention were maintainable. An earlier petition of the detainee in *Akram Hossain Mondal*, under section 491 of the *Code of Criminal Procedure* before the High Court Division was unsuccessful. Subsequently, another petition, the basis of the decision in *Akram Hossain Mondal*, was preferred before the High Court Division on fresh grounds. On behalf of the State it was contended that the subsequent petition of the detainee before the High Court division was not maintainable, since the previous petition was heard by the Court on its merits and rejected.

The High Court Division had therefore to consider whether successive petitions of this kind were prohibited by the *Code of Criminal Procedure*, repugnant to any rule or practice, or were contrary to public policy. After

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53 *Ibid.*, at 241. See also *Md Farnuque Reza v Government of Bangladesh*, (1977) 29 D.L.R. 4, where the detention order referred to "prejudicial acts" of the detainee, without specifying which of the prejudicial acts, defined in Rule 2 (e) of the *Emergency Powers Rules 1975*, pertained to the detainee's activities. It was held by the High Court Division that:

[v]agueness in an order of detention may not be fatal, but if this court finds it difficult to satisfy itself as to the lawful authority of the order, then such order ought not be allowed to continue.


54 (1979) 31 D.L.R. 127.
referring to the *High Court Rules*\(^55\) and an elaborate examination of precedents on this issue from Pakistan and India, the High Court Division held that a fresh petition against an order of detention was maintainable on new grounds.\(^56\) The underlying basis for this decision of the Court in *Akram Hossain Mondal* was its conclusion that the detention of the petitioner was otherwise invalid.

[T]he order of detention, if otherwise invalid, the detention of the ... [detainee] is a continuing wrong. To redress the wrong the ... [detainee] is entitled to maintain fresh ... [petitions] on new grounds.\(^57\)

**Successive Orders of Detention**

Although the Court in Bangladesh has held that successive petitions to the Court against a detention order was not barred, it has held successive orders of detention invalid. In *A.K.M. Shamsuddin v Government of Bangladesh*,\(^58\) the petitioner was detained before the Proclamation of Emergency in 1974 under the provisions of the *Special Powers Act*, 1974,\(^59\) a non-emergency statute providing for preventive detention and other measures special offences. After the Proclamation of Emergency in December, 1974, the petitioner's order of detention under the *Special Powers Act* was revoked, and a fresh order of detention was passed under Rule 5 (1) (a) of the *Emergency Powers Rules* 1975. During the applicant's detention under the previous order, the grounds for his detention were made available to him. However, since the new order of detention under the *Emergency Powers Rules*, no fresh grounds were offered by the detaining authority for the continued detention of the applicant. Justice

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\(^{55}\) Rules 28 to 40 of the *High Court Rules* in Bangladesh governs proceedings under section 491 of the *Code of Criminal Procedure*. The High Court Division found that no provision of those *Rules* barred successive applications under the *Code*.


\(^{57}\) *Akram Hossain Mondal*, op. cit., at 138.

\(^{58}\) (1976) 29 D.L.R. 117.

\(^{59}\) Act No. 14 of 1974.
F.K.M.A. Munim, later Chief Justice, delivering the opinion of the Court in *A.K.M. Shamsuddin*, observed:

> It has not been made clear to us why after the revocation of the previous order of detention this order under the Emergency Powers Rules was passed, since the grounds of detention as were communicated in pursuance of the first order of detention do no longer exist...\(^{60}\)

After examining the order of detention under the *Emergency Powers Rules* 1975, Munim J. continued:

> Unless fresh causes existed or came into existence, a fresh order under the Emergency Powers Rules, 1975, was not called for ... [The detention] cannot be justified simply because there is no basis for it.\(^{61}\)

In *Ranabir Das v Secretary, Ministry of Home Affairs*,\(^{62}\) the High Court Division did not need to decide whether the detaining authority was debarred from making, on the same materials, a fresh order of detention under the *Emergency Powers Rules* 1975, after it had revoked an earlier order of detention under the *Special Powers Act*, 1974. However, the Court found that the grounds under the previous detention order of the applicant *Ranabir Das* were "vague" and "irrelevant". Since there were no fresh materials on which to base the subsequent detention order, the Court found:

> no difficulty in holding that the detaining authority had no requisite satisfaction based on relevant materials ... [A]s such the detention ... [could] not be sustained.\(^{63}\)

A fresh detention order served on the detainee, while he was still in the premises of the jail, was held unlawful in *Anwar Hossain v Government of Bangladesh*.\(^{64}\) Justice Ruhul Islam held that:

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\(^{60}\) *A.K.M. Shamsuddin*, op. cit., at 122.


\(^{63}\) *Ibid.*, at 57, per Masud J.

[a]fter revocation of [the previous] detention order, it should be presumed that there is no material for continuing his detention. In the absence of any fresh materials, and in this case there was no scope for giving rise to any materials, as the ... [detainee] was not allowed to come out of the jail gate, the impugned order of detention is not in accordance with law, and as such the detention is wholly unauthorised.  

In *Shamsun Nahar Begum v Bangladesh*, among a number of successive detention orders, was one served on the detainee, while he was still in prison. The previous orders of detention were directed to prevent the detainee from acting in a manner "prejudicial to the security, the public safety or interest of Bangladesh". This last order made while the detainee was still in prison stated that he was being detained for the further period on account of his prejudicial activities against the "maintenance of supplies and services essential to the life of the community". The detention by successive orders, based on disparate grounds, was challenged as being motivated by *mala fides*.

On behalf of the State, it was contented that the disparity in the orders of detention was due to the mistake of using a wrong form in making an earlier order. It was proposed by the State that the Court accept the subsequent rectified order as the basis of the detention. The Court, however, was not prepared to accept the rectified order, and held the detention to be unlawful. Delivering the opinion of the Court, B.H. Chowdhury J. held:

Liberty of a citizen does not rest on the user of a printed form, or for that matter a cyclostyled form ... [The] liberty [of a citizen] can only be circumscribed by arriving at a decision that it is ... necessary to prevent him from acting prejudicially. The degree of consideration, the degree of care, the degree of duty that is cast on the ... [State] is of [the] highest order ... [The] slightest deviation care from such care, from such consideration, from such duty will ... [be considered to be an act of bad faith].

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69 *Shamsun Nahar, op. cit.*, at 40.
Satisfaction of the detaining authority

Rule 5 (1) (a) of the *Emergency Power Rules* 1975, sanctioned preventive detention if the government was satisfied that detention was necessary to prevent any person from acting in a number of prejudicial ways. A number of decisions relating to detention under the *Rules* considered the nature of the satisfaction of the detaining authority in ordering detention during an Emergency. It will be remembered that in *Humayun Kabir v The State*, a non-emergency decision, it was held that preventive detention must be based on "reasonable and valid grounds, sufficient to satisfy the judicial conscience". The Court has in relation to detentions during an Emergency continued to require a reasonable basis for detention based on objective criteria.

In Malaysia, the Courts have characterised the *satisfaction* of the detaining authority in passing preventive detention orders as *subjective*. The Malaysian Courts have relied principally upon the English House of Lords decision in *Liversidge v Anderson*. In Sri Lanka, the Supreme Court also relied upon this English precedent during its earlier period of decision-making, but in more recent times it has, in some decisions, appeared to forsake the *Liversidge* rule. But as has been noted, the Sri Lankan Court has not discarded the doctrine of subjective satisfaction. In the context of Bangladesh, the predecessor Supreme Court of Pakistan rejected the doctrine of subjective satisfaction of the detaining authority upheld by the House of Lords in *Liversidge v Anderson*. In

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70 (1976) 28 D.L.R. 259. This decision has been discussed in Chapter II, *supra*.

71 Ibid., at 279, per Justice Ruhul Islam:

'Satisfaction' must be based on reasonable grounds. Ascertainment of reasonable grounds is essentially in the nature of a judicial or at least a quasi-judicial function. The Constitution guarantees that every citizen shall be dealt with strictly in accordance with law. In view of ... [this], the executive also is required to exercise the power of making detention orders, judicially. The right given to a ... [detainee] to make a representation [against his detention] makes [it] all the more necessary to make [a] detention order on reasonable and valid grounds sufficient to satisfy the judicial conscience.

**CHAPTER VIII**

*Ghulam Jilani v Government of West Pakistan*,\(^73\) which concerned preventive detention during an Emergency,\(^74\) the Supreme Court of Pakistan overruled the decision of the High Court of West Pakistan, from which the appeal arose. The High Court had based its decision on *Liversidge*, but the Supreme Court held:

> It is too late in the day to rely, as the High Court has done, on the dictum in the English case of *Liversidge* for the purpose of investing the detaining authority with complete power to be the judge of its own satisfaction. Public power is now exercised in Pakistan under the Constitution of 1962, of which Article 2 requires that every citizen shall be dealt with strictly in accordance with law.\(^75\)

Regarding the nature of the satisfaction of the detaining authority in ordering detention, the Supreme Court of Pakistan, in *Ghulam Jilani*, observed:

> ['Satisfaction' of the detaining authority ... must be a state of mind, which has been induced by the existence of reasonable grounds for such satisfaction ... [The exercise of this power is not] immune to judicial review ... \(^76\)]

This principle was reaffirmed and expanded subsequently in the Pakistan Court’s decisions in *Abdul Baqi Baluch v Government of Pakistan*,\(^77\) and *Government of West Pakistan v Begum Agha Abdul Karim Shorish Kashmiri*.\(^78\)

The Court in Bangladesh continued the jurisprudence of the Supreme Court of Pakistan. In *Mukhlesur Rahman v The State*,\(^79\) the High Court Division relied upon the Pakistani precedents in *Ghulam Jilani*, *Abdul Baqi Baluch*, and *Begum Agha Abdul Karim Shorish Kashmiri* to hold that:

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\(^74\) The detention was ordered under the *Defence of Pakistan Ordinance*, 1965, and the *Rules* made thereunder.

\(^75\) (1967) 19 D.L.R. (S.C.) 403, at 415, per Cornelius C.J.

\(^76\) *Ibid.*, at 418, per Cornelius C.J.


It is now an established principle of law that when an authority makes an order of preventive detention, he must show that there are reasonable grounds for such detention ... Satisfaction of the detaining authority is amenable to judicial review, so as to guard against deprivation of a citizen’s liberty by any arbitrary action of the Executive. 80

In reviewing the materials on the basis of which the detention order was passed in Kripa Shindu Hazra v The State, 81 the High Court Division of Bangladesh upheld the judicial scrutiny of the reasonableness of the materials and grounds upon which the detention order was based. Relying on the precedent of Begum Agha Abdul Karim Shorish Kashmiri, the High Court Division observed that:

the Court is to see whether any reasonable body of persons could have acted upon such ... material[s] and pass the order of detention. Reasonable ground or belief is an important ingredient in ascertaining bonafides ... 82

In Nurunnahar Begum v Government of Bangladesh, 83 the High Court Division identified the satisfaction required by Rule 5 (1) (a) of the Emergency Powers Rules 1975 as an "onerous responsibility".

[S]atisfaction [of the detaining authority] as required by Rule 5 (1) (a) is an onerous responsibility ... [I]t is well settled that ... [detention based on the satisfaction of the Executive] is to be viewed with [a] scrutinizing eye, so that the liberty [of the citizen] is not jeopardized even at the time of emergency. 84

80 Ibid., at 176, per Shahabuddin J. These observations, according to the learned Judge, related to the powers of judicial review under Article 102 of the Constitution of Bangladesh. The powers of review under section 491 of the Code of Criminal Procedure, 1898 being narrower, no relief was granted to the petitioner in Mukhlesur Rahman.


82 Ibid., at 115. Like Mukhlesur Rahman, the jurisdiction of the High Court Division in Kripa Shindu Hazra was invoked under section 491 of the Code of Criminal Procedure. Unlike the previous case, the High Court Division in Kripa Shindu Hazra was prepared to uphold almost as broad parameters for judicial review under the Code as under the Constitution.


84 Ibid., at 376, per B.H. Chowdhury J.
Judicial Review during a State of Martial Law

The jurisprudence of legality, upheld by the Court in Bangladesh during a state of constitutional Emergency, was sought to be continued during a period of extra-constitutional Emergency occasioned by a Proclamation of Martial Law. During a state of Martial Law, however, the Proclamation and decrees made under it were made paramount and non-justiciable. The Proclamation of Martial Law in 1982 suspended the Constitution.\(^{85}\) The earlier Proclamation of Martial Law in 1975 did not suspend the Constitution, but it provided that the Proclamation and all decrees made under it were to be considered valid notwithstanding anything contained in the Constitution. Clauses (d) and (e) of the 1975 Proclamation provided:

(d) [T]his Proclamation and the Martial Regulations and Orders (and other Orders) ... shall have effect notwithstanding anything contained in the Constitution ... or in any law for the time being in force;

(e) the Constitution ... shall, subject to this Proclamation and the Martial Law Regulations and Orders (and others Orders) ... continue to remain in force ... \(^{86}\)

The Supreme Court or any other Court or Tribunal was barred by this Proclamation from exercising any jurisdiction in respect of the Proclamation or decrees.

(g) [N]o Court, including the Supreme Court, or [any] tribunal or authority shall have any power to call in question in any manner whatsoever or declare illegal or void this Proclamation or any Martial Law Regulation or Order (or other Orders) .... \(^{87}\)

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\(^{85}\) Clause (f), *Proclamation of Martial Law*, March 24, 1982 (published in the Bangladesh Gazette Extraordinary of same date):

The Constitution of the People's Republic of Bangladesh shall stand suspended with immediate effect.


\(^{87}\) *Ibid.*, Clause (g). Clause (h) of the 1982 Proclamation of Martial Law was phrased in identical terms.
The position under the 1975 Proclamation was summed up by the Supreme Court in the following way.

In view of clauses (d), (e) and (g) of the Proclamation, the supremacy of the Constitution as declared in ... Article [7 (2) of the Constitution,] is no longer unqualified. In spite of ... Article [7 (2),] no constitutional provision can claim to be sacrosanct and immutable ... 88

A similar conclusion was reached by the Court in State v Haji Joynal Abedin.89

[There is] no room for doubt that [since the 1975 Proclamation of Martial Law,] the Constitution, though not abrogated, was reduced to a position subordinate to the Proclamation ... [T]he unamended and unsuspended constitutional provisions were kept in force and allowed to continue subject to the Proclamation and Martial Law Regulations... 90

Despite the sweeping embargo on the Court's jurisdiction by the 1975 Proclamation of Martial Law, the Supreme Court of Bangladesh was able to afford some relief for unjustified encroachment on personal liberty by Tribunals constituted under Martial Law decrees. Since in decisions during this state of Martial Law, the Court in Bangladesh relied upon precedents in Pakistan, a brief reference to those precedents will be helpful.

In Asma Jilani v Government of Punjab,91 where the Supreme Court of Pakistan retroactively invalidated the 1969 Proclamation of Martial Law, it was held that, notwithstanding the state of Martial Law, the Court had powers to scrutinize acts of the authorities in appropriate cases. Later, in The State v Zia-ur-Rahman,92 the Pakistan Supreme Court elaborated the circumstances

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88 Halima Khatun v Bangladesh, (1978) 30 D.L.R. (S.C.) 207, at 218, per F.K.M.A. Munim J. Article 7 (2) of the Constitution of Bangladesh provides:

This Constitution is, the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void.


90 Ibid., at 122, per Ruhul Islam J.


in which the Court’s jurisdiction would be attracted. In *Zia-ur-Rahman*, the Court agreed that the validity of Martial Law Regulations would not normally be questioned. However, the validity of the acts under Martial Law decrees would not extend to acts done, orders made or proceedings taken without jurisdiction, or made *mala fide*.

Turning now to the Bangladesh cases, in *K. Ehteshamuddin Ahmed v Bangladesh*, the trial and sentencing of the appellant by a Special Martial Law Court, which had been constituted by a Martial Law decree, was challenged before the High Court Division under Article 102 of the Constitution. The High Court had summarily rejected the application. On appeal, the Appellate Division invoked the Pakistani precedents of *Asma Jilani* and *Zia-ur-Rahman*, and held that:

> [t]he moment any Martial Law Court is found to have acted without jurisdiction, [or] more precisely, has taken cognizance of an offence not triable by such Courts under the [applicable] Martial Law Regulation, or the Martial Law Court is not properly constituted, the ... [the Supreme Court has the] power [under Article 102 of the Constitution] to declare the proceedings wholly illegal and without any lawful authority ...  

In the absence of any relief granted to the appellant in *K. Ehteshamuddin Ahmed*, the observations of the Court were strictly speaking, *obiter*. However, the conclusions of the Court in *K. Ehteshamuddin Ahmed* regarding the power of the Court to scrutinize actions taken under Martial Law decrees enabled the Appellate Division in a subsequent decision to set aside a verdict of a Martial Law Court. In *Khondker Moshtaque Ahmed v Bangladesh*, the appellant was installed as President following a military *coup d’Etat* in August.

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94 In rejecting the application, the High Court Division based its decision on the Appellate Division’s findings in *Halima Khatun v Bangladesh*, (1978) 30 D.L.R. (S.C.) 207. In that case it was held that the 1975 Proclamation of Martial Law had totally ousted the jurisdiction of the Court from examining, *inter alia*, any action taken under Martial decrees. See the discussion on this case in Chapter IV, *supra*.

95 *K. Ehteshamuddin Ahmed*, op. cit., at 170, per Ruhul Islam J.

96 (1982) 34 D.L.R. (A.D.) 222. The appeal arose from the decision of the High Court Division reported as *Khondker Moshtaque Ahmed v Bangladesh*, (1981) 33 D.L.R. 348. The High Court Division had declined to interfere with the order of the Special Martial Law Court.
1975. He had declared the first state of Martial Law in Bangladesh. However, in the confusion of a series of military coups and counter-coups in November of the same year, the appellant had lost his presidency. He had also afterwards declined to take up the position of President when offered. About a year later, the appellant was arrested, tried and convicted by a Special Martial Law Court on charges of corruption while in power as President.

Before the Appellate Division, it was argued on behalf of the appellant in *Khondker Moshtaque Ahmed* that the trial and conviction of the appellant was actuated by mala fides on the part of the Martial Law government. It was contended that the conviction of the appellant on criminal charges by the government was directed to preclude him from future political activities. The appellant’s conviction, it was argued, was aimed at attracting the provision of the Constitution of Bangladesh, by which a person convicted of a criminal offence is debared from participating in parliamentary or presidential elections. The attention of the Appellate Division was drawn to the attendant political circumstances and the course of events which led to the arrest and the subsequent hastily arranged trial of the appellant before a Special Martial Law Court.

The Court examined the sequence of events leading up to the arrest of the appellant in *Khondker Moshtaque Ahmed* and his subsequent trial, and noted:

The sequence of events are in so close proximity that the same undoubtedly stares [one] at the face.\(^{98}\)

The changes brought about in the composition of the Special Martial Law Court, by Martial Law decrees, for the purpose of trying the appellant, in *Khondker Moshtaque Ahmed*, were also examined. In that regard, the Court held:

The materials on record reveal that ... [the changes in the composition of the Special Martial Law Court] were brought about to achieve a direct purpose of debarring the appellant from elective political activities.\(^{99}\)

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\(^{97}\) Articles 50 and 66, Constitution of Bangladesh.

\(^{98}\) *Khondker Moshtaque Ahmed*, op. cit., at 235, per Chowdhury J.

\(^{99}\) *Khondker Moshtaque Ahmed*, op. cit., at 231.
With regard to the plea of *mala fides* by the appellant in *Khondker Moshtaque Ahmed*, the Appellate Division considered, amongst others, the Pakistani decisions of *Asma Jilani* and *Zia-ur-Rahman*, and its previous decision in *K. Ehteshamuddin Ahmed* and observed that:

the proposition that has been laid down consistently is that ... *mala fide* or *coram non judice* proceedings are not immune from the scrutiny of the Supreme Court notwithstanding any ouster clause in the Martial Law Proclamation.\(^{100}\)

In view of its findings with regard to the sequence of events leading to the arrest and trial of the appellant in *Khondker Moshtaque Ahmed*, the Court concluded:

The cumulative effect of these particulars leads to [the] irresistible conclusion that the proceedings were instituted with [an] ulterior purpose and such proceedings ... [are] *mala fide*.\(^{101}\)

On this finding, the Appellate Division set aside the order of the Special Martial Law Court and quashed the conviction of the appellant.\(^{102}\)

* * *

The decisions of the Court in Bangladesh, during an Emergency, show that the Court required state authorities to conform to the principles of legality in derogating from the right to liberty. When possible, a similar stand was taken by the Court during a state of Martial Law. This approach of the Court in Bangladesh contrasts quite significantly with the techniques of interpretation adopted by the Malaysian and Sri Lankan Courts. Can the jurisprudence of the Bangladesh Court be then identified as a model for judicial review of the

\(^{100}\) *Khondker Moshtaque Ahmed*, op. cit., at 234. The findings of the Appellate Division in *K. Ehteshamuddin Ahmed* and *Khondker Moshtaque Ahmed* regarding the non-ouster of the Court's jurisdiction on procedural irregularities and *mala fides* were subsequently held to be applicable in cases of Court-Martial of military personnel; see *(Captain) Jamil Huq v Bangladesh*, (1982) 34 D.L.R. (A.D.) 125.

\(^{101}\) *Khondker Moshtaque Ahmed*, op. cit., at 237.

\(^{102}\) By the time the decision of the Appellate Division in *Khondker Moshtaque Ahmed* was handed down, the appellant had already served his jail sentence. The Court's decision removed the constitutional bar on the appellant to participate in parliamentary and presidential elections.

It should also be noted that the Court's decision in *Khondker Moshtaque Ahmed* was given after the withdrawal of the 1975 Proclamation of Martial Law.
rights of citizens during an Emergency? This question, together with other more substantial issues relating to constitutional interpretation, the nature of judicial review under a Constitution, and the nature and operation of constitutional rights will be discussed in Chapters IX and X.
CHAPTER IX
EMERGENCY, JUDICIAL REVIEW AND CONSTITUTIONAL INTERPRETATION

The descriptive account of the jurisprudential trends of the Courts in Malaysia, Sri Lanka, and Bangladesh presented in Chapters VI, VII, and VIII projects a range of fundamental issues. These issues cannot be resolved by an exegesis of the emergency provisions of the Constitution alone, but must be addressed in the context of the basic premises which underlie the constitutional system, and in this respect the most crucial issues are the proper scope of judicial review under the constitution, the principles of legal and constitutional interpretation, and the content of constitutional rights. These matters, although underlying the basic premises of constitutional litigation during an Emergency, were not examined in any significant way by any of the Courts. The task therefore falls upon the serious examiner of emergency powers to address these problems and try and reach some conclusions.

The current Chapter and the next, will examine critically the general patterns of judicial decision-making during an Emergency as revealed in the previous Chapters, and suggest alternative premises for judicial review, legal interpretation, and constitutional rights. The present Chapter will address the themes of judicial review and legal interpretation, while Chapter X will discuss the nature of constitutional rights and judicial decision-making concerning these rights.

Emergency Powers and Judicial Review: An evaluation of the prevailing Jurisprudence

A. Malaysia

In decisions of the Federal and High Courts of Malaysia, one encounters a strong and traditional reluctance to interfere in matters relating to the subjective satisfaction of the detaining authority. In the process of upholding the overwhelming number of detention orders on a wide variety of grounds, the Malaysian Court has been instrumental in making the subjective satisfaction of Executive detention authorities virtually immune from judicial scrutiny. This

1 See Chapter VI, supra.
inviolability of Executive satisfaction was applicable to preventive detention in normal and emergency situations alike.

The only ground for review of executive detention orders conceded by the Court in Malaysia is one of bad faith (*mala fides*). Such an allegation is, however, difficult to establish in Court, and this concession to the detainees is of dubious practical significance. In this regard it is also to be noted that the manner of inquiry of the Court has been customarily based on the proposition that the Executive was presumed to have acted properly. A detainee alleging *mala fide* action thus has a burden to prove his allegations which is exceedingly difficult to discharge.

In its interpretation of constitutional provisions on citizens' liberties, the Federal/Supreme Court of Malaysia pursued a formal style of interpretation at the expense of the protection of the values sought to be promoted by the Constitution. Thus in *Karam Singh*, Suffian F.J. (as he was then), appeared to suggest that Article 5 of the Constitution of Malaysia, which guaranteed the right to life and liberty, could be curtailed by the State in any manner however arbitrary. His Lordship drew attention to the absence of the word *procedure* in Article 5 (1) and concluded that the Malaysian Constitution did not visualize that any particular procedure be followed by the State when it deprived a person of his life or personal liberty.

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3 Article 5 (1) of the Malaysian Constitution provided:

No person shall be deprived of his life or personal liberty save in accordance with law.

Emphasis added.

4 Suffian F.J. compared Article 5 of the Malaysian Constitution with Article 21 of the Indian Constitution which provided:

No person shall be deprived of his life and liberty except according to procedure established by law.

Emphasis added.

On the reasoning that the Indian constitutional provision referred to *procedure*, whereas the Malaysian provision did not, Suffian L.J. concluded:

[In Malaysia] ... detention in order to be lawful, must be in accordance with law, not as in India where it must be in accordance with *procedure* established by law.
This proposition is truly extraordinary. What Article 5 of the Malaysian Constitution lays down is that an infringement of life or liberty of the citizen must be in accordance with law. The *law* by which deprivation of liberty can be justified should have a substantive content, that is, it should define the circumstances in which a person can be deprived of his or her liberty and, in addition, the *law* should stipulate some procedure to ensure fairness. If the *law* does not provide for procedure, then the Court ought to turn to the general law, that is, to natural justice principles. This is the position taken in Bangladesh. The guarantee of life and liberty under the Constitution of Bangladesh is phrased in terms identical to Article 5 of the Constitution of Malaysia.\(^5\) The Supreme Court of Bangladesh interpreted the constitutional provision relating to the deprivation of liberty by the sanction of *law* to mean not only statute law, but also other rules and principles ensuring justice and fairness.\(^6\)

To assert that Article 5 of the Malaysian Constitution does not require any procedural proprieties to be followed, is to sanction arrest and detention in any arbitrary manner whatsoever. Indeed, in *Tan Boon Liat*, Suffian L.P. made it clear that no serious consequences would ensue if procedural requirements relating to the deprivation of liberty are breached.\(^7\) Such an interpretation of Article 5 cannot have been the intention of the makers of the Malaysian Constitution.

The formal style of interpretation overlooks the indeterminacy of language, construction and expression that sometimes characterise written

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\(^5\) Constitution of Bangladesh, Article 32:

No person shall be deprived of his life or personal liberty save in accordance with law.


communication. Moreover, the context of the Constitution or statute and the intent of framers should be kept in mind in its interpretation. The decisions in Karam Singh and Tan Boon Liat indicate that the Malaysian Court had failed to appreciate these dimensions of constitutional interpretation. On the other hand, it appears that the Malaysian Court has on occasion been inclined to interpret the enabling provisions of emergency statutes in expansive terms to the benefit of the Executive. In P.E. Long[8] for instance, the Court held that the phrase, "securing public order" in the Emergency (Public Order and Prevention of Crime) Ordinance, 1969,[9] encompassed all threats to "peace, order and good government".

Another distinctive feature of the Malaysian Court’s decision-making is its arbitrary classification of statutory and constitutional provisions as directory or mandatory. Thus in Che Su Binti Shafie,[10] the Court implicitly accepted the contention on behalf of the State that the provisions of section 5 of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969,[11] were not mandatory. This provision related to the communication to a detainee of the grounds for his or her detention. For the Court, the non-fulfilment of this requirement by the detaining authority did not invalidate the detention order. On the other hand, in Subramanium,[12] the High Court of Malaya characterised as directory, the provisions of section 6 of the Ordinance which provided that representations from detainees were to be considered by an Advisory Board within three months of the date of detention. Although similar provisions existed in the Constitution,[13] the Court distinguished section 6 of the Ordinance from the constitutional provision by identifying section 6 as a directory provision. The characterisation of this provision of the Ordinance as merely directory meant that non-fulfilment of this requirement did not vitiate the detention in derogation of a person’s constitutional liberty.

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13 Constitution of Malaysia, Article 151 (1) (b), amended since then.
This tendency of the Malaysian Court to segregate provisions of the Constitution and the law into mandatory and directive categories without discussion of the values in issue is another manifestation of its disposition to interpret law in the formal style. Thus interpreted, the Constitution and the law, especially to the extent that such provisions relate to life and liberty, lose their intrinsic significance, and become vulnerable to manipulation.

In other major respects too, the reasoning of the Malaysian Court reflects the formal style. The Court has for example advanced the argument that the preamble to a statute does not constitute a part of the statute. As has been seen in Chapter VI, this proposition in *P.E. Long* was a basis for sanctioning detention for purposes extraneous to the objects of the preventive detention statute stated in its preamble. In that case, "trafficking in drugs" was held to constitute an act "prejudicial to public order" and consequently attracted preventive detention measures under the emergency statute. Reasoning of this nature subjects a whole range of criminal and anti-social activities to the sanctions of preventive detention statutes, in circumvention of ordinary criminal and legal processes.

An observer of Emergency decisions of the Malaysian Court is struck by its overhelming reliance on English war-time preventive detention cases. Decisions of the English Courts are almost venerated. Most of the English decided cases relied upon by the Malaysian Court in its decisions on emergency powers and preventive detention belong to a period when Malaysia was administered by Britain. The English precedents most frequently cited by the Malaysian Court, such as *Halliday*, *Lees*, *Liversidge* and *Greene* were all decided in the first half of this century when Britain was still the colonial power in Malaysia. In that pre-Independence stage of Malaysia's

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14 *Re: P.E. Long @ Jimmy and Others, sub nom. P.E. Long and Others v Menteri Hal Ehwal Dalam Negari Malaysia and Others*, [1976] 2 M.L.J. 133. This decision has been analysed in detail in Chapter VI, *supra*.


history, those English decisions formed part of the law in Malaysia. Upon Independence, the application of case-law of an earlier era must have regard to the principles of the Independence Constitution, and more importantly to the entrenched rights provisions. The applicable principles of construction and interpretation in the post-Independence constitutional order cannot be derived solely from those of the colonial era.

It is also the case, moreover, that those English decisions were given in circumstances of actual warfare, during the first and second world wars. In Malaysia, these precedents continued to be applied years after the Emergency was declared on grounds of "internal disturbance". Although the causes giving rise to such a Proclamation ceased to exist in a matter of weeks, the Emergency was not revoked when the crisis was over. Like the political authorities of State who prolonged the Emergency beyond its initial justification, the Malaysian Court continued to rely on English war-time precedents to rationalise its decisions.

Overall, the manner in which the Malaysian Court exercised its power of judicial review suggests that it did not regard itself as a constitutional court. The Court construed the procedural requirements of preventive detention in a manner which was directed to accord legitimacy to the detaining authority rather than to ensure that the requirements of legality were met. By refusing to examine the discretion of the detaining authority, the Malaysian Court has suggested that it had no inherent power to determine whether the detaining authority had complied with the requirements of the Constitution and law.

**B. Sri Lanka**

In Sri Lanka, neither the Constitution of 1948 nor that of 1972 provided for justiciable rights or express powers of judicial review. Under the 1978 Constitution of Sri Lanka, rights of the citizens were entrenched and the Supreme Court was expressly accorded the power to enforce the constitutional rights. However, despite the changed circumstances, there was no basic change in the attitude of the Sri Lankan Supreme Court.

Like its counterpart in Malaysia, the Supreme Court of Sri Lanka refused to examine the *subjective satisfaction* of the executive detention authority. This
has been the dominant theme of judicial review of preventive detention both 
during the operation of Sri Lanka's Independence Constitution of 1948 and 
under the subsequent autochthonous Constitutions of 1972 and 1978. By placing 
the good faith of the detaining authority above the reach of judicial scrutiny, 
the Sri Lankan Court, under the previous constitutional orders, made the 
subjective satisfaction of the executive authority inviolable. More recently, 
the Supreme Court appeared to assert that it would review the reasonableness 
of executive detention powers. This change of attitude has, however, 
remained illusory for the Court has been prepared to uphold new orders of 
detention, on the same set of circumstances, in a situation where a previous 
order was found to be unreasonable, invalid or defective. The judicial sanction 
of the subjective satisfaction of the detaining authority was thus continued in a 
different way.

The Sri Lankan Court justified successive detention orders in various ways. In Senthilanayagam, for example, the detaining authority served fresh orders of 
detention while the detainees were incarcerated. The new orders of detention 
were directed to "cure" the "defects" of the initial orders of detention. The 
Court found the old orders "invalid ab in itio," but at the same time upheld 
the new orders as "valid ex facie". The presumption of honest opinion has 
also been a ground for upholding a new order of detention. In Gunasekera,

19 See for example, Janak Hirdaramani v Ratnavele, (1972) 75 N.L.R. 67 and S. Gunasekera v A. Ratnavele, (1973) 76 N.L.R. 316. Wijaya Kumaranatunga decided after the 1978 Constitution was 
decided similarly: Wijaya Kumaranatunga v G.V.P. Samarasinghe and Others, Supreme Court 
Application No 121 of 1982, reported in Fundamental Rights, Vol 2, Decisions of the Supreme 
Court of Sri Lanka (January 1982 - December 1982), Colombo, Lake House Investments, 347- 
363.


22 Ibid., at 205.

23 Ibid., at 206.

the new order of detention, after the detainee was released upon a court order, was upheld on the basis of the *honest opinion*\(^{25}\) of the detaining authority.

In several respects, the Sri Lankan Judges have invoked presumptions or *rules* of statutory interpretation which have worked in favour of the Executive. In *Janak Hirdaramani*,\(^{26}\) Chief Justice Fernando, speaking of executive detention orders, said that the Court "commence[s] by presuming the good faith of the Permanent Secretary ... "\(^{27}\) when making an order of detention. The invocation of this presumption is indicative of a formal technique of interpretation which pays insufficient attention to context.

In upholding the immunity of executive discretion, the Sri Lankan Court has further held that even a *mistaken* or *dishonest* opinion of the detaining authority would not invalidate an order of detention.\(^{28}\) According to Alles J., this conclusion followed because the enabling legislation authorizing detention on the basis of the *opinion* of the Executive was not qualified by the expression *reasonable*.\(^{29}\) The *opinion* of the Executive could not, therefore, be challenged on any ground whatsoever.\(^{30}\) But it is surely reasonable to suppose that in passing emergency legislation of this kind, sanctioning detention on executive *opinion*, the legislature assumes that power will be used reasonably. In this context, it should be pointed out that the absence of the expression *reasonable* in Sri Lanka’s emergency legislation was highlighted by Alles J. by comparison to English emergency legislation.\(^{31}\) Interpretation by reference to the provisions of foreign statutes could be very misleading.


\(^{26}\) *Janak Hirdaramani v Ratnavale*, (1972) 75 N.L.R. 67.

\(^{27}\) *Ibid.*, at 78.

\(^{28}\) *Janak Hirdaramani*, at 105; *S. Gunasekera v A. Ratnavale*, (1973) 73 N.L.R. 316, at 323.


\(^{30}\) *S. Gunasekera, op. cit.*, at 323.

\(^{31}\) *Defence (General) Regulations* 1939, Regulation 18B.
Chief Justice Fernando has advanced the presumption of absolute *good faith* of the detaining authority. Justice Alles has suggested the presumption against invalidity of a detention order in the absence of any criteria of *reasonableness* on the part of the detaining authority. In *Wijaya Kumaranatunga*, Soza J. has relied on another presumption of statutory interpretation which it might be said is not appropriate where what is in question is the validity of an exercise of executive discretion which impinges on personal liberty. Concerning the validity of an exercise of the power of detention, Soza J. reasoned that if the power of the detaining authority was exercised by reference to the wrong provisions of law, it might nevertheless be found to have been exercised under the correct provisions of law. This presumption was reiterated in *Edirisuriya*. Justice Ranasinghe explained that "as long as an authority ... [had] the power to do a thing, it ... [did] not matter if he ... [purported] to do it by reference to a wrong provision of law ... [T]he order can always be justified by reference to the correct provision of law ... ". It has been pointed out earlier that the conclusions of Soza and Ranasinghe J.J. were based on precedents from another jurisdiction and concerned with issues of revenue and contract laws. Whatever may be the merits of the application of this presumption in these branches of law, its application where questions of the constitutional liberty of citizens is in issue is very dubious. At least, that the contexts are different should be acknowledged, and the application of the presumption justified.

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34 *Edirisuriya v Navaratnam*, [1985] 1 Sri L.R. 100.


36 The precedents cited by the learned Judges were mostly of the Indian Supreme Court. An Indian authority on "Interpretation of Statutes" was also quoted. See Chapter VII, *supra*.

37 The Privy Council, for example, has maintained that the principles of constitutional interpretation do not necessarily adopt:

> all the presumptions that are relevant to legislation of private law.


38 See the discussion on principled interpretation *infra*. 
The same English war-time decisions on preventive detention that had been relied upon by the Malaysian Court are found to inspire the Sri Lankan judiciary. Sri Lanka was a colony of Britain until 1948 and the English decisions relied upon were of the period when Sri Lanka was still a colony. In addition to relying on precedents of the pre-Independence era, the Supreme Court of Sri Lanka had also relied upon case-law of the Indian Supreme Court. Thus in Gunasekera, Alles J. invoked Indian precedents to uphold successive detention orders. In Kumaranatunga and Edirisuriya, the Court relied upon Indian precedents to uphold a misconceived rule as to the presumption of legality. While foreign precedents are sometimes of great persuasive value, reliance on the case-law of another jurisdiction, without careful consideration of the different contexts, is unacceptable.

Foreign decisions do not simply state rules, but in addition incorporate the social values which those rules reflect and there must always be a question whether those values are consonant...

There are other indications that the Supreme Court of Sri Lanka interprets provisions of emergency legislation in a formal style. In Kumaranatunga, for instance, the Court found that no legal consequences flowed from the non-service of the order of detention on the detainee. Justice Soza reasoned that

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40 Janak Hirdaramani, S. Gunasekera and decisions of the Supreme Court on preventive detention before the adoption of the 1978 Constitution were all based on the rule in Liversidge and Greene.

41 S. Gunasekera v A. Ratnavale, (1973) 76 N.L.R. 316.


43 Edirisuriya v Navaratnam, [1985] 1 Sri L.R. 100.

44 Discussed supra.


46 Wijaya Kumaranatunga, op. cit.

47 See Chapter VII, supra.
service of the detention order had not been "made imperative by any rule of law".\textsuperscript{48} The Court is then suggesting that a detainee could be incarcerated without being informed of the grounds or the reasons for his or her detention.

Like the Malaysian Court, the Supreme Court of Sri Lanka also appear not to have regarded its function as a Court whose powers of judicial review were entrenched by the Constitution. By upholding detention orders on a variety of dubious grounds, the Sri Lankan Court denied its power under the Constitution to ensure that the Executive had acted in accordance with constitutional and legal requirements.

C. Bangladesh

Unlike the Courts in Malaysia and Sri Lanka, the Supreme Court of Bangladesh has endeavoured to uphold a jurisprudence based on principles of legality in matters of infringement of personal liberty. From the outset, the Court in Bangladesh has rejected the doctrine of subjective satisfaction of the detaining authority. In almost all of its decisions regarding preventive detention, in Emergency and non-Emergency situations, the Supreme Court sought "to make an objective assessment on which the necessary satisfaction of the detaining authority has been based and to be satisfied that an average prudent man could reasonably be so satisfied".\textsuperscript{49} In \textit{Humayun Kabir},\textsuperscript{50} it was held that a detention order must be based upon "reasonable and valid grounds sufficient to satisfy the judicial conscience".\textsuperscript{51} And in \textit{Mukhlesur Rahman},\textsuperscript{52} the proposition that "satisfaction of the detaining authority ... [was] amenable to judicial review" was characterised as "an established principle of law".\textsuperscript{53}

\textsuperscript{48} Ibid., at 360.

\textsuperscript{49} \textit{Aruna Sen v Government of Bangladesh}, (1975) 27 D.L.R. 122.

\textsuperscript{50} \textit{Humayan Kabir v The State}, (1976) 28 D.L.R. 259.

\textsuperscript{51} Ibid., at 276.

\textsuperscript{52} \textit{Mukhlesur Rahman v The State}, (1976) 28 D.L.R. 172.

\textsuperscript{53} Ibid., at 176; similar observations were also made in \textit{Nurunnahar Begum v Government of Bangladesh}, (1977) 29 D.L.R. 372, at 376.
In conformity with this approach to questions relating to preventive detention, the Court in Bangladesh had maintained that detaining authorities comply with all requirements of the relevant law. Requirements such as the communication of the grounds of detention to a detainee within the specified time was identified as a "mandatory requirement of law", the non-compliance with which would invalidate a detention order. The Appellate Division held that "unless there ... [was] strict compliance with the essential provisions of ... [the emergency legislation, [a] detention order ... [could not] be sustained". It was also held by the Appellate Division that any doubts in relation to the compliance by the detaining authority of the requirements of the law of emergency preventive detention "must be resolved in favour of the ... [detainee]."

In Shamsun Nahar, the Court observed that the "slightest deviation from the care, consideration and duty expected from detaining authority would attract allegations of bad faith". By contrast the Malaysian Court had, on occasion, been prepared to condone the failure of the detaining authority to observe fully the pre-conditions of preventive detention by accommodating such failure through the mandatory/directory dichotomy. The Sri Lankan Court had upheld an invalid exercise of the powers of detention by referring it to alternate sources of power.

The Malaysian and Sri Lankan Courts had been prepared to sanction successive detention orders, detention extraneous to the objects of the detention law, and also generally to accept detention orders which were otherwise defective. The Bangladesh Court on the other hand provides a large number of decisions where orders of detention were struck down on similar grounds. Thus in Krishna Gopal Bhowmick and Akram Hossain Mondal,

55 Gopal Krishna Bhowmick v Secretary, Ministry of Home Affairs, Bangladesh, (1979) 31 D.L.R. (A.D.) 145, at 148, per Kemaluddin Hossain C.J.
57 Ibid., at 40.
58 Ibid.
disjunctive and alternate grounds for detention were held to have vitiated the detention orders. Successive orders of detention to extend or validate previous orders on a variety of grounds, were also disallowed by the Court in Bangladesh.60

The role of the Supreme Court of Bangladesh in giving effect to the basic notions of legality must be acknowledged. To a large extent, this approach was made possible by the fact that the detaining authority provided to the Court information concerning and reasons for the detention. The Constitution of Bangladesh does however sanction the non-disclosure of the materials relating to detention in certain circumstances.61 During the 1975-77 Emergency in India, the Indian Government relied heavily on similar provisions in the Constitution and the preventive detention statute to deny access to information relating to the detention.62 Although authorities in Bangladesh have not relied on such a course of action, the Bangladesh Court will in that eventuality face difficulties in discharging its role of judicial review.

Some problems of interpretation are also encountered in certain decisions of the Court in Bangladesh. These difficulties are in some respects similar to the problems of construction noted in the context of the Malaysian and Sri Lankan Courts. In *Mukhlesur Rahman*63 and *Kripa Shindu Hazra*,64 for example, the High Court Division sought to differentiate its jurisdiction on the basis of the expressions used in the respective provisions of the statute and the Constitution. It was quite rightly held in *Mukhlesur Rahman* that the

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61 Constitution of Bangladesh, Proviso to Article 33 (5):

Provided that the authority making any such order may refuse to disclose facts which such authority considers to be against the public interest to disclose.

The *Special Powers Act*, 1974, by section 8 also expresses this rule.


constitutional jurisdiction of the High Court Division to enforce the right to liberty\footnote{Article 102, Constitution of Bangladesh.} was wider than a similar judicial power under the criminal law.\footnote{Code of Criminal Procedure, 1898, section 491. The relevant provisions of the Constitution and statute are discussed in the judgement in \textit{Mukhlesur Rahman, op. cit.}, at 177.} However, having so held, the Court denied relief to a detainee because the application was made to the Court under the provisions of the criminal law.

In \textit{Kripa Shindu Hazra}, on the other hand, the Court advanced the proposition that the scope of judicial inquiry into questions of personal liberty under the provisions of the criminal law was wider than that afforded by the Constitution.\footnote{\textit{Kripa Shindu Hazra, op. cit.}, at 114.} This interpretation was focussed on the wording of the relevant criminal law provisions. The argument that the judicial power under a sub-constitutional statute could be wider in scope than the constitutional jurisdiction of the Court in matters affecting the entrenched right of personal liberty is unacceptable.

In contrast with the attitude of the Malaysian and Sri Lankan Courts the Supreme Court of Bangladesh is found to vigourously assert its constitutional jurisdiction under the Constitution. However, there has been some confusion about the exact nature and parameters of this jurisdiction.

\textbf{The Problem}

The permeating influence of conventional ideas of law and justice, the familiarity with common law rules of interpretation and the self-denial of the Court of its status as constitutional court have all contributed to the failure of the Malaysian and Sri Lankan Courts to render justice on vital questions concerning constitutional liberty. Adherence to the formal style of interpretation in relation to constitutional questions overlooks the fact of post-Independence statehood and the principles, priorities and values of the post-Independence constitutional order. The Bangladesh Court has also been influenced by the formal style, although to a lesser degree than its counterparts in Malaysia and Sri Lanka.
The influence of the formal style in constitutional adjudication appears to be quite significant in Courts of countries which had previously been part of the British colonial empire. The significance of the break with the old legal order and the introduction of new constitutional orders in the independent States has not been sufficiently grasped. In one study, the powerful influences of the common law in judicial reasoning has been presented and rebutted in the context of a judicial decision concerning the franchise under the Constitution of Western Samoa. With regard to the tendency of lawyers and judges in Western Samoa to read the Constitution and its Bill of Rights as merely stating the common law, it has been remarked that:

this method of reasoning avoids the difficult questions of balancing competing interests which the constitutional provisions require.\(^68\)

While the common law may sometimes provide a guide for interpretation:

what is further required is analysis of whether it conforms to the constitution and the values and principles it incorporates.\(^69\)

In a decision on an appeal from Bermuda, *Minister of Home Affairs v Fisher*,\(^70\) the Privy Council advocated a "generous interpretation" of constitutional provisions on citizens' rights avoiding the "austerity of tabulated legalism".\(^71\) The way to interpret a Constitution, according to the Privy Council in *Fisher*, was to construe it:

as sui generis, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law.\(^72\)


\(^{71}\) Ibid., at 328.

\(^{72}\) Ibid., at 329, per Lord Wilberforce. See also *Attorney General of St Christopher, Nevis and Anguilla v Reynolds*, [1980] A.C. 637, *Ong Ah Chuan v Public Prosecutor*, [1981] A.C. 648, and *Attorney General v Momodu Jobe*, [1984] 1 A.C.689, where the principles of interpretation developed in the *Fisher* case proved to be influential, "at least rhetorically".
It is just this kind of initial approach that is lacking in the vast bulk of the decisions of the Courts of Malaysia, Sri Lanka, and Bangladesh reviewed in Chapters VI, VII, and VIII, and more briefly in this Chapter. In the concluding part of this Chapter, a new basis of interpretation will be advanced. Before that is done, two other alternative theories of interpretation and judicial review will be examined.

The Literal/Purposive Dichotomy

Approaches to judicial review and constitutional interpretation are sometimes classified as narrow or broad, literal or liberal, legalistic or purposive. As will be argued, these classifications are inadequate, unrealistic and misleading.

In presenting the approaches to judicial review of the Nigerian Court, Nwabueze adopts a similar classification.

In deciding the constitutionality of statutes the Nigerian courts have vacillated between two approaches: the broad or liberal interpretation as represented by the practice in the United States Supreme Court and the strict or narrow interpretation which generally characterizes judicial review in many parts of the Commonwealth.

Nwabueze then remarks that:

73 There could be different combinations based on each of these trends. Techniques of interpretation and review have also been presented in other contrasting categories.

The distinction is made between 'precedent-oriented legal positivism' and 'policy-oriented legal realism', ... between 'mechanical' and 'political' jurisprudence, ... between decision-making built upon 'logic' and that built upon 'experience' between 'legalism' and 'pragmatism' ....


[o]ne would therefore wish to see the Nigerian Constitution interpreted in a broad manner.  

A similar sentiment was expressed by the Pakistan Supreme Court.

Consistently with the language used, constitutional instruments should receive a broader and more liberal construction than statutes.

Trends of constitutional interpretation explicated as belonging to narrow and broad categories of construction raises problems of delineating the parameters and the content of the respective approaches. A wide range of values and justification would be encompassed in each of the judicial review processes so that a characterization based on the narrow/broad category is not an adequate classification.

A strict or narrow technique of interpretation follows from a commitment to a literal construction of legal and constitutional provisions.

Literalism has been manifested by refusing construction and limiting the judicial role to an interpretation of the language used in the organic law ... [S]uch interpretation [is restricted] to the meaning of words at the time they were employed by the framers of national constitutions ... 

While it is true that such techniques of interpretation are unacceptable, the suggested alternative of a liberal approach need to be more substantively identified. There would then be the additional problem of choosing from a wide variety of values which would qualify as liberal.

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75 B.O. Nwabeueze, at 306.


77 The pre-New Deal decisions of the Supreme Court of the U.S.A. embracing liberty of contract can be interpreted as both liberal and conservative according to the perspective of the commentator. The exercise of judicial power over legislative acts during that period can be seen as a liberal role. In so far as the Court sought to preserve the socio-economic status quo from the encroachment of new legislative policies, it was conservative.

78 C.J. Antieau, op. cit., at 47.
At his investiture with the office of the Chief Justice of the High Court of Australia, Sir Owen Dixon upheld a "a strict and complete legalism" in constitutional adjudication.

It may be that the Court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.\(^79\)

Legalism as a technique of constitutional interpretation is identified as a rigid adherence to rules of statutory interpretation. It is generally asserted that a legalistic interpretation disregards the economic, social and political premises of decision-making.\(^80\) However, in the context of legalism of the Australian High Court it has been pointed out that:

[i]t seems that many judges who emphasize the importance of legalism do not regard that method of approach as denying resort to broad social and political values they perceive in the Constitution.\(^81\)

A purposive approach to judicial review, as opposed to a legalistic enquiry, fails to satisfy the criteria of clarity and practicability as a distinct technique. It has been suggested, in the context of constitutional adjudication in Australia, that a legalistic enquiry was also concerned with "the purpose of the particular constitutional provision".\(^82\) The distinction between a legalistic and purposive approach is therefore not a practicable one to assert.\(^83\)

There are other significant difficulties as well. The underlying premises of a purposive approach to judicial review is to ascertain the "purpose(s)" behind the provisions of the Constitution. However an investigation into the purpose of particular constitutional provisions in isolation and without regard to the

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\(^80\) See Introduction, *supra*.


\(^82\) *Ibid*.

\(^83\) The reference here is to the legalistic/purposive dichotomy and not to the singular category of legalism or formalism which is adopted in this thesis as a practical characterization of the approaches of the Courts in the countries examined.
context in which a provision is applied could defeat the very object of such a technique. In this regard, an "Emergency" decision from the Supreme Court of India, *A.D.M. Jabalpur v Shivkant Shukla*[^84] is very revealing. In this case, the majority of the Indian Supreme Court upheld a purposive interpretation of the emergency provisions of the Constitution. The majority felt that the scope of the emergency provisions of the Indian Constitution was to be ascertained solely by reference to its purpose as a emergency provision. This, for the Judges, meant that the content of the constitutional rights were to be defined in terms of the "necessary" scope of the emergency powers of the Constitution.^[85]

In this vein, Bhagwati J observed that the consequence of giving a restrictive interpretation to the scope of the emergency provisions of the Constitution would be:

> that even in a perilous situation when the nation is engaged in mortal combat with the enemy, the courts would be free to examine the legality of detention and even if a detention has been made for efficient prosecution of the war or protecting the nation against enemy activities, it would be liable to be struck down by the courts if some procedural safeguard has been violated ...[^86]

The Indian Supreme Court decision in *Shivkant Shukla* illustrates the practical difficulties inherent in a purposive approach to judicial review. Also, as has been suggested, a technique of interpretation based on legalism can also encompass aspects of a purposive enquiry. It would therefore seem unwise to suggest that the problems of interpretation encountered in constitutional adjudication in Malaysia, Sri Lanka and Bangladesh could be resolved by recourse to techniques proposed in the form of linguistic categories like legalistic or purposive.

The only merit that can be conceded to these models of judicial interpretation is that these distinctions could sometimes be helpful starting points for a more


[^86]: *Shivkant Shukla*, *op. cit.*, at 1356, per Bhagwati J.
thorough analysis. In order to confront the deep-rooted problems of interpretation and judicial review in the constitutional systems of the post-colonial States, theoretical premises of more substance are called for. Before that task is undertaken, another alternative model of interpretation and judicial review is discussed in the following section.

Judicial Review and "Basic Features" of the Constitution

In *Keshavananda Bharati v State of Kerala*, the Supreme Court of India has suggested an approach to constitutional interpretation on the basis of a theory which has come to be known in Indian jurisprudence as the Basic Features Doctrine. Although directed to constitutional interpretation and judicial review in respect of constitutional amendments, the Doctrine has some relevance to legal interpretation in general. Simply stated, the Doctrine proposed that the Indian Constitution encompassed certain basic and immutable features. If those basic features of the Constitution were transgressed by Parliament in its exercise of amending powers, the Supreme Court would hold the Acts of Parliament invalid by invoking its constitutional jurisdiction.

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89 Constitution of India, Article 368.
The origins of this theory lie in a dissenting opinion of Chief Justice Kennedy of the Irish Supreme Court in *State (Ryan) v Lennon*,\(^{90}\) where his Honour proposed that certain basic principles or features in a constitution were fundamental, immutable and outside the amending powers of Parliament.\(^{91}\) In *Ryan*, Kennedy C.J.'s dissent was prompted by his grave concern at the introduction of extensive emergency powers in the Constitution of the Irish Free State 1922, by a constitutional amendment in 1931.\(^{92}\) The 1931 Amendment provided for the establishment of special military tribunals, sanctioned the curtailment of the ordinary processes of law, and granted extraordinary police powers of search and arrest. The Chief Justice denied that the Irish Parliament had the authority to amend the *fundamental principles* of the 1922 Constitution by the 1931 Amendment.

In my opinion, any amendment of the Constitution, purporting to be made under the power given by the Constituent Assembly, which would be a violation of, or be inconsistent with, any fundamental principle so declared, is necessarily outside the scope of the power and invalid and void.\(^{93}\)

Chief Justice Kennedy's proposal in *Ryan*, that certain basic principles or features in a Constitution were fundamental, immutable and outside the amending powers of Parliament, motivated the Supreme Court of India, some forty years later, to formulate the Basic Features Doctrine in its decision in *Keshavananda Bharati*.\(^{94}\) In an earlier decision, *Golaknath v. State of Punjab*,\(^{95}\) the Indian Supreme Court had held that the fundamental rights in


> When an Act of Parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control and adjudge such act to be void.

\(^{92}\) The *Constitution (Amendment 17) Act*, 1931.


the Constitution were immune to modification under Parliament's amending power. In Keshavananda Bharati, the Court unanimously conceded amending power to the Indian Parliament, including the power to amend provisions of the entrenched rights. But by a narrow majority, it held that this general power of amendment did not include any amendment which would destroy the basic features of the Constitution. If such an amendment was attempted, it would be ultra vires the powers of Parliament.

Although the seven majority judges in Keshavananda Bharati differed in their views as to the identity of these basic features, all held to be basic, the supremacy of the Constitution, and the separation of powers between the legislature, the executive and the judiciary. According to Sikri C.J., these basic features related to the dignity and freedom of the individual which was of supreme importance and could not by any form of amendment be destroyed. The basic features, according to the Chief Justice, are easily discernable from the Preamble and the whole scheme of the Constitution. Although, in Keshavananda Bharati, the Court modified its previous position in Golaknath in respect to the sanctity of constitutional rights, the new Basic Features Doctrine was not confined in its application to the constitutional rights only, but extended to the entire Constitution.

The problem with such a theory as the Basic Features Doctrine is that the categories, "supremacy of the constitution", "separation of powers", or the "dignity and freedom of the individual", by themselves offer no guidance to constitutional interpretation. It has the familiar ring of the arguments

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97 Sikri C.J., identified the following basic features of the Indian Constitution:

(1) Supremacy of the Constitution;
(2) Republican and Democratic forms of Government;
(3) Secular character of the Constitution;
(4) Separation of powers between the legislature, the executive and the judiciary;
(5) federal character of the Constitution.


proposing a broad or liberal or purposive interpretation. Just how some of the suggested basic features of the Constitution can be manipulated to conform to diverse interpretations is exemplified by the Indian Supreme Court's subsequent decision in *A.D.M. Jabalpur v. Shikvant Shukla*, given during the 1975-77 Emergency. In *Shikvant Shukla*, Chandrachud J. held that the emergency provisions of the Indian Constitution were part of the basic features of the Constitution. Referring to Article 359 (1) of the Indian Constitution by which the President, following the declaration of Emergency, was enabled to suspend the enforcement of specified constitutional rights, Chandrachud J. observed:

That Article is as much a basic feature of the Constitution as any other ... [provision of the Constitution].

The predominating importance of the dignity and freedom of the individual, which Sikri C.J. in *Keshavananda Bharati* characterized as the foundation of the basic features of the Indian Constitution, has been the subject of much theorization and debate over the years. Dicey, for example, has encompassed such an idea in his Rule of Law concept. Argument based on this rule of law concept was advanced on behalf of the detainees in *Shikvant Shukla*. Three of the majority judges - Ray C.J. and Beg and Chandrachud JJ - dismissed this argument as "intractable". All three judges felt that the emergency provisions of the Indian Constitution constituted the rule of law during an Emergency. Chandrachud J. emphatically pointed out that "there

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100 Constitution of India, Article 359 (1), as amended:

Where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

101 *Shivkant Shukla*, op.cit., at 1331. In this regard the learned Judge also observed that arguments based on the theory of basic features were not particularly relevant. *Ibid.*, at 1330.


103 *Shivkant Shukla*, op.cit., at 1235, 1309.
... [could] not be a brooding and omnipotent rule of law drowning in its effervescence the emergency provisions of the Constitution.\footnote{104}{Ibid., at 1334.}

The Basic Features Doctrine postulated by the Indian Supreme Court recognizes that the Parliament has the power to amend the provisions of constitutional rights in consideration of a policy goal in the constitution. The doctrine thus implicitly accepts that the citizens have only those rights as have been granted by the constitution. This aspect of the Basic Features Doctrine will be discussed in Chapter X.

The theory of Basic Features is admittedly directed to examine the validity of amendments to the Constitution. In so far as it projects certain constitutional values as basic, the theory would appear to have some relevance to constitutional interpretation in general. It was on this understanding that the postulates of the Basic Features Doctrine were relied upon in arguments before the Court in India on a variety of grounds including preventive detention during an Emergency. As the decision in \textit{Shivkant Shukla} suggests however, the categories of the basic features are susceptible of a wide range of interpretations. In the context of the present study, the Basic Features Doctrine offers little insight into the fundamental problems of constitutional interpretation.


\begin{itemize}
\item In \textit{Law's Empire}, the jurisprudential approach in \textit{Taking Rights Seriously} and \textit{A Matter of Principle} is continued at a broader philosophical level. In \textit{Law's Empire}, Ronald Dworkin offers an extensive presentation of his theory of law. This account of law is built on two basic propositions - \textit{interpretation} and \textit{integrity}. According to Dworkin, legal practice is \textit{interpretive}, not \textit{semantic}. Further that, law should be seen as serving a fundamental \textit{political} ideal called \textit{integrity}, which encompasses a coherent conception of \textit{justice} and \textit{fairness} and serve as a guide in the adjudicative process.
\end{itemize}
Principled Approach to Interpretation and Judicial Review

This section is principally directed to discuss the basic premises of Dworkin's jurisprudence and to suggest its application to constitutional interpretation by the Courts in the countries under review. Dworkin's theory is expounded as a critique of legal positivism and of H.L.A. Hart's philosophy of law.106 It is desirable therefore that the basic features of positivism are identified and Hart's theory is reviewed in brief before the discussion centres on Dworkin.

Legal Positivism

The rigid precedent-oriented, and strict rule-based approaches of the Courts in Malaysia and Sri Lanka are representative of a positivist technique of interpretation. To a lesser extent, judicial interpretation of the Court in Bangladesh has also tended towards a positivistic inquiry. While the term positivism is now "radically ambiguous and dominantly perjorative",107 the variety of views represented by legal positivism may be identified as including the following:

1. that law as it is can be clearly differentiated from law as it ought to be,
2. that only the concepts of existing positive law are fit for analytical study,
3. that force or power is the essence of law,
4. that law is a self-sufficient closed system which does not draw on other disciplines for any of its premises,
5. that laws and legal decisions cannot, in any ultimate sense, be rationally defended,

(6) that a logically self-consistent Utopia exists to which positive law ought to be made to conform,

(7) that, in interpreting statutes, considerations of what the law ought to be have no place,

(8) that judicial decisions are logical deductions from pre-existing premises,

(9) that certainty is the 'chief end of law',

(10) that there is an absolute duty to obey evil laws,

(11) that there can be no higher law in any significant sense, and

(12) the law consists of hard and fast rules. ¹⁰⁸

Hart’s Positivism

In contemporary times, one of the most influential legal philosophers of the positivist tradition is H.L.A. Hart.¹⁰⁹ In Concept of Law, Hart presents law as a system of rules, differentiated as primary and secondary rules.

Under rules of the one type, which may well be considered the basic or primary type, human beings are required to do or abstain from certain actions, whether they wish to or not. Rules of the other type are in a sense parasitic upon or secondary to the first; for they provide that human beings may by doing or saying certain things introduce new rules of the primary type, extinguish or modify old ones, or in various ways determine their incidence or control their operations.¹¹⁰

¹⁰⁸ Ibid., at 15. As the writer points out, "No legal philosopher holds all of these views." Ibid.

Some key tenets of positivism are also given in R. Dworkin, Taking Rights Seriously, at 17.

¹⁰⁹ Hart’s jurisprudence may be more descriptively identified as representing a "neo-positivist" trend in the "School of Linguistic Analysis". See Hendrik Jan van Eikema Hommes, Major Trends in the History of Legal Philosophy, Netherlands, North-Holland Publishing Co., 1979, at 358-365.

¹¹⁰ Concept of Law, at 78-79.
The secondary rules in Hart's model of law are comprised of "rules of recognition", "rules of change" and "rules of adjudication". Rules of recognition accord validity to primary legal rules. However, "[f]or the most part the rule of recognition is not stated ... [I]ts existence is shown in the way in which particular rules are identified ... ". The medium through which a rule of recognition commonly operates include "a written constitution, enactment by a legislature and judicial precedents".\textsuperscript{111} In the hierarchy of legal rules of Hart's model, the rule of recognition is the \textit{ultimate} rule,\textsuperscript{112} which need not satisfy the criteria of validity.\textsuperscript{113} Rules of change provide for the alteration of primary rules. In addition to specifying the legislative body, the rules of change define the "procedure to be followed in legislation".\textsuperscript{114} Conflicts are resolved through rules of adjudication, which "[b]esides identifying the individuals who are to adjudicate, ... also define the procedure to be followed".\textsuperscript{115}

Hart's ultimate rule of recognition can be considered from two points of view.

\begin{quote}
[O]ne is expressed in the external statement of fact that the rule exists in the actual practice of the system; the other is expressed in the internal statements of validity made by those who use it in identifying the law.\textsuperscript{116}
\end{quote}

In presenting his model of rules, Hart admits that a "fringe of vagueness or 'open texture'" attaches to all rules.

\begin{quote}
The open texture of law means that there are, indeed, areas of conduct which must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.\textsuperscript{117}
\end{quote}

\textsuperscript{111} \textit{Ibid.}, at 98.
\textsuperscript{112} \textit{Ibid.}, 10-104.
\textsuperscript{113} \textit{Ibid.}, at 105.
\textsuperscript{114} \textit{Ibid.}, at 93.
\textsuperscript{115} \textit{Ibid.}, at 94.
\textsuperscript{116} \textit{Ibid.}, at 108.
\textsuperscript{117} \textit{Ibid.}, at 132.
In conceding the open-texture of the rules and the resulting task that devolved on the courts, Hart implicitly acknowledges that a wide discretion is left to the judiciary.

Here at the margins of rules and in the fields left open by the theory of precedents, the courts perform a rule-producing function which administrative bodies perform centrally in the elaboration of variable standards.\footnote{In reviewing M. Cohen (Ed), \textit{Ronald Dworkin and Contemporary Jurisprudence}, New Jersey, Rowman and Allenheld, 1986, Stephen Ball has encapsulated Dworkin's theory in a "sequence of six logically connected thesis".}

Dworkin's Jurisprudence

This section is primarily concerned with Dworkin's formulation on law, the legal system, and judicial decision-making. The rights thesis will be discussed in Chapter X.\footnote{In reviewing M. Cohen (Ed), \textit{Ronald Dworkin and Contemporary Jurisprudence}, New Jersey, Rowman and Allenheld, 1986, Stephen Ball has encapsulated Dworkin's theory in a "sequence of six logically connected thesis".}

\begin{enumerate}
\item Existing law consists not only of 'rules' in Hart's sense, but also 'principles' of morality (fairness, equity, etc.), which are chiefly distinguished by the fact that they have merely presumptive weight in deciding cases ...
\item No positivistic litmus test like Hart's ... [rule of recognition] can be formulated to include such principles as legally valid.
\item Consequently, since there is no veridical test for identifying all law in terms of positivist features apart from moral criteria, there is no conceptual 'separation' between morality and legal validity.
\item In place of Hart's ... [rule of recognition], a 'coherence theory' of legal truth must be substituted according to which the correct decision in a case at law is a function of how well it fits with the entire history of the legal system, and how convincingly it can be justified by principles of morality embedded in both the legal system and other political institutions ...
\item The Right Answer Thesis: when the job of judicial decision-making is conducted as in (4), there is in theory a uniquely correct answer, determined by already existing law, to almost every legal issue in modern, complex legal systems.
\item The Rights Thesis: therefore, litigants in civil cases and defendants in criminal cases have a right to have their cases decided correctly according to (5), and, in 'hard cases' not settled by 'rules', judges have a duty (contrary to Hart's doctrine of discretion) so to decide on the basis of 'principle(s)' rather than to 'legislate' interstitially on the basis of 'policy' ...
\end{enumerate}

\footnotemark[18] \textit{Ibid.}


(a) Principles and Rules

In *Taking Rights Seriously*, Ronald Dworkin argues that the positivist's portrayal of law as a system of rules is fallacious and chooses Hart's "model of rules" to demonstrate the fallacy. Dworkin points that in the resolution of disputes about legal rights and obligations, *standards* are used which do not function as *rules*. These *standards* operate variously as *principles*, *policies* and other *standards*. A *principle*, according to Dworkin, is:

>a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.*

Legal *principles* as formulated by Dworkin differ from the *legal rules* of Hart's model of law in their application to decisions about legal obligations. In Hart's model:

>[r]ules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.*

Contrary to the nature of *rules*, the *principles* within a legal system offer standards to be taken into account, subject to relevancy, in deciding the direction of legal decisions. Legal *principles* have the dimensions of *weight* and *importance* not found in *rules*; in reaching legal decisions involving conflicting *principles*, the relative weights and importance of the *principles* are to be considered.

Principles have a dimension that rules do not - the dimension of weight or importance. When principles intersect ... , one who must resolve the conflict has to take into account the relative weight of each. This cannot be, of course, an exact measurement, and the judgement that a particular principle or policy is more important than another will often be a

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120 *Taking Rights Seriously*, *op. cit.* at 22.
controversial one. Nevertheless, it is an integral part of the concept of a principle that it has this dimension that it makes sense to ask how important or how weighty it is.\textsuperscript{122}

According to Dworkin, the origins of principles as legal principles cannot be derived from statutes or precedents and there is no "formula" as to what kind of "institutional support" is necessary for legal principles to be asserted.

We argue for a particular principle by grappling with a whole set of shifting, developing and interacting standards (themselves principles rather than rules) about institutional responsibility, statutory interpretation, the persuasive force of various sorts of precedents, the relation of all these to contemporary moral practices, and hosts of other such standards.\textsuperscript{123}

Since the origins of legal principles are complex and diverse, the concept of a "fundamental rule of recognition" suggested by Hart is irrelevant. In the application of principles, questions of acceptance and validity - which are distinctly different in Hart's model - lose their distinctiveness. It is not possible to formulate criteria according to which the 'validity' of a principle can be tested. There is no 'rule of recognition' one can apply to principles. Substituting principles compendiously as the "rule of recognition", however, is not the answer, for that would be like saying that "law is law". It is not possible to put together an enumerative list of legal principles because:

\begin{quote}
[t]hey are controversial, their weight is all important, they are numberless, and they shift and change ... [very] fast ... \textsuperscript{124}
\end{quote}

Since legal rules as formulated by Hart do not have the dimensions of weight and importance that principles have, decisions on conflicting rules would then have to be based on considerations beyond the rules themselves. Among such considerations would be the principles of law and the legal system. It would, however, be a mistake to assert the idea that principles can be accommodated in Hart's model of rules, for the whole notion of principles is basically different from rules, as Dworkin explains in elaboration of his concept of principles. Legal principles are different from legal rules on moral, political and philosophical grounds. For Dworkin legal standards cannot be distinguished in principle and as a group from the moral and political standards of a

\textsuperscript{122} Ibid., at 26.
\textsuperscript{123} Ibid., at 40.
\textsuperscript{124} Ibid., at 44. See also Law's Empire, at 413.
society. Nor are legal principles and policies directed to explain settled legal rules by historical interpretivist methods.

If a theory of law is to provide a basis for judicial duty, then the principles it sets out must justify the settled rules by identifying the political and moral concerns and traditions of the community which ... support the rules.126

This justificatory process for a theory of law is not concerned with a "test" of "pedigree" in the tradition of Hart, but is based on political and moral values.127

(b) Principles and the Soundest Theory of Law

For Dworkin, the set of principles which justify and explain the correct propositions of law should be designated as the "soundest theory of law". Principles of morality, according to Dworkin are not co-extensive with legal principles. It is only those moral principles which figure in the "soundest theory of law" of a particular jurisdiction which are also legal principles.

[A] principle is a principle of law if it figures in the soundest theory of law that can be provided as a justification for the explicit substantive and institutional rules of the jurisdiction in question.128

(c) Principles and Policies

In Dworkin's theory, a policy is:

[a] kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community .... .129

125 Ibid., at 60.
126 Ibid., at 67, emphasis in original.
127 Ibid.
128 Ibid., at 66. See also Law's Empire, at 100.
129 Ibid., at 22.
Policies are different from principles. The fundamental distinction between principles and policies is found in the context of "political theory".

Arguments of policy justify a political decision by showing that the decision advances or protects some collective goal of the community as a whole ... Arguments of principle justify a political decision by showing that the decision respects or secures some individual or group right.¹³⁰

(d) Principles and Judicial Review

In Hart's model of law, rules dictate the result of judicial decisions, and when no applicable rules are found, a judge exercises "discretion", which really amounts to a fresh piece of "legislation".¹³¹ But in Dworkin's view, principles do not determine the results of judicial decision-making.

Principles ... incline a decision one way, though not conclusively, and they survive intact when they do not prevail. This seems no reason for concluding that judges who must reckon with principles have discretion because a set of principles can dictate a result. If a judge believes that principles he is bound to recognize point in one direction and that principles pointing in the other direction, if any, are not of equal weight, then he must decide accordingly, just as he must follow what he believes to be a binding rule. He may, of course, be wrong in his assessment of the principles, but he may also be wrong in his judgement that the rule be binding.¹³²

Dworkin proposes that Courts should base their decisions on arguments of principle rather than of policy.

[A]n argument of principle fixes on some interest presented by the proponent of the right it describes, an interest alleged to be of such a character as to make irrelevant the fine discriminations of any argument of policy that might oppose it. A judge who is insulated from the demands of the political majority whose

¹³⁰ Ibid., at 82.

¹³¹ Hart, Concept of Law, at 132.

¹³² Taking Rights Seriously, at 35, emphasis in original.
interests the right would trump is, therefore in a better position to evaluate the argument.\textsuperscript{133}

In the performance of the judicial task:

[\textit{w}hen a judge chooses between the rule established in precedent and some new rule thought to be fairer, he does not choose between history and justice. He rather makes a judgement that requires some compromise between considerations that ordinarily combine in any calculation of political right, but here compete.\textsuperscript{134}]

\textbf{Dworkin's Jurisprudence and the CLS critique}

In addition to conventional criticisms of Dworkin's jurisprudence,\textsuperscript{135} directed at the inclusion of \textit{morals} in legal theory and the presumed entailment of legal indeterminacy,\textsuperscript{136} Dworkin has come under consistent attack from writers within the Critical Legal Studies (CLS) School. The use of \textit{principles} in judicial decision-making has been criticized by CLS writers on the grounds that this does not overcome the problem of indeterminacy. Dworkin's assignment of varying \textit{weights} to different \textit{principles} has been attacked by proponents of CLS as being implausible and incoherent. The attack is predicated on the premises that there is no discoverable \textit{metapriniciple} for assigning \textit{weights}.

Dworkin's attempt to portray "legal determinacy" through a coherent theory, by explicating the law and the legal system in terms of legal principles of variable "weights", decided according to the "soundest theory of law", has been

\textsuperscript{133} \textit{Ibid.}, at 85.
\textsuperscript{134} \textit{Ibid.}, at 87. See also \textit{Law's Empire}, Chapter 11.
\textsuperscript{135} See generally M. Cohen (Ed), \textit{Ronald Dworkin and Contemporary Jurisprudence} which contain a collection of essays by well-known legal theorists critical of Dworkin's theory. Compared to the CLS critique, Neil MacCormick, for example, is conventional because he shares with Dworkin the assumptions that legal doctrine is, by and large, logical and coherent. See A. Altman, \textit{Legal Realism, Critical Legal Studies, and Dworkin}, (1986) 15 \textit{Philosophy and Public Affairs} 205, at 223-225.
\textsuperscript{136} This critique of "indeterminacy" is different from the CLS critique on the same point. The conventional critique is predicated on the fact that the use of Dworkin's \textit{principles} will unsettle fixed points of law.
described by Roberto Unger as a "daring and implausible" venture.\textsuperscript{137} But a writer, supportive of Dworkin's theory notes that the trend of writers of the CLS School may lead them to assert that an infinite number of interpretations are possible and that conflicts of interpretation can never be rationally adjudicated. If this position is taken up, the CLS position, according to the writer, can be identified as "deconstructive legal nihilism."\textsuperscript{138}

Dworkin has been much criticized by CLS writers for proposing that moral, political and social controversies in society could be resolved by judges, thereby rechanneling controversies away from political and other societal institutions. The choice of judges to perform the job of protecting the moral basis of society is interpreted by CLS writers as implying that the public is not to be burdened with the problem of deciding issues affecting the common good.

The distinction made by Dworkin while dealing with political questions is overlooked by CLS writers. Dworkin proposes a distinction between principles and policies. By assigning arguments of policy to political forums and projecting principles as the basis of judicial decisions, Dworkin insulates his theory from the charges of usurping the functions of political, social, and communitarian institutions.

The Formal Style and the need for a Principled Approach to Constitutional Interpretation

Several decades have now passed from the time that the countries, the focus of this study, moved from from colonial status to independent polities with well defined objectives in the respective Constitutions. Yet, in varying degrees, the Courts in Malaysia, Sri Lanka and Bangladesh have confined their constitutional decision-making to the elements of the formal style. By so confining the interpretation of the law and Constitution, Courts in Malaysia and Sri Lanka have been instrumental in justifying, promoting and continuing


the moral and political values of the pre-Independence colonial era. In earlier Chapters, it has been seen how the invocation of outdated foreign precedents and outmoded common law rules of interpretation by the Courts in Malaysia and Sri Lanka have reduced the significance of the principles and values of the new constitutional orders.

The Constitutions of Malaysia, Sri Lanka and Bangladesh project visions of social orders based on values of equality, liberty, justice, dignity and related social and moral values. These values are not only projected in the Preambles to the Constitutions, or in some cases a set of "Directive Principles of State Policy", but underlie the whole scheme of the Constitution, including principally the entrenched rights.\[139\] In place of the pre-Independence formal style, a new jurisprudential approach based on broad moral and philosophical grounds is thus unavoidable. Such an approach is unavoidable even apart from the fact of the Constitutions. Sir Anthony Mason, for example, has observed that:

> [u]nfortunately, it is impossible to interpret any instrument, let alone a constitution, divorced from values. To the extent they are taken into account, they should be acknowledged and should

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139 The Preamble to the Constitution of Bangladesh emphasizes the realization, "through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens..."

Further elaborate state policies are contained in the "Fundamental Principles of State Policy", Articles 8-25, Constitution of Bangladesh.

The Preamble to the Constitution of Sri Lanka 1978, constitutes the State into a "DEMOCRATIC SOCIALIST REPUBLIC, whilst ratifying the immutable republican principles of REPRESENTATIVE DEMOCRACY, and assuring to all peoples FREEDOM, EQUALITY, JUSTICE, FUNDAMENTAL HUMAN RIGHTS, and the INDEPENDENCE OF THE JUDICIARY as the intangible heritage that guarantees the dignity and well being of succeeding generations of the People of SRI LANKA and of all the people of the World, who come to share with those generations the effort of working for the creation and preservation of a JUST AND FREE SOCIETY ... ". Emphasis in original.

The "Directive Principles of State Policy and Fundamental Duties" of the Sri lankan Constitution are contained in Articles 27-29.

The Constitution of Malaysia does not contain any Preamble or "Principles of State Policy", but the concerns of freedom, equality, justice and human rights, rule of law and related principles are addressed in similar terms in the provisions on 'Fundamental Liberties' and other parts of the Constitution.
be accepted community values rather than mere personal values.140

Dworkin's jurisprudence is broadly based on philosophical, moral and political considerations. The expansive parameters of Dworkin's theory attaches to it a character of universality that transcends the confines of the older democratic societies which provided the immediate background for his theorization. The application of Dworkin's theoretical premises to judicial interpretation in countries like Malaysia, Sri Lanka or Bangladesh is not only possible but can prove to be very useful. If Courts recognize that constitutional interpretation involve complex social, moral and political standards, then a wide array of considerations will be available on which to base and legitimize judicial decisions, other than the strict "letter" of the law or the Constitution. In the context of the new Constitutions of the Pacific region, it has been suggested that statements in the Preables and provisions of the Bills of Rights be explicated in terms of the principles articulated in Dworkin's jurisprudence.

It is suggested that it is appropriate and indeed desirable that the judges should explicitly resort to such principles to justify a decision on constitutional review. The process is not essentially different from the manner in which the common law has developed. Common lawyers have no difficulty working with principles as broad as that which presumes that property shall not be taken without compensation. Other kinds of social values can be employed in the same manner.141

If legal and constitutional provisions are construed, as Dworkin suggests, as encompassing principles which have variable dimensions of significance and emphasis, then the so-called rule of subjective satisfaction, for example, is exposed to scrutiny on a variety of grounds. A multiplicity of principles, such as aspects of the liberty of the citizen, the moral questions surrounding deprivation of liberty, the concerns of security of other citizens, evidentiary questions, and questions of political priorities shall all have to be taken into consideration in reaching a decision on the legality of an act of preventive detention. Questions raised by these principles will have to be decided

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notwithstanding that the Constitution or a statute sanctions detention on the *satisfaction* of a state official without providing for any further elaboration. For these questions implicate the social, moral, and political concerns of the constitutional order, and must therefore be addressed to secure fairness and the basic tenets of justice. Similarly, in an inquiry along these lines, the Court would not have search in vain for legal rules to settle the question of the consequences of a failure to observe the administrative process governing the communication of a detention order and its grounds to a detainee. While rules of statutory interpretation (such as those concerning the mandatory/directory dichotomy) are obviously relevant to such an inquiry, concerns of fairness, human liberty and dignity which are implicit in the constitutional system will also be taken into account in ensuring procedural proprieties.

It has been noted that the Court in Malaysia had engaged in linguistic and semantic debates as to whether deprivation of the constitutional right to liberty could be legitimized on substantive or procedural grounds.\(^{142}\) Fallacies of this kind would be avoided if the right to liberty is construed in terms of a cluster of principles, which cannot be segregated in the way that the Malaysian Court suggests. It has also been noted that the Sri Lankan Court sought to resolve questions of liberty in terms of the formal style.\(^{143}\) If it is accepted that the values encompassed in the right to liberty are fundamentally different to the principles that inhere in say, branches of commercial law, an interpretation in terms of relative principles of differing "weights" and "importance" would avoid attempts like the Court in Sri Lanka. An interpretation based on a consideration of variable standards which are identified in isolation or in combinations, would avoid conclusions, like the Bangladesh Court, that questions of the right to liberty could be considered exclusively from either a statutory or a constitutional point of view. It would also then be appreciated that in view of the various dimensions which attach to a particular right, like the right to liberty, a separation of the subject-matter of the right cannot be feasible.

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\(^{142}\) See Chapter VI, *supra*.

\(^{143}\) See Chapter VII *supra*. 
While the present Chapter was concerned primarily with the theme of judicial interpretation in general, Chapter X will be directed to explore the theoretical basis of judicial review of constitutional rights in particular.
CHAPTER X
EMERGENCY, JUDICIAL REVIEW AND RIGHTS

In Chapter IX, it was suggested that a principled approach to constitutional interpretation and to judicial review be adopted. Some aspects of the right to liberty were implicit in the discussion of judicial interpretation. The present Chapter will analyse the nature of constitutional rights and the judicial interpretation of these rights. As was stressed in the last Chapter, the issues of constitutional rights, although arising in the context of the use of emergency powers, cannot be resolved by reference to the emergency provisions of the Constitution alone. A discussion of emergency powers and constitutional rights cannot therefore be limited to the scope of emergency powers, but must encompass a consideration of the basic principles of citizens’ rights and their relevance to the constitutional system.

This Chapter begins by highlighting the issues raised by the suspension and suspension of means for the enforcement of constitutional rights during an Emergency in Malaysia, Sri Lanka and Bangladesh. The Court’s role with regard to these issues is examined, and the fundamental problems of articulation and adjudication of constitutional rights are presented. With these problems as the background, two contemporary theories of rights and judicial review - those of John Hart Ely\(^1\) and Ronald Dworkin\(^2\) - are examined. It is then proposed that Dworkin’s theory of rights and judicial review is the more appropriate in the context of rights-adjudication in the countries under review.

Emergency Powers, Rights and the Courts: Unanswered Questions

In Chapter V, the techniques of curtailment of constitutional rights during an Emergency under the Constitutions of Malaysia, Sri Lanka and Bangladesh were examined. Since the discussion in this Section will centre on the


questions that arise as a result of the curtailment of rights during an Emergency, it is helpful to recapitulate briefly the constitutional mechanisms which permit such curtailment.

The Constitutions of Malaysia, Sri Lanka and Bangladesh contemplate two techniques of curtailment of rights during a state of emergency. By the first, which is common to all three Constitutions, some or all of the constitutional rights are suspended during an Emergency. The suspension of rights is effected by legalizing emergency measures which, in normal times would derogate from the constitutional rights. The second is found only in the Bangladesh Constitution, and permits an indirect derogation of constitutional rights during an Emergency. This is brought about by suspension of means for the enforcement of specified rights by the operation of a Presidential Order during the Emergency.

With regard to the first technique, the question arises as to whether "suspension" of rights means the "abrogation" of rights during an Emergency. Does "suspension" mean that in their entirety the rights are "unenforceable and inoperative" during the Emergency? Or does the suspension merely permit the Legislature, during an Emergency, to make laws inconsistent with the "suspended" rights, those rights otherwise remaining intact?

Further, since the "suspension" of constitutional rights during an Emergency extends protection to both legislative and executive action, other questions arise with regard to executive measures during the Emergency. Three fundamental questions arise in this regard. Firstly, what is the extent of the protection extended to executive measures that violate the rights which are suspended? Secondly, what is the scope of the power of the Executive to act in violation of the constitutional rights "suspended" by virtue of the Proclamation of Emergency? Thirdly, does the removal of fetters imposed by the constitutional rights upon the Legislature and the Executive imply that executive action during an Emergency which is contrary to law is immune to challenge as a violation of the rights which are suspended?

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3 See Chapter V, supra.

4 Ibid.
Under the Malaysian Constitution, all of the constitutional rights are "suspended" during an Emergency. Under the Constitutions of Bangladesh and Sri Lanka only specified rights are "suspended".\(^5\) In Sri Lanka and Bangladesh therefore, a Proclamation of Emergency operates to remove the fetters on state power imposed only in so far as the specified Articles of Constitution are concerned. Would this then not mean that no immunity is granted to the State in making a law or taking an action which is inconsistent with the rights that are not suspended?

The second technique of curtailing constitutional rights during an Emergency, adopted by the Constitution of Bangladesh, raises additional questions. The suspension of means for the enforcement of specified rights would appear not to affect the existence of the rights specified in the Presidential Order, but operates merely to deprive the citizen of the right to approach the Courts to seek a remedy. But if the suspension of means for the enforcement of specified rights implies that the provisions of the rights which are not "suspended" apply to the Legislature and the Executive even during an Emergency a question arises as to the effect of a Presidential Order suspending the means for the enforcement of constitutional rights.

This question acquires additional significance when it is considered that under the Bangladesh Constitution, a number of important rights, such as the safeguards respecting arrest and detention, and the right not to be deprived of life or personal liberty save in accordance with law,\(^6\) are outside the purview of "suspension" during an Emergency. There is, however, no bar to the suspension of means for the enforcement of these rights by Presidential Order during an Emergency.\(^7\) With regard to the constitutional rights whose means for enforcement are barred, would it be possible for someone to rely on one of

\(^5\) In Sri Lanka, only the provisions of rights guaranteed by Articles 12, 13 (1), 13 (2), 13 (5), 13 (6), and 14 of the 1978 Constitution are "suspended". See Chapter V supra.

In Bangladesh, "suspension" operates only in respect of the rights entrenched by Articles 36, 37, 38, 39, 40 and 42 of the Constitution. See Chapter V supra.

\(^6\) Articles 33 and 32, Constitution of Bangladesh. Other important rights such as "equality before law" (Article 27), and "right to protection of law" (Article 31) cannot also be "suspended".

\(^7\) The Emergency Presidential Order of December 28, 1974 suspended the enforcement of nearly all of the constitutional rights, including those guaranteed by Articles 27, 31, 32 and 33. The Order is quoted in Chapter VIII, supra.
those rights, not for the purpose of enforcing the right, but merely to demonstrate that a particular law is violative of an unsuspended right?

This question is further complicated by the fact that the constitutionally entrenched judicial power of the Bangladesh Court is not expressly curtailed during the operation of a Proclamation of Emergency. Thus the power of the High Court Division under Article 102 of the Constitution to enforce the constitutional rights remains alive during an Emergency. Additionally, the citizen's right, under Article 44, to move the High Court Division for enforcement of any of the constitutional rights cannot be "suspended" during Emergency. And, although the "suspensive power" of the President during an Emergency has reference to all of the constitutional rights, this right was not included in the 1974 Emergency Presidential Order. Would this state of affairs mean that the Court can exercise its judicial power to ensure that the liberty of the citizen is not encroached upon arbitrarily?

If the judicial power of the Court is indirectly affected by the suspension of means for the enforcement of rights would then this mean that the Legislature can enact, and the Executive can take measures, which are contrary to law? Also, when the suspension ceases to operate either during the Emergency or after it ceases to operate, would the right to move the Court revive so that an aggrieved person could seek judicial redress with respect to actions taken during the operation of the Presidential Order? Is it possible to construe the emergency constitutional provisions in a manner which, notwithstanding the suspension of enforcement of rights, would not deprive the Court of its constitutional power to prevent the enactment of unconstitutional laws?

These questions which are fundamental to the interpretation of rights during an Emergency are not discussed in the decisions of the Courts in Malaysia, Sri Lanka and Bangladesh. However, a stand in respect to a few of the questions appears to be implicit in some decisions of the Courts. In some other

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8 This right is not included in the catalogue of rights which are "suspended" during an Emergency by the operation of Article 141B, Constitution of Bangladesh.

9 See the text of the Presidential Order quoted in Chapter VIII, supra.

10 By Article 141C of the Constitution of Bangladesh, the Presidential Order is either co-extensive with the duration of the Emergency or for such shorter period as is specified in the Order.
decisions, there are statements stating or denying a proposition with respect to one or other of the questions above, but no further explanation is given. In several decisions of the Courts in Malaysia and Sri Lanka, one gets the impression that the "suspension" of rights during an Emergency renders executive measures virtually immune from challenge on any ground whatsoever. This seems to be true even though the executive actions are violative of the safeguards provided to a detainee by the emergency preventive detention statute. The procedural safeguards which are provided by emergency preventive detention statutes are aimed to ensure that detention is in accordance with recognized principles. Failure by the executive detaining authority to abide by the procedural requirements of the detention laws means that their actions are unlawful and thereby violative of the rights which are "suspended". By failing to provide any remedy, to a detainee, for infringement of these procedural safeguards, the Courts in Malaysia and Sri Lanka have, in effect, said that executive action contrary to law cannot be challenged as a violation of the "suspended" rights.

In *Che Su Binte Shafie*, the Malaysian Court held the failure of the executive detaining authority to observe the provisions of the *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969, relating to the communication of the grounds of detention to the detainee, did not invalidate the detention order. The right of a detainee to have the grounds of detention communicated to him or her is a entrenched right under the Malaysian Constitution, which was reiterated in the *Ordinance*. Two conclusions can be inferred from the decision in *Che Su Binte Shafie*. Firstly, the decision suggests that because of the "suspension" of rights, illegal executive actions cannot be challenged as a violation of the rights. Secondly, the Court appears to suggest that the necessity of compliance with the statutory requirements of the preventive detention law could be dispensed with as a result of the

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12 Ordinance No V of 1969.

13 *Che Su Binte Shafie*, op. cit., at 194. See the discussion in Chapter VI, *supra*.

14 Article 151 (1), Constitution of Malaysia.

"suspension" of constitutional rights. In *Subramaniam*, the Malaysian Court held that non-compliance with the statutory right of the detainee to have representations heard by an Advisory Committee within a specified time, did not render his detention invalid. The same conclusions that were inferred from the judgement in *Che Su Binte Shafie* flow from this decision as well.

Like the Malaysian Court, the Supreme Court of Sri Lanka has been instrumental in giving the impression that emergency executive measures were immune from challenge even though the actions were invalid under the law and thereby violative of the "suspended" rights. In *Wijaya Kumaranatunga*, the majority of the Supreme Court refused to hold invalid, "an illegal arrest and detention" purported to have been made under the provisions of the 1982 Emergency Regulations. In the face of the arrest and detention of the petitioner in *Wijaya Kumaranatunga* being carried out under the wrong provisions of the detention laws, the majority ascribed the correct provisions to the "intention" of the detaining authority. Similarly, in *Edirisuriya*, an invalid detention order was justified by the Court by "referring" it to the correct provision of law. These decisions indicate that the Court in Sri Lanka

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17 *Ibid.*, at 84. The right to have representations against executive detention heard by an Advisory Board within a fixed period of time was afforded by s. 6 of the *Emergency (Public Order and Prevention of Crime) Ordinance*, 1969. Article 151 (1) (b) of the Constitution also provided for this right.

18 *Wijaya Kumaranatunga v G.V.P. Samarasinghe and Others*, Supreme Court Application No 121 of 1982, reported in *Fundamental Rights*, Vol 2, Decisions of the Supreme Court of Sri Lanka (January 1982 - December 1982), Colombo, Lake House Investments, 347-363. This decision has been discussed in Chapter VII, *supra*.

19 In his dissenting judgement in *Wijaya Kumaranatunga*, Samarakoon C.J. concluded that "the arrest and detention of the petitioner was ... was wholly illegal*. *Wijaya Kumaranatunga*, *op. cit.*, at 362.

20 The *Emergency (Miscellaneous Provisions and Powers) Regulations*, No. 2 of 1982 promulgated by the President on October 20, 1982, the same day that the Emergency was proclaimed. The same *Regulations* were renewed as *Emergency (Miscellaneous Provisions and Powers) Regulations*, No. 3 of 1982 on November 20, 1982. See Chapter VII, *supra*.

21 *Wijaya Kumaranatunga*, *op. cit.*, at 358.

has not been responsive towards the need of requiring the Executive to act in accordance with law during an Emergency.

It is true that in some decisions the Sri Lankan Court one comes across the odd statement that actions under emergency laws are only "restrictive" of constitutional rights, and do not operate as a "total denial" of rights. In Janatha Finance, for example, the Supreme Court held that the Emergency Regulation which permitted the closure and forfeiture of a printing press was not directed to totally denying the equality rights of the Constitution. There is, however, no further discussion on this important question of the nature of the restriction of rights during an Emergency.

In Bangladesh the High Court and the Appellate Divisions of the Supreme Court have been prepared to employ their jurisdiction under the Constitution and statute to give relief to detainees. It was possible for the Court to exercise its judicial power when in addition to some constitutional rights being "suspended", means for the enforcement of others were barred. In granting remedies to persons under emergency preventive detention, the Court in Bangladesh engaged in a technique of requiring strict compliance, on the part of the detaining authorities, with the safeguards in the detention laws. But unfortunately, there is no discussion on the jurisprudential questions relating to the "suspension" and suspension of means for the enforcement of rights during an Emergency. There are occasional statements in some decisions affirming or denying the Court's position with respect to the operation of rights during an Emergency, but no reasoned analysis for such a judicial stand is offered. In Kripa Shindu Hazra for example, the Court

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26 Article 102, Constitution of Bangladesh.

27 Section 491, Criminal Procedure Code, 1898, Act No. 5 of 1898.

stated that, during an Emergency, neither the Court's constitutional nor its statutory jurisdiction was available to grant relief in terms of the constitutional rights. But, neither the reasons for adopting such a position nor the implications for such a stand are discussed.

There are no simple answers to most of the questions which arise as a result of the "suspension" or the suspension of means for the enforcement of rights during an Emergency. A wide array of fundamental jurisprudential issues are involved in the process of reaching some conclusions regarding these questions. Inquiries into the complex issues presented by the curtailment of rights during an Emergency cannot be confined to the emergency provisions of the Constitution only. For the most basic of the issues in this regard relates to the very nature of constitutional rights. The controversies generated by the restrictions on rights during an Emergency must, therefore, be addressed in the context of the intrinsic nature of the constitutional rights and the scope of judicial review with regard to these rights.

The thrust of this Chapter is directed to examine theories of rights and judicial review, but before that is undertaken, some other issues relating to the nature of constitutional rights in general, arising from decided cases in Malaysia, Sri Lanka and Bangladesh during states of emergency will be highlighted.

**Emergency Powers and Judicial Interpretation of Rights:**

**Other Issues**

In addition to a host of vital questions which arise as a result of the curtailment of constitutional rights during an Emergency, there are other issues of rights which must be taken into account. These additional issues emanate not from unanswered questions, but as a result of judicial determination of aspects of constitutional rights made in the course of deliberating on the operation of rights during an Emergency.

"Substance" and "Procedure" in the Deprivation of Liberty

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29 Ibid., at 114.
In Malaysia, Suffian L.P. had suggested that Article 5 (1) of the Malaysian Constitution, which guaranteed that no person would be deprived of life or liberty "save in accordance with law", did not envisage any "procedural" requirement for the deprivation of these rights. This assertion was made in Karam Singh, a non-emergency preventive detention case, and later reaffirmed in Tan Boon Liat. The conclusion on the part of Suffian L.P. that Article 5 (1) of the Malaysian Constitution did not contemplate "procedure" was based on a linguistic analysis of the provisions of the Article and was premised on the absence of the word "procedure" in that Article. The consequences of this holding was that "the courts ... [would] take a serious view of failure to comply with substantive law but not of failure to comply with procedural law".

A similar tendency to conceive a constitutional right as encompassing either substantive or procedural provisions is discerned in older decisions of the Supreme Court of Ireland. While Suffian L.P. contended that the right to liberty in the Malaysian Constitution did not import any "procedural" dimensions, the Irish Supreme Court had occasion to assert that the constitutional right to liberty was entirely "procedural". Although the Malaysian and Irish Courts have emphasized different aspects of a basically similar constitutional right, the problems of interpretation presented by the respective approaches are similar. In The State (Ryan) v Lennon, Fitzgibbon J. of the Supreme Court of the Irish Free State characterised the right to liberty under the 1922 Constitution, as merely "procedural". For the learned

30 Article 5 (1), Constitution of Malaysia:

No person shall be deprived of his life or personal liberty save in accordance with law.

Emphasis added.


33 Karam Singh, op. cit., at 148.

34 Re: Tan Boon Liat, op. cit., at 109, per Suffian L.P.


36 Article 6, Constitution of the Irish Free State (Saorstat Eireann) Act, 1922:
Judge, this meant that the law could make all kinds of provisions in accordance with which a person might be deprived of his or her liberty.

In Article 6, it is declared that 'liberty of the person is inviolable,' but that is not a law of universal application, for the Article proceeds: 'and no person shall be deprived of his liberty except in accordance with law.' The law may, therefore, make provisions in accordance with which a person may be deprived of his liberty. It is for the Legislature to prescribe those provisions, and for the Courts to enforce them, and even if ... a person has been deprived of his liberty by the mere caprice of an Executive Minister ... such a deprivation would be 'in accordance with law'... 37

More recently, however, the Supreme Court in Ireland has asserted a broader interpretation of the constitutional right to liberty which transcends the narrow confines of the controversies regarding the substantive and procedural aspects of the right. Interpreting the right to liberty in Article 40 of the Constitution of Ireland 1937, Henchy J. of the Supreme Court has observed that:

the guarantee in Article 40, s.4, sub-s. 1, that no citizen shall be deprived of personal liberty save in accordance with law ... means without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution ... 39

Looking now to India, the controversy regarding the "substance" and "process" of the right to liberty under the Indian Constitution, was resolved soon after

The liberty of the person is inviolable, and no person shall be deprived of his liberty except in accordance with law.

37 [1935] IR 170, at 229. Justice Fitzgibbon was one of the two majority Judges in Ryan. Chief Justice Kennedy dissented on a number of issues including the construction of right to liberty under Article 6. For Kennedy C.J.'s views on Article 6, see Ryan, at 208.

38 Constitution of Ireland 1937, Article 40.4.1:

No citizen shall be deprived of his personal liberty save in accordance with law.


40 Article 21, Constitution of India:

No person shall be deprived of his life or personal liberty except according to procedure established by law.
the adoption of the Constitution. In *A.K. Gopalan v State*, the majority of the Indian Supreme Court agreed that the right to life and liberty in Article 21 of the Constitution deals with both substantive and procedural rights. One of the majority Judges, Mukherjea J. observed that:

[i]t is not correct to say that Art. 21 is confined to matters of procedure only. There must be a substantive law, under which the State is empowered to deprive a man of his life and personal liberty and such a law must be a valid law which the legislature is competent to enact within the limits of the powers assigned to it and which does not transgress any of the fundamental rights that the Constitution lays down.

There is no indication that the Malaysian Court has been prepared to overrule Suffian L.P.'s stand in *Karam Singh* that the right to liberty under the Malaysian Constitution has no reference to "procedure". Rather it has been noted that the learned Judge reiterated the proposition in the subsequent decision in *Tan Boon Liat*.

The controversy relating to the substantive and procedural aspects of rights has also indirectly generated another significant trend in the Malaysian Court. This trend relates to the inclination to visualize the Constitution as the "sole repository" of the concern of individual rights.

**The Constitution as "Sole Repository" of Rights**

The proposition that the Constitution is the "sole repository" of rights emerges quite clearly from the decision of the Malaysian Court in *Subramanium*. In that case, it was contended *inter alia* that non-compliance by the detaining authority of the procedural requirements of the emergency preventive


detention statute infringed the detainee's right to personal liberty under the Constitution. Justice Abdul Hamid rejected the submission that considerations of the right to liberty could be implicit in the safeguards in a detention statute. The rights which were entrenched in the Constitution were, for Abdul Hamid J., "real and substantial", while the provisions of the detention statute were solely directed to "miscellaneous matters essential for the proper enforcement and execution of duties and functions connected with preventive detention".

The conclusion in *Subramanium* that all aspects of particular individual rights are to be found only in the constitutional provisions on rights and nowhere else, is suggested in other decisions as well. A similar conclusion is implicit in Suffian L.P.'s opinions in *Karam Singh* and *Tan Boon Liat* where it was held that no consequences arose for breach of procedural law relating to the right of liberty. The reason for this being, as has already been discussed, that the constitutional right to liberty has no reference to "procedure". These views of the Malaysian Court can be identified with the proposition that particular constitutional rights are the "sole repositories" of the subject-matter of the "rights" concerned.

Taking again a brief comparative look, the view that a particular constitutional right is the "sole repository" of the subject-matter of the "right", was articulated at some length by several Judges of the Indian Supreme Court in *A.D.M. Jabalpur v Shivkant Shukla.* Chief Justice Ray characterized Article 21 of

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45 The reference here was to s. 6 (1) of the *Emergency (Public Order and Prevention of Crime) Ordinance, 1969*, by which a detainee was entitled to have representations heard by an Advisory Committee within a period of three months.

46 In this regard, Abdul Hamid J. observed:

[I]t cannot seriously be suggested that it is the objective of the ... [Emergency Ordinance 1969] to pronounce therein the fundamental right and liberty of a subject.

*Subramanium, op. cit.,* at 84.

47 *Subramanium, op. cit.,* at 84.


49 *Tan Boon Liat, op. cit.,* at 109.

the Indian Constitution, which guarantees the right to "life" and "liberty", as "the sole repository of rights to life and liberty".\(^{51}\) It was Ray C.J.'s contention that since there can be no right to life or personal liberty outside the constitutional right conferred by Article 21 of the Indian Constitution, the suspension of means for its enforcement during an Emergency meant that this "right" could not be asserted in any manner whatsoever.

A similar view was articulated in a High Court decision of the Irish Free State, reported as *The State (Walsh) v Lennon*.\(^{52}\) The applicants applied to the Court for orders of "habeas corpus" and "prohibition" against their detention in military barracks, and their trial before a military tribunal. Since constitutional rights were suspended at that time, the applicants argued that they were basing their right to an order of "habeas corpus" not on the Constitution, but on common law principles. Justice Gavan Duffy observed that the antecedent rights to personal liberty under common law principles had merged with the express constitutional provisions.\(^{53}\) Justice Maguire felt that this argument implied that the state had two constitutions, the one written and defined, and the other unwritten and undefined.\(^{54}\) On the basis of these holdings, the contentions of the applicants were rejected by the Court.

In contrast to the trend to regard constitutional rights as the singular repository of citizens' rights, there has been the tendency to equate constitutional rights with ordinary legal rights. A not dissimilar approach to this has been to assert that a statutory remedy to a right was totally separate and distinct from the corresponding constitutional right. These trends are projected in the next section.

**Constitutional, Legal and Statutory Rights**

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\(^{51}\) *Ibid.*, at 1241; see also at 1229. See also the reasonings of Beg and Chandrachud JJ. in this regard at 1284 and 1337 respectively.

\(^{52}\) [1942] I.R. 112.


\(^{54}\) *Ibid.*, at 123.
In *Kathigesu Visvalingam*[^55] Soza J. of the Sri Lankan Supreme Court was not prepared to accord to the constitutional rights any more weight than ordinary legal rights. For the learned Judge, "[t]here ... [was] nothing special in the nature of fundamental rights to justify a departure from the usual approach which the Court would adopt in enforcing a legal right"[^56].

In *Kripa Shindu Hazra*[^57], the High Court Division of Bangladesh held that the statutory remedy of *habeas corpus* under the criminal law[^58] had nothing to do with the right to move the Court for enforcement of the constitutional right to liberty[^59]. The criminal law remedy was characterised as "discretionary" and hence distinct from the right to move the High Court Division to enforce the constitutional right to liberty[^60]. This judicial stand overlooks the fact that whether the jurisdiction of the Court is invoked by virtue of a constitutional provision, or invoked by reliance upon an ordinary statute, does not, by itself, affect the content of the substantive right sought to be asserted.

So far, the major questions with regard to the "suspension" and the suspension of means for the enforcement of certain rights during an Emergency have been suggested. Other basic issues in the way of interpretation of constitutional rights have also been noted. The task now is to give consideration to a theory of rights and judicial review.

### The Need for a Theory of Rights and Judicial Review

It is possible to go to great lengths to confront each of the questions which were asked in the beginning of this Chapter. It is also possible to go into each of the other issues in detail. But the problems of emergency powers,


[^58]: Section 491, *Code of Criminal Procedure*, 1898.

[^59]: Article 102 (2) (b) (i), Constitution of Bangladesh.

[^60]: *Kripa Shindu Hazra, op. cit.*, at 115, per B.H. Chowdhury J.
constitutional rights and judicial interpretation will not be solved in that way. This is because solutions to each of the problems arrived at in isolation will generate more problems of interpretation. The need therefore is to adopt broad theoretical premises about the nature of constitutional rights and the function of judicial review.

As has been suggested earlier, the problems raised by the curtailment of constitutional rights during an Emergency cannot meaningfully be addressed by application of the formal style of interpretation to the constitutional framework of emergency powers. The issues presented by the encroachment of rights during Emergency rule must be addressed in the context of the basic nature and operation of constitutional rights and by identifying the nature of constitutional judicial review. Although many newly independent States have lived with constitutional Bills of Rights and entrenched powers of judicial review, some for several decades now, little scholarship has been directed to establishing the basis for theorizing about these crucial aspects of the new constitutional orders. Choice of a jurisprudence of rights and judicial review has therefore, in the main, to be necessarily reliant upon scholarly ventures in the western world, based upon the experiences in the older democracies.

In recent times, issues of constitutional rights and judicial review has been the subject of much debate in legal and academic circles in the USA. The writings of John Hart Ely61 and Ronald Dworkin62 have been very influential, and in the following sections their theories are examined.

**A Process-Based Theory: John Hart Ely**

In *Democracy and Distrust*, John Ely's primary concern is to reconcile judicial review with "democratic theory".63 Ely's basic premise is that rule by the

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majority is "the core of the ... [d]emocratic system", and he argues that his theory of judicial review "is consistent with ... [the] underlying assumptions of [democracy]". Decisions in a democracy must, according to Ely be made by electorally accountable officials. Thus, his theory recognizes:

the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values than elected representatives, devoting itself instead to policing the mechanisms by which the system seeks to ensure that ... [the] elected representatives will actually represent.

In Ely's model, judicial review is justified only:

when (1) the ins are choking off the channels of political change to ensure that they will stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of a simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system ...

Ely's conception of judicial review as "policing the process of representation" may be described as a process-based judicial review. Ely seeks to demonstrate

Several constitutional provisions are so open-ended that their meanings cannot be determined by reference to text or history. Courts and most commentators usually attempt to define these open-ended provisions by reference to fundamental values discovered in such places as natural law, tradition, or contemporary morality. Each possible source of fundamental values confronts fatal theoretical and practical difficulties, the result being that each only masks the court's or commentator's imposition of personal values on society. Because this is unacceptable in representative democracy, an alternative model for judicial enforcement of these open-ended provisions must be developed ... [This alternative model of judicial review] is 'participation-oriented' and 'representation-reinforcing'.

Ibid., at 168-169.


65 Ibid., at vii.

66 Ibid., at 102.

67 Ibid., at 103; see too at 117, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about ..."
that his theory was the form of review contemplated by the makers of the Constitution.

Contrary to the standard characterization of the Constitution as 'an enduring but evolving statement of general values,' ... in fact the selection and accommodation of substantive values is left almost entirely to the political process and instead the document is overwhelmingly concerned, on the one hand, with procedural fairness in the resolution of individual disputes (process writ small), and on the other, with what might capaciously be designated process writ large - with ensuring broad participation in the process and distribution of government.68

For Ely, a participation-oriented form of judicial review concerns itself with how decisions effecting value choices are made. By engaging in this review, the Court will uphold what Ely terms "participational values". The Court should pursue such values because they are those with which:

(1) ... [the] Constitution has ... concerned itself, (2) whose 'imposition' is not incompatible with, but on the contrary supports, the ... system of representative democracy, and (3) that courts set apart from the political process are uniquely situated to 'impose'.69

The function of review that Ely assigns to the Court is connected to his suggested technique of judicial interpretation. Ely rejects "interpretivism" as a technique of constitutional interpretation. Interpretivism, according to Ely is a technique of judicial interpretation whereby "the work of the political branches [of government] is to be invalidated only in accord with an inference whose starting point, whose underlying premise, is fairly discoverable in the Constitution".70 Constitutional interpretation, according to Ely, must be based on the premise that the Constitution envisions "certain fundamental principles whose implications for each age must be determined in contemporary context".71

68 Ibid., at 87.
69 Ibid., at 75 n.
70 Ibid., at 2.
71 Ibid., at 1.
Ely argues that instead of pursuing an interpretivist technique, judicial review must ultimately rely upon "noninterpretivist" arguments. Non-interpretivist judicial decisions are those which draw "their mandates not from any documentary provisions but rather from some principle derived externally". Since the American Constitution did not explicitly provide for judicial review, "the justification for judicial review ... must ultimately rely upon noninterpretivist arguments".

In advocating non-interpretivist judicial review, Ely does not suggest that fundamental values can be discovered beyond the Constitution. In this regard Ely emphatically concludes that:

our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles ... .

Thus, there not being in existence a set of objective moral values to guide adjudication, non-interpretivist judicial review cannot be directed to "overturn the decisions of ... [the] elected representatives [on those grounds]". Ely's rejection of the availability of any objective set of moral values is also the underlying theme of his interpretation of constitutional rights.

Ely sees the provisions of the United States Constitution concerning rights as process-oriented. This is because the Constitution does not:

root ... a set of substantive rights entitled to protection. The Constitution has instead proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself - by structuring decision processes at all levels to try to ensure, first, that everyone's interests will be actually or virtually represented (usually both) at the point of substantive decision,

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72 Ibid., at 40. As an example of a noninterpretivist decision, the writer cites Dr Bohnam's Case, (1610) 8 Coke Rep. 114; 77 E.R. 646 (K.B.).


74 Democracy and Distrust, at 54.

75 Ibid.
and second, that the processes of individual application will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in society.  

A Critique of Ely

Ely defines 'democracy' "in purely procedural terms as a requirement that only electorally accountable officials may make decisions". But when one is referring to constitutional democracy, 'democracy' cannot simply mean majority rule because constitutional democracy is not synonymous with majority rule.

The Constitution is based neither on a concept of democratic rule that is purely majoritarian nor on an assumption that all policies must be chosen by electorally accountable officials.

Countries like Malaysia, Sri Lanka and Bangladesh are constitutional democracies where the Constitutions are directed to ensure "limited government". Ely's conception of "procedural democracy" is therefore inapplicable in these contexts.

With regard to Ely's contention that participation supports democracy, it has been observed that:

[t]here are two difficulties with any such argument for enshrining participation in a constitutional theory. First, as a practical matter, democracies continue to function despite very low rates of participation. Second and more important, this approach assumes that maintaining a certain form of government rather than, say, preserving individual liberty, is the fundamental value embodied in the Constitution.

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76 Ibid., at 100-101.


78 Ibid., at 1232-33.

Rates of participation are even lower in the emergent democracies. This means that legislatures in countries like Malaysia, Sri Lanka or Bangladesh are generally "unrepresentative" of citizens' aspirations. In India, the Supreme Court has even sought to justify judicial review of "constitutional amendments" on the grounds that Parliament was unrepresentative.

Two-thirds of the members of the two Houses of Parliament need not necessarily represent even the majority of people in this country. Our electoral system is such that even a minority of voters can elect more than two-thirds of the members of Parliament.  

The electoral mechanisms and rates of participations in countries like Sri Lanka and Malaysia are similar to that in the Indian context. These observations of the Indian Supreme Court would therefore be applicable in those situations as well.

Ely's primary concern is to reconcile judicial review with democracy. But "Ely's theory fails to reconcile non-interpretivist review with his definition of democracy because the Court still overturns the decisions of popularly elected officials based on their own substantive value judgements". In fact, the role of judicial review that Ely visualises permits the Court:

   to perceive and portray themselves as servants of democracy even ... as they strike down the actions of supposedly democratic governments...  

In addition to the flaws revealed in Ely's attempt to harmonize judicial review with his conception of democracy, the task of reconciling judicial review with democracy is not so crucial in countries such as those the subject of this thesis. In these countries, judicial review is entrenched in the Constitution.

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83 Constitution of Malaysia: Article 4, the provisions of judicial review in respect of the "Fundamental Liberties" in Part II, Article 128 and Article 162 (6).
The process-based, non-interpretivist approach to judicial review is equally unconvincing.

The process theme by itself determines nothing unless its presuppositions are specified, and its content supplemented, by a full theory of substantive rights and values.\(^84\)

In order that judicial review ensure "fairness" of the participatory processes, as Ely suggests, the Court cannot avoid making substantive value judgements. This is because a decision on what is a fair process within the constitutional scheme requires a determination of the nature and character of the subject-matter of the interests in issue. A determination in that regard:

requires a theory of values and rights as plainly substantive as ... the theories of values and rights which underlie the Constitution's provisions ... \(^85\)

Viewed from another perspective, process-based judicial review "necessarily involves judicial displacement of citizens' choices between political and other kinds of activity, in the name of the objective value of political participation".\(^86\)

Just as ensuring fair participatory process involves decisions on substantive values, so also constitutional rights are not simply directed to "protecting whatever 'entitlements' happen to be conferred by legislation or administrative regulation"\(^87\). A realistic theory of constitutional rights must "posit a right to individual dignity, or some similarly substantive norm, as the base on which

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\(^85\) L. Tribe, *op. cit.*, at 1069.

\(^86\) M. Tushnet, *op. cit.*, at 1038.

\(^87\) L. Tribe, *op. cit.*, at 1070.
conceptions of procedural fairness are constructed". Ely himself concedes that "there are ... provisions in the ... [Constitution] that seem almost entirely value oriented".

In the specific circumstances of the emergent democracies, it cannot seriously be suggested that the rights entrenched in the Constitutions are merely procedural rights. In Constitutions such as those of Sri Lanka and Bangladesh, the entrenched rights are characteristically designated as "fundamental rights". The historical intervention of colonialism in these societies has made the significance of the post-colonial constitutional rights very substantive. Rights in the Constitutions of Malaysia, Sri Lanka and Bangladesh cannot, therefore, be explained in terms of "procedure" only as Ely suggests.

Ely has generally been criticized for moving the focus away from rights in constitutional interpretation. In contrast, Ronald Dworkin presents a model of judicial review which is based on an articulation of the substantive nature of rights.

**Rights-Based Theory: Ronald Dworkin**

**The Nature of Rights**

Dworkin's jurisprudence centres on the proposition that "rights" are to be taken "seriously". He dismisses arguments that citizens "have only such legal rights as the Constitution grants them" or, that they "have no moral rights against the state and only such rights as the law expressly provides". While rejecting these arguments, Dworkin does not however, direct himself to establish a theory of moral rights against the State. Rather, the purpose of his

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89 *Democracy and Distrust*, at 92, though it is pointed out that "they are few and far between". *Ibid.*

90 "Fundamental Liberties" in the Constitution of Malaysia.

91 *Taking Rights Seriously*, at 138.

jurisprudence is to examine the implications of the premise that citizens do have moral rights against their government. In Dworkin's view:

a man has a moral right against the state if for some reason the state would do wrong to treat him in a certain way, even though it would be in the general interest to do so.

Conceived in this way, a theory of rights "simply shows a claim of right to be a special, in the sense of a restricted sort of judgement about what is right or wrong for governments to do".

According to Dworkin, when rights characterized by these moral dimensions are "fused" with the "legal" rights enumerated in the Constitution, the validity of a sub-constitutional law is made dependent on answers to complex moral problems like liberty or equality. But:

though the constitutional system adds something to the protection of moral rights against the Government, it falls far short of guaranteeing these rights, or even establishing what they are.

Since rights have legal and moral dimensions, Dworkin suggests that citizens have a "duty to obey the law but have the right to follow their consciences when it conflicts with that duty". While a citizen has the right to disobey the law whenever the law wrongly invades his or her right, the right to disobey the law is not to be considered as a separate right.

The right to disobey the law is not a separate right, having something to do with conscience, additional to other rights against the Government. It is simply a feature of these rights against the Government, and it cannot be denied in principle without denying that any such rights exist.

93 Ibid., at 184:
I shall not be concerned ... to defend a thesis that citizens have moral rights against their governments; I want instead to explore the implications of that thesis for those ... who profess to accept it.

94 Taking Rights Seriously, at 139.

95 Ibid.

96 Ibid., at 186.

97 Ibid., at 192.
Constitutional provisions on rights are often expressed in "vague" terms. Dworkin proposes that these "vague" constitutional clauses are "appeals to the concepts they employ, legality, equality and cruelty" and points out that "as appeals to moral concepts, they could not be made more precise by being more detailed". On the basis of these propositions, Dworkin advances the following conclusion about constitutional rights and judicial review in the context of the U.S.A.

Our constitutional system rests on a particular moral theory, namely, that men have moral rights against the state. The difficult clauses of the Bill of Rights, like the due process and equal protection clauses, must be understood as appealing to moral concepts rather than laying down particular conceptions; therefore a court that undertakes the burden of applying these clauses fully as law must be an activist court, in the sense that it must be prepared to frame and answer questions of political morality.

Rights and Utilitarian considerations

Since rights against the Government, as Dworkin conceptualizes them, are rights which are available even though the majority in society considers them wrong, "utilitarian" arguments have no place in Dworkin's jurisprudence. The accommodation of utilitarian considerations in an explanation of rights would mean the "annihilation" of rights.

If we ... say that society has a right to do whatever is in the general benefit, or the right to preserve whatever sort of environment the majority wishes to live in, and we mean that these are the sort of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the latter rights.

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98 Ibid., at 135-6.
99 Ibid., at 147.
100 Ibid., at 194.
For Dworkin, the question of "competing rights" has relevance only to the extent that the "competing rights" are of individual fellow members of the community to have "protection" against the liberty of "acts" of others. The argument that the public interest must be balanced against personal claims is flawed because:

[the institution of rights against the Government is not a gift of God, or an ancient ritual, or a national sport ... Anyone who professes to take rights seriously ... must accept, at the minimum, one or both of two important ideas. The first is the vague but powerful idea of human dignity ... The second is the more familiar idea of political equality.\textsuperscript{101}

The question of balancing the competing interests of the society and the individual, according to Dworkin, can only arise in situations of grave Emergency. The Emergency must, however, be a "genuine" one, "of magnitude", posing a "clear and present danger" - not of a speculative kind.\textsuperscript{102}

In extraordinary situations where \textit{rights} are at stake, Dworkin urges "tolerance" - for such a course cannot destroy or threaten the community in a way strict law enforcement in this regard can.

[C]itizens often do the right thing in exercising what they take to be moral rights to break the law, and that prosecutors often do the right thing in failing to prosecute them for it.\textsuperscript{103}

Rights for Dworkin are crucial because the institution of rights:

represents the majority's promise to the minorities that their dignity and equality will be respected.\textsuperscript{104}

\textbf{Right to Equal Concern and Respect}

Dworkin rejects conventional ideas of the right to liberty because those ideas create "a false sense of a necessary conflict between liberty and other values
Rights to certain liberties, according to Dworkin, must be based "on grounds of political morality". In this regard the fundamental principle is not "liberty" but "equality". Dworkin articulates the right to equality as the "right to equal concern and respect". For Dworkin, this right to equal concern and respect is the criterion by which other rights are identified.

Citizens governed by the liberal conception of equality each have a right to equal concern and respect. But there are two different rights that might be comprehended by that abstract right. The first is the right to equal treatment, that is, to the same distribution of goods or opportunities as anyone has or is given ... The second is the right to treatment as an equal. This is a right, not to an equal distribution of some good or opportunity, but the right to equal concern and respect in the political decision about how goods and opportunities are to be distributed.

Of the two grounds of political morality that are comprehended by the "abstract" right to "equal concern and respect", Dworkin proposes that the "right to treatment as an equal", rather than the "right of equal treatment", be taken as fundamental.

I propose that the right to treatment as an equal must be taken to be fundamental under the liberal conception of equality, and the more restrictive right to equal treatment hold only in those special circumstances in which, for some reason, it follows from the more fundamental right ...

The proposition that right to treatment as an equal is the fundamental basis of other rights means that "individual rights to distinct liberties must be recognized only when the fundamental right to treatment as an equal can be shown to require these rights". Conceived in this way, "the right to distinct liberties does not conflict with any supposed competing right to equality, but

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105 Ibid., at 271.
106 Ibid., at 272.
107 Ibid., at 273.
108 Ibid.
109 Ibid., at 274.
on the contrary follows from a conception of equality conceded to be more fundamental".110

The political dimensions of Dworkin's theory of rights are elucidated in the context of the adjudication of rights.

**The Adjudication of Rights**

Dworkin's theory of adjudication of rights is described as the "Rights Thesis". The central propositions are that:

(1) even in hard civil cases ... the effect of a judicial decision is to enforce a right of one of the litigants; (2) the right enforced is a preexisting right; (3) preexisting rights derive from political morality; (4) there is a uniquely correct answer in every case; and (5) by virtue of 1 - 4 above, judges never exercise judicial discretion in the strong sense".112

Dworkin elaborates his theory of adjudication by drawing a distinction between individual rights and collective goals. The distinction proceeds "by fixing on the distributional character of claims about rights ... against claims of a different distributional character".113 The separation is, however not intrinsic, but "formal"; it is directed to "discover what rights people actually have by looking for arguments that would justify claims having the appropriate distributional character".114 The distinction between "rights" and collective "goals" is stated in the following way.

A political right is an individuated political aim. An individual has a right to some opportunity or resource or liberty if it counts in favour of a political decision that the decision is likely to advance or protect the state of affairs in which he enjoys the


111 Some aspects of Dworkin's theory of adjudication has been discussed in Chapter IX, *supra*. Discussion of those aspects is not repeated here.


113 *Taking Rights Seriously*, at 90.

right, even when no other political aim is served and some political aim is disserved thereby, and counts against that decision that it will retard or endanger that state of affairs, even when some other political aim is thereby served ... A goal is a nonindividuated political aim, that is, a state of affairs whose specification does not in this way call for any particular opportunity or resource or liberty for particular individuals.115

While collective goals are prone to "trade-offs", a right "has a certain threshold weight against collective goals in general".116 In Dworkin's model of adjudication, arguments of "policy" that describe collective goals in society, cannot be the basis of judicial decision-making on rights. It has been suggested that:

Dworkin's more profound arguments against policy as a basis of decision in hard cases seem to rely on the assertion that the effect of a judicial decision based on policy is to announce or create new rights and thus the decision violates the right to a decision based on existing rights.117

Dworkin presents a model of adjudication of rights through the medium of his philosophical judge, Hercules. In that model:

there is no inconsistency in saying both that judges must protect the rights of individuals and that judges may justify their decisions by reference to new and contemporary moral views of what these rights are. There is no unavoidable tension between judicial originality and rights as long as a reconstruction of the development of a branch of law in a particular jurisdiction can be shown to be consistent with a new conception of the right in question.118

As noted earlier, the rights which are the subject of adjudication in Dworkin's model, are preexisting rights.

115 Ibid.

116 Ibid., at 92.

117 Jules L. Coleman, op. cit., at 905. See Chapter IX, supra, for Dworkin’s justification on why judges should base their decisions on arguments of "principles" rather than those of "policy".

The rights of individuals which justify judicial decisions are not ‘found’ through the process of legal reasonings; they are not independent and intransigent reference points to which the judicial decision must conform. Rather, rights are themselves a product of the process of legal reasoning: they emerge and take shape as reasons for and against a course of action which are weighed against a background theory of constitutional law.\(^\text{119}\)

Dworkin recognizes that judicial decision-making on rights is sometimes difficult, and that different judges may differ in their conclusions in "hard" and controversial cases. The emphasis, however, is on the point that:

[i]n hard cases judges must show how their decisions fit into the context of a general political theory ... [W]hen judges reason about rights and obligations in hard cases they need not plunge themselves into a sea of subjectivity. By emphasizing the elaboration of reasons and the creative reconstruction of legal theory, Dworkin believes judges can show a decision to be based on conceptions of individual right rather than resulting from "legislating" interstitially to fill gaps in the law.\(^\text{120}\)

Dworkin's theory of rights has generated a host of critical responses from legal and philosophical writers.\(^\text{121}\) By far the most critical of responses have come from writers of the Critical Legal Studies (CLS) School. The next section will briefly consider the major objections to Dworkin's theory of institutionalized rights from the communitarian perspective of the CLS School.

**Individual Rights and Communitarian Visions**

It is outside the scope of this study to discuss at any length the work of those writers within the CLS School who have resisted the claims of institutionalized individual rights. In the brief account which follows, the views of only two writers, who are considered to be representative of the major trend within the CLS School, are considered.

\(^{119}\) Ibid.

\(^{120}\) Ibid., at 73.

\(^{121}\) For critical responses of a "conventional" nature, see generally, M. Cohen (Ed), Ronald Dworkin and Contemporary Jurisprudence, New Jersey, Rowman & Allanheld, 1984.
In reviewing *Taking Rights Seriously*, Peter Gable has asserted that Dworkin and "other modern writers in the liberal tradition" direct themselves to "define a liberty that is only an anxious privatism and a legal equality that conceals practical domination". Continues Gable:

[b]ecause their philosophy is but an abstraction from their present, they confuse a historically contingent social experience with human nature, reifying 'man' in their own alienated self-image and constructing imaginary 'communities' which are simply idealized representations of the alienated social relationships they have known in their lives.

The alternative premise suggested by Gable involves the comprehension of "justice" in concrete terms.

If we are to think about justice from the point of view of people's concrete experience, we must begin by penetrating the false and massified 'institutional morality' that Dworkin has elevated to the status of a natural law, and focus on the details of the production process that directly or indirectly infects every aspect of our lives ... It is only by transforming these processes themselves rather than by tinkering with a legal system that legitimates them that we can create the possible conditions for concrete justice...

In *An Essay on Rights*, Mark Tushnet advances four related critiques of "rights" with more or less a similar underlying theme as Peter Gable presents. These critiques are summarized in the following way.

1. Once one identifies what counts as a right in a specific setting, it invariably turns out the right is unstable; significantly but relatively small changes in the social setting can make it difficult to sustain the claim that a right remains implicated. (2) The claim that a right is implicated in some settings produces no determinate consequences ...

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converts into an empty abstraction (reifies) real experiences that we ought to value for their own sake ... (4) The use of rights in contemporary discourse impedes advances by progressive social forces ... . 127

Simply stated, Tushnet's first point disputes that any purpose is served by discussing rights in the abstract. The important consideration is whether "some specific right is or is not recognized in some specific social setting". 128 Tushnet's second and third points are more fundamental. In the second, Tushnet distinguishes between two kinds of indeterminacy - "technical" and "fundamental". By technical indeterminacy of rights, Tushnet emphasizes that "the outcome of the 'balancing' of competing interests necessitated by a prima facie rights-claim is not determined by the prima facie rights-claim in question". 129 According to Tushnet, fundamental indeterminacy results from claims of abstract rights. Because of such indeterminacy:

it [is] impossible to connect ... [an] abstract right ... [like] 'autonomy' or 'equal concern and respect' ... to any particular outcome without fully specifying a wide range of social arrangements that the proponents of the right take for granted but another person who believes in 'autonomy' might reject ...

The argument for fundamental indeterminacy is that abstract rights get specified in particular social contexts. 130

In relation to his third point, Tushnet concludes that:

[t]he language of rights should be abandoned to the very extent that it takes as a goal the realization of the reified abstraction 'rights' rather than the experiences of solidarity and individuality. 131

127 Ibid., at 1363-4.
128 Ibid., at 1364.
130 An Essay on Rights, op. cit., at 1375.
131 Ibid., at 1382-3.
Tushnet's fourth point, that the discourse on rights is "harmful", is justified on the following overarching consideration.

People need food and shelter right now, and demanding that those needs be satisfied - whether or not satisfying them can today persuasively be characterized as enforcing a right - strikes me as more likely to succeed than claiming that existing rights to food and shelter must be enforced.

With this brief survey of the CLS critique, the next section will be primarily concerned to relate Dworkin's theory of rights to the critical problems of rights-adjudication during states of emergency in the countries under review. The CLS critique will be taken up towards the end of this analysis.

**Emergency, Rights and Dworkin's Jurisprudence**

To return to the questions which were framed at the beginning of this Chapter, the "suspension" of rights during an Emergency should not render illegal legislative or executive action immune from judicial scrutiny. While the constitutional mechanisms for the "suspension" of rights during an Emergency in Malaysia, Sri Lanka or Bangladesh purport to remove the fetters on state power imposed by all or some of the constitutional rights, every executive act to the prejudice of any person must be supported by legislation. In Bangladesh, a number of constitutional rights cannot be "suspended" during an Emergency. This means that during an Emergency, no laws can be made and no executive action can be taken which would be inconsistent with the "unsuspended" rights. With regard to the rights that are "suspended" during an Emergency in Malaysia, Sri Lanka and Bangladesh, every piece of emergency legislation that purport to deprive a citizen of his or her constitutional rights would be subject to judicial scrutiny on a variety of grounds. The challenge to the *Emergency (Security Cases) (Amendments) Regulations 1975* in Malaysia, and the decision of the Privy Council in *Teh Cheng Poh v Public Prosecutor* that the


134 The Regulations were promulgated by the Yang di-Pertuan, purporting to act under s. 2 of the *Emergency (Essential Powers) Ordinance*, 1969, Ordinance No. I of 1969.

135 [1979] 1 M.L.J. 50. For a discussion of this decision, see Chapters IV and V, *supra.*
Regulations were invalid, provides an instance where emergency legislation, albeit "delegated legislation", is subject to judicial examination and invalidation if found unlawful.

A similar conclusion must be made with regard to the suspension of means for the enforcement of specified rights during an Emergency. The mere fact that under the Constitution of Bangladesh, an aggrieved person may be temporarily prevented from moving the Court for the enforcement of a constitutional right does not relieve the State of its obligation to comply with the provisions of the right. The suspension of the remedy for the infringement of a right cannot negate the right itself. It should further be concluded in this regard that the suspension of the remedy cannot invest the Legislature with power to make laws contrary to those rights. In addition to the constitutional duty of state authorities to abide by the provisions of constitutional rights, there is also the consideration of the common law principle of legality. Under that principle, no member of the Executive can interfere with the liberty of a person except on the condition that the legality of the action can be supported in a court of law.\textsuperscript{136}

It has already been noted that while the Constitutions of Malaysia, Sri Lanka and Bangladesh provide for the curtailment of rights during an Emergency, the jurisdiction of the Courts in this regard does not suffer any diminution. This is especially significant when one considers that the Constitution in each of the countries entrusts the Court with the enforcement of the constitutional rights. The conclusion that neither the suspension of rights, nor the suspension of means for the enforcement of rights during an Emergency, has the effect of rendering executive and legislative action immune from judicial scrutiny, is therefore strengthened.

These propositions are, however, easier made than enforced. The Privy Council decision in Teh Cheng Poh was predicated upon a manipulation of the principles of statutory interpretation. It did not state any general premises

\textsuperscript{136} See for example Lord Atkin's observation in Eshugbayi Eleko v Officer administering the Government of Nigeria, [1931] A.C. 662, at 670:

In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice.
regarding the legality of executive and legislative action during an Emergency in so far as the constitutional rights of citizens were concerned. The decision in Teh Cheng Poh was, additionally, a solitary decision in this regard. In the vast majority of decisions on emergency powers, the Malaysian Court has given the impression that, because of the "suspension" of rights, the Court has no power whatsoever to enforce compliance with the constitutional rights. The Supreme Court of Sri Lanka was similarly disposed.\(^{137}\)

In Bangladesh, as has been noted, the Court had invalidated executive action during an Emergency, on a wide variety of grounds. This has been possible on the part of the Court in Bangladesh even when, unlike Malaysia and Sri Lanka, both techniques of curtailment of constitutional rights were in operation. The approach of the Bangladesh Court in this regard had been to subordinate the interpretation of emergency powers to the basic postulate that the Executive must act in conformity with law. The Courts in Malaysia and Sri Lanka failed to take a similar approach. While upholding the basic principles of legality, the Court in Bangladesh has however, been unable to offer any broad theoretical premises explaining the nature of constitutional rights or the extent of their "availability" during an extraordinary situation of Emergency. The need for a consistent and coherent theory of rights and adjudication therefore becomes crucial. In this regard, Dworkin's jurisprudence offers significant insights.

The proposition that constitutional rights are neither entirely "suspended", nor made totally unenforceable during an Emergency, finds powerful support in the theory of rights expounded by Dworkin. If, as Dworkin suggests, individual rights in a Constitution such as those of Malaysia or Sri Lanka, are conceived as moral-political rights against the State, the conventional arguments based on the bare language of the provisions of rights in the Constitution lose force. Constitutional provisions on rights are then explicated in terms of moral

\(^{137}\) See, for example, B.A. Siriwardena and Others v D.J.F. Liyanage and Others, Supreme Court Application No. 120 of 1982, reported in Fundamental Rights, Vol 2, Colombo, Lake House Investments, 1986, 310-346, at 346, per Rodrigo J.:

Emergency Regulations are not reviewable by Courts, in any case by petitions under Sec. 126 of the Constitution relating to alleged infringement of fundamental rights ... The constitutional machinery is not geared to meet this kind of challenge during an emergency when state officers ought to be more usefully left alone to deal with urgent matters needing prompt attention and decisions in the conditions of an emergency.
concepts which encompass ideas, for example, of liberty, equality and dignity. Once these dimensions of rights are agreed upon, it becomes impossible to assert that these values can be negated in any substantial degree even during situations of crisis, such as are occasioned by states of constitutional emergency.

A major source of confusion with regard to the operation of constitutional rights, and their curtailment during an Emergency, has been a fallacious assumption that rights were, in some way, "gifts" or "bequests" of the constitutional charter. Such an implicit assumption has been responsible for the assertion, for example, by the Malaysian Court that all aspects of the right to liberty were to be deduced only from the text of the Constitution. It has been noted earlier that such a position entailed the conclusion that the Constitution was the "sole repository" of individual rights. As Dworkin emphatically asserts, rights are not "gifts" of the Constitution. It is also rightly argued by Dworkin that, given the nature of individual rights as moral rights against the government, the Constitution falls far short of guaranteeing these rights. According to Dworkin, constitutional rights are rather better understood as appeals to values like liberty or equality. Conceptualized in this way, since rights are neither creatures of the Constitution, nor adequately "guaranteed" in the document, it follows that these rights cannot be curtailed during an Emergency in the way suggested by conventional interpretation of constitutional provisions on rights and Emergency.

Dworkin rejects the idea that individual rights can be balanced against the interests of society as a whole. In the context of Malaysia, Sri Lanka and Bangladesh, this is a crucial proposition to adopt. The whole notion of constitutional emergency provisions in these countries is generally interpreted to mean that curtailment of rights is legitimized whenever the interests of the State are claimed to be at stake. Reliance on Dworkin's jurisprudence will have the effect of overcoming the idea that constitutional rights must always be "balanced" with the priorities of state interests. Dworkin concedes that only a situation of grave emergency may justify a departure from the general premise that individual rights must not be seen to be competing with state

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interests. No one will seriously contest the proposition that constitutional rights in Malaysia Sri Lanka or Bangladesh may be curtailed to some extent in a situation of genuine Emergency. The point of Dworkin's position is to rebut the general claim that rights are necessarily curtailed to the extent that the Courts in Malaysia have been prepared to uphold, whenever there is a Proclamation of Emergency, regardless of its justification.

Dworkin's articulation of the right to liberty in terms of the right to equality, meaning the "right to treatment as an equal", is also very significant in the context of emergency jurisprudence. State authorities in countries like Malaysia may offer "persuasive" grounds in support of an encroachment on the right to liberty during an Emergency. It will, however, be more difficult for the Government to justify a restriction of the "right to treatment as an equal", in the way that Dworkin conceives this right. Such a course of reasoning will facilitate the operation of the right to liberty and at the same time avoid the real or imagined conflict between personal liberty and state interests.

In Dworkin's model of adjudication of rights, there is a fundamental distinction between principles and rights on one side, and policies and goals on the other. The task of a Judge in that model is to identify principles and uphold the resulting rights; it is not the Judge's task to base his or her decision on considerations of policy. Implicit in Dworkin's distinction between principles and policies is the legitimation of judicial review. The explanation of judicial review as directed to the "discovery" and application of principles, rather than to the resolution of questions of policy, is a particularly attractive proposition in the context of the interpretation of constitutional rights in the emergent constitutional orders. In countries such as those the subject of this thesis, the judiciary has sometimes to contend with attempted manipulation of the process of justice by the political organs of state. Real or attempted encroachment on judicial independence is especially prevalent during extraordinary situations occasioned by a Proclamation of Emergency or

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139 In 1988, the Lord President of the Supreme Court of Malaysia was suspended from office by the Yang di Pertuan Agong and later dismissed from office. For events surrounding this dismissal see, for example, R.H. Hickling, The Malaysian Judiciary in Crisis, [1989] Public Law 20 (Analysis). In Sri Lanka, several Justices of the Supreme Court lost office in 1978 when the President made fresh appointments under the new Constitution. See M.J.A. Cooray, Judicial Role under the Constitutions of Ceylon/Sri Lanka, Colombo, Lake House Investments, 1982, at 289-290.
Martial Law. In situations like this, the legitimacy of judicial review has to be defended on grounds of principle. In this regard, Dworkin's jurisprudence offers a strong justification of judicial review at a sophisticated and persuasive level.

Dworkin's articulation of legal principles and their role in the process of judicial decision-making means that judges lack plenary discretion in adjudicating on rights. This aspect of Dworkin's theory of adjudication is of fundamental importance in the emergency jurisprudence of countries like Malaysia and Sri Lanka. Courts in these countries have too often exercised the "discretion" to rule on the unavailability of any "right" during an Emergency. These rulings have been characterised by a lack of any realistic considerations of the basic attributes of citizens' rights in a constitutional system. The decisions further reveal the absence of any analysis of the necessitating circumstances for the curtailment of rights claimed by the political authorities of the State. Application of Dworkin's suggested theory of adjudication would mean that in deciding questions of constitutional rights, a Judge would be obliged to seek out and apply relevant principles which are expressly or implicitly recognized by the constitutional system. Considerations of justice, fairness, equal concern, dignity and the like must all have to be deliberated in the task of judicial review of rights. The course of judicial inquiry would have to be the same even during an Emergency.

By proposing that the basic principles of Dworkin's jurisprudence be adopted as the basis of constitutional interpretation and rights-adjudication, it is not suggested that the Courts in Malaysia or Sri Lanka should persistently take a confrontationist course with the political organs of the government. This need not be so. There would be situations where restraint in asserting judicial power would be prudent. But in such instances of judicial restraint, the affirmation of judicial review in principle is important. To take an example from Bangladesh,

140 In Bangladesh, Martial Law governents resorted to the devious means of lowering the retirement age of Judges to achieve their objective. Two senior Justices of the Supreme Court were retired in 1977 by this method. In 1982, the Chief Justice of the Supreme Court was similarly retired. See K. Imtiaz Omar, Independence of the Judiciary and the Role of the Bangladesh Supreme Court, (1988) 11 Journal of the Bangladesh Institute of Law and International Affairs 80, at 94-96. Cf The position in India during the 1975-77 Emergency when the government resorted to overt and covert ways to intimidate the judiciary. See H. M. Seervai, The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism, Bombay, N.M. Tripathi Ltd., 1978, at 123-126.
there was little that the Court could provide by way of relief against arbitrary action under Martial Law decrees during the operation of a state of Martial Law. In *K. Ehteshamuddin Ahmed*,141 decided while Martial Law was in force, the Supreme Court of Bangladesh nevertheless affirmed its power of judicial review regarding findings of Martial Law Courts. While no relief was afforded to the appellant in *K. Ehteshamuddin Ahmed*, the Supreme Court's assertion of judicial review in this decision enabled the Court at a subsequent time, when Martial Law was withdrawn, to set aside a conviction of a Martial Law Court.142

CLS scholars like Tushnet have highlighted that the institution of rights can be "harmful" to the concerns of basic human needs like food and shelter. It is true that in the new constitutional orders, the need to meet fundamental human needs like food and shelter present grave challenges in the continuing process of transition to a truly welfare State. But it is difficult to see how institutionalized rights necessarily impede such a process. There is no inherent contradiction between the institution of rights and the priorities of political, social or economic change. This is true not only in the situation of the emergent polities, but more generally.

While it is easy to understand how one person's right to separately possess property limits another person's separate possession, ... [it does not follow that] one person's exercise of, for example, free speech and dissent necessarily limits another person's. Quite the contrary; the exercise of these latter rights can increase the other person's ability to exercise them. It is not the social legitimation which flows from the formal recognition of rights that inhibits transformative, humanizing social struggle. Many factors impede such struggle. But rights such as free speech and dissent protect the ability of groups of people - including working people - to change their society, better their group situation, and expand their human freedom.143


Long periods of states of emergency or Martial Law in post-colonial states like Malaysia or Bangladesh have had the effect of precluding any legitimate political activity in opposition to the governments of the day. In such periods of extraordinary rule, the protection of individual rights assume crucial significance. No immediate purpose is really served if one were to renounce this protection of individual rights and argue instead for community rights. Even in normal situations, the principles of individual rights offer a kind of protection that communitarian rights, like trade union rights, are unable to provide. In fact the vision of a conflict between the two is unfounded. Notwithstanding powerful critiques of institutionalized rights, some writers of the Critical Legal Studies School have admitted the "limited" role of rights. It has, for example, been acknowledged that:

the critique of rights as liberal philosophy does not imply that the left should abandon rights rhetoric as a tool of political organizing or legal argument.144

Other CLS writers have recognized the important role of constitutional rights in more positive terms. Staughton Lynd, for example, has this to say.

Notwithstanding ... [the] criticisms of the traditional rights rhetoric, I believe that wholly to discard the language of rights would present serious dangers and forgo obvious opportunities. First, demolishing the conceptual underpinning of the Bill of Rights, without putting something in its place, would deprive dissenters of such protection as they now have under ... [the] Constitution.145

Speaking of the "serious dangers" and the "foregone opportunities" which would entail if the dominant CLS trend against individual rights were to be accepted, a scholar "sympathetic to the CLS movement" has observed that:


That one must use the language of rights in court does not necessarily mean that one must use it with one's clients and in everyday political activity.

[the CLS attack on the notion of legal rights] is both ahistorical ... and reactionary. It is sometimes blind to the significance of legal protections for certain fundamental human rights. This attack leads not to ‘transformative’ social activity but to a nihilistic perspective which can encourage repression and tyranny.146

146 Ed Sparer, op. cit., at 512. In stating his position in the debate on rights, Professor Sparer says:

I write as someone sympathetic to the CLS movement. I do not know yet whether I am a part of it, even though I consider myself as a person ‘of the left’... .

Ibid at 511.
CHAPTER XI
TOWARDS A NEW JURISPRUDENCE OF EMERGENCY, RIGHTS AND JUDICIAL REVIEW

States of Emergency and Constitutionalism

Since Independence, people in Malaysia, Sri Lanka and Bangladesh has had to endure considerable periods of time under Emergency rule. The independent state of Malaysia was born amidst a State of Emergency proclaimed in 1948 which was continued till 1960. In 1964, an Emergency was proclaimed throughout Malaysia on account of the confrontation with Indonesia over Sabah and Sarawak. In 1969, there was another Proclamation of Emergency in the wake of ethnic violence. Besides these two Proclamations of Emergency, having effect throughout Malaysia, there were two other localised Proclamations of Emergency, one in Sarawak in 1966 and the other in Kelantan in 1977. None of the Proclamations of Emergency made so far have been revoked.

In addition to the fact that Emergency rule continued for long periods of time, the constitutional emergency provisions have undergone constant tinkering in Malaysia. The latest Amendment in 1981 has sought to make a Proclamation of Emergency or its continuance non-justiciable. The Amendment has also legitimized successive Proclamations of Emergency.2

The long duration of Emergency rule in Malaysia has entailed a denial of the basic liberties of the new constitutional order. In this regard, it has been observed:

The invocation of the emergency powers ... on so many occasions in the short life-span of the Malaysian Constitution to date poses problems of profound constitutional significance. In particular, it raises a big question mark over the state of constitutionalism in Malaysia.3

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1 See Chapter VI, supra for the dates and other particulars of the these Proclamations.

2 See Chapter IV, supra.

Like Malaysia, there have been numerous Proclamations of Emergency in Sri Lanka since Independence. Proclamations of Emergency were made in 1953, 1958, 1961, 1962, 1966, 1971, 1978, 1980, 1982, 1983. The most significant of these states of emergency in terms of their duration have been the ones declared in 1971 and 1983. The propensity to declare states of emergency in Sri Lanka has been summed up in this revealing comment.

Widespread disturbances ... [in 1958 led to the Proclamation of a] state of emergency ... on 27 May 1958. From then on, the pattern was set for governments to resort to emergency rule whenever they were confronted with serious and embarrassing situations.

In Bangladesh there has been fewer years of Emergency rule, compared to Malaysia or Sri Lanka. But there has been about ten years of Martial Law when the Constitution was partially or fully suspended. States of Emergency was declared in Bangladesh in 1974, 1981, and in 1987. The 1974 Proclamation of Emergency in Bangladesh had no compelling justification at all. Reflecting on the Proclamation, a former Judge and President of Bangladesh has commented:

Even before the proclamation of Emergency, the Prime Minister in reality possessed all the powers, and as such its need was widely doubted.

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While on some occasions, the justification for a Proclamation of Emergency has been dubious,\(^7\) for other Proclamations there were some necessitating conditions at the time when the states of emergency were declared. Thus in Malaysia, a situation of external confrontation, and violent ethnic rivalry, justified declarations of states of emergency in 1964 and 1969 respectively. The same may also be said of the Proclamation of Emergency in Sri Lanka in 1971.\(^8\) In most cases, however, the state of emergency was continued long after the crisis which was its justification.

One of the essential purposes of constitutionally entrenched emergency powers is to predefine the legal consequences of a situation of state crisis. Constitutional emergency powers further appear to be directed to replace the ambiguity that may be associated with the judicial determination of the extent of such powers. When the makers of the Constitutions of Malaysia, Sri Lanka and Bangladesh incorporated these drastic emergency powers, they no doubt had in mind situations of dramatic national peril, such as might arise from wars, invasions or violent rebellions. More importantly, the discretionary powers associated with Emergency rule were conceived as purely temporary powers directed for preserving democracy, not destroying it. It was assumed that parliamentary control of the emergency powers would be an adequate safeguard against the abuse of these powers by the Executive.

In this regard, it should be noted that under the Constitution of Bangladesh, once a Proclamation has received the requisite parliamentary approval, it can only be revoked by a subsequent Proclamation issued by the Executive. An innovative feature of the 1978 Constitution of Sri Lanka is the stipulation of periodic parliamentary review of the duration of a Proclamation of Emergency. Under this arrangement, a resolution supported by a two-third majority must be passed by Parliament if a state of emergency is to continue beyond a maximum period. It has, however, been pointed out that it is possible to overcome this obstacle.

\[\text{[A] government such as the present one which commands a more than five-sixths majority in Parliament will, it can be}\]

\(\text{7 Thus for example, the 1974 declaration of Emergency in Bangladesh was patently}\ mala fide \text{(see Chapter VIII, supra.). The same is true of the 1982 Proclamation in Sri Lanka. Both of these Proclamations were motivated by sectarian political objectives.}\)

\(\text{8 See Chapter VII, supra.}\)
argued have no difficulty in crossing the two-thirds barrier should occasion demand it.9

The long periods of Emergency in Malaysia, Sri Lanka and Bangladesh have demonstrated that the political controls envisaged by the provisions of constitutional emergency powers have failed dismally. What is to happen if the political controls, envisaged by the Constitution, against the abuse of emergency powers fail? How may then the concept of constitutionalism be articulated?

**The Requirements of Constitutionalism**

The principal function of a written Constitution is to articulate limitations on the exercise of state power. What is of special significance for an analysis of constitutional rights and judicial review is not the nature of the institutionalized mechanisms of enforcing such limitations but the factual effectiveness of a constitutional system in controlling the abuse of state power in the context of the limitations which that Constitution imposes.

Where Constitutions such as those of Malaysia, Sri Lanka or Bangladesh articulate legal norms which purport to limit the scope of Executive power, there must likewise exist an effective mechanism of control to ensure the Executive does in fact act within the scope of the power conferred by the Constitution. It does not suffice that mechanisms of control exist at a notional level. For if the mechanisms of control fail to the satisfy the criterion of effectiveness, the limitations which the Constitution purport to impose are reduced to a meaningless facade.

Viewed from this perspective, the judicial power to interpret the Constitution imposes upon the Courts not only the right, but also the constitutional duty to examine whether the mechanisms of political control of executive power do in fact provide an adequate safeguard against the abuse of state power. Where alternative safeguards are patently inadequate, the power not only to interpret, but also to enforce compliance with the constitutional mandate devolves upon

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CHAPTER XI

the Courts. This judicial power exists as a concomitant of a constitutional system of government.

An examination of the judicial powers available under the Constitutions of Malaysia, Sri Lanka and Bangladesh reveal the existence of significant powers of judicial review.

The Political Function of the Court

With regard to function of constitutional review by the Court, it has been observed:

There is an inescapable political element in the function of review of the constitutionality of governmental action, for the decisions of the courts bear on what governments can and cannot do, and thus on how resources are distributed in society. Moreover, the nature of legal reasoning is such that there is an element of choice as to outcome, and this is particularly true where courts must interpret broadly worded constitutional provisions which embody social goals and values.\(^\text{10}\)

The admission that constitutional judicial review involves decisions on political questions, however, does not end the inquiry into the function of constitutional courts.

[The observation that the judicial process is a political process and that judges are policy-makers, whether wittingly or unwittingly, is not the end of the discussion, but its beginning.\(^\text{11}\)]

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[It is impossible to interpret any instrument, let alone a constitution, divorced from values.

The exercise of the power of judicial review on questions involving the constitutionality of governmental action would have to be related back to the source of this power. In the context of the constitutional democracies of Malaysia, Sri Lanka and Bangladesh, the legitimacy for the assertion of this kind of judicial power is provided by the Constitutions themselves. All three Constitutions expressly grant powers of judicial review to the Courts. The scope of judicial review under the Constitution of Bangladesh has been explained in the following way.

A combined reading of the provisions ... [of Articles 7, 22, 26 (1), 102, and 108 of the Constitution of Bangladesh] indicates that full judicial powers have been conferred ... on the [superior] judiciary as an independent organ of the State. [The Supreme Court] has the power to declare a law [ultra vires], if it is inconsistent with the Constitution or [the] fundamental rights ... The ... [Supreme Court] has also been conferred with the power of judicial review of executive acts ... 12

Powers of judicial review are also expressly recognized by the Constitution of Malaysia. Under the Malaysian Constitution, the superior judiciary has been given the responsibility:

[t]o adjudicate on the constitutionality or validity of executive and legislative acts ... 13

Under Article 126 of the present Constitution of Sri Lanka:

[t]he Supreme Court has the sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive and administrative action of any fundamental right or language right enshrined in the Constitution ... 14

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Although judicial review of legislation is excluded by the Constitution of Sri Lanka, the Supreme Court of Sri Lanka has been entrusted with:

[the function of determining the constitutionality of [Legislative] Bills referred to it ... [by the President or by any citizen.] A Bill comes up before the Supreme Court for ... determination as to whether the Bill or any provision thereof is inconsistent with the Constitution ... 15

Emergency provisions in the Constitutions of Malaysia, Sri Lanka and Bangladesh provide for curtailing the operation of the entrenched rights. There is, however, no provision for the exclusion of the broad powers of judicial review of any of the Courts during an Emergency. The express provisions of judicial review under the Constitutions of Malaysia, Sri Lanka and Bangladesh are sufficient to dispel any vague doubts regarding the legitimacy of the exercise of judicial authority on questions of constitutionality of executive and legislative action. In this regard, it is interesting to note that the institution of judicial review of legislation had crystallized into a convention even before the entrenchment of powers of judicial review in the respective Constitutions. This came about as a result of the exercise of powers of judicial review by the Privy Council with respect to colonial legislation.

The essential premise on which the Privy Council proceeded was that colonial legislatures were subordinate legislative bodies vis-à-vis the United Kingdom Parliament, and that their enactments were therefore subject to review by the courts on the same basis as, for example, regulations passed by local government bodies within the United Kingdom. 16

With respect to Sri Lanka and Malaysia, the Privy Council continued to exercise judicial review powers for varying lengths of time after Independence.

Having concluded that explicit powers of judicial review are granted by the Constitutions of Malaysia, Sri Lanka and Bangladesh, the issues to be addressed concern the use of that judicial power. For although a firm basis for judicial review may be found in the constitutional text and in practice, the exercise of the power of judicial review must be justified in two principal ways.

15 Ibid., at 276-277.

In the first place, constitutional judicial review must be based on principles of interpretation which recognize the unique nature of a constitutional text, as distinct from that of a statute. In the second place, judicial review, especially on matters of conflict between the citizen and the State, must be legitimized on broad philosophical, moral and political grounds.

The Constitution is different from ordinary statutes in one striking way. The Constitution is foundational of other law, so ... interpretation of the document as a whole, and of its abstract clauses, must be foundational as well. It must fit and justify the most basic arrangements of political power in the community, which means it must be a justification drawn from the most philosophical reaches of political theory.\footnote{17}

\textit{Justification} in judicial reasoning is crucial for two reasons. Firstly, judgements of the Court have to be ‘justified’ by reasoned opinions so as to maintain respect for and confidence in the judicial process.

One of the major functions of any system of law is to assure its own acceptance in the society it governs and this is part of the job of each judicial opinion.\footnote{18}


Justice Kirby notes that:
Secondly, *justification* in the judicial review process of the appellate courts is directed to a more fundamental objective. The justificatory process serves to legitimize the very exercise of the function of judicial review. Although, as observed earlier, the function of judicial review has an inescapable political element, Courts are institutionally very different from the political organs of the State. Courts must therefore distinguish their role from the other state institutions in a manner which then legitimize the assumption of the function of judicial review. It has been pointed out that "any difference which inheres in the judicial institution exists because of the justification which judges are compelled to offer for their decisions".\(^{19}\) The critical link between the *justification* and the *legitimacy* of judicial review has been identified in the following way.

\[\text{The Court's power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom.}^{20}\]

Judicial interpretation of constitutional provisions assumes a critical significance during states of emergency. The difference between, on the one hand, the application of the appropriate principles of interpretation, and the adoption of misconceived premises on the other, would mean vastly different outcomes in the body politic. In terms of political consequences, the disparity could result either in constitutional government or constitutional dictatorship.

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Constitutional Interpretation, Emergency Powers and Judicial Review

The Context

It is generally assumed that the rights which citizens enjoy in normal times may be curtailed during times of crisis. In common law countries, theoretical justification for the curtailment of rights are sought to be grounded on the principle of *necessity*. In accordance with this rationale, Courts in common law jurisdiction have been prepared to sanction, in varying degrees, the necessarily disruptive legal consequences that ensue in times of national crisis. But the invocation of the principle of *necessity* logically presupposes some degree of connection, some reasonable nexus between the nature of the crisis and the kinds of legal consequences which the Courts are prepared to sanction.

In countries such as Britain where the authority to legislate is supposedly unfettered, the Courts achieve this differentiation through the manipulation of doctrines of statutory interpretation. In jurisdictions such as the Commonwealth of Australia, where the power to legislate is restricted by a written Constitution, the inquiry into claims of emergency measures and the resultant legal consequences is not simply a matter of statutory interpretation. The answer to the question whether there is a reasonable nexus between the nature of a given crisis and the degree of permissible deviation from normal constitutional practice is influenced by substantive principles of constitutional law. But under the Constitution of the Commonwealth of Australia, the range of substantive principles which may be invoked is very limited.

The context of judicial interpretation of emergency powers in countries like Malaysia, Sri Lanka or Bangladesh, is fundamentally different. Under the Constitutions of these countries, legislative power is restricted by the entrenchment of constitutional rights. Thus, the question of a reasonable nexus between the purposes of emergency powers and the manner of their

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22 *Australian Communist Party v Commonwealth*, (1951) C.L.R. 1 (the substantive principle being that under a written constitution the judiciary must decide questions of constitutionality).

exercise presents substantive constitutional issues. These issues cannot be resolved by the application of the formal style of statutory interpretation.

The most disturbing feature of the emergency provisions of the Constitutions of Malaysia, Sri Lanka and Bangladesh is the absence of any limit to the occasions for the exercise of emergency powers. The only words of limitation to be found in the emergency provisions relate to the satisfaction of the Yang di-Pertuan Agong in Malaysia and the President in Sri Lanka and Bangladesh as to the need for a Proclamation. The suspension of constitutional rights which automatically results as a result of a Proclamation of Emergency in Malaysia, Sri Lanka or Bangladesh, is in no manner expressly confined to the purpose(s) of the Emergency.

In the absence of legally relevant limitations to the occasions for the exercise of emergency powers by the Executive, the task for the Courts in these countries is by no means simple. It falls upon the Courts to reconcile their own position as a constitutional court, entrusted with significant powers of judicial review, with the moratorium on the rights of citizens brought about by the Proclamation of an Emergency. There is no doubt that the rigidity of the emergency provisions, entrenched in the Constitution with the object of granting comprehensive powers to the Executive in the event of a national crisis, render the task of defining standards of judicial control quite complicated.

It is within this broad context of constitutional emergency powers, entrenched rights, and institutionalised judicial power that one must approach the questions arising out the operation of a state of emergency.

The Predicament

(a) The Reviewability of a Proclamation

The Courts in Malaysia and Sri Lanka have consistently held that a Proclamation of Emergency is non-justiciable.\(^{24}\) In Malaysia, the issue of the

justiciability of a Proclamation has apparently been set to rest by the 1981 Amendment to the Constitution. The 1981 Amendment declares the non-justiciability of a Proclamation of Emergency or its continued operation. Notwithstanding the new provisions in the Constitution of Malaysia, it is theoretically possible to successfully challenge a Proclamation of Emergency made under the Constitution of Malaysia and one made under the Constitutions of Sri Lanka or Bangladesh. The exercise of the power of proclaiming an Emergency could, for example, be impugned on grounds of bad faith or an invalid exercise of power. In the context of the Indian Constitution, which entrenches similar emergency powers, it has suggested that the Court could justifiably intervene in a case of invalid exercise of the President's power to proclaim an Emergency.

If it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid.

In Chapter III, a state of Martial Law was characterised as an instance of extra-constitutional Emergency. In this regard, it is interesting to note that the Supreme Court of Pakistan held a Proclamation of Martial Law illegal and invalid.²⁷


It should be noted that in Stephen Kalong Ningkan v Government of Malaysia, [1968] 2 M.L.J. 238, the Privy Council had suggested that the issue of the justiciability of a Proclamation was "debatable".


²⁷ Asma Jilini v. Government of Punjab, [1972] P.L.D. (S.C.) 139. The Proclamation of Martial Law was invalidated retroactively on the ground that the Military Commander who declared Martial Law and instituted himself Chief Martial Law Administrator was an usurper who acted
The dictum of the Indian Supreme Court and the precedent of the Pakistan Supreme Court suggest that it is, in theory, possible to challenge a Proclamation of Emergency on the ground that it was made in bad faith. However, there would be considerable difficulties in conclusively establishing that the power of proclaiming an Emergency had been exercised in such a way. Proof of bad faith would be exceedingly difficult to substantiate in a Court. The theoretical proposition of successfully challenging a Proclamation of Emergency would thereby lose any practical significance.

(b) The Reviewability of the Exercise of Emergency Powers

In the context of countries like Malaysia, Sri Lanka or Bangladesh, as perhaps elsewhere, the crucial question is not so much the way in which the emergency powers are invoked. Rather, the substantial issues relate to the extent and manner to which these powers may be permissibly applied. For if the Executive can be effectively prevented from abusing the powers resulting from a Proclamation of Emergency, then the existence of the state of emergency is reduced to a matter of secondary importance. Judicial control of executive powers resulting from a declaration of Emergency is of critical significance in Malaysia, Sri Lanka and Bangladesh because the Constitutions of these countries fail to expressly limit the legal effects of a Proclamation of Emergency.

The discussions in Chapters VI and VII reveal that the Courts in Malaysia and Sri Lanka had not been able to play even a minimal role in ensuring constitutionalism or in safeguarding the rights of citizens during states of emergency. This is so despite the fact that provisions of citizens' rights and powers of judicial review are entrenched in the Constitutions of both the countries. In varying degrees, the Malaysian and Sri Lankan Courts persisted in the tradition of an undiscriminating deference to the will of Executive to the detriment of the basic liberties of citizens.

The manner in which the Courts in Malaysia and Sri Lanka exercised its powers of judicial review during an Emergency suggests that these Courts did not regard themselves as constitutional courts. This is obvious when one considers the extent to which the Courts in Malaysia and Sri Lanka had acquiesced to the exercise of delegated powers under sub-constitutional emergency legislation. By holding that the Court could not scrutinize detention orders, the Malaysian and Sri Lankan Courts have suggested that there was no judicial power to determine whether or not the detaining authority had complied with the requirements of the enabling legislation. In Malaysia, issues of legality of detention were seen as questions of whether procedural requirements were mandatory or directory. By identifying the substantive issues of liberty as a procedural matter, and by determining that procedural defects were not serious enough to invalidate detention orders, the Malaysian Court struck at the very roots of constitutionalism.

The Malaysian and Sri Lankan Courts have been instrumental in making executive discretion in powers of detention during an Emergency totally immune from judicial scrutiny. More recently the Supreme Court of Sri Lanka appeared to assert that the subjective satisfaction of the Executive in ordering detention should be based on some objective criteria. At the same time, however, the Court negated its stand by validating executive action on other dubious grounds. The Sri Lankan Supreme Court's decision in *Edirisuriya*\(^{28}\) illustrates this quite vividly.

In judicial decision-making on violations of constitutional rights during an Emergency, the Courts in Malaysia and Sri Lanka persisted in a formal style of interpretation. In addition, these Courts invoked precedents of the colonial era to justify executive discretion in resorting to preventive detention during an Emergency. In Chapters IX and X it was argued that a formal style approach to constitutional interpretation and explication of constitutional rights must be rejected.

The consequence of the trend of decision-making pursued by the Courts in Malaysia and Sri Lanka has been to legitimize every exercise of emergency powers by the Government. The Courts have adopted an undiscriminating

\(^{28}\) *Edirisuriya v Navaratnam*, [1985] 1 Sri L.R. 100. See the discussion of this case in Chapter VII, *supra*.
attitude towards emergency executive and legislative action, and have sanctioned plenary powers in this regard to the political organs of the State during times of Emergency. The judicial approval of every exercise of emergency powers has meant that the Courts in Malaysia and Sri Lanka have in effect encouraged the excesses of the abuses of these powers.

The role of the Court in Bangladesh, discussed in Chapter VIII, has been quite different. It has made a consistent effort to uphold the basic principles of legality during an Emergency. By subordinating the interpretation of constitutional emergency powers and the executive power of detention during an Emergency to the basic requirements of legality, the Court in Bangladesh had been able to assert a minimum degree of judicial control. The decision in Khondker Moshtaque\(^ 29 \) shows that the Court was able to require a standard of legality even with regard to acts during a state of Martial Law. As noted, however, the Court had not been able to articulate a realistic and consistent approach to constitutional rights and emergency powers.

It was stressed in Chapters IX and X that the problems and issues presented by the use of emergency powers in Malaysia, Sri Lanka, and Bangladesh cannot be resolved within the confines of the constitutional provisions on emergency powers alone. The issues raised by the invocation of a state of emergency, it was suggested, would have to be addressed in the context of the fundamental premises of a constitutional system. A new jurisprudence was therefore considered essential. In that regard, Ronald Dworkin's theoretical premises of law, constitution, rights and adjudication\(^ 30 \) was proposed as an alternate model.

**Towards a New Jurisprudence of Rights, Emergency and Judicial Review**

It appears that political authorities in Malaysia, Sri Lanka and Bangladesh have chosen to rely on constitutional emergency powers for purposes of


implementing policies of political, economic and social change. The expansion of executive and legislative powers, which during a constitutional emergency, automatically accrue to the government, appears to offer an irresistible temptation to utilize the expedient of a national emergency for the purpose of realizing policy goals. For the political authorities in these countries, the availability of emergency powers has meant that they could dispense with the obligations of ensuring compliance with constitutional limitations. The temptation to resort to emergency powers offers to these governments the justification of derogating from the entrenched rights.

It must be admitted that since Independence, there have serious political, social and economic problems in Malaysia, Sri Lanka and Bangladesh. It can be conceded that these admittedly severe crises might justify a re-allocation of institutional power. But it is difficult to see how such crises can, for example, justify the deprivation of the right to liberty whenever the Executive, in its discretion, determines that detention is necessary. In Bangladesh, detention can be ordered on the subjective satisfaction of a multitude of civil servants. Printed detention order forms stating that satisfaction are conveniently available for use, a fact that led the Supreme Court in Bangladesh to say that "[l]iberty of a citizen does not rest on the user of a printed form".31

The problems of emergency powers, constitutionalism and rights-enforcement have proved incapable of resolution by the application of statutory and common law rules. These problems cannot also be resolved by employing traditional rules of constitutional construction. The context of the post-colonial constitutional orders, and the entrenchment of rights and powers of judicial review in the Constitutions of Malaysia, Sri Lanka and Bangladesh calls for a wholly new jurisprudential approach. Ronald Dworkin's theoretical premises, discussed in Chapters IX and X offer valuable guidance in defining the nature, content and operation of constitutional rights and in promoting a principled approach in these matters.

Dworkin's jurisprudence is broadly based on philosophical, moral and political considerations. The expansive parameters of Dworkin's legal-constitutional theory has a character of universality that transcends the confines of the settings of the older democratic societies which provided the immediate

background for his theorization. The application of Dworkin’s theory to the problems of enforcement of rights and of judicial review in the constitutional systems of countries like Malaysia, Sri Lanka and Bangladesh, is not only possible but can prove to be very useful.

The constitutional rights of citizens, in countries like Malaysia or Sri Lanka have been customarily projected to be "gifts" of the Constitution. The pervasiveness of this kind of disposition is, in part, explicable by the historical circumstances of the intervention of colonialism between the phases of pre-colonial independent status and post-colonial statehood. During the colonial period, legal rights against the state were not recognized as such. Upon attainment of Independence, the entrenched rights of the new Constitutions were therefore seen to be something which the constitutional charter bequeathed to the citizens.

The constitutional recognition of citizens’ rights, while having roots in some of the ancient traditions of the East, achieved its explicit articulation in the West. In the process of its evolution, it has come to be seen as a birth-right of all people. Aversion to Western traditions and the quest for ethnocentric bias in modelling constitutional systems must not overlook the now accepted international character of basic individual rights. The past experience of colonial administration makes it all the more compelling that citizens’ rights in the newer democracies be allowed to flourish without impediment.

In Chapter X, it was noted that Dworkin’s strong advocacy of individual rights has come under much criticism from the communitarian perspective of the CLS School. In addition to the CLS critique of rights, there has been other disagreement, in Western jurisprudence, over a vigourous rights-based approach. In this regard, it has to be remembered that such disagreement with Dworkin’s approach in the Western world take place in an environment where individual rights are, on the whole, secure and assured. In countries such as Malaysia, Sri Lanka and Bangladesh the context is very different. The entrenchment of individual rights in the Constitutions of these countries has so often proved illusory that the advocacy of rights should not be underemphasized. Rights in countries such as these has the potential of not only safeguarding individual interests but also in performing a vital role towards ensuring a balanced and stable polity.
CHAPTER XI

The assertion of individual rights in countries such as those under study can mean the difference between a constitutional government and an authoritarian one. The recurrent and prolonged periods of Emergency rule in these countries and the resultant authoritarianism strengthens the argument in favour of individual rights advocacy. During times such as these, the constitutional rights are all that citizens can fall back upon. In the articulation of the parameters of these rights and their enforcement, Dworkin’s theory is very persuasive and realistic. His jurisprudence therefore merit serious consideration for application in the situation of Third World rights-enforcement.

Dworkin articulates citizens’ rights in terms of political-moral rights against the State. The significance of the constitutional entrenchment of these rights, for Dworkin, lies in the fact of their appeal to moral values like liberty and equality. These conceptions are particularly significant in the context of emergent polities like Malaysia or Bangladesh where citizens’ liberties are sought to be negated by long periods of constitutional emergencies. Reliance on Dworkin’s arguments would enable one to assert that the values encompassed by the constitutional rights can never be negated in any substantial way. Dworkin’s portrayal of individual rights in terms of the "right to treatment as an equal" is a powerful argument in the context of the prevailing emergency jurisprudence in countries such as Malaysia or Sri Lanka. While it may be comparatively easy to legitimize governmental restrictions on personal liberty by projecting a real or imagined crisis, it will be difficult to justify a restriction of the "right to treatment as an equal".

In the context of judicial review of the use of constitutional emergency powers in Malaysia, Sri Lanka and Bangladesh, Dworkin’s jurisprudence would help in two ways. In the first place, judicial review directed to the marshalling and application of principles inherent in the constitutional order and grounded on political morality, would be more easily legitimized. The suggested model of decision-making would also exclude judicial discretion in a strong sense, by making it incumbent on the Court to address the concerns of liberty, fairness, dignity and related principles while adjudicating questions of detention during an Emergency. It will thereby not be possible for Courts during an Emergency to defer to executive satisfaction directed to the deprivation of personal liberty without an exhaustive consideration of all relevant principles.
Reliance on the principles of the legal-constitutional orders, in the way that Dworkin conceptualizes them, would also enable the Court to apply some test of the relation between a particular emergency measure and the nature of an Emergency. In this way, although the policy of the government to proclaim and continue a state of emergency would not necessarily be invalidated, it would be possible for the Court to subject to review the emergency measures introduced under a Proclamation. The Court could, for example, employ principles of reasonableness in scrutinizing emergency legislation to the detriment of citizens' liberties. The use of standards of fairness and reasonableness, for example, would also enable the Court to require a reasonable nexus between the nature of the Emergency and the kinds of legal consequences which it would be prepared to condone. In this regard, a test like the "clear and present danger test", suggested by Holmes J. of the Supreme Court of the U.S.A. could be relevant.\(^\text{32}\)

It is sometimes argued that the different priorities of emergent polities like Malaysia, Sri Lanka and Bangladesh, as compared to those of the older democracies, can be the basis of a differentiated operation of individual rights. Arguments of this nature are based on the objectives of the State declared in the policy-goals of the Constitution.\(^\text{33}\) These are fallacious contentions. There

\(^{32}\) In *Schenck v U.S.*, 249 U.S. 47 (1918), Holmes J. delineated the circumstances under which the freedom of speech, guaranteed by the First Amendment to the U.S. Constitution, could be restricted.

The question in every case is whether the words used are used in such circumstances and are of such a nature as create a clear and present danger that will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity.


The clear and present danger test, has been controversial and the premises underlying the doctrine had been subsequently misused, especially during the trials of the Communist Party leaders in the U.S.A. under the infamous *Smith Act*, 1940. The decision in *Dennis v United States*, 341 U.S. 494 (1951) illustrates this quite vividly. The misuse of the clear and present danger test, however, cannot be an argument against its proper use.

\(^{33}\) The Constitution of Sri Lanka identifies these goals as the "Directive Principles of State Policy and Fundamental Duties", Articles 27-29. In the Bangladesh Constitution, these are described as "Fundamental Principles of State Policy", Articles 8-25. The Malaysian Constitution does not declare any similar goals. It has, however, been pointed out that a consensual agreement between representatives of political parties and interests groups in Malaysia, described as the *Rukunegara* could constitute the "Directive Principles of Policy", if inserted into the Constitution. The *Rukunegara* was proclaimed by the Yang di-Pertuan in 1970 and "was the result of result of lengthy deliberations in the National Consultative Council". See *Parliamentary*
can be no inherent contradictions between the civil, and political rights of the citizens on the one hand and the priorities of distributive justice or political transition on the other. It is true that the economic rights of citizens, such as the right to property might, in certain circumstances, be re-adjusted to accord with the theme of distributive justice.

Constitutional state policies directed at implementing the "goals" enumerated in the Constitution must accommodate the basic human values of dignity, liberty and equality. In addition to the imperatives of political, social and economic transition, the Principles of State Policy (PSP) also recognize democratic values and human rights. Thus under the Constitution of Bangladesh, one of the Fundamental Principles of State Policy stresses that:

The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed.

Similarly in Sri Lanka, one of the Directive Principles of State Policy is:

the full realization of the fundamental rights and freedoms of all persons.

A typical Principle of State Policy is thus defined:

The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable of wealth among citizens and of opportunities in order to attain a uniform level of economic development throughout the Republic.

(Article 19(2), Constitution of Bangladesh).

34 In addition to the declarations in the PSP, the Preambles to the Constitutions of Sri Lanka and Bangladesh also stress the basic values and liberties of the constitutional orders. The Preamble to the Constitution of Bangladesh emphasizes the realization "through the democratic process a socialist society, free from exploitation - a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens ... ". The Preamble to the Constitution of Sri Lanka 1978 declares that "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent herinafter provided ... ".

35 Article 11, Constitution of Bangladesh.

36 Article 27 (2) (a), Constitution of Sri Lanka 1978.
In Malaysia, the *Rukunegara*\(^\text{37}\) declares the dedication of the State "to maintaining a democratic way of life" and upholding the *Rule of Law*.\(^\text{38}\)

The *Principles of State Policy* (PSP) in the Constitutions of Sri Lanka and Bangladesh, and the Malaysian *Rukunegara*, embody therefore different kinds of *standards* as guides to the activities of the State. On the one hand, they set broad parameters to state activity directed to the achievement of certain goals. On the other hand, they also project a range of *principles*, envisioning the requirements of liberty, equality, justice, fairness and other dimensions of political and social morality. These *principles* can form the basis for evaluating and scrutinizing executive and legislative conduct. These *principles* combined with the values projected in the entrenched rights provisions of the Constitutions, must inform inquiries into the legitimacy of governmental acts in relation to citizens' rights.

Emergent polities are certainly not in danger of too much political freedom. The extensive use of emergency powers and the consequent inroads on citizens' rights in countries like Malaysia, Sri Lanka and Bangladesh vividly illustrates that concerns for *liberty* and *equality* are perhaps nowhere more pressing than in the emergent polities. The rights of citizens in countries such as these are capable of enforcement by recourse to the method of interpretation suggested in this thesis.

In suggesting this approach, one is reminded of the vulnerability of the Judiciary in the countries studied in this thesis, in common with their counterpart in most Third World polities. It cannot, however, be seriously contended that apprehended threats to the Judiciary by the political branches of government can be the rationale for the abdication of judicial responsibility. While there may be situations of restraint, powers of judicial review cannot be forsaken.

Experience has shown that even while engaged in a predominantly *pliant* role, the Judiciary has been threatened and manipulated by governments. In adopting the more expansive dimensions of judicial review suggested in this thesis.

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\(^{37}\) *Supra*, n. 33.

\(^{38}\) Quoted in *H.P. Lee*, *op. cit.*, at 150.
thesis, the Judiciary will not be worse off. The Court in the emergent state must not shrug off its responsibility, especially when in the circumstances of the emerging societies it is the only forum for enforcing the citizens' rights.
APPENDIX I
CONSTITUTION OF MALAYSIA

PART II - FUNDAMENTAL LIBERTIES

5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority.

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day.

(5) Clauses (3) and (4) do not apply to any enemy alien.

6. (1) No person shall be held in slavery.

(2) All forms of forced labour are prohibited, but Parliament may by law provide for compulsory service for national purposes.

(3) Work accidental to the serving of a sentence of imprisonment imposed by a court of law shall not be taken to be forced within the meaning of this Article.

(4) Where by any written law the whole or any part of the functions of any public authority is to be carried on by another public authority, for the purpose of enabling those functions to be performed the employees of the first mentioned public authority shall be bound to serve the second mentioned public authority, and their service with the second mentioned public authority shall not be taken to be forced labour within the meaning of this Article, and no such employee shall be entitled to demand any right from either the first mentioned public authority or the second mentioned public authority by reason of the transfer of his employment.

7. (1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

(2) 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
acquittal has been quashed an a retrial ordered by a court superior to that by which he was acquitted or convicted.

8. (1) All persons are equal before the law and entitled to the equal protection of the law.

(2) Except as expressly authorised by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession vocation or employment.

(3) There shall be no discrimination in favour of any person on the ground that he is a subject of the Ruler of any State.

(4) No public authority shall discriminate against any person on the ground that he is resident or carrying on business in any part of the Federation outside the jurisdiction of the authority.

(5) This Article does not invalidate or prohibit -

(a) any provision regulating personal law;

(b) any provision or practice restricting office or employment connected with the affairs of any religion, or of an institution managed by a group professing any religion, to persons professing that religion;

(c) any provision for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) or the reservation to aborigines of a reasonable proportion of suitable positions in the public service;

(d) any provision prescribing residence in a State or part of a State as a qualification for election or appointment to any authority having jurisdiction only in that State or part, or for voting in such an election;

(e) any provision of a Constitution of State, being or corresponding to a provision in force immediately before Merdeka Day;

(f) any provision restricting enlistment in the Malay Regiment to Malays.

9. (1) No citizen shall be banished or excluded from the Federation.

(2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

(3) So long as under this Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence.

10. (1) Subject to Clauses (2), (3) and (4) -
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(a) every citizen has the right to freedom of speech and expression;

(b) all citizens have the right to assemble peaceably and without arms;

(c) all citizens have the right to form associations.

(2) Parliament may by law impose -

(a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence;

(b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order;

(c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

(3) Restrictions on the right to form associations conferred by paragraph (c) of Clause (1) may also be imposed by any law relating to labour or education.

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2) (a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law.

11. (1) Every person has the right to profess and practise his religion and, subject to Clause (4), to propagate it.

(2) No person shall be compelled to pay any tax the proceeds of which are specially allocated in whole or in part for the purposes of a religion other than his own.

(3) Every religious group has the right -

(a) to manage its own religious affairs;

(b) to establish and maintain institutions for religious or charitable purposes; and

(c) to acquire and own property and hold and administer it in accordance with law.
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(4) State law and in respect of the Federal Territory federal law may control or restrict the propagation of any religious doctrine or belief among persons professing the religion of Islam.

(5) This Article does not authorise any act contrary to any general law relating to public order, public health or morality.

12. (1) Without prejudice to the generality of Article 8, there shall be no discrimination against any citizen on the grounds only of religion, race, descent or place of birth -

(a) in the administration of any educational institution maintained by a public authority, and, in particular the admission of pupils or students or the payment of fees; or

(b) in providing out of the funds of a public authority financial aid for the maintenance or education of pupils or students in any educational institution (whether or not maintained by a public authority and whether within or outside the Federation).

(2) Every religious group has the right to establish and maintain institutions for the education of children in its own religion, and there shall be no discrimination on the ground only of religion in any law relating to such institutions or in the administration of any such law; but it shall be lawful for the Federation or a State to establish or maintain or assist in establishing or maintaining Islamic institutions or provide or assist in providing instructions in the religion of Islam and incur such expenditure as may be necessary for the purpose.

(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

13. (1) No person shall be deprived of property save in accordance with law.

(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

PART IX - THE JUDICIARY

121. (1) Subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status, namely -

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in the State of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the State of Sabah and Sarawak as the Yang di-Pertuan Agong may determine.
CONSTITUTION OF MALAYSIA

(c) (Repealed).

and in such inferior courts as may be provided by federal law.

(2) The following jurisdiction shall be vested in a court which shall be known as the Supreme Court and shall have its principal registry in Kuala Lumpur, that is to say -

(a) exclusive jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the court and appealable under federal law to a judge of the Court); and

(b) such original or consultative jurisdiction as is specified in Articles 128 and 130.

122. (1) The Supreme Court shall consist of a president of the Court (to be styled "the Lord President of the Federal Court"), of the Chief Justices of the High Court and, until the Yang di-Pertuan Agong by order otherwise provides, of four other judges and such additional judges as may be appointed pursuant to Clause (1A).

122A. (1) Each of the High Courts shall consist of a Chief Justice and not less than four other judges; but the number of other judges shall not, until the Yang di-Pertuan Agong by order otherwise provides, exceed -

(a) in the High Court in Malaya, twelve; and

(b) in the High Court in Borneo, eight

(c) (Repealed).

(2) Any person qualified for appointment as a judge of a High Court may sit as a judge of that court, if designated for the purpose (as occasion requires) in accordance with Article 122B.

128. (1) The Supreme Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction -

(a) any question whether a law made by Parliament or by the Legislative of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the legislative of the State has now power to make laws; and

(b) disputes on any other question between States or between the Federation and any State.

(2) Without prejudice to any appellate jurisdiction of the Supreme Court, where in any proceedings before another court a question arises as to the effect of any
130. The Yang di-Pertuan Agong may refer to the Supreme Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise, and the Supreme Court shall pronounce in open court its opinion on any question so referred to it.

PART XI - SPECIAL POWERS AGAINST SUBVERSION, ORGANISED VIOLENCE, AND ACTS AND CRIMES PREJUDICIAL TO THE PUBLIC AND EMERGENCY POWERS

149. (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agong or any government in the Federation; or

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

(f) which is prejudicial to public order in, or the security of the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything Parliament to make a new law under this Article.

150. (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

(2) A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.
(2A) The power conferred on the Yang di-Pertuan Agong by his Article shall include the power issue different Proclamations on different grounds or in different circumstances, whether or not there is a proclamation or Proclamations already issued by the Yang di-Pertuan Agong under Clause (1) and such Proclamation or Proclamations are in operation.

(2B) If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.

(2C) An ordinance promulgated under Clause (2B) shall have the same force and effect as an Act of Parliament, and shall continue in full force and effect as if it is an Act of Parliament until it is revoked or annulled under Clause (3) or until it lapses under Clause (7); and the power of the Yang di-Pertuan Agong to promulgate ordinances under clause (2B) may be exercised in relation to any matter with respect to which Parliament has power to make laws, regardless of the legislative or other procedures required to be followed, or the proportion of the total votes required to be had, in either House of Parliament.

(3) A Proclamation of Emergency and any ordinance promulgated under Clause (2B) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new proclamation under Clause (1) or promulgate any ordinance under Clause (2B).

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this constitution, extend to any matter within the legislative authority of a state and to the giving of directions to the Government of a State or to any officer or authority thereof.

(5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a bill for such a law or an amendment to such a bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto or which restricts the coming into force of a law after it is passed or the presentation of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a bill to the Yang di-Pertuan Agong for his assent.

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.
(7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect except as to things done or omitted to be done before the expiration of that period.

(8) Notwithstanding anything in this constitution -

(a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and

(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of -

(i) A Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);

(ii) the continued operation of such Proclamation;

(iii) any ordinance promulgated under Clause (2B);

or

(iv) the continuation in force of any such ordinance.

(9) For the purposes of this Article the Houses of Parliament shall be regarded as sitting only if the members of each House are respectively assembled together and carrying out the business of the House.

151. (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention -

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;

(b) no citizen shall continue to be detained under the law or ordinance unless an advisory board constituted as mentioned in Clause 2 has considered any representations made by him under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.

(2) An advisory board constituted for the purposes of this Article shall consist of a chairman, who shall be appointed by the Yang di-Pertuan Agong and who shall be or have been, or be qualified to be a judge of the Supreme Court or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court, and two other members, who shall be appointed by the Yang di-Pertuan Agong.
(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest.
APPENDIX II
CONSTITUTION OF SRI LANKA 1978

CHAPTER III FUNDAMENTAL RIGHTS

10. Every person is entitled to freedom of thoughts, conscience and religion, including the freedom to have or to adopt a religion or belief of his choice.

11. No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

12. (1) All persons are equal before the law and are entitled to the equal protection of the law.

(2) No citizen shall be discriminated against on the grounds of race, religion, language, caste, sex, political opinion, place of birth or any one of such grounds.

Provided that it shall be lawful to require a person to acquire within a reasonable time sufficient knowledge of any language as a qualification for any employment or office in the Public Judicial or Local Government Service or in the service of any public corporation, where such knowledge is reasonably necessary for the discharge of the duties of such employment or office.

Provided further that it shall be lawful to require a person to have a sufficient knowledge of any language as a qualification for any such employment or office where no function of that employment or office can be discharged otherwise than with a knowledge of that language.

(3) No person shall, on the grounds of race, religion, language, caste, sex or any one of such grounds, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels, places of public entertainment and places of public worship of his own religion.

(4) Nothing in this Article shall prevent special provision being made, by law, subordinate legislation or executive action, for the advancement of women, children or disabled persons.

13. (1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

(3) Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court of the reason for his arrest.
(4) No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person pending investigation or trial, shall not constitute punishment.

(5) Every person shall be presumed innocent until he is proved guilty.

Provided that the burden of proving particular facts may, by law, be placed on an accused person.

(6) No person shall be held guilty of an offence on account of any act or omission which did not, at the time of such act or omission, constitute such an offence, and no penalty shall be imposed for any offence more severe than the penalty in force at the time such offence was committed.

Nothing in this Article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

It shall not be a contravention of this Article to require the imposition of a minimum penalty for an offence provided that such penalty does not exceed the maximum penalty prescribed for such offence at the time such offence was committed.

(7) The arrest, holding in custody, detention or other deprivation of personal liberty of a person, by reason of a removal order or a deportation order made under the provisions of the Immigrants and Emigrants Act or the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967, or such other law as may be enacted in substitution thereof, shall not be a contravention of this Article.

14. (1) Every citizen is entitled to -
(a) the freedom of speech and expression including publication;
(b) the freedom of peaceful assembly;
(c) the freedom of association;
(d) the freedom to form and join a trade union;
(e) the freedom, either by himself or in association with others, and either in public or in private, to manifest his religion or belief in worship, observance, practice and teaching;
(f) the freedom by himself or in association with others to enjoy and promote his own culture and to use his own language;
(g) the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise;
(h) the freedom of movement and of choosing his residence within Sri Lanka; and

(i) the freedom to return to Sri Lanka.

(2) A person who, not being a citizen of any other country, has been permanently and legally resident in Sri Lanka immediately prior to the commencement of the Constitution and continues to be so resident shall be entitled, for a period of ten years from the commencement of the Constitution, to the rights declared and recognized by paragraph (1) of this Article.

15. (1) The exercise and operation of the fundamental rights declared and recognized by Articles 13 (5) and 13 (6) shall be subject only to such restrictions as may be prescribed by law in the interests of national security. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

(2) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.

(3) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(b) shall be subject to such restrictions as may be prescribed by law in the interest of racial and religious harmony.

(4) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(c) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or national ecnomony.

(5) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(g) shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation to -

(a) the professional, technical, academic, financial and other qualifications necessary for practising any profession or carrying on any occupation, trade, business or enterprise, and the licensing and disciplinary control of the person entitled to such fundamental right;

(b) the carrying on by the State, a State agency or a public corporation of any trade, business, industry, service or enterprise whether to the exclusion, complete or partial, of citizens or otherwise.

(6) The exercise and operation of the fundamental right declared and recognized by Article 14(1)(h) shall be subject to such restrictions as may be prescribed by law in the interests of national economy.

(7) The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13, (1), 13 (2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a
deomocratic society. For the purposes of this paragraph "law" includes regulations made under the law for the time being relating to public security.

(8) The exercise and operation of the fundamental right declared and recognized by Articles 12(1), 13 and 14 shall, in their application to the members of the Armed Forces, Police Force and other Forces charged with the maintenance of public order, be subject to such restrictions as may be prescribed by law in the interests of the proper discharge of their duties and the maintenance of discipline among them.

16. (1) All existing written law and unwritten law shall be valid and operative notwithstanding any inconsistency with the preceding provisions of this Chapter.

(2) The subjection of any person on the order of a competent court to any form of punishment recognized by any existing written law shall not be a contravention of the provisions of this Chapter.

17. Every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, by executive or administrative action, of a fundamental right to which such person is entitled under the provisions of this Chapter.

CHAPTER VI - DIRECTIVE PRINCIPLES OF STATE POLICY AND FUNDAMENTAL DUTIES

27. (1) The Directive Principles of State Policy herein contained shall guide Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of Sri Lanka for the establishment of a just and free society.

(2) The State is pledged to establish in Sri Lanka a democratic socialist society, the objectives of which include -

(a) the promotion of the welfare of the People by securing and protecting as effectively as it may, a social order in which justice (social, economic and political) shall guide all the institutions of the national life;

(c) the realization by all citizens of an adequate standard of living for themselves and their families, including adequate food, clothing and housing, the continuous improvement of living conditions and the full enjoyment of leisure and social and cultural opportunities;

(d) the rapid development of the whole country by means of public and private economic activity and by laws prescribing such planning and controls as may be expedient for directing and co-ordinating such public and private economic activity towards social objectives and the public weal;

(e) the equitable distribution among all citizens of the material resources of the community and the social product, so as best to subserve the common good;

(f) the establishment of a just social order in which the means of production, distribution and exchange are not concentrated and centralised in
the State, State agencies or in the hands of a privileged few, but are dispersed among, and owned by, all the People of Sri Lanka;

(g) raising the moral and cultural standards of the People, and ensuring the full development of human personality; and

(h) the complete eradication of illiteracy and the assurance to all persons of the right to universal and equal access to education at all levels.

(3) The State shall safeguard the independence, sovereignty, unity and the territorial integrity of Sri Lanka.

(4) The State shall strengthen and broaden the democratic structure of government and the democratic rights of the People by decentralising the administration and by affording all possible opportunities to the People to participate at every level in national life and in government.

(5) The State shall strengthen national unity by promoting co-operation and mutual confidence among all sections of the People of Sri Lanka, including the racial, religious, linguistic and other groups, and shall take effective steps in the fields of teaching, education and information in order to eliminate discrimination and prejudice.

(6) The State shall ensure equality of opportunity to citizens, so that no citizen shall suffer any disability on the ground of race, religion, language, caste, sex, political opinion or occupation.

(7) The State shall eliminate economic and social privilege and disparity, and the exploitation of man by man or by the State.

(8) The State shall ensure that the operation of the economic system does not result in the concentration of wealth and the means of production to the common detriment.

(9) The State shall ensure social security and welfare.

(10) The State shall assist the development of the cultures and the languages of the People.

(11) The State shall create the necessary economic and social environment to enable people of all religious faiths to make a reality of their religious principles.

(12) The State shall recognize and protect the family as the basic unit of society.

(13) The State shall promote with special care the interests of children and youth, so as to ensure their full development, physical, mental, religious and social, and to protect them from exploitation and discrimination.

(14) The State shall protect, preserve and improve the environment for the benefit of the community.

(15) The State shall promote international peace, security and cooperation, and the establishment of a just and equitable international
economic and social order, and shall endeavour to foster respect for international law and treaty obligations in dealings among nations.

28. The exercise and enjoyment of rights and freedoms is inseparable from the performance of duties and obligations, and accordingly it is the duty of every person in Sri Lanka -

(a) to uphold and defend the constitution and the law;
(b) to further the national interest and to foster national unity;
(c) to work conscientiously in his chosen occupation;
(d) to preserve and protect public property, and to combat misuse and waste of public property;
(e) to respect the rights and freedoms of others; and
(f) to protect nature and conserve its riches.

29. The provisions of this Chapter do not confer or impose legal rights or obligations, and are not enforceable in any court or tribunal. No question of inconsistency with such provisions shall be raised in any court or tribunal.

CHAPTER XVI - THE SUPERIOR COURTS

118. The Supreme Court of the Republic of Sri Lanka shall be the highest and final superior court of record in the Republic and shall subject to the provisions of the constitution exercise -

(a) jurisdiction in respect of constitutional matters;
(b) jurisdiction for the protection of fundamental rights;
(c) final appellate jurisdiction;
(d) consultative jurisdiction;
(e) jurisdiction in election petitions;
(f) jurisdiction in respect of any breach of the privileges of Parliament; and
(g) jurisdiction in respect of such other matters which Parliament may be law vest or ordain.

119. (1) The Supreme Court shall consist of the Chief Justice and of not less than six and not more than ten other Judges who shall be appointed as provided in Article 107.

(2) The Supreme Court shall have power to act notwithstanding any vacancy in its membership, and no act or proceeding of the Court shall be, or
shall be deemed to be, invalid by reason only of any such vacancy or any defect in the appointment of a Judge.

120 (1) The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution.

Provided that -

(a) in the case of a Bill described in its long title as being for the amendment of any provision of the constitution, or for the repeal and replacement of the constitution, the only question which the Supreme Court may determine is whether such Bill requires approval by the People at a referendum by virtue of the provisions of Article 83;

(b) where the Cabinet of Ministers certifies that a Bill which is described in its long title as being for the amendment of any provisions of the Constitution, or for the repeal and replacement of the Constitution, is intended to be passed with the special majority required by Article 83 and submitted to the People by Referendum, the Supreme Court shall have and exercise no jurisdiction in respect of such Bill;

(c) where the Cabinet of Ministers certifies that a Bill which is not described in its long title as being for the amendment of any provision of the Constitution, or for the repeal and replacement of the Constitution, is intended to be passed with the special majority required by Article 84, the only question which the Supreme Court may determine is whether such Bill requires approval by the people at a Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with paragraph (1) and (2) of Article 82; or

(d) where the Cabinet of Ministers certifies that any provision of any Bill which is not described in its long title as being for the amendment of any provision of the Constitution or for the repeal and replacement of the constitution is intended to be passed with the special majority by Article 84, the only question which the Supreme Court may determine is whether any other provision of such Bill requires the approval by the People at a Referendum by virtue of the provisions of Article 83 or whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82.

121 (1) The jurisdiction of the Supreme court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed, within one week of the Bill being placed on the Order Paper of the Parliament, and a copy thereof shall at the same time be delivered to the Speaker. In this paragraph "citizen" includes a body, whether incorporated or unincorporated, if not less than three-fourths of the members of such body are citizens.

(2) Where the jurisdiction of the Supreme Court has been so invoked no proceedings shall be had in Parliament in relation to such Bill until the determination of the Supreme Court has been made, or the expiration of a period of three weeks from the date of such reference or petition, whichever occurs first.
(3) The Supreme Court shall make and communicate its determination to the president and to the Speaker within three weeks of the making of the reference or the filing of the petition, as the case may be.

122 (1) In the case of a bill which is, in the view of the Cabinet of Ministers, urgent in the national interest, and bears an endorsement to that effect under the hand of the Secretary to the Cabinet -

(a) the provisions of Article 78 (1) and of Article 121, shall subject to the provisions of paragraph (2) of this Article, have no application;

(b) the President shall by a written reference addressed to the Chief Justice, require the special determination of the Supreme Court as to whether the Bill or any provision thereof is inconsistent with the Constitution. A copy of such reference at the same time be delivered to the Speaker;

(c) the Supreme Court shall make its determination within twenty-four hours (or such longer period not exceeding three days as the President may specify) of the assembling of the court, and shall communicate its determination only to the President and the Speaker.

(2) The provisions of paragraph (2) of Article 121 shall, mutatis mutandis, apply to such Bill.

123 (1) The determination of the Supreme Court shall be accompanied by the reasons thereof, and shall state whether the Bill or any provision thereof is inconsistent with the Constitution and if so, which provision or provisions of the Constitution.

(2) Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state -

(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82; or

(b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraphs (2) of Article 84; or

(c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83,

and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent.

(3) In the case of a Bill endorsed as provided in Article 122, if the Supreme court entertains a doubt whether the Bill or any provision thereof is inconsistent with the Constitution, it shall be deemed to have been determined that the Bill or such provision of the Bill is determined that the Bill or such provision of the Supreme Court shall comply with the provisions of paragraphs (1) and (2) of this Article.

(4) Where any Bill, or the provision of any Bill, has been determined, or is deemed to have been determined, to be inconsistent with the
Constitution, such Bill or such provision shall not be passed except in the manner stated in the determination of the Supreme Court.

Provided that it shall be lawful for such Bill to be passed after such amendment as would make the Bill cease to be inconsistent with the Constitution.

124 Save as otherwise provided in Articles 120, 121 and 122, no court or tribunal created and established for the administration of justice, or other institution, person or body of persons shall in relation to any Bill, have power or jurisdiction to inquire into or pronounce upon, the constitutionality of such Bill or its due compliance with the legislative process, on any ground whatsoever.

125. (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the interpretation of the Constitution, and accordingly, whenever any such question arises in the course of any proceedings in any other court or tribunal or other institution empowered by law to administer justice or to exercise judicial or quasi-judicial functions, such question shall forthwith be referred to the Supreme Court for determination. The Supreme Court may direct that further proceedings be stayed pending the determination of such question.

(2) The Supreme Court shall determine such question within two months of the date of reference and make any such consequential order as the circumstances of the case may require.

126. (1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV.

(2) Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within one month thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress of such infringement. Such application may be proceeded with only with leave to proceed first had been obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges.

(3) Where in the course of hearing in the Court of Appeal into an application for orders in the nature of a writ habeas corpus, certiorari, prohibition, procedendo, mandamus or quo warranto, it appears to such Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV by a party to such application, such court shall forthwith refer such matter for determination by the Supreme Court.

(4) The Supreme Court shall have power to grant such relief or make such directions as it may deem just and equitable in the circumstance in respect of any petition or reference referred to in paragraphs (2) and (3) of this Article or refer the matter back to the Court of Appeal if in its opinion there is no infringement of a fundamental right or language right.
(5) The Supreme Court shall hear and finally dispose of any petition or reference under this Article within two months of the filing of such petition or the making of such reference.

127. (1) The Supreme Court shall, subject to the Constitution, be the final court of civil and criminal appellate jurisdiction for and within the republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.

(2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgment, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court and it may affirm, reverse or vary any such order, judgement, decree or sentence of the Court of Appeal and may issue directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require, and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance.

128. (1) An Appeal shall lie to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal in any matter of proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings.

(2) The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment, decree, or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court.

Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance.

(3) Any appeal from an order or judgment of the Court of Appeal, made or given in the exercise of its jurisdiction under Article 139, 140, 141 or 143 to which the President, a Minister, a Deputy Minister or a public officer in his official capacity is a party, shall be heard and determined within two months of the date of filing thereof.

(4) An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament.

129. (1) If at any time it appears to the President of the Republic that a question of law or fact has arisen or is likely to arise which is of such nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer that question to that Court for consideration and the Court may, after such hearing as it thinks fit, within the
period specified in such reference or within such time as may be extended by
the President, report to the President its opinion thereon.

(2) Where the Speaker refers to the Supreme Court for inquiry and
report all or any of the allegation or allegations, as the case may be, contained
in any such resolution as is referred to in Article 38 (2) (a), the Supreme Court
shall in accordance with Article 38 (2) (d) inquire into such allegation or
allegations and shall report its determination to the Speaker within two
months of the date of reference.

(3) Such opinion, determination and report shall be expressed after
consideration by at least five Judges of the Supreme Court, of whom, unless he
otherwise directs, the Chief Justice shall be one.

(4) Every proceeding under paragraph (1) of the Article shall be
held in private unless the Court for special reasons otherwise directs.

130. The Supreme Court shall have the power to hear and determine and
make such orders as provided for by law on -

(a) any legal proceeding relating to the election of the President;

(b) any appeal from an order or judgment of the Court of Appeal in
an election petition case.

Provided the hearing and determination of a proceeding relating to the
election of the President shall be by at least five Judges of the Supreme Court
of whom unless he otherwise directs, the Chief Justice shall be one.

131. The Supreme Court shall have according to law the power to take
cognizance of and punish any person for the breach of the privileges of
Parliament.

...
and to discharge or remand any person so brought up or otherwise deal with such person according to law:

Provided that it shall be lawful for the Court of Appeal to require the body of such person to be brought up before the most convenient Court of First Instance and to direct the judge of such court to inquire into and report upon the acts of the alleged imprisonment or detention and to make such provision such court shall seem right; and the Court of Appeal shall upon the receipt of such report, make order to discharge or remand the person so alleged to be imprisoned or detained or otherwise deal with such person according to law, and the Court of First Instance shall conform to, and carry into immediate effect, the order so pronounced or made by the Court of Appeal.

Provided further that if provision be made by law for the exercise by any court of jurisdiction in respect of the custody and control of minor children, then the Court of Appeal, if satisfied that any dispute regarding the custody of any such minor child may more properly be dealt with by such court, direct the parties to make application in that court in respect of the custody of such minor child.

142. The Court of Appeal may direct -

(i) that a prisoner detained in any prison be brought before a court-martial or any Commissioners acting under the authority of any Commission from the President of the Republic of trial or to be examined relating to any matters pending before any such court-martial or Commissioners respectively; or

(ii) that a prisoner detained in prison be removed from one custody to another for purposes of trial.

CHAPTER XVIII - PUBLIC SECURITY

155. (1) The Public Security Ordinance as amended and in force immediately prior to the commencement of the Constitution shall be deemed to be a law enacted by Parliament.

(2) The power to make emergency regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall include the power to make regulations having the legal effect of over-riding, amending or suspending the operation of the provisions of any law, except the provisions of the Constitution.

(3) The provisions of any law relating to public security, empowering the President to make emergency regulations which have the legal effect over-riding, amending or suspending the operation of the provisions of any law, shall not come into operation, except the making of a Proclamation under such law, bringing such provisions into operation.
(4) Upon the making of such proclamation, the occasion thereof shall, subject to the other provisions of this Article, be forthwith communicated to Parliament, and, accordingly -

(i) if such Proclamation is issued after the dissolution of Parliament such Proclamation shall operate as a summoning of Parliament to meet on the tenth day after such proclamation, unless the Proclamation appoints an earlier date for the meeting which shall not be less than three days from the date of the Proclamation; and the Parliament so summoned shall be kept in session until the expiry or revocation of such or any further Proclamation or until the conclusion of the General Election whichever event occurs earlier and shall thereupon stand dissolved;

(ii) if Parliament is at the date of the making of such Proclamation, separated by any such adjournment or prorogation as will not expire within ten days, a Proclamation shall be issued for the meeting of Parliament within ten days.

(5) Where the provision of any law relating to public security have been brought into operation by the making of a Proclamation under such law, such Proclamation shall, subject to the succeeding provisions of this Article, be in operation for a period of one month from the date of the making thereof, but without prejudice to the earlier revocation of such Proclamation or to the making of a further Proclamation at or before the end of that period.

(6) Where such provisions as are referred to in paragraph (3) of this Article, of any law relating to public security, have been brought into operation by the making of a Proclamation under such law, such Proclamation shall expire after a period of fourteen days from the date on which such provisions shall have come into operation, unless such Proclamation is approved by a resolution of Parliament.

Provided that if -

(a) Parliament stands dissolved at the date of the making of such Proclamation; or

(b) Parliament is at such date separated by any such adjournment or prorogation, as is referred to in paragraph (4) (ii) of this Article; or

(c) Parliament does not meet when summoned to meet as provided in paragraphs (4) (i) and (4) (ii) of this Article

then such Proclamation shall expire at the end of ten days after the date on which Parliament shall next meet and sit, unless approved by a resolution at such meeting of Parliament.

(7) Upon the revocation of a Proclamation referred to in paragraph (6) of this Article within a period of fourteen days from the date on which the provisions of any law relating to public security shall have come into operation or upon the expiry of such a Proclamation in accordance with the provisions of paragraph (6), no Proclamation made within thirty days next ensuing shall come into operation until the making thereof shall have been approved by a resolution of Parliament.
(8) Where such provisions as are referred to in paragraph (6) of this Article, of any law relating to public security, shall have been in operation for a period of ninety consecutive days or a period of ninety days in the aggregate during six consecutive calendar months, no Proclamation bringing such provisions of any law into operation, shall, if make it any time during the succeeding six calendar months, be in operation for more than days from the date on which such provision are brought into operation by such Proclamation, unless such Proclamation is approved by a resolution of Parliament passed by at least two-thirds of the whole number of Members of Parliament (including those not present) voting in favour of such resolution.

Provided that if-

(a) Parliament stands dissolved at the date of the making of such Proclamation; or

(b) Parliament is, at such date, separated by any such adjournment or prorogation, as is referred to in paragraph (4) (ii) of this Article; or

(c) Parliament does not meet when summoned to meet as provided by paragraph (4) (i) of this Article

then such Proclamation shall expire at the end of ten days after the date on which Parliament shall next meet and sit unless approved by Parliament by a resolution passed by at least two-thirds of the whole number of Members of Parliament (including those not present) voting in favour of such resolution.

(9) Upon the revocation of a Proclamation referred to in paragraph (8) of this Article within a period of ten days from the date on which the provisions of any law relating to public security shall have come into operation or upon the expiry of any such a Proclamation in accordance with the provisions of paragraph (8) of this Article, no Proclamation made within ninety days next ensuing shall come into operation until the making thereof shall have been approved by a resolution of Parliament passed by at least two-thirds of the whole number of Members of Parliament (including those not present voting in favour of such resolution.

(10) If Parliament does not approve any Proclamation bringing such provisions as are referred to in paragraph (3) of this Article into operation, such Proclamation shall, immediately upon such disapproval, cease to be valid and of any force in law but without prejudice to anything lawfully done thereunder.

(11) If the making of a Proclamation cannot be communicated to and approved by Parliament by reason of the fact that Parliament does not meet when summoned, nothing in paragraph (6), (7), (8) or (9) of this Article, shall affect the validity or operation of such Proclamation.

Provided that in such event, Parliament shall against be summoned to meet as early as possible thereafter.
PART II - FUNDAMENTAL PRINCIPLES OF STATE POLICY

8. (1) The principles of absolute trust and faith in the Almighty Allah, nationalism, democracy and socialism meaning economic and social justice, together with the principles derived from them as set out in this Part, shall constitute the fundamental principles of state policy.

(1A) Absolute trust and faith in the Almighty Allah shall be the basis of all actions.

(2) The principles set out in this Part shall be fundamental to the governance of Bangladesh, shall be applied by the State in the making of laws, shall be a guide to the interpretation of the Constitution and of the other laws of Bangladesh, and shall form the basis of the work of the state and of its citizens, but shall not be judicially enforceable.

9. The State shall encourage Local Government institutions composed of representatives of the areas concerned and in such institutions special representation shall be given, as far as possible, to peasants, workers and women.

10. Steps shall be taken to ensure participation of women in all spheres of national life.

11. The Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed.

12. (Omitted).

13. The people shall own or control the instruments and means of production and distribution, and with this end in view ownership shall assume the following forms -

(a) state ownership, that is ownership by the State on behalf of the people through the creation of an efficient and dynamic nationalised public sector embracing the key sectors of the economy;

(b) co-operative ownership by co-operatives on behalf of their members within such limits as may be prescribed by law; and

(c) private ownership, that is ownership by individuals within such limits as may be prescribed by law.

14. It shall be a fundamental responsibility of the State to emancipate the toiling masses - the peasants and workers - and backward sections of the people from all forms of exploitation.

15. It shall be a fundamental responsibility of the State to attain, through planned economic growth, a constant increase of productive forces and a
steady improvement in the material and cultural standard of living of the people with a view to securing to its citizens -

(a) the provision of the basic necessities of life, including food, clothing, shelter, education and medical care;

(b) the right to work, that is the right to guaranteed employment at a reasonable wage having regard to the quantity and quality of work;

(c) the right to reasonable rest, recreation and leisure; and

(d) the right to social security, that is to say to public assistance in cases of undeserved want arising from unemployment, illness or disablement, or suffered by widows or orphans or in old age, or in other such cases.

16. The State shall adopt effective measures to bring about a radical transformation in the rural areas through the promotion of an agricultural revolution, the provision of rural electrification, the development of cottage and other industries, and the improvement of education, communications and public health, in those areas, so as progressively to remove the disparity in the standards of living between the urban and the rural areas.

17. The State shall adopt effective measures for the purpose of -

(a) establishing a uniform, mass-oriented and universal system of education and extending free and compulsory education to all children to such stage as may be determined by law;

(b) relating education to the needs of society and producing properly trained and motivated citizens to serve those needs;

(c) removing illiteracy within such time as may be determined by law.

18. (1) The State shall regard the raising of the level of nutrition and the improvement of public health as among its primary duties, and in particular shall adopt effective measures to prevent the consumption, except for medical purposes or for such other purposes as may be prescribed by law, of alcoholic and other intoxicating drinks and of drugs which are injurious to health.

(2) The State shall adopt effective measures to prevent prostitution and gambling.

19. (1) The State shall endeavour to ensure equality of opportunity to all citizens.

(2) The State shall adopt effective measures to remove social and economic inequality between man and man and to ensure the equitable distribution of wealth among citizens, and of opportunities in order to attain a uniform level of economic development throughout the Republic.

20. (1) Work is a right, a duty and a matter of honour for every citizen who is capable of working, and everyone shall be paid for his work on the basis of the principle "from each according to his abilities to each according to his work".
(2) The State shall endeavour to create conditions in which, as a general principle, persons shall not be able to enjoy unearned incomes, and in which human labour in every form, intellectual and physical, shall become a fuller expression of creative endeavour and of the human personality.

21. (1) It is the duty of every citizen to observe the Constitution and the laws, to maintain discipline, to perform public duties and to protect public property.

(2) Every person in the service of the Republic has a duty to strive at all times to serve the people.

22. The State shall ensure the separation of the judiciary from the executive organs of the State.

23. The State shall adopt measures to conserve the cultural traditions and heritage of the people, and so to foster and improve the national language, literature and the arts that all sections of the people are afforded the opportunity to contribute towards and to participate in the enrichment of the national culture.

24. The State shall adopt measures for the protection against disfigurement, damage or removal of all monuments, objects or places of special artistic or historic importance or interest.

25. (1) The State shall base its international relations on the principles of respect for national sovereignty and equality, non-interference in the internal affairs of other countries, peaceful settlement of international disputes and respect for international law and the principles enunciated in the United Nations Charter, and on the basis of those principles shall -

(a) strive for the renunciation of the use of force in international relations and for general and complete disarmament;

(b) uphold the right of every people freely to determine and build up its own social, economic and political system by ways and means of its own free choice; and

(c) support oppressed peoples throughout the world waging a just struggle against imperialism, colonialism or racialism.

(2) The State shall endeavoure to consolidate, preserve and strengthen fraternal relations among Muslim countries based on Islamic solidarity.

PART III - FUNDAMENTAL RIGHTS

26. (1) All existing law inconsistent with the provisions of this Part shall, to the extent of such inconsistency, become void on the commencement of this Constitution.
(2) The State shall not make any law inconsistent with any provisions of this Part, and any law so made shall, to the extent of such inconsistency, be void.

(3) Nothing in this Article shall apply to any amendment of this constitution made under Article 142.

27. All citizens are equal before law and are entitled to equal protection of law.

28. (1) The State shall not discriminate against any citizens on grounds only of religion, race, caste, sex or place of birth.

(2) Women shall have equal rights with men in all spheres of the State and of public life.

(3) No citizen shall, on grounds only of religion, race, caste, sex or place of birth be subjected to any disability, liability, restriction or condition with regard to access to any place of public entertainment or resort, admission to any educational institution.

(4) Nothing in this Article shall prevent the State from making special provision in favour of women or children or for the advancement of any backward section of citizens.

29. (1) There shall be equality of opportunity for all citizens in respect of employment or office in the service of the Republic.

(2) No citizen shall, on grounds only of religion, race, caste, sex or place of birth, be ineligible for, or discriminated against in respect of, any employment or office in the service of the Republic.

(3) Nothing in this Article shall prevent the State from -

(a) making special provision in favour of any backward section of citizens for the purpose of securing their adequate representation in the service of the Republic;

(b) giving effect to any law which makes provision for reserving appointments relating to any religious or denominational institution to persons of that religion or denomination;

(c) reserving for members of one sex class of employment or office on the ground that is considered by its nature to be unsuited to members of the opposite sex.

30. (1) No title, honour or decoration shall be conferred by the State.

(2) No citizen shall, without the prior approval of the President, accept any title, honour, award or decoration from any foreign State.

(3) Nothing in this Article shall prevent the State from making awards for gallantry or from conferring academic distinctions.

31. To enjoy the protection of the law, and to be treated in accordance with law, and only in accordance with law, is the inalienable right of every citizen,
wherever he may be, and of every other person for the time being within Bangladesh, and in particular no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law.

32. No person shall be deprived of life or personal liberty save in accordance with law.

33. (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest, nor shall he be denied the right to consult and be defended by a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be brought before the nearest magistrate within a period of twenty-four hours of such arrest, excluding the time necessary for the journey from the place of arrest to the court of the magistrate, and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply to any person -

(a) who for the time being is an enemy alien; or

(b) who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a period exceeding six months unless an Advisory Board consisting of three persons, of whom two shall be persons who are, or have been, or are qualified to be appointed as, Judges of the Supreme Court and other shall be a person who is a senior officer in the service of the Republic, has, after affording him an opportunity of being heard in person, reported before the expiration of the said period of six months that there is in its opinion, sufficient cause for such detention.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order.

Provided that the authority making any such order may refuse to disclose facts which such authority considers to be against the public interests to disclose.

(6) Parliament may be law prescribe the procedure to be followed by an Advisory Board in any inquiry under clause (4).

34. (1) All forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall apply to compulsory labour -

(a) by persons undergoing lawful punishment for a criminal offence;
(b) required by any law for public purposes.

35. (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than, or different from, that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) Every person accused of a criminal offence shall have the right to a speedy and public trial by an independent and impartial court or tribunal established by law.

(4) No person accused of any offence shall be compelled to be a witness against himself.

(5) No person shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment.

(6) Nothing in clause (3) or clause (5) shall affect the operation of any existing law which prescribes any punishment or procedure for trial.

36. Subject to any reasonable restrictions imposed by law in the public interest, every citizen shall have the right to move freely throughout Bangladesh, to reside and settle in any place therein and to leave and re-enter Bangladesh.

37. Every citizen shall have the right to assemble and to participate in public meetings and processions peacefully and without arms, subject to any reasonable restrictions imposed by law in the interests of public order or public health.

38. Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interests of morality or public order.

39. (1) Freedom of thought and conscience is guaranteed.

(2) Subject to any reasonable restrictions imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence -

(a) the right to every citizen to freedom of speech and expression;

and

(b) freedom of the press, are guaranteed.

40. Subject to any restrictions imposed by law, every citizen possessing such qualifications, if any, as may be prescribed by law in relation to his profession, occupation, trade or business shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business.

41. (1) Subject to law, public order and morality -
(a) every citizen has the right to process, practise or prorogue any religion;

(b) every religious community or denomination has the right to establish, maintain and manage its religious institutions.

(2) No person attending any educational institution shall be required to receive religious instruction, or to take part in or to attend any religious ceremony or worship, if that instruction, ceremony or worship relates to a religion other than his own.

42. (1) Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold transfer or otherwise dispose of property, and no property shall be compulsory acquired, nationalised or requisitioned save by authority of law.

(2) A law made under clause (1) shall provide for the acquisition, nationalization requisition with compensation and shall either fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid; but no such law shall be called in question in any court on the ground that any provision in respect of such compensation is not adequate.

(3) Nothing in this Article shall affect the operation of any law made before the commencement of the Proclamations (Amendment) Order 1977 (Proclamations Order No. I of 1977), in so far as it relates to the acquisition, nationalization or acquisition of any property without compensation.

43. Every citizen shall have the right, subject to any reasonable restrictions imposed by law in the interests of the security of the State, public order, public morality or public health -

(a) to be secured in his home against entry, search and seizure; and

(b) to the privacy of his correspondence and other means of communication.

44. (1) The right move the High Court Division in accordance with clause (1) of Article 102, for the enforcement of the rights conferred by this Part is guaranteed.

(2) Without prejudice to the powers of the High Court Division under Article 102, Parliament may by law empower any other court, within the local limits of its jurisdiction, to exercise all or any of those powers.]

45. Nothing in this Part shall apply to any provision of a disciplinary law relating to members of a disciplined force, being a provision limited to the purpose of ensuring the proper discharge of their duties or the maintenance of discipline in that force.

46. Notwithstanding anything in the foregoing provisions of this Part, Parliament may be law make provision for indemnifying any person in the service of the Republic or any other person in respect of any act done by him in connection with the national liberation struggle or the maintenance or
restoration of order in any in Bangladesh or validate any sentence passed, punishment inflicted, forfeiture ordered, or other act done in any such area.

47. (1) No law providing for any of the following matters shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges, any of the rights guaranteed by this Part -

(a) the compulsory acquisition, nationalization or requisition of any property, or the control or management thereof whether temporarily or permanently;

(b) the compulsory amalgamation of bodies carrying on commercial or other undertakings;

(c) the extinction, modification, restriction or regulation of rights of directors, managers, agents and officers of any such bodies, or of the voting rights of persons owning shares or stock (in whatever form) therein;

(d) the extinction, modification, restriction or regulation of rights to search of or win minerals or mineral oil;

(e) the carrying on by the Government or by a corporation owned, controlled or managed by the Government of any trade, business, industry or service to the exclusion, complete or partial, of other persons; or

(f) the extinction, modification, restriction or regulation of any right to property, any right in respect of a profession, occupation, trade or business or the rights of employers or employees in any statutory public authority or in any commercial or industrial undertaking

if Parliament in such law (including, in the case of existing law, by amendment) expressly declares that such provision is made to give effect to any of the fundamental principles of state policy set out in Part II of this Constitution.

(2) Notwithstanding anything contained in this Constitution the laws specified in the First Schedule (including any amendment of any such law) shall continue to have full force and effect, and no provision of any such law, nor anything done or omitted to be done under the authority of such law, shall be deemed void or unlawful on the ground of inconsistency with, or repugnance to, any provision of this Constitution.

Provided that nothing in this Article shall prevent amendment, modification or repeal of any such law.

...
Provided that no Ordinance under this Clause shall make any provision

(i) which could not lawfully be made under this Constitution by Act of Parliament;

(ii) for altering or repealing any provision of this Constitution; or

(iii) continuing in force any provision of an Ordinance previously made.

(2) An Ordinance made under Clause (1) shall be laid before Parliament at its first meeting following the promulgation of the Ordinance and shall, unless it is earlier repealed, cease to have effect at the expiration of thirty days after it is so laid or, if a resolution disapproving of the Ordinance is passed by Parliament before such expiration, upon the passing of the resolution.

(3) At any time when Parliament stands dissolved the President may, if he is satisfied that circumstances exist which render such action necessary, make and promulgate an Ordinance authorising expenditure from the Consolidated Fund, whether the expenditure is charged by the Constitution upon that fund or not, and any Ordinance so made shall, as from its promulgation, have the like force of law as an Act of Parliament.

(4) Every Ordinance promulgated under clause (3) shall be laid before Parliament as soon as may be, and the provisions of Articles 87, 89 and 90 shall, with necessary adaptations, be complied with in respect thereof within thirty days of the reconstitution of Parliament.

PART VI THE JUDICIARY

CHAPTER I THE SUPREME COURT

94. (1) There shall be a Supreme Court of Bangladesh (to be known as the Supreme Court of Bangladesh) comprising the Appellate Division and the High Court Division.

(2) The Supreme Court shall consist of the Chief Justice, to be known as the Chief Justice of Bangladesh, and such number of other Judges as the President may deem it necessary to appoint to each Division.

(3) The Chief Justice, and the Judges appointed to the Appellate Division, shall sit only in that division, and the other Judges shall sit only in the High Court Division.

(4) Subject to the provisions of this Constitution, the Chief Justice and the other Judges shall be independent in the exercise of their judicial functions.

101. The High Court Division shall have such original, appellate and other jurisdiction, powers and functions as are or may be conferred on it by this Constitution or any other law.
102. (1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement for any of the fundamental rights conferred by Part III of this Constitution.

(2) The High Court Division may, if satisfied that no other equally efficacious remedy is provided by law -

(a) on the application of any person aggrieved, make an order -

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do; or

(ii) declaring that any act done or preceding taken by a person performing functions in connection with the affairs of the Republic or of a local authority has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order -

(i) directing that person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office.

(3) Notwithstanding anything contained in the foregoing clauses, the High Court Division shall have no power under this Article to pass any interim or other order in relation to any law to which Article 47 applies.

(4) Where on an application made under Clause (1) or sub-clause (a) of Clause (2), an interim order is prayed for and such interim order is likely to have the effect of -

(a) prejudicing or interfering with any measure designed to implement programme, or any development programme, or any development work; or

(b) being otherwise harmful to the public interest, the High Court Division shall not make an interim order unless the Attorney General has been given reasonable notice of the application and he (or an advocate authorised by him in that behalf) has been given an opportunity of being heard, and the High Court Division is satisfied that the interim order would not have the effect referred to in sub-clause (a) or sub-clause (b).

(5) In this Article, unless the context otherwise requires, "person" includes a statutory public authority and any court or tribunal, other than a court or tribunal established under a law relating to the defence services of Bangladesh or any disciplined force or a tribunal to which Article 117 applies.
103. (1) The Appellate Division shall have jurisdiction to hear and determine appeals from judgments, decrees, orders or sentences of the High Court Division.

(2) An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division shall lie as of right where the High Court Division -

(a) certifies that the case involves a substantial question of law as to the interpretation of this constitution; or

(b) has sentenced a person to death or to transportation for life; or

(c) has imposed punishment on a person for contempt of that Division;

and in such other cases as may be provided for by Act of Parliament.

(3) An appeal to the Appellate Division from a judgment, decree, order or sentence of the High Court Division in a case to which Clause (2) does not apply shall lie only if the Appellate Division grants leave to appeal.

(4) Parliament may be law declare that the provisions of this Article shall apply in relation to any other court or tribunal as they apply in relation to the High Court Division.

104. The Appellate Division shall have power to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it, including orders for the purpose of securing the attendance of any person or the discovery or production of any document.

105. The Appellate Division shall have power, subject to the provisions of any Act of Parliament and of any rules made by that Division to review any judgment pronounced or order made by it.

106. If at any time it appears to the President that a question of law has arisen, or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Supreme Court upon it, he may refer the question to the Appellate Division for consideration and the Division may after such hearing as it thinks fit, report its opinion thereon to the President.

PART IXA - EMERGENCY PROVISIONS

141A. (1) If the President is satisfied that a grave emergency exists in which the security or economic life of Bangladesh, or any part thereof, is threatened by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency.

(2) A Proclamation of Emergency -

(a) may be revoked by a subsequent Proclamation;
(b) shall be laid before Parliament;

(c) shall cease to operate at the expiration of one hundred and twenty days, unless before the expiration of that period it has been approved by a resolution of Parliament.

Provided that if any such Proclamation is issued at a time when Parliament stands dissolved or the dissolution of Parliament takes place during the period of one hundred and twenty days referred to in sub-clause (c), the Proclamation shall cease to operate at the expiration of thirty days from the date on which Parliament first meets after its reconstitution, unless before the expiration of the said period of thirty days a resolution approving the Proclamation has been passed by Parliament.

(3) A Proclamation of Emergency declaring that the security of Bangladesh, or any part thereof, is threatened by war or external aggression or by internal disturbance may be made before the actual occurrence of war or any such aggression or disturbance if the President is satisfied that there is imminent danger thereof.

141B Where a Proclamation of Emergency is in operation, nothing in Articles 36, 37, 38, 39, 40 and 42 shall restrict the power of the State to make any law or to take any executive action which the State would, but for the provisions contained in Part III of this Constitution, be competent to make or to take, but any law so made shall, to the extent of the incompetency, cease to have effect as soon as the Proclamation ceases or operate, except as respects things done or omitted to be done before the law so ceases to have effect.

141C (1) While a Proclamation of Emergency is in operation, the President may, by order, declare that the right to move any court for the enforcement of such of the rights conferred by Part III of this Constitution as may be specified in the order, and all proceedings pending in any court for the enforcement of the right so specified, shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order.

(2) An order made under this Article may extend to the whole of Bangladesh or any part thereof.

(3) Every order made under this Article shall, as soon as may be, be laid before Parliament.
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