Personal Liberty and Reasons of State

by Beverley Byfield

INTRODUCTION

In his celebrated dissent in Liversidge v. Anderson ([1942] AC 206 (HL)), Lord Atkin described the order of preventive detention as follows:

> "[it] does not purport to be made for the commission of an offence against the criminal law. It is made by an executive minister and not by any kind of judicial officer, it is not made after any inquiry as to facts to which the subject is party, it cannot be reversed on any appeal, and there is no limit to the period for which the detention may last" (at 225 to 226).

These formidable emergency powers are conferred on the Executive in furtherance of their duty to protect and preserve the security and sovereignty of the State against actual or perceived threats, that is, for reasons of State. In short, notwithstanding guarantees of fundamental rights, an individual, in certain exceptional circumstances, may be deprived of personal liberty on mere suspicion of involvement in certain activities, or to prevent the commission of acts, which the administrative authorities believe to be prejudicial to the security of the State.

Such emergency powers are specified in some national constitutions and, with the exception of the African Charter on Human and Peoples' Rights, in regional and international treaties for the protection of fundamental rights[1]. These instruments expressly acknowledge the right of State authorities to take measures that derogate from certain of the rights guaranteed, where a situation of emergency or other national crisis exists. They also prescribe the circumstances in which such measures may be taken.

A. PRINCIPLES APPLICABLE TO THE INTERPRETATION OF FUNDAMENTAL RIGHTS AND FREEDOMS

Before turning to a consideration of the way in which derogation provisions have been interpreted, it is pertinent to consider the approach taken by national courts in the task of giving meaning and effect to constitutional guarantees of fundamental rights. It is also appropriate to have regard to the relevance and persuasive value of international and comparative human rights law in this context.

1. The approach of national courts

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[1] The importance attached to the protection of the rights of detained persons is underscored by the General Assembly's recent adoption of a "Body of Principles" for that purpose (see UNGA Resolution 43/173 of 9 December 1988).

The principle that a "generous approach" should be taken to the interpretation of constitutional rights has been articulated by the Judicial Committee of the Privy Council on a number of occasions. Delivering the judgment in Minister of Home Affairs v. Fisher ([1980] AC 319 (PC)), a case from Bermuda, Lord Wilberforce stated that a constitutional instrument should not be treated as if it were an Act of Parliament. Rather, the proper approach 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" (at 329C-D).

This approach, Lord Wilberforce said, derived from the strong influence of the European Convention on Human Rights and, in turn, of the Universal Declaration of Human Rights, on the formulation of the Fundamental Rights Chapter of the Constitution of Bermuda, as well as on other Constitutions based on the Westminster model. These antecedents called for:

> "a generous interpretation avoiding what has been called the 'austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

These words were quoted with approval by Lord Diplock, on behalf of the Privy Council, in the subsequent case of Ong Ah Chuan v. Public Prosecutor ([1981] AC 649), from Singapore. The principle was again affirmed in Attorney-General of The Gambia v. Momodou Jobe ([1984] 1 AC 689). There, Lord Diplock stated that:

> "[a] constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction" (at 700H).

The Judicial Committee has also had regard to decisions of other national courts, including the Supreme Courts of India and the United States, in the interpretation of constitutional guarantees. In Bell v. Director of Public Prosecutions of Jamaica ([1985] 2 All E.R. 585) for example, their Lordships expressly recognised the relevance and importance of the interpretation placed on the Sixth Amendment to the Constitution of the United States by that country's Supreme Court. In the case referred to - Barker v. Wingo ([1972] 407 US 514 at 521-531) - the U.S. Supreme Court enumerated four criteria which it stated were relevant to the assessment of whether an accused person had enjoyed the constitutional right to a speedy trial. The Judicial Committee then acknowledged

> "... the desirability of applying the same or similar criteria to any constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings" (Bell v. DPP, p.591h-j).

As the Judicial Committee further noted, the same factors which were considered relevant in the Barker v. Wingo case have also been applied by the Alberta Queen's Bench Court in the interpretation of the analogous right under the Canadian Charter

of Rights (in R v. Cameron [1982] 6 WWR 270).

2. Relevance of international and comparative human rights law

The growing awareness of the highly persuasive value and potential impact of international and comparative human rights law is by no means confined to the Judicial Committee of the Privy Council. A few recent examples from Commonwealth jurisdictions serve to illustrate the widening influence of this body of law. In a unanimous decision in the case of Stephen Ncube and Others v. The State (judgment of 14 December 1987, 1988 (2) SA 702), the Supreme Court of Zimbabwe declared judicial corporal punishment of an adult unconstitutional[2]. The Court was concerned with the interpretation of Section 15(1) of the Zimbabwe Constitution which, in terms virtually identical to Article 3 of the European Convention, prohibits torture, inhuman or degrading punishment or treatment. In arriving at its decision, the Court relied particularly on the decision of the European Court of Human Rights in the case of Tyrer v. United Kingdom ([1978] 2 EHRR 1). Giving the judgment of the Court Gubbay J.A., described the penalty of whipping as:

> "... not only inherently brutal and cruel ... [I]t is relentless in its severity and contrary to the traditional humanity practised by almost the whole of the civilised world, being incompatible with the evolving standards of decency".

In reaching its conclusions, the Court also had regard to decisions of the U.S. Supreme Court and to Commonwealth authorities in which the punishment had been declared unconstitutional. The Court also considered the progressive moves which had taken place in a number of other countries, to restrict or abolish the punishment of whipping.

The decision of the Court of Appeal of Botswana in The State v. Petrus and Another ([1985] LRC (Const) 699) is another important case in point. In a unanimous judgment, Maisels, P., on behalf of the Court, stated:

> "... it is only right that the indebtedness of the Court should be expressed to counsel for the accused for having made available to it, by means of photocopies, the numerous judgments, Articles and Conventions to which reference was made by them in the course of argument. But for this many would have been inaccessible to the Court; and, speaking for myself, the existence of many of them was quite unknown" (at 702).

A full bench of five judges had been constituted for the purpose of deciding, inter alia, whether corporal punishment, as prescribed by the Criminal Procedure and Evidence Act, was ultra vires section 7 of the Constitution of Botswana which prohibits inhuman or degrading punishment. The Court concluded that the

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2 In a judgment of 29 June 1989, the Court similarly ruled that judicial corporal punishment of juveniles was unconstitutional (A Juvenile v. The State, Crim. Appeal No.156/88, Judgment No. S.C. 64/89).

manner of punishment, which was administered by repeated and delayed instalments, was ultra vires the Constitution. In the course of its decision, the Court of Appeal drew support from decisions of the European Court of Human Rights, the United States Supreme Court, and to a strong dissenting opinion of the Privy Council in Riley and Others v. Attorney General of Jamaica ([1982] 3 All E.R. 469).

The Supreme Court of India has also looked to decisions of the European Court of Human Rights. In Rangarajan v. Jagjivan Ram & Ors and Union of India v. Jagjeevan Ram & Ors (Civil Appeal Nos. 13667-69 of 1988, judgment dated 30 March 1989, as yet unreported), the Supreme Court had to consider the validity of film censorship in the context of the freedom of expression guarantee under Article 19(1)(a) of the Indian Constitution. In allowing the appeal against a decision to revoke the film's certificate, the Supreme Court stated:

> "[O]ur commitment to freedom of expression demands that it cannot be suppressed unless the situations created by allowing the freedom are pressing and the community interest is endangered. The anticipated danger should not be remote, conjectural or far fetched. It should have proximate and direct nexus with the expression. The expression of thought should be intrinsically dangerous to the public interests. In other words, the expression should be inseparably locked up with the action contemplated like the equivalent of a 'spark in a powder keg' ".

The Supreme Court cited, with approval, the decision of the European Court of Human Rights in Handyside v. United Kingdom ([1976] 1 EHRR 737) and concluded that the European Court's approach to the protection of freedom of expression was similar to its own, notwithstanding the extensive limitations imposed on the right under Article 10(2) of the European Convention. Both Courts have held that the right freely to exchange ideas and information is a fundamental feature of the democratic process. In the words of the European Court, the right to freedom of expression is applicable not only to information that is:

> "favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend shock or disturb the State or any sector of the population" (Handyside, para.49).

The Court of Appeal of Singapore has expressly acknowledged that it was persuaded by the arguments, and by the powerful decisions of the Supreme Courts of Zimbabwe, South Africa and Namibia, of the English Courts and of the Privy Council, in its decision to overturn some twenty years of case law. In the far-reaching judgment, given on 8 December 1988 in the case of Teo Soh Lung and Others v. The Minister of Home Affairs, The Attorney-General of Singapore and The Commissioner of Police (Civil Appeal No.81 of 1988, as yet unreported), the Court unanimously asserted its authority to review the exercise of discretion by the President and relevant Minister, to order preventive detention under the Internal Security Act, where the President is "satisfied" that it is necessary on grounds of national security. The decision is considered more fully below.

The approach to constitutional interpretation adopted by the

Courts in the decisions cited above has been strongly endorsed by a group of Commonwealth Judges at a meeting in Bangalore, India, in February 1988. The "Bangalore Principles" which that meeting adopted, recognised and affirmed the relevance and importance of:

> "... a growing tendency for national courts to have regard to these international norms for the purpose of deciding cases where the domestic law - whether constitutional, statute or common law - is uncertain or incomplete" (Principle 4).

The guidance provided by the case law of regional and international tribunals is all the more important when one recalls that the concept of constitutional interpretation is a relatively new one for most Commonwealth lawyers.

B. DEROGATIONS UNDER INTERNATIONAL LAW

1. The European Convention on Human Rights

The derogation provision under the European Convention on Human Rights is to be found in Article 15(1), which states:

> "[I]n time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".

The European Court of Human Rights has had occasion to consider Article 15 and to rule on its scope and effect. In Lawless v. Ireland (No.3) ([1961] 1 EHRR 15), the Court stated that the words "other public emergency threatening the life of the nation" when given their natural and ordinary meaning, referred to:

> "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".

It was against these requirements, the Court held, that the Applicant's detention had to be examined. The Court said that, contrary to the Irish Government's claims, Article 5(1)(c) of the Convention did not authorise preventive detention. Rather, it permits the arrest or detention of a person only:

> "for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ... ".

In the absence of any of these specified circumstances, the Article could not be relied on to justify the detention. It could only be justified if the State Party could show that a state of emergency existed, and that the detention was strictly

required by the exigencies of the situation. Furthermore, the Court observed, the obligation to permit a judicial determination of the merits of the deprivation of liberty was reinforced when read in conjunction with paragraph 5(3), with which it forms a whole. Any other interpretation of these two paragraphs would mean, in effect, that:

> "...anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention. Such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention" (para.14).

The European Court reaffirmed that the purpose of the Convention was, inter alia, to protect the freedom and security of the individual against arbitrary detention or arrest. It also noted, in the present case, that the Applicant had not been brought before a 'competent legal authority' during the period of his detention, which had lasted nearly five months.

In the later case of Ireland v. United Kingdom ([1978] 2 EHRR 25), the European Court confirmed that the determination whether the conditions laid down in Article 15 have been fulfilled, is a matter for the Court. It acknowledged, however, that States Parties,

> "[b]y reason of their direct and continuous contact with the pressing needs of the moment ... are in principle in a better position than the international judge to decide both on the presence of an emergency and on the nature and scope of derogations necessary to avert it ... " (para.207).

Notwithstanding this "wide domestic margin of appreciation" however, the Court has made clear that States Parties do not enjoy an unlimited power in this respect, but are subject to a European supervision. Responsibility rests with the European Court and Commission to ensure that States comply with their obligations and do not go beyond that which is 'strictly required by the exigencies of the crisis'.

In both the Lawless and the Ireland v. U.K. cases, the European Court concluded that the domestic authorities' declaration that a state of emergency existed was reasonably justifiable in all the circumstances of each case. The Court arrived at its findings after examining the conditions prevailing at the time. It had regard, for example, to the existence of a secret terrorist army and to the gravity of the threat posed to the security of each State by the activities of that army. In assessing whether the exceptional measures taken were necessary, the Court also took account of the fact that powers available to the authorities under ordinary laws were inadequate to combat the serious escalation of violence and intimidation. In the circumstances, the Court concluded that the authorities' resort to extrajudicial deprivation of liberty did not contravene the Convention.

2. The American Convention on Human Rights

Equally strict conditions govern the suspension of the fundamental rights guarantees which is permitted by Article 27 of the American Convention on Human Rights. That Article provides:

> "1. In time of war, public danger, or other emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention to the extent and for the period of time strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law and do not involve discrimination on the ground of race, color, sex, language, religion, or social origin".

Paragraph 2 of Article 27 lists a number of non-derogable rights, among them "the judicial guarantees essential for the protection of such [non-derogable] rights". In a recent and highly significant Advisory Opinion (OC-8/87 of 30 January 1987, Series A, No.8), the Inter-American Court of Human Rights held that the writ of habeas corpus was one of the judicial remedies which may not be suspended in emergency situations. The Court stated that the purpose of the writ, which is guaranteed by Articles 7(6) and 25(1) of the American Convention on Human Rights, is to protect personal freedom or physical integrity against arbitrary detentions. As such, and in order to achieve its primary objective of obtaining a judicial determination of the lawfulness of a detention, the Court held that:

> "... it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment".

The Court was giving its Opinion in response to a request from the Inter-American Commission of Human on whether the writ of habeas corpus was one of the judicial guarantees, referred to in Article 27(2), which may not be suspended by States Parties to the Convention. The Commission explained that its request was prompted, inter alia, by the assumption on the part of some States Parties that the writ could be suspended in emergency situations. The Commission also remarked that some States had already enacted special laws to facilitate incommunicado detention for prolonged periods.

The Inter-American Court emphasised the exceptional situations - specifically referred to in paragraph 1 of Article 27 -in which derogations are permitted. The Court further noted that the permitted derogation was not absolute but merely a suspension or limitation of the full and effective exercise of certain rights "to the extent and for the period of time strictly required by the exigencies of the situation". In order to ensure strict compliance with these requirements, the Court observed that:

"... it is entirely in order for an autonomous and independent judicial order to exercise control over the lawfulness of such measures by verifying, for example, whether a detention based on the suspension of personal freedom complies with the legislation authorized by the state of emergency" (para. 40).

This was particularly so in a system governed by the rule of law. The Court concluded that the writ of habeas corpus was one of the judicial remedies essential "for the protection of various rights whose derogation is prohibited by Article 27(2) and that serve, moreover, to preserve legality in a democratic society" (para. 42). It followed, therefore, that those States Parties which had expressly or impliedly suspended the legal remedy of habeas corpus were in contravention of their international legal obligations under the Convention.

3. The International Covenant on Civil and Political Rights and The African Charter on Human and Peoples' Rights

The International Covenant and the African Charter are the two major human rights treaties to which member States of the Organisation of African Unity may become party. Twenty-two African countries[3] have now ratified the International Covenant on Civil and Political Rights (ICCPR) and, as of 15 September 1988, twelve of these[4] count among the forty-three States Parties which have accepted the right of individual petition under the Optional Protocol. This means that any derogation measures adopted by these States Parties will be subject to the supervisory powers of the Human Rights Committee, which is charged with the implementation of the Covenant and Optional Protocol. The Committee's powers are activated when States Parties comply with their obligation to submit periodic reports under the Covenant. They may also be triggered by inter-State applications under Article 41 or, in respect of those States Parties to the Optional Protocol, on receipt of individual complaints.

The Human Rights Committee has not yet had occasion to rule extensively on the scope of the derogation provision contained in Article 4 of the Covenant. Nevertheless, the similarities in the phrasing of this Article and the analogous provisions of the European and American Conventions, mean that the interpretation of the two latter treaties is relevant for purposes of interpreting the Covenant obligations. The case law under these two instruments also provide important guidance for States Parties when enacting or implementing security regulations.

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[3] Cameroon, Central African Republic, Congo, Equatorial Guinea, Gabon, The Gambia, Guinea, Kenya, Libyan Arab Jamahiriya, Madagascar, Mali, Mauritius, Morocco, Niger, Rwanda, Senegal, Sudan, Togo, Tunisia, United Republic of Tanzania, Zaire and Zambia.

[4] Cameroon, Central African Republic, Congo, Equatorial Guinea, The Gambia, Madagascar, Mauritius, Niger, Senegal, Togo, Zaire and Zambia (source: Human Rights Centre, Geneva).

The growing body of jurisprudence may also provide valuable assistance to the African Commission on Human and Peoples' Rights as it seeks to give effect to the guarantees set out in the African Charter. The Charter, to which there are now thirty-five States Parties[5], contains no specific derogation clause and could well give rise to State Party claims that the suspension of rights in the interest of State security is a matter purely for the domestic authorities. However, the African Commission is by no means confined to the prescriptions of domestic law in the discharge of its functions. Articles 60 and 61 set out the principles applicable to the interpretation of the Charter and directs the Commission to "draw inspiration from international law on human and peoples' rights" and particularly from other instruments adopted by the United Nations and its Specialised Agencies. The Commission is therefore at liberty to apply the case law referred to above when considering, inter alia, the guarantee of liberty and security of person contained in Article 6, and the further stipulation in that Article that any deprivation of freedom must be "for reasons and conditions previously laid down by law". Any other approach would lead to the odd situation that external restraints could be imposed on African Governments by an international tribunal, as a result of the application of stricter standards, but not by the African Commission.

C. DEROGATIONS IN DOMESTIC LAW

Although derogation provisions under domestic law may be differently worded, the decisions and views of the international tribunals referred to above provide important guiding principles for domestic courts concerned with interpreting and applying similar concepts. They are also of value in the courts' assessment of whether or not the authorities have complied with those requirements of domestic law that regulate the declaration of an emergency and the suspension or limitation of rights.

Chandrachud, C.J. (as he then was), when delivering the judgment of the Supreme Court of India in State of Punjab and Others v. Talwandi ([1985] LRC (Const) 600), stated that:

> "Preventive detention is a necessary evil but essentially an evil. Therefore, deprivation of personal liberty, if at all, has to be on the strict terms of the Constitution. Nothing less" (at pp. 607-8).

Despite this unequivocal statement, it is not always clear from the decisions of national courts that equally rigorous tests are applied, for example, to the question whether a state of

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5. As at 28 April 1988, at the end of the African Commission's Third Session, the following States had ratified or acceded to the Charter: Algeria, Benin, Botswana, Burkino Faso, Cape Verde, Central African Republic, Chad, Comoros, Congo, Egypt, Equatorial Guinea, Gabon, Gambia, Guinea, Guinea-Bissau, Liberia, Libya, Mali, Mauritania, Niger, Nigeria, Rwanda, Sahrawi Arab Democratic Republic, Sao Tome & Principe, Senegal, Sierra Leone, Somalia, Sudan, Tanzania, Togo, Tunisia, Uganda, Zaire, Zambia and Zimbabwe.

emergency exists in fact, and whether the exceptional measures taken are only such as are necessary to deal with the prevailing situation. The following sections examine the scope of judicial scrutiny of executive exercise of discretion in relation to the right to personal liberty and security.

D. REVIEWABILITY BY NATIONAL COURTS

The problem of balancing the enjoyment of liberties against the security interests of the State is one that arises in all societies. It is also a common and legitimate concern of all governments to be able to respond rapidly and effectively to thwart acts that are considered prejudicial to that security. In practice, an inevitable consequence of this executive response is the infringement of civil liberties - personal liberty being one of the most frequent victims. Infringements may often be justifiable on national security grounds. However, abuses of civil liberties may also occur, not in the genuine defence or protection of State security, but where politicians are determined to retain power at all costs, notwithstanding widespread opposition and the loss of popular support.

The need to ensure that wide discretionary powers of preventive detention are not abused, contrary to the Rule of Law, in the words of the Hon. Chief Justice Dumbutshena:

> "... create[s] unnecessary conflict between the Judiciary, which is the custodian of the rights of the citizens who seek protection in the Courts, and the Executive, the guardian of the security of the State" (Minister of Home Affairs & Anor v. Austin & Anor [1987] LRC (Const) 567 at 571 to 572).

The scope for conflict is increased by the fact that information on which the decision to detain is based, is necessarily within the exclusive domain of the executive. Concerned as it is with matters of national security, the latter is often reluctant to disclose any of that information to the courts. In the absence of adequate information, the courts are effectively prevented from making any meaningful assessment of the validity of the detention order. This presents a curious dichotomy since the courts are charged with ultimate responsibility for interpreting and enforcing fundamental rights. Their inability to inquire into, or to look behind detention orders as a result, casts serious doubts over their competence properly to discharge this responsibility. This dilemma also raises the important question whether matters of preventive detention are properly susceptible to judicial review.

These considerations - as well as Executive-mindedness in some cases - have led a number of courts to adopt a very restrictive approach to their jurisdiction. Thus, in R. v. Halliday [1917] AC 260, where the applicant was detained under reg. 14B of the Defence of the Realm (Consolidation) Regulations, Lord Finlay, LC, delivering the judgment of the House of Lords, declared:

> "[i]t seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court

of law. No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy" (at p.269).

Halliday's case, and other restrictive wartime decisions such as Liversidge v. Anderson and Greene v. Secretary of State for Home Affairs ([1942] AC 284 (HL)), have been followed by the Courts of Malaysia. Thus, in Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129, Azmi, LP, in the Federal Court of Appeal of Malaysia, quoted with approval the words of Lord Macmillan in Liversidge:

> "But how could a court of law deal with the question whether there was a 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 fault? A decision on this question can manifestly be taken only by one who has both knowledge and responsibility which no court can share" (at p.140, right hand column).

In the same case, Ong, CJ, similarly opted for this "more realistic view of things" taken by the English Courts. He did so after surveying and rejecting a number of Indian authorities which favoured a more objective approach. In a passage which is reminiscent of Lord Atkin's reference in Liversidge v. Anderson to judges who 'show themselves more Executive minded than the Executive', Ong, CJ went on to remark that:

> "Indian judges ... impress me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive powers" (at p.141, left hand column).

In the later case of Theresa Lim Chin Chin & Ors v. Inspector General of Police [1988] 1 MLJ 293, Salleh Abas, LP, delivering the judgment of the Supreme Court of Malaysia stated that:

> "the intention of the framers of the Constitution is that judges in the matter of preventive detention relating to the security of the Federation are the executive".

The Supreme Court of Malaysia has since gone further and ruled, in Karpal Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia (1988) 3 MLJ 293, that even where the exercise of discretion is on irrelevant grounds or in bad faith, it will not be susceptible of judicial review.

1. The South African and Namibian Courts

These restrictive decisions are in sharp contrast with those of the South African or Namibian Courts. In Hurley and Another v. Minister of Law and Order ([1985] (4) SA 709 (D)), the Durban and Coast Local Division was faced with an application for habeas corpus of the Director of an umbrella church organisation who had been detained under Section 29 of the Internal Security Act 74 of 1982. Leon, Acting Deputy Judge President, in a decision that was unanimously upheld by five South African judges sitting in the Appellate Division (1986 (3) SA 568), declared the detention unlawful and released the detainee. In doing so he pointed out

that the South African Courts had not adopted the same construction as was applied in the Liversidge case and that:

> "[t]his case raises matters of great constitutional importance affecting the liberty of the subject, the security of the State and the jurisdiction of the Courts. In dealing with this kind of legislation, KOTZE JA said the following in Union Government v. Fakir 1923 AD 466 at 471:
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> > 'I should like, without attempting to dictate to the Legislature, to point out the great danger involved in departing from a well-known rule of constitutional law in all civilised countries - namely, that the courts of law alone are entrusted with deciding on the rights and duties of all persons who are within the protection of the courts.'
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> "The great danger to which KOTZE JA correctly referred would, in my judgment, be increased enormously were the judiciary to approach such legislation in a spirit of compliance rather than one of independent scrutiny" (715).

The Supreme Court of South West Africa (Namibia) has also implicitly rejected the majority decision in Liversidge v. Anderson. In an application for habeas corpus on behalf of Josef Katofa who was detained under Section 2 of Proc AG 26 of 1978 (SWA), the Supreme Court stated, in Katofa v. Administrator-General for South West Africa and Anor ([1985] (4) SA 211 (SWA)), that:

> "[i]llegal deprivation of liberty is a threat to the very foundation of a society based on law and order. Through the centuries the courts in democratic countries have jealously guarded and protected the rights of the individual to his liberty and their own jurisdiction in respect of such matters. This is indeed the position in South West Africa and the very legislation which this Court is now considering spells out the protection of those inalienable rights as its very objective" (at pp.220-221).

A shadow has since been cast over the decision in this case by the Supreme Court of South Africa, which exercises appellate jurisdiction over the Namibian Courts. Although it affirmed the decision of the lower court in the Katofa case, the South African Supreme Court has offered different reasons for doing so. Whereas the applicant's release had been ordered in the earlier decision on the basis that the Administrator-General had not discharged the burden on him to justify the detention, the South African Supreme Court subsequently held that the words "if the Administrator-General is satisfied" are not objectively justiciable. The appellate Court did, however, distinguish the Hurley case, among others, on the basis of the requirement in those cases for the relevant authority to have "reason to be satisfied" or to "believe on reasonable grounds" (Tussentydse Regering Vir Suidwes-Afrika v. Katofa [1987] (1) 695).

2. The English Courts since Liversidge v. Anderson

Despite the professed preference for the "more realistic" English view of things, the Malaysian Courts have also failed to

keep pace altogether with the advances made by the English Courts in developing the scope of judicial review. The English Courts are increasingly inclined to exert their review function to control abuse of executive discretion. As a result, judicial review now constitutes a growing, though by no means sufficient, protection for the citizen in his or her dealings with the government. This is demonstrated by Lord Scarman's statement in R v. Home Secretary, ex parte Khawaja [1984] AC 74 (HL) that:

> "The classic dissent of Lord Atkin in Liversidge v. Anderson [1942] AC 206 is now accepted (Reg. v. Inland Revenue Commissioners, Ex parte Rossminster Ltd [1980] AC 952, 1011, 1025) as correct not only on the point of construction but in its declaration of English legal principle. Lord Atkin put it thus, at p.245: 'that in English law every imprisonment is prima facie unlawful and that it is for the person directing imprisonment to justify his act'".

In fact, in the Rossminster case, the House of Lords expressly overruled the majority decision in Liversidge, not just in the context of Rossminster, but generally. Lord Diplock stated, at p.1011 that:

> "For my part I think the time has come to acknowledge openly that the majority of this House in Liversidge v. Anderson was expediently and at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was correct".

And Lord Scarman, in even stronger terms, declared at pp.1024-1025:

> "The ghost of Liversidge v. Anderson [1942] AC 206 therefore casts no shadow upon this [Taxes Management] statute. And I would think it need no longer haunt the law. It was laid to rest by Lord Radcliffe in Nakkuda Ali v. Jayaratne [1951] AC 66, 77, and no one in this case has sought to revive it. It is now beyond recall".

The majority in Liversidge had held that, where the Secretary of State, acting in good faith under regulation 18B of the Defence (General) Regulations, 1939, made an order in which he recited that he had reasonable cause to believe a person to be of hostile associations and that by reason thereof it was necessary to detain him, a court of law could not inquire whether in fact the Secretary of State had reasonable grounds for his belief. The matter was one for the executive discretion of the Secretary of State.

The approach affirmed in Rossminster now holds sway in the English Courts and has influenced subsequent decisions concerning judicial review of administrative action. Thus, in the recent immigration case of Bugdacay v. Secretary of State for the Home Department ([1987] 1 All E.R. 940 (H.L.)), Lord Templeman stated that:

> "where the result of a flawed decision may imperil life or liberty a special responsibility lies on the court in the examination of the decision-making process" (at p.956).

And at p.952, Lord Bridge said that the courts were entitled, within limits,

"to subject an administrative decision to the more rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines. The most fundamental of all human rights is the individual's right to life and, when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision under challenge must surely call for the most anxious scrutiny".

The Courts have even demonstrated a readiness to overturn longstanding barriers to the review of prerogative powers. Lord Roskill in Council of Civil Service Unions and Others v. Minister for the Civil Service [1984] 3 All E.R. 935 (HL), while acknowledging that certain prerogative powers were not susceptible to judicial review, stated:

"I am unable to see ... that there is any logical reason why the fact that the source of the power is the prerogative and not statute should today deprive the citizen of that right of challenge to the manner of its exercise which he would possess were the source of the power statutory" (at 956).

He listed, among the powers that were not reviewable, the making of treaties, the defence of the realm, the prerogative of mercy, appointment of ministers, the grant of honours and the dissolution of Parliament.

Lord Scarman, who agreed with this view, said at p.948:

"...I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable, that is to say if it is a matter on which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power".

The case, otherwise referred to as the GCHQ case, raised the issue whether the withdrawal of trade union rights, without consultation and where the union had a legitimate expectation of being consulted, was justified on grounds of national security. Lord Scarman, giving the judgment of the House of Lords, concluded:

"I am in favour of dismissing the appeal only because the respondent has established by evidence that the interests of national security required in her judgment that she should refuse to consult the unions before issuing her instruction. But for this I would have allowed the appeal on the procedural ground that the respondent had acted unfairly in failing to consult unions or staff before making her decision".

3. Other Courts of the Commonwealth

This positive approach is evident in the decisions of other Commonwealth Courts where Lord Atkin's dissent in Liversidge v. Anderson also finds expression. The importance of the developing

case law is demonstrated by the significant impact which it has recently had on the course of judicial review in Singapore. The case of Teo Soh Lung, referred to above, concerned an appeal from the High Court's dismissal of the Appellant's application for a writ of habeas corpus following her arrest and detention, together with thirteen other persons, for alleged involvement in a Marxist conspiracy to subvert and destabilise the security of the State. The Appellant was detained for one year pursuant to Section 8(1)(a) of the Internal Security Act which provides:

> "(1) If the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof ..., it is necessary to do so, the Minister shall make an order -
> (a) directing that such person be detained for any period not exceeding two years; ...".

She was conditionally released some four months later but again detained after issuing a press statement in which she denied the government's accusations.

In allowing the appeal, the Court of Appeal of Singapore acknowledged that the time had come to recognise that the subjective test in respect of Sections 8 and 10 of the Internal Security Act could no longer be supported. The Court rejected the Respondent's contention that the discretion was not justiciable, stating that:

> "... the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power".

The Court continued:

> "[i]f the discretion is not subject to review by a court of law, then, in our judgment, that discretion would be in actual fact as arbitrary as if the provisions themselves do not restrict the discretion to any purpose and to suggest otherwise would in our view be naive".

These decisions are also very much in keeping with those of international tribunals which are charged with interpreting and implementing international human rights treaties. In the Inter-American Court's important Advisory Opinion referred to above, the Court quoted with approval, a decision of the Criminal Division of the Federal Court of Appeal of Buenos Aires, Argentina (Case No. 1980 of April 1977), which, in granting a writ of habeas corpus, ruled that:

> "It is not possible to accept the argument that the President of the Republic is alone empowered to examine the situation of those who are detained at his order. ... [I]t is equally clear that it is the duty of the Judiciary of the Nation to examine exceptional cases such as the present as to the reasonableness of the measures taken by the Executive..." (para.41).

The Inter-American Commission expressed similar views when submitting its request for an Advisory Opinion to the Court. It

said:

> "To hold the contrary view - that is, that the executive branch is under no obligation to give reasons for a detention and may prolong such detention indefinitely during states of emergency, without bringing the detainee before a judge empowered to grant the remedies set forth in [specified articles] of the Convention - would ... be equivalent to attributing uniquely judicial functions to the executive branch, which would violate the principle of separation of powers, a basic characteristic of the rule of law and of democratic systems" (para. 12).

E. ATTEMPTS TO OUST THE JURISDICTION OF THE COURTS

Executive attempts to exclude judicial review have taken various forms: statutory exclusion clauses, the assertion of executive privilege and public interest immunity, or subjectively formulated discretionary powers. Where these devices have failed to exclude or restrict the courts' review powers, some governments have even resorted to legislative enactments to override the court's judgment. Difficulties with regard to the enforcement of the courts' judgments will also be looked at under section G below.

1. Statutory exclusion clauses

In Wang and Others v. Chief of Staff, Supreme Headquarters, Lagos and Others [1986] LRC (Const) 319, the Nigerian Federal Court of Appeal had to consider, inter alia, the effect of the Military Government's Decrees Nos. 2 and 13 of 1984 in relation to constitutional rights. Section 4(1) and (2) of the State Security (Detention of Persons) Decree (No.2 of 1984) purported to remove the right to institute legal proceedings, to suspend the fundamental rights Chapter of the 1979 Constitution, and to oust the jurisdiction of the courts in relation to anything done or intended to be done "in pursuance of this Decree". Decree No. 13, entitled "Supremacy and Enforcement of Powers Decree", similarly mandated that anything done "in pursuance of any Decree or an Edict" which allegedly contravened Chapter IV (fundamental rights) of the Constitution "shall not be inquired into in any court of law".

The applicants had been held under detention orders made by the Chief of Staff who had power, under Decree No.2, to issue such order where he is satisfied, in respect of any person, that that person has been "recently concerned in acts prejudicial to the State's security" or has "contributed to the economic adversity of the country". On appeal, the Federal Court of Appeal held that the combined effect of Decrees Nos. 2 and 13 of 1984 had been to oust the jurisdiction of the Courts. It therefore struck out the Appellants' appeal against the dismissal of their application for a writ of habeas corpus and stated that the Federal High Court should have done the same. In doing so, the Court concluded:

> "... on the question of civil liberties, the law courts of Nigeria must as of now blow muted trumpets" (at 330).

However, the decision in this case must be read in the light

of Decree No. 13 which also declared that the military take-over of 31 December 1983 "effectively abrogated the whole pre-existing legal order in Nigeria except what has been preserved ...". It would therefore seem that the Courts were here faced with the application of a new legal order in which the fundamental rights chapter of the Constitution was not part of the preserved laws.

In Hurley and Another v. Minister of Law and Order [1985] (4) SA 709 (D), the Durban and Coast Local Division of the South African Court was also required to rule on the validity of an ouster clause, and on its effect on the courts' review powers. Leon, Acting Deputy Judge President, rejected a restrictive approach to the construction of Section 29(6) of the Internal Security Act 74 of 1982 which states that no court of law shall have jurisdiction to pronounce upon the validity of any action taken in terms of the section or to order the release of any person detained under the provisions of the section. The Learned Judge held that the ouster clause did not preclude the court from investigating whether, on an objective test, the necessary jurisdictional facts existed.

The decision was unanimously upheld by five judges sitting in the Appellate Division. They held that the arresting officer's decision to arrest Mr. Kearney was objectively justiciable, and that Section 29(6) did not preclude the court from reviewing the decision to arrest and detain.

The same issue came before the House Lords in the earlier case of Anisminic v. Foreign Compensation Commission [1969] 2 A C 147 (HL). The clause under consideration was section 4(4) of the Foreign Compensation Act 1950, which provided that:

> "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law".

The House of Lords held that the Commission had misconstrued the enabling statute concerning its jurisdiction and the Court was therefore not precluded from inquiring into the validity of the Commission's order. The Commission had been set to determine entitlement claims under a compensation fund set up in respect of sequestrated and/or damaged property. However, the Commission rejected a substantial part of the appellant's claim on the grounds that they were not, at the time of their claim, title holders to the property. The case established the principle that where an authority exceeds its jurisdiction, its decision will be regarded by the courts as invalid and beyond the protection of any exclusionary formula.

2. Subjectively framed discretionary powers

The subjective formulation of discretionary powers represents a further attempt by the executive to restrict the scope of judicial review. The usual formula is for the regulations to authorise the exercise of discretion where "it appears" to the Minister or other authority, or where he or she "is satisfied" as to certain specified matters. The proposition that such clauses restrict the courts' review power has been upheld in a long line of Malaysian cases since Karam Singh's case in which the Malaysian Federal Court of Appeal stated that:

"... when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is purely a subjective condition, so as to exclude judicial inquiry into the sufficiency of the grounds to justify the detention, it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation. Indeed, the logical result of [this] argument ... would be to invalidate section 8 of the Internal Security Act in so far as it purports to make the satisfaction of the Government the sole condition of a lawful detention" (per Suffian F J, at p.150, left hand column).

On this view, the courts would be denied any opportunity to rule on the validity of detention orders, except on the basis of a breach of natural justice or other procedural impropriety. It would also place impossible obstacles in the path of any aggrieved detainee seeking to challenge the validity of his detention order. However, as Lord Wilberforce pointed out in Secretary of State for Education and Science v. Metropolitan Borough of Tameside [1976] 3 All E R 665:

"This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the Court must enquire whether those facts exist, and have been taken into account, whether judgment has been made on a proper self direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge" (at 681-682).

This reflects the objective approach taken in the Hurley case with regard to the interpretation of the words "if he has reason to believe" in section 29(1) of the Internal Security Act 74 of 1982. There, Leon, ADJP, held that the ordinary grammatical meaning of the phrase "reason to believe" was a belief based upon reason and did not mean "thinks he has reason to believe". In other words, there had to be a factual basis for the belief.

The Supreme Court of Zimbabwe has likewise held, in Austin, that judicial review was not excluded by section 17(1) of the Emergency Powers (Maintenance of Law and Order) Regulations 1983 which permitted the making of a detention order "if it appears to the Minister that it is expedient in the interests of public safety or public order" to do so. Although the discretion was a subjectively framed one, the Court said that there had to be reasonable grounds to support the action. Furthermore, the detaining authority was under a duty to act fairly, and it was the court's duty to determine, on well-established administrative law grounds of illegality, irrationality and procedural impropriety, whether the detaining authority had in fact acted

fairly in coming to its decision.

The Judicial Committee of the Privy Council took a similar approach when considering Regulation 3 of the Emergency Powers Regulations 1967 in Attorney-General of St. Christopher, Nevis and Anguilla v. Reynolds [1980] AC 637. That regulation empowered the Governor, where he "is satisfied" as to certain matters, to order the detention of any person who "has recently been concerned in acts prejudicial to the public safety ...". The Privy Council declared the detention unlawful because, it said, there were no grounds capable of amounting to reasonable grounds on which to justify the detention. In coming to this conclusion, the Privy Council implied a requirement of reasonableness, derived from the Constitution, into the emergency powers regulations. Lord Salmon, delivering the judgment of the Court, stated:

> "Their Lordships consider that it is impossible that a regulation made on May 30, 1967, under an Order in Council which, on its true construction, conformed with the Constitution on that date, could be properly construed as conferring dictatorial powers on the Governor: and that is what the regulation would purport to do if the words 'if the Governor is satisfied' mean 'if the Governor thinks that etc.' No doubt Hitler thought that the measures - even the most atrocious measures - which he took were necessary and justifiable, but no reasonable man could think any such thing" (at 656).

It is these decisions which so strongly influenced the Court of Appeal of Singapore in the Teo Soh Lung case, referred to above, to overturn longstanding decisions of the Courts of that country which had applied a subjective test in reviewing the exercise of discretion.

3. Executive privilege and public interest immunity

The administrative authorities have also sought to immunise their actions against judicial scrutiny by claims that disclosure of information or materials in their possession would be detrimental to the public interest. The effect of such a claim, if successful, is to make it very difficult, and often impossible, for the applicant for habeas corpus to show that the detention is unconstitutional, illegal or irrational, so as to make the detention unlawful.

Notwithstanding Lord Parker's statement in The Zamora [1916] 2 AC 77 that:

> "[T]hose who are responsible for the national security must be the sole judges of what the national security requires. [and that] [I]t would be obviously undesirable that such matters should be made the subject of evidence in a Court of law or otherwise be discussed in public" (at 107),

the Courts have since been asserting their authority to mitigate the hardship that a detainee would otherwise suffer. They have made clear that claims of national security and of public interest cannot operate to exclude judicial review. The scope of the review power in this context was set out in R v. Governor of Brixton Prison ex parte Soblen [1963] 2 QB 243, where Lord

Denning M R, stated that:

> "The court cannot compel the Home Secretary to disclose the materials on which he acted, but if there is evidence on which it could reasonably be supposed that the Home Secretary was using the power of deportation for an ulterior purpose, then the court can call on the Home Secretary for an answer; and if he fails to give it, it can upset his order" (at p.302).

In the GCHQ case, Lord Roskill, at p.958 stated:

> "The courts have long shown themselves sensitive to the assertion by the executive that considerations of national security must preclude judicial investigation of a particular individual grievance. But even in that field the courts will not act on a mere assertion that questions of national security were involved. Evidence is required that the decision under challenge was in fact founded on those grounds".

These views received strong support and were further elaborated in the subsequent case of R v. Secretary of State for the Home Department, ex parte Ruddock and others [1987] 2 All E R 518 (QBD) where Taylor J., stated:

> "in all such cases, cogent evidence of potential damage to national security flowing from the trial of the issues would have to be adduced, whether in open court or in camera, to justify any modification of the court's normal procedure. Totally to oust the court's supervisory jurisdiction in a field where ex hypothesi the citizen can have no right to be consulted is a draconian and dangerous step indeed. Evidence to justify the court's declining to decide a case (if such a course is ever justified) would need to be very strong and specific" (at 527).

While accepting that there are limits to the review powers, the courts have therefore clearly shown that they will not hesitate to intervene to prevent an excess or abuse of power, even where claims of national security are advanced.

On this issue, the domestic courts have been more courageous than the European Convention organs. A recent example is provided by the complaint submitted to the European Commission of Human Rights in Council of Civil Service Union and Others v. United Kingdom ([1987] 10 EHRR 269). In ruling the complaint inadmissible, the Commission held that the interference with the applicants' freedom to form and to join a trade union was justified under Article 11(2) of the Convention. Article 11(2) permits the imposition of lawful restrictions on the exercise of the right by "members ... of the administration of the State". Without defining the meaning of this phrase, the Commission accepted that it also embraced GCHQ employees. Surprisingly, the Commission gave its ruling without even considering whether the important requirement in the first sentence of Article 11(2) that the restriction must be "necessary in a democratic society in the interests of national security or public safety" had been met.

When viewed alongside the decision of the European Court in Leander v. Sweden (Judgment of the European Court,26 March

1987, Series A, No.116), the GCHQ case indicates that the European Convention organs are more willing to give greater breadth to the "domestic margin of appreciation" when national security issues are invoked by States Parties. Mr. Leander, a civilian carpenter, was refused employment at a Swedish naval museum on unstated security grounds. The security report, to which he was denied access, was not made available either to the Commission or Court. Although the Court found that the secret police-register system interfered with Mr. Leander's right to respect for his private life, it nevertheless concluded that the interference was necessary in a democratic society in the interests of national security. The Court stated, in fact, that the "margin of appreciation ... for achieving the legitimate aim of protecting national security, was a wide one" (para.59).

The European Court of Justice

By contrast, the European Court of Justice, the judicial organ of the European Community, has issued important and authoritative statements on the scope of judicial review in the context of national security and public order in Johnston v. Chief Constable of the Royal Ulster Constabulary (Case No.222/84) 3 CMLR. 240. Following a policy decision to arm male members only of the Royal Ulster Constabulary, the Applicant, Mrs. Johnston, was denied a renewal of her full-time employment contract. The Secretary of State issued a "conclusive certificate" stating that the decision had been taken for the purpose of safeguarding national security and for protecting public safety and public order. The certificate, issued under Section 53 of The Sex Discrimination (Northern Ireland) Order 1976, effectively barred access to the courts for victims of sex discrimination, although the 1976 Order purported to give domestic effect to Council Directive 76/207 concerning equality of treatment for men and women in relation to employment.

The Court concluded that provisions such as Article 53 of the Order were not compatible with Article 6 of the Directive which required an effective judicial control. The Court stated that the provision was:

> "contrary to the principle of effective judicial control laid down in Article 6 of the Directive"

because it enabled the individual to be deprived of the possibility of asserting, through the judicial process, the rights that the Directive conferred. The Court further stated that the derogation provisions under European Community law did not lend themselves to a wide interpretation and no general proviso covering measures taken in the interests of public safety could therefore be inferred from them.

In the Court's opinion, derogations had to be within the limits of what was appropriate and necessary for achieving the objective in question. Furthermore, it was for the domestic court to ensure respect for this principle of proportionality and to determine:

> "whether the refusal to renew Mrs. Johnston's contract could not be avoided by allocating to women duties which, without jeopardising the aims pursued, can be performed without

firearms" (para.39).

F. PROCEDURAL SAFEGUARDS

Whether the courts adopt an objective or subjective approach in the determination of the validity of any detention order will have important implications for the outcome of the case as a whole. In particular, it will affect the detainee's ability to to make effective representations before the tribunal. The right to be informed of the reasons for the detention is an important procedural safeguard which forms an integral part of the right to liberty and security. A proper assessment of the lawfulness of the detention must therefore also encompass an examination of the authorities' observance of this safeguard.

1. Right to be informed of reasons for detention

This guarantee requires the detaining authority to supply the reasons for the deprivation of liberty on arrest or as soon thereafter as is reasonably practicable. The information provided must be sufficient to enable the detainee to know the allegations against him and to make an effective representation before the relevant tribunal. His right, in other words, is to receive "every material particular without which a full and effective representation cannot be made" (State of Punjab and Others v. Talwandi [1985] LRC (Const) 600 at 609b). Referring to this latter requirement, Chandrachud, C J, as he then was, had this to say:

> "[t]he obligation which rests on the detaining authority in this behalf admits of no exception and its rigour cannot be relaxed under any circumstances" (at 607b).

The Supreme Court of Zimbabwe, elaborating on this requirement has said that:

> "[i]n drawing up the grounds of detention it is incumbent upon the detaining authority to appreciate that the detainees will prepare their representations to the review tribunal on inadequate grounds. It is more important that the detainee be furnished with sufficient information or particulars to enable him to prepare his case and to make effective representations before the review tribunal. A bare or bald statement that the detainee is a spy is not good enough" (Minister of Home Affairs and Another v. Austin and Another [1987] LRC (Const) 567 at 574).

In the Talwindi case, the Indian Supreme Court also held that copies of any statements or other documents referred to in the detention order should also be supplied to the detainee. The information, however, is not required to be in technical or precise language. In the particular circumstances of the Talwindi case, the Court concluded that the respondent had failed to establish his claim that the grounds given for his detention were insufficient to enable him effectively to make representations to the advisory board, as required by Article 22(5) of the Indian Constitution.

The respondent had been arrested in pursuance of a detention order under s.3 of the National Security Act 1980 on the basis

of two speeches he was alleged to have made. On appeal, the Supreme Court of India found that the information provided to him mentioned the place, date and time of the alleged meeting; it described the occasion on which the meeting was held; it mentioned the approximate number of persons who were present at the meeting and, with particularity, the various statements made by the respondent in his speech. In the circumstances, the Court rejected the respondent's challenge to the validity of the detention.

Where, however, the reasons for the detention are so vague that the petitioner is unable to make any meaningful representations concerning the propriety of his detention, the Court will strike down the order (Paweni v. Minister of State (Security) and Another) [1985] LRC (Const) 612).

2. Right to be brought promptly before a court

A second and equally important procedural safeguard is the right to be brought promptly before a judicial authority. The European Court of Human Rights has recently had occasion to consider and rule on the meaning of this requirement. The Court's judgment in the case of Brogan and Others v. United Kingdom (judgment of the Court of 29 November 1988, Vol. 145-B, Series A), highlights a distinct departure from the approach of many domestic courts concerning the period of time within which the detainee is required to be brought before a judicial authority. The four applicants were arrested under special powers conferred by s.12 of the 1984 Prevention of Terrorism (Temporary Provisions) Act which provided for the detention of persons suspected of involvement in terrorism in Northern Ireland. Before the Commission, they contended, inter alia, a violation of their rights under Article 5(3) of the Convention which states that:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...".

In assessing the meaning and scope of the word "promptly", the European Court had regard to the importance of the Article in the context of the Convention as a whole. It observed that:

> "[j]udicial control of interferences by the State with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law [and is] "one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention" (para.58).

Consequently, the Court took the view that the scope for flexibility in interpreting and applying the notion of "promptness" was very limited. While the term has to be assessed having regard to the special features of each case:

> "... the significance to be attached to those features can never be taken to the point of impairing the very essence

of the right guaranteed by Article 5(3), that is to the point of effectively negativing the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority" (para. 59).

Although the Court acknowledged the difficulties with which the authorities were confronted in the investigation of terrorist offences, and notwithstanding the legitimate aim of protecting the community as a whole from terrorism, neither of these considerations was sufficient, in the Court's opinion, to justify the lengthy period of detention without appearance before a judicial authority. To hold otherwise would be to attach an unacceptably wide interpretation of the plain meaning of the word "promptly" and

> "... would import into Article 5(3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision" (para. 62).

The Court therefore concluded that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following arrest; even the shortest of the four periods of detention, namely four days and six hours, fell outside the strict constraints of the time permitted by Article 5(3).

The Court's interpretation of this requirement is of importance for national courts which are faced, in many cases, with the interpretation and application of statutory provisions which permit detention for considerable periods of time. In the Austin case, for example, section 17(2) of the Emergency Powers (Maintenance of Law and Order) Regulations - which reflects the wording of the Constitution - allows the Executive a period of up to seven days within which to furnish the detainee with reasons for his arrest. This, despite the requirement in Section 13(4)(b) of the Constitution that a detainee should be brought "without undue delay" before a court. Similarly, in Attorney-General v. Reynolds, Section 5(3) of the Constitution of St. Christopher and Nevis stipulates that a person detained

> "... shall be brought before a court without undue delay and in any case not later than seventy-two hours after his arrest or detention".

In that case the detainee was only served with the written reasons for his detention some five days after his detention. Furthermore, during the course of an inquiry held approximately one month after the arrest, the State conceded that it had no evidence for the detention. Nevertheless, it continued the detention for another month.

Clearly, if detainees are to be given the full protection of the law, the courts must exercise closer scrutiny over all aspects of preventive detention, particularly these procedural safeguards.

The Inter-American Commission and Court have also examined the scope of this provision. In submitting its request for an Advisory Opinion to the Inter-American Court, the Inter-American

Commission expressed the opinion that the immediate aim of the remedy of habeas corpus is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. In the Commission's view, the importance of the remedy could not be overstated, particularly in view of the fact that the right to humane treatment recognised in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances. The Inter-American Court endorsed these views in its Advisory Opinion, adding that such a conclusion was buttressed by the realities of disappearances, torture and murder committed or tolerated by some governments of the hemisphere. Furthermore, these experiences had demonstrated again and again that the right to life and to humane treatment are threatened whenever the right to habeas corpus is partially or wholly suspended.

G. PROBLEMS OF ENFORCING THE COURTS' JUDGMENTS

The inherent conflict between the executive and the judiciary is perhaps most apparent so far as the enforcement of the courts' judgments is concerned. The Executive may express its displeasure at a particular judgment by disregarding the court's order to release the detainee. Alternatively, it may enact legislation to override the decision, or seek to justify the detention by declaring a state of emergency where previously it had not sought to do so.

The United Kingdom's decision to avail itself of the right of derogation under Article 15(3) of the European Convention in response to the European Court's decision in the Brogan case is an example of the latter course. By letter dated 23rd December 1988, the United Kingdom's Permanent Representative to the Council of Europe advised the Secretary-General of the Council to this effect. The Government based its decision on the need to continue to exercise powers of preventive detention for periods of up to seven days to enable the police to counter terrorism. The Government also indicated that it was continuing the search for a solution that would comply with Article 5(3) of the Convention. That is, it was examining the possibility of introducing a judicial element into the powers under the 1984 Prevention of Terrorism (Temporary) Provisions) Act, which is to be re-enacted following its expiry this year.

In Singapore, the Government has enacted legislation to amend the Constitution and the Internal Security Act so as to nullify, retrospectively, the effects of the Court of Appeal's decision in the Teo Soh Lung case. The amendments purport to to remove the right of appeal to the Judicial Committee of the Privy Council; they also exclude judicial review of preventive detention except for failure to satisfy the procedural requirements of the Internal Security Act. The amendments further expressly exclude the constitutional guarantees of separation of power, including the protection of the independence of the

judiciary[6]. It remains to be seen how the Courts of Singapore will respond to the challenge which has been made to the validity of these amendments.

These actions emphasise the vulnerability of the rule of law, particularly in times of national crisis. The primary purpose of constitutional and treaty guarantees of liberty and security, and of the Habeas Corpus Act of 1816, is to protect the right to personal freedom of those who are detained or who have been threatened with detention. Failure to give effect to decisions of the courts means that individuals do not enjoy the full protection of these guarantees and that the power of interpretation and enforcement entrusted to the courts is usurped. It also denies the "generous approach" to constitutional instruments which the Judicial Committee of the Privy Council, as well as other national and international courts advise is necessary to give effect to fundamental rights.

In dealing with the issue of constitutional amendments, the Indian Supreme Court has given powerful decisions to limit the effects, on constitutional rights, of the liberal use of Parliamentary powers of amendment. While conceding that Parliament does have power to amend the Constitution, the Court rejects the validity of any amendment which would have the effect of damaging the basic features of the Constitution or destroying its basic structure (Kesavananda Bharati v. State of Kerala [1973] 4 SCR 1). The Court has also frequently asserted its authority by refusing to declare cases non-justiciable on the grounds that they involve political issues which may be regarded by the executive as being within its exclusive domain. In the Kesavananda Bharati case, for example, the Court stated that:

> "[e]very constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political".

However, the Court has not always been consistent and a major departure from this approach is evident in the case of A.D.M. Jabalpur v. Shivkant Shukla (AIR [1976] SC 1207). In that case, the Supreme Court, by a majority, upheld the Presidential Order which denied standing in the courts in any habeas corpus or other writ proceedings to challenge the validity of detention orders during the state of emergency.

CONCLUSION

It is evident that the efficacy of safeguards for the protection of fundamental rights, particularly in times of serious conflict, depends on the willingness of the courts to undertake a rigorous scrutiny of the exercise of executive discretion and to impose legal limits on the scope of those powers. Without this independent scrutiny and control by the courts, there is a serious risk of the situation envisaged by Lord Shaw in his dissenting opinion in R. v. Halliday [1917] AC

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6 The Internal Security (Amendment) Act 1989 (Act No.2 of 1989) and The Constitution of the Republic of Singapore (Amendment) Act 1989 (Act No.1 of 1989), respectively.

260 of a rapid transition to "arbitrary government".

It is also clear, however, that a courageous judiciary cannot, by itself, protect against such arbitrary government. There must be a willingness on the part of governments to respect the judgments of the courts and the rule of law; there must be, too, an informed and vigilant public opinion. As the Hon. Chief Justice Dumbutshena cautioned in Minister of Home Affairs & Anor v. Austin & Anor ([1987] LRC (Const) 567):

> "[w]hen the Executive ignores the orders and judgments of the Courts there is the inevitable breakdown of law and order, resulting in uncivilised chaos because the Courts cannot enforce their own orders" (at p.572).

In this context, it is also apposite to recall the observation of the Inter-American Court of Human Rights that there is "an inseparable bond between the principle of legality, democratic institutions and the rule of law" (A.O. OC-6/86 of May 9, 1986. Series A No.6, para.32), and that "in a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad".

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