EMERGENCY POWERS IN THE STATES OF SOUTHERN ASIA

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ABSTRACT

After examining how far Rule of Law applied in the Indo-Pakistan sub-continent in the Moghul Period, the thesis traces the history of the exercise of emergency powers from the early days of the East India Company, when martial law was proclaimed in the event of war or insurrection. After 1861 the ordinance-making power of the Governor-General, which could be used to enact legislation specially directed to meet the difficulties created by most kinds of crisis, resulted in a large volume of emergency legislation during the second quarter of the present century. The thesis also deals with the power of certification of Bills conferred by the Government of India Act, 1919 and continued by the Constitution Act of 1935. Emergency legislation during the two world wars is analysed with a view to estimating how far it affected civil liberties. Public security measures during the dominion period in India and Pakistan are also dealt with.

While setting out the emergency provisions in the Constitution of India, their inherent weaknesses which may tend to create a dictatorship are mentioned. The Indian provisions are compared with the emergency provisions in the Pakistan Constitution of 1956. The events and conditions which led to the abrogation of the latter Constitution and the establishment of a military dictatorship are set out.

The history of emergency powers in Ceylon is traced from the

days of the British conquest of the island, passing in review the proclamation of martial law on various occasions. The Public Security Ordinance, 1947, and its several amendments culminating in the amending Act of 1959, it is pointed out, may eclipse democratic freedoms for the minorities in the island.

The concluding chapter deals in the main with some suggestions which might help to stabilise the democratic institutions set up in the South Asian states.

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CHAPTER I

INTRODUCTION

The expression 'Emergency Powers' connotes the powers, over and above those recognised as existing when the ship of state is proceeding on an even keel in fair weather, available to a government in times of crisis. Formerly 'crisis' in this connexion was generally assumed to be limited to war, insurrection and riots, but as the conception of the duties of the state has been enlarged, and as the technique of the revolutionary has improved, the concept of 'crisis' has been enlarged to include any serious threat to the safety of the state, and its social and economic stability, so that it is no longer unusual to find constitutions which confer emergency powers on government to deal with dangerous or difficult situations in peace time. Thus, for instance, the (British) Emergency Powers Act, 1920, was intended to meet threats to essential public services and was brought into operation during the coal strike of 1921, another sectional strike of 1924, the general strike of 1926 and the dock strike of 1948. The (British) Supplies and Services (Transitional Powers) Act, 1945, sought to provide the government with extraordinary powers to deal with the transition from a nation in arms fighting for its existence to the peace-time welfare state after the Second World War. New powers were again conferred upon the governments to meet an economic crisis by the Supplies and Services (Essential Powers) Act, 1947, which gave carte blanche to

the government to ensure that "the whole resources of the community are available for use and are used in a manner best calculated to serve the interests of the community". It is clear from all this that the meaning of 'crisis' or 'emergency' in the present context has been extended to cover any situation deemed dangerous to the welfare of the public.

There has been a corresponding change in the nature of emergency powers. Whereas formerly they consisted mainly in enhanced powers to employ force, they now include powers to legislate by executive decree, to curtail basic freedoms, to conscript the wealth and talents of the people and, in federal states, the concentration of the powers of regional governments at the centre.

In the following pages it is proposed to attempt a study of emergency powers in the states of Southern Asia, the nature of these powers, the circumstances in which they may be invoked and the control of public authorities who exercise such powers. It is also proposed to deal with the tendencies envisaged by the exercise of these powers in the administration of law and order with a view to finding out whether the democratic principle is in danger of subversion in a democratic state during a period of emergency and whether any safeguards against the possible encroachment of totalitarianism could be adopted without seriously interfering with the exercise of such powers when circumstances demand such exercise.

As the legal systems of the states of Southern Asia are, in varying degrees, based on the common law, it will be helpful to an

appreciation of the subject to make occasional comparisons with the law of emergency in other common law countries. If emergency powers prove a threat to civil liberties in countries of which democracy is a well-established product, they cannot be innocuous in states where democracy in its modern connotation as accepted in the west, is not yet fully acclimatised and where public opinion is neither sufficiently educated nor developed to withstand incursions into human rights, "For if they do these things in a green tree, what shall be done in the dry?"(1)

It has been said that "in the eternal dispute between government and liberty, crisis means more government and less liberty".(2) One is at times confronted with the vision of a military dictator, in the name of emergency, attempting the role of a universal Providence, as happens in Pakistan at the moment, and the Chief Justice of a Supreme Court straining all his intellectual nerves to justify the role. "If bad cases make bad law, emergencies may make worse".(3) Hence the importance of a study of emergency powers in the states of South Asia where, with a singular exception, democracy, under the stress of emergencies real or otherwise, tends to be controlled or guided and in the long run, probably subverted. Even in the case of the exception that is India, it is often contended, that it is a facade of democracy and not the reality that exists.

It is hoped that the suggestions made in the last chapter, if

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(1) St. Luke, XXIII, 31.
(2) C. T. Carr, Concerning English Administrative Law, page 92.
(3) idem, page 65.

accepted and acted upon, may postpone, and possibly prevent the subversion of the democratic principle in the South Asian states. It may be conceded, but not without regret, that the parliamentary system of government is not "one of universal validity",(4) but that is no reason to abandon in despair the democratic experiment started in this region, before the finality of a decision is freely reached against it by the people concerned. The course of democracy, like that of love, has never run smooth, and it is to restrain the growing hindrances to its smooth running that the suggestions regarding the subject of this thesis are made at its conclusion.

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(4) P. Griffiths, Democracy under Strain in South Asia, Asian Review, April 1959, page 101.

CHAPTER II

EMERGENCY POWERS IN THE INDO-PAKISTAN SUB-CONTINENT BETWEEN 1600 and 1861

i. Rule of Law in the Moghul Period.

British rule in India, according to the Joint Committee on Indian Constitutional Reforms which reported to the Parliament of the United Kingdom in 1934, "established the rule of law".(1) From the context it would seem that the Committee used the phrase 'rule of law' in the sense in which it is normally used by English lawyers. In that sense it means "a state of affairs in which there are legal barriers to governmental arbitrariness, and legal safeguards for the protection of the individual".(2) "Stripped of all technicalities", writes Hayek, "this (rule of law) means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge".(3)

Rule of law, in the sense indicated above, cannot be said to have flourished in the Moghul empire or in the contemporaneous princely states. In all these States, the rulers were practically

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(1) Joint Committee on Indian Constitutional Reforms, Report, 1934. Volume I, Part I, page 3.
(2) W. Friedmann, Law and Social Change in Contemporary Britain, page 282.
(3) F. A. Hayek, The Road to Serfdom, page 54.

absolute, notwithstanding that a Muslim prince was, in theory, obliged to abide by the Sharia in the governance of his country, and a Hindu prince was, in theory, under the law laid down in the Dharmasastra. In practice the obligations imposed by their religions did not deter the Indian princes from generally acting as they thought fit. In the Moghul empire and in the Indian princely states there was no legal sanction for the prince's transgressions of the divine law, and the wrath of God, as in most human lives, was an ineffective ban on waywardness. Many of the princes were enlightened for their time and most accepted in some matters, at some times or in some circumstances, the limitations on their absolute discretion imposed by the divine laws to which they were subject. Theirs was government of laws and yet of men, with a strong accent on the human element. Unlike an administrator in a democratic society, the Indian ruler of the Moghul period could, if he chose, act arbitrarily up to the point of provoking successful rebellion. It was the absence of legal sanctions against arbitrary behaviour which differentiated the rule of the Moghuls and the Indian princes from the system ultimately developed by the British and taken over by the Indian Republic.

ii. Common Law in the British Indian Settlements

The mercantile successes of some of the European powers in the 15th and 16th centuries inspired a group of London merchants to form into a company to trade with the East. It was called the London East India Company. On December 31, 1600, Queen Elizabeth granted them a charter empowering the Governor and the Company to make reasonable laws for the good government of the Company and for the better advancement and continuance of their trade and to provide such pains and penalties by imprisonment or fine as might seem to them necessary. The laws and penalties were to be reasonable and not to be repugnant to the laws, statutes and customs of England. James I renewed the same powers by his charter granted in 1609. It was with these powers and limitations that the English traders came to India and set up a factory at Surat. In 1612 Captain Best secured from the Moghul Emperor an imperial decree granting permission to the English to trade there on payment of a customs duty. The Company secured its next territorial foothold in 1639 at Madras when Francis Day built Fort St. George. In 1662 Bombay was given by Portugal to Charles II as part of the dowry of Catherine de Braganza. The King turned it over to the Company. The third leg of the tripod on which England built up her system of administration in India was obtained in 1690 when Job Charnock and his followers established a permanent settlement in Calcutta.

The treaty between Captain Best and the Moghul Governor at Surat stipulated that "in all questions, wrongs and injuries that shall be

offered to the British and to their nation, they do receive from the judges and those that be in authority speedy justice".(1) But the personal character of the law of India and the nature of many of its principles and penalties made it impossible for men of a different culture and habits of thought to adopt it, and in 1615 Sir Thomas Roe managed to secure from the Moghul Emperor certain facilities for the English including the right to be governed by their own laws, to have disputes settled by their own tribunals, but disputes between an Englishman on the one hand and a Hindu or Muslim on the other were to be settled by established local authorities.(2) "European Christians have usually been allowed by the indulgence or weakness of the potentates of these countries to retain the use of their laws and their factories have for many purposes been treated as part of the territory of the sovereign from whose dominions they came."(3) Thus, though the English factories were part of the dominion of the Moghul Emperor, their own law (in so far as the merchants who exercised judicial functions knew it) was administered in the settlements; it was, at least, administered according to current English notions of justice and fair play. An alien residing in and carrying on trade in one of these settlements was held to take his temporary national character, "not from the Moghul dominion, but from the British possessions" (4)

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(1) M S. India House Records.
(2) M. P. Jain, Outlines of Indian Legal History, page 4.
(3) A. G. of Bengal v. Ranee Swarnamayee Dossee, (1863) 9 M.I.A. 391 at page 429.
(4) Cowell, History and Constitution of the Courts and Legislative Authorities in India, page 10.

In 1765 the Company obtained from the Moghul Emperor who had fallen on evil days, the grant of the diwani over Bengal. Strictly speaking, this was the right to administer the revenue of Bengal, which carried with it the duty of administering civil justice, while the nizamat, or right administer criminal justice remained with the naib nazim, a minister of the Nawab, in theory a feudatory of the Emperor. In practice, the inconvenience of separating these powers proved so grave that the Company encroached upon and ultimately usurped the power to administer criminal justice. As Lord Brougham said:- "..... the settlement of the Company in Bengal was effected by leave of a regularly established government, in possession of the country, invested with the rights of sovereignty and exercising its powers: ... by permission of that government, Calcutta was founded and the factory fortified, in a district purchased from the owners of the soil, by permission of that government, and held under it, by the Company, as subjects owing obedience, as tenants rendering rents and even as officers exercising, by delegation, a part of its administrative authority. At what precise time and by what steps, they exchanged the character of the subjects for that of Sovereign or rather, acquired by themselves, or with the help of the Crown, the right of sovereignty, cannot be ascertained, the sovereignty has long since been vested in the Crown."(5)

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(5) Mayor of Lyons v. East India Company (1836) I.M.I.A. 272 at 273-274.

In these circumstances, it became necessary, even before the Company could claim dominion over any part of India that the Crown should grant to them certain legislative and judicial powers to be exercised by them over the English servants of the Company and such Indian settlers as placed themselves under their protection.

For each voyage the Crown used to grant to the 'General' or Commander of the fleet the right to inflict punishment for capital offences and to enforce 'martial law'. The royal grant of December 14, 1615, provided that in cases involving capital offences a verdic must be found by a jury.

In February 1616, Gregory Lellington was tried under martial law (that is, military law)(6) on board ship off Swally Road, and executed. The charge was that he had murdered one Henry Barton, Englishman, "in or near the town of Surat in the dominion of the Moghul". Kaye(7) considers this the earliest trial on record in th history of British administration of justice in India.

James I on February 4, 1623, empowered the East India Company to issue commissions to any of its Presidents and his Council to "chastise, correct and punish all and every subject of us, our heir and successors, employed by the Company". The death penalty could

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(6) In the records relating to the East India Company, in the 17th and 18th centuries, we find the expression 'martial law' used in the sense of military law as well as in its strict modern sense. As was pointed out by Cockburn, C.J., in his charge to the grand jury in Rex v. Nelson and Brand, ((1867) Special Reports, 99-100), martial law in its modern sense was confused with military law until after the time of Blackstone.

(7) J. L. Kaye, History of the Administration of the East India Company, page 66.

be inflicted only for mutiny or other felony, after trial by a jury of twelve or more Englishmen. In spite of this grant of power, the Company in 1624 applied to the King for authority to punish their servants abroad by martial law as well as by municipal law. The petition for this increase of authority was probably necessitated by the fact that the Englishmen, whenever they could, without manifest danger, took the law into their own hands(8): "Among themselves justice was administered in criminal cases by virtue of a King's Commission under the Great Seal, which empowered the Commissions to punish and execute offenders by martial law."(9)

Charles II by his charter granted in 1661 empowered the Governo and Council of each factory "to judge all persons belonging to the Company or living under them, in all causes, civil and criminal, according to the laws of England and to execute judgement accordingly This general provision placed judicial power in the hands of the executive and restricted the law to be administered to that in force in England.(10) According to Rankin,(11) the first provision for the exercise of judicial powers by the East India Company was made by the charter of Charles II and its responsibility for the administration of law in India was confined until 1765 to the factories of the Company and their branches.

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(8) Kaye, op. cit. page 65.
(9) Kaye, op. cit. pages 65-66.
(10) Fawcett, The First Century of British Justice in India, Introduction, xix.
(11) Rankin, Background to Indian Law, page 1.

The provisions of the Charter of 1661 were interpreted as applicable only to the European servants of the Company. The Englis Crown "at this time clearly had no jurisdiction over native subjects of the Moghul and the Charter was admitted to apply to the European servants of the Company."(12)

The Charter of August 9, 1683, while giving full powers to the Company to make peace and war with any of the nations of Asia, Africa and America within the Charter limits, empowered them to raise such military forces as seemed necessary and to execute martial law for the defence of their forts, places and plantations against foreign invasions or domestic insurrection or rebellion. James II on April 2, 1686 authorised the Company to appoint admirals and other naval officers in their ships within the charter limits. The officers were given the power to raise naval forces and exercise, within their ships on the other side of Good Hope, martial law for the defence of their ships when engaged in open hostility with other nations. William III's Charter of 1698 gave the Company the right to appoint generals and other officers for their forces on sea and on land, to raise forces and to exercise martial law in time of war or open hostility. The Company had complained of its lack of authority to keep its military forces in proper order and it may be t this renewed recognition of existing authority was not wholly satisfactory to them(13)

The royal charter of September 24, 1726, provided for the

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(12) A. G. of Bengal v. Ranee Swarnamayee Dossee (1863) 9 M.I.A. 391 at 430.

(13) A. B. Keith: A Constitutional History of India, 18-19.

establishment at Madras, Fort William and Bombay, of civil and criminal courts that derived their authority from the King, instead of the Company. The charter recites that a representation was made by the Company that there was "a great want" at these places of a proper and competent power and authority "for the speedy and effectua administering of justice in civil causes, and for the trying and punishing of capital and other criminal offences and misdemeanours." Thus was introduced into each Presidency town a Mayor's Court, not a court of the Company as there had been in Madras since 1687, but a court of the King of England, "though exercising its authority in a land to which the King of England had no claim to sovereignty".(14) "That the law intended to be applied by these courts was the law of England is clear enough from the terms of the charter though this is not expressly stated; and it has long been accepted doctrine that this charter introduced into the Presidency towns the law of England both common and statute law - as it stood in 1726"(15). It was observed by the Privy Council in Attorney General of Bengal v. Ranee Swarnamayee Dossee(16) that "the English law, civil and criminal, has been usually considered to have been made applicable to natives, within the limits of Calcutta, in the year 1726, by the charter 13th George I. Neither that nor the subsequent charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them". But English law in its entirety was not

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(14) Rankin, Background to Indian Law, page 1.
(15) Rankin, loc. cit.
(16) (1863) 9 M.I.A. 391 at 430-31.

introduced into India. "The acts of the power which.....introduced the English laws generally show that it was introduced, not in all its branches..... Notwithstanding the extent to which the laws have been introduced, it is allowed on all hands that many parts of them are still unknown in our Indian dominions".(17) It was observed by Lord Brougham(18) that Freeman v. Fairlie(19) "only decided that the estate in land and tenants of a British subject in Calcutta was of such a nature as to descend to him according to the English law of succession - that it was freehold of inheritance". It is true that this conclusion was reached by the adoption of a larger position that the English law had been introduced into the settlement; but whatever went beyond the point of the land being freehold of inheritance was obiter and cannot be said to have been decided.(20)

The Charter of George II granted in 1753 expressly provided that the Mayor's courts were not to try actions between Indians, unless both parties consented to submit the dispute for determination by the Mayor's courts. The principle of this provision, which does not seem to have been adopted in Bombay, formed the basis of Warren Hastings's 'plan' of 1772 when the Company decided to "stand forth as diwan" under the grant of 1765 from the Moghul Emperor. The plan provided that Hindus and Muslims were to be governed by their own personal laws in "suits regarding inheritance, marriage, and caste

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(17) Mayor of Lyons v. East India Company (1836) I. M.I.A. 175 at 282.
(18) Ibid.
(19) (1828) I.M.I.A. 305.
(20) Lord Brougham in Mayor of Lyons v. East India Company (1836) I M.I.A. 275 at 282.

and other religious usages and institutions".

The Regulating Act of 1773 provided that it was lawful for the Governor-General and Council "to make and issue such rules, ordinances and regulations, for the good order and civil government" of the United Company's settlements - "as shall be deemed just and reasonable (such rules, ordinances and regulations not being repugnant to the laws of the realm) and to set, impose, inflict and levy reasonable fines and forfeitures for the breach or non-observanc of such rules, ordinances and regulations".

Section 60 of the Regulation of July 5, 1781, made by the Governor-General and Council provided that "in all cases within the jurisdiction of the Mofussil Diwani Adalats, for which no specific directions are hereby given the respective judges thereof do act according to justice, equity and good conscience". Similarly, Section 93 laid down that 'In all cases, for which no specific directions are hereby given, the judge of the Sadar Diwani Adalat do act according to justice, equity and good conscience".

The directions first given in Regulation II of 1772 to apply the personal law in matter of "inheritance, marriage, caste, and other religious usages and institutions" remained in force, "succession" being added to the list. The rule of "justice, equity and good conscience" justified the application of the personal law in family and religious matters not enumerated in the Regulations and even in matters of contract. . The Hindu law was applied in adoption, guardianship, joint family, partition , gift and wills.

The Muslim law of divorce, gifts and pre-emption was adopted by the courts. Customs of the community and locality of the parties were also souces from which the judges borrowed principles of law. When English judges trained in common law were appointed to the High Courts and later to the lower courts "justice, equity and good conscience" came to be interpreted to mean principles of English law when apposite. In Varden Seth Sam v. Luckpathy(21) Lord Kingsdown delivering the opinion of the Judicial Committee of the Privy Council observed that though English law was not obligatory upon the courts in the mofussil, they ought, in proceeding according to justice, equity and good conscience, to be governed by the principles of English law, applicable to a similar state of circumstances. Twentyfive years later in 1887 Lord Hobhouse stated that equity and good conscience had been "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances".(22)

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(21) (1862) 9 M.I.A. 307.
(22) Waghela Rajsanji v. Shekh Masludin, (1887) 14. Indian Appeals 87 at page 96.

iii. Company's Laws

As a special charter was granted for the administration of Bombay and a set of laws framed by the East India Company under the charter, the island requires separate discussion.

"Bombay was the first place in India where British justice was administered to native inhabitants by a Special Court of Judicature!"(1

When the island was given over to the Company in September 1668, it had already been under British rule for three and a half years. It had previously been under Portuguese rule for over a century and quarter, (that is, from its cession by the Sultan of Gujerat in 1534) and Portuguese laws and customs had been firmly established. In his report of December 23, 1665, Humprey Cooke, the Governor, wrote: "The Portugalls on the Maine and neighbouring places in these parts, have some lands on this Island, and many inhabitants heere, have lands ther, so that I have been forced (to excuse a confusion) to settle the civil law among them in this Island, the which hath hugely pleased boath partys: among ourselves is martial law, and for religion, liberty of conscience is given to all."(2) To avoid a conflict of laws, Cooke allowed the Portuguese Civil law to contin to govern the Portuguese and other non-English inhabitants of the island. He appointed a Justice of the Peace to inquire into all causes with the bailiff and to report to Cooke, who gave the final decision.

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(1) C. Fawcett, The First Century of British Justice in India, page
(2) quoted by S. A. Khan, Anglo-Indian Negotiations relating to Bombay, 1660-77, page 467.

Martial law regulations adapted from the set issued by Peterborough for the garrison of Tangier were enforced in Bombay in the first years of the island under the direct control of the Crown. As the island was threatened by the hostility of Aurangzeb and Shivaji and also by the Portuguese and the Dutch, and as military protection was the chief concern of the government, martial law regulations which could be enforced under conditions akin to war were considered necessary.(3) Judicial arrangements were comparatively easy to make in the Bombay of those days, as the island, unlike Fort William, did not derive law from two sources. Apart from the extensive use of military law which Cooke had instituted, the Portuguese laws continued until they were abolished by proclamation in 1672.

The regulations issued by Lord Peterborough for the garrison of Tangier were based on those of Essex and Fairfax in the Civil War of 1642-49. This explains their extreme severity,(4) for Cromwell, according to Macaulay, subjected his soldiers to a discipline more rigid than had ever been known in England.

Sir George Oxenden, President of Surat, who visited Bombay in 1669 doubted the validity of enforcing the laws and ordinances of war in time of peace, especially because the laws had not been formally issued by the King. He wrote that "the Articles are not allowable by the Common law of England, which wee must answer to, should wee

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(3) A. B. Keith, A Constitutional History of India, page 31.
(4) C. Fawcett, The First Century of British Justice, page 10.

(be) called to account".[5]

The provision of the Charter of 1668 under which Bombay was transferred to the Company limited the Company's powers of enacting laws, not only by requiring them to be "consonant to reason, and not repugnant or contrary to" the laws of England, but also by prescribing that they should be 'as near as may be agreeable to' such laws. The Charter also provided that the courts and their proceedings should be "like unto those that are established and used in this our realm of England."

In February 1670 laws enacted by the Company under the charter were brought from England by Gerald Aungier and published in Portugues and Konkani. They were drafted by Thomas Papillon, Sir Josiah Child's rival, and by the Company's solicitor and revised by the Court of Committees and the Solicitor General. Section 6 deals with military discipline and prevention of insurrection. The death penalty was laid down for mutiny, sedition, rebellion or insurrectio Other offences were not so seriously treated. Even a soldier who slept at his post could only be sentenced to a fine not exceeding two months' pay and corporal punishment. Offences were to be tried by the Governor and Council or by jury, not by Courts martial. The mildness of the laws evoked complaints in the island and it was decided by the President and the Council to have recourse to the articles of war whenever considered necessary.

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(5) Surat letter of June 21, 1669, Factory Records, Bombay, Volume page 76.

"The spirit of even-handed and temperate justice that animated the Laws does credit to the Company; but they had grave defects, due mainly to their being drafted without reference to the special circumstances of Bombay and without the advantage of the prior consultation that was at first contemplated."(6)

Though the articles of war generally superseded in practice the Company's laws, there were exceptional occasions when offences were tried by the Governor and Council with a jury. For instance, in 1674, Captain Shaxton, the deputy governor, was tried for complicity in the mutiny of his soldiers in accordance with the laws of the Company. When he alleged that the court consisted mainly of interested parties, the matter was merely referred to the Company. But the soldiers concerned in the mutiny were tried by courts martial. It was argued that by mutiny they had renounced the Company's laws. This interpretation was against the spirit of Clause (iii) of Section which provides that "if any captain, or officers or soldiers or mariners that have entertained themselves with the Company's service raise sedition or make or abet any mutiny, such captain, officer, soldier or mariner, being thereof convicted by a jury shall be sentenced to suffer death and to forfeit and lose all his estate to the use of the Company". Captain Shaxton and Ensign Kennedy were prosecuted under Clause (v) of Section 6 of the Company's laws and tried by a jury, as required under the Clause in cases of insurrection. The interpretation of renouncing the Company's laws

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(6) Fawcett, op. cit. page 17.

by mutiny does not seem to have been extended to them. This difference must have been due to Aungier's adopting the line of least resistance in the enforcement of the Company's laws.

It is already seen that the Company was in favour of having recourse to common law principles even in cases of mutiny by soldiers. But Sir Josiah Child,(7) a few years later, asserted that under the charters of 1683 and 1686 Bombay was to be governed by martial law and so much of the civil law(8) as was suitable to Indian conditions. He believed that common law and English statutes of a general character were quite unsuited to India. In a letter written to Bombay on July 28, 1686 by the Company, guided by Sir Josiah, occurs the following:

"And by his present Majesty's charter(9) and the last charter of our late sovereign,(10) you are to govern our people there, being subject to us under His Majesty by the law martial and the civil law, which is only proper to India".(11) Again on February 3, 1687, the Company sent similar instructions to the President and Council at Surat: "We do enjoin you, according to His Majesty's last charter to govern the soldiers and the people of that island, as well English as others, by martial law, and that jurisdiction lately established, of the Admiralty, for trying controversies between party and party, in a summary way, and according to the usage of the civil law,

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(7) Governor of the Company.
(8) that is, Roman law.
(9) The Charter of 1686 granted by James II.
(10) The Charter of 1683 granted by Charles II.
(11) Letter Books in the Factory Records, Volume 8, page 168.

which only is proper for India, the common law of England being peculiar to this Kingdom, and not adopted in any kind to the government of India, and the nature of these people, as we have formerly writ to you and have found by long and useful experience".(12 The directions contained in the letters of the directors, in Sir Josiah's view, had the binding force of law.

The Charter of 1683 required that cases should be adjudged "according to equity and good conscience and according to the laws and customs of merchants." The cases were not always to be tried in a summary way, but upon "due examination and proof", and by "summary way or otherwise" as the Court in its discretion might determine.

As Sir Josiah was in favour of 'martial law' being used for the government of colonies like St. Helena(13) and Bombay, he had books on 'Laws Martial' sent out to these places. Sir John Wyborne who was appointed Deputy Governor of Bombay was commissioned to try by martial law at St. Helena, on his way to Bombay, the planters and others concerned in Keigwin's rebellion of 1683-84.

Sir John Wyborne, who was also Judge Advocate, besides being Deputy Governor, had a predilection for 'martial law', probably because of his experiences at Tangier. He remonstrated against the order of Sir John Child, the Governor, for the retrial by the Court

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(12) id. page 265.

(13) In the Company's despatch of May 6, 1685, to St. Helena it was stated: "We have His Majesty's Commission to govern our plantations by martial law, which is absolutely necessary in such remote places". (Letter Books in the Factory Records, Volume 7, page 458)

of Judicature, of one Robert Clarke, who had killed the gunman's mate of the Phoenix in a quarrel. Wyborne had reasonable grounds for his objection; as Clarke was a soldier, he should be deemed to have been properly tried when tried by a court martial. In a letter sent by Wyborne and his Council, to Sir John Child, it was pointed that "Sir Josiah Child is wholly for governing by martial law, and has been at a great deal of trouble to obtain it in times past and now write to that purpose".(14)

Courts martial were held during Siddi Yakub's invasion of Bombay in 1689-90. It is unlikely that martial law was ever entirely dispensed with as there was the prime necessity of keeping discipline in the garrison. It was resorted to in 1691 as the Factory Records of Surat indicate.(15)

In spite of Sir Josiah's predilections for 'martial law', the Company's charter for a corporation for Madras, issued in 1688, under his guidance recites as the motive for its issue that "the Company had found by experience and the practice of other European nations in India that the making and establishing of corporations in cities and towns that are grown exceeding populous tends more to the well-governing of such populous places, and to the increase of trade, that the constant use of the law martial in trivial concerns". His love for 'martial law' seems to have been counterbalanced by his admiration for the Dutch system of government, which it was thought

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(14) quoted in Fawcett, op. cit. page 114.
(15) Volume 93, page 41.

desirable to imitate. The reference to 'other European nations' was mainly to the Dutch. Still, the qualification, 'in trivial concerns' deserves notice.

The Company's laws were superseded by the Charter of 1726 which established the Mayor's Courts in the Presidency towns.(16)

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(16) As early as May 1687 when Surat ceased to be one, Bombay had been made a Presidency.

iv. Insurrections and Martial Law

In his concurring opinion in Duncan v. Kahanamoku,(1) Chief Justice Stone of the United States Supreme Court observed, that "martial law is the exercise of the power which resides in the executive branch of the government to preserve order and insure the public safety in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety.....It is a law of necessity to be prescribed and administered by the executive power". Its true character is emphasised by Weiner when he describes it as "the public law of necessity".(2) "Necessity calls it forth, necessity justifies its existence, and necessity measures the extent and degree to which it may be employed".(3) Martial law can exist only to the extent which military necessity may require. When it is absolutely imperative for the maintenance of public safety and good order, ordinary legal processes can be superseded and military tribunals authorised to exercise the jurisdiction normally vested in the courts.(4) In times of extreme emergency such as an invasion, insurrection, or catastrophic natural disaster, the circumstances may warrant the administration of martial law.

The circumstances in India until the Company's possessions were taken over by the Crown in 1858 necessitated the declaration of martial

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(1) 327 U.S. 304 at 335 (1946)
(2) Weiner, A Practical Manual of Martial Law, page 16.
(3) Ibid.
(4) B. Schwartz, The Supreme Court, page 286.

law on a number of occasions. There were hostile powers like the Mahrattas threatening the safety and public order of the possessions; further the people in these possessions were inclined to rise in rebellion owing to some grievance or other. It was therefore thought expedient to give a statutory basis to the administration of martial law in India, and in 1804 the Bengal State Offences Regulation (Regulation X of 1804) was passed.

Its main provisions were that, during the existence of any war in which the government might be engaged as well as during the existence of open rebellion against the authority of the government, the Governor-General in Council might suspend the functions of the ordinary courts and might establish martial law and direct the immediate trial by court martial of all persons owing allegiance to the British government in India who should be taken in arms in open hostility to the government or in the act of opposing its authority by force of arms, or in the actual commission of any overt act of rebellion against the State, or in the act of openly aiding and abetting the enemies of the British government.

This regulation was supplemented, for reasons of public security, by Bengal Regulation III of 1818 which provided for preventive detention of individuals against whom there might not be "sufficient ground to institute any judicial proceeding" or when such proceeding might be "unadvisable or improper". The preamble recited reasons of state, embracing the due maintenance of the alliances formed by the British government with foreign powers, the preservation of tranquillity in the territories of native princes

entitled to its protection and the security of the British dominions from foreign hostility and from internal commotion as the ground for such detention, " without any immediate view to ulterior proceedings of a judicial nature", by means of a warrant of commitment under the authority of the Governor-General.

This regulation, too, was necessitated by the many wars with the Indian princes engaged in by the British government during the period. The unwritten law or constitution "would admit of a relaxation of the rules securing private rights in times of public distress or danger, ne quid detrimenti capiat respublica. An Act for the suspension of the Habeas Corpus Act in such times is no violation of the Constitution," observed Norman, J., of the Supreme Court, Calcutta, in re Amir Khan.(5)

As has been said before, martial law was proclaimed on a number of occasions between 1817 and 1858(6). After the administration of martial law in Cuttack in 1818, the Home Government in England wrote to the authorities in India, "We earnestly hope that the power of administering martial law.... will be exercised with as much forbearance as circumstances will admit of. Moderation and clemency would be becoming in all cases, but they are more particularly incumbent upon us, in one where we fear there are good grounds for believing that the affections of the people may have been alienated

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(5) (1870) 6 Bengal L. R. 392.
(6) In Cuttack in 1817-1818, in Vizagapatam and in Palkonda in 1832; in Kimedi in 1833; in Gumsur in 1835, in Savantwadi in 1844, in various places in 1857.

from our government by maladministration and that they may have been goaded by suffering to resistance"(7)

The Privy Council in Elphinstone v. Berdachund(8) indicated the relevancy of martial law in relation to a state of war. Reversing the decision of the Supreme Court of Bombay, the Privy Council allowed the appeal of Elphinstone with regard to a seizure of treasure from Poona, Lord Tenterton observing; "We think that the proper character of the transaction was that of hostile seizure made if not flagrante, yet nodum cessante bello, regard being had both to the time, the place and the person, and consequently that the municipal court had no jurisdiction to adjudge upon the subject".

During the Sepoy Mutiny of 1857, for a considerable time and over a large extent of territory, all civil courts were necessarily suspended in consequence of the act of the rebels. No authority other than the military was in existence and it had to act immediately and summarily for the sake of self-preservation. On June 9, 1857, martial law was proclaimed in the Divisions of Varanasi (Benaras) and Allahabad. While the forces were engaged in fighting, everyone who appeared to belong to, or to be siding with, the rebels was dealt with as an enemy.(9) When once there was an end of the fighting, civilians were attached to the army for the purpose of dealing with

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(7) Parliamentary Papers 1831-32, Volume XI, Paper 735 - III App. No.8, page 58.
(8) 1830 Knapp P.C. 316.
(9) Mayne, Criminal Law of India, IV Edition, Part II, page 109.

those whose guilt admitted of a doubt.[10] The State Offences Act, 1857, (XI of 1857) empowered the executive to proclaim any district which was, or had been, in a state of rebellion and to issue a commission for the trial of the rebels for any offence against the State or for murder, arson, robbery or any other serious crime agains person or property. The proceedings were to be summary and without appeal; but no sentence was to be passed except such as was authorised by law for the offence.

After the Mutiny and the administration of martial law during the period, there was for nearly sixty years no insurrection of consequence necessitating martial rule.

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(10) ibid.

CHAPTER III

EMERGENCY POWERS FROM 1861 TO 1937

i. Ordinance-making Power of the Governor-General.

In the course of his speech in the House of Commons introducing the India Councils Bill, 1861, Sir Charles Wood said, "The Bill also gives power to the Governor-General in cases of emergency to pass an ordinance having the force of law for a limited period. Questions might arise about the Arms Act or the press, as to which it would be very injudicious that delay should occur; and we, therefore, propose to empower the Governor-General on his own authority to pass an ordinance having the force of law, to continue for a period of six months, unless disallowed by the Secretary of State or superseded by an Act of the legislature."(1)

The Marquis of Dalhousie believed that emergencies would not be infrequent in India. In his reply to the farewell address presented to him on his departure from Calcutta he said, "No prudent man, having any knowledge of Eastern affairs, would even venture to predict a prolonged continuation of peace in India. We have learnt by hard experience how a difference with a native power, which seems at first to be but a little cloud, no bigger than a man's hand, may rapidly darken and swell into a storm of war, involving the whole empire in its gloom. We have lately seen how in the very midst of us insurrection may rise like an exhalation

(1) Speech on June 6, 1861.

from the earth, and how cruel violence, worse than the excesses of war, may be suddenly committed by men who to the very day in which they broke out in the frenzy of blood, have been regarded as a simple, harmless, timid race, not by the Government alone, but even by those who knew them best, who are dwelling among them and were their earliest victims."(2) The same opinion was expressed by him in the fourth paragraph of his minute of February 28, 1856.

Wood probably shared Lord Dalhousie's view. Further he felt the need for conferring greater powers on the Governor-General, "the supreme authority in India, who is responsible for the peace, security and good government of that vast territory".(3) He was of the opinion that the legislative council of the Governor-General had exceeded its powers, that "it had become a sort of debating society or petty Parliament"(4) and that "it was certainly a great mistake that a body of twelve members should have been established with all the forms and functions of a Parliament".(5)

As early as December 23, 1854, Wood had expressed his view of the position of the Governor-General in his letter to Lord Dalhousie: "I look upon all the Councils, Secretaries etc. as so many machines for lightening the labour of the Governor-General and for doing what I may call the mechanical work of the government. I have made him more absolute than he was in the Executive Council and I do not wish

(2) quoted in Andrew Crawford, Remarks on the Indian Army, page 3.
(3) Wood's dispatch of August 9, 1861.
(4) Wood's speech in the House of Commons on June 6, 1861.
(5) Ibid.

to make the Executive Council a body which does more than aid him in administrating (sic), the Legislative Council in law-making".(6) Wood was evidently referring to the Charter Act of 1853. But Lord Canning in 1861 was not too happy with the situation. On January 26, 1861, he wrote to Wood, "The fault of the present Constitution of Council is the waste of labour and the delays that it entails. This has been mitigated of late, but not so much as it might be".(7) Canning's complaint regarding delays was generally met by Section 8 of the India Councils Act, 1861, which empowered the Governor-Genera to make rules and orders for the more convenient transaction of business in the Executive Council. An emergency was another situation which could not brook delay. Wood who had strong views about the position of the Governor-General, as indicated in his letter cited above, thought it prudent to grant the Governor-General statutory powers to deal with an emergency. Section 23 of the India Councils Act, 1861, was therefore enacted. The Section reads "Notwithstanding anything in this Act contained, it shall be lawful for the Governor-General, in cases of emergency, to make and promulgate, from time to time, ordinances for the peace and good government of the said territories or of any part thereof, subject, however, to the restrictions contained in the last preceding

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(6) Letter to Lord Dalhousie, December 23, 1854.
(7) Letter to Sir Charles Wood, January 26, 1861, (emphasis supplie

section;(8) and every such ordinance shall have like force of law with a law or regulation made by the Governor-General in Council, as by this Act provided, for the space of not more than six months from its promulgation, unless the disallowance of such ordinance by Her Majesty shall be earlier signified to the Governor-General by the Secretary of State for India in Council, or unless such ordinance shall be controlled or superseded by some law or regulation made by the Governor-General in Council at a meeting for the purpose of making laws and regulations as by this Act provided".

The Secretary of State for India knew that the Governor-General was being given very wide powers under this Section. That is why he exhorted the Governor-General to use them only on urgent occasions. Wood's dispatch to the Governor-General sent with the India Councils Act sets down certain conditions for the exercise of these powers. "By Section 23 the Governor-General of India is vested with a new and extraordinary power of making and promulgating ordinances in cases of emergency on his own authority. It is due to the supreme authority in India, who is responsible for the peace, security and good government of that vast territory, that he should

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(8) Section 22: Governor-General in Council shall have power...to make laws and regulations...provided always that the said Governor-General in Council shall not have the power of making any laws or regulations wich...may affect the authority of Parliament or the Constitution and rights of the East India Company, or any part of the unwritten laws or Constitution of the United Kingdom of Great Britain and Ireland, whereon may depend in any degree the allegiance of any person to the Crown of the United Kingdom, or the sovereignty or the dominion of the Crown over any part of the said territories.

be armed with this power, but it is to be called into action only on urgent occasions, the reasons for a resort to it should always be recorded, and, these together with the ordinance itself should be submitted without loss of time, for the consideration of Her Majesty's government.(9)

Till 1914 the ordinance-making power was not frequently used. Between 1861 and 1914, which was a period of comparative tranquillity seven ordinances only were promulgated. The declaratio of the First World War in 1914 was followed by the promulgation of a number of ordinances. Between 1914 and 1918 twentyseven ordinances were issued.(10) They were mainly war measures and many of them dealt with currency and exchange. Of the ordinances issued in 1919 and 1920, six dealt with law and order, five of them being in connexion with the administration of martial law in the Panjab. Between 1921 and 1935, that is, after the inauguration of the Montagu-Chemsford Reforms and before the passing of the Constitution Act of 1935, as many as fiftytwo ordinances were issued. As political agitation was continuous and public tranquillity was frequently in danger during these years, it is not surprising that most of the ordinances dealt with law and order. While Government regarded them as absolutely essential for the proper discharge of its functions, non-official opinion generally questioned their necessity.

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(9) Wood's dispatch of August 9, 1861.
(10) Some of them under Section 72 of the Government of India Act, 1915, which is substantially the same as Section 23 of Indian Councils Act, 1861.

We shall proceed to take note of a few of the ordinances issued by the Governor-General between 1861 and 1935.

The first ordinance under Section 23 of India Councils Act, 1861, was promulgated on December 27, 1861. It was to prohibit the export of saltpetre except in British vessels bound for the ports of London or Liverpool. The urgency of the measure was indicated by the citation in the Ordinance that "information has reached the Governor-General by public telegraph that the exportation of saltpetr from the United Kingdom has been interdicted by royal proclamation". It was therefore thought expedient that the exportation of saltpetre from India except in British vessels bound for the ports of London or Liverpool should be prohibited.

On January 3, 1862, a second Ordinance regarding saltpetre was promulgated as instructions from the Secretary of State were received to take immediate measures for preventing the exportation of salt petre from India except in British vessels bound for the ports of the United Kingdom and to cause any saltpetre which previously to the receipt and contrary to the conditions of the instructions might have been placed on board ships still in port to be relanded. The Ordinance provided for relanding of such saltpetre and also empowered any Customs House Officer to seize without warrant saltpetre liable to confiscation under the Ordinance.

The Ordinance of October 4, 1869, promulgated by Lord Mayo from Simla, provided for the removal of the Angor Valley from the jurisdiction of civil and criminal courts and the control of officer

of revenue constituted by the Rules, Regulations and Acts in force in the territories under the control of the Lieutenant Governor of the Panjab. The administration of justice and superintendence of the settlement and realisation of public revenue of the valleywas, by this Ordinance, vested in officers to be appointed by the Lieutenant Governor.

The object of this Ordinance was to substitute in the Angar Valley, presumably then a backward area, a less sophisticated form of administration than that prevailing in the Panjab generally, and this would seem to have been regarded as an urgent matter. Government being at Simla at the time, an immediate session of the Legislative Council was not possible. After the return to the plains, this Ordinance was replaced by an Act of the Legislative Council.(11)

The same day another Ordinance was issued with a view to increasing the price of salt in the Presidency of Madras and the duty on salt in the Presidency of Bombay. The preamble recites that "the financial condition of British India requires an immediate enhancement of the price of salt manufactured and sold in the Presidency of Fort St. George and of the duty leviable on salt manufactured in or imported into the Presidency of Bombay". It further says that "pending the re-assembly in Calcutta of the Council of the Governor-General for the purpose of making laws and regulations

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(11) The Angor Valley Act, 1870 (III of 1870)

it is expedient" to effect such an enhancement by an ordinance.

In this case again urgent action seems to have been necessary.

The Ordinance of February 29, 1876, was promulgated by Lord Northbrook to empower the Lieutenant Governor of Bengal to prohibit dramatic performances, which were scandalous, defamatory, seditiou obscene or otherwise prejudicial to the public interest, "pending the consideration and enactment by the Governor-General in Council of a law conferring such power".

The Ordinance conferred considerable powers on the Magistrates, including Magistrates of Police.

Section 1 provided: "Whenever the Lieutenant Governor of Bengal is of opinion that any play, pantomime, or other drama performed or about to be performed is

(a) of a scandalous or defamatory nature or

(b) likely to excite feelings of disaffection to the Government established by law in British India, or

(c) likely to deprave or corrupt persons present at such performance or

(d) otherwise prejudicial to the interests of the public,

the said Lieutenant Governor, or such officer as he may generally or specifically empower in this behalf may by order prohibit such performance."

Any act in disobedience of such order would be punishable with imprisonment for three months or with fine or with both. Even a spectator at such a performance would be subject to the same penalt

If Section 1 granted wide powers to the Lieutenant Governor, with untrammelled power of delegation to "such officer as he may generally or specifically empower in this behalf", Section 5 provided that "if any Magistrate has reason to believe that any house, room or place is used, or is about to be used, for any performance prohibited under the Ordinance, he may, by his warrant, authorise any officer of police to enter with such assistance as may be requisite, by night or by day, and by force, if necessary, any such house, room or place, and to take into custody all persons whom he finds therein, and to seize all scenery, dresses and other articles found therein and reasonably suspected to have been used, or to be intended to be used, for the purpose of such performance".

Section 6 of the Ordinance provided that "No conviction under this Ordinance shall bar a prosecution under Section 124 A (Sedition) or Section 294 (Obscene acts and songs) of the Indian Penal Code".

It is doubtful whether there was any urgency to necessitate the promulgation of this Ordinance. It was issued from Calcutta on February 29, 1876, and was to remain in force till May 31, 1876. On March 14, the Dramatic Performances Bill, in substantially the same terms as the Ordinance, but extending to the whole of India, was introduced in the Legislative Council by the Honourable Mr. Hobhouse. It was not passed until December 6, 1876, although the Ordinance expired on May 31, which suggests that the members of the Council were not convinced of the urgency of the measure, or hesitated to pass a measure which inter alia violated the English Common law principle,[12] 'a man may not be put twice in peril for

(12) Section 6 of the Ordinance and Section 9 of the Act.

the same offence".

That the Honourable Mr. Hobhouse had to speak for his Bill on three different occasions before it could be passed also suggests that the members of the legislative council did not feel the urgency of the measure in the same way as the Governor-General did. When the Bill was finally considered on December 6, 1876, that is, about nine months after its introduction on March 14, the Honourable Mr. Hobhouse, in answer to some of the objections raised, said, "There were many cases in which prevention was worth all the punishment in the world. That was particularly true in times of excitement, and in cases where the play was of a seditious character If the performance took place a few times, the mischief was done, and it was a poor satisfaction to punish the offenders afterwards".(13)

The Regulation of Meetings Ordinance, 1907, issued on May 11, 1907, from Simla recites that "an emergency has risen(14) which makes it necessary to regulate the holding of meetings in the provinces of Eastern Bengal and Assam and of the Panjab". Section 2 provided that the Ordinance extended to the Provinces of Eastern Bengal and Assam and of the Panjab", but shall only come into operation in such areas (called proclaimed areas) as the Lieutenant Governor of each province respectively may from time to time notify in the local official gazette".

It was provided that District Superintendent of Police should be given at least seven days' notice if a meeting for the discussion

(13) quoted in W. R. Donogh, The History and Law of Sedition, page1
(14) A similar recital is common in later ordinances.

of public or political matters was sought to be held in a proclaimed area. Under the Ordinance, the District Magistrate could, at any time by an order in writing, prohibit any meeting in a proclaimed area if in his opinion such a meeting was likely to promote sedition or disaffection or to cause a disturbance of the public tranquillity. A meeting prohibited would be deemed an unlawful assembly within the meaning of Chapter VIII of Indian Penal Code and Chapter IX of the Code of Criminal Procedure. The partition of Bengal for the creation of the province of East Bengal and Assam caused widespread anger among Bengalis and caused agitation, often of a violent nature, for its revocation. The situation doubtless appeared to the Central Government to be sufficiently serious to justify urgent actio

The Bengal Cotton Gambling Ordinance, 1912, was promulgated from Delhi on December 13, 1912, by Lord Hardinge. It sought to prohibit the practice of cotton gambling(15) in the Presidency of Fort William. The Ordinance brought cotton gambling under the purview of Howrah Offences Act, 1857, Calcutta Police Act, 1866, and Bengal Public Gambling Act, 1867, as amended by the Bengal Rain Gambling Act, 1897.

Gambling in futures from time to time in different parts of India was indulged in to such an extent as to alarm the authorities, who doubtless had good reasons for regarding immediate action as necessary in the case.

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(15) Wagering on a number to be arrived at by a manipulation of figures showing rates for the sale of cotton or other marketable commodity.

This brings to an end the list of ordinances promulgated before the War of 1914-1918. Leaving the emergency legislation during the First World War and the martial law Ordinances of 1919-1921 to be dealt with in a later section, we shall notice some of the Ordinances issued after the inauguration of the Montagu-Chemsford Reforms.

The Bengal Ordinance, 1924, empowered the local government to have persons alleged to be terrorists to be tried by Special Commissioners. The accused were granted the right of appeal against convictions by these Special Courts, and sentence of death required confirmation by the High Court. The local government was authorised to control the movements of suspected persons by requiring that they should notify their residence or any change of residence or report themselves to the police. Any such person could be arrested without warrant and be detained in prison without trial. Cases of persons detained in custody were to be submitted for scrutiny to two judges who had to go by ex parte evidence untested by cross-examination. Wide powers of search were given to the police, who could arrest without warrant any person against whom any reasonable suspicion existed. No suits or prosecutions or other proceedings were to be against any person for anything done or intended to be done in good faith under the provisions of this Ordinance. Legislation of this kind was usually passed since 1924, when the volume of violent crime suddenly increased and when the public showed reluctance to help the police. In such a situation urgent action was generally justified.

The Bengal Emergency Powers Ordinance, 1931, authorised certai officers of the local government to require any person suspected to be acting or about to act in a manner prejudicial to the public safety or peace to give an account of his identity and movements, and to arrest and detain him for twentyfour hours for the purpose of obtaining and verifying his statements. The local government was empowered to take possession of any land or building to be utilised as quarters or offices for public servants, and for other purposes. Wide powers of search were granted to police officers. Provision was made for the imposition of collective fines on the people in disturbed areas. There were to be special judges, specia magistrates and special tribunals to facilitate speedy and effective trials. Special tribunals were empowered to pass any sentence and confirmation of death sentence by the High Court was not required under the Ordinance, though, under general law, a death sentence pronounced by a sessions judge sitting with a jury required such confirmation. The Special Magistrates were to follow the summary procedure of trial and could pass sentences other than those of death or transportation or imprisonment for seven years.

Where a young person under sixteen years was convicted of an offence under this Ordinance or of an offence which in the opinion of the court had been committed in furtherance of a movement prejudicial to the public safety or peace, and such young person was sentenced to fine, the court could order the parent or guardian to pay the fine, or in default suffer imprisonment.

Attempt to murder was made a capital offence.

Wide rule-making powers were given to the local government and its executives under this Ordinance. Obviously, in the view of the Central Government the Ordinance was justified by the prevailing danger to the public peace.

The Emergency Powers Ordinance, 1932, unlike the two Ordinances noticed above, extended to the whole of British India. It empowered any authorised officer of government, if satisfied that there were reasonable grounds for believing that a person acted or was about to act in a manner prejudicial to the public safety or peace, to arrest such person without warrant. The person so arrested could be detained in prison for fifteen days or, under the special orders of the local government, for a longer period, subject to a maximum of two months. Local officers were given the power to control the movements of suspected persons, to take possession of private buildings, to prohibit access to certain places, and to control the supply of commodities in general use. There was provision for the imposition of collective fines. The jurisdiction of the courts was barred in respect of complaints against any officer acting or purporting to act in good faith.

Between November 1931 and the first week of January 1932, several ordinances were issued in quick succession to meet the second Civil Disobedience Movement in the country. These, on the eve of their expiry, were renewed by a consolidated Ordinance, The Special Powers Ordinance, 1932. In view of the extension of the

Governor-General's legislative powers by the Government of India Act, 1935, it would seem doubtful whether this was within the constitutional powers of the Governor-General, but Mr. (later Sir) Harry Haig, the Home Member defending this procedure urged: "As the period of their expiry approached, it became evident that we were in no position to discard the weapons with which the civil disobedience movement was being fought. Accordingly at the end of June, (1932) the Governor-General issued a new consolidated ordinance.(16)

This procedure of renewal was severely criticised in the Assembly. It was contended that the renewal of an Ordinance was against the spirit, if not the letter, of Section 72 of the Government of India Act. It was also pointed out that the procedure was an affront to the Assembly which ought to have been approached with an appropriate Bill if the Government considered the continuance of the provisions of the Ordinances necessary. Sir Abdur Rahim put it forcibly when he said, "'Emergency' must be understood in its ordinary English sense. That is to say, if the ordinary body, whose function and responsibility is to enact laws, is not meeting at the time and is not available in order to enact the necessary law to meet a particular emergency, then and then alone His Excellency the Governor-General, in order to save the situation, can pass an appropriate ordinance. It is not therefore, the intention of the Government of India Act that while there is every opportunity for the

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(16) L. A. Debates. 1932 Vol. V page 1127.

Government of India to bring a proper Bill before the Assembly, the Governor-General should pass an ordinance to take the place of a regular enactment"[17].

In this connection, the words "for the space of not more than six months from its promulgation", in Section 72 of the Government of India Act deserve consideration. An ordinance may be declared to be in force for a shorter period, but it must not remain in force for more than six months. The exact period will depend on the circumstances, but six months, it would seem, was considered by the Parliament of the United Kingdom a long enough period for a situation of emergency to pass or to enable an Act to be passed by the Legislature if that were thought necessary. The Section also provides that the Ordinance "may be controlled or superseded by "an Act of the legislature". This obviously contemplates that, when it is necessary to continue, beyond six months, the period of validity of the provisions of an ordinance, they must be re-enacted by the legislature. If it is conceded that, at the conclusion of the period of six months, an ordinance may be promulgated a second time, there is no reason why it should not be renewed a third or a fourth time. If this practice were followed, it would involve the total eclipse of the Indian Legislature in the fields covered by the

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(17) L. A. Debates, 1932, Vol. V page 1572. In the course of the criticism of the renewal, Mr. B. R. Puri (ibid pages 1389-1390) cited the procedure followed by Lord Irwin in regard to the Press Ordinance of 1930 which was placed before the Legislature in the form of a Bill when it assembled after the promulgation of the Ordinance. This, it was submitted, was the proper procedure.

Ordinances. The Constitution permitted the promulgation of ordinances where subject matter covered the whole field within the power of the Central Legislature.

In reply to the criticism of Government for not holding a special session of the Assembly on the resumption of the Civil Disobedience Movement, in order to pass an Act incorporating the Ordinances, Sir George Rainy replied that such a procedure would involve loss of time and that the Government was busy dealing with the situation in the country and it could not waste time on discussion in the legislature. He added that the attitude of the legislature was known to be hostile. As Sir Hugh Cocke put it, "I think it is obvious that it is impossible for this Government, as it is constituted at present, to expect the powers they require from this House"(18). It should, however, be noted that in the event of the legislature rejecting a Bill in the same terms as an expiring ordinance, the Governor-General could, under Section 67(B) of the Constitution Act, certify the Bill as essential to the safety, tranquillity, or interest of India, and it would then be deemed to have been passed by the legislature.

Government presumably did not pursue this course because it anticipated that, if a Bill were introduced in the legislature, there would be delay before it was disposed of, and that the discussion and rejection of the Bill would result in more intense and

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(18) L. A. Debates, 1932, Volume I pages 282-83.

widespread hostility to Government than would be provoked by the promulgation of a new ordinance in the same terms. Its action can only be justified, if at all, by the compelling necessity of the situation.

The Constitution Act seems to have contemplated the use of the ordinance-making power only when the circumstances called for immediate action and it was not practicable to summon the legislature and present a Bill for its consideration. It did not contemplate the use of this power to circumvent the will of the legislature, a matter provided for in Section 67(B). By acting as it did in regard to the Special Powers Ordinance, 1932, it was bound to evoke the criticism that the Government was determined to abrogate the powers of the legislature. Nor is this an isolated instance of Government's determination to secure powers which the legislature would be unwilling to grant by use of the ordinance-making power.

During the period under review twelve ordinances were promulgated when the legislature was in session and five were issued immediately before or after a session. Besides these, a number of ordinances giving very wide powers to the executive were issued by Lord Willingdon during the periods between the close of the Special November Session in 1931 and the commencement of the Winter Session in January, 1932, and the close of the latter and the commencement of the Simla Session in 1932.

Even a hostile critic of the ordinance-making power of the Governor-General might be inclined to approve the first Currency Ordinance of 1931, because there was no time to seek the cooperation

of the legislature. As Sir George Schuster said, Government had only an interval of ninety minutes between the receipt of the news from England and the opening of the Exchange Market (19). In 1935 the Finance Bill was not passed before the end of March, so the promulgation of Ordinances Nos. I and II of 1935 became necessary, as, without them, certain sources of revenue would not have been available to Government during the year.

The Kashmir State (Protection against Disorders) Ordinance, 1931, was issued on the day the legislature met for its special session. This Ordinance empowered District Magistrates in the Panjab to prevent assemblies of men from proceeding from British India to Jammu and Kashmir and promoting disorders there. As the delay of a day or two in the circumstances would not have made any serious difference in the situation, the appropriate procedure would have been the introduction of a Bill in the Legislature.

A large number of ordinances were promulgated immediately before or after a session of the Legislature. The Public Safety Ordinance, 1929, which was mainly intended to provide against Communist propaganda in the country, was issued on the day the Assembly was prorogued. It was issued in exceptional circumstances. A Public Safety Bill "to check the dissimination in British India from other countries of certain forms of propaganda" and for this purpose, to provide for the removal of certain persons from British

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(19) L. A. Debates, 26 September, 1931.

India and for the seizure and control of money or other valuables received from outside British India for the furtherance of subversive activities or doctrines in the country, had been introduced in the Legislature, but further consideration of the Bill after the report of the Select Committee had been refused by the President of the Assembly on the ground that a debate on the Bill was impossible without "extensive discussion" of most of the matters which were then sub judice in the Meerut Case in which thirtyone persons were charged with conspiracy to overthrow the government. He suggested two ways out of the difficulty, either to postpone further consideration of the Bill until the conclusion of the case, or to withdraw the case. Government thought that the law was urgently needed,(20) and was not prepared to wait until the conclusion of the case, nor was it prepared to withdraw the case in order to enable it to proceed with the Bill. The only alternative therefore was the promulgation of an Ordinance.

The Unauthorised Newssheets and Newspapers Ordinance, 1930, was issued five days before the commencement of a session and the Foreign Relations Ordinance, 1931, was promulgated four days after the conclusion of a session of the Assembly. The first Ordinance empowered District Magistrates to authorise persons to publish newssheets. It further enabled Magistrates to seize and destroy

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(20) "I conceive that it has become imperative for government to obtain the powers proposed in the Public Safety Bill without delay", declared Lord Irwin in his address to the members of the Legislature on April 12, 1929. (Legislative Assembly Debates, 1929, Vol. III, 2995.)

unauthorised news-sheets and newspapers and also to seize and forfeit undeclared presses producing unauthorised news-sheets and newspapers. In regard to this Ordinance, there would probably have been no serious harm if legislation were delayed for a week. The Foreign Relations Ordinance was intended to provide against the publication and circulation of statements likely to promote unfriendly relations between His Majesty's government and the governments of foreign states. It declared such publication and circulation punishable, and provided that any publication containing such matter as described could be forfeited or detained in course of transmission through the post. It is not clear how in four days an emergency developed in regard to foreign relations.

The Governor-General was the sole judge of whether conditions existed which justified the promulgation of an Ordinance. This was laid down by the Privy Council in Bhagat Singh v. King-Emperor.(21) On May 1, 1930, Lord Irwin promulgated the Lahore Conspiracy Case Ordinance (No. III of 1930) which provided for the transfer of the Lahore Conspiracy Case from the magistrate holding the preliminary inquiry to a tribunal of three High Court Judges to be nominated by the Chief Justice of Lahore. While the trial was pending before this tribunal, an application was made on behalf of Des Raj, one of the accused, for a writ of habeas corpus under Sections 491 and

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(21) (1931) 58. I.A. 169.

561 A[22] of the Criminal Procedure Code. The application was heard by a Divisional Bench of the Lahore High Court, consisting of Broadway and Bhide, J.J. Broadway, J., held that the court had no jurisdiction to consider whether there was a state of emergency. "It seems to me," observed the learned judge, "that it was the intention of the framers of the Act to leave it to the Governor-General to decide, as a pure act of administration, whether a state of emergency existed which called for an ordinance and that his decision on that point is, and was intended to be, final and not liable to consideration by the courts".[23]

Bhide, J., on the other hand, held that the court had jurisdiction. "There is nothing in the language of Section 72", he observed, "to indicate that the Governor-General's opinion ... is to be taken as final"[24] "If, for instance", he said, "it is found that an Ordinance was promulgated in the absence of any emergency whatever or for a purpose wholly unconnected with the peace and good government of the country..... can it be maintained that a court of law has no power to declare the Ordinance to be invalid? I think the answer to this question must clearly be in the negative".[25] Bhide, J., was evidently (and wrongly)

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(22) Section 561 A provides: "Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any court or otherwise to secure the ends of justice".
(23) Des Raj v. The Crown, (1931) I.L.R. 12 Lahore 26 at 35.
(24) id. 40.
(25) id. 42-43.

reducing the Governor-General's Ordinance to the position of a regulation made under an Act of Parliament. On the facts of the case, however, he held that the conditions necessary for the promulgation of an ordinance were satisfied. The application was, therefore, refused.

The trial terminated in the conviction of the accused, and Bhagat Singh was one of those sentenced to death. He and some others applied to the Privy Council for special leave to appeal. Special leave was not granted, and Viscount Dunedin, who delivered the judgement of the Board observed: "The petitioners ask this Board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that that someone must be the Governor-General and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General".(26)

"It was next said", continued Viscount Dunedin, "that the Ordinance did not conduce to the peace and good government of British India. The same remark applies. The Governor-General is also the judge of that. The power given by Section 72 is an absolute

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(26) Bhagat Singh v. King-Emperor (1931) I.A. 169 at 171-2.

power, without any limits prescribed, except only that it cannot do what the Indian legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity when the good government of India demands it".[27] His Lordship added that it was not even incumbent upon the Governor-General to give the reasons which induced him to promulgate an Ordinance.

The Privy Council thus conclusively decided that, under the Government of India Act, the Governor-General alone was the judge of the existence of an emergency and of the necessity of an ordinance for the peace and good government of British India. With great respect to Bhide, J., it may be submitted that the ordinance-making power of the Governor-General is not analogous to the power of subordinate legislation. As was held in Queen v. Burah,[28] the powers of legislative authorities set up by a Constitution Act are, except in so far as they are limited by the Act, of the same kind and extent as those of Parliament itself. The ordinance-making power was, and was intended to be, on a par with the legislative powers of the Indian legislature. The Governor-General could, therefore, by means of an ordinance, confer upon subordinate authorities the power of subsidiary legislation. In fact, many ordinances gave them very wide rule-making powers.

The ordinance-making power was indeed an "absolute power"[29]. Referring to this power, Lord Reading observed that on his

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(27) id. 172.
(28) (1878) 3 A.C. 889.
(29) Bhagat Singh v. King-Emperor, (1931) I.A. 169 at 172.

appointment as Governor-General he was almost staggered to find that he "had the power to issue an edict.....which could override the law of the land and every statute passed in the land, which had the force of a statute and could not be discussed in the Assembly or in the legislature unless (he) chose to allow it." (30)

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(30) Speech in the House of Lords on the motion for the appointment of a Joint Select Committee on the White Paper on Constitutional Reforms, 1933. H. L. Debates, April 6, 1933. Vol. 87. Col. 424-425.

ii Emergency Legislation during the First World War

If ordinances under Section 23 of Indian Councils Act, 1861 were not infrequent during times of peace, they were understandably more frequent during times of war. War broke out between Great Britain and Germany on August 4, 1914, and a proclamation of the state of war was issued by the Governor-General the next day. This was followed by a number of ordinances and legislative enactments necessitated by the state of war. Between August 7 and November 30 of 1914 no less than nine ordinances were issued. As they were of temporary duration, due to expire within six months of the date of their promulgation, they were re-enacted in a consolidating Act on January 2, 1915. This Emergency Legislation Continuance Act, 1915 kept the provisions of these nine ordinances in force for the duration of the war and for a period of six months after the termination of hostilities.

The object of the first ordinance, the Indian Naval and Military News (Emergency) Ordinance, 1914, was to secure control of the press during the war. It prohibited the publication of any information about movements or disposition of troops, ships, aircraft, or war material or the strategic schemes of the naval or military authorities or of any measures undertaken for the defence of the British Empire.

The Impressment of Vessels Ordinance, issued on August 14, 1914, authorised the Governor-General in Council to empower any gazetted officer of the Indian Marine Service to impress temporarily

for the service of His Majesty's vessels in any specified port.

The Foreigners Ordinance of August 20, 1914 enabled the exercise of more effective control over foreigners in British India. Under this Ordinance, the Governor-General in Council could by order, prohibit, regulate or restrict the entry of foreigners into, and their departure from, British India, and also regulate and restrict the liberty of foreigners residing in the country. Section 11 of the Ordinance prevented any order under the Ordinance being called in question in any court. In a case that arose out of an internment order[1] it was held by the Calcutta High Court that the Governor-General in Council had the power to oust the jurisdiction of the courts and that Section 11 of Ordinance III of 1914, which was later embodied in the Emergency Legislation Continuance Act, 1915, (I of 1915) and which sought to oust the jurisdiction of the courts did not offend against Section 22 of the Indian Councils Act, 1861.[2] Act I of 1915, the court said, was not ultra vires "and this Court has no jurisdiction to call in question the orders that have been passed thereunder". The Court further observed, that it was for the Governor-General in Council to be satisfied on the materials before him and that the court could not call for materials to examine them.

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(1) In re Jewa Nathoo and others,(1916) I.L.R. 44 Cal. 459.
(2) See footnote (8) in Chapter III, Section i.

The Foreigners (Amendment) Ordinance, issued about six weeks later, provided that foreigners residing in British India were prohibited from carrying on trade or business or from dealing with any property except under conditions or restrictions imposed by the Governor-General in Council. The power of prohibition or restriction which could be exercised on foreigners was extended by this amendment to any company or association of which any member or officer was a foreigner. By a second amending ordinance, this was further extended to cover companies and associations of which a foreigner was on August 3, 1914, a member or officer.

The Indian Volunteers Ordinance, 1914, provided that the members of any corps of volunteers called out for actual military service would be subject to military law and that the Army Act would apply to them.

Provision was made in the Ingress into India Ordinance, 1914, which was to be deemed to be a part of the Foreigners Ordinance of the same year, for the control of persons entering British India in order to protect the State from the prosecution of any purpose prejudicial to its safety, interests or tranquillity. This Ordinance was made applicable to persons, not being foreigners (as defined in the Foreigners Ordinance) who entered British India. This was intended not to prohibit entry, but to control the persons in the interests of the security of the State.

The Commercial Intercourse with Enemies Ordinance (No. VI of 1914) prohibited financial and other dealings with any state at

war with His Majesty and provided for the punishment of persons contravening any proclamation or order in Council of His Majesty relating to trade, commercial intercourse or other dealings with His Majesty's enemies during the continuance of the war.

In Padgett v. Jamshetji Hormusji,(3) which arose out of this Ordinance and the Hostile Foreigners Trading Order issued under it, it was held that the existence of a state of war between the respective countries of the debtor and creditor suspended the accrual of interest when it would ordinarily be recoverable as damages, and not as substantive part of the debt, the reason being that a party should not be called upon to pay damages for retaining money which it was his duty to withhold. The accrual of interest was equally suspended, even when the alien enemy creditor remained in the country of the debtor, until the debtor had actual notice that the principal could safely be paid without the possibility of its enuring for the benefit of the enemy during the continuance of hostilities.

In Hooper v. King Emperor(4) the accused, a trader in Madras dealing in tobacco, cabled on 28th July 1914 to one Rupell, a German residing in Germany, for certain bales of tobacco. Complying with this order, Rupell sent some bales of tobacco to

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(3) (1916) I.L.R. 41 Bom. 390.
(4) (1916) I.L.R. 40 Mad. 34.

certain agents of the accused at Amsterdam about the end of September 1914 and these agents again shipped the bales on October 7, 1914 to the agents of the accused in London. Having received the bales before the 14th of October, 1914, the London agent reshipped them to the accused who received them in Madras between 21st and 26th November. The accused wrote two letters on November 26, 1914, one to a neutral subject in Holland and another to an enemy in Germany, requesting them to secure for him his merchandise in Germany. The Royal proclamation prohibiting trade with the enemy was made on 9th September 1914 and the Commercial Intercourse with Enemies Ordinance to the same effect was issued on October 14, 1914. On these facts, it was held that the accused was guilty of attempt to trade with the enemy, even if the goods in the enemy's country became his own before the outbreak of the war or even if there were no goods of his share at the time he wrote the letters.

In view of the proclamation prohibiting trading with the enemy, the tender of shipping documents by an enemy alien in Germany to a tradesman in Bombay in regard to a contract of sale effected on July 17, 1914, was held to be not a valid tender.(5) Acceptance of and payment against such documents would be a violation of the proclamation. (6)

(5) Nissim Isaac Bekhor v. Haji Sultanali Shastary, (1915) I.L.R. 40 Bom. 11.
(6) Ibid.

In Sukhlal Chandanmull v. The Eastern Bank Ltd,(7) the defendants shipped certain goods before the outbreak of war to London firms in enemy vessels destined untimately to enemy ports. These goods were covered by bills of exchange drawn in Calcutta on these firms with their addresses given in the bills as London. They were then discounted with and endorsed to the plaintiffs in Calcutta. The bills of exchange reached London, one on the day war was declared and the others on a subsequent date. The endorsees presented the bills for acceptance. They were returned dishonoured by the drawees. It was held that any further step in the performance of the contract after the outbreak of the war was rendered impossible and that the acceptance of the bills by the drawees would have amounted to a trading in goods destined for enemy ports and would come within the meaning of the royal proclamation and therefore the drawees were under no obligation to the drawers to accept the bills. It was also held that the further performance of the contract having become impossible and there being no obligation on the drawees to accept, the plaintiffs were not bound to give notice of dishonour.

In Textile Manufacturing Company Ltd v. Solomon Brothers,(8) the defendants were a German joint-stock company incorporated in

(7) (1918) I.L.R. 46 Cal. 584.
(8) (1915) I.L.R. 40 Bom. 570.

Hanover, having a branch in Bombay under the sole management of a German citizen. By a contract in writing dated 18th February 1914, the defendants agreed to buy from the plaintiffs the total quantity of waste produced in the plaintiffs' mills during the year ending 31st December 1914 at the respective prices specified in the contract. The defendants deposited with the plaintiff 3½% Government Promissory Notes of the face value of Rs 2,200 to be retained by the plaintiffs against the fulfilment of the contract. On the 18th August 1914, that is, a fortnight after the declaration of war between Great Britain and Germany, the plaintiffs wrote to the defendants asking them to take delivery of the waste under the contract. On the 22nd August the defendant company replied that owing to the existing political situation, the defendants were not allowed to do business in India and requested the plaintiffs to keep the delivery of waste standing over until business was allowed to be resumed. On 5th September, the manager of the defendant company was interned as an alien enemy, and the defendants' local business ceased for all practical purposes. On November 11th, the plaintiffs again asked the defendants to take delivery of the waste, the defendants replying that they were unable to arrange for further delivery until the declaration of peace. On November 14th, the Hostile Foreigners Trading Order was issued by which an hostile foreigner or firm was prohibited from carrying on or engaging in any trade

or business in British India except under a licence issued by or under the authority of the Governor-General in Council, subject to such conditions, restrictions or supervisions as the Governor-General in Council might direct. On December 3rd, again the plaintiffs called upon the defendants to comply with their notice of November 11th on or before 8th Dedember and subsequently extended the time for taking delivery until 16th December. The defendants replied on the 18th December referring to the internment of their manager and claiming that under Section 56(2) of the Indian Contract Act, they were relieved from performing their part of the contract. On February 8, 1915, the defendants obtained a licence limited to the winding up and liquidation of their local business under government supervision. On 16th February, the plaintiffs informed the defendants that they had sold the waste of which the defendants had been under contract to take delivery at a loss of Rs 4270-13-0 and after deducting the value of the deposit demanded payment of Rs 2074-13-2. On 11th March, the plaintiffs filed a suit to recover the sum of Rs 4270-13-2 from the defendants and for a declaration that the plaintiffs were entitled to retain the 3½% Government Promissory Notes and to set off their value in part satisfaction of the amount claimed. The defendants pleaded

(i) illegality of contract on the outbreak of the war

(ii) impossibility of performance

and

(iii) waiver on the part of the plaintiffs granting extension of time of performance until 16th December 1914.

It was held that

(i) the contract became illegal on the outbreak of war and was dissolved on 4th August, 1914

(ii) that it had become impossible for the defendants to perform their part of the contract, owing to the subsequent events arising from a state of war,

(iii) that, assuming that it only became so after 14th November, 1914,(9) the plaintiffs gave the defendants further time for taking delivery until 16th December and so waived any breach committed before that date

and

(iv) that the defendants were entitled to a return of their deposit under Section 65 of the Indian Contract Act.

The ninth and last ordinance of 1914, the Articles of Commerce Ordinance, was necessitated by the hoarding of articles of commerce by various persons during the war. It empowered the Governor-General in Council and each local government to require any person to make a return giving particulars of any article of commerce of

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(9) The date of the Hostile Foreigners Trading Order.

which he was owner. The Ordinance also empowered the same authorities to make a declaration that any article of commerce was being unreasonably withheld from the market.(10) After such declaration had been made, the same authorities could authorise any person to take possession of any supplies of the article covered by the declaration, on paying the owner such compensation as might be determined by agreement between the person so empowered and the owner of such supplies, or, in default of agreement, on payment or tender of payment of such compensation as the person so empowered considered reasonable. The last section of the Ordinance barred the jurisdiction of the courts in respect of any order or award made under the Ordinance.

In May 1915, an ordinance to provide special protection of the interests of Indian soldiers serving under war conditions in civil and revenue litigation was promulgated. In September of the same year, an Act on the lines of the Ordinance was passed. It provided for postponement of proceedings against a soldier on active service if it was necessary in the interests of justice, and also for the setting aside, in certain circumstances, of

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(10) In March 1917, the Governor-General in Council declared by notification that napthaline was being unreasonably withheld in the presidencies of Calcutta and Bombay. The government of Bihar and Orissa made a similar declaration in regard to mica in 1917 and the government of the Panjab in respect of straw of wheat, barley and grain in 1919.

decrees and orders passed against such soldiers.

The Defence of India Ordinance, 1915 (No. III of 1915) was intended to extend the powers conferred by the Defence of India (Criminal Law Amendment) Act, 1915. It was issued on November 10, 1915, and was later incorporated in the Defence of India (Amendment) Act passed on February 15, 1916.(11)

The Import and Export of Goods Ordinance, 1916, sought to prohibit or restrict, by notification of the Governor-General in Council in any way specified in the notification, the import or export of goods from or to any country or place.

The Enemy Trading Ordinance, 1916, was intended to supplement the provisions of the Enemy Trading Act, 1915, which provided facilities for payment to a public authority of certain moneys, the payment of which was prohibited by a Proclamation or Order of His Majesty relating to commercial intercourse with alien enemies, and which made certain provisions as to dealings with foreigners. The Ordinance was promulgated in order to prohibit or control trading by hostile foreigners and hostile firms. The Governor-General in Council could, under the Ordinance, make an order prohibiting any hostile firm from carrying on business except for the purposes and subject to the conditions specified in the

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(11) The Act is discussed below.

order. He could also require by order a hostile firm to be wound up. Such an order would have the effect of a winding up order made by a court under the Indian Company's Act, 1913. It was also provided that if a contract entered into before or during the war or a transfer of property made during the war with or by a hostile foreigner or firm was injurious to the public interest, the Governor-General in Council could by order cancel or determine such contract or declare such transfer to be void.

On account of the extraordinary financial situation created by the war, Indian Paper Currency (Amendment) Ordinances were issued in 1915, twice in 1916, in 1917, and in 1918, increasing progressively the amount for which currency notes could be issued by the Governor-General in Council against Treasury Bills. The Indian Paper Currency Ordinance issued in April, 1918, declared that silver held on behalf of the Secretary of State for India or the Governor-General in Council might, if so held, in the U.S.A. or if in the course of transmission from there, be deemed part of the reserve referred to in Section 19 of the Paper Currency Act, 1910.(12) There were also passed three temporary Amendment Acts during the period amending the Act of 1910.

The Registration Ordinance, issued on February 2, 1917, was to provide for the registration of certain European British

(12) Section 19. "The whole amount of currency notes at any time in circulation shall not exceed the total amount represented by the sovereigns, half-sovereigns, rupees, half-rupees and gold bullion, and the sum expended in the purchase of the silver bullion and securities, which are for the time being held by the Secretary of State for India in Council and by the Governor-General in Council as a reserve to provide for the satisfaction and discharge of the said notes....."

subjects resident in India. Every male European British subject between sixteen and fifty years of age, was required to register himself with the registration authority contemplated by the Ordinance This Ordinance was kept in force during the continuance of the war and for six months thereafter by Section 18 of the Indian Defence Force Act, 1917 (No. III of 1917).

The Foreigners (Trial by Court Martial) Ordinance, 1916, enabled the Governor-General in Council to direct that a foreigner charged with any offence against the Defence of India Rules should be tried by courtsmartial. The foreigner would be proceeded against and dealt with as if he were a person subject to military law under the Army Act. This ordinance was replaced by the Foreigners (Trial by Court Martial) Act, 1916 (No. III of 1916).

The Gold (Import) Ordinance, 1917, empowered the government to take possession of gold imported to British India on payment of a stipulated compensation. The Silver (Import) Ordinance, 1917, issued a few days later, made similar provision in regard to imported silver.

The Treaty of Peace Ordinance, 1920, the Treaty of Peace (Austria) Ordinance, 1920, and the Treaty of Peace (Hungary) Ordinance, 1921, were promulgated to give effect to the provisions of the treaties concluded after the war. They also prohibited the payment of enemy debts and barred legal proceedings for their recovery. They charged enemy property in India with the

payment of the amounts due in respect of claims by British nationals in India.

Besides the Ordinances noticed above, a number of Acts to meet situations created by the war were passed. Some of them, such as the Emergency Legislation Continuance Act, 1915, and the Enemy Trading Act, 1916, were intended to continue in force the provisions of certain ordinances already promulgated. Others covered new ground and dealt with such matters as the speedy trial of certain offences and the constitution of an Indian Defence Force.

The Defence of India (Criminal Law Amendment) Act, 1915, was passed in order to secure the public safety and the defence of British India and to effect the speedy trial of certain offences. It was provided that the Governor-General in Council could make rules "for the purpose of securing the public safety and the defence of British India and as to the powers and duties of public servants and other persons in furtherance of that purpose".(13) In addition to public safety and defence, the statute empowered the central executive to make rules on twelve enumerated subjects, to which six more were added by the Defence of India (Amendment) Act, 1916. These eighteen subjects included

(i) communicating with the enemy

(ii) safety of His Majesty's forces

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(13) Section 2.

(iii) spread of false reports or reports likely to cause disaffection or to prejudice relations with foreign powers

(iv) safety of railways, ports, dockyards etc.

(v) taking possession of any property for naval or military purposes

(vi) possession of explosives, arms and other munitions of war

(vii) prevention of any attempt to dissuade persons from entering the defence services of His Majesty

(viii) taking possession for the purpose of the Governor-General in Council any industrial concern and requiring any such concern to place at the disposal of the government its output or to work it in accordance with the directions of the government

(ix) regulating the possession and manufacture of articles which could be utilised in the prosecution of the war

and

(x) regulating the sailings of British Steamers from any port in British India.

The government was authorised to make rules

(i) "to empower any civil or military authority where, in the opinion of such authority, there are reasonable grounds for suspecting that any person

has acted, is acting or is about to act in a manner prejudicial to the public safety, to direct that such person shall not enter, reside or remain in any area specified in writing by such authority or that such person shall reside or remain in any area so specified, or that he shall conduct himself in such manner or abstain from such acts, or take such order with any property in his possession or under his control, as such authority may direct"(14)

(ii) "to empower any civil or military authority to enter and search any place if such authority has reason to believe that such place is being used for any purpose prejudicial to the public safety or to the defence of British India and to sieze anything found there which he has reason to believe is being used for any such purpose"(15)

(iii) "to provide for the arrest of persons contravening or reasonably suspected of contravening any rule made under this Section and prescribing the duties of public servants and other persons in regard to such arrests"(16)

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(14) Section 2 (1) (f).
(15) Section 2 (1) (i).
(16) Section 2 (1) (j).

(iv) " to prescribe the duties of public servants and other persons as to preventing any contravention of rules made under this Section, and to prohibit any attempt to screen persons contravening any such rule from punishment"(17)

and

(v) "otherwise to prevent assistance being given to the enemy or the successful prosecution of the war being endangered".(18)

Local Governments were empowered to direct that any person accused of an offence in violation of any rule made under Section 2 or accused of any offence punishable with death, transportation or imprisonment for a term extending to seven years, or of criminal conspiracy to commit or of abetting, or of attempting to commit or abet, any such offence, whether the offence was committed before or after the commencement of the Act should be tried by three Commissioners appointed under the Act. Two of the commissioners, were required to be persons who had served as Sessions Judges for at least three years or persons qualified for appointment to the High Court or legal practitioners of ten years standing.

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(17) Section 2 (1) (k).
(18) Section 2 (1) (l).

The Commissioners could take cognizance of offences without the accused being committed to them for trial and were to follow the procedure for the trial of warrant cases by Magistrates, except that they were only required to make a memorandum of the substance of the evidence. Their judgement was to be final and conclusive; they could pass any sentence authorised by law and no order of confirmation was necessary in the case of any sentence passed by them. They could admit as evidence the statement of any person recorded by a Magistrate, if such person was dead or could not be found or was incapable of giving evidence, if they considered that such death or disappearance or incapacity was caused in the interests of the accused.

To obviate the necessity of passing an Act of Indemnity after the war, Section 11 enacted that 'No order under this Act shall be called in question in any court and no suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act". (19)

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(19) In the absence of this statutory provision the position would have been as follows:- "After the war is over, persons may be made liable, civilly and criminally, for any acts which they are proved to have done in excess of what was reasonably required by the necessities of the case,- unless these acts have in the meantime been covered by an Act of Indemnity" it was observed in Rex v. Allen (1921) 2 Ir.R. 241 at 264.

In Paraneswar Ahir v. The Emperor,[20] Patna High Court held that Section 22 of the India Councils Act, 1861, read with Section 9 of the High Court Act was wide enough to empower the Governor-General in Council to create new tribunals as contemplated by Section 4 of the Defence of India Act. It was held by the same High Court in Sheonandan Prasad Singh v King Emperor[21] that the High Court had no jurisdiction to superintend the proceedings of Commissioners appointed under the Act.

The Madras High Court held that Rules framed under Section 2 of the Defence of India Act, must be read as part of that Section, and were effective from the date of their publication; they were not dependent on the remainder of the Act being brought into operation.[22] It was held,[23] accordingly, that a person in the Presidency of Madras, who, in contravention of the rules, dissuaded another from entering into His Majesty's military service, was guilty of an offence, though the remainder of the Act had not been brought into operation in the Province. In the absence of a notification creating special tribunals for the trial of offences under the Defence of India Act, such offences were triable by the ordinary magisterial courts of the country in the manner provided in the Criminal Procedure Code as 'offences against other laws'

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(20) A.I.R. 1918 Patna 155 (F.B.).
(21) A.I.R. 1918 Patna 103 (F.B.).
(22) Kandaswami Pillai v. (F.B.) ror (1918) I.L.R. 42 Mad. 69.
(23) Ibid. (F.B.).

within Schedule II of the Code.(24)

The object of the Indian Bills of Exchange Act, 1916, as amended by the Indian Bills of Exchange (Amendment) Act, 1917, was to condone delay, caused by the war in the presentment of a bill of exchange payable outside British India, and to remedy the situation created by loss of a bill through enemy action. It was provided that delay should be excused, notwithstanding the provisions of the Negotiable Instruments Act and, in the case of loss of a bill, the court could allow proof of the bill being given by means of a copy of it certified by a notary public, and pass a decree accordingly.

The Indian Defence Force Act, 1917, created the Indian Defence Force and made provision for the compulsory enrolment of certain European British subjects in the Force. Male European British subjects between the years of eighteen and fortyone were deemed to be enrolled for general military service and those between sixteen and eighteen and those between fortyone and fifty for local military service. The Indian Defence Force (Foreign Service) Amendment Act, 1918, made it obligatory for any person enrolled for general military service to serve within or without the limits of British India. The Indian Defence Force (Further Amendment) Act, 1918,

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(24) Ibid.

provided that any European British subject above fifty years could offer himself, and presumably herself,(25) for enrolment for general or local military service.

The Indian Transfer of Ships Restriction Act, 1917, was passed to prevent the transfer of any interest in a British ship, to a foreign-controlled company or person without the previous consent of the Governor-General in Council.

The Indian Company's (Foreign Interests) Act, 1918, prohibited the alteration, except with the consent of the Governor-General in Council, of articles of association of a company designed to restrict the interests which might be held or powers which might be exercised by foreign members of the company. It also enacted that a resolution for the voluntary winding up of a company declared by notification to be one with restrictive provisions would be of no effect unless the Governor-General in Council authorised or ratified it.

The Cotton Cloth Act, 1918, was passed in order to encourage and maintain the cheap supply of cotton cloth manufactured in India to the poor classes of the community. Under this Act, Controllers with powers to make orders in respect of dealings in cotton cloth were to be appointed. A Controller would be assisted

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(25) Section 2 referred to "any European British subject", which, unless qualified, would include females.

by an Advisory Committee in the performance of his duties. The local government could fix the price at which standard cloth should be sold to the public. It was made obligatory to obtain a licence from the government before any person could sell standard cloth.

If the Cotton Cloth Act was intended to protect the interests of the poor in the difficult situation created by the war, the Excess Profits Duty Act, 1919, was meant to tax the profiteers who had done well out of the war. It provided that where the profits of a business, not being one of those excepted under the Act, exceeded the standard profits, a duty of an amount equal to fifty percent of that excess should be levied. The amount of the duty, however, was not to exceed such sum as would reduce the profits in the accounting period below thirty thousand rupees. It was also provided that where the profits of any business in the accounting period were chargeable to excess profits duty and to super-tax, one of them, which exceeded the other in amount, only would be charged.

Apart from these and other Acts, a large number of notifications were issued under the Acts. Because of the extraordinary situation created by the war, some of them dealt with such details of every day life as the supply of salt and kerosene oil. One of them, issued in August 1918, provided for the control of the supply of grass throughout the Presidency of Bombay.

The notifications and orders issued under the Indian (Foreign

Jurisdiction) Order in Council, 1902, the Foreigners Ordinance, 1914, and other ordinances were numerous. A few of them delegated certain powers of the Governor-General in Council to the local government or the military authorities. Some of them granted special powers to certain officers, as was done under the Foreigners' Ordinance, 1914. Certain officers were authorised by the Ordinance to grant permits for the entry and departure of foreigners.

The delegation of wide powers to subordinate authorities and the assurance of immunity from legal proceedings for acts done in good faith by its delegates no doubt seemed to the Indian Government to be justified by the extraordinary circumstances created by the war. The interference with the daily lives of the Indian people which this legislation caused would have been more readily endured if the officials who created it had been less heavily protected from being called to account by the indemnities in this legislation.

iii. The Rowlatt Act

There had been revolutionary movements in Bengal for quite a long time before the First World War; in other parts of India also the activities of revolutionaries had been a source of constant anxiety to the Government of India during the war. A Committee was therefore appointed, at the end of 1917, with Mr. Justice Rowlatt, a Judge of the King's Bench Division in the United Kingdom, as Chairman to investigate the extent of the revolutionary activities and to recommend legislation to deal with them. Their report (1) gave a full account of the subversive activities in the country. It left no doubt about the widespread character of the movements and about the difficulties of obtaining the conviction of accused persons under the ordinary law, owing to intimidation of witnesses and juries. The Committee found that the Defence of India Act had been effective in dealing with revolutionary activities, because under its provisions restrictions could be imposed upon persons implicated in revolutionary propaganda and conspiracy without bringing them to trial. They apprehended a recrudescence of revolutionary crime when that Act lapsed after the end of the war and therefore recommended that the provisions of the Act which had been found effective should be added to the criminal law. The main measures suggested were the trial of cases of revolutionary crime by three Judges without juries and the conferring upon Provincial governments of power to intern persons concerned in subversive

(1) Cmd. 9190/1918.

movements. "Such measures must always be distasteful to an Englishman, but they cannot be considered extreme in the light of the extent of the conspiracies, or of the fact that the ordinary people were so terrified by the revolutionaries that they dared not give evidence against them".(2)

Two Bills were introduced to give effect to the proposals. One was intended to deal with the immediate result of the lapse of the Defence of India Act and the other to strengthen the ordinary law. The former was passed, but never used, while the other was never passed.

The Anarchical and Revolutionary Crimes Act, 1919, commonly called the Rowlatt Act, after the Chairman of the Sedition Committee, authorised the Government to exercise certain emergency powers to deal with anarchical and revolutionary movements. It supplemented the ordinary criminal law and specified in a schedule the offences brought under its purview. They included:-

(i) certain offences against the State such as waging war, conspiring to overthrow the government etc.

(ii) certain offences of violence against person and property in connexion with movements endangering the security of the State such as sedition, rioting with deadly weapons, murder, robbery, dacoity, damaging roads, and bridges, house breaking, criminal intimidation and

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(2) P. Griffiths, The British Impact on India, page 381.

(iii) certain offences connected with the use of explosives and arms, provided that such offences were associated with anarchical and revolutionary movements. Any attempt or conspiracy to commit or any abetment of any of these offences was also included in the schedule.

The Act was to extend to the whole of British India and was to continue in force for three years from the date of the termination of the war.

The Act was divided into five parts, each enabling the Government of India to give to the local governments certain special powers, according to the nature and seriousness of the revolutionary activities in the area concerned.

Under Part I, in any Province in which the Government of India had notified the need for speedy trials owing to the prevalence of anarchical and revolutionary offences, if the local government had evidence that any person had committed any offence listed in the schedule and thought that such a person should be given a special trial, they could lay before the Chief Justice of the High Court a written statement of their accusation with full details, a copy of it being required to be given to the accused. The Chief Justice would then nominate three High Court Judges to try the accused. The usual delay caused by the preliminary inquiry before a Magistrate was thus sought to be avoided. There was to be no jury, for it was thought that juries were liable to be terrorised and were not impartial and reliable in the circumstances. There was to be no appeal to a higher court, for the special tribunal consisted of

three High Court Judges.

The trial could be conducted in accordance with the ordinary criminal procedure, excepted for certain changes made by the Act. Section 18 provided that if any person killed or otherwise prevented a witness from giving evidence, the statement of such a witness previously taken down before a Magistrate or before the Court itself could be given as evidence. The court could, prohibit or restrict the publication of its proceedings. The accused could, if he so desired, give evidence himself and if he did, he was liable to cross-examination. When a charge was framed, the accused was entitled to ask for an adjournment of the trial up to fourteen days. The court was not bound to adjourn any trial for any purpose, subject to the above provision, unless such adjournment was, in its opinion, necessary in the interests of justice. All these procedural arrangements were intended to meet the difficulties arising from the terrorisation of jurors and witnesses, the delays of the ordinary procedure, and the problem of procuring reliable evidence.

Part II dealt with certain measures to be adopted by the local governments to prevent the commission of revolutionary crimes. This part was to come into force in any area specified by the Governor-General in Council in a notification declaring that he was satisfied that revolutionary or anarchical movements likely to lead to the commission of scheduled offences were being extensively promoted in the whole or any part of British India. The local government could then take the following action against any person who, in its opinion was actively concerned in such movements. It

could place all the materials in its possession relating to his case before a judicial officer qualified for appointment to a High Court for his opinion. If after considering his opinion, the provincial government was satisfied that action under the provisions of this Act was necessary, it could order that the person concerned should execute a bond undertaking not to commit within a period of one year any of the scheduled offences; it could also order him to remain in any specified place or area, or to refrain from acts liable to disturb the public peace, or prejudicial to the public safety, or to inform it of any change in his address, or to report himself at certain definite intervals to the police. As soon as the government passed any order of the kind indicated above, an inquiry into the case was to be held in camera by an investigating authority, consisting of three persons, of whom two should be persons who had held judicial office not below that of a District Judge and the third a non-official. The government should lay before the authority a written statement of the facts of the case with its reasons for making the order. The authority should in every case allow the person against whom the order was made to appear before it, explain to him what he was charged with, hear any explanation he might offer and make any further investigation necessary in the circumstances. In conducting their investigation, they were not bound to observe the rules of the law of evidence, (3) that is, the authority could take into account hearsay statements and written statements of persons not present and such other data as in their opinion, were best suited

(3) Section 26(3)

to elicit the facts of the case. The person whose case was being investigated was not given the right, under the Act, to be represented by a pleader; nor was the provincial government entitled to be so represented. On completing their inquiry, the authority would report to the government the conclusions they reached, together with their reasons. After receiving the report, the government could confirm, alter or cancel its previous order, but it was obliged to publish the conclusions reached by the authority and give a copy of the order to the person concerned. An order thus passed would not remain in force for more than a year from the date of the original order. It could be renewed for another year; if so, the person concerned had the right to make a representation to the government and the investigating authority would make a further inquiry regarding the representation made.

It was thought that the provisions of this Part would enable the government to watch, restrain, and forestall revolutionary activities, which though dangerous in themselves, had not yet resulted in any specific acts of violence.

Part III, which provided, among other things, for detention without trial, could be brought into force in any area, specified in a notification issued by the Governor-General in Council when satisfied that in that area anarchical and revolutionary movements were being promoted and scheduled offences in connexion with such movements were prevalent to such an extent as to endanger public safety. Under this Part if the local government was satisfied that any person was concerned

in a scheduled offence, it could place, as under Part II, all the materials in its possession relating to his case before a judicial officer and after considering his opinion, it could not only make any of the orders authorised by Part II but also further direct, by order in writing, the arrest of any such person without warrant, and his confinement in any place (not being that part of the prison used for the imprisonment of convicted criminals) and the search of any place used by such person for any purpose in furtherance of anarchical or revolutionary movements. A person arrested under this provision should not be detained for more than seven days without a further order from the government and in no case should such a person be kept in custody, pending an order of confinement, for more than fifteen days. Where an order of confinement was passed, the provisions of Part II in regard to inquiry by an investigating authority would apply and the order would remain in force for one year only, unless it was extended for another year, in which case the person concerned could make a representation to the Government and a further inquiry would be made.

Part IV treated of the extension of the provisions of the Act to such persons as had already been dealt with under the Defence of India Act, 1915, and other similar wartime measures.

Part V contained some details regarding the application of a few provisions of the Act in certain circumstances. It also contained a provision that no order under this Act should be called in question in any court of law. It was also stated in this Part that all powers given by this Act were in addition to and not in

derogation of any other powers conferred by or under any enactment.

The Rowlatt Act was the occasion of much unrest in India. It was passed to counteract 'anarchical and revolutionary crime'. This phrase in the Act has been interpreted to mean "conspiracies, propaganda and agitations with the object of overthrowing the government, upsetting established order, and interfering with the administration of the laws".(4)

It was a measure intended to be used in an emergency and directed against a particularly dangerous class of offenders. It was repealed in 1922.

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(4) E. V. Rieu, The Rowlatt Act, page 4.

iv. Martial Law Ordinances

The agitation against the Rowlatt Act, when passive resistance was tacked to it, led to serious riots in Calcutta, Bombay and Delhi. These were put down with the help of the military with the loss of a few lives in each instance. But a similar situation in the Panjab appeared to necessitate the declaration of martial law. The Lieutenant-Governor of the Panjab stated that there was open rebellion in Lahore and other places and in some of them, he said, there was to be found "anarchy in its naked and deadly aspect".(1)

On April 14, 1919 the Martial Law Ordinance, 1919 was promulgated by Lord Chelmsford, bringing Lahore and Amritsar under martial law from the midnight between the 15th and the 16th April on the ground that the Governor-General was satisfied of the existence of a state of open rebellion against the authority of the government in certain parts of the Province of the Panjab.(1a)

According to the Ordinance, every trial held under the Bengal State Offences Regulation of 1804,(2) instead of being held by courts martial should be held by a Commission of three persons

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(1) Quoted in Nundy, The Present Situation With Special Reference to the Panjab Disturbances, page 82.

(1a) A resolution of the Governor-General in Council of April 14, 1919, stated: "The offences which have occurred in Delhi, Calcutta, Bombay and Lahore have one common feature - the unprovoked attempt of violent and unruly mobs to hamper or obstruct those charged with the duty of maintaining order in public places" - quoted by Nundy, in The Present Situation With Special Reference to the Panjab Disturbances.

(2) It was extended to the Panjab in 1872.

appointed by the local government. Two of them should be persons who had served as Sessions Judges or were qualified to be appointed Judges of a High Court. The Commission should follow in all matters the procedure regulating trials by Courts Martial prescribed by the Indian Army Act, 1911. The local government could, however, direct the Commission to follow the procedure prescribed for a Summary General Courts Martial under the Act, if such procedure was considered necessary in the interests of public safety. The finding and sentence of a Commission were not to be subject to confirmation by any authority. Section 7 gave retrospective operation to the Ordinance in that it stated that the provisions of the Ordinance would apply to persons who were charged with offences committed on or after 13th April, 1919.

The Martial Law (Extension) Ordinance, 1919, issued on 16th April, extended the application of the previous Ordinance to the district of Gujranwala.

Another Ordinance(3) issued two days later, empowered any court martial or a Commission appointed under the Martial Law Ordinance, 1919, to sentence a person, when convicted. to transportation for life, or for any period not less than ten years or to rigorous imprisonment for a term between seven and fourteen years. A convicted person would not be liable to forfeiture of property, unless the Court or the Commission directed such forfeiture.

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(3) Martial Law (Sentences) Ordinance, 1919.

Martial Law (Further Extension) Ordinance, 1919, issued on 21st April, gave further retrospective effect to the first Ordinance.(3a) By this Ordinance, the local government was enabled to direct a Commission to try any person charged with any offence committed on or after 30th March, 1919.

Martial Law (Trials Continuance) Ordinance, 1919, provided for the continuance and completion of trials pending before the Commissioners appointed under the first Martial Law Ordinance, though martial law had ceased to operate and the order suspending the functions of the ordinary criminal courts had been cancelled. In the category of pending trials were included trials for which an order had been made convening a Commission.(4)

Bugga and others v. The Emperor(5) arose out of these Ordinances. Bugga was arrested on the 12th April and the other appellants in the case on subsequent dates. None of them was taken in arms or in the act of committing the offences alleged against them. On 13th April the Governor-General in Council, acting under the Bengal State Offences Regulation, which was extended to the Panjab by the Panjab Laws Act, 1872, made an order whereby he suspended the function of the ordinary criminal courts within the districts of Lahore and Amritsar,(6)

(3a) Martial Law Ordinance (No.I of 1919)
(4) Explanation under Section 2 of the Ordinance.
(5) I.L.R. (1919) 1. Lahore 326.
(6) Later extended to those of Gujranwala and Gujrat.

as regards the trial of persons for offences such as Bugga and others were charged with and established martial law within those districts, and by the same order he directed the immediate trial by court martial of all such persons. On 14th April, the Governor-General promulgated the Martial Law Ordinance(No 1 of 1919) providing that every trial in the above mentioned districts, instead of being tried by a court martial, should be tried by a Commission of three persons appointed by the local government. The provisions of the Ordinance were to apply to all the persons referred to in the Regulations who were charged with any of the offences therein described committed on or after 13th April,1919. By the Martial Law (Further Extension) Ordinance (No IV of 1919), issued on 21st April, the Commissioners were empowered to try any person charged with offences committed after 30th March 1919, Section 65 of the Government of India Act, 1915, while giving the Governor-General in Council a general power to make laws for British India, enacted by subsection (2) that he should not be able to make any law affecting the authority of Parliament or any part of the unwritten law or Constitution of the United Kingdom whereon might depend in any degree the allegiance of any person to the Crown of the United Kingdom or affecting the Sovereignity or dominion of the Crown over any part of British India, and by sub-section (3) enacted that he should have no power "without the previous approval of the Secretary of State in Council to make any law empowering any Court other than a High Court to sentence

to the punishment of death any of His Majesty's subjects born in Europe or the children of such subjects or abolishing any court". The appellants who were natives of India, were at the trial charged with offences under the Penal Code and some of them were sentenced to death. The Lahore High Court held that Ordinance No. IV could not be construed as intended only to extend the operation of Ordinance I to offences committed before 13th April, but not earlier than 30th March and therefore did not apply only to persons taken in the act of committing any of the offences specified in Regulation X of 1804. It was clearly stated in the recital introducing the Ordinance that its operation was not confined to the persons and offences described in the earlier Ordinance. It was also held by the High Court (and later by the Privy Council too[6a]) that Ordinance IV was not invalid by reason of Subsection (2) of Section 65 of the Government of India Act, 1915, as affecting the unwritten laws or the Constitution on which depended the allegiance of His Majesty's subjects in India. That Subsection did not prevent the Government of India from passing a law which might modify or affect a rule of the Constitution or of the common law upon the observation of which some person might conceive or allege that his allegiance depended. It referred only to laws which directly affected

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(6a) (1920) 47 I.A. 128.

the allegiance of the subjects to the Crown, as by a transfer or qualification of the allegiance or by a modification of the obligations thereby imposed. Ordinance IV of 1919, if it was repugnant to Subsection (3) of Section 65 of the Government of India Act, so far as British born subjects were concerned, was, under Section 2 of the Government of India Act, 1916(7), void to the extent of that repugnancy, but not otherwise.

In Kalinath Roy v. King Emperor,(7a) the appellant, editor of the 'Tribune' published at Lahore, was convicted by a Court of Commissioners sitting at Lahore under the Martial Law Ordinance I of 1919 of an offence under Section 124A of the Indian Penal Code, namely, of having by written words excited or attempted to excite disaffection towards His Majesty or the Government established by law in British India. The order of the Lieutenant-Governor made under Ordinance IV of 1919(7b) did not name the accused who were to be tried by the Commissioners, but applied to "all persons charged with offences connected with the recent disturbances". The Privy Council held that the validity of the ordinance being established by the decision of the Board in Bugga v. King Emperor,(7c) the Commission's Court had jurisdiction,

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(7) "A law made by any authority in British India and repugnant to any provision of this or any other Act of Parliament shall, to the extent of that repugnancy, but not otherwise, be void". Section 2.

(7a) (1920) 48 I.A. 96.

(7b) Martial Law (Further Extension Ordinance)

(7c) (1920) 47 I.A. 128.

although the order of the Lieutenant-Governor did not mention the names of the accused persons and that the court having applied the right principles of law in considering whether an offence under Section 124A had been committed, no interference with the conclusions was called for.

It was contended by many Indian lawyers and politicians that there was no concerted action on the part of the people to overthrow the government and that there was no open rebellion to justify the declaration of martial law(8)

It would seem that there were better grounds for the declaration of martial law in the district of Malabar in the Presidency of Madras in 1921.

A tenancy movement was started in Malabar in 1919 as a result of the increase in rent and the eviction of peasants from their holdings by the landlords. When the movement was in its height, the Khilafat movement came into existence. To win over the Moplah peasants who formed more than three quarters of the Muslim population of Malabar, the Khilafat movement in the district lent its support to the tenancy movement. When peasant unions were formed and tenancy meetings were held, Section 144 of the

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(8) The Times Literary Supplement of October 17, 1917, reviewing Nundy's "Present Situation" (cited above) wrote: He "contrasts the putting down of serious riots in Calcutta, Bombay and Delhi by the aid of the military, and not without loss of life, but without any declaration of martial law, with the severe maintenance for some time of such laws in Lahore, and gives historical instances to show that in this country the supersession of the ordinary law for military rule has not been adopted save with great reluctance and as a last resort".

Criminal Procedure Code[9] was enforced and meetings were forcibly dispersed by the police. As the police turned to violence, the people thought of retaliation and prepared themselves for an armed rising. A Moplah religious leader, in the meantime, proclaimed himself the head of an independent state and announced his intention of driving away the British.[9a] A number of Moplahs supported him.

On 20th August 1921 a mosque was besieged and forcibly entered, under orders of the District Magistrate, by the police and the military to arrest a few leaders of the tenancy movement. A fight between the government forces and the peasants who had assembled near the mosque ensued. The next day martial law was declared. A regiment from Burma and a Gurkha regiment were soon sent to Malabar. Fights continued until the end of November, when the rising was quelled.

The Martial Law Ordinance, 1921, issued on 26th August 1921 provided for the administration of four taluks of Malabar by a military commander who was empowered to make regulations for the public safety and the restoration and maintenance of public order. He could authorise a Magistrate or a military officer of seven years' service to make and issue martial law orders. Summary

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(9) Discussed below.
(9a) Unni Nayar, My Malabar page 248

courts of criminal jurisdiction could be constituted and they would follow, in all trials of serious offences, the procedure laid down in the Criminal Procedure Code for the trial of warrant cases. They were not required to frame a formal charge or to record more than a memorandum of evidence. No offence which was punishable with imprisonment for more than five years could be tried by a summary court. Though an accused before a summary court was given the right to be defended by a legal practitioner, the court might not grant an adjournment if it thought that an adjournment would cause unreasonable delay in the disposal of the case. There was to be no appeal from an order or sentence of a summary court and no court had jurisdiction of any kind in respect of any proceedings in such a court. Ordinary criminal courts were empowered to try any offence in respect of which the military commander made such a direction to the court as also any offence against a regulation or martial law order which was not triable by a summary court.

Martial Law (Supplementary) Ordinance (No III of 1921) made provision for the constitution of Special Tribunals consisting of three persons. One of them should be a person who had acted or was acting as a High Court Judge and the other two should be persons who had exercised the powers of a Sessions Judge for at least two years. A Special Tribunal could try any offence connected with the events which necessitated the enforcement and

continuance of martial law. It was for the local government to decide whether an offence was so connected. A Special Tribunal could take cognizance of offences without the accused being committed to it for trial and should follow the procedure for the trial of warrant cases by Magistrates. The local government, however, was allowed to make rules providing for the procedure of special tribunals. In the case of a sentence of death, transportation for life or for imprisonment for ten years or more, an appeal would lie to the High Court.

The Martial Law (Military Courts) Ordinance, 1921 enabled the military commander and any officer whom he authorised in this behalf to convene a military court in order to try certain offences specified in the Ordinance. A military court should be constituted in the same manner and would exercise the same powers and follow the same procedure as a summary General Court Martial convened under the Indian Army Act, 1911, except that a Magistrate of the First Class or a Sessions Judge could be appointed as a member of the court and a memorandum of evidence given at the trial and the statement, if any, made by the accused were required to be recorded. The finding and sentence of a Military Court were to be confirmed by the convening officer, and a sentence of death was required to be reserved for confirmation by the General Officer Commanding the District. Subject to the special provisions noticed above, the rules of procedure for the military courts would be the same as those for the summary courts under the Martial Law Ordinance, 1921.

The Martial Law (Special Magistrates) Ordinance (No V of 1921) enabled the local government to invest any Magistrate of the First Class who had exercised the powers of such a Magistrate for at least two years and who had been authorised to exercise the powers of a summary court under the Martial Law Ordinance, 1921, with the powers of a Special Magistrate who could try any offence as the local government or an officer empowered in this behalf might direct, except offences unconnected with the events which led to the declaration and continuance of martial law and offences punishable with death. Whether an offence was connected with such events would be determined by the Special Magistrate. He should follow the procedure laid down for the trial of cases by a Special Tribunal. A sentence of transportation or of imprisonment for more than two years passed by a Special Magistrate was subject to appeal to a Special Tribunal.

The Ordinance was not meant to be in derogation of the power of the Military Commander to direct that an offence should be tried by a Military Court.

The local government was allowed to appoint places outside the area in which martial law was in force, at which any Summary Court or Special Magistrate might sit for the trial of offences. (Section 10).

The provision last mentioned was probably made owing to the fact that the Government of India took note of the common law rule

that there was no right at all to hold a military court except in the martial law area. In Rex v. Allen[10] it was held that civil courts had no jurisdiction durante bello to interfere with the decision of a military court sitting in a martial law area, even where a capital sentence had been pronounced and was about to be executed for an offence not punishable capitally under the ordinary criminal law. King v. Strickland,[11] following Rex v. Allen held that when a state of war still existed in a martial law area, the civil courts had no jurisdiction durante bello to interfere with the decision of a military court sitting therein.

In re Kochunni Elaya Nayar,[12] Kumaraswami Sastri, J., observed, obiter, that a summary court appointed under the Martial Law Ordinance could not try offences committed outside the martial law area or hold court outside such area. The High Court had power, apart from Section 491 of the Criminal Procedure Code, to issue a writ of habeas corpus; and Section 16 of Ordinance No. II of 1921[13] which excluded the interference of other courts did not refer to such general jurisdiction and the High Court could issue such writ if the summary court acted without jurisdiction.

In Govindan Nayar and another v. Emperor,[14] a case which

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(10) (1921) 2 Ir.R. 241.
(11) (1921) 2 Ir.R. 317.
(12) A.I.R. (1922) Madras 215.
(13) Martial Law Ordinance, 1921.
(14) A.I.R. (1922) Madras 499.

arose from the Martial Law Ordinance, 1921, a petition for a writ of habeas corpus was made by two persons undergoing imprisonment for alleged participation in the Moplah rebellion. They were tried outside the martial law area by a Summary Court constituted under the Ordinance. The Madras High Court held in that case that there was no right at all to hold a summary court except in the martial law area and the jurisdiction of such a court was local. Outside the area the ordinary rules of law would prevail and there was nothing in the Ordinance to prevent the High Court from interfering with the decision of any court outside that area purporting to exercise a criminal jurisdiction which it did not possess.(15)

The Malabar (Restoration of Order) Ordinance, 1922 (No I of 1922) was promulgated to provide for the speedy trial of certain offences committed during the period when martial law was in force or arising out of the circumstances which necessitated the enforcement of martial law, and for the restoration and maintenance of order in the district. The Local Government was authorised to make regulations for the protection of law-abiding citizens and for the restoration and maintenance of order. It could make rules

(15) In the course of the judgement the court referred to the provision made in the later ordinance (No V of 1921) enabling the local government to appoint any place outside the martial law area to hold sittings of courts constituted under the Martial Law Ordinance.

for the control and distribution of foodstuffs and for the prohibition of the export of foodstuffs from the scheduled area.(16)

The Ordinance provided for the setting up of the following classes of courts

(i) Summary Courts

(ii) Courts of Special Magistrates

(iii) Courts of Special Judges

The Local Government might empower any Magistrate to exercise the powers of a summary court. Any Magistrate who had exercised the powers of a Magistrate of the First Class for two years could be appointed as a Special Magistrate, and any officer who had exercised the powers of a Sessions Judge for two years could be a Special Judge.

These courts were precluded from trying as an offence any act which was an offence by reason only of the fact that it constituted a contravention of a regulation or martial law order made under the Martial Law Ordinance, 1921.

The Summary Courts were not to try offences punishable with death, transportation, and with imprisonment for more than five years. They could not pass a sentence of imprisonment for more than two years or of fine exceeding one thousand rupees.

Special Magistrates were authorised to try any offences

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(16) Walavanad, Ponnani, Ernad and Calicut.

other than those punishable with death and might pass any sentence which a Magistrate specially empowered under Section 30 of the Criminal Procedure Code could pass.

A Special Judge could try any offence connected with the disturbances and pass any sentence authorised by law.

These courts were to follow the procedure prescribed for the trial of warrant cases, except that they were not required to record more than a memorandum of the evidence. In the trial of offences punishable with imprisonment for a term not exceeding one year, they could follow the procedure for the summary trial of cases in which an appeal lay.

Appeals from the judgements of Summary Courts and from those of Special Magistrates lay, with a few exceptions, to the Court of Special Judges. If a Special Magistrate passed a sentence of imprisonment for more than four years or of transportation, the High Court alone was entitled to entertain an appeal. In the case of appeals from the judgement of a Special Judge, rules in regard to appeals from the court of a Sessions Judge would apply.

The powers of revision and reference conferred on courts under the Code of Criminal Procedure would be exercisable in respect of proceedings before courts constituted under the Ordinance.

By the Malabar (Restoration of Order) Amendment Ordinance, 1922, Summary Courts were given power to try cases punishable with imprisonment for a term not exceeding seven years. (17)

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(17) Under the Malabar (Restoration of Order) Ordinance, the upper limit was five years.

The Malabar (Completion of Trials) Ordinance, 1922, was promulgated to make provision for the trial of persons whose trial had commenced before or who were awaiting trial by the courts constituted under the Malabar (Restoration of Order) Ordinance and for the disposal of appeals pending under the provisions of that Ordinance. Any court constituted under the Malabar (Restoration of Order) Ordinance could complete the trial of any person whose trial had commenced prior to the expiry of that Ordinance and also to try any person who prior to such expiry had been arrested and was awaiting trial under the provisions of that Ordinance. These courts were barred from trying offences which were offences only by reason of the provisions of the Martial Law Ordinance, 1921, the Martial Law (Military Courts) Ordinance, 1921 or the Malabar (Restoration of Order) Ordinance, 1922. The right of appeal granted under the Malabar (Restoration of Order) Ordinance, 1921, continued under this Ordinance as if the expiry of the former did not take place.

After a lull of nine years, martial law was declared in 1930 in two places, first at Sholapur and then at Peshawar.

Riots took place at Sholapur in May, 1930 following the arrest of Mahatma Gandhi on the 5th of the month. When some persons were arrested in connection with the riots, the mob obstructed the movement of police lorries on the road and threw stones at the police. The police fired, wounding a number of

people. The crowd thereupon attacked a police station and killed two police constables and an Excise Inspector. They drew the police force out of the town by a feint and burnt the court buildings. On the 8th a company of soldiers arrived. No more outrages took place. Further military assistance arrived on the 12th. In the evening of the same day, the military took charge of the town from the civil authorities and proclaimed martial law. The next day certain martial law regulations were issued. On the 15th the Shalapur Martial Law Ordinance, 1930 (IV of 1930) to provide for the proclamation of martial law at Sholapur was promulgated and published in the Gazette of India, and on the 18th it was proclaimed at Sholapur. Sholapur continued to be under martial law for about seven weeks. On June 30, 1930 the Ordinance was withdrawn.

Under the Ordinance, the Commander-in-Chief or General Officer Commanding-in-Chief was authorised to appoint one or more Military Commanders who could make regulations for the public safety and the restoration and maintenance of order and as to the powers and duties of military officers and others in furtherance of this purpose. The Military Commander could empower any Magistrate or any military officer of seven years service, not below the rank of Captain, to issue martial law orders for supplementing the regulations.

A number of offences were created by the Ordinance. No

person was to communicate with the enemy,[18] or, with the intention of communicating it to the enemy, collect or publish any information prejudicial to the restoration and maintenance of order. Any person who assisted, relieved, concealed or harboured any enemy was liable to be punished with imprisonment for ten years. Ordinary criminal courts could deal with offences punishable under the Ordinance and civil courts could also continue to function in the administration area provided they, in the exercise of their jurisdiction, did not interfere with the regulations and martial law orders issued under the Ordinance.

The Ordinance also gave ex post facto validity to regulations, orders and sentences passed before the proclamation of the Ordinance on or after 12th May by any officer in the exercise of military control. Section 12 by way of indemnity, protected from legal proceedings any person who acted under the Ordinance or in the exercise of military control on or after 12th May, for the purpose of providing for the public safety or the restoration or maintenance of order. The proviso to the section stated that "nothing in the section shall prevent the institution of proceedings by or on behalf of the Government against any person in respect of any matter where such person has not acted in good faith and a reasonable belief that his action was necessary for the aforementioned purposes".

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(18) Enemy included mutineers, rebels and rioters against whom operations were being carried out by military or police forces.

Under the martial law regulations issued, anyone committing an act likely to be interpreted as meaning that the person was performing or intending to perform the duties of constituted authority was liable to ten years imprisonment and fine. Anyone who knew or had reason to believe that his relative or dependent had joined or was about to join persons actively engaged in the disturbances and failed to give information to the police could be sentenced to five years imprisonment and fine.

In a case[19] that came up before the Bombay High Court, the question of the necessity for declaring martial law at Sholapur was discussed by the learned Judges. "The court is bound when its jurisdiction is invoked", it was held in Rex(O'Brien) v. Military Governor[20] "to decide whether or not there exists a state of war or armed rebellion... The issue...is whether there is or is not that deliberate, organised resistance by force and arms to the laws and operations of the lawful government, amounting to war or armed rebellion, which justifies what is sometimes called martial law".

Channappa and others v.Emperor[21] was a habeas corpus application by the relatives of seventeen persons who were under detention after having been convicted and sentenced by the military authorities at Sholapur between 14th and 18th May, 1930.

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(19) Channappa v.Emperor (1931) A.I.R. Bom.57.
(20) (1924) 1 Ir.R. 32, 38.
(21) (1931) A.I.R. Bom.57.

Section 11 of the Sholapur Martial Law Ordinance had validated all sentences passed by any officer acting in the exercise of military control between the 12th and the 18th May as if they were sentences passed under the Ordinance. So the question whether martial law was properly proclaimed on the 12th May did not arise in deciding the petition in habeas corpus, because all that the courts could do was to give effect to the Ordinance which, under law, had the same force and effect as an Act of the Indian legislature.

Beaumont, C.J., observed that in his view it was not necessary to determine whether the declaration of martial law on 12th May was justified, for on 15th May the Governor-General at Simla issued an Ordinance reciting that an emergency had arisen in Sholapur which made it necessary to provide for the proclamation of martial law in the town of Sholapur and its vicinity. The Ordinance seemed to have introduced a modified form of martial law, the trial of offences was not left to the will of the Military Commander, but was to be held by the ordinary criminal courts. The state of martial law, he further observed, was not to determine with the necessity for it, but was to continue until brought to an end by a notification in the Gazette of India.

Referring to the necessity for the declaration of martial law, the learned Chief Justice said, "As by the law of England which applies in India, the Crown is not above the law, the Crown can only declare martial law in cases of absolute necessity, and

when the necessity ends, normal legal conditions are automatically restored. Where martial law has been declared it is competent for the courts - and is indeed the duty of the courts if called upon - after the restoration of normal conditions to decide whether and to what extent martial law was justified.

"The question whether an emergency exists or not is one of fact which the courts can inquire into. But in as much as the Governor-General is the person who must, in the first instance, decide whether or not there is an emergency upon which he ought to act, and in as much as he may frequently have information which in the public interests he may be unwilling to disclose, and which no court can compel him to disclose, I think all that the courts can do is to inquire whether there is evidence upon which the Governor-General may reasonably conclude that an emergency exists. If that question be answered in the affirmative, there is an end of the matter".

Madgavkar, J., who, in his judgement referred to a number of cases which arose out of the administration of martial law in the British Commonwealth was emphatic in pointing out the weakness which lay in deciding important issues like the promulgation of a martial law ordinance on the report of the man on the spot. Martial law was declared by the local authorities at Sholapur and the military took charge before the Ordinance was passed. It was therefore the District Magistrate and not the Governor-General, who decided whether there was an emergency.

"The man on the spot", the learned Judge observed, "may exaggerate a riot with sticks into an armed insurrection, and disobedience of his own orders into a rebellion. Parliament has not, as far as I know, ordained that the existence of the laws and the working of the courts should cease on the ipse dixit and at the will of the man on the spot whether District Magistrate, mamlatdar or police patil, or that excesses or breach of peace, arson or even murder on the part of a small minority of the population should justify the man on the spot into exaggerating disaffection into rebellion or riot into an armed insurrection and abdicating himself in favour of the military with the abolition of the ordinary law. Such a state is not the first stage in the supression of any disorder but the last resort of the civil power".

The single allegation that an order under Section 144 of the Criminal Procedure Code,(22) was not obeyed did not, in the learned Judge's opinion, suffice to establish the plea of necessity, which the law demanded as justifying the proclamation of martial law. He was not satisfied as to why military aid did not alone suffice, without the handing over of charge by the civil authorities to the military, "which in law makes all the difference possible".(23)

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(22) Discussed below: See next section.
(23) Channappa v. Emperor A.I.R. (1931) Bom. 57.

It is submitted that it was not possible for the Governor-General in Simla to act except on the information received from the man on the spot. As was pointed out by Blackwell, J., in the same case, the Governor-General "must obviously act promptly and may sometimes have to make up his mind on information which may afterwards be found to be erroneous".(24a)

The District Magistrate in this case submitted that the unarmed police were disorganised and many of them did not report for duty for days. There were only about sixty armed police to deal with a disturbed city of 120,000 inhabitants and four other places in the district. The Deputy-Inspector of Police informed him that no police assistance could be sent from other districts. Hence he had to hand over charge of the situation to the military authorities with the approval of the Provincial Government.

Counsel for the Crown pointed out that the military might not be willing to come to the aid of the civil authorities unless they were given charge of the situation. The District Magistrate in his affidavit stated that military orders prohibited the use of the troops in place of police or for patrolling the city.

Assuming that, in spite of the rule laid down in Phillips v. Eyre,(24b) the military authorities refused, except on their own terms, to aid the civil authority, the District Magistrate was obviously

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(24a) Ibid.
(24b) (1870) 6 Q.B. 1.

obliged to accept military aid on these terms, as it was incumbent on him to see that the situation did not deteriorate. In R.v. Pinney,(24c) it was stated that a public officer was expected to "assemble a sufficient force for suppressing the riot and preventing the mischief which occurred". He was required "to make such use of the force which was obtained and also of his own personal exertion to prevent mischief, as might reasonably have been expected from a firm and honest man".(24d)

It is conceivable that the military authorities might, as suggested by the Counsel, refuse aid unless given charge of the situation. After the Jallianwala Bagh incident in which General Dyer's conduct was severely criticised, the military authorities in India were not too eager to come to the aid of the civil authorities in putting down disturbances.

By 1930 the Red Shirt Movement under Abdul Gaffar Khan had spread widely in the North West Frontier Province. The contempt for governmental authorities which the leaders of the movement inspired contributed largely to create disaffection and prepared the ground for a conflict. (25) The gravest disturbance took place in Peshawar in April 1930. The city was practically under the control of the mob. The police were withdrawn and the troops

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(24c) (1832) 5 C P 254.
(24d) Ibid.
(25) J. Campbell Ker, "Subversive Movements" in Political India, 1832-1932 Edited by Sir J. Cummings, (1932) page 244.

were sent to reoccupy the city.

When discontent about the lack of local self government and the failure to associate the Frontier Province with the Canal Colonies established for the Panjab was still smouldering, a formidable incursion of Afridi tribesmen from beyond the frontier into Peshawar took place in August.

Though the discontented inhabitants gave every assistance within their means to the intruders who posed as liberators and with a remarkable degree of discipline refrained from looting, the local authorities succeeded in clearing the district of all tribesmen by August 11th. But the Government of India along with Pears, the Chief Commissioner, considered that ordinary civil powers were insufficient to deal with the serious situation which, according to them, still existed in the district and secured the Secretary of State's approval to the promulgation of martial law. On August 16, the district of Peshawar was placed under martial law. The crisis produced by the Afridi incursion had by this time passed and it is unusual to declare martial law as a deterrent against the possible renewal of danger. Lord Irwin, the Governor-General decided to act on the advice of Pears who was emphatic that the worst was not over and that the Afridis had withdrawn only to collect reinforcements from other tribes. (26) After the declaration

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(26) S. Gopal, The Viceroyalty of Lord Irwin, (1957) page 83.

of martial law, no danger of a sufficiently serious nature developed to justify it. In fact it was administered only in Peshawar subdivision though proclaimed throughout the district, and it was administered with moderation. No special courts were set up but martial law was in force for five months until it was abrogated on January 24, 1931. During these five months twentyone men were convicted under martial law regulations, but the maximum punishment awarded was rigorous imprisonment for three months. This was interpreted by the government as indicating their moderation and by their opponents as proof that there had been no need for the declaration of martial law.(27)

It may be that the news of the proclamation of martial law acted as an effective deterrent and tended to prevent the Afridis from making further incursions, so that the necessity for a strict administration of martial law did not arise. The fact that martial law remained in force for about five months, in spite of the absence of serious disturbances may have been due to the Chief Commissioner's apprehension of renewed incursions of the tribesmen. If the Chief Commissioner, in making his report, gave undue consideration to the necessity of maintaining public order and tranquillity it would be difficult for the Governor-General to come to a decision against the counsel of the man on the spot, whom he would naturally trust to give an objective report on the local situation.

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(27) S. Gopal, The Viceroyalty of Lord Irwin, page 83.

The Martial Law Ordinance, 1930, (No.VIII of 1930) which consisted of 43 Sections, was divided into two parts, the first dealing with the proclamation and enforcement of martial law and the second with the Special Courts created by it.

Under the Ordinance the General Officer Commanding, Northern Command, who was appointed as the chief administering authority of martial law under the Ordinance, and who could delegate his powers to any one of his choice, was authorised to provide for the public safety and the restoration of peace and order and as to the power and duties of administrators, military officers and other persons in furtherance of that purpose. He could make regulations for the whole martial law area and the administrators under him could make regulations for the administration areas to which they were appointed. An Administrator could empower any Magistrate or military officer of seven years' service, not below the rank of Captain, to make martial law orders in any part of the administration area for the purpose of aupplementing the regulations.

The same kind of acts declared offences by the Sholapur Martial Law Ordinance were so declared under this Ordinance also.

The same jurisdiction as was granted under the Sholapur Martial Law Ordinance was granted to the civil courts. Ordinary criminal courts were empowered to try offences against a regulation or martial law order with the exception of those which were to be tried by the special courts created by the Ordinance. Regulations and orders made before the proclamation of martial law and after the

date notified as the date on which the emergency arose were validated. Sentences passed by officers exercising military control during the above period were also validated.

The Ordinance created five classes of Special Courts. They were:

(i) Special Tribunals

(ii) Special Judges

(iii) Special Magistrates

(iv) Summary Courts and

(v) Military Courts

The Special Tribunals were to consist of three persons, one of whom should have acted or was acting as a High Court Judge and the other two should have acted as Sessions Judges for at least two years. They should in general follow the procedure prescribed for the trial of warrant cases by Magistrates, but should make a memorandum of the evidence of the witnesses and were not bound to adjourn the trial for any purpose, unless such adjournment was considered by them to be necessary in the interests of justice. Appeal lay if sentences of death, transportation or imprisonment for ten years or more were passed by the Tribunals.

Special Judges could be appointed by the Local Government from among persons who had been Sessions Judges for at least two years. They should follow the same procedure as the Special Tribunals. Sentences of death, transportation and imprisonment for five years or more were appealable.

Any Magistrate of the First Class who had exercised powers

in that capacity for two years could be appointed as a Special Magistrate. Special Magistrates could be empowered to try any offence not punishable with death. They could follow the same procedure as prescribed for the Special Tribunals. They could pass any sentence which a Magistrate specially empowered under Section 30 of the Criminal Procedure Code(28) was enabled to pass. If they passed a sentence of transportation or imprisonment for more than two years, appeal lay to the Special Tribunal.

An Administrator could empower any Magistrate to exercise the powers of a Summary Court which could try offences other than those punishable with imprisonment for more than five years, but could not pass a sentence of imprisonment for a term exceeding two years or of fine exceeding one thousand rupees. It should follow the procedure laid down for the trial of warrant cases but was not required to record more than a memorandum of evidence, or to frame a formal charge. If the offence was one punishable with imprisonment for a term not exceeding one year, it could follow the procedure for the summary trial of cases in which an appeal lay.

The Administrator or any Officer, not below the rank of a Field Officer authorised by him in this behalf could direct that certain offences should be tried by a Military Court convened by him, if the exigencies of the situation, in his opinion, required

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(28) "The Court of a Magistrate, specially empowered under Section 30, may pass any sentence authorised by law except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years" (Section 34 of the Criminal Procedure Code as it stood before its amendment in 1955)

the adoption of such a course for restoring and maintaining order. A Military Court was to be constituted in the same manner and should follow the same procedure as a Summary General Court Martial convened under the Indian Army Act, except that a Magistrate of the First Class or a Sessions Judge could be appointed a member of the Military Court and that a memorandum of the evidence and the statement, if any, of the accused should be recorded. The finding and sentence of a Military Court were subject to confirmation by the convening officer; a sentence of death was required to be reserved for confirmation by the General Officer Commanding-in-Chief.

This was the last occasion when martial law was proclaimed in India during the period under review. We may mention in passing that it was proclaimed in certain parts of Sind in 1942. The Hurs(29) terrorised whole districts, committing murder, sabotage and dacoity, to such an extent that the civil authorities found it difficult to cope with the situation. A special force of troops was sent to the area to aid the civil authorities in restoring order. The Military Commander was instructed to take all necessary steps to restore civil security and order with all possible speed. To this end, he proclaimed martial law which enabled summary justice to be enforced by Special Courts against the Hurs. Complete control of the civil administration was given over to the Military Commander who could have the advice and assistance of the civil

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(29) "A criminal tribe of Sind and the neighbouring states" The Indian Annual Register, 1942, Vol.I, page 265.

authorities in the area concerned.(30)

This proclamation was made under the common law rule which justified the repelling of force by force. Martial law continued in force for eleven months, from June 1, 1942 to May 31, 1943.

The Martial Law (Indemnity) Ordinance, 1943 (XVIII of 1943) indemnified all servants of the Crown as well as persons who acted under orders of the servants of the Crown for any act done in the martial law area in order to maintain or restore order or to carry into effect any regulation, order or direction issued by the martial law authority provided that the act was done in good faith and in the reasonable belief that "it was necessary for the purpose intended to be served thereby". All orders for the seizure and destruction of property made by martial law authority were confirmed and all sentences passed, including those passed for offences committed before the martial law period, by the martial law courts during the period were validated, whether the courts sat within or outside the martial law area.

This modern practice of proclaiming and enforcing martial law without resort to legislation which was successfully carried out in Sindh seems to have inspired(31) Article 34 of the Constitution of India which makes provision for the passing of an Act of Indemnity by the Parliament in respect of acts done under martial law.(32)

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(30) Ibid.
(31) A. Gledhill, Fundamental Rights in India, pages 122-123.
(32) For a discussion of Article 34, see infra Chapter VI.

v. Other Statutory Provisions

Between 1861 and 1916 the Ordinances of the Governor-General were promulgated under Section 23 of the Indian Councils Act, 1861. Section 23 of the Act of 1861, with some verbal alterations made in the main to suit the circumstances caused by the creation of the Legislative Council under the Minto-Morley Reforms, was incorporated in Section 72 of the Government of India Act, 1915,(1) which reads as follows:

"72. The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall, for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Governor-General in Legislative Council; but the power of making Ordinances under this Section is subject to the like restrictions as the power of the Governor-General in Legislative Council to make laws; and any Ordinance made under this Section is subject to the like disallowance as an Act passed by the Governor-General in Legislative Council, and may be controlled or superseded by such an Act."

The Government of India Act, 1919, reenacted the same emergency provision(2) with the substitution of the words "Indian legislature' for the words 'Governor-General in Legislative Council'.(3) It also

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(1) It was a consolidating measure repealing and re-enacting the numerous Parliamentary statutes relating to the administration of British India which had been passed between the years 1770 and 1912.

(2) Section 72 of the Government of India Act.

(3) This was necessitated by the Montague-Chelmsford Reforms introduced by the Act.

introduced a new emergency power to be exercised by the Governor-General in the event of the rejection of a Bill by the Indian Legislature. Section 67B of the Government of India Act provided that when either chamber of the legislature failed to pass a Bill as recommended by the Governor-General, he could, whether consented to or not by the other chamber, certify that the passage of the Bill was essential for the safety, tranquillity or interests of British India or any part thereof and on his signature it could become law with the same force and effect as an Act passed by the Indian Legislature. Such an Act was required to be laid before both Houses of Parliament before it received His Majesty's assent. But a proviso to Subsection (2) of the Section stated that "where in the opinion of the Governor-General a state of emergency exists which justifies such action, the Governor-General may direct that any such Act shall come into operation forthwith, and thereupon the Act shall have such force and effect as aforesaid, subject, however, to disallowance by His Majesty in Council.(4)

(4) In relation to the power granted under this Section, Mr. Montague explained in the Parliament: "It is not any measure which affects the interests; it is a measure which the Viceroy can say is essential. He does not now, as he used to do, pass that lesgislation by means of .... the 'official block'; he passes it frankly as an executive order of his Government" (H.C. Debates, December 4, 1919). The Montague-Chelmsford Report contrasted this power with the ordinance-making power and stated that the latter "merely provides, however, a means of issuing decrees after private discussion in the Executive Council, and without opportunities for public debate or criticism; and normally it should be used only in rare emergencies (paragraph 276). The present power provides a means, for use on special occasions, of placing on the statute book, after full publicity and discussion permanent measures to which the majority of members in the Legislative Assembly may be unwilling to assent. (ibid). It was therefore proposed to create a Council of State with a clear Government majority, which was expected to help the Governor-General in legislation in matters which he regarded as essential.

Section 72E of the Government of India Act granted similar powers of certification to the Governor of a Province. In the event of a Governor's Legislative Council not passing a Bill relating to a reserved subject, that is, a subject which was under the control of the Governor in his executive council, he could certify that the passage of the Bill was essential for the discharge of his responsibility for the subject and on his signature it would become an Act of the local legislature. In such a case the Governor-General to whom a copy of the Act would be sent was to reserve it for His Majesty's assent. But if the Governor-General considered that an emergency existed which justified such action, he could signify his assent to the Act, instead of reserving it for the signification of His Majesty's pleasure, subject to disallowance by His Majesty in Council. Acts passed by certification were to be laid before each House of Parliament.

A number of Bills were certified under Section 67B and many of them were brought into immediate operation under the proviso to the Section. A few of those brought into immediate effect are noticed below.

The Finance Bill of 1923 was passed by the Legislative Assembly with one important amendment. It reduced the salt tax from Rupees 2-8 to Rupees 1-4 per maund. When the amended Bill was laid before the Council of State, the Governor-General recommended to the Council the restoration of the figure to Rupees 2-8-0. The Council passed the Bill as recommended. The Governor-General now recommended to the

Legislative Assembly that it should pass the Bill in the form in which it had been passed by the Council of State. The Assembly debated it again; but did not comply with the recommendation. The Governor-General thereupon certified that the passage of the Bill was essential for the interests of British India and signified his assent to the Bill, as passed by the Council of State. As he was of opinion that a state of emergency existed which justified such action, he brought the Act into immediate operation. In his dispatch of April 4, 1923, to the Secretary of State, the Governor-General set out the reasons for this certification pointing out specially that the balancing of the budget was his primary consideration. "The Assembly", he wrote, "was unable to agree on the adoption of any alternative form of taxation which would secure the amount required. Nevertheless it rejected the proposal for the enhancement of the salt tax. It was in these circumstances that it became my duty to certify the measure". But it was considered in some quarters as "a strained use of a legal authority"(5). All things considered, the certification, even though desirable, could not be said to have been essential in the interests of British India.(6)

The Finance Bill of 1924 also was certified in the same way. On March 17, 1924, the motion for the consideration of the Finance Bill in the Legislative Assembly was lost by 60 votes against 57. The next day the Governor-General recommended the passage of the Bill

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(5) Speech of Mr. Charles Roberts on July 5, 1923, in the House of Commons.

(6) A. B. Rudra, The Viceroy and Governor-General of India, page 206

in a slightly modified form. But leave to introduce the Bill was refused. The Bill was therefore taken to the Council of State which passed it in the modified form as recommended by the Governor-General. After signifying his assent, the Act was brought into force immediately. In this case, the opposition to the Bill was almost wholly political. The unqualified rejection of the Finance Bill, both in its original and modified forms, in the third week of March, made it absolutely necessary for the Governor-General to exercise his power of certification and bring the Act into immediate operation.

Before the expiry of the Bengal Criminal Law Amendment Ordinance (1 of 1924) a Bill was sought to be introduced in the Bengal Legislative Council incorporating those provisions of the Ordinance which were within the competence of the Provincial Legislature. When leave to introduce the Bill was refused by the Council, it was certified by the Governor and after being laid before Parliament, it was brought into operation. Those provisions which were beyond the competence of the Provincial Legislature were embodied in the Bengal Criminal Law Amendment (Supplementary) Bill, 1925, placed before the Central Legislature. The Bill was strongly opposed in the Assembly which rejected such clauses as those which provided for the detention of arrested persons outside the Province and for the suspension of the right to habeas corpus in certain cases. The Home Member declined to move the passage of the amended Bill. The Governor-General sent a message to the Assembly recommending it to pass the Bill in its original form. When the Assembly refused to pass it, it was recommended to the Council of State which

immediately passed it. The Governor-General certified that the passage of the bill was essential and gave his assent to it. The Act was brought into operation immediately. As the Bengal Ordinance was about to expire, and there was no time to go through the normal procedure the Governor-General held that there was a state of emergency justifying such action.

The Finance Bill of 1931 also had to be certified by the Governor-General. "The only courses open to me", wrote Lord Irwin, the Governor-General, "were to submit to the rejection of my recommendation, which meant accepting an unbalanced Budget or to use my powers of certification".(7) He preferred the latter course. The Assembly amended the Bill in respect of the proposal for income tax. To avoid a deadlock between the Assembly and the Government, Lord Irwin held an informal conference at the Viceregal Lodge. Though it was attended by the leaders of the Parties in the Assembly and the Members of the Government, no compromise was reached. The next day, that is, March 26, 1931, Lord Irwin made a conciliatory recommendation to the Assembly, urging the acceptance of an amendment in the income tax schedule which would reduce the yield therefrom by one crore, while leaving a securely balanced Budget, by effecting the postponement by a year of certain schemes for military equipment. The Amendment in the income tax schedule was moved on behalf of the Government, but was defeated. The Governor-General then recommended the Bill with the amended income tax schedule to the Council of State which passed it on 30th March. The

(7) Governor-General's Despatch to the Secretary of State, No.22, dated April 2, 1931. H.C. Papers. No. 109 of 1931.

same day he assented to the Bill and directed that the Act should be brought into force immediately. While the Government thought that the Budget must be balanced at all costs and therefore considered that increased taxation was necessary, the members of the Opposition maintained that the balancing ought to be done not only by increased taxation but also by judicious retrenchment.

On September 29 of the same year, a Bill to supplement and extend the Finance Act which was brought into force by certification by Lord Irwin was introduced in a special session of the Assembly. The Bill departed from the established convention in that it fixed the rates of taxation for eighteen months ahead instead of a year. It provided for further taxation and proposed that the Finance Act, 1931, should be in operation till March 31, 1933. The Assembly was annoyed at the introduction of a second taxation Bill in the same session and it amended the Bill reducing the estimated yield by about four crores. The Governor-General, Lord Willingdon, like Lord Irwin before him, in vain held an informal conference with the representatives of all the parties and groups in the Assembly. He then recommended the Bill in a slightly modified form to the Assembly which defeated the motion for its passage. The Governor-General certified that the passing of the Bill was essential for the interests of British India and when passed by the Council of State, assented to it. The Act thus made was directed to come into force forthwith. The Government was, no doubt, faced with a serious financial crisis. This was evident from the proposal for a voluntary reduction in the salary of the Governor-General and the members of the Executive

Council and from the suggestion made to effect a temporary cut in the salaries of Government servants, except those in receipt of a certain minimum salary. But the imposition of new taxes within a few months after the certification of the Finance Bill in March was resented by the elected Members who felt that there was further scope for retrenchment.

We may notice in passing that the Finance Bills of 1936 and 1937 which were amended by the Assembly and the Finance Bill of 1938 which was thrown out as a political gesture at the consideration stage were certified by the Governor-General.

Over and above these emergency powers conferred by the United Kingdom Parliament on the government of India, the Indian Legislature also conferred powers of an emergency character on the government.

Section 518(8) of the Code of Criminal Procedure, 1872, was enacted to provide experienced magistrates with summary powers to meet local emergencies. This Section with amendments reappeared in the Codes of 1882 and 1898. As the Code of 1898, with amendments, is still in force in India it is only necessary to deal with Section 144 of the Code of 1898, which gives the ultimate form of the provision.

To enable him to deal temporarily with urgent cases of nuisance

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(8) This corresponded to Section 62 of the Code of Criminal Procedure, 1861. But its emergency character was taken on in the Code of 1872.

or apprehended danger, whenever it appears to a District Magistrate, Subdivisional Magistrate, or other Magistrate of the first or second class specially empowered under the Section[9] that immediate prevention or abatement of a public nuisance or speedy action to prevent an apprehended danger to the public is desirable, he can issue a written order setting forth the material facts of the case and served as a summons, directing any person to abstain from a certain act or to take specified order with certain property in his possession or under his management. Such a direction can be given to prevent obstruction, annoyance or injury to any person lawfully employed, danger to human life, health or safety, disturbance of the public tranquillity, or riot or affray. In cases of emergency the order can be passed ex parte. It can either be directed to a person individually or to the public generally when present in a particular place. The Magistrate can rescind or alter the order either suo motu or on the application of a person aggrieved. On receipt of the application, the person is entitled to be heard. If the application is rejected, the reason for the rejection must be recorded. An order under this Section will remain in force for two months only; but in special cases it can be continued longer by a notification by the Provincial Government.

The Section applies to cases where temporary orders in the nature of things would be appropriate and would afford a reasonably adequate relief in the circumstances of the case.

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(9) The Criminal Procedure (Amendment) Act, 1923, excluded Magistrates of the third class from the exercise of the powers under this Section.

The power conferred upon a Magistrate under this section is an extraordinary power and he should resort to it only when he is satisfie that other powers with which he is entrusted are insufficient to deal with the situation.(10) In Kamini Mohan Das Gupta v. Harendra Kumar Sarkar(11), it was held, that the existence of circumstances showing the necessity of immediate action is a condition precedent to the Magistrate's exercising the powers conferred by this Section. The question whether there is an emergency is prima facie for the Magistrate and it has been held that the High Court will not lightly interfere.(12) The Section is not limited in its operation to cases of possible general breach of the peace, but contemplates also cases of interference with individual rights.(13)

A Magistrate can pass only restrictive orders under this Section preventing a person from doing a certain, that is, a definite act. The Section confers no power on him to pass a positive or mandatory order directing a party to do particular acts.(14) This cannot be evaded by framing what is substantially an order to perform a certain act in a negative grammatical form. A magistrate can not order a person to abstain from residing in the place in which he was residing at the time of the order, for this is, in effect, an order to leave that place.(15)

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(10) Sundaram Chetti v. The Queen, (1882) I.L.R. 6 Madras 203.
(11) (1911) I.L.R. 38 Calcutta 876.
(12) Emperor v. G. V. Mavlankar, (1930) I.L.R. 50 Bombay 322.
(13) Rashid Allidina v. Jiwandas Khemji, (1942) I.L.R. 1 Cal. 488.
(14) Emperor v. B. N. Sasmal, (1930) I.L.R. 58 Calcutta 1037; S. C. Mukhuty v. L. L. Pal Chaudhury (1935) 39 C.W.N. 1053.
(15) Thakin Ba Thaung v. King Emperor (1934) I.L.R. 12 Ran. 283.

A proceeding under this Section has been held to be a judicial proceeding,[16] so that a magistrate is immune from proceedings instituted by the person to whom his order is addressed, if his proceeding is irregular.

Every order issued under this Section expires at the end of two months, and the Magistrate cannot revive or resuscitate his order from time to time[17] unless it can be justified by circumstances which have supervened since the original order; these must be set out in the subsequent order, and be prima facie sufficient to justify the subsequent order[18]. The grant of what in effect is an order for a perpetual injunction is entirely beyond the Magistrate's powers.[19] But the Provincial Government may perpetuate it for any length of time. In Emperor v. Bhure Mal[20] where the Provincial Government extended an order of a Magistrate forbidding the passage of processions along particular streets in a certain town until such order should be cancelled by notification, it was held that the Provincial Government was competent thus to extend the Magistrate's order.

From 1872 to 1923 a ban was placed upon the High Court's power of revision with regard to proceedings under this Section. But by the repeal of Section 435(3) by the Code of Criminal Procedure (Amendment) Act, 1923, the High Court has been enabled to deal on

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(16) Govinda Ram Marwari v. Basanti Lal Marwari (1927) I.L.R. 7 Patna 269.
(17) Govinda Chetti v. Perumal Chetti (1913) I.L.R. 38 Madras 489.
(18) Ibid.
(19) Bradley v. Jameson (1882) I.L.R. 8 Calcutta 580.
(20) (1923) I.L.R. 45 Allahabad 526.

revision with an order issued under it. In P. T. Chandra v. The Emperor[21] it was held that the propriety of the order as well as its legality can be considered by the High Court in revision. It was observed in the same case that the power conferred by this Section is a discretionary one and being large and extraordinary, it should be used sparingly and only where all the conditions prescribed are strictly fulfilled.

The Indian Post Office Act, 1898, enacted an emergency provisio granting the Government power to intercept postal articles. Section 26 of the Act, as amended in 1912, provided that on the occurrence of any public emergency or in the interests of public safety or tranquillity, the Governor-General in Council or the Local Government or any officer specially authorised in this behalf could, by an order in writing, direct that any article in course of transmission by post should be intercepted or detained or disposed of in such manner as the authority issuing the order might direct. A certificate from the Governor-General in Council or the Local Government was to be conclusive proof whether there was an emergency or whether any act done under the Section was in the interest of public safety or tranquillity.

A similar provision with regard to telegraph messages was already in the Statute Book. Under Section 5 of the Indian Telegraph Act, 1885, it was also provided that on the occurrence of any public emergency or in the interests of public safety, the

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(21) (1942) I.L.R. Lahore 510.

Government could take temporary possession of any telegraph established, maintained or worked by any licensed person.

Another emergency measure was enacted with the passing of the Criminal Law Amendment Act (XIV of 1908) which provided for the more speedy trial of certain offences and for the prohibition of associations dangerous to the public peace. Part I of the Act introduced a special procedure for the trial of offences under the following sections of the Indian Penal Code: Section 121 (Waging war or attempting to wage war or abetting the waging of war against the Queen), Section 121A (Conspiracy to commit any of the offences punishable under Section 121), Section 122 (Collecting men, arms or ammunition or otherwise preparing to wage war with the intention of either waging or being prepared to wage war against the Queen), Section 123 (Concealing the existence of a design to wage war against the Queen with intent to facilitate the design), Section 124 (Assaulting or overawing Governor-General, Governor etc. with intent to compel or restrain the exercise of any lawful power), Section 131 (abetting mutiny, or attempting to seduce a soldier, sailor or airman from his duty), Section 132 (abetment of mutiny if mutiny is committed in consequence of the abetment) and Section 148 (rioting armed with deadly weapons).

Section 4 of the Act provided that "the accused shall not be present during an inquiry made by a Magistrate, unless the Magistrate so directs, nor shall he be represented by a pleader during such an inquiry, nor shall any person have any right of access to the Court of the Magistrate while he is holding such inquiry". No person was

to be released on bail if there appeared to be sufficient grounds for further inquiry into the guilt of such person. Evidence of any witness taken by a Magistrate in proceedings before him could be treated as evidence at the trial if the witness was dead or could not be produced andif the High Court had reason to believe that his death or absence had been caused in the interests of the accused. The trial was to be before a Special Bench of three judges of the High Court, without any jury. The Special Bench was required to apply the provisions of Chapter XX(1) of the Code of Criminal Procedure, which lays down the procedure to be followed in sessions trials, with such modifications as were rendered necessary by the absence of a jury or assessors.

Part II empowered the Governor-General in Council to declare an association unlawful if, in his opinion, that association interfered, or had as its object interference with the administration of the law or with the maintenance of law and order or if it constituted a danger to the public peace. Membership of such an association was punishable by imprisonment for six months, with or without fine, while management or assistance to the management was punishable by imprisonment for three years, with or without fine.

The Indian Press (Emergency Powers) Act, 1931, was passed to provide for the better control of the Press and of unauthorised news sheets and newspapers in view of the spread of the terrorist movement in the country, the increasing number of crimes committed in pursuance of such movement and the encouragement given by some sections of the Press to the movement. It was stated in the objects

and reasons that it was "the practice of a section of the Press to give direct or indirect incitement to crimes of violence and in particular to encourage crimes of a terrorist character by eulogy of those guilty of such crimes". The Act was to be in force in the first instance for one year only, but the Governor-General in Council was empowered to extend its duration for two years, by two consecutive annual extensions. The Act provided for control of the Press, not by the usual continental method of prohibiting publication except after approval by a censor, but by the equally effective British method of requiring heavy deposits from owners of printing presses and publishers of newspapers and by the forfeiture of such deposits and the confiscation of such presses under executive orders.

The Act, as amended in 1932, was intended to provide "for the better control of the press"(22).

Section 3 provided that any person keeping a printing press might be required to deposit with a District Magistrate or Chief Presidency Magistrate an amount not exceeding one thousand rupees. Under Section 4 the security could be declared forfeit by the Provincial Government, if it appeared to that Government that the press was being used for the purpose of printing or publishing any newspaper or other document which incited or encouraged the commission of any cognizable offence involving violence or expressed

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(22) The words within quotation marks were substituted for the words "against the publication of matter inciting to or encouraging murder or violence" by the Criminal Law Amendment Act, 1932.

approval of any such offence or person who was alleged to have committed such offence. If the deposit had not already been paid, the press itself could be forfeited in the same circumstances. The Criminal Law Amendment Act, 1932, which amended the Section included a wider variety of circumstances in which forfeiture could be effected, as where the document printed or published tended directly or indirectly, among other things, "to bring into hatred or contempt His Majesty or the government established by law in British India or the administration of justice in British India or any class or section of His Majesty's subjects in British India or to excite disaffection towards His Majesty or the said government" or "to promote feelings of enmity or hatred between different classes of His Majesty's subjects" or to encourage or incite any person to interfere with the administration of the law or with the maintenance of law and order, or to commit any offence or to refuse or defer payment of any land revenue, tax, rate or cess or other dues or amount payable to government or any local authority, or any rent of agricultural land, or anything recoverable as arrears of, or along with, such rent.

When the security was declared forfeited, a further security was required to be deposited. If the press was again used for printing or publishing newspapers or other documents of the nature described in Section 4 it was provided under Section 6 that the further security so deposited and all copies of the publication could be forfeited to government. After the expiry of ten days from the issue of a notice of forfeiture of such further deposit, the declaration made in respect of such press under the Press and

Registration of Books Act, 1867, would be deemed to be annulled.

Similar provisions in regard to deposit and forfeiture were enacted under Sedtions 7, 8, 9 and 10 in relation to publishers of newspapers.

If a deposit was not made when so required by the Provincial Government or the Magistrate, the keeper of the press or the publisher of the newspaper, as the case might be, would be liable to punishment by fine not exceeding two thousand rupees or by simple imprisonment for a term not exceeding six months or by both.

Section 15 empowered the Magistrate to authorise, by order in writing and "subject to such conditions as he may think fit to impose" any person to publish news sheets from time to time. He could at anytime revoke such order. Newssheets and newspapers which were published without prior authorisation by Magistrate could, under Section 16, be seized and destroyed on the orders of a Magistrate not below the rank of a Magistrate of the first class. Section 17 provided that presses producing unauthorised newssheets and newspapers could be seized and declared forfeit to the government. Dissemination of such unauthorised newssheets and newspapers was declared a cognizable offence punishable by imprisonment for six months or with fine or with both.

It was provided under Section 23 that the keeper of a printing press or the publisher of a newspaper who had been ordered to deposit security or any person having an interest in any property in respect of which an order of forfeiture had been made could within two months from the date of such order apply to the High Court to set aside such

order and the High Court would decide whether the newspaper or other document did or did not contain words, signs or visible representation of the nature described in Section 4. Such application would be heard and determined by a Special Bench of the High Court composed of three Judges.

In Mudaliar v. Secretary of State,(23) an application to set aside two orders requiring the deposit of security in respect of a printing press and a newspaper succeeded, as the court held that "to find out whether the words tend to have a certain effect one must look not merely to the words themselves, but also to the circumstances under which they were published and the audience to which they were addressed".(24) The case arose out of a leading article in an insignificant Tamil newspaper published from Rangoon, in which appeared certain militant and seditious words like "Be vigilant! Let the grip be on the handle of the sword of Ahimsa (non-violence). As soon as order is issued let us unsheath thirtythree crores of swords and lift them up," purporting to exhort the readers to support the political movement in India. Page, C.J., said that he could not persuade himself that the effect of the language used in the offending passages upon the few Tamils in Rangoon who might read the insignificant newspaper would be to induce them to commit any criminal act of violence. "No doubt", the learned Chief Justice observed, "the intention of the applicant in publishing this

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(23) A.I.R. 1932 Rangoon 69.
(24) id. 72.

article, and the language in which it is couched is incriminatory and seditious, but taking all the circumstances into account, and bearing in mind the occasion upon which the words were used, the place where they were published, the context in which they appear and the persons to whom they are addressed, in my opinion, it cannot fairly or reasonably be held that the words of which complaint is made 'incite to or encourage or tend to incite to or encourage the commission of any offence of murder or any cognizable offence involving violence' or otherwise within the ambit of Section 4(1) of the Act".(25) Cunliffe, J., also was of the view that the intention of the writer of the article was frankly seditious, but His Lordship said that the nature of his offence, unlike many criminal offences, did not rest on intention, but on the effect produced on the minds of others. The learned Judge, therefore, while concurring with the Chief Justice in allowing the application, remarked that "it is no fault of his (the applicant's) that he escapes the provisions of the Statute".(26)

In Rana Shankar Tewari v. State(27) which arose from an alleged breach of Section 15, it was observed by the Allahabad High Court in regard to the absolute discretion granted to the District Magistrate whose decision to grant or refuse a permit was not subject to review: "Absence of review, judicial or otherwise, of executive discretion

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(25) ibid.
(26) ibid.
(27) A.I.R. (1954) Allahabad 562. Though these observations were made in relation to the Section vis-a-vis Article 19(2) of the Constitution of India, the point about review of executive discretion deserves attention.

is undoubtedly not an exceptional feature of a statute and a restriction may not be said to be unreasonable solely because no provision is made for review. But the absence of a provision for review is certainly a factor to be taken into consideration in deciding whether a restriction is reasonable or not".

This Act was repealed in 1951 by the Press (Objectionable Matters) Act (No.56 of 1951).

The Criminal Law Amendment Act, 1932 (commonly known as the Ordinance Act) was intended to supplement the criminal law, by reproducing in the form of amendments to existing Acts certain provisions of the Special Powers Ordinance (X of 1932) and including provisions against associations dangerous to the public peace, and against certain forms of intimidation and provisions to secure greater control of the Press. It sought to amend the Press Act of 1931 and also to amend temporarily the Criminal Law Amendment Act, 1908. "The Civil Disobedience Movement, (it was stated in the objects and reasons) had made it necessary to supplement the Criminal Law by means of certain ordinances. The Special Powers Ordinance which combines the powers taken by the earlier Ordinances lapses on 29th December 1932..... In the absence of certain of the powers at present existing; it is not difficult to start or revive subversive movements." The Act sought to penalise the dissemination of the contents of proscribed documents and made picketing a penal offence. It empowered the Local Government to take possession of places used for the purposes of an unlawful association and to forfeit the funds of such association. The jurisdiction of the courts was barred in

cases of such taking possession or forfeiture. It authorised the Government to order his parent or guardian to pay the fine imposed on a young person.

The Bengal Criminal Law (Supplementary) Act, 1932, was passed following the attempt to murder the Governor of Bengal. It empowered the Local Government to direct any person to be committed to custody in any jail in British India; in effect the Government of Bengal was given power to put any person in a jail outside Bengal. The Act also provided that the powers conferred by Section 491 of the Code of Criminal Procedure should not be exercised in respect of any person arrested, committed to or detained in custody under the Act.

During the Civil Disobedience Movement of 1930, a no-rent and no-revenue campaign had been vigorously preached as a political measure by Congress adherents in certain districts of the United Provinces. According to a statement issued by the Government of the United Provinces, "crops attached on judicial decrees were forcibly removed; there were many cases of intimidation, either by violence or by social boycott directed against tenants who paid rent. Allahabad district reported cases of the burning of crops of tenants who had paid up their dues.(28) The Unlawful Instigation Ordinance, 1932, was therefore promulgated. It provided against instigation to the illegal refusal of the payment of notified liabilities to the Government. In the same year, under Section 3 of the United

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(28) Statement issued on December 14, 1931, paragraph 5.

Provinces Special Powers Act, 1932, it was made penal for a person to instigate a class of persons not to pay dues recoverable as arrears of land revenue.

In 1935 Lord Willingdon, the Governor-General, passed by certification under 67-B of the Constitution Act of 1919 a Criminal Law Amendment Act, which removed the temporary character of the Amendment Act of 1932[29] and made permanent certain provisions of the Indian Press (Emergency Powers) Act, 1931, affecting the Press and Registration of Books Act, 1867. The Governor-General was of the opinion that the Act was essential for the interests of British India because of the threat of civil disobedience, terrorism, communism and communal hatred. As to communism, he was satisfied that it formed 'a very real, though possibly not an immediate, menace to the peace of the country'.

The same year the Parliament of the United Kingdom passed the Government of India Act, 1935, which virtually repealed the earlier Constitution Acts.[30] In the next chapter we shall notice the emergency provisions made in the new Act.

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(29) It was to expire on 18 December, 1935.

(30) The Preamble and Subsection (1) of Section 47 (which dealt with the short title) of the 1919 Act, and Section 6 (Transfer of India stock by deed) and Section 8 (Short title, commencement, and construction) of the Amendment Act, 1916, were retained. To many critics, the preservation of the smile of the Cheshire cat after its disappearance seemed to be the best parallel to this retention of the Preamble. (See Keith, Constitutional History of India, page 316)

CHAPTER IV

EMERGENCY POWERS UNDER THE GOVERNMENT OF INDIA ACT, 1935

i. General Features of the Act

The general features envisaged by the Government of India Act, 1935, were

(i) The Union of British Indian Provinces with the Princely States in a Federation,

(ii) A considerable degree of autonomy and responsible government in the Provinces.

(iii) A measure of responsibility at the Centre.

(iv) The theory of Indo-British partnership in Government and also in trade.

(v) Safeguards in the form of special responsibilities and a reserve of discretionary power assigned to the Governor-General and the Provincial Governor.

The assent of the Ruler was a pre-requisite of a Princely State acceding to the Federation, (1) while the statute itself made the Governor's Provinces units of the Federation by assigning to them powers previously vested in the Centre. "The transformation of the Provinces from their previous position as bodies subordinate to the Government of India into units in a Federation with direct devolution of their powers from Parliament is an accession to their status, while in the case of the

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(1) No Princely State acceded to the Federation during the British period. On April 1, 1937 only the provincial part of the Act and the parts distributing powers were brought into operation.

Rulers of the States, the powers ceded to the Federation to legislate within their states is a derogation from their authority". (2) The union of disparate elements, the Provinces with their democratic institutions and the Princely States with their autocratic governments, appeared incongruous.

The Act made a division of legislative powers between the Central Government and the Provinces, giving three elaborate lists of subjects:

(i) The Federal Legislative List

(ii) The Provincial Legislative List

(iii) The Concurrent Legislative List

An Act passed by the Federal Legislature on a subject in the third list would normally prevail over a Provincial Act on the same subject, but the latter would be valid, if it were reserved for and assented to by the Governor-General. Powers not enumerated on the lists would be assigned by the Governor-General, as occasion arose, either to the Federal or to the Provincial Legislature.

To facilitate effective legislation in emergencies, the Act provided that the Centre could, with the previous consent of the Provincial Governors, legislate on Provincial subjects to give effect to treaties and international agreements, but on the treaty or agreement ceasing to have effect, a Provincial Legislature might repeal such provisions of

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(2) N. Raja Gopala Aiyangar, The Government of India Act, 1935, Introduction, page XLII.

the legislation as were within its legislative power.

The Act established a Federal Court with original and appellate jurisdiction over the Provinces as well as the Indian States.

The Provincial autonomy introduced by the Act meant

(i) the possession by the Provincial Executive and Legislature of exclusive authority within the Province in specified spheres in respect of which they were generally free from control by the Central Executive and Legislature;

(ii) responsibility of the Provincial Ministers to the Provincial Legislature in regard to matters within the provincial sphere.

The measure of responsibility contemplated for the Centre was strictly limited, because defence and external affairs were reserved subjects and army expenditure which amounted to eighty per cent of the Federal revenues were outside the purview of ministerial and legislative control. As A. B. Keith puts it, "In the Federal Government also the semblance of responsible government is presented. But the reality is lacking, for the powers in defence and external affairs necessarily, as matters stand, given to the Governor-General limit vitally the scope of ministerial activity, and the measure of representation given to the rulers of the Indian States negatives any possibility of even the beginnings of democratic control".(3)

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(3) quoted in Raja Gopala Aiyangar, op. cit., pages XIII - XIV.

With a view to promoting Indo-British partnership in trade any legislation discriminating against Companies incorporated in the United Kingdom but trading in India was forbidden under the Act, so long as the Government of the United Kingdom refrained from discriminating against Indian Companies trading in the United Kingdom.

One important feature of the Constitution Act was the provision made for elaborate safeguards. They fall, in the main, under two categories. One was the denial of legislative power to the Indian legislatures in regard to a number of subjects. The other was the grant of reserve powers to the Governor-General and the Provincial Governors to override their ministers and legislatures in certain circumstances.

In the following section we shall notice their reserve powers and special responsibilities.

ii. Special Responsibilities and Reserve Powers of the Governor-General and the Provincial Governors.

Relations with the princely states except in so far as they covered matters surrendered in the prince's Instruments of Accession were dealt with by the "Crown Representative", an office held for so long as it existed by the Governor-General. Defence, External Affairs, Ecclesiastical Affairs and the administration of Tribal areas were subjects exclusively reserved to the Governor-General to be administered in his discretion.(1) The remaining Federal subjects were assigned to the Council of Ministers. But even within these subjects which constituted the ministerial field, in certain matters the Governor-General had special responsibilities, in the due discharge of which he was authorised to act in his individual judgement.(1a)

(1) Though in regard to reserved subjects he was not bound to consult his Ministers, the Instrument of Instruction issued to the Governor-General in the name of the Crown in accordance with the ~~powers~~ provisions of the Act enjoined the Governor-General to encourage the practice of joint consultation between his counsellors and ministers even in these matters.

(1a) The words "individual judgement" are used in relation to actions by the Governor-General in his individual judgement in the ordinary sense of the word within the ambit in which normally he would be acting on the advice of his Ministers. The words "in his discretion" are used where the Governor-General is acting on his own judgement outside the ministerial field. Putting it differently, the words "individual judgement" are used in respect of powers within the area in which normally in ordinary times the Governor-General would be acting on the advice of his Ministers. The words "in his discretion" are used in respect of powers and functions outside the ministerial field. (G. N. Joshi, The New Constitution of India, page 128) When acting "in his discretion" the Governor-General was obliged to consult his Ministers. When acting in his individual judgement he was not.

These matters included

(i) The prevention of any grave menace to the peace or tranquillity of India or any part thereof,

(ii) the safeguarding of the financial stability and credits of the Federal Government,

(iii) the safeguarding the legitimate interests of minorities,

(iv) the protection of the rights of public servants, past and present, and their dependants,

(v) prevention of discriminatory action against British or Burmese goods,

(vi) the protection of the rights of Indian States and their rulers,

(vii) the securing that the due discharge of his functions with respect to matters in which he was required to act in his discretion or to exercise his individual judgement was not prejudiced or impeded by any course of action taken with respect to any other matter.

In so far as any special responsibility of the Governor-General was involved, he was required to exercise his individual judgement as to the action to be taken in the performance of his functions.

The Act did not restrict the Governor-General's special responsibility for the prevention of any grave menace to the peace to cases in which the menace arose from subversive movements or activities tending to crimes of violence.(2)

(2) Eddy and Lawton, India's New Constitution, page 38.

The imposition of special responsibilities entailed the grant of special powers to the Governor-General. Apart from a number of administrative powers like making appointments in the Defence Department, summoning and proroguing the Federal Legislature and dissolving the Federal Assembly, he was given wide powers of legislation. In certain matters he had negative power of legislation, in that he could not only withhold assent to a Bill passed by the legislature or reserve it for His Majesty's consideration, but also refuse sanction for the introduction of any Bill or amendment in respect of such matters. For instance, the previous sanction of the Governor-General, in his discretion, was required for the introduction of a Bill which

(i) repealed, amended, or was repugnant to any provision of any Act of Parliament extending to British India which the Indian Legislature was competent to repeal or amend,

(ii) repealed, amended or was repugnant to any Governor-General's or Governor's Act, or any ordinance promulgated in his discretion by the Governor-General or a Governor,

(iii) affected matters in which the Governor-General was required by or under the Act to act in his discretion,

(iv) enlarged the appellate jurisdiction of the Federal Court or related to a number of other specified matters.

The Governor-General was given positive powers of legislation by ordinance and by Act. The former was of two kinds.

(i) An Ordinance could be issued on the advice of the Council of Ministers at a time when the Legislature was not in session and immediate action was considered necessary. Such an ordinance would expire after six weeks from the re-assembly of the Legislature unless revoked earlier by resolutions of both Chambers, or by the Governor-General himself, on ministerial advice. (Section 42)

(ii) An Ordinance could be promulgated by the Governor-General in his discretion. If at any time the Governor-General was satisfied that circumstances existed which rendered it necessary for him to take immediate action for enabling him satisfactorily to discharge his functions in respect of which he was required to act in his discretion or in the exercise of his individual judgement, he could promulgate an ordinance. Such an ordinance could continue in operation for six months only, unless extended by a subsequent ordinance for a further period not exceeding six months. (3) (Section 43)

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(3) In re Valyuddin AIR 1950 MAD. 324

Apart from this power of temporary legislation, the Governor-General was empowered to enact, in his discretion, permanent laws known as Governor-General's Acts. If it appeared to the Governor-General that for the satisfactory discharge of his functions in his discretion or individual judgement, it was essential that provision should be made by legislation, he might by message to the Legislature explain the circumstances which rendered legislation essential and either

(i) enact forthwith, as a Governor-General's Act, a Bill containing such provisions as he considered necessary; or

(ii) attach to his message a draft of the Bill which he considered necessary.

Where the latter course was adopted, he could, after the expiration of one month, enact the Bill as a Governor-General's Act, either in the form of the draft proposed by him to the Chambers or with such amendments as he deemed necessary, after taking into consideration the suggestions of either Chamber, if any, in regard to the Bill. A Governor-General's Act was to have the same force and effect as an Act of the Federal Legislature. It could be disallowed by the Crown. (Section 44) Every Governor-General's Act was to be communicated to the Secretary of State and laid by him before each House of

Parliament(3a) It must be noted that this power of enacting permanent laws is exercisable only in the field of his functions where he was required to act in his discretion or in his individual judgement. (4)

With the reservation of certain departments to the Governor-General and with the special responsibilities enjoined on him, the grant of powers of legislation contemplated in Section 43 and 44 was probably inevitable.

The Governor of a Province, like the Govenor-General, had certain special responsibilities and reserve powers under the Act.

The Constitution Act sought to ensure that law and order were withdrawn from the field of party politics and interference by members of the party in power in the legislature. (5)

(3a) From the events that led to the setting up of the Select Committee on Statutory Instruments (as it is now called) in the UK, it could be seen how ineffective this control would be. In 1946 the Home Secretary apologetically explained to the House of Commons that twenty three sets of regulations extending over a period of three years had by mistake never been laid as required. See also Report on Indian Constitutional Reforms by Montagu and Chemsford in which they said, "Parliament may sometimes be a sleepy guardian of Indian interests.... If resentment has been felt in India that there has been a tendency on occasions to treat Viceroys of India as 'agents' of the British Government, it is fair to add that there have been periods when Viceroys have almost regarded Secretaries of State as the convenient mouthpiece of their policy in Parliament. (1925 Impression, page 33).

(4) His powers of legislation in cases of emergency will be discussed in the next section.

(5) Venkoba Rao, The Indian Constitution, page 63.

Among some provisions made to that end, a few special responsibilities were imposed on the Governor. They included the prevention of grave menace to the peace or tranquility of the province, the protection of the interests of the minorities, of the rights of the civil servants and their dependants, and of the Indian States and their rulers and the execution of the Governor-General's orders or directions under Part VI(6) of the Act. In matters for which he had a special responsibility he was required to act in his individual judgement, that is, he was not obliged to consult his Ministers. His functions in these matters would chiefly be exercised through officers acting under his orders. In matters for which he had no special responsibility, he was expected to act in his discretion, that is, he was obliged to consult his Ministers, but was not bound to follow their advice. In the discretionary field were included matters like the choice and dismissal of Ministers, summoning, proroguing and dissolving the Legislature, assent and reservation of Bills, and measures to deal with terrorism. His functions in the field would normally be exercised through his Ministers. If, in his opinion, terrorist activities endangered the peace of the Province, he could direct, with a view to preventing such activities, that any of his functions should be exercised in his discretion. Though he was obliged

(6) Part VI deals with administrative relations between the Centre and the Provinces.

to obey any direction received from the Governor-General in accordance with the provision of Part VI (Administrative Relations), Whether a particular matter was one in which he should act in his discretion or exercise his individual judgement was a question for him to decide in his discretion. Every Secretary of the Government was therefore obliged to inform his Minister and every Minister the Governor of any matter likely to involve the Governor's special responsibilities.

For the effective execution of these responsibilities, the Governor was given a reserve of legislative power. He was authorised to promulgate ordinances and enact Acts in the circumstances, in which, the Governor-General could, mutatis mutandis, exercise these powers. But he could not, without instructions from the Governor-General in his discretion, promulgate an ordinance in the ministerial field, if a Bill containing the same provisions would have required the previous sanction of the Governor-General for its introduction, or if he would have thought it necessary to reserve a Bill having the same provisions for the consideration of the Governor-General. The promulgation of ordinances by the Governor in respect of matters in which he was required to exercise his discretion or individual judgement, required the concurrence of the Governor-General in his discretion. If the Govenor considered it impracticable to obtain in time such concurrence he could dispense

with it, but in that case the Governor-General might, in his discretion, direct the Governor to withdraw the ordinance. Similarly the enactment of a Governor's Act required the concurrence of the Governor-General in his discretion.

Moreover, the Governor had a negative power of legislation. It was provided that no Bill which repealed, amended or was repugnant to a Governor's Act or any ordinance promulgated by the Governor in his discretion, or which repealed, amended or affected any Act relating to the Police Force could be introduced in the Provincial Legislature without the previous sanction of the Governor. (7)

The scheme of these provisions was that in matters in which the Governor had to act in his discretion or individual judgement, he was to be under the control of the Governor-General and that in similar matters the latter was considered to be under the control of the Secretary of State. Thus in regard to these matters, there was forged an indirect chain of responsibility running from the Provincial Governor and ending in Whitehall.

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(7) This provision was in addition to the requirement about the previous sanction of the Governor-General for the introduction of Bills in the Provincial Legislature on some specified subjects.

iii. Emergency Provisions in the Act

Apart from the Governor-General's power in the Constitution Act of 1919 to certify Bills as essential to the discharge of his special responsibilities, whereupon they were deemed to have been passed by the legislature[1] and his power to promulgate Ordinances in cases of emergency[2], which were kept alive until the establishment of the Federation by the provisions in the ninth schedule of the Act of 1935, and the power granted to the Governor-General and the Governors to promulgate Ordinances and enact Acts under the latter Act, other emergency provisions were incorporated in the last-named Constitution Act. As the Act envisaged autonomy for the Provinces, some emergency powers were granted to the Provincial Governor, in addition to those granted to the Governor-General.

The Act contemplated three types of emergencies

(i) War or internal disturbance threatening the security of India[3]

(ii) Breakdown of the Constitutional machinery in the Centre or the Provinces[4]

(iii) Terrorist activities endangering the peace of a Province[5]

Section 102 provided that if the Governor-General had in his discretion declared by Proclamation that a grave emergency existed whereby the security of India was threatened, whether by war or

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(1) Section 67 - B
(2) Section 72
(3) Section 102
(4) Sections 45 and 93
(5) Section 57

internal disturbance, the Federal Legislature was to have power to make laws for a Province with respect to any of the matters enumerated in the Provincial Legislative List. But no Bill or amendment for these purposes was to be introduced or moved without the previous sanction of the Governor-General. Before giving his sanction the Governor-General was to satisfy himself that the provisions proposed was a proper provision in view of the nature of the emergency.

A Provincial Legislature could continue to exercise its legislative functions despite the proclamation of a state of emergency. If, however, any provision of a Provincial law was found to be repugnant to any provision of a Federal law which the Federal Legislature had power to make during the continuance of the emergency, the Federal law, whether passed before or after the Provincial law, was to prevail, and the Provincial law to the extent of the repugnancy, but so long only as the Federal law continued to have effect, was to be unenforceable.

A Proclamation of Emergency was to be communicated forthwith to the Secretary of State and laid before him before each House of Parliament. It would cease to operate at the expiration of six months, unless before the expiration of that period it had been approved by Resolution of both Houses of Parliament.

A Proclamation of Emergency could be revoked by a subsequent Proclamation.

A law made by the Federal Legislature which that Legislature would not but for the issue of the Proclamation of Emergency have

been competent to make would cease to have effect on the expiration of six months after the Proclamation had ceased to operate, except as respect things done or omitted to be done before the expiration of that period.

Section 102 only dealt with a state of emergency in which the security of India was threatened either as a result of war or of internal disturbance. In order to overcome the inherent defect in a federal constitution, the difficulty of dealing comprehensively with urgent matters resulting from a grave emergency, the Centre was given the right to take over for the necessary time the legislative field allotted to the Provinces.(6)

The intention in enacting this Section was "to give the Federal Legislature and in consequence the Governor-General for the purposes of his personal legislative power extensive powers on the lines of the English Defence of the Realm Act".(7)

The emergency power under this Section was not limited to defence in the sense of repelling external aggression; it covered internal disturbance also. But the internal disturbance, according to the J. P. C. Report, "should be defined in terms which will ensure that for this purpose it must be comparable in

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(6) Parliamentary Debates. Volume 299. Cal. 1935.
(7) J. P. C. Report, paragraph 238.

gravity to the repelling of external aggression.(8)

Further, Section 126(5) empowered the Governor-General, acting in his discretion, to issue orders to the Governor of a Province as to the manner in which the executive authority thereof was to be exercised for the purpose of preventing any grave menace to the peace or tranquillity of India or any part thereof.(8a)

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(8) ibid. "We recognise", the Committee reported, "that the inclusion of internal disturbance.....among the circumstances, which in an emergency, will enable the Governor-General to confer upon himself, or upon the Federal Legislature, as the case may be, the power to invade the exclusively provincial sphere and override provincial legislation within that sphere may be criticised as a derogation from the general plan of provincial autonomy which we advocate; but in the absence of such power we could not regard the Governor-General as adequately armed to discharge the ultimate responsibility which rests upon him for the peace and tranquillity of the whole of India. (Paragraph 238).
The Pakistan Constitution of 1956 specifically conferred the exercise of this power to an "internal disturbance beyond the power of the Provincial Government to control". (Article 191(1))

(8a) Orders under this Section were issued to the Governors of United Provinces and Bihar in 1938 when the Congress ministries in these Provinces insisted on the release of political prisoners. The ministers resigned, when, under the orders, the release was refused.

Section 45 provided for discretionary government in case of failure of the Constitutional machinery in the Federation and Section 93 made similar provisions for such failure in the Provinces. Under Section 45, if at any time the Governor-General, in his discretion, was satisfied that a situation had arisen in which the Government of the Federation could not be carried on according to the provisions of the Act, he might by proclamation, declare that his functions would, to such extent as specified in the Proclamation, be exercised by him in his discretion and assume to himself all or any of the powers vested in or exercisable by any Federal body or authority, except the Federal Court. A Proclamation made under this Section might contain such incidental and consequential provisions as might appear to the Governor-General to be necessary or desirable for giving effect to it, including provisions for suspending in whole or in part the operation of any provisions of the Constitution relating to any Federal body. The Governor-General, however, was not enabled to suspend, either in whole or in part, the operation of any provision of the Act relating to the Federal Court. When such a Proclamation was issued, it was to be communicated to the Secretary of State and laid by him before each House of Parliament and unless it was a Proclamation revoking a previous Proclamation, (9) it would cease to operate at the

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(9) One Proclamation could be revoked or varied by another. Section 45 (2)

expiration of six months. It was provided, however, that if and so often as a resolution approving the continuance in force of such a Proclamation was passed by both Houses of Parliament, the Proclamation, unless revoked, was to continue in force for a further period of twelve months from the date on which it would otherwise have ceased to operate. If at any time the Government of the Federation had for a continuous period of three years been carried on under such a Proclamation, then, at the expiration of such a period, the Proclamation would cease to have effect and the Government of the Federation was to be carried on according to the other provisions of the Act, subject to any amendment of it which Parliament might make. If the Governor-General, by a Proclamation under this Section, assumed to himself any power of the Federal Legislature to make laws, any law made by him in the exercise of that power would continue to have effect for two years after the revocation or expiration of the Proclamation, unless sooner repealed or re-enacted by the appropriate Legislature.

Under this Section, in the event of a breakdown in the machinery of the Federal Legislature or the Federal Council of Ministers, the Governor-General could, to such extent as he would declare, supersede the Ministry or supersede the Legislature and the Ministry.

Where the Governor-General assumed to himself, under the provisions of this Section, the powers of the Federal Legislature, his legislative powers would be subject to the same limitation as those of the Federal Legislature and the validity of the laws passed by him could be challenged in Courts.

Section 93 provided that the Governor of a Province could issue Proclamations in the event of a failure of Constitutional machinery in the Province on practically the same terms as the Governor-General (10). No Proclamation under this Section could, however, be made by the Governor without the concurrence of the Governor-General.

In 1939 Proclamations under Section 93 were issued in seven Provinces. In pursuance of its policy of resisting the utilisation of Indians and India's resources in what it called Britain's wars and by reason of the failure of the British Government to assure India's independence at the end of the war and to take immediate steps to transfer power at the Centre to elected Ministers, the Indian National Congress called on Congress Ministries to resign as a first step in non-co-operation with the war. (11) In all the Congress provinces, except Assam, the local

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(10) "In the event of a breakdown of the Constitutional machinery, the Governor is not bound to take over the whole Government of the Province and administer it himself on his own undivided responsibility The intention is to provide also for the possibility of a partial breakdown and to enable the Governor to take over part only of the machinery of government, leaving the reminder to function according to the ordinary law. Then the Governor might, if the breakdown were in the legislative machinery of the Province alone, still carry on the government with the aid of his Ministers, if they were willing to support him; we are speaking of course of such a case as the refusal of the Legislature to function at all, and not merely of lesser conflicts or disputes between it and the Governor "(J. P. C. Report, paragraph 109).

(11) M. R. Masani in India's Constitution at Work by C. Y. Chintamani and M. R. Masani, Page 158.

Assembly passed a resolution, endorsing the Congress attitude to war and the ministries thereafter resigned. The Madras Cabinet was the first to tender its resignation. The Governor, unable to find an alternative ministry, issued a Proclamation under Section 93, stating that the Government of the Province could not be carried on in accordance with the provisions of the Constitution and that he had therefore assumed to himself all powers vested in the Provincial Legislature. He appointed three members of the Civil Service to act as his advisers. A similar process was gone through in six other Provinces. In Assam, the Congress Coalition Ministry resigned, but an alternative Ministry was formed. In the Punjab, Bengal and Sind alone provincial auntonomy continued to function.

Section 57 provided for a state of emergency arising from a threat to peace and tranquillity in a Province due to terrorist activities. If it appeared to the Governor of a Province that the peace and tranquillity of the Province was endangered by the operation of any person committing or conspiring, preparing or attempting to commit, crimes of violence which, in the opinion of the Governor, were intended to overthrow the government as by law established, he could direct that, for the purpose of combating such operations, his functions, to such extent as might be specified in the direction, would be exercised by him in his discretion, and until otherwise provided by a subsequent direction, those functions should to that extent be exercised by him accordingly.

In such circumstances, he was authorised to appoint, in his discretion, an official as a temporary member of the Legislature to act

as his mouthpiece in that body, and any official so appointed had the same powers and rights, other than the right to vote, as an elected member.(12)

This section "contemplates a situation arising not so serious as that envisaged in Section 93 where provision is made for the contingency of a breakdown in the Constitution where the Parliamentary system can no longer continue in operation. In such a case therefore it is only necessary to take over one department or two without bringing to an end the whole machinery of Provincial Government". (13)

The powers given to the Governor of a Province under this Section, it may be noted, were in addition to his powers in relation to his special responsibility for the prevention of any grave menace to the peace and tranquillity of the Province. (14)

In 1939 Lord Linlithgow, the Governor-General, was anxious that the Government of India should be vested with special powers in the event of war for the purpose of co-ordinating the activities of the Central and Provincial Governments.(15)

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(12) Thus the principle adopted in the Federal Centre that where there was a reserved department, the Governor-General would have his Counsellor to take part in the discussions in the Legislature affecting such department, was extended to the provincial field.

(13) Raja Gopala Aiyangar, The Government of India Act, 1935, Page 82.

(14) The following remarks in The Economist, October 17th, 1953, made in another context, deserve notice in this connexion. "In theory, the Governor's reserve powers exist for the purpose of preserving good government if the local politicians prove intractable. If colonial experience has shown anything, it is that the reserve powers of the Governor cannot be brought down to the level of the market place. As a weapon behind closed doors they are a useful deterrant, but they cannot be brought into the open without giving agitators the opportunity of using them as a whipping-boy for working up hate."

(15) V. P. Menon, The Transfer of Power in India, Page 59.

An amending Act to the Constitution Act of 1935 was therefore passed by the U. K. Parliament. The Government of India (Amendment) Act, 1939, empowered the Central Government not only to give directions to a Province as to the manner in which its executive authority should be exercised, but also to make laws conferring executive authority in respect of provincial subjects on the Central Government and its officers.(16)

By the India and Burma (Emergency Provisions) Act, 1940 which amended certain provisions of the Government of India Act, 1935, it was provided that Ordinances under Section 72 of the Government of India Act would continue to have effect beyond the period of six months from their promulgation.(17) It was further provided that ordinances could be issued affecting the Army Act, the Air Force Act, and the Naval Discipline Act, notwithstanding the provision in Section 72 that the power of making ordinances was subject to the same restrictions as the power of the Indian legislature to make laws.(18) Section 111 of the Act of 1935 which exempted certain British subjects from certain Indian laws was not to apply to any Ordinance made during the period when the above provisions were in force.

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(16) The Congress protested against this amending Act 'which strikes at the very basis of provincial autonomy and renders it a farce in case of war'. - quoted in V. P. Menon, ibid, Page 59.
(17) Section 1 (3)
(18) Section 1 (3) (a).

The India (Proclamation of Emergency) Act, 1946, amended Section 102 of the Government of India Act, 1935, which enabled the Central Legislature, when a proclamation of emergency was in force, to make laws for a Province with respect to any matters enumerated in the Provincial List by providing under Section 1 that the Central Legislature could "make any laws, whether or not for a Province or any part thereof, with respect to any matter not enumerated in any of the lists in the Seventh Schedule".

The Act was to be deemed to have come into operation on the commencement of the Provincial Part of the Constitution Act.

The Act also provided that where before the passing of this Act a High Court had given a judgement or made a final order in any civil proceedings involving a question as to the validity of any law passed in India, any party to the proceedings might, within ninety days from the passing of the Act, apply for a review of the proceedings in the light of the provisions of the Act and the High Court or the Federal Court where an appeal had been decided by that Court, was to review the proceedings accordingly.

The India (Central Government and Legislature) Act, 1946, further amended Section 102 of the Constitution Act of 1935. Section 5 of the Act provided that a law made by the Indian Legislature whether before or after the passing of this Act during the continuance in force of a proclamation of emergency, being a law which that Legislature would not, but for the issue of such a proclamation, have been competent to make,

would not cease to have effect on the expiry of six months after the proclamation had ceased to operate, except to the extent to which the Central Legislature would not, but for the issue of the proclamation, have been competent to make it.

Under the Act, during the period of one year beginning with the date on which the proclamation of emergency in force at the passing of the Act ceased to operate or, if the Governor-General by public notification so directed, during the period of two years beginning with that date, the Indian Legislature was enabled to make laws with respect to trade, commerce and unemployment and also laws providing for the continuance of the powers of requisitioning of land in a Province and of compulsory acquisition of land directly and without interposition of any Province. The period during which these powers might be exercised by the Central Legislature could be extended from time to time by a resolution of both Houses of Parliament for a further period of twelve months, but it was not to continue for more than five years from the date on which the proclamation of emergency ceased to operate.

iv. Defence of India Act and Rules

On the outbreak of the Second World War, the Governor-General declared under Section 102 of the Government of India Act, 1935, that a grave emergency existed whereby the security of India was threatened, with the result that the power to legislate on subjects in the Provincial list also was vested in the Centre. Having been thus enabled to make laws for the whole of British India, the Governor-General, by virtue of his power to issue ordinances in cases of emergency under Section 72 in the ninth schedule of the Act, promulgated the Defence of India Ordinance (Ordinance No. V of 1939). This Ordinance was later placed before the Central Legislature and enacted as the Defence of India Act, 1939.

The Act was to remain in force during the continuance of the war and for a period of six months thereafter. By Section 2(1) of the Act the Central Government was empowered to make such rules as appeared to it to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community. Section 2(2) provided that without prejudice to the generality of the powers conferred by Subsection (1), the rules could provide for, or could empower any authority to make orders providing for, all or any of the matters enumerated in the Subsection; which were enumerated under thirtyfive heads, covering every conceivable aspect of the life of the citizen.(1) Subsection 4 and 5 enabled the Central and

(1) M. C. Setalvad, War and Civil Liberties, page 47.

the Provincial Governments to delegate to any officer or authority subordinate to them any power or duty conferred or imposed upon these Governments. Section 3 ... provided that any order made under Section 2 should be valid and enforceable notwithstanding that it was inconsistent with any enactment... other than the Defence of India Act. A number of Acts were temporarily amended by Sections 5 and 6 for the purpose of enhancing penalties for certain offences.

Section 8 enabled the Provincial Governments to set up Special Tribunals, consisting of three members, to try offences under rules made under Section 2 or punishable with death, transportation or imprisonment for a term extending to seven years. The Special Tribunals could take cognizance of offences without the accused being committed to it for trial. (Section 10) It was not necessary for the Special Tribunal to take down the evidence at length in writing, it was only required to cause a memorandum of the substance of the depositions of witnesses to be taken down in the English language. It could, if it considered necessary for the safety of the State, exclude the public from its proceedings. (Section 11) No appeal lay from the sentence of a Special Tribunal, except when the sentence was one of death, or transportation for life or of imprisonment for a term extending to ten years. No court had any authority to revise an order made or sentence passed by a Special Tribunal or to make an order in the nature of habeas corpus under Section 491 of the Code of Criminal Procedure, or to exercise any jurisdiction in respect of the proceedings of a Special Tribunal. It was provided by Section 14 that save as otherwise expressly provided by or under the Act, the

ordinary criminal and civil courts would continue to exercise jurisdiction.(2)

Section 16(1) provided that no order made in exercise of any power conferred by or under the Act was to be called in question in any court. Section 17 conferred an indemnity in respect of acts "in good faith done or intended to be done in pursuance of the Act or any rules made thereunder" - by barring prosecution or other legal proceeding against any person for such acts.

Section 19 made provision for payment of compensation for compulsory acquisition for public purposes of any land or industrial or commercial undertaking or any interest in them, the amount of compensation to be fixed by agreement or by the award of an arbitrator.

In Niherendu Dutt Majumdar v. King Emperor (3) the validity of the Defence of India Act was challenged. It was held by the Federal Court that by virtue of the transitory provision in Section 316 (4) of the Constitution Act, the then existing Indian Legislature was treated for the purposes of the statute as the Federal Legislature and that the Defence of India Act was, therefore, not ultra vires on the ground only that it was enacted by the Indian Legislature.

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(2) This provision in effect enabled the Government in exercise of its power of making rules under the Act to deprive the criminal and civil courts of their ordinary jurisdiction.

(3) 1942 F.C.R. 38.

(4) Section 316. "The powers conferred by the provisions of this Act for the time being in force on the Federal Legislature shall be exercisable by the Indian Legislature and accordingly references in those provisions to the Federal Legislature shall be construed as references to the Indian Legislature and laws of the Indian Legislature....."

The Rules made under the Defence of India Ordinance, 1939 (5) formed a large code covering all aspects of the life of the citizen.(6) Two of the rules (7) deserve special attention as they were widely made use of by the Executive and were a source of continuous litigation.

Rule 26 provided that the Central or the Provincial Government could make an order directing that a particular person be detained if it were satisfied that, with a view to preventing him from acting in any manner prejudicial to the efficient prosecution of war, to the defence of British India or to the public order, it was necessary to do so. The same authorities were also empowered, under similar conditions, to impose a number of other restrictions on the liberty of the person and movements of the citizen.

Rule 81 enabled the Central and Provincial Governments, so far as it appeared to be necessary or expedient, for securing the defence of British India or the efficient prosecution of the war, or for maintaining supplies and services essential to the life of the community, to make orders on a number of specified matters, such as the regulation or prohibition of the "production, treatment, keeping,

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(5) The Ordinance was repeated in the Defence of India Act, 1939. All rules, notifications and orders made under the Ordinance were kept alive by Section 21 of the Act.

(6) On February 12, 1943, a member of the Legislative Assembly asked whether the Government were aware that the Defence of India Rules had superseded the Indian Penal Code and the Criminal Procedure Code. Another member followed the question with the query: "Are they aware that even for restitution of conjugal rights, the Defence of India Rules have been used?" (quoted in Indian Annual Register, 1943, Volume I, 149)

(7) Rules 26, and 81.

storage, movement, transport, distribution, disposal, acquisition, use or consumption" and the control of selling prices of articles or things of any description whatsoever and the prohibiting or withholding from sale of articles generally or to specified persons or classes of persons.

As we have seen, Section 2 of the Defence of India Act empowered the Central Government to make rules which appeared to it necessary or expedient for securing the d efence 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. The rules made under the Section also authorised the Government to make orders and exercise powers for these purposes. The words used in the Section were a reproduction with a little alteration of the language used in the British Emergency Powers (Defence) Act, 1939 (8). But the legislative power of the Indian legislature, unlike that of the Parliament of the United Kingdom, was limited to the items mentioned in the Legislative Lists in the Seventh Schedule to the Government of India Act, 1935. These lists did not mention 'defence of British India', as a head of legislation (9). It was, therefore, contended that, in the

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(8) His Majesty may by Order in Council make such Regulations as appear to him to be necessary or expedient "for securing the public safety, the defence of the realm, the maintenance of public order, and the efficient prosecution of the war in which His Majesty may be engaged and for maintaining supplies and services essential to the life of the community." (Section 1(1) of the Emergency Powers (Defence) Act, 1939. 2 and 3 George 6. Chapter 62)

(9) The Canadian and Australian Constitutional Acts, it may be noted, do mention defence as a subject of legislation.

absence of the relevant legislative power, the Act was ultra vires and the rules made under it were invalid. But the Federal Court in Keshav Talpade v. Emperor (10) held that, notwithstanding the absence of the head 'defence of British India', in the lists, entries in the Legislative Lists could be found which would justify legislation on most matters covered by the general words of Section 2(1) of the Act as well as by the precise provisions set out in Subsection (2) with its thirtyfive paragraphs. The court observed,

"The draftsman of Section 2(1) appears to have adopted the language of the Emergency Powers (Defence) Act, 1939, which has been passed by Parliament, not altogether happily, seeing, that with the possible exception of 'the maintenance of public order', none of the purposes which he has set out are to be found under the same description among the matters comprised in the Legislative Lists". (11)

In this case, an authorised petition writer on the Insolvency Side of the Bombay High Court was detained under Rule 26 by the Government of Bombay. The order recited that the Government was satisfied that it was necessary to make a n order of detention against him with a view to preventing him 'from acting in a manner prejudicial to the defence of British India, the public safety, the maintenance of public order and the efficient prosecution of the war'. He instituted habeas corpus proceedings in the High Court of Bombay, but the High Court refused to interfere, basing their decision on

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(10) (1943) 6 F.L.J. 28.
(11) Keshav Talpade v. Emperor, (1943) 6 F.L.J. 28, 36-37.

Liversidge v. Anderson[12]. Talpade therefore appealed to the Federal Court.

Rule 26 made under Section 2(2) empowered the Government, if it was satisfied with respect to any particular person that, with a view to preventing him from acting in a manner prejudicial to the defence of British India, the public policy, the maintenance of public order and the efficient prosecution of the war, it was necessary to detain him, to make an order that such person be detained. The rule was made in exercise of the power in Section 2(2) of the Act, which provided that the rules made for the general purposes mentioned in Subsection (1) might provide for, or might empower any authority to make orders providing for "the apprehension and detention in custody of any person reasonably suspected of being of hostile origins or having acted, acting or being about to act in a manner prejudicial to the public safety or interest or to the defence of British India."[13]

It was contended on behalf of the appellant that Rule 26 was not within the rule-making power conferred by the Act, because, while the rule-making power contemplated the detention of a person who was 'reasonably suspected' of the various matters mentioned in Section 2(2), Rule 26 as framed enabled the Government to detain a person if it was

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(12) (1942) A.C. 206. It held that the subjective satisfaction of the Home Secretary in regard to the hostile associations of a person was sufficient to justify an order of detention against him under the English Regulation 18-B, and the court would not enquire into the sufficiency or the cogency of the material upon which his satisfaction was based.

(13) Section 2(2) (x)

'satisfied' that his detention was necessary for the reasons mentioned in it. The court considered whether the words 'reasonably suspected' in the Act implied the existence of suspicions for which there was reasonable justification and whether the words in Rule 26 indicated that "there must be suspicions which are reasonable in fact and not merely suspicions which some as yet unspecified person or authority might regard as unreasonable". The court considered Liversidge v. Anderson and pointed out that there was an essential difference between the language of the English Regulation 18-B and that of Rule 26. Gwyer, C.J., delivering the opinion of the court observed,

'There is nothing in the Act to prevent these powers being vested in any person or body, however insignificant or subordinate. It is one thing to confer a power to make a regulation empowering the Home Secretary 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 may by rule choose to select, or to whom the Central Government may by rule give powers for the purpose."(14)

The court further observed that they might take judicial notice of the fact that the number of persons detained in India, compared to those in the United Kingdom, was very large, and it was difficult to suppose that the Governor-General in Council or the Governors with their advisors had always been able to give their personal attention to each case; so that the consideration of the facts must have been left in very many instances, to put it no higher, to officials,

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(14) Keshav Talpade v. The Emperor, (1943) F.L.J. 28, at page 42.

sometimes no doubt highly placed, but not necessarily so.(15)

Though the point was not decided, the court thought that in the circumstances, notwithstanding the decision in Liversidge v. Anderson the more natural interpretation of the words used in the rule-making power was that there must be suspicions which were reasonable in fact and not such as the authority making the order might regard as reasonable. The court held that Rule 26 as framed went beyond the rule-making power in Section 2(2) and was therefore invalid. The court observed:

"We need hardly point out the divergence between Rule 26 and paragraph (x) of Section 2(2) of the Act, which is clearly intended to be the authority for making the rule. The Act authorises the making of a rule for the detention of persons reasonably suspected of certain things; the rule would enable the Central Government or any Provincial Government to detain a person about whom it need have no suspicions, reasonable or unreasonable, that he has acted, is acting or is about to act in any prejudicial manner at all. The Government has only to be satisfied that with a view to preventing him from acting in a particular way it is necessary to detain him.

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(15) ibid, page 43. In King Emperor v. Shibnath Banerji (1945) 72 I.A. 241, the Privy Council held that it was not necessary that the Governor should be personably satisfied as to necessity of a person's detention under Defence Rule 26; such a matter should be dealt with, like other executive matters, in accordance with the rules under Section 59 of the Constitution Act. The satisfaction of a subordinate officer (which included a minister) was sufficient, and the burden was on the detenu to establish that there was no satisfaction.

The Government may come to the conclusion that it would be wiser to take no risks, and may therefore subject a person to preventive detention against whom there is no evidence or reasonable suspicion of past or present prejudicial acts or of any actual intention of acting prejudicially; and Rule 26 gives it power to do so.....(16) There is no power to detain a person because the Government thinks that he may do something hereafter or because it may think that he is a man likely to do it; he must be a person about whom suspicions of the kind mentioned in the paragraph are reasonably entertained".(17)

The Crown tried to base its case on the wider rule-making power contained in Section 2(1) (18) but this contention was however rejected by the court on the ground that it was not permissible to call in aid the more general words in that subsection in order to justify a rule which so plainly overstepped the limits of the specific power granted under subsection (2).(19)

Allowing the appeal, the court said:

"We do not know the evidence which persuaded the Government of Bombay that it was necessary to prevent the appellant from acting in a manner prejudicial to the defence of British India, the public

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(16) cf. Brutus's argument in Shakespeare's "Julius Caesar":

> And since the quarrel
> Will bear no colour for the thing he is,
> Fashion it thus; that what he is, augmented,
> Would run to these and these extremities;
> And therefore think him as a serpent's egg,
> Which, hatched, would, as his kind, grow mischievous,
> And kill him in the shell.
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> II. i. 28-34.

(17) Keshav Talpade v. Emperor, (1943) F.L.J. 28, at pages 43-44.

(18) "The Central Government may ..... make such rules as appear to it to be necessary....for securing the defence of India..."

(19) This decision was overruled by the Privy Council in Emperor v. Shibnath Banerji (1945) VIII F.L.J. 222.

safety, the maintenance of public order and the efficient prosecution of the war; but we may be forgiven for wondering whether a person who is described as an authorised petition writer on the Insolvency Side of the Bombay High Court was really as dangerous a character as the recital of all these four grounds in the order of detention suggests.(20) The order does nothing to remove the apprehension that we have already expressed that in many cases the persons in whom this grave power is vested may have had no opportunity of applying their minds to the facts of every case which comes before them".(21)

This decision of the Federal Court was deemed to have created an emergency and the Defence of India (Amendment) Ordinance, 1943 (No.XIV of 1943) was promulgated. It substituted a new clause for Clause (x) of Section 2(2) of the Defence of India Act, 1939. Section 2 of the Ordinance stated that for the said clause "the following clause shall be substituted, and shall be deemed always to have been substituted, namely:-

"(x) the apprehension and detention in custody of any person whom the authority empowered by the rules to apprehend or detain as the case may be suspects on grounds appearing to such authority to be reasonable, of being of hostile origin, or of having acted, acting, being about to act, or being likely to act in a manner prejudicial to the public safety or interest, the defence of British India, the

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(20) The order recited that his detention was necessary to prevent him from acting to the prejudice of the defence of India, the public safety, the maintenance of public order, and the efficient prosecution of the war.

(21) Keshav Talpade v. Emperor, (1943) 6 F.L.J. 28, 45-46.

maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in tribal areas, or the efficient prosecution of the war, or with respect to whom such authority is satisfied that his apprehension and detention are necessary for the purpose of preventing him from acting in any such prejudicial manner, the prohibition of such person from entering or residing or remaining in any area, and the compelling of such person to reside and remain in any area, or to do or abstain from doing anything;"

Section 3 stated: "For the removal of doubts it is hereby enacted that no order heretofore made against any person under rule 26 of the Defence of India Rules shall be deemed to be invalid or shall be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said rule was made be lawfully conferred by a rule made or deemed to have been made under Section 2 of the Defence of India Act, 1939".

In King Emperor v. Shibnath Banerjee and others,(22) the Federal Court observed that, whether Section 2 of the Ordinance was valid or not, Section 3 was certainly not invalid or ultra vires, as it was within the Ordinance-making powers of the Governor-General. The court further held that it was a condition precedent for the valid exercise of the power of detention conferred by rule 26 that the Provincial Government should have applied its mind and become satisfied that such detention was necessary for preventing the person concerned

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(22) (1943) 6 F.L.J. page 151.

from acting in a prejudicial manner. The court, therefore, found that the orders of detention made in pursuance of a general order that if the police recommended detention of any person under rule 26, such a person might be detained, were invalid. A majority of the court (Spens, C.J., dissenting) also held that Provincial Government in rule 26 meant the Governor acting with or without the advice of his ministers; and therefore delegation of the powers of the Provincial Governor under the Defence of India Act could be made only under the provisions of Section 2(5) [23] of the Act, and in the absence of a delegation so made, the authority to be satisfied under rule 26 was the Governor himself.

When the matter was taken up in appeal to the Privy Council,[24] it held, as pointed out earlier,[25] that rule 26 of the Defence of India Rules was within the rule-making power conferred by Section 2(1) of the Defence of India Act. The function of subsection (2) was mainly illustrative; the rule-making power was conferred by subsection (1); subsection (2) could not be regarded as restrictive, for its opening words were " without prejudice to the generality of the powers conferred by subsection (1)..." The Judicial Committee also held that it was not necessary that the Governor should personally satisfy himself as to the matters set out in rule 26; that

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(23) Section 2(5) "A Provincial Government may by order direct that any power or duty which by rule made under subsection (1)..... shall.....be exercised or discharged by any officer or authority, not being an officer or authority subordinate to the Central Government".

(24) 1945 F.C.R. 195.

(25) See footnotes (15) and (19)

the challenged orders of detention were regular and proper with the exception of two which were made in a routine manner. Their Lordships held that nothing in Section 59(2) [26] of the Government of India Act or Section 16 [27] of the Defence of India Act, ousted the jurisdiction of the court to investigate the validity of the orders of detention.

Some time after the judgement of the Federal Court in Shibnath Banerjee's case, the Governor-General promulgated another Ordinance making provision for preventive detention along with some related matters. The Restriction and Detention Ordinance, 1944 (III of 1944) was an amending and consolidating Ordinance empowering the Central and Provincial Governments and any officer or authority to whom the Central Government or the Provincial Government might delegate its powers in this behalf to "restrict the movements and actions of, and to place in detention and detain certain persons, to regulate the exercise of these powers and the duration of orders made in such exercise, and to confirm the validity of the past exercise of such powers under rule 26 of the Defence of India Rules".

Section 3(1) provided that: "The Central Government or the

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(26) Section 59(2) Orders and instruments made and executed in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor, and the validity of an order or instrument which is so authenticated shall not be called in question on the ground that it is not an order or instrument made or executed by the Governor.

(27) Section 16(1) op. cit.; 16(2) "Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act, a court shall, within the meaning of the Evidence Act, 1872, presume that such order was so made by that authority."

Provincial Government, if satisfied with respect to any particular person that with a view to preventing him from acting in any manner prejudicial to the defence of British India, the public safety, the maintenance of public order, His Majesty's relations with foreign powers or Indian States, the maintenance of peaceful conditions in Tribal Areas, or the efficient prosecution of the war it is necessary so to do, may make an order.....

(b) directing that he be detained;

(c) directing that, except in so far as he may be permitted by the provisions of the order, or by such authority or person as may be specified therein, he shall not be in any such area or place in British India as may be specified in the order;

(d) requiring him to reside or remain in such a place or within such area in British India as may be specified in the order and if he is not already there to proceed to that place or area within such time as may be specified in the order;

(e) requiring him to notify his movements or to report himself or both to notify his movements and report himself in such manner at such time and to such authority or person as may be specified in the order;

(f) imposing upon him such restrictions as may be specified in the order in respect of his employment or business, in respect of his association or communication with other persons, and in respect of his activities in relation to the dissemination of news or propagation of opinions;

(g) prohibiting or restricting the possession or use by him of any such article or articles as may be specified in the order;

(h) otherwise regulating his conduct in such particular as may be specified in the order, ...

provided .....that no order shall be made by the Provincial Government under Clause (C) of this Subsection directing that any person ordinarily resident in the Province shall not be in the Province". A person contravening an order was liable to punishment with imprisonment for five years, with or without fine.

Section 3(9) provided that any order made under the Section would have effect notwithstanding anything inconsistent with it contained in any Act, Ordinance or regulation other than this Ordinance, or in any instrument having effect by virtue of any such Act, ordinance or regulation.

Section 5(1) enabled the Central Government to delegate its powers and duties under the Ordinance to any officer or authority subordinate to it or to any Provincial Government. Subsection (2) conferred a like power of delegation on the Provincial Government.

Section 6 validated orders made under rule 26 of the Defence of India Rules. Section 6(1) stated: "No order made before the commencement of the Ordinance under Rule 26 of the Defence of India Rules shall after such commencement be deemed to be invalid, or be called in question on the ground merely that the said rule purported to confer powers in excess of the powers that might at the time the said order was made be legally conferred by a rule made under Section 2 of the Defence of India Act, 1939". The cancellation of

such an order by the order of a Competant Court, it was provided, would not prevent the making, under the Ordinance, of a fresh order to the same effect as the order cancelled.

When an order of detention was made in respect of any person, the authority making the order was required under Section 7 to communicate to the person affected the grounds on which the order had been made and such other particulars as would be sufficient, in the opinion of the authority, to enable him to make a representation in writing against the order of the authority. When the order was made by an officer or authority to whom the power of making such an order was delegated, he was required to report the fact to the Government to which he was subordinate, together with the representation, if any, made by the person affected by the order. An order of detention would have effect for six months only from the date of making the order, but the Government or the authority or officer subordinate to it could prolong its operation for any length of time by half yearly extensions.

The jurisdiction of the courts was barred in regard to orders made under the Ordinance (Section 10)

The provisions requiring the person detained to be furnished with the grounds of detention and affording him an opportunity for making a representation were a pale shadow of the corresponding provision in the English Regulation of 18-B, which itself was an improvement made on Regulation 14-B issued during the First World War, in deference to the observations of Lord Shaw in his dissenting judgement in Rex v. Halliday [28]. Under the English

(28) (1917) A.C. 260.

Regulations the jurisdiction of the courts was not barred, and under Regulation 18-B, even though the Home Secretary was enabled to detain any one whom he had reasonable cause to believe to be within specified categories of suspects, necessitating some exercise of control over him, Advisory Committees were set up and the detenu was given facilities to make his representations against detention before such committees after having received legal advice. The Home Secretary was bound to report to Parliament every month the number of persons detained and the number of cases in which he did not follow the recommendations of the Advisory Committee.

The provision in the Indian Ordinance giving the detenu an opportunity to make a representation proved ineffective in the case of a large number of persons under detention, because there was no provision enabling such person to obtain legal advice. Moreover, nothing more than the bare ground of detention had to be communicated to the detenu under the Ordinance and the right to put forward his case in these circumstances was almost illusory.

Though the Executive by means of this Ordinance sought to protect itself from control of its exercise of the power of preventive detention by the courts, the courts, as will now be indicated were reluctant to relinguish such powers of control as the statute permitted, and endeavoured to prevent the statute completely denying to the citizen the right of personal liberty during the emergency.

This Ordinance was also challenged as <u>ultra vires</u> the Governor-General, because in so far as it purported to authorise detention

of persons on the ground that they were likely to act in a manner prejudicial to the efficient prosecution of war, it was legislation relating to the prosecution of war, a subject which was not in the ambit of any of the lists in Schedule VII of the Constitution Act. It was held by the Federal Court in Basanta Chandra Ghose v. King Emperor (29) that the reference to "the efficient prosecution of the war" in the Ordinance must be understood in the light of the circumstances in which the Ordinance came to be passed. Events in 1942-1944, of which the court could take judicial notice indicated that the efficient prosecution of the war was necessary for the defence of India. It could not therefore be said that prosecution of the war was not a matter of defence. It was further held that if, owing to different views being entertained about the formalities necessary for a valid order of detention, a fresh order of detention was passed in the place of an earlier one to remedy defects apparent in the latter, such a course would not justify an inference of fraud or abuse of power. The court also held that where an earlier order of detention was defective on merely formal grounds, there was nothing to preclude a proper order of detention being based on the pre-existing grounds themselves, especially in cases in which the sufficiency of the grounds could not be examined by the courts.

The Federal Court had held earlier (30) that all that

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(29) (1945) 8 F.L.J. 40.
(30) Basanta Chandra Ghose v. King Emperor, (1944) F.L.J. 203.

Section 10 of the Ordinance(31) did was to interdict the High Court from exercising in a certain class of cases the power or jurisdiction conferred on it by Section 491, Criminal Procedure Code, but that it did not follow that the court could no longer consider the validity of an order which on the face of it appeared or purported to have been passed under the Ordinance. Spens, C.J., who delivered the judgement of the court observed: "The court is and will be still at liberty to investigate whether an order purporting to have been made under rule 26 and now deemed to be made under Ordinance III or a new order purporting to be made under Ordinance III was in fact validly made, in exactly the same way as immediately before the promulgation of the Ordinance"(32).

Under Rule 81 which provided for the general control of trade and industry, Provincial Governments passed numerous control orders which were so frequently amended that it was impossible for the ordinary citizen and by no means easy for lawyers to know what could legally be done at any moment, so that citizens frequently contravened the orders unintentionally. The courts were inclined to be charitable to those who thus contravened the orders out of ignorance or misunderstanding as they were couched in language which

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(31) Section 10(1) "....no court shall have power to make any order under Section 491 of the Criminal Procedure Code, 1898, (V of 1898) in respect of any order made under or having effect under this Ordinance, or in respect of any person the subject of such an order".

(32) Basanta Chandra Bose v. King Emperor, (1944) F.L.J. 203 at page 212.

it was not always easy even for a trained lawyer to understand.(33)

Although ignorantia legis neminem excusat is a wellknown principle, the Allahabad High Court observed in Dinanath v. Emperor,(34) nevertheless there might be cases in which the rigour of that maxim might be mitigated. When rules and orders with respect to the distribution of food grains had been made in quick succession, a sentence for infringement was reduced since the accused, an illiterate man, was unaware of an amendment forbidding him to apply for an identity card enabling him to draw Government food grains when provision had been made to enable him to satisfy his needs otherwise.

In Roshan Lal v. Emperor(35) a firm exported arhar from United Provinces to Howrah in contravention of United Provinces Food Grains and Oil Seeds (Movement) Control Order. The railway dalal arranged the cartage of arhar to the railway station and procured waggons. The station master arranged for the waggons and the arhar was booked to Howrah. All the persons were under the genuine though mistaken impression that there was no restriction on the export of arhar. The partners of the firm were convicted under Defence Rule 81(4) read with Rule 122, the station master under Rule 81(4) and the railway dalal under Rule 81(4) read with Rule 121

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(33) "The interpretation of the circulars is becoming almost as esoteric an art as the interpretation of statutes" C.K. Allen, Law and Orders, page 219. The same was true of orders and notifications in India.

(34) A.I.R. 1946 Allahabad 117.

(35) A.I.R. 1946 Allahabad 161.

as an abettor of the offence. The High Court held that the partners of the firm and the station master were rightly convicted, but the fact that the accused was under a genuine though mistaken impression that the export of arhar was not prohibited was an extenuating circumstance which could be taken into account in awarding sentence and that, as all the accused were labouring under a misapprehension, it was very doubtful whether the part played by the railway dalal really amounted to an abetment of what was done by the station master and the dalal should therefore be given the benefit of doubt and his conviction must be quashed.

In Srinivas Mall Bairoliya v. Emperor(36) Lord du Parcq delivering the opinion of the Privy Council observed that offences against Rule 81(2), which empowered Government to make price control orders, were not within the limited and exceptional class of offences which could be held to be committed without a guilty mind. Offences which are within that class are usually of a comparatively minor character and a person who was morally innocent of blame could not be held vicariously liable for a servant's crime involving contravention of Rule 81(2) and so punishable "with imprisonment for a term which may extend to three years". The first appellant was the Salt Agent employed to supply salt to licensed retailers in a particular area; the second appellant the one who actually made the allotment to the retailers. They were jointly

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(36) A.I.R. 1947 P.C. 135.

charged with selling salt to three traders at more than the maximum price. The Board dismissed their appeal, holding the mens rea established.

In Muhammad Bashir v. Emperor(37) it was held that offence under Defence Rule 81(4) read with Rule 121 was committed by both proprietor and manager of a hotel when the latter, who was in exclusive management of the hotel sold refreshments to customers in contravention of a notification under Rule 81(2) prohibiting the sale of such articles after a certain hour at night. Following English decisions, an exception to the general rule that the master is not criminally liable for the acts of the servant was made as the notification prohibited the act absolutely and the servant in transgression committed it.

In Pratapmal Rikhabdas v. Emperor,(38) the accused, a shop keeper, was found guilty of "black marketing", i.e. selling to one individual a large quantity of sugar in contravention of the Bombay Rationing Order issued under Rule 81(2). The High Court observed that where the accused was guilty of a grave breach of the Rationing Regulations involving deliberate black marketing in times of food scarcity he committed a crime against society of a most despicable character as he was unlawfully enriching himself at the expense of his fellow citizens, especially the poorer ones who could not afford to pay the black market prices which were thus

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(37) I.L.R. 1946 Bombay 173.
(38) (1946) I.L.R. Bombay 1114.

created and that such type of offence was a most contemptible crime and called for a deterrent sentence in all cases in which it was deliberately committed.

Rule 75 A deserves special notice as it substantially affected the right to property of the citizens.

Rule 75 A(1) enabled the Central and Provincial Governments to requisition any property, movable or immovable, except property used for the purpose of religious worship and vessels and aircrafts registered in British India, if, in the opinion of the Government, it was necessary or expedient to do so for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community.

Subrule (2) empowered the Government to use or deal with the property requisitioned in such manner as might appear to it to be expedient and also to acquire it if it decided to do so.

Subrule (4) provided that whenever the Central Government or the Provincial Government requisitioned or acquired any movable property, the owner thereof should be paid such compensation as that Government might determine".

When Rule 75 A was challenged in the courts as being ultra vires the legislative powers of the Indian Legislature, although "compulsory acquisition of property" is item 9 on the Provincial List in the Constitution Act of 1935, and inasmuch as the greater includes the less, this presumably includes "requisition", conflicting decisions were given by different High Courts. To

mention only three, in Tan Bug Tain v. Collector of Bombay,(39) the Bombay High Court held that the requisition of immovable property under Section 2(2) (XXIV) of the Defence of India Act and Rule 75 A of the Defence of India Rules, not being comprised in any of the three lists in Schedule VII, Government of India Act, the Central Legislature had no power to legislate with respect to the same, in the absence of a public notification by the Governor-General under Section 104,(40) Government of India Act, even though there was a proclamation of emergency by the Governor-General under Section 102(1). The decision was based on the view that a strict construction should be put on provisions of the Constitution Act curtailing the liberties of the subject. It is submitted that this principle, though relevant when interpreting the scope of a condition to which the exercise of legislative power is subject, is irrelevant in construing the scope of an item on the legislative lists, which should be construed generously.(41) In H. C. Gupta v. Mackertich John, (42) an order was made under Rule 75A requisitioning a certain building in which the respondent was carrying on a hotel business. It was contended that the order amounted in effect to the requisitioning of the respondent's undertaking and that such an

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(39) A.I.R. 1946 Bombay 216.

(40) Section 104(1) "The Governor-General may by public notification empower either the Federal Legislature or a Provincial Legislature to enact a law with respect to any matter not enumerated in any of the Lists in the Seventh Schedule of this Act....."

(41) Bhola Prasad v. King Emperor, (1942) F.C.R. 17, United Provinces v. Mst Atiqa Begum, (1940) F.C.R. 110.

(42) A.I.R. 1946 Calcutta 140.

order was not authorised by the rule. The Calcutta High Court held that an order under Rule 75A requisitioning a building where a hotel business was being carried on was not ultra vires. It further held that though the requisitioning of the building might interrupt and damage the respondent's business for the time being, the order did not amount to the requisitioning of the business and that even assuming it to be otherwise, the requisitioning of an undertaking was within the power conferred by Rule 75A. The court observed that Rule 75A permitted the requisitioning of any property, movable or immovable, and the requisitioning of a business undertaking was covered by the rule.

The Madras High Court also held that Rule 75A was not ultra vires the Government of India Act.(43)

In Municipal Board v. Allah Tala(44) it was observed that if circumstances were found by the court to exist which not only negatived the entire idea of good faith but established a position wholly inconsistent with the same it could not be said that acquisition made in the exercise of powers under Rule 75A could not be questioned. A suit for a declaration that the property had been wrongly acquired would not under such circumstances be barred either by Section 16 or Section 17 of the Defence of India Act.

In Juggilal Kamlapat v. Collector of Bombay(45), it was held

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(43) Venkata Subbier v. Emperor, A.I.R. 1945 Madras 104.
(44) 1951 A.L.J. 145.
(45) A.I.R. 1946 Bombay 280, 286.

that where a flat was requisitioned for the duration of war and six months thereafter, the order delegating the power to determine this term to the officer for whose use the flat was requisitioned was not illegal. It was also held that an order by a Collector under Rule 75A, requisitioning premises in occupation of a person carrying on business there was a judicial act over which the High Court could exercise jurisdiction by issuing a writ of certiorari or a writ of prohibition.

The question of compensation under Rule 75A(4) provoked criticism in the courts and outside them. On the one hand it was maintained that some of the officers on whom the duty of assessment of compensation was laid could be corruptly induced to make an over-valuation. On the other hand it was said that it was unjust to leave the amount of compensation to be determined by Government in its discretion.

In fact, however, the courts provided a remedy against inadequate compensation.

In Province of Bengal v. Board of Trustees,(46) a rule in regard to compensation was laid down by the Calcutta High Court. A piece of land which the Board of Trustees for the Improvement of Calcutta had acquired for the express purpose of providing a park for the public was requisitioned by the Government under Rule 75A. The court held that the Board was entitled to get compensation for the park on the same basis as building sites. It observed that

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(46) A.I.R. 1946 Calcutta 416.

the effect of a requisition under the Defence of India Rules was to deprive the owner of his possession and that he must, therefore, get the value of his possession. Looking at the matter from another aspect, the court remarked that the requisitioning authority got the possession from the owner and became, so to say, a statutory tenant, and the basis of compensation must, therefore, be fair rent. Again in Collector of Darjeeling v. Mackertich,(47) the court observed that compensation had to be assessed at the value of the claimant's possession, measured by the fair rent to be paid in respect of the premises. If the fair rent was capable of direct assessment the court had to proceed on that basis. Ordinarily the rent which was being paid in respect of certain premises at any point of time might be regarded as the fair rent payable for them.

In Aftab Rai v. Collector of Lahore,(48) it was held that the compensation to be paid in respect of land acquired for a certain period was to be determined in accordance with the amount of rent at which the plot of land could be let out by the owner acting on his own volition, and without compulsion.

In Province of West Bengal v. Raja of Jhargram,(49) it was laid down that if property was requisitioned for a limited period the requisitioning authority was bound to pay reasonable compensation for the period and that the basis of compensation was the amount of

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(47) (1951) 54 C.W.N. 853.
(48) A.I.R. 1948 Lahore C.R. 55, 203.
(49) A.I.R. 1955 Calcutta 392.

fair rent. If property was compulsorily acquired, the compensation payable was the market price of the property together with claims admissible for costs of removal, severance etc. If at the time of derequisition it was found that damage had been done to the property during the period of requisition and the property was not in the same condition as it had been when requisitioned, the Government was liable for what is technically known as terminal damages.

In Union of India v. Ram Parshad (50) it was held that the principle on which market value for payment of compensation was to be assessed was not the principle on which a Rent Controller would assess standard rent for the property.

Clearly the trend of these decisions was that though the Defence Rules did not expressly provide for just compensation as was done by the English Defence Regulations, the courts were ready to order payment of fair and reasonable compensation.

Rule 129 provoked criticism from Indian lawyers on the ground that it gave police officers unnecessary opportunities for abusing their powers. It provided that any police officer might arrest without warrant any person whom he reasonably suspected of acting, having acted or being about to act, in a manner prejudicial to the public safety or to the efficient prosecution of the war • Subrule (2) required the police officer who made the arrest to report forthwith the fact of such arrest to the Provincial

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(50) A.I.R. 1952 Panjab 116.

Government and pending the receipt of the orders of the Provincial Government, he could commit the person arrested to custody. No person was to be detained in custody under the Subrule for a period exceeding fifteen days without the order of the Provincial Government and no person was to be detained in custody under the subrule for a period exceeding two months. Subrule 4 enacted that on receipt of any report under Subrule (2) the Provincial Government might make in exercise of any power conferred on it by any law for the time being in force such final order as to his detention, release, residence or any other matter concerning him as might appear to the Government in the circumstances of the case to be reasonable or necessary.

In Vimala Bhai Deshpande v. Crown(51), very early one August morning, an Advocate of the Nagpur High Court was arrested and taken to the police lock-up. Later he was taken to the lock-up in the compound of the District Magistrate to be interrogated in connexion with a dacoity which had taken place in Bombay. The arrest was made under Rule 129. On receipt of a report of the arrest, the Provincial Government directed that the person be detained for fifteen days. The period of detention was sought to be extended by two subsequent orders from the Provincial Government for a period of fortyfive days. In the meantime, on an application by his wife, the detenu, who was not even given permission to consult his counsel, was released by the Nagpur High

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(51) (1945) I.L.R. Nagpur 6.

Court. The court observed that this case was a clear illustration of malice in law. On appeal to the Privy Council, the decision of the High Court was affirmed in Emperor v. Deshpande.(52) Their Lordships of the Privy Council pointed out that, whereas a detention order could be passed under Defence Rule 26 if Government was satisfied that it was necessary, a police officer could only arrest under Rule 129(1) if he was reasonably satisfied, and the burden lay on him to show that his suspicions were reasonable. Clause 4 of Rule 129 did not enlarge the powers which Government possessed to deal with a person arrested under Clause 1. If the original arrest order Clause 1 was invalid, because made without reasonable grounds, Government had no power under Clause 4 to make an order for the temporary custody of the person arrested.

In the Panjab one Teja Singh was arrested and detained in custody under Rule 129, not because he had done anything prejudicial to the public safety or the prosecution of the war, but because he had had the misfortune to incur the displeasure of the sub-inspector and the head constable of the local police station. In habeas corpus proceedings, the Lahore High Court released the detenu, the court observing in the course of the judgement (53) that if there were evidence of any material on which the arresting officer could have based his suspicions, and in the absence of evidence of mala fides, the court would have held the arrest justified by Rule 129 and it would refuse to determine whether the

(52) A.I.R. 1946 P.C. 123.
(53) Teja Singh v. Emperor, A.I.R. (1945) Lahore 293.

material was or was not sufficient for the suspicion, but where there was no material at all and consequently there was no scope for any kind of suspicion, reasonable or unreasonable, the court was bound to hold that the case did not come within the scope of Rule 129 and the arrest was made mala fide.

In Prabhakar Kesho Tare v. Emperor (54) dealing with Indian defence regulations in general the Nagpur High Court observed that there was no substantial difference in meaning between the two phrases, 'has reasonable cause to believe' and 'is satisfied'(55). The court held that persons detained under Defence of India Act had the right to move the High Court under Section 491 of the Criminal Procedure Code, and this was particularly necessary when arbitrary powers were exercisable even by District Magistrates and Sub-divisional Magistrates. Though the Provincial Government was entitled to take all proper precautions in the matter of granting interviews even to legal advisers, it had no power to shut a detained person off altogether from reasonable and proper legal advice; the Provincial Government had no power to prevent such

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(54) A.I.R. 1943 Nagpur 26.

(55) The original British Defence Regulation 18B made by Order in Council gave the Secretary of State power to detain any particular person "if satisfied ..... that it is necessary to do so". Mr. Herbert Morrison, then in opposition, remarked in Parliament, "I think that any Minister is capable of being wicked when he has a body of regulations like this to administer". (quoted in C. K. Allen, Law and Orders, page 413). In Liversidge v. Anderson, the House of Lords held that there was in effect no difference between the two expressions, 'if satisfied' and 'reasonable cause to believe'.

issues as bad faith or abuse of the Act from being tried in the High Court in the ordinary way, if they were raised subject, of course, to such reasonable safeguards as the Provincial Governments might desire to have observed, that is to say, the trial, despite all safeguards, must be according to canons of natural justice, or according to the fundamental rules of practice necessary for the due protection of persons and the safe administration of criminal justice. Refusing all access, the court held, was an abuse of power. "The history of liberty has largely been the history of observance of procedural safeguards."(56)

Another observation, indicative of the Allahabad High Court's concern for the liberty of the subject was made in Peare Lal v. Emperor.(57) As the Defence of India Act, it said, was a special piece of legislation enacting a penal provision which made a serious inroad into the right to personal liberty, its provisions should be strictly construed.

Benintende, the Chief of the Council of Ten, in Byron's Marino Faliero, Doge of Venice, says:

.... "On great emergencies

The law must be remodelled or amended"(58).

This sentiment was echoed by Lord Atkin: "Amid the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace"(59).

(56) per Frankfurter, J., in McNabb v. United States (1943) 318 U.S. 332 at 347.
(57) A.I.R. 1944 Allahabad 168.
(58) Marino Faliero, V. i. 84-85.
(59) Dissenting judgement in Liversidge v. Anderson, (1942) A.C.244.

v. Special Criminal Courts Ordinance

Though the Defence of India Act had provided for the constitution of Special Tribunals which could follow a special procedure modifying the usual procedure of the courts, Special Tribunals were not set up. Instead an ordinance called Special Criminal Courts Ordinance (II(2) of 1942) was promulgated early in 1942 making provision for the setting up of special criminal courts of three classes, namely, Special Judges, Special Magistrates and Summary Courts. The Ordinance was to come into force in any Province only if the Provincial Government being satisfied of the existence of an emergency arising from a hostile attack on India or on a country neighbouring on India or from the imminence of such an attack, by notification, declared it to be in force in the Province. (Section 1(3)).

A Special Judge was to be a person who had exercised for not less than two years the powers of a Sessions Judge or Assistant Sessions Judge. He was authorised to try "such offences or classes of offences, or such cases or classes of cases as the Provincial Government or a servant of the Crown empowered by the Provincial Government in this behalf, may, by general or special order in writing, direct". (Section 5). He could take cognizance of offences without the accused being committed for trial and was to follow the procedure prescribed for the trial of warrant cases by Magistrates; he was required ordinarily to record only a memorandum of the substance of the evidence of the witnesses. A Court of the Special Judge was deemed under the Ordinance to be a Court of Session. A Special Judge could pass any sentence authorised by law.

If any person was sentenced to death, transportation for life or to imprisonment for seven years or more by a Special Judge, the proceedings were to be reviewed by a High Court Judge specially nominated by the Provincial Government in this behalf.

Any Presidency Magistrate or Magistrate of the first class of two years service could be appointed a Special Magistrate. He could try "such offences or classes of offences, or cases or classes of cases" other than offences or cases involving offences punishable by death, as the Provincial Government or a servant of the Crown empowered in this behalf might direct (Section 10). The Special Magistrate was to follow the same procedure as the Special Judge and could pass any sentence except a sentence of death or of transportation or imprisonment for a term exceeding seven years. If a Special Magistrate passed a sentence of transportation or imprisonment for a term exceeding two years an appeal would lie to the Court of a Special Judge.

The Provincial Government could empower any Magistrate to exercise the powers of a Summary Court which would have power to try such offences or classes of offences, or such cases or classes of cases, as the District Magistrate or the Chief Presidency Magistrate or a servant of the Crown authorised in this behalf by the District Magistrate or the Chief Presidency Magistrate might direct. (Section 16) But no person was to be tried by a Summary Court for an offence punishable by imprisonment for a term exceeding two years, unless it was one of the offences

mentioned in 260 (1),, [1] of the Criminal Procedure Code. A Summary Court was required to follow the procedure for the trial of warrant cases, but it was not required to frame a formal charge or to record more than a memorandum of the evidence. In the trial of an offence punishable for a term not exceeding one year, it could follow the procedure for summary trial of cases in which an appeal would lie. It could pass any sentence which might be passed by a Magistrate of the first class. From a Summary Court appeal lay in certain cases to a Chief Presidency Magistrate or a Special Magistrate or other Magistrate of the first class appointed by the District Magistrate to hear appeals.

The Special Courts could dispense with the attendance of refractory accused and proceed with the trial in their absence. Such accused would be deemed not to plead guilty and could be represented by a pleader. The Special Courts might exclude the public generally or any particular persons from the Court buildings. They might order that the fine paid by a convicted person should be given to the person affected by the offence or as a reward to the person who had given information leading to the detection of the offence or to the conviction of the accused (Section 24 (2)). Section 26 provided that "there shall, save as provided in this Ordinance, be no appeal from any order or

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(1) These offences could be tried summarily under the ordinary law. They included petty theft, for which the maximum punishment under the Indian Penal Code was three years imprisonment and fine.

sentence of a Court constituted under this Ordinance and, save as aforesaid, no court shall have authority to revise such order or sentence, or to transfer any case from any such court, or to make any order under Section 491 of the Code or have any jurisdiction of any kind in respect of any proceedings of any such court".

In the course of its brief existence the Ordinance was amended three times. The first amending Ordinance made strict provisions in regard to granting bail to the accused. One condition for granting it was that the court should be satisfied that there were reasonable grounds for believing that the accused was not guilty of the offence charged (Section 24 A(b)).

The second amending Ordinance amended Section 3 so that this extraordinary criminal procedure could be brought into operation in the event of there being "any disorder within the Province".

The third amending Ordinance provided that a Sessions Judge could transfer a case from one Special Judge to another at any stage of the proceedings. A District Magistrate was empowered to transfer a case in like manner from one Special Magistrate to another and neither the Special Judge nor the Special Magistrate to whom the case was transferred was bound to re-summon or re-hear witnesses unless he considered that such a course was necessary in the interests of justice.

Benoari Lall Sharma and others who were tried by a Special Magistrate functioning under the Ordinance and sentenced to rigorous imprisonment for two years invoked the revisional jurisdiction of

the Calcutta High Court contending that the Ordinance was ultra vires, that the revisional jurisdiction of the High Court was therefore not excluded by Section 26 of the Ordinance and that the Special Magistrate had no jurisdiction to try them. A special Bench of the High Court declared that the provision in the Ordinance empowering a delegation to the Provincial Government to decide the particular cases or classes of cases which should go for trial to the Special Courts was invalid;(2) and the decision of the High Court was affirmed by a majority of the Federal Court in Emperor v. Benoari Lall Sharma and others.(3)

In that case it was pointed out on behalf of the Crown that the way in which the powers of the High Court had been dealt with in the Ordinance was a question of policy with which the court was not concerned. The court, in reply, indicated that the circumstance that the impugned legislation was enacted by an Ordinance raised an important question. It stated that though legislation by Ordinance had been given the same force and effect as ordinary legislation and though the ambit in regard to subject matter was the same in both, there were two important points of difference between the two. By the very terms of Section 72 in the Ninth Schedule, authorising the enactment of Ordinances, their operation

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(2) Benoari Lall Sharma v. Emperor, A.I.R. 1943 Calcutta 285.
(3) 1943 F.L.J. page 79.

was limited to a period of six months (4), and the Ordinances were avowedly promulgated in the exercise of a special power granted to meet an emergency. These two circumstances, the court said, differentiated legislation by Ordinance from ordinary legislation and afforded ground for doubting the applicability of the principle of plenary powers laid down in The Queen v. Burah(5) to Ordinances. It was pointed out by the court that the very conception underlying the Ordinance-making power so closely associated it with the personal discretion of the Governor-General that the objection against delegation to subordinate executive authorities of any matter of principle as was attempted to be done in the Ordinance in question was quite serious. The court further observed:

"It has no doubt been always recognised that some authority in the State should be in a position to enact necessary measures to meet extraordinary contingencies. Section 72 of the Ninth Schedule makes ample provision for it; the question is about the manner of exercising that power. Before applying the analogy based on the English practice as to emergency legislation, certain differentiating circumstances should be borne in mind. In England even emergency legislation is Parliamentary legislation or Order in Council passed under the authority of Parliamentary Statute and it is always subject to Parliamentary control, including in the last resort the right to insist on the annulment or modification of the Order in Council or even the

(4) "Even now it is only temporary", the court pointed out, "though the particular limit has been removed". ibid, page 116.
(5) 1878 A.C. 889.

repeal or modification of the Statute itself. Under the Indian Constitution the Legislature has no share in or control over the making of an ordinance or the exercise of powers thereunder, nor has it any voice in asking for its repeal or modification. Again, anything like a serious excess in the use of special emergency powers will, under the English practice, be a matter which Parliament can take note of when the time comes for passing the usual Indemnity Act on the termination of the emergency. (See Dicey's Law of the Constitution, page 236 and Carr's Administrative Law, pages 69 and 70). That is not the position here, as the indemnity can be provided by an ordinance. As against all this, the only safeguard provided in the Indian Constitution is that the matter rests entirely upon the responsibility of the Governor-General. This only confirms the argument against delegation of such responsibility, at least without laying down in clear and definite terms the limits and conditions governing the exercise by executive officers of powers conferred upon them by the Ordinance".(6)

As to the main contention against the Ordinance that it left to the Executive the sole power to decide which cases or classes of cases should be withdrawn from the purview of the ordinary courts and assigned for trial to the Special Courts, the courts observed:

"A comparative study of the Ordinances promulgated by the Governor-General during the last two decades will reveal a progressive diminution

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(6) Emperor v. Benoari Lall Sharma, (1943) F.L.J. 79 at 117.

in the definiteness and completeness of the relevant legislative provision and a corresponding expansion of the limits of executive intervention in the determination of the forum and the procedure applicable. The earlier Ordinanceswere limited to defined categories of crimes with reference to their nature, time, place or purpose and the choice of the forum even in such cases was left to the Governor or the Government to make. The practice has now been extended to all offences and the choice of the forum (with all its serious consequences under the present Ordinance) has been entrusted to any servant of the Crown who may be authorised by the Provincial Government.....

As we have already observed, the considerations and safeguards suggested in the foregoing passages may be no more than considerations of policy or expediency under the English Constitution. But under Constitutions like the Indian and the American, where the constitutionality of the legislation is examinable in a Court of law, these considerations are, in our opinion, an integral and essential part of the limitation on the extent of delegation of responsibility by the legislature to the executive. In the present case, it is impossible to deny that the Ordinance-making authority has wholly evaded the responsibility of laying down any rules or conditions or even enunciating the policy with reference to which cases are to be assigned to the ordinary Criminal Courts and to the Special Courts respectively and left the whole matter to the unguided and uncontrolled action of the executive authorities. This is not a criticism of the policy of the

law - as Counsel for the Crown would make it appear - but a complaint that the law has laid down no policy or principle to guide and control the exercise of the undefined powers entrusted to the executive authorities by Sections 5, 10 and 16 of the Ordinance". (7)

But the minority judgement stated:

"It is not for us to concern ourselves with the policy where the law is clear but to give effect to its provisions however injurious we may conceive the consequences to be". (8)

As a result of this decision of the Federal Court, a repealing Ordinance was promulgated. The Special Criminal Courts (Repeal) Ordinance, 1943 (XIV of 1943), while repealing the Ordinance of the previous year which constituted the Special Criminal Courts, confirmed sentences passed by a Special Judge, Special Magistrate or Summary Court as if they had been passed by a Sessions Judge, Assistant Sessions Judge or a Magistrate of the first class at a trial held in accordance with the provisions of the Criminal Procedure Code. Such sentences were made subject to rights of appeal or revision, as the case might be, as under the Code. If they had been altered in the course of review or appeal under the provisions of the Ordinance of 1942, the altered sentence, it was provided, would be subject to appeal or revision. Cases pending before Special Courts were to be transferred to the ordinary Criminal Courts. An indemnity was granted to any Servant of

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(7) ibid, page 118.
(8) ibid, page 134.

the Crown for any sentence passed or act done by him in the exercise of any jurisdiction or power conferred upon him or purported to have been conferred upon him by the Special Criminal Courts Ordinance.

Notwithstanding the repeal of the Ordinance, the Executive appealed to the Privy Council. (9) Their Lordships while recognising that in view of the repeal the question raised before them was largely academic thought that the better course would be to decide whether the Special Courts Ordinance was invalid, "especially as this may be of assistance in deciding other questions which may arise thereafter as to the validity of Ordinances made, in cases of emergency, by the Governor General", under paragraph 72 of the Ninth Schedule.

Their Lordships observed that an emergency might exist which made it necessary to provide for the setting up of Special Criminal Courts without requiring such courts to be actually set up forthwith all over India. The Governor-General might well have considered that, in view of the existing emergency, it was necessary to have a scheme for Special Courts drawn up and all ready for application if the existing emergency was further aggravated. It was undoubtedly true that the Governor-General, acting under paragraph 72 of the Ninth Schedule, must himself discharge the duty there cast upon him and could not transfer it to other authorities. But the Governor-General had not delegated under Section 1 (3) his legislative powers at all.

(9) King Emperor v. Benoari Lall Sharma (1945) F.L.J. 1.

His powers in this respect in cases of emergency were as wide as the powers of the Indian Legislature which, in view of the proclamation under Section 102, had power to make laws for a Province in respect of matters which would otherwise be reserved to the Provincial Legislature. There could be no valid objection, in point of legality, to the Governor-General's Ordinance taking the form that the actual setting up of Special Courts under the terms of the Ordinance should take place at the time and within the limits judged to be necessary by the Provincial Government specially concerned. This, according to their Lordships, was not delegated legislation at all. It was merely an example of the not uncommon legislative arrangement by which the local application of the provision of a statute was determined by the judgement of a local administrative body as to its necessity. Their Lordships held that if he was satisfied of the existence of an emergency, the Governor-General under paragraph 72 might repeal or alter the ordinary law as to the revisionary jurisdiction of the High Court, just as the Indian Legislature itself might do. The principle that legislation should enable an offender to know in advance before what court he would be brought if he was charged with a given crime, in their Lordships' view, was a question of policy, not of law. There was nothing either in the written Constitution of India or underlying it, which debarred the executive authority, if specially authorised by the statute or ordinance to do so, from giving directions after the accused had been arrested and charged with crime as to the choice of court which was to try him. The

law-making authority in India, whether that authority was the Legislature or the Governor-General, like the Parliament of Westminster, could validly enact that the choice of the court should rest with an executive authority.

Viscount Simon, L.C., who delivered the opinion of the Council observed:

"..... the question whether the Ordinance is intra vires or ultra vires does not depend on considerations of jurisprudence or policy. It depends simply on examining the language of the Government of India Act and of comparing the legislative authority conferred on the Governor-General with the provisions of the Ordinance by which he is purporting to exercise that authority. It may be that, as a matter of wise and well-framed legislation it is better, if circumstances permit, to frame a statute in such a way that the offender may know in advance before what court he will be brought if he is charged with a given crime: but that is a question of policy, not of law. There is nothing of which their Lordships are aware in the Indian Constitution to render invalid a statute, whether passed by the Central Legislature or under the Governor-General's emergency powers, which does not accord with this principle..... Again and again, this Board has insisted that in construing enacted words we are not concerned with the policy involved or with the results injurious or otherwise, which may follow from giving effect to the language used".

In the circumstances their Lordships held that the Ordinance was not ultra vires.

A writer in the Law Quarterly Review,(10) referring to the judgement commented, "Most constitutional lawyers would sympathise with the objections of the eminent judges in India to the provisions of the Ordinance in question. Delegation of such powers to the Executive may well be considered to be contrary to constitutional principles. An appeal to constitutional principles frequently deters Parliament from enacting some proposed provision of an Act of Parliament. Constitutional principles are, however, only guides to the Legislature and not principles of law. What the Legislature has enacted must under the British and also the Indian Constitutions be enforced by the courts".(11)

(10) G.G.P. in Law Quarterly Review, 1945, Vol.61, pages 123, 124.

(11) Under Irish law, emergency legislation and the setting up of special courts have been held to be in conformity with the Constitution. Article 28,3,(3) of the Constitution of Eire contains a wide provision for dealing with war or armed rebellion; under it the Constitution cannot be invoked to invalidate any law enacted by the Oireachtas which is expressed to be for the purpose of securing "the public safety and the preservation of the State", and anything purported to be done under such legislation cannot be challenged. This Article was amended in 1939 so that the Legislature was able to make provision for the emergency created by the Second World War. In the exercise of this power, Emergency Powers Acts were passed in 1939 and 1940 and under the Emergency Powers Orders made under the Acts, military courts were set up to try certain specified offences. The jurisdiction of these courts was challenged in In re McGrath and Harte ((1941) I.R.68) and in The State (Walsh) v. Lennon ((1942) I.R.112). In the first case it was held that the reference to emergency in the long titles of these Acts sufficed to bring them within Article 28 of the Constitution so that the other articles of the Constitution could not be invoked to invalidate them. It was also held by the Supreme Court that Section 3 of the Emergency Powers Act, 1940 which provided that the Government might by order make provisions for the trial in a summary manner of any person alleged to have committed any offence specified in such order, authorised the Government to provide for the trial and punishment of persons, whether the offences were alleged to have been committed before or after the making of such order. In the second case, four accused persons were ordered to be brought before a military court established by the Emergency Powers Order, 1940 to be tried on a charge of murder. It was contended on their behalf that the Order was ultra vires as it directed that the military court which was to try the accused, was to try them together, and so precluded the court from exercising its discretion and control over its own procedure. It was held by the Supreme Court that the Order was within the powers conferred by the Constitution and the Emergency Powers Acts and could not be impugned.

The validity of certain provisions of the repealing Ordinance (XIX of 1943) was challenged by Piarre Dusadh and others [12] who had been convicted by courts functioning under the Special Criminal Courts Ordinance, 1942. Their contention was that the sentences which had already been passed by the Special Courts could not be validated by the new Ordinance. The Federal Court held that the repealing Ordinance conferred validity and full effectiveness on sentences passed by Special Courts which had functioned under the Special Criminal Courts Ordinance. It also held that the Special Criminal Courts (Repeal) Ordinance, 1943, was not ultra vires the Governor-General. The subject matter of the Ordinance was covered by the entry 'administration of justice' in List II and the entry 'criminal procedure' in List III and in promulgating the Ordinance, it said, the Governor-General had not attempted to do indirectly what he could not do directly or to exercise judicial power in the guise of legislation. The Ordinance was also not invalidated on the ground that the Governor-General had validated by retrospective legislation proceedings held in courts which were void for want of jurisdiction, as there was nothing in the Indian Constitution which precluded the Legislature from doing so. The court observed that the limitation in the American Constitution that the Legislature could not by retrospective legislation validate proceedings which had been held in the courts, but which were void for want of jurisdiction was derived from the interpretation given by the American Courts to the Fifth and Fourteenth Amendments which provided against any person being "deprived of life, liberty or property without due process of law". The position

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(12) Piarre Dusadh and others v. King Emperor, (1944) F.C.R. 61.

was different in India, the court said, as there was nothing in the Government of India Act, 1935, corresponding to so much of the Amendments as relate to deprivation of life or liberty, and even as to property it only required that such deprivation should be by "authority of law". The sacredness of personal freedom remained in India, in the view of the court, only as a principle of private law, and executive interference with the liberty of the subject might be justified as much by legislation or statutory rule as by production of an order of court.

vi. Other Security Measures

During the war years the Government of India had to cope with three special emergencies over and above the general continuing peril consequent on being involved as a belligerent. One was the assault of the Japanese armed forces upon its eastern gates; another was the ~~nationalist~~ agitation of a section of nationalists, which, though less hostile than it might have been, did not fail to act on the principle that England's peril was India's opportunity; and the third was the subversive activities of the Communists whose ideology was foreign to the rulers and most of the people of India and whose loyalties were to Russia, the most difficult of England's allies.

To meet the situation, the Government passed a number of measures in addition to the Defence of India Act and the rules and orders made under it. Some of these measures were repetitions or adaptations of enactments passed during the First World War while others broke new ground as the whirligig of time had brought with it new conditions and attitudes in life. A few of them are noticed below.

The Registration Ordinance, 1939, requiring certain European British subjects to register themselves followed the lines of similar legislation during the First World War. The Requisitioning of Vessels Ordinance, 1939, and the Transfer of Aircraft and Vessels Restriction Ordinance, 1939, had also their counterpart in

enactments made during the previous war. The Foreigners Ordinance, 1939, was a revised and enlarged version of the Foreigners Ordinance, 1914. It provided for the imposition of restrictions on the entry of foreigners into British India and for their internment, if necessary. It empowered the Central Government to order a foreigner not to depart from British India or to depart only in such manner as might be prescribed. It prohibited a foreigner from changing his name while in British India. The penalty for contravention of orders made under the Ordinance by the Central Government or its delegates was imprisonment for a term extending to five years and fine. It conferred immunity from legal proceedings on any person for anything which was in good faith done or intended to be done under the Ordinance.

Ordinances were promulgated in order to constitute a Civil Pioneer Force,(1) Women's Auxiliary Corps,(2) and Railway Air Raid Precautions Service.(3)

The right enjoyed by certain members of the Police Forces to resign office on giving notice of their intention to resign was suspended by the Police (Resignation of Office) Ordinance, 1942.

The Defence of India (Amendment) Ordinance, 1942 (XXIII of

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(1) The Civil Pioneer Force Ordinance, 1942 (X of 1942).
(2) The Women's Auxiliary Corps Ordinance, 1942 (XIII of 1942).
(3) The Railway Air Raid Precaution Service Ordinance, 1942 (XXI of 1942).

1942), amended the Defence of India Act, 1939, to make provision, among other things, for granting to the military and police forces of the Indian States and to the police force of the Crown Representative, while employed in British India, the same powers vested in, and the same legal protection enjoyed by, His Majesty's military and police forces in British India.

The Subversive Activities Ordinance, 1943, (XXXIV of 1943) provided that anyone who did any subversive act or printed or uttered any document containing subversive matter without lawful authority or excuse would be liable to punishment with transportation for life or with imprisonment for ten years and fine. Subversive act was defined as "any act which is intended or is likely to cause disaffection among, or to prejudice, prevent or interfere with the discipline, health or training of, or the performance of their duties by, members of His Majesty's naval, military or air forces or to induce or influence any member of His Majesty's naval, military or air forces to fail in the performance of his duties as such, or to render any member of His Majesty's naval, military or air forces incapable of efficiently performing his duties as such". Subversive matter meant "any matter, whether expressed in words, spoken or written or in signs or visible representations or in any other manner whatsoever, which is intended or is likely to cause disaffection among, or to prejudice, prevent or interfere with the discipline, health or training of, or the performance of their duties by, members of His Majesty's naval, military or air

forces, or to induce or influence any member of His Majesty's naval, military or air forces to fail in the performance of his duties as such, or which is an incitement to the commission of a subversive act". Anyone, without lawful authority or excuse, found in possession of documents containing subversive matter was liable to imprisonment for ten years and fine. Offences under Sections 121A (Conspiracy with a view to waging, or attempting to wage war or abetting waging of war, against the King), 122 (Collecting men, arms and ammunition or otherwise preparing to wage war against the King), 123 (Conceding, with intent to facilitate, design to wage war against the King), and 131 (Abetting mutiny or attempting to seduce a soldier, sailor or airman from his duty) of the Indian Penal Code were declared capital offences by the Ordinance.

The War Injuries Ordinance, 1941, (VII of 1941), empowered the Central Government to make schemes providing for grant of relief in respect of personal injuries sustained by gainfully occupied persons and other specified persons and in respect of war service injuries sustained by civil service volunteers during the continuance of hostilities by payments of temporary allowances and payments for the purchase of artificial limbs and surgical appliances.

The War Risks (Goods) Insurance Ordinance, 1940 (IX of 1940) provided for compulsory insurance of goods or agricultural products owned by persons carrying on business as sellers of goods in the

course of such business. The War Risks (Factories) Ordinance, 1942, (XII of 1942) made similar provision for factories in British India. The Central Government was empowered to put into operation a scheme by which it would undertake in relation to factories the liabilities of insuring against war risks to the extent set out in the Ordinance.

The Penalties (Enhancement) Ordinance, 1942, as amended by the Penalties (Enhancement) Amendment Ordinance, 1942, and the Penalties (Enhancement) Second Amendment Ordinance, 1942, made offences punishable under Sections 326 (Voluntarily causing grievous hurt by dangerous weapons or means), 386 (Extortion by putting a person in fear of death or grievous hurt) 387 (Putting a person in fear of death or of grievous hurt, in order to commit extortion), 392 (Robbery), 393 (Attempt to commit robbery), 399 (Making preparation to commit dacoity), 435 (Mischief by fire or explosive substance with intent to cause damage to the amount of one-hundred rupees,(4) or upwards or in case of agricultural produce, ten rupees or upwards(5), and 436 (Mischief by fire or explosive substance with intent to destroy dwelling house, place of worship or place for the custody of property) of the Indian Penal Code punishable with death or with whipping in addition to any punishment to which the offender was liable under the Code, and offences under Sections 147 (rioting), 148 (rioting armed with deadly weapon), and 186 (obstructing any

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(4) that is, £7. 10s. -.
(5) that is, 15 shillings.

public servant in the discharge of his public functions) of the Code were made punishable with whipping in addition to any punishment to which the offender was liable under the Code. Offences under Sections 376 (rape), 380 (theft in buildings, tent or vessel used either for human dwelling or for the custody of property), 382 (theft after preparation made for causing death, hurt or restraint in order to the committing of the theft), 394 (voluntarily causing hurt in committing robbery) and 395 (dacoity) were declared capital offences. Contravention of any of the provisions of Rule 35 of the Defence of India Rules relating to sabotage and receiving sabotaged property was made punishable with death or with whipping or with whipping in addition to any punishment to which the offender was liable under the rule. Persons committing theft from premises damaged by war operations or left vacant for fear of enemy attack, it was provided, would be punished with death or with rigorous imprisonment for a term extending to ten years or with whipping in addition to such rigorous imprisonment. Though many of the above-mentioned offences were declared capital offences, the courts which might have tried them if they were not so declared, were made competent to try them. The Provincial Governments were empowered to put the provisions of the Ordinance into effect throughout the Province or in any specified area.

The Collective Fines Ordinance, 1942 (XX of 1942), enabled the Provincial Government to impose a collective fine on the

inhabitants of any area if it appeared to the Government that the inhabitants were concerned in or abetting the commission of offences prejudicially affecting the defence of British India or the efficient prosecution of war, or were harbouring persons concerned in the commission of such offences, or were failing to render all the assistance in their power to discover or apprehend the offenders or were suppressing material evidence of the commission of such offences. The Government might exempt any person or class or section of the inhabitants from liability to pay any portion of such fine. The District Magistrate was required to apportion the fine among the inhabitants according to his judgement of their respective means.

In Emperor v. Ram Ranjan Sur(6) it was held that a District Magistrate, when demanding fine from individual persons under the Ordinance acted as a court and that his orders were subject to revision in the High Court. In sending with the notice demanding the fine a threat to issue a warrant of attachment in default of payment, he had initiated proceedings for the recovery of the fine in a manner not provided for in the Code of Criminal Procedure. This novel and illegal procedure was a cogent reason for interference. But when apportioning the collective fine among those liable to pay it under Section 3(3) of the Ordinance, the District

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(6) Crim. Ref. Nos. 36 to 45 of 1947 dated 28-3-1947 in the Calcutta High Court.

Magistrate was not acting judicially and the order was not subject to revision under the Code of Criminal Procedure. Further, when the imposition or collection of a particular fine was impugned by the subject the onus was on the Crown to establish and justify such imposition and the power and authority to recover such fine.

The Criminal Law Amendment Ordinance, 1943 (XXIX of 1943), with the amendments made to it in the two following years, provided for the " more speedy trial" by Special Tribunals of certain offences specified in a schedule. They included offences punishable under Sections 161 (Public servant taking illegal gratification in respect of an official act) 165 (Public servant obtaining valuable thing, without consideration, from any person concerned in proceeding or business transacted by such public servant) of the Penal Code and also offences under Sections 406 (criminal breach of trust), 408 (criminal breach of trust by clerk or servant) 409 (criminal breach of trust by public servant or by banker, merchant or agent) 411 (dishonestly receiving stolen property) and 414 (assisting in concealment of stolen property) of the Code where the property in respect of which the offence was committed was property entrusted by the Government of the United Kingdom or of any of His Majesty's dominions, or the Central or Provincial Government or a local authority or a person acting on behalf of any such government or authority. The schedule also listed offences punishable under Section 417 (cheating) and

Section 420 (Cheating and dishonestly inducing delivery of property) where the person deceived was the Government in the United Kingdom or in any of His Majesty's dominions, or the Central or a Provincial Government, or a local authority or a person acting on behalf of any such government or authority. Offences punishable under the Hoarding and Profiteering Prevention Ordinance, 1943, or under any rule made or deemed to have been made under the Defence of India Act, 1939, were also included in the schedule. It was provided that any conspiracy to commit or any attempt to commit or any abetment of any of the aforesaid offences was triable by the Special Tribunals.

The Ordinance contemplated the constitution of five Special Tribunals each consisting of three members. At least one of the members should be qualified for appointment as a Judge of the High Court; another could be an officer of His Majesty's forces provided he was also a barrister, or an Advocate of Scotland, of five years standing. The third should either be qualified for appointment to a High Court or should have exercised for at least three years the powers of a Sessions Judge, Chief Presidency Magistrate or District Magistrate.

A Special Tribunal could take cognizance of offences without the accused being committed to it for trial and was required to follow the procedure prescribed for trials of warrant cases by Magistrates. Two members of the Tribunal in the temporary and

unavoidable absence of the third could proceed with the trial provided the third member would be present when the prosecutor or the accused was addressing the Tribunal and when the judgement was delivered. The provisions of the Code of Criminal Procedure, in so far as they were not inconsistent with the Ordinance, would generally apply to the proceedings of a Special Tribunal. It could pass any sentence authorised by law. Under Section 7 the High Court could exercise powers of appeal and revision, as if the Special Tribunal were a Court of Sessions trying cases without jury. Section 8 provided that "No court shall have authority to transfer any case from a Special Tribunal or to make an order under Section 491 of the Code of Criminal Procedure, 1898 (V of 1898), or save as provided in Section 7 have any jurisdiction of any kind in respect of any proceedings of a Special Tribunal". Special rules of evidence were also laid down in the Ordinance. Section 9(1) provided that when any person was charged with an offence specified in the schedule the fact that the person was in possession, for which he could not satisfactorily account, of pecuniary resources or property disproportionate to his known sources of income or that the person had, at or about the time of the offence, obtained an accretion to his pecuniary sources or property for which he could not satisfactorily account, might be proved and might be taken into consideration by the Special Tribunal as a relevant fact in deciding whether he was

or was not guilty of the particular offence. Under Section 9(2) it was provided that in a trial for an offence punishable under Section 161 (Public servant taking illegal gratification in respect of an official act) or under Section 165 (Public servant obtaining valuable thing, without consideration, from any person concerned in any proceeding or business transacted by such public servant) of the Indian Penal Code if it was proved that an accused person had accepted or obtained or had agreed to accept or attempted to obtain for himself or for any other person, any gratification other than legal remuneration or any valuable thing from any person it would be presumed, unless the contrary was proved, that he had accepted or obtained or agreed to accept or attempted to obtain the gratification or valuable thing without consideration or for a consideration which he knew to be inadequate, or as a motive or reward for doing or forbearing to do any official act or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person with the Government or with any public servant.

A Special Tribunal was required, notwithstanding anything contained in the Indian Penal Code, whether it imposed a sentence of imprisonment or not, to impose a fine which should not be less than the amount of money in value of the property found to have been procured by the offender by means of the offence.

In Shiv Kali Goswami v. Emperor,(7) it was held that the

(7) A.I.R. 1944 All. 257.

Criminal Law Amendment Ordinance, 1943, was intra vires the ordinance-making authority of the Government of India including the provision conferring revisional powers on the High Court in excess of those conferred by the Letters Patent. The court observed that the revisional powers were undoubtedly wide, but were discretionary and must be exercised not as a matter of course, but only when it was demanded in the interests of public justice.

The Nagpur High Court held that a Special Tribunal was competant to try not only the offences mentioned in the Schedule to the Ordinance, but also other offences with which an accused could be charged at the same trial under the provisions of the Code of Criminal Procedure.(8)

In Emperor v. J. K. Gas Plant Manufacturing Company(9) the Bombay High Court held that the Governor-General could not constitute a tribunal to try any offence committed outside British India and that the allotment for trial of a case in respect of such offence to the Special Tribunal was therefore ultra vires. The Federal Court, confirming the judgement of the Bombay High Court on the point held that notification issued under the Ordinance alloting trial of offences to the Special Tribunal did not cease to operate after the end of the emergency.(10)

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(8) Sarangpani v. Emperor, A.I.R. 1946 Nagpur 374.
(9) A.I.R. 1947 Bombay 361.
(10) J. K. Gas Plant Manufacturing Company v. Emperor. (1947) F.C.R.141.

As communal disturbances and Communist activities were rife in the country, the Provincial Governments enacted, when the Defence of India Act and Rules expired, security laws like

The Assam Maintenance of Public Order Act, 1947 (April 2, 1947)

The Bihar Maintenance of Public Order Act, 1947 (March 16, 1947)

The Bombay Public Securities Measures Act, 1947 (March 23, 1947)

and

The United Provinces Maintenance of Public Order Act, 1947 (March 1, 1947)

These statutes included provisions generally adapted from the British Emergency Powers (Defence) Act, 1939, along with Regulation 18 B.(11)

In Bengal, by the Bengal Ordinances Temporary Enactment Act, 1947 (March 16, 1947) the life of the following Ordinances, namely, the Bengal Civic Guards and Collective Fines Continuance Ordinance, 1947; the Bengal Special Powers Ordinance, 1947, the Dacca Area Security Ordinance, 1947, the Bengal Criminal Law Amendment Ordinance, 1947, the Bengal Civil Pioneer Force Ordinance, 1947, among others, was extended by six months with a grant of power to the Provincial Government to extend it to a further period of six months.

During the war years, that is, between 1939 and 1945, no less than 255 ordinances were promulgated by the Governor-General

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(11) As they all followed the same pattern, it is only necessary to deal with one, like the Bombay Public Security Measures Act, 1947, which will be discussed in detail in the next chapter.

while the Acts of the Central Legislature during the same period numbered 203 only. It was a period when, to borrow Burke's phrase, the medicine of the constitution seemed to become its daily diet. But it can be argued that they were years of stress and strain and the body politic required large quantities of medicine. What is unfortunate is that this habit of drugging the body politic continued during subsequent periods of comparitive good health. Thus between 1946 and 1949 no less than 130 ordinances were issued by the Governor-General. If during the war years on an average three ordinances a month were issued, during the four years after the war 2.7 ordinances a month were promulgated, exclusive of the ordinances issued by the Governors of Provinces. If the Government has to declare a state of emergency every tenth day, we probably live in a state of permanent emergency even in peace time.

A similar continuance of emergency provisions made during the war was effected in the United Kingdom also. Though 84 including 18B, out of a total of 342 Defence Regulations then in force together with a large number of Regulations forming parts of Special Codes were revoked the day after the end of hostilities in Europe and a further large batch was revoked within five months, as it was recognised that certain Regulations could not be dispensed with until the reconversion of national economy to peace time conditions had made some progress, the Supplies and Services

(Transitional Powers) Act, 1945, was passed in order to give authority for these Regulations to remain in force. The Act provided that certain Defence Regulations (12) might be continued in force by Order in Council, if it appeared to His Majesty that they were necessary or expedient for the purpose of maintaining, controlling and regulating supplies and services so as to facilitate the demobilisation and resettlement of persons, and the readjustment of industry and commerce to peace time requirements, or to secure a sufficiency of essential supplies or their equitable distribution or to assist the relief of suffering at home or abroad. It did not authorise the making of any new regulations, except for the purpose of price control, but merely authorised the continuance in force of some of the existing regulations after the expiration of the Emergency Powers (Defence) Act, 1939. The Act was to remain in force for five years, that is, until December 10, 1950, with the provision that it might be continued thereafter for a year at a time by Order in Council if both Houses of Parliament presented an address to His Majesty praying that it should be continued. A similar Act called Emergency Laws (Transitional Provisions) Act, 1946, was passed with a view to extending until December 31, 1947, certain war time Acts and also some of the Defence

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(12) Regulations in Part III and IV of the Defence (General) Regulations, 1939, and certain separate codes of regulations specified in Schedule I to the Act.

Regulations which were not covered by the Supplies and Services (Transitional Provisions) Act, 1945. This Act also made permanent a few minor amendments to pre-war Acts which had been temporarily effected by Defence Regulations. In 1947 another Act called the Supplies and Services (Extended Purposes) Act, 1947, was passed to authorise Defence Regulations to be used for certain non-wartime purposes in addition to those authorised by the Supplies and Services (Transitional Powers) Act, 1945. It authorised any Defence Regulations already in force under the 1945 Act and any orders or other instruments in force thereunder to be applied to the following additional purposes, namely:

(i) for promoting the productivity of industry, commerce and agriculture;

(ii) for fostering and directing exports and reducing imports and

(iii) generally for issuing that the whole resources of the community are available for use, and are used, in a manner best calculated to serve the interests of the community.

These powers were so wide that they seemed to leave no room for any judicial control of their application in good faith. It would be almost impossible for a court to hold a regulation or order made under the Act to be ultra vires on the ground that its purpose was not one which would ensure the use of resources in a

manner best calculated to serve the interests of the community. Then this is only one more instance of delegating wide and ill-defined legislative powers to the Executive. But what is novel and remarkable about the Act is that under it exceptional legislative powers, which had been originally conferred for the special and limited purpose of waging war and which had been kept alive at the end of the war for the transitional purposes of demobilisation and readjustment to peace time conditions, were being kept in operation for different purposes apparently quite unconnected with the conduct or termination of war.

It would seem that the Executive in India in promulgating numerous ordinances providing for emergency measures after the termination of the war were only following in the footsteps of the Cabinet in England.

CHAPTER V

EMERGENCY POWERS IN THE DOMINION OF INDIA

1. Public Security Measures

The Indian Independence Act, 1947, passed by the United Kingdom Parliament received the royal assent on July 18, 1947, and by the 15th of the following month, the Indian subcontinent was divided into two Dominions, India and Pakistan. The mass movements of refugees, the communal disturbances in the wake of the partition and the Communist activities in the country necessitated special public security measures which the Provincial Governments promptly passed. Some of the Provincial Governments which had already enacted security laws of a temporary nature during the pre-Dominion period kept them alive by means of amending Acts.

These security laws included the following:

Bombay Public Security Measures Act, 1947.

Bihar Maintenance of Public Order Act, 1947.

Madras Maintenance of Public Order Act, 1947.

Madras Suppression of Disturbances Act, 1948.

United Provinces Communal Disturbances Prevention Act, 1947.

West Bengal Criminal Law Amendment Act, 1947.

Central Provinces and Berar Public Safety Act, 1947.

Central Provinces and Berar Public Safety Act, 1948.

Madras Maintenance of Public Order Act, 1949.

Orissa Maintenance of Public Order Act, 1948.

Punjab Public Safety Act, 1947.

West Bengal Security Act, 1948.

Sind Maintenance of Public Safety Act, 1948.

West Bengal Security Ordinance, 1949.

The Bombay Public Security Measures Act, 1947, which was passed as early as March 23, 1947 and kept alive until 1953 may be studied as an example of these security laws.

The Bombay Act was amended four times; in 1948, twice, in 1949 and in 1950. The summary of the statute given below is of the law as it was administered in the dominion period, that is, before the amendment of 1950.

The Statute was enacted to "consolidate and amend the law relating to public safety, maintenance of public order and the preservation of peace and tranquillity in the Province of Bombay." It was to remain in force for three years.(1)

Under Section 2(A1) any Police Officer not below the rank of a Superintendent of Police in Greater Bombay or the Deputy Superintendent of Police elsewhere, authorised in this behalf, if he was satisfied that any person was acting or was likely to act in a manner prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province or any part thereof was empowered to arrest without warrant such person and keep him in custody for fifteen days and report the fact of the arrest to the Provincial Government.

Section 2(1) provided that the Provincial Government, if it was satisfied that any person "was acting,(2) is acting or is likely

(1) By the amending Act of 1950, its life was extended to six years.
(2) These words were added by an amending Act in 1948.
See infra, Hirji Shivram Vyas's case.

to act" in the same prejudicial manner as in 2(A1), could make an order directing that he be detained or that he should not be, or should remain, in such area in the Province as might be specified, or that he should notify his movements or report himself periodically or do both. The Government could impose on him such restrictions as might be specified in respect of his employment, business or association or communication with other persons, or in respect of his activities in relation to the dissemination of news or propagation of opinion. It could also prohibit or restrict the possession or use by him of any specified articles.

Section 3 provided that when an order of detention was made under Section 2(1) the Provincial Government "may upon application by the person affected by the order, communicate to him"(3) the grounds on which the order had been made, without disclosing facts which it considered against the public interest to disclose and such particulars as were in its opinion sufficient to enable him to make a representation to the Provincial Government against the order and afford him the earliest opportunity of making such representation. Section 4 empowered the Provincial Government, on receipt of such representation, to annul, confirm or modify the order or make any other order $under Section 2(1).

Section 5 provided for the control of essential services by enacting that the Provincial Government could by order direct that persons engaged in employments considered essential for the purpose

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(3) These words were substituted by the amending Act (30 of 1948) for "shall, as soon as may be, communicate to the person affected by the order".

of public safety, maintenance of public order or for maintaining supplies and services essential to the community should not depart out of such area or areas as were specified in the order.

Section 6 empowered the Provincial Government to impose collective fines on inhabitants of any area if it was satisfied that they were concerned in certain specified activities.

Under Section 9, it was provided that persons contravening orders prohibiting the carrying of certain specified weapons of offence or corrosive substances or explosives would be punished with whipping in addition to any other punishment to which they might be liable.

Section 9A provided for the control of publications for the purpose of preventing any activity prejudicial to the public safety, the maintenance of public order or the tranquillity of the Province. The Provincial Government could, under the Section, prohibit by order the bringing of any book, periodical or document into the Province or prohibit the publication of any book, periodical or document in the Province. It could also require that any matter relating to particular subjects should be submitted for scrutiny before publication.

Section 9B empowered the Provincial Government to restrict the removal of any commodity from the Province.

The Act provided for the constitution of Special Criminal Courts. The Provincial Government could appoint as a Special Judge for Greater Bombay any person who was a Judge of the High Court and for any other area any person who had been a Sessions Judge for two years. A Special Judge was required to try "such offences or class

of offences or such cases or class of cases" as the Provincial Government might direct. He could take cognizance of offences without the accused being committed to his Court for trial. He was required to record a memorandum only of the substance of the evidence given by witnesses. He could pass any sentence authorised by law. The trial of offences before a Special Judge, it was provided, was not to be by Jury or with the aid of Assessors. Any person convicted by a Special Judge could appeal to the High Court within fifteen days. The High Court could call for the record of the proceedings of any case tried by a Special Judge and could exercise in respect of such case, its powers of revision and confirmation. Section 18(3) provided that "no court shall have jurisdiction to transfer any case from any Special Judge or to make any order under Section 491 of the Code (of Criminal Procedure) in respect of any person triable by a Special Judge or, save as herein otherwise provided, have jurisdiction of any kind in respect of proceedings of any Special Judge".

By Section 21 the Provincial Government was enabled to delegate its powers and duties under the Act to any officer or authority subordinate to it, not being below the rank of a Deputy Commissioner of Police or a District Magistrate.

Section 22 empowered any police officer to arrest without warrant any person who was reasonably suspected of having committed an offence punishable under the Act.

Section 24 provided for indemnity for actions done in good faith under the provisions of the Act.

By Section 25 the Provincial Government was empowered to make rules to carry out the purposes of the Act.

Section 27 empowered the Provincial Government to declare unlawful any association which, in the opinion of the Government, was organised or equipped for the purpose of enabling the members of the association to be employed, or was organised or equipped in such manner as to arouse reasonable apprehension that the members might be employed, in usurping the functions of His Majesty's forces or any police force, or for the use or display of physical force in furtherance of the common object of the association.

The power of a District Magistrate to make an order under Section 2, when such power was delegated to him under Section 21, was limited to his District not only as regards the whereabouts of the person against whom the order was made, but also in regard to the place of detention. Thus where the District Magistrate of Sholapur passed an order detaining a person in the Yervada Jail in the Poona District, the order was held to have been made without jurisdiction.(a)

An order of detention made orally was held good.(b) The detention of a person without showing him the order for some days was deprecated.(c)

An order of detention for a collateral purpose was held illegal. Thus if the purpose of detaining a person was to deprive him of his

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(a) Bashan Madar Korbu v. Emperor, A.I.R. 1949 Bom. 37.
(b) Anwari Begum v. Commissioner of Police, A.I.R. 1949 Bom. (C.N.26) 82.
(c) Bashan Madar Korbu v. Emperor, A.I.R. 1949 Bom. 37.

rights and safeguards under the Criminal Procedure Code and to carry on an investigation without the supervision of the Court while keeping him under detention, then the detention was mala fide.(d)

In a prosecution for contravention of an order made under Section 2(1), the burden was upon the prosecution to establish that the detaining authority was satisfied before the order was made, that the accused was acting in a prejudicial manner. The detaining authority must step into the witness box and make the statement on oath that he was satisfied in order to enable the accused to challenge that statement in his attempt to prove that the order was made arbitrarily, capriciously or mala fide.(4)

In re Moinuddin Abdullamia Koreishi,(5) while observing that if the Court was satisfied that the order had been made bona fide, there would ordinarily be every reason to accept a statement of fact mentioned in the grounds when it was reinforced by the affidavit of the detaining authority, it was held that the Court would be entitled to interfere if an essential or significant fact was successfully falsified by the petitioner and the Court was inclined to consider that the satisfaction of the detaining authority was based on a fact found to be untenable, even though the authority was genuinely satisfied in terms of Section 2.

Hirji Shivram Vyas v. The Commissioner of Police(6) was a case where the Commissioner of Police detained the detenue exercising his

(d) Maledath Bharatan v. Commissioner of Police, A.I.R. 1950 Bom. 202.
(4) Emperor v. Abdul Majid, I.L.R. (1949) Bom. 363.
Emperor v. Bikhu Ramachandra, A.I.R. 1950 Bom. 330.
(5) A.I.R. 1949 Bom. 86.
(6) A.I.R. (1948) Bom. 417.

special powers under the Public Security Measures Act, after an order for bail had been made in favour of the detenue by the Chief Presidency Magistrate. Desai, J., observed that the Act which contained very special and wide powers did not contemplate that there should be prosecution first for the purpose of securing a conviction and that after that long drawn out process was over, the Police Commissioner should have recourse to those special powers and direct the accused on those very grounds on which he should in the very first instance have been detained. He further observed: "I do feel and feel strongly, that it is not permissible for the Commissioner of Police to lend himself to any course of action which suggests that he arrogates to himself the right to review the judgement of the Magistrate. He must respectfully abide by it. Where then a situation arises which lends itself to the construction that the action of the Police Commissioner is an attempt to supersede the order of the Magistrate, Courts of justice must be vigilant to see that justice is not brought into ridicule and rendered impotent and that a tendency towards autocracy does not prevail in the minds of the representatives of democracy".(7) The court held that the words "is acting or is likely to act" in Section 2(1) restricted the scope of the Act to the present and future actions of the detenue. Thereupon the subsection was amended by inserting the words "was acting" before the words "is acting or is likely to act".(8)

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(7) id. 421.
(8) Public Security Measures (Second Amendment) Act, 1948.

In re Krishnaji Gopal,(9) where the grounds communicated to the detenu were that he was an active leader of a subversive organisation at Amalner, that he had been carrying on subversive propaganda among the people to prepare and use illegal and violent means and that he was thus acting in a manner prejudicial to the public safety and maintenance of public order and tranquillity in Amalner town, it was held that the communication purported to give grounds and not particulars; that the grounds conveyed no precise information to the detenu which would enable him to make proper representation to the District Magistrate and thatthe notice under Section 3 was therefore bad.

In re Pandurang Govind Phatak(10) the detenu was released because the place where he had been alleged to have engaged himself "in objectionable and harmful activities" and incited people to violence, was mentioned neither in the order nor in the grounds communicated nor in the affidavit so that the court held that in the circumstances it could not be said that the District Magistrate was satisfied that the detenu was acting in a manner prejudicial to the maintenance of public order at any place within the area with referehce to his activities in which a valid order of detention could be made against him. Sen, J., observed that when under a statute enacted in peaceful and normal times an executive officer of the status of a District Magistrate had been given the authority to interfere with the liberty of a subject, and he had been often

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(9) A.I.R. (1948) Bom. 360.
(10) A.I.R. (1949) Bom. 84.

proved to be careless, arbitrary and mechanical and even to act mala fide or with an ulterior object in making use of the power of detention conferred on him, the Court would not be justified in relying on the principle omnia praesumuntur esse rite acta. "In such circumstances", he said, "it becomes our plain duty to scrutinise the order made and the grounds given therefor with the utmost care and anxiety and to make every legitimate inference in favour of the subject."(11)

It was held in re Rajadhar Kalu Patil(12) that the grounds furnished under Section 3 must be "clear, precise and accurate, otherwise they would fail to serve the purpose for which they were intended by the legislature. The grounds must be such as to make it clear to the person detained what he is charged with and what has moved the Government to deprive him of his liberty". Chagla, Ag. C.J., observed: "We are most anxious that this safeguard afforded to the subject, which seems to be the only safeguard under this Act, should be maintained intact and should not be in any way whittled down.....Without encroaching upon the right of the Government to decide what particulars to furnish and what particulars not to furnish, it is necessary to state that the grounds must be given with sufficient particularity for them to serve the purpose they were intended to serve. In our opinion grounds which are vague and indefinite and which contain no particulars whatever are no grounds at all within the meaning of Section 3 of the Act".(13)

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(11) id. page 86.
(12) A.I.R. 1948 Bom. 334.
(13) id. page 335.

These judicial decisions proved irksome to the Executive authorities of the State, and they managed to get the statute amended so that the detaining authority, under the amended statute, was required to furnish the grounds of detention only "upon application" by the person affected by the order. The provision in the original Act that the authority should inform the detener of his right to make a representation was dropped from the statute.

It is noteworthy that instead of refraining from the arbitrary actions condemned by the judiciary, the executive hastened to change the law so as to restrict interference by the judiciary in similar circumstances in future.

This kind of executive action which had the appearance of "playing with the courts of law", as Mr. Setalvad would put it,(14) was repeated in other Provinces also. We shall notice in brief what happened in Bihar in regard to its public security measures.

The Bihar Maintenance of Public Order Act, 1947, is of interest because of the posthumous vissicitudes which it underwent. Though its operation was extended after the expiry of its first year's existence by notification by the Governor of Bihar and the following year by an amending Act of the Provincial Legislature, the Federal Court found that it had ceased to be in existence after March 15, 1948.

The Act came into force on March 16, 1947 and by Section 1(3)

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(14) M. C. Setalvad, War and Civil Liberties, page 69. Mr. Setalvad, the present Attorney General of India used the expression in 1946 in relation to the enactments and amendments of various security measures in the pre-Dominion period.

its operation was limited to one year from the date of its commencement. There was however a proviso to the effect that "the Provincial Government may, by notification, on a resolution passed by the Bihar Legislative Assembly and agreed to by the Bihar Legislative Council, direct that this Act shall remain in force for a further period of one year with such modifications, if any, as may be specified in the notification."

On March 11, 1948 after a resolution of both Houses, the Provincial Government issued a notification extending the life of the Act for one year from March 16, 1948 to March 15, 1949. By the Bihar Act V of 1949 which came into force on March 15, 1949, were substituted in Section 1(3) of the Act of 1947, for the words "for a period of one year from the date of its commencement" the words and figure "till the 31st March, 1950." As the Bihar Act of 1947 could not of its own force come into operation in Chhota Nagpur which had been declared a "partially excluded area" under Section 91 of the Government of India Act, the Governor of Bihar issued a notification on March 16, 1947 directing that the Bihar Act should apply to the Chhota Nagpur Division. But when the life of the Act of 1947 was extended in 1948, it was not followed by fresh notification under Section 92(1) of the Government of India Act, until March 7, 1949 when the Governor issued a validating notification that the Act stood extended by one year to Chhota Nagpur from March 16, 1948 and that it should be deemed that it always had application there. On March 12, 1949 a notification was issued by the Governor directing that the Act of 1949 should apply

to Chhota Nagpur. The appellants in Jatindra Nath Gupta v. The Province of Bihar[15] who had been arrested in Chhota Nagpur on various dates in December 1948 and January and February 1949, under the Bihar Act as extended, applied under Section 491, Criminal Procedure Code for their release on the ground that their arrest and detention were unauthorised and illegal in as much as Section 1(3) of the Act was ultra vires the powers of the Bihar Legislature and as such there was no Act in existence after the expiry of the period of one year fixed under the Act and even otherwise the Bihar Act with its extended duration was not effectually brought into operation in Chhota Nagpur. The Federal Court held that the power to extend the operation of the Act for a further period of one year with such modifications, if any, as might be specified was a legislative power, that the proviso to Section 1(3) of Act V of 1947 which delegated such power to an authority other than the Provincial Legislature was not conditional legislation but delegation of legislative power, and that the proviso, and the notification issued by the Governor of Bihar under the proviso extending the operation of the Act were consequently ultra vires. It further held that when the Act of 1949 was enacted, the Act of 1947 which it purported to amend was not in operation and the Act of 1949 was therefore inoperative and that the notification of the Governor on March 12, 1949 could not improve the position in these circumstances and the detention of the appellants was consequently illegal.

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(15) 1949 F.C.R. 595.

Later in the year the Bihar Maintenance of Public Order Act (III of 1950) was passed "to provide for preventive detention, imposition of collective fines, control of meetings and processions, imposition of censorship, requisitioning of property and prevention of unlawful drilling and the wearing of unofficial uniforms and regulating the conduct of persons in a protected place in connexion with the public safety and maintenance of order in the Province of Bihar".

This Act too was declared ultra vires, but that was done after the new Constitution of India came into force. Meredith, C.J., has summed up the circumstances in which the decision was given. The detenêr in Brahmeswar Prarad v. State of Bihar,(16) says the learned Chief Justice, "was arrested on 3rd March 1949 under Section 151, Criminal Procedure Code and lodged in the Bhagalpur Camp Jail where he has been in custody ever since. On 13th March there was a detention order under Act V of 1957. That Act having been declared ultra vires and having been replaced by an Ordinance, there was a fresh detention order under the Ordinance on 6th June. That Ordinance in turn was declared ultra vires by this Court, and was replaced by Ordinance iV of 1949, under which a fresh order was made and served on 5th July. On 6th December the present application was preferred. A rule was issued and 16th January was fixed for hearing. It eventually came up on 18th January, this Court having in the meanwhile held that the provision in the Ordinance for reference to an Advisory Council and report by that

(16) A.I.R. 1950 Patna 265.

Council, were mandatory, and non-compliance would make the detention illegal. The Government Advocate, however, stated that a fresh detention order had been passed under subsection (1)(a) of Section 2, Bihar Maintenance of Public Order Act (Bihar Act III of 1950) which had replaced the Ordinance on 4th January 1950..... it has been established that in fact a fresh detention order under Act IV of 1950 was passed on 15th January and was served on the 16th".

By the time the matter once more came up for hearing, the new Constitution had come into force and the Court held that the detention provision in the Act was completely inconsistent with the fundamental rights guaranteed under Artical 22(4) and (5)[17] of the Constitution of India and consequently when the Constitution came into force on the midnight of January 25, 1950, those provisions became void. The provisions of the impugned Act relating

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(17) Article 22(4). No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless:

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention.

Provided that nothing in this sub clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under subclauses (a) and (b) of clause (7)

Article 22(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.

to the duration of detention being inextricably mixed up with the provisions of safeguards laid down therein the doctrine of severability could not apply and therefore the entire Act became void. Referring to the Preventive Detention (Extension of Duration) Order, 1950, made by the President under subclauses (a) and (b) of clause (7) of Article 22[18] read with Article 373[19], even before he took the oath of office, the court observed that the provisions relating to preventive detention in Act III of 1950 having already become void as soon as the Constitution commenced, they could not be revived by any act of the President purporting to do so under Article 22(7) read with Article 373 of the Constitution[20] No order or law made under Article 22(7) could operate upon a law

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(18) Article 22(7) Parliament may by law prescribe
(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of subclause (a) of clause (4);
(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention.

(19) Article 373. Until provision is made by Parliament under clause (7) of Article 22, or until the expiration of one year from the commencement of this Constitution, whichever is earlier, the said article shall have effect as if for any reference to Parliament in clauses (4) and (7) thereof there were substituted a reference to the President and for any reference to any law made by Parliament in those classes there were substituted a reference to an order made by the President.

(20) Three other High Courts also declared the order ultra vires. Prahlad Jena v. State of Orissa, A.I.R. 1950 Orissa, 157; Sunil Kumar Bose v. Chief Secretary to the Government of West Bengal, A.I.R. 1950 Cal. 274; Showkat-un-nissa Begum v. State of Hyderabad, A.I.R. 1950 Hyd. 20. Nagpur High Court in Trimbak Shivarudra v. State of M.P., A.I.R. 1950, Nag. 203, held the order valid.

which had already become void under Article 13(1).[21]

These measures suggest that civil liberties are not better protected in free India than they were in British India. "The new abrogation of civil rights", it was said, "is a measure of the present Government's exasperation"[22] with Communist activities. "It is axiomatic" wrote V. P. Menon, the former Secretary of the Ministry of State and Home Affairs, in another context,[23] "that no nation can afford to be generous at the cost of its integrity and India has no reason to be afraid of her own shadow."[24] It may be so; but the fact remains that these public security measures and the Preventive Detention Act, 1950 in which these culminated, contained provisions "much like some of those acts and ordinances imposed against the nationalists during the struggle for freedom".[25] The voice is Jacob's voice, but the hands are the hands of Esau.[26]

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(21) Article 13(1). All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, (Fundamental Rights) shall, to the extent of such inconsistency, be void.
(22) W. Norman Brown, The United States and India and Pakistan, page 205.
(23) V. P. Menon, The Integration of the Indian States, page 389.
(24) In connexion with the police action in Hyderabad.
(25) W. Norman Brown, op. cit. page 205.
(26) Genesis, XXVII, 22.

ii. Police Action in Hyderabad

With the establishment of Pakistan and the exodus of large numbers of Muslims from India into Pakistan, the Hyderabad Muslims felt isolated and prepared to fight to retain control of a territory in which the majority of the population consisted of Hindus. The strongest Muslim organisation in the State was the Ittehad - ul - Muslemeen, which was dedicated to preserving the power of the ruling class. In 1947 its leader, Syed Quasim Razvi, organised a private army whose members were called Razakars. As paramountcy had lapsed with the passing of the Indian Independence Act, 1947, the Nizam of Hyderabad, it seemed, wished to be an independent monarch and he was encouraged in his intransigeance by the Ittehad organisation from within and by Pakistan from outside.

In 1948 the Government of India discovered that Hyderabad had transferred £15,000,000 of Government of India Securities to Pakistan as a loan. Razvi assured his followers that the Hyderabad flag would soon fly from Delhi's Red Fort. The activities of the Razakars compelled the Government of India to ask the Nizam to ban the Razakars, a request repeated without effect throughout the summer of 1948. The Nizam's government, in the meanwhile, was making attempts to bring in arms and ammunition for its troops, for the police and for the Razakars. With a view to stopping this, India tightened up her blockade of the State. In August the Government of Hyderabad informed the Indian Government that it had decided to take the dispute between them to the United Nations. On September 7, the Indian Premier announced that India had asked the Nizam for the last time to ban the Razakars and repeated a request to

provide immediate facilities for the return of Indian troops to Secunderabad from where they had been withdrawn after the Standstill Agreement with the Nizam. "All Hyderabad's resources", the Premier declared, "are being mobilised for war and no country in India's position can tolerate such preparations". (1)

On September 13, the Indian troops entered Hyderabad "to restore peace and tranquillity inside the State and a sense of security in the adjoining Indian territory". This military operation was officially called police action.(1a) It was accompanied by a proclamation by the Governor-General of a state of grave emergency "whereby the security of India is threatened by internal disturbance". On September 14, an Ordinance under Section 42 of the Government of India Act, 1935, was promulgated to provide for special measures to ensure the public safety and interest and prevent any grave menace to the security of India.

The Indian troops met with no serious opposition. By the afternoon of September 17, the Nizam capitulated. He was made the Rajpramukh (Prince-Governor) of the State.

A Military Governor was appointed by the Government of India to administer the country until peace and order were finally restored. It was decided that the Military Governor should be invested with full executive authority with powers to issue regulations having the force of law.(2)

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(1) quoted by Andrew Mellor, India Since Partition, page 84

(1a) 'Military intervention' was always the term used in Army HQ. "It was called 'Operation Polo', for it was just a game for the Indian Army. Army Headquarters gave it that name". (D.F. Karaka, Fabulous Mogul, Nizam VII of Hyderabad, page 116)

(2) V. P. Menon, The Integration of the Indian States, page 380

To this effect a firman (Ordinance) was issued by the Nizam. A civil administrator was appointed to assist the Military Governor. The administration under the Military Governor continued till December 1949 when an administration with a Civil Servant as Chief Minister was installed. In 1950 four representatives of the Hyderabad State Congress were taken into the administration as Ministers. This administration continued till March 1952 when after the general elections a Congress Ministry was formed in the State.(3) Thus "the apparatus of a modern and free State was progressively set up, at first under the Military Governor and then under a Council of Ministers". (4)

The Public Safety Ordinance, 1948, (XXIV of 1948) promulgated during the police action, followed the lines of the Defence of India Act, 1939. It extended to all Provinces of India and to every acceding State to the extent to which the Dominion Legislature had power to make laws for that State.

Section 3 (1) empowered the appropriate Governments to make such rules as appeared to them to be necessary or expedient for securing the public safety, the maintenance of public order, the maintenance of supplies and services essential to the life of the community, or for preventing any grave menace to the security of India. Subsection (2) provided that, without prejudice to the generality of the powers conferred by subsection (1), rules might be made for thirty five enumerated matters which included publication of news and information and preventive detention of persons

(3) ibid, page 382
(4) K. M. Munshi, The End of an Era, page 255.

suspected of "having acted, acting, being about to act or being likely to act" in a prejudicial manner.

Section 4 stated that any rule made under Section 3 or any order made under such rule would have effect notwithstanding anything inconsistent with it in any enactment other than the Essential Supplies (Temporary Powers) Act, 1946, or this Ordinance or in any instrument having effect by virtue of any enactment other than the Act mentioned or this Ordinance.

Section 6 provided for enhanced penalties for certain specified offences. Under subsection 3 of Section 6 it was provided that for the purposes of this section any person who "attempts to contravene, or abets or attempts to abet or does any act preparatory to a contravention of, a provision of any law, rule or order, shall be deemed to have contravened that provision".

No order made in exercise of any power conferred by or under the Ordinance was to be called in question in any Court. Section 10 gave immunity to any person for anything done in good faith or intended to be done under the Ordinance.

The Ordinance made provision for compulsory acquisition of immovable property in certain circumstances subject to payment of compensation. The amount of compensation was to be fixed either by agreement or by award of an arbitrator. The arbitrator in fixing the amount was required to be guided by the provisions of the Land Acquisition Act, 1894. This was a clear concession made in favour of the subject in deference to the decisionsof the High Courts in cases which arose out of Rule 81 of the

Defence of India Rules.

As the police action was eminently successful and the operation virtually ended in about hundred hours - it was referred to as a "hundred-hour war" - the enforcement of the Ordinance was not found necessary.

CHAPTER VI

EMERGENCY POWERS UNDER THE CONSTITUTION OF INDIA

i. General Features of the Constitution

The Constitution of India may be described as a palimpsest of the Government of India Act, 1935. Both in language and substance it derives in great measure from the Act of 1935. The language of the Act has, in some places, been modified in consequence of the interpretation put upon it by the courts. The provisions regarding federalism, relations between the branches of the government, the Ordinance-making power of the head of the State, to name a few, are all derived from the Act. The making of the Constitution was like "writing the final chapter in a work which had occupied many years and over which much had been thought, said and written".[1] The mark of the skilled hand of Sir Maurice Gwyer,[2] outstreched caressingly, seems to spread over the whole Constitution.

The main departures from the Constitution Act are the Preamble which envisages a sovereign democratic republic, the directive principles of State policy which, though not judicially enforceable, are intended to be guiding lights to the future legislator, and the fundamental rights which, in certain instances, are hedged in by justiciable 'reasonable restrictions'.

The Constitution contains 395 Articles and nine Schedules and is rated as the lengthiest Constitution in the world. This remarkable bulk

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(1) A. Gledhill, Constitutional Crisis in Pakistan, page 1.
(2) the draftsman of the 1935 Act.

too is a legacy of the Government of India Act, for like the Act it is not merely a Constitution but a detailed code dealing with almost all major aspects of the constitutional and administrative system of the Union. It contains not only the Constitution of the Union but also of the States comprising the Union. Apart from exhaustively dealing with the distribution of legislative powers between the Union and the States and their financial and administrative relations, it also treats of a number of miscellaneous matters such as the Public Service Commission, elections, languages, and minorities which could have been left to ordinary legislation. One might assume that the length and detail of the Constitution would give it unnecessary rigidity for changes of many unimportant matters can be effected only by amendment of the Constitution. But the process of amendment is not excessively difficult, and since the Constitution came into force, while the Congress party has remained paramount, many amendments have been made.

The system of government established by the Constitution has been described as 'at most quasi-federal... a unitary State with subsidiary federal features rather than a federation with subsidiary unitary features'.(3) But it has to be borne in mind that there is no standard pattern of federalism to which all federations must conform. No two federations are alike in all respects and a certain variety can be noticed

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(3) K. C. Wheare, India's New Constitution Analysed, 48 A.L.J. 21.

in the relationship between the central and regional governments in the different federations. The Constitution of India has affected an adjustment in federal-state relations suited to the conditions of the country. While the Centre has been made strong, the constituent units enjoy in normal times "substantial and significant powers of legislation and administration". (4)

Under the Constitution the Indian Courts, observed Fazl Ali, J., (5) are not committed to the American notion of separation of powers. In the directive principles of State policy, however, it is stated that the State shall take steps to separate the judiciary from the executive. (6)

The Founding Fathers envisaged a Cabinet form of government for India. If the English constitutional conventions with which India gained some familiarity during the British period continue to be followed, the Indian experiment in Parliamentary democracy may succeed, though "democracy in India is only a top-dressing on an Indian soil which is essentially undemocratic," (7) despite the fact that certain republican institutions existed in ancient India.

(4) T. T. Krishnamachari, C.A.D. XI, 953

(4) T. T. Krishnamachari, C.A.D. XI, 953 747

(5) In re Delhi Laws Act, (1951) S.C.R. 747

(6) Article 50

(7) B. R. Ambedkar, C.A.D. VIII, 38.

ii. Emergency Provisions

The Constitution provides for three types of emergencies:

(i) an emergency arising from actual or threatened war or external aggression or internal disturbance (1)

(ii) the failure of the constitutional machinery in any of the component States (2)

(iii) any situation endangering the financial stability or credit of the Indian Union or of any part of the territory of the Union (3)

A proclamation of emergency may be issued by the President if he is satisfied that there exists a grave menace to the security of India or any part of it by war, external aggression or internal disturbance.(4) The actual outbreak of war or external aggression or internal disturbance is not necessary to justify a proclamation of emergency. It is sufficient if the President is satisfied that there is imminent danger of such an outbreak.(5) A proclamation of emergency must be laid before each House of Parliament and will cease to operate at the expiration of two months unless it is approved by resolution of both Houses within the period. If the House of the People has been dissolved either before the proclamation of emergency or within two months after it, the proclamation must be approved by the Council of States within two months and by the newly elected House within thirty days of

(1) Article 352
(2) Article 356
(3) Article 360
(4) Article 352
(5) Article 352(3) This provision was introduced to remove the doubts raised in Emperor v. Benoari Lal, A.I.R. (1943) Calcutta 285.

its first sitting. A proclamation of emergency may be revoked by a subsequent proclamation. (6)

While a proclamation of emergency is in operation, the Government of India is virtually transformed into a unitary government. Parliament is empowered during the emergency "to make laws for the whole or any part of the territory of India with respect to any of the matters in the State List". (7) This does not mean that State laws existing at the date of the Proclamation are repealed pro tanto by repugnant provisions in Parliamentary laws passed on exclusive State subjects in exercise of the emergency power nor does it mean that the State legislative power cannot be exercised, but in case of repugnancy between provisions of State legislation and provisions of Parliamentary law made in exercise of the emergency power, the latter will prevail for so long as they continue to have effect. (8) Laws made by Parliament outside its normal legislative competency by virtue of the emergency provisions will cease to have effect on the expiry of six months after the proclamation of emergency has ceased to operate, except as regards things done or omitted to be done before the expiry of this period. (9)

Parliament has power to prolong its own life by law during the period of emergency by a year at a time. Such an extension cannot last beyond six months after the proclamation of emergency has ceased to operate. (10)

While a proclamation of emergency is in force, the Union Government may issue directions to the Goverhment of any State as to the manner in

(6) Article 352 (2)
(7) Article 250
(8) Article 251
(9) Article 250 (2)
(10) Article 83 (2)

which its executive power is to be exercised. (11) Parliament may confer powers and impose duties upon the Union Government or officers or authorities subordinate to it even in respect of matters which do not fall within the Parliament's normal legislative powers. (12) The President may, by order, suspend wholly or in part the provisions of the Constitution under which the States are entitled to the proceeds of certain taxes and a share in others levied by the Union, until the end of the financial year in which the proclamation of emergency ceases to operate. The order must be laid before each House of Parliament "as soon as may be after it is made". (13)

While a proclamation of emergency is in operation there is an automatic suspension, under the Constitution, of the seven freedoms, freedom of speech, of assembly, of association, of movement, of residence, freedom to deal with property and freedom to follow an avocation, guaranteed under Article 19 and all legislative authorities of the State will have the power to make any law curtailing those freedoms to any extent. (13a) But any laws 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 dome or omitted to be done before the law so ceases to have effect. (14)

During the continuation of a proclamation of emergency the President may, by order, suspend over the entire Union or in any part of it for the

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(11) Article 353
(12) ibid.
(13) Article 354
(13a) Article 358
(14) ibid.

period of the emergency or for any shorter period as may be specified, the right of the citizen to move the courts for the enforcement of such of the rights conferred by Part 111 (Fundamental Rights) of the Constitution, including proceedings pending in any court for the enforcement of such rights. Every such order must be laid before each House of Parliament as soon as may be [15] after it is made. [15a]

The words 'If the President is satisfied' in Articles 352, 356 and 360 make it clear that the President, on the advice of the Council of Ministers, alone need be satisfied as to the existence of an emergency and that the courts will have no power to question the validity of a proclamation made by the President on the ground that it is not justified by the existence of any of the facts mentioned as constituting an emergency. These words were used to remove the doubts raised in regard to the expression 'in cases of emergency' (The Governor-General may, in cases of emergency, make and promulgate an Ordinance) in Section 72 of the Government of India Act, 1919, kept alive by the ninth schedule of the Constitution Act of 1935. [16] It may be recollected that the expression 'in cases of emergency' was interpreted to mean that "the question whether an emergency existed at the time when an ordinance is made and promulgated is a matter of which the Governor-General is the sole judge". [17]

In Articles 123 and 213 [18] which deal with the ordinance-making

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(15) that is, "as early as is reasonable in the circumstances of the particular case". Tarapada v. West Bengal. 1951 S.C.J. 233.
(15a) Article 359
(16) Bhagat Singh v. The King Emperor (1931) A.C. 169
The King Emperor v. Benoari Lal (1945) A.C. 14.
(17) The Emperor v. Benoari Lal (1945) A.C. 14,22.
(18) infra.

powers of the President and the Governors respectively, the words, 'if satisfied' are used, with a view to barring the jurisdiction of the courts in regard to the satisfaction of the head of the state which necessitates his promulgating an ordinance.

It would appear that the President can make a further proclamation of emergency at or before the expiry of two months from the date of the first proclamation. (19) In re Anukul Chandra (20) it was held that an Ordinance promulgated under Section 72 of the Government of India Act could be repeated. Mukherji, J., observed: "The same conditions which may at one time create an emergency, may, whether they continue or disappear, well be regarded as again creating an emergency. Whether at any particular moment there is a state of emergency or not is a matter entirely for the Governor-General to judge; see Bhagat Singh v. Emperor.(a) And there is nothing in Section 72, Government of India Act, which may be construed as indicating that an Ordinance, which, under it, is to remain in force for six months, cannot be repeated". (21) The same argument, it is submitted, holds good in relation to the repetition of a proclamation of emergency under the present Constitution.

The second type of emergency arises from the fact that it is the duty of the Union Government not only to protect every constituent State

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(19) The Ceylon Public Security Ordinance, 1947, makes express provision for such a further proclamation.
(20) A.I.R. 1933 Cal. 278,
(a) A.I.R. 1931 P.C.111
(21) In re Anukul Chandra, A.I.R. 1933 Cal. 278, 279.

from external aggression or internal disturbance but also to ensure that the government of every state is carried on in accordance with the provisions of the Constitution. (22) If the President is satisfied on the report of the Governor or otherwise that the Government of a State cannot be carried on in accordance with the terms of the Constitution, he may by proclamation assume to himself all or any of the executive functions of the State and declare the powers of the State Legislature exercisable by or under the authority of the Parliament. (23) He may also make any necessary or desirable incidental and consequential changes in the provisions of the Constitution relating to any State authority to facilitate giving effect to the objects of the proclamation. But the President may not assume any of the functions of the High Courts or suspend the operation of any provision of the Constitution relating to them. (24)

During such an emergency due to the failure of constitutional machinery in a State, the Parliament may confer on the President the powers exercisable by the State Legislature and also authorise him to delegate such powers to subordinate authorities. (25) The President, the Parliament or other authorities vested with power to make laws for the State during an emergency may confer powers and impose duties on the Union, its officers and authorities. (26) If the House of the People is

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(22) Article 355
(23) Article 356(1)
(24) ibid
(25) Article 357(1)
(26) ibid

not in session, the President may authorise expenditure from the Consolidated Fund of the State pending parliamentary sanction.(27) Laws made by the Parliament, the President and other authorities which fall within the sphere of legislative powers of the States will cease to have effect, to the extent of their incompetency, a year after their proclamation under Article 356 has ceased to operate unless they have been repealed earlier or re-enacted by the State Legislature.(28)

A proclamation of emergency under Article 356 has to be laid before each House of Parliament and will cease to operate at the expiry of two months unless it is approved by resolutions by both Houses within the period. If the House of the People has been dissolved in the meanwhile the proclamation should be approved by the Council of States within two months and by the newly elected House within thirty days of its first meeting.(29) If approved by Parliament it remains in force for six months and may be extended by Parliament for six months at a time by resolution up to a maximum period of three years. The proclamation may be revoked or varied by a subsequent proclamation.(30)

The Union Government is empowered under Article 257 to give directions to a State as to the exercise of its executive power so as to prevent interference with the exercise of the Union executive power. The Union may also give directions regarding the construction and maintenance of communications of national and military importance and regarding protection of railways. While a proclamation of emergency is in force, the Union

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(27) ibid
(28) Article 357(2)
(29) Article 356(3)
(30) Article 356(4)

Government's power to give directions under Article 353, is unlimited, and during the continuance of a proclamation of financial emergency, Union government's directions to the State may cover every aspect of the State's financial business.(31) Failure to give effect to any direction of the kind indicated empowers the President under Article 365 to suspend the State Constitution. The State has no right of recourse to any other authority, if it is not satisfied regarding the wisdom or expediency of an order issued by the Union and while it would not be true to say that the power has been abused, the possibility of abuse is palpable. If the validity of the direction is challenged in the Supreme Court, it would presumably hold that it could only consider the legality of such a direction and has no jurisdiction to question the expediency of the measure proposed by the Union. It is not for the Court, it would probably point out, to substitute its discretion for the discretion of the Union executive. A state which continues to be recalcitrant may jeopardise its own existence, for disciplinary action taken against it can go to the extent of its extinction by an Act of Parliament under Article 3.

The power under Article 356 may also be exercised where there is an abuse of the constitutional powers by a State government as, for instance, gross misgovernment, as distinguished from, and more serious than, maladministration. States, it may be said, "retain their autonomy during good behaviour". (32)

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(31) Article 360
(32) A. Gledhill, The Republic of India, page 83.

The power under this Article was exercised when there was a political breakdown in the sense that there was, in the opinion of the Governor, a want of stable majority for a party or a coalition to form a ministry. In such a situation the President's rule under the Article was set up. The first instance of such an application of the Article was in the Panjab in June 1951 when after the resignation of Dr. Gopichand Bhargava's ministry, no alternative ministry could be formed. The President's Order (33) recited that he, having received a report from the Governor of the State and having been satisfied that a situation had arisen in which the Government of the State could not be carried on in accordance with the provisions of the Constitution, he assumed to himself all functions of the Government of the State. He declared that the powers of the Legislature of the State would be exercisable by or under the authority of the Parliament. Under the power to make incidental and consequential provisions, he declared that it would be lawful for him to act to such extent as he thought fit through the Governor of the State; he suspended the operation of certain provisions of the Constitution in relation to the State such as the provisions regarding the laying of the reports of the Comptroller and Auditor-General of the State before the Legislature of the State by the Governor; stated that it was unnecessary to hold an election for the purpose of filling any casual vacancy in the Legislative Assembly of the State, and declared that any reference in the Constitution to the Governor in relation to the State of the Panjab should be construed as a

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(33) S.R.O. 925, Gazette of India Extraordinary dated 20.6.51.

reference to the President, that any reference to the Legislature in so far as it relates to its functions and powers should be construed as a reference to Parliament and that any reference to Acts or laws of the Legislature of the State should be construed as including a reference to Acts or laws made, in exercise of the power of the Legislature of the State, by Parliament, or the President or other authority by virtue of the proclamation of emergency under Article 356.

A second Order (34) issued on the same day as the first provided that all the functions of the Government of the State of the Panjab and all the powers vested in or exercisable by the Governor of that State under the Constitution or under any law in force in that State would be exercised by the Governor of the State, subject to the superintendence, direction and control of the President.

The next instance of a proclamation under Article 356 was in relation to PEPSU (Patiala and East Panjab States Union), in March 1953. PEPSU was a Part B State with a Rajpramukh at its head before the reorganisation of the constituent States of the Union was effected by the Seventh Amendment of the Constitution in 1956. When the Congress Ministry lost its majority in the State Legislature in 1952 it was replaced by a coalition government. This coalition of opposition parties with the Akalis themselves divided into left and right wing groups, failed to maintain law and order. The government was, therefore, dissolved and a proclamation of emergency was made. During the period of emergency,

(34) S.R.O. 926, Gazette of India Extraordinary dated 20.6.1951.

the Rajpramukh who represented the President and carried on the powers and functions of the latter under the provisions of the Constitution, was assisted by an Adviser appointed by the President. When general elections were held and the Congress came back to power, the proclamation was withdrawn and normal Cabinet government was set up.

A third instance occurred in the Andhra State in November 1954. The Prakasam Ministry composed of the Congress party and a number of independents decided to implement the recommendations of the Ramamurthy Committee which favoured the issue of liquor permits without insisting on medical certificates. The Ministry was defeated on this question by a strange coalition consisting of forty Communists, eight members of the Krishikar Lok party, seven Praja Socialists, two dissident Congress men and ten independents who combined together, as would appear, to defend prohibition in the State. When the Ministry resigned, the Leader of the opposition approached the Governor seeking a mandate to form a new Ministry. As the Praja Socialists were unlikely to co-operate with the Communist Party and as new elections were expected to be held soon, the Governor asked the Prakasam Ministry to carry on as a care-taker government until the end of the elections. When the Ministry refused, the President on the report of the Governor, took over the administration by a proclamation of emergency. When the proclamation was approved by the House of the People by resolution it was declared that the action of the President was the only proper Constitutional remedy for the crisis that arose on the resignation of the Prakasam Ministry.

The proclamation in this case was criticised on the ground that according to British Parliamentary conventions, it was the duty of the Governor to have permitted the leader of the opposition to form a Government and that a proclamation of emergency would have been justified only if the formation of an alternative government was impossible. The Central Government, however, defended the Presidential action on the grounds that (i) there was no party in the State which could claim majority (ii) no coalition between the Communist Party and the Praja Socialist Party could be expected to form a stable government as there was nothing common in the ideologies of the two parties and the party alignment of the members in the Legislature was in a state of constant flux and (iii) general elections were expected to take place within three months and it was beneficial for all parties to have an impartial administration during the period of the elections. (35)

The latest instance took place in Travancore- Cochin, a Part B State, which by the Seventh Amendment was merged in the present Kerala State. In 1953 when the Congress government of the State lost the confidence of the local Assembly, the President's rule was not introduced, for the Congress Ministry decided to appeal to the electorate, staying on as a caretaker government till the elections were over. After the elections it had to resign in favour of the Praja Socialist Party who formed a government. In 1956 the new Ministry lost the support of the Assembly and resigned. The United Front of Leftists depending on the support of a

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(35) Rajya Sabha Debates of November 29th, 1954.

few Independents offered to form a Ministry. But, in the opinion of the Rajpramukh, they were not in a position to form a stable Ministry. Hence on the report of the Rajpramukh, the President proclaimed a state of emergency under Article 356 and assumed to himself the government of the State. An Adviser was appointed to assist the Rajpramukh who acted as the President's representative during the emergency.

The President may make a proclamation of financial emergency if he is "satisfied that a situation has arisen whereby the financial stability or credit of India or of any part of the territory thereof is threatened."(36) This proclamation like the others must be laid before each House of Parliament and unless approved by resolutions by both Houses, it will cease to operate at the expiry of two months. If the House of the People is dissolved, it must be approved by the Council of States within the two months and by the new House of the People within a month from the date of its first meeting. The proclamation can be revoked by a subsequent proclamation.(37)

While a proclamation of financial emergency is in operation the Union Executive may issue directions to any State to observe such canons of financial propriety as may be specified in the directions and others which the President considers necessary for the purpose.(38) Such directions may require a State to reduce the salaries and allowances of all classes of public servants and to reserve all Money Bills for the consideration of the President after their passage in the Legislature of the State. Further it will be competent for the President to give directions to reduce the

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(36) Article 360
(37) Article 360(2)
(38) Article 360(3)

salaries and allowances of all classes of Union public servants, including the Judges of the Supreme Court and the High Courts, notwithstanding the fact that the allowances of these judges are protected by the Constitution. (39)

Apart from these provisions which are set out in Part XVIII (Emergency Provisions) of the Constitution, there is provision for the promulgation of Ordinances by the President and the Governors of the constituent States when the appropriate Legislature is not in session and immediate action is deemed necessary. This ordaining power, as Madame Sieghart would call it, (40) may be considered an emergency power, though a learned commentator (41) has expressed the opinion that the expression 'immediate action' has no necessary connexion with any emergency. The existence of an emergency does not emerge clearly from the circumstances surrounding every exercise of this power. For example, it would be difficult to point to one when provision was made for the use of seals of common form and design by the High Courts in the States by an Ordinance promulgated by the President. (42) There have been instances of

(39) Article 360(4)
(40) M.A. Sieghart, Government by Decree, page 252
(41) D.D. Basu, Commentary on the Constitution of India, Vol.1. page 715
(42) The High Courts Seals Ordinance, 1950, requiring all High Courts to use a seal bearing a device or impression of the Asoka Capital within an exergue or label surrounding the same, with the following inscription 'The Seal of the High Court at (or of)..... followed by the name of the State or seat of the High Court and Satyameva Jayate in Devanagari script'. In the Dominion period, a Central Nursing Council was constituted by an Ordinance. (Central Nursing Council Ordinance, No. 13 of 1947).

an ordinance being promulgated after the introduction in Parliament of a Bill in the same terms, for example the Sugar Crisis Inquiring Authority Ordinance, 1950 (25 of 1950) and the Administration of Evacuee Property Act (Amendment) Ordinance, 1950(27 of 1950).

In these cases the necessity for immediate action, if not an emergency, is obvious.

An Ordinance promulgated by the President has the same force and effect as an Act of Parliament, but it must be laid before both Houses of Parliament and it ceases to operate at the end of six weeks from the re-assembly of the Parliament unless resolutions disapproving it are passed by both Houses before the expiry of that period. It can be withdrawn by the President at any time. When the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks is to be reckoned from the later of those dates. Any such Ordinance to the extent to which it makes any provision which would be beyond the competance of the Parliament to enact would be void.(43) A President's Ordinance must be restricted to the same subject matter as is within the legislative power of Parliament, as laid down in Articles 245 - 255 and the Legislative Lists, and must comply with constitutional conditions for the exercise of that power, such as conformity to the fundamental rights but when owing to recourse to the emergency provisions, Parliament's powers have been extended or trammels removed, the ordinance-making power of the President is correspondingly enhanced. This ordaining power of the President is an

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(43) Article 123.

extraordinary power, but it is expected to be exercised by him on the advice of the Ministry which is responsible to Parliament.

A similar power is given to the Governor of a State. If at any time except when the Legislative Assembly is in session or where there is a Legislative Council, except when both Houses of the Legislature are in session, the Governor is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as circumstances appear to him to require. But the Governor shall not, without instructions from the President, promulgate any such Ordinance if (a) a Bill containing the same provisions would under the Constitution have required the previous sanction of the President for its introduction in the Legislature, as for instance, a Bill imposing restrictions on freedom of trade within a State or an amendment providing for the imposition of such a restriction, or (b) he would have deemed it necessary to reserve a Bill containing the same provisions for the consideration of the President, as in the case of a Bill imposing a tax on water or electricity under the control of an authority like the Damodar Valley Corporation for developing an inter-State river or river valley, or a Bill which in the opinion of the Governor would be repugnant to any provision of the Constitution or the constitutionality of which is doubtful or which would affect the powers of the Union, or would seriously conflict with Union policy or of the interests of the people of India as a whole, or (c) an Act of the State Legislature containing the same provisions would have been invalid unless, having been reserved for the consideration of the President, it had received the assent of the President, as for instance, a Bill which, in the opinion of the Governor, would so derogate

from the powers of the High Cpurt as to endanger its position it is designed to fill under the Constitution.(44) Such an Ordinance has the same force and effect as an Act of the State Legislature. It must be laid before the Legislative Assembly of the State or where there is a Legislative Council, before both the Houses, and it ceases to operate at the end of six weeks from the reassembly of the Legislature unless a resolution disapproving it is passed by the House or both Houses before the expiry of that period. It may be withdrawn at any time by the Governor. Where the Houses of the State Legislature are summoned to reassemble on different dates, the period of six weeks is to be reckoned from the later of those dates. Any such Ordinance to the extent to which it makes any provision which would be beyond the competence of the State Legislature to enact is void. An Ordinance promulgated by the Governor in pursuance of instructions from the President with respect to a matter in the Concurrent List, if it is repugnant to an Act of Parliament or an existing law with respect to such matter, shall be deemed to be an Act of the State Legislature which has been reserved for the consideration of the President and assented to by him.(45) While under Article 254(2) assent of the President is required after the Act is passed, this provision validates an Ordinance if it has been made by the Governor in pursuance of instructions received from the President. A Governor's Ordinance in respect of a matter in the concurrent field made without such instructions will be void to the extent of the repugnancy,if there is an existing

(44) Article 200. 2nd proviso.
(45) Article 213(3) proviso.

law or Act of Parliament to which any provision of the Ordinance is repugnant.(46) In the absence of such law or Act of Parliament, the Ordinance would be valid without previous instructions from the President. When an Ordinance is promulgated in pursuance of such instructions, further reservation of the Ordinance under Article 254(2) would not be necessary.

An Ordinance promulgated by the President under Article 123 or by a Governor under Article 213 will be void, if it is promulgated before the order proroguing the relevant legislature is made and notified.(47) As in a bicameral legislature, neither house sitting alone is competent to legislate, the ordinance-making power of the Head of the State may be exercised as soon as either House is prorogued.

The Head of the State is not bound to give reasons for promulgating an Ordinance; nor need they be proved affirmatively in a Court of law.(48) He is the sole judge of the existence of circumstances which calls for the exercise of the ordinance-making power.(49) The existence of such necessity is not a justiciable issue which the Courts of law could determine by applying an objective test.(50) For the expression 'if satisfied' in the Articles clearly indicates that the satisfaction referred to is that of the Head of the State. Even when he states the reasons which satisfied him in regard to the necessity of immediate action, the

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(46) Bhutnath v. Province of Bihar D.L.R. (1949) Patna 201
(47) Bidya v. Province of Bihar A.I.R. 1950 Pat. 18
(48) Lakshminarayam v. Province of Bihar (1950) S.C.J. 32
(49) Ibid
(50) Ibid

Courts cannot question the bona fide of his action. In Jnan Prosanna v. Province of West Bengal,[51] the West Bengal Security Act (Amendment) Ordinance, 1948 (VIII of 1948) promulgated by the Governor of West Bengal in order to prevent the High Court from pronouncing a decision which would be unwelcome to the Provincial Government[52] was held to be valid by the Full Bench of the Calcutta High Court on the ground that the Court was not competent to inquire into the circumstances justifying the promulgation of the Ordinance. Though this was an Ordinance made under the power in Section 88 of the Government of India Act, 1935, the language is the same as that in Articles 123 and 213 of the Constitution and the ratio set out above applies to Ordinances made under the Constitution.

The conduct of the President or a Governor in proroguing the legislature for the express purpose of exercising the ordinance-making power cannot be impugned as illegal, fraudulent or mala fide.[53]

As the ordaining power is thus legally unfettered, Parliament has endeavoured to ensure that the power is not abused by the Executive. To prevent resort to the ordaining power when the introduction of a Bill in Parliament might meet with opposition, Rule 89 of the Rules of the

(51) A.I.R. 1949 Cal. 1.

(52) The Ordinance purported to take away the jurisdiction of the Court to consider the validity of orders previously made upon the ground that there existed no reasonable grounds upon which such orders could be founded, by deleting the words 'on reasonable grounds' from Section 16 of the Security Act ("The Provincial Government if satisfied on reasonable grounds") and by giving retrospective operation to this amendment.

(53) In re Veerabhadra, A.I.R. 1950, Mad. 243.

House of the People now provides (1) that whenever a Bill seeking to replace an Ordinance with or without modification is introduced in the House, there shall be placed before the House along with the Bill a statement explaining the circumstances which necessitated immediate legislation by Ordinance and (2) that whenever an Ordinance, which embodies wholly or partly or with modifications the provisions of a Bill pending before a House, is promulgated a statement explaining the circumstances which necessitated immediate legislation by Ordinance shall be laid on the table at the commencement of the session following the promulgation of the Ordinance.

But it is doubtful whether Rule 89 has been effective in achieving the object with which it was made. For instance, the Benares Hindu University (Amendment) Ordinance, 1958, (IV of 1958) amending certain provisions of the University Act in relation to details of administration could have been postponed till the Parliament was able to debate its provisions and pass an Act in the ordinary way. When once the whole necessary administrative machinery had been set up and decisions had been taken in accordance with the Ordinance, Parliament was presented with a fait accompli which it felt unwise or inexpedient to undo, whereas, had the provisions of the Ordinance been first presented to Parliament in the form of a Bill, it is highly probable that, in the course of the debate, some changes in the provisions would have beem made. When a Bill is introduced to replace an Ordinance, it is difficult for the members of the majority party to suggest modifications which would substantially affect the arrangements already made and normally if such modifications are suggested by the Opposition, they will be defeated.

No fixed period has been laid down for the duration of an Ordinance. As mentioned above, in the case of an Ordinance made by the President it may last until six weeks after the re-assembly of the Parliament or if the two Houses re-assemble on different dates, six weeks from the later date. Though Parliament is summoned and prorogued from time to time by the President, not more than six months must intervene between its last sitting in one session and its first sitting in the next;(54a) there must be a budget session in each year. Similar provisions regarding the State Legislature prevents Governor's Ordinances having unlimited duration.(54b)

The ordaining power is one that can be easily abused. If a Cabinet, doubtful of its hold over the Legislature advises the President to resort to this power and if he accedes, the Legislature may be prorogued for a period of about six months, the maximum period of recess under Article 85 (1) and government by decree may be carried on during the period. As has been already pointed out, in certain cases, it would be impracticable for the Legislature to reverse the action taken under an Ordinance, even if the Legislature disapproves of it. For instance, Allianz und Stuttgarter Life Insurance (Transfer) Ordinance, 1950 (XXIV of 1950), provided for the transfer of the business of the Company to the United India Life Insurance Company. When once the transfer has been effected and the former Company wound up, it would be difficult for the Parliament, say, after about six months, to reverse the action taken,

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(54a) Article 85
(54b) Article 174

even if it disapproved of the Ordinance.

The power of the President to legislate by Ordinance during a recess of Parliament is co-extensive with the power of the Parliament itself. He may enact by Ordinance what Parliament might have enacted, but he cannot enact what Parliament could not; for instance, a law violating the Fundamental Rights. Mutatis mutandis, the same is true of Governor's Ordinances. As the President cannot enact what Parliament could not, he cannot possibly make a provision in his Ordinance that the validity of its provisions shall not be open to challenge in a Court of law on the ground of their being ultra vires his legislative powers.

Since a Legislature can amend or repeal its own laws, the President or Governor may, by Ordinance, amend or repeal laws passed by the appropriate Legislature, subject to the provisions as to the duration of the Ordinance mentioned above.(55) As a law passed by a Legislature can be retrospective in operation, an Ordinance too can be made retrospective in effect.(56) An Ordinance can even be given retrospective operation from a date when the Legislature was in session.(57)

Further, though the duration of an Ordinance is limited, there is nothing to prevent an Ordinance from defining a new criminal offence and providing a punishment for its commission, or extending indemnity to specified acts. In such cases the sentences imposed and the indemnity given will continue in effect after the expiry of the Ordinance, for, as

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(55) Emperor v. Benoari Lal, (1945) F.L.J.I.
(56) United Provinces v. Antigua, (1942) F.C.R.110.
(57) Jnan Prasanna v. State of Bengal, A.I.R. 1949 Cal.1.

with other legislation, the expiry of an Ordinance does not affect rights accrued or liabilities incurred while it was in force.

An Ordinance may be withdrawn by an order of the President or the Governor who promulgated it. It is not necessary to enact a repealing Ordinance;(58) but he may, if he so chooses repeal or amend one Ordinance by another.(59) But he cannot extend the life of one Ordinance by another Ordinance.(60) This situation will, however, rarely arise, because an Ordinance will only remain in operation until the expiry of six weeks after the re-assembly of the Legislature, if it has not already been disapproved by resolutions of the Legislature. When once it is disapproved it cannot, of course, be extended for two reasons. In the first place, as the Ordinance is already dead, there is nothing in existence susceptible of being continued. In the second place, neither the President, nor the Governor can exercise the ordinance-making power during a session of the Legislature. It would, however, seem that there is nothing, except the possibility of the Cabinet's losing the confidence of the Legislature, to prevent the President or Governor from making, on ministerial advice, during the next recess of the Legislature an Ordinance containing the same or substantially the same provisions as the one that has been disapproved. The possibility of losing the confidence of the House may be regarded as remote, if the question involved in the Ordinance does not involve some essential principle or is

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(58) Tabarak v. Province of Bihar, D.L.R. 1950 Patna 66
(59) id.
(60) id.

not of fundamental importance in as much as, in all other circumstances, members are unlikely to indulge in such persistent opposition as will result in the dissolution of the chamber, and the trouble and expense of a premature election. Moreover, in most cases, the Ministry would be in a position to show that the circumstances which originally called for immediate legislation had recurred.(61)

Another emergency power is the common law power of administering martial law which, though not expressly stated in the Constitution, is implied in Article 34 read with Artcle 372(1). Article 34 states that, notwithstanding the provisions guaranteeing fundamental rights and the right to move the Supreme Court for their enforcement, Parliament may by law indemnify any public servant or any other person in respect of any act done by him in connexion with the maintenance or restoration of order in any area within the territory of India where martial law was in force and validate any sentence passed, punishment inflicted or forfeiture ordered, or other act done under martial law in such area. Article 372(1) provides that all the law in force in the territory of India immediately before the commencement of the Constitution and not repugnant to it shall continue in force. Bengal Regulation X of 1804 which has been already referred to,(62) was part of the law of the land when the Constitution came into force. Further, the common law power of proclaiming martial law as part of the law of India has been recognised by Indian Courts.(63)

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(61) Cf. In re Anukul Chandra, op. cit.
(62) Supra, Chapter II
(63) Channappa v. Emp. A.I.R. (1931) Bom.57 . Supra. Chapter III.

'Law' in Article 372(1) presumably includes unwritten law.

The Constitution does not specify by whom and in what circumstances martial law may be proclaimed. It may be presumed that it will be proclaimed by the executive without reference to the legislature, for, as Cromwell is reported to have said, "If nothing should be done but what is according to law, the throat of the Nation might be cut while we send for someone to make a law". (64) But that need not preclude judicial review. Though the power of the courts to decide whether a proclamation, or administration without proclamation, of martial law is justified or not is recognised in India, the exercise of this power would usually prove illusory, for an Indemnity Ordinance or a provision for indemnity in the Ordinance proclaiming martial law would be a complete answer to charges made against those responsible for administering the law, even if the Courts find that the circumstances of the case did not justify the proclamation of martial law. (65) Moreover the Courts do not get around to a redress of executive action until it is over. (66) Even Parliamentary Correctives usually come along after the event. It would therefore seem desirable for Parliament by law to lay down by whom and in what circumstances martial law should be proclaimed or administered, without being discouraged by the fact that previous attempts at martial law legislation have been unsuccessful. As 'the old order changeth yielding place to new', it would be worth making

(64) quoted in re Special Reference by the Governor-General of Pakistan P.L.R. (1956) W.P.598. Law here means legislative enactments.
(65) Channappa v. Emperor, A.I.R. (1931) Bom, 57.
(66) ex parte Milligan. (1866) 4 Wall.2.

a further attempt at martial law legislation, as otherwise amid the clash of arms, the voice of law may remain muffled, if not silent.

In this connexion it is of interest to note how emergency powers are exercised in other States, especially to notice what provisions are made for the effective control of the executive by the Legislature during an emergency.

In the United Kingdom, the Emergency Powers Act, 1920 was enacted to confer special powers on the Executive for the purpose of meeting any domestic crisis. It empowers the Crown to declare by proclamation a state of emergency whenever "it appears to His Majesty that any action has been taken or is immediately threatened by any person or body of persons of such a nature and 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". When such an emergency has been declared, the Crown is authorised to issue regulations having the force of law ('as if enacted in this Act') "for securing the essentials of life to the Community" and to delegate these powers to Government departments and other competent persons. These wide powers are limited by the provision that certain kinds of regulations are not authorised by the Act, namely (i) regulations imposing any form of compulsory military service or industrial conscription (ii) regulations making it an offence to take part in a strike or persuading other people peacefully to take part in a strike and (iii) regulations altering existing procedure in criminal cases, or conferring any right to punish

by fine or imprisonment without trial.

A proclamation of emergency may remain in force for not more than a month, but without prejudice to the issue of another proclamation at or before the end of that period. In 1926 when there was a general strike, the Act was brought into operation first by a proclamation on April 30, and successive proclamations were made each month until November 20, inclusive.

Parliamentary control is safeguarded in two ways under the Act.

(i) Under Section 1 (2) the occasion for making a proclamation must be communicated to Parliament forthwith, and if Parliament is adjourned or prorogued for a period which will not expire within five days, then Parliament must be convened to meet within five days.

(ii) Any regulations made under the Act, it is provided, must be laid before Parliament as soon as may be after they are made and shall not continue in force after the expiry of seven days from the time when they are so laid unless a resolution is passed by both Houses providing for their continuance; that is to say, an affirmative resolution is required.

This Act is an instance of a well-drawn-up emergency law which while conferring wide powers on the executive does not jeopardise constitutional safeguards. It defines with sufficient precision the purpose for which the powers are conferred and imposes limits to the extent of such powers. It also sets a time limit to the operation of the proclamation and the regulations which may be made under it. It provides for ample and immediate

Parliamentary control. If the words, 'as if enacted in this Act', are given the restrictive interpretation which seems to have been put upon them in another context by the House of Lords in R. v. Minister of Health ex parte Yaffe [67] there is provision for judicial control also. Though the House of Lords did not give a clear exposition of the meaning of the words, their Lordships seemed to suggest that the expression did not prevent the Courts from ascertaining whether a regulation made under it conflicted with the parent statute and declaring it ultra vires if it did. The one uncertain point which may go against the citizen is in the wording 'if it appears to His Majesty'. This, like the expression, "if satisfied" in the corresponding Indian provision, may suggest that the decision as to whether an emergency has arisen cannot be questioned in a Court of law.

This Act is a constitutional innovation in that, unlike the Defence of the Realm Act, 1914, it is a permanent statute [68] and is not limited to a particular emergency. In its character of permanency and its purpose, it is akin to the provision for a declaration of state of siege in France. The main purpose of declaring a state of siege in France is to maintain public order. When the country is at war it is necessary in France, as in England, for special powers to be conferred on the Executive by Parliament.

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(67) (1931) A.C. 494. The case turned upon the meaning of subsection 5 of Section 40 of the Housing Act, 1925, which was that "the order on the Minister when made shall have effect as if enacted in this Act". The House of Lords while holding a housing scheme made by the Minister of Health intra vires observed that 'if one can find that the scheme is inconsistent with the provisions of the Act which authorises the scheme, the scheme will be bad and that can only be gone into by way of proceedings by certiorari'.

(68) The Emergency Laws (Miscellaneous Provisions) Act, 1953, like the Act of 1920, is permanent legislation.

As will shortly be explained, power to declare a state of siège is subject to Parliamentary control. Further, though it involves the temporary and partial transfer of powers from the civil to the military authorities,(69) the powers of the military remain limited by law.(70)

The law of August 9, 1849 supplemented and amended by the laws of April 3, 1878 and April 27, 1916 forms the basis of 'state of siege' in France. Under the law of 1849 the declaration of an état de siège would have the following consequences:

(i) For all general police duties military authorities will replace civil authorities and it is for the former to decide which of these duties they will take over and which they will leave to the civil authorities.

(ii) The civil authorities will have special police powers to make house searches by night and day, to remove persons who have no domicile in the area under siege from that area, to order the surrender of arms and ammunition, to search for and remove them and to prohibit publications and meetings which, in their view, might endanger public order.

(iii) Military tribunals will assume jurisdiction over civilians who have committed crimes against public safety or public order. This provision was limited in its application by the law of April 27, 1916.

A state of siege may be declared by Parliament in the event of imminent

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(69) Hood Phillips, Constitutional Law, 545
(70) Duguit, Traite de Droit Constitutionnel, referred to in Hood Phillips, op. cit. page 545.

danger of war or of internal armed disturbance. The President of the Republic can declare a state of siege if the Parliament is not in session and if such a measure is proposed to him by the Ministry, but in that case, Parliament meets within two days in its own right, that is, without being summoned by the President, and decides whether the state of siege is to be continued or not. If there is a disagreement between the two Houses, the state of siege comes to an end.

A declaration of state of siege, it is provided, must give a description of the area to which it applies and must specify a definite time - limit at the end of which the state of siege expires, if not extended by a new law. The provisions of the law governing a state of siege were primarily adapted to suit conditions which prevailed in cities under siege or in territories overrun by the enemy. That is why there are provisions which submit the civilian population to military law and suspend, for the period of the emergency, some of the Constitutional guarantees of individual rights. In modern times state of siege has been given a much wider range. On August 2, 1914 a State of Siege was declared all over France and Algeria by a Presidential decree. This declaration which did not specify any time limit was confirmed by the law of August 5, 1914.

Under the Constitution of the Dominican Republic it is provided that in the event of national soverignty being exposed to serious or imminent danger, Congress may declare that a state of national emergency (as distinguished from a state of siege which is declared 'in case of a disturbance of the public peace') exists and suspend the individual rights guaranteed by the Constitution. If Congress is not in session these steps

may be taken by the President of the Republic but he must at the same time summon Congress to meet within the next ten days, in order to decide upon the maintenance or revocation of the state of national emergency. If he does not or if Congress does not assemble, the state of national emergency automatically ceases.(71)

If Parliamentary control of the power to proclaim an emergency is to be effective in India, there should be provision for the assembly of the Houses of Parliament immediately after the proclamation is made. Under the present provisions it may be nearly six months before the Parliament can review a proclamation of emergency and executive action taken under it. A provision like that in France or that in the Dominican Republic as to the meeting of the Chambers after a declaration of a state of siege or national emergency would prove helpful in controlling executive discretion.

Professor Alan Gledhill has presented the picture of an Indian President who without violating the Constitution establishes an authoritarian government. He asks us to imagine a situation in which one fourth of the Members of a House of Parliament, suddenly aware of the personal ambition of the President, have given notice to impeach him, but before a resolution can be moved after the expiry of fourteen days from the date of the notice, he dissolves the Parliament. A newly elected House of the People need not meet for six months; meanwhile the President appoints Ministers of his own choice who need not be members of the Parliament for six months. The President governs by decree by issuing Ordinances which will be as valid as Acts of the Parliament for six months.

(71) Article 33 (8) of the Constitution of the Dominican Republic.

Then he makes a proclamation of emergency and suspends the fundamental rights and the remedies for their breach. He issues directives to States of a kind calculated to provoke disobedience and then takes over their governments. He proclaims a financial emergency. By means of Ordinances he gives himself extensive powers of preventive detention . With all his political opponents under preventive detention and with the help of the armed forces in support of the civil power, a general election to the House of the People is held. He has now under his control a House of People full of his ardent supporters. Even if he has some imprudent opponents in the Council of States, it would not be necessary to imprison them under the preventive detention Ordinance, as the House of the People with double the number of members in the Council of State will ensure a majority for the President at a joint sitting.

"This may seem a nightmare", says Professor Gledhill, "but it is not dissimilar to the way in which the Weimer Constitution was destroyed".(72) He believes that "possibly the danger is averted by recognising it".(73) He further remarks that the vast Indian electorate will have to develop a proper regard for the sanctity of the Constitution before its stability can be assured.(74)

The Indian Founding Fathers were of the view that democratic government would on occasions need for its preservation the exercise of almost dictatorial powers. A temporary suspension of Constitutional government in an emergency may well be the only means of ultimately

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(72) A. Gledhill, The Republic of India, page 108.
(73) id, page 109.
(74) ibid.

preserving it. (75) Abraham Lincoln in partial defence of his suspending the writ of habeas corpus without Congressional authorisation said, "Are all laws but one to go unexecuted, and Government itself go to pieces lest that one be violated? Even in such a case would not the official oath be broken if the Government should be overthrown when it was believed that disregarding the single law would tend to preserve it?". (76)

As against this view, it may be observed that "the experience of history has not yet shown us how Constitutional democratic institutions can be preserved in the presence and under the control of ever increasing administrative discretion". (77) Their preservation is bound to bristle with difficulties in India as the Indian way of life is essentially undemocratic. The traditional Indian concept of society is hierarchical with a monarch at the top. The doctrine of karma (the inexorable law of moral consequences), the concept of maya (the belief that the world is an illusion) and the spirit of renunciation, characteristic of the Indian habit of thinking, coupled with the absence of democratic traditions, except at the village level, may tend to give a permanent character to temporary suspension of Constitutional government, if eternal vigilance by Parliament is not jealously maintained.

Recent trends in constitution-making would seem to favour the conferment of wide powers on the head of the State during an emergency. For instance, the Constitution of the Fifth Republic in France confers upon the President wide emergency powers "when the institutions of the

(75) B.R. Ambedkar, C.A.D. Vol.IX, 177.
(76) quoted in Corwin, The President, Office and Powers, page 7.
(77) E. Blythe Stason, Introduction to Corwin's Total War and the Constitution, page viii.

Republic, the independence of the nation, the integrity of its territory or the execution of its commitments are gravely and immediately threatened and the regular functioning of the Constitutional public authorities is interrupted".(78)

These changing trends can also be seen from the following judicial opinions delivered in U.S.A. In 1866 Davis, J., said, "The Constitution of the United States is a law for rulers and people equally in war and in peace and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism".(79)

A little over half a century later, in 1919, Holmes, J., had something very different to say about civil liberties during war. "When a nation is at war", he said, "many things that might be said in a time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and no Court could regard them as protected by any Constitutional right". (80)

The Indian Founding Fathers were no doubt moving with the times when they provided for vesting wide powers on the executive during an emergency. If the administrators in India do not move with the dictatorial trends in some of the States of South and South East Asia, India may cpntinue to be safe for democracy. The Indian Premier is optimistic in his belief that the contagion of democracy will spread from India to other Asian

(78) Article 16.
(79) Ex parte Milligan. (1866) 4 Wall. 2, 121.
(80) Schenck v. U.S. (1919) 249 U.S. 47

countries. "If he fails, the Parliamentary system of government throughout the World will be grievously weakened". (81)

(81) Douglas Houghton, Asian Parliaments in Parliamentary Affairs, XI, No. 2, 210.

CHAPTER VII

EMERGENCY POWERS IN THE DOMINION OF PAKISTAN

i. Public Security Measures

"Pakistan is a child of the strife that has arisen from the impact of Islam upon Hinduism. It is nearly a thousand years since Islam began to establish itself in India as a whole, and more than twelve hundred years since it gained its first footing in Sind and Multan. Yet the pace of the psyche's self-adjustment is so slow that in A.D. 1947, the Muslim community in the Indian Sub-continent decided that there was still not enough common ground between Muslims and Hindus to enable the two communities to remain united under s single government."(1)

As Pakistan is the child of encounter and strife its infancy was marred by strife. With the passing of the Indian Independence Act, 1947, and the partition of the subcontinent into two Dominions, India and Pakistan, the lack of common ground between the Hindus and the Muslims found expression more than ever before in communal disturbances and mass movements of refugees from both the Dominions and culminated in mass massacres of an unprecedented scale.

To counteract these disturbances and to maintain peace and public order, public safety measures passed in the pre-Dominion period in the Provinces were continued and kept alive by subsequent enactments in Pakistan as was done in India. In some Provinces, new measures

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(1) A. J. Toynbee: Pakistan as a Historian Sees her, in 'Crescent and Green', pages 1 and 2.

were passed. They generally followed the lines of the Bombay Public Security Measures Act, which was discussed above.

The Panjab Public Safety Act, 1947, is an instance of an Act passed during the pre-Dominion period, whose provisions were kept alive by subsequent amendments and ordinances relating to it. Similary the (East) Bengal Ordinance Temporary Re-enactment Act, 1950 (IV of 1950), sought to re-enact the Bengal Special Powers Ordinance, 1946. On the other hand, the Sind Maintenance of Public Safety Act, 1948 (XV of 1948), was an Act passed in the Dominion period. The Baluchistan Public Safety Regulation, 1947, under Section 95(3) of the Government of India Act, 1935, as modified and adapted by the Pakistan (Provisional Constitution) Order, 1947, was also issued in the Dominion period. As these security measures followed similar lines, only one of them, the Panjab Public Safety Act, 1947, is noticed below.

This Act was enacted by the Governor of the Panjab under Section $93^{(2)}$ of the Government of India Act, 1935, and received the assent of the Governor-General on March 20, 1947.

The Act, which is similar to the Bombay Public Security Measures Act, 1947, dealt with in detail in Chapter V, will be briefly summarised. It contains six chapters and forty-six sections. The first chapter relates to preliminary matters. The Second Chapter deals with Emergency Powers. Sections 3 and 4 of the Act relate to arrest, detention and control of suspected persons if the Provincial

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(2) Supra, Chapter IV.

government or officers authorised by it in this behalf are satisfied that it is necessary to arrest or detain a person with the object of preventing him from acting in any manner prejudicial to the public safety, or the maintenance of public order. Under Section 3 the Provincial Government may by order in writing commit any person arrested by it or on its direction to such custody as the Provincial Government may deem fit (Subsection 3), but no person shall, unless the Provincial Government by special order otherwise directs, be detained in custody for more than a month (Subsection 4) and no person may be detained in custody for more than six months (Subsection 5). Sections 5, 6, and 7 empower the authorities to control educational institutions, publications and the entry of newspapers in the Panjab, while Sections 8 and 9 are designed to control the supply of commodities of general use, water and electric supply. Sections 10 and 11 confer power to prohibit and regulate the use of vehicles or animals and drilling. Sections 12 and 13 empower the authorities to prohibit meetings and proceedings and to get reports about them. Sections 14 to 18 deal with the service of orders, give power to issue search warrants and make searches, and provide for the execution of such orders. Chapter III deals with offences and penalties. Section 21 is designed to prevent the dissemination of rumours. The other Sections of the Chapter provide penalties for the boycott of public servants, participation in mock funeral ceremonies, molestation, membership of quasi-military organisations, tampering with public servants, and sabotage. Chapters IV, V and VI relate to procedure.

The West Panjab Public Safety (Amendment) Ordinance, (IV of 1948),

made under Section 88 of the Government of India Act, 1935,[3] and promulgated by the Governor of the West Panjab on December 10, 1948, substituted the following subsection for Subsection 5 of Section 3 of the Act of 1947.

"(5) No order made by the Provincial Government under the provisions of Subsection (3) shall remain in force for a period of more than six months, but the Provincial Government may before the expiry of such period, renew such order and thereafter such order shall remain in force for a further period not exceeding six months unless before the expiry of that period it is similarly renewed or cancelled".

The Act of 1947 expired on August 15, 1949. The Governor had in the meanwhile assumed to himself all the powers vested in and exercisable by the Provincial Legislature in pursuance of a Proclamation made by the Governor-General of Pakistan under Section 92A of the Government of India Act, 1935, and he enacted the West Panjab Public Safety Act, 1949 (XVIII of 1949). The Act was declared to have come into force immediately on the expiry of the Act of 1947. The Act of 1947 set out above was incorporated in the Act of 1949 which was in effect a re-enactment and continuation of the Act of 1947.

Maulana Abdul Aala Maududi who had been arrested and detained for one month to start with was kept in custody by renewed orders under the enactments until April 3, 1950. On the 2nd of April another orderof renewal was made purporting to detain him until October 3, 1950.

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(3) Supra, Chapter IV.

In Muhammad Ali v. The Crown re Maulana Maududi,(4) it was contended on behalf of the detenu that his detention was illegal in that not being competent to legislate with respect to public safety, but with respect to public order only as referred to in entry No.1 of the Provincial Legislative List in the Seventh Schedule of the Government of India Act, 1935, the Act was ultra vires the Provincial legislative authority, in this case the Governor of the Panjab who had passed it. Adopting the pith and substance rule in interpretation, the Federal Court held that the Act was intra vires. The court observed that public safety might "be endangered by an internal commotion or disturbance as well as by various other causes too numerous to enumerate, which may have nothing whatsoever to do with any act of external aggression and may have no relation to any 'reasons of State connected with defence, external affairs or the discharge of the functions of the Crown in its relation with Indian States'.(5) Moreover, public safety in our way of reading, was merely a result which was meant to be achieved and it would depend on the circumstances existing at the time whether it was being disturbed or was in danger of being disturbed by any act of external aggression or by internal commotion. If it was being endangered by an act of external aggression, the matter would fall within the ambit of entry 1 of List I of the Seventh Schedule to the Government of India Act, but if it was endangered by any internal commotion or on account of violation of public order, it would fall within the category of the subjects

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(4) P.L.D. (1950) F.C. 1.
(5) In entry No.2 of the Federal Legislative List. (List I).

referred to in entry No. I of List II. It may possibly be that at any given time both such causes may exist simultaneously.... In such a case, it would fall both within List I and List II and while the Federal Legislature would be competent to legislate with regard to preventive detention for reasons of State connected with defence or external affairs, it would be open to a Provincial Legislature to pass a similar legislation but for reasons connected with the maintenance of public order..... It is true that the words with a view to preventing him from 'acting in any manner prejudicial to public safety' precede the words 'the maintenance of public order', in Section 3(1) of the Act but that was either with the object of emphasising the important result which was intended to be achieved or used in that sequence on account of the name given to the Act. We do not, however, attach any importance to the order in which the two expressions have been used in the Section, for it seems to be quite clear that the prevention of a person fro m acting in a manner prejudicial to the public safety was one of the main objects of the maintenance of 'public order' and could not in the context be taken to refer to public safety endangered by other causes.(6) The court further said: "Relying on the principles enunciated by their Lordships in Prafulla Kumar Mukherjee's case,(7) we would hold that in pith and substance the true nature and character of the Act was to provide for subjects enumerated generally in List II or in some cases in List III".(8)

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(6) In re Maulana Maududi P.L.D. (1950) F.C. 1, 6-7.
(7) Prafulla Kumar Mukherjee v. Bank of Commerce, Limited, Khulna (1947) P.C.R. 28.
(8) In re Maulana Maududi, P.L.D. (1950) F.C. 1, 8.

The Act of 1947 had provided that in disturbed areas all Sessions cases were to be tried without the aid of assessors and subject to the procedure laid down in the Code of Criminal Procedure for trial of summons cases. The Public Safety Act of 1949 which replaced the Act of 1947 adopted the same policy and by Section 30 the legislative authority confirmed the policy which had been adopted in the first Public Safety Act, although its applicability like that of its predecessor in regard to an area other than dangerously disturbed area was made to depend on a notification. Being a matter relating to procedure, a proviso was added to Section 36 that all cases pending or instituted before the expiry of the earlier Act would have to be tried in accordance with the provisions of Section 35 of the earlier Act, that is, the Act of 1947. Section 35 of the Act of 1947 provided that "all offences under this Act or under any other law for the time being in force in a dangerously disturbed area and in any other area all offences under this Act and any other offence under any other law which the Provincial Government may certify to be triable under this Act" should be tried according to the procedure prescribed by the Code provided that in all cases the procedure prescribed for the trial of summons cases by the Code should be adopted, except in the case of summary trials. In the Crown v. Shams-ud-Din (9) the Lahore High Court held that the Act of 1949 while prescribing the procedure of a summons case in the trial of a sessions case did not prescribe that the commitment proceedings or the choosing of the assessors should be

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(9) P.L.D. 1950 Lahore 93.

dispensed with. The legislative authority took notice of the decision and enacted a remedial measure, the Panjab Public Safety (Amendment) Act, 1950, (Act IV of 1950). Sections 2 and 3 of that Act were to the effect that in spite of the decision in Shamsuddin's Case all cases instituted in the Court of Sessions before August 15, 1949, should be tried as summons cases and without the aid of assessors. These sections could not have been applicable to cases which had been decided between the dates on which Act XVIII of 1949 and the amending Act IV of 1950 came into force. Another Act, the Panjab Public Safety (Second Amendment) Act, 1950, (XXIX of 1950) was therefore passed. This Act repealed the first Amendment Act (Act IV of 1950) and unequivocally indicated the intention of the legislative authority as to how all cases instituted before August 15, 1949, in a Court of Sessions and tried without the aid of assessors should be dealt with on appeal or revision. Section 2 of the Amending Act provided, inter alia, that where in a case instituted before August 15, 1949,

"(i) a Court of Sessions has tried any accused person without the aid of assessors, or by the procedure provided for Courts of Sessions by the Code and with the aid of assessors; or

(ii) a Magistrate or a Bench of Magistrates has tried any accused person by the procedure applicable to the trial of warrant cases; or

(iii) the case has been committed to a Court of Session by the procedure laid down in Chapter XVIII of the Code, no finding, sentence or order passed by such Court, Magistrate or Bench of Magistrates shall be reversed or altered on appeal or

revision or under Chapter XXVII of the Code, by reason only of there having been any irregularity in the procedure under which the case was tried, or as the case may be, committed for trial, unless such irregularity has in fact occasioned a failure of justice".

In Muhammad Haroon v. Crown, (10) it was contended on behalf of the petitioners that the trial of the accused was invalid in as much as two of the assessors had not been chosen by the Sessions Judge from out of the list prepared or revised as required by the provisions of the Code and the trial could not, therefore, be held to have taken place with the aid of assessors as required by Section 268 of the Code. This objection was for the first time taken in the Federal Court. The majority of the court (Rashid, C.J., dissenting) held that the Sessions Judge should be deemed to have tried the case without the aid of assessors. Rahman, J., observed: "The intention of the legislative authority is, in my way of thinking, quite clear and it is our obvious duty to give effect to this legislation and to prevent the mischief which it was designed to suppress.... It might be pointed out that this Act at least characterises the mistake in the procedure as to the trial of cases without the aid of assessors, when they should have been tried with their aid, as an irregularity and not an illegality. And this was done in spite of the catena of decisions holding a defect of this nature to be an illegality of which the legislative authority must be deemed to have been fully aware. Calling

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(10) P.L.D. (1951) F.C. 118.

this defect to be an irregularity may not be conclusive, but having regard to the history of the legislation on this subject since 1947 the legislative authority's description may not be wholly irrelevant. Anyhow, even if it were an illegality, it could not be so regarded in the presence of several measures taken by the Provincial Government culminating in the Panjab Act XXIX of 1950, when it was fully competent to do away with the procedure for trial of sessions cases with the aid of assessors and substitute it by trials without their aid".(11)

He further observed: "In my view, there is no real distinction in principle between a trial without the aid of assessors and a trial without the minimum required by law. In the one case all the assessors are physically absent, while in the other only some of them are so, not to take notice of those whose names were not in the list and who could not, therefore, be correctly described as assessors at all. And once the requisite number of assessors is found not to be present when the trial commenced, the assessors must, as a body, be deemed to be absent or, perhaps it would be more correct to say, non-existent in the eye of the law. The legal effect in both the cases is the same and in both cases the trial must be held to have taken place without the aid of assessors."(12)

Abdul Rashid, C.J., in his dissenting judgement observed that to hold a trial with the aid of assessors who were not qualified as assessors was an illegality and not a mere irregularity. It could not, in his view, amount merely to an irregularity simply because

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(11) Muhammad Haroon v. Crown, P.L.D. (1951) F.C. 118, 136.
(12) id, 136-137.

Section 2(3) of the Act described it as an irregularity. The learned Chief Justice further observed: "It has been said that there is no real distinction in principle between a trial without the aid of assessors and without the minimum required by law. With all respect, I cannot assent to this proposition. The procedure that will be followed when two competent assessors assist the Sessions Judge in the trial would be materially different from the procedure which a Sessions Judge will adopt when there are no assessors at all. This fact alone completely distinguishes a trial without the aid of assessors from a trial held with the aid of two assessors. If, at the commencement of the trial, only two competent assessors are present, it cannot be held that the assessors are non-existent in the eye of law. In such a case all that can be said is that as the mandatory provisions of Section 284 of the Code of Criminal Procedure have not been complied with, the whole trial has been vitiated. The legal effect of the complete absence of assessors and of the presence of only two assessors may be the same in the sense that in both cases the trial will be held to be illegal. But this reason alone is not sufficient for holding that there is no distinction in principle between a trial without the aid of assessors and a trial with a deficient number of assessors".(13)

He was of the opinion that the words "without the aid of assessors" in the Act must be given its plain grammatical meaning, that the trial in question was wholly illegal as two persons who were not qualified to act as assessors, were made to act as assessors and that the tribunal

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(13) id., 127-28.

which tried the petitioners was not properly constituted.

Akram, J., who was with the majority of the court in upholding the legality of the trial tried to meet this point raised by the learned Chief Justice by observing that as the Act was a remedial measure the object of which was to legalise those trials which were held in contravention of the provisions of the law and to obviate the need for a retrial, its provisions should be construed liberally so as to give them a meaning to their fullest extent and capacity and thereby cover all those cases which fell within the mischief which the statute sought to remedy. Statutes of this nature could not always be so worded as to provide for every contingency that might possibly arise; regard was to be paid, therefore, to the policy which dictated it, as also to the words used. He was accordingly "inclined to give the words 'without the aid of assessors', a wide meaning so as to comprehend within its scope cases not only of physical absence of assessors, but also other cases, in which persons pruporting to act as assessors could not be regarded as such for some reason of law and thus to give effect to the spirit of law, though not perhaps to the letter of it". (14)

Unfortunately, since Pakistan came into existence, the judiciary have again and again been obliged to choose between producing administrative chaos or finding some justification for official acts. To a lawyer trained in the common law it seems somewhat strange to call in aid the spirit of the law to circumvent the letter of the law,

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(14) ibid, page 139.

especially when the result is prejudicial to the liberty of the subject.

Apart from these Provincial measures, an ordinance called the Pakistan Public Safety Ordinance, 1949, was issued by the Governor-General under Section 42 of the Government of India Act. It extended to all the Provinces and to the capital of the Federation and to every acceding state to the extent to which, the Central Legislature had power to make laws for that State as regards public safety and public order. The duration of the Ordinance which was to come into force at once was fixed as one year, with the provision that the Central Government could from time to time extend its life by notification.

Section 3 provided that the Central Government, if satisfied with respect to any person, that, with a view to preventing him from acting in any manner prejudicial to public safety or the maintenance of public order it was necessary so to do, might make an order:

(a) directing such person to remove himself from Pakistan, provided that he was not ordinarily resident in Pakistan,

(b) directing that he be detained,

(c) directing that he should not be in any such area or place as might be specified in the order,

(d) requiring him to reside or remain in such place or within such area in Pakistan as might be specified,

(e) requiring him to notify his movements or to report himself or to do both to a specified authority,

(f) requiring him to conduct himself in such manner, abstain from such acts, or take such order with any property in his possession or under his control as might be specified.

If any person contravened any order under this Section, he would be punishable with imprisonment for three years or with fine or with both. An order would remain in force for such period as might be specified in the order or if no period was specified until revoked by the authority making the order. Such revocation would not prevent the making of a fresh order to the same effect as the order revoked.

Section 4 provided for the winding up of associations which the Central Government considered would act in a prejudicial manner. When an association was directed to be wound up, the Central or Provincial Government might, authorise any officer to take possession of any land, buildings, any other property or documents belonging to, or in the custody of the association for a specified period. It was further provided that powers exercisable under certain provisions of the Criminal Law Amendment Act, 1908, (15) by the Provincial Government in relation to unlawful assemblies could be exercised by the Central Government also in relation to assemblies contemplated under this Section.

Under Section 5 it was provided that the Central Government, if satisfied with respect to any particular person, association or establishment that it was necessary or expedient to do so, might direct such person, association or establishment to abstain from:

(i) spreading or publishing any news, report or information,

(ii) exhibiting any film or slides,

(iii) holding any meeting or fair or procession or

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(15) Supra, Chapter III.

(iv) using any uniform or flag or insignia.

Section 6 sought to control documents containing information which, in the opinion of the Central Government, was likely to endanger public safety or the maintenance of public order. The Central Government was empowered to require the editor, printer, publisher or any person in possession of such documents to inform any specified authority of the name and address of the person who supplied the information, and to deliver the documents to him, to prohibit any further publication of them and to declare such documents forfeit to the government.

Section 7 authorised the Central Government or any authority empowered by it to require by order that all matters relating to a particular subject or class of subjects, should, before being published, be submitted for scrutiny to a specified authority. It also enabled the same authorities to prohibit or regulate the making or publishing of any document, and to prohibit either absolutely or for a specified period the publication of any newspaper or periodical. Section 8 provided for deposit of security by editors, printers and publishers as under the Press (Emergency Powers) Act, 1931.(16) In certain cases of contravention of prohibitions in the Ordinance, the Central Government could declare the deposit forfeit.

Only on the report in writing by public servants was a court to take cognizance of offences under the Ordinance. Such offences could be tried by a Magistrate of the First Class in accordance with

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(16) Supra, Chapter III.

the procedure prescribed for the trial of summons cases in the Code of Criminal Procedure.

Offences under the Ordinance were declared cognizable. They were also to be deemed non-bailable except when the prosecution was given an opportunity to oppose the application for bail and when, even after such opposition by the prosecution, the Court was satisfied that there were reasonable grounds for believing that the accused person was not guilty of the offence.

Section 14 provided that no order, direction or proceeding under the Ordinance would be called in question in any court and no legal proceeding would lie against any person for anything done or in good faith intended to be done under the Ordinance or for any loss or damage caused to any property taken possession of in pursuance of the provisions of the Ordinance.

The Pakistan Public Safety Ordinance, 1952 (VI of 1952) continued in force the provisions of the Public Safety Ordinance of 1949 and added provisions relating to rule-making and delegation of powers by the Central Government. Section 16 provided that the Central Government might, by order, direct that any power which was conferred by the Ordinance on the Central Government could be exercised in respect of Karachi by the Administrator of Karachi or by any officer under him, not being below the rank of District Magistrate, as he might direct. Under Section 17 it was provided that the Central Government could make rules, not inconsistent with the provisions of the Ordinance, to carry into effect its purposes. All rules made were required to be laid before the Central Legislature as soon as

possible after they were made.

The Ordinance which under Section 1 was deemed to have taken effect on March 3, 1952, though published in the Gazette on March 5, was replaced by the Security of Pakistan Act, 1952, which was assented to by the Governor-General on May 5, 1952.

The Security of Pakistan Act, 1952, intended to provide for special measures to deal with persons acting in a manner prejudicial to the defence, external affairs and security of Pakistan or the maintenance of supplies and services essential to the community, or the maintenance of public order, incorporated in it the provisions of the Pakistan Public Safety Ordinance, 1952, and also made certain additional provisions. The grounds for imposing restrictions on the movements of suspected persons and providing for their detention were extended to cover probable prejudicial acts in relation to defence, external affairs, the security of Pakistan or any part thereof, the maintenance of supplies and services essential to the community or the maintenance of public order.

The same extension of grounds was made in respect of provisions regarding control of subversive activities and dissemination of news and information.

The most important difference between the Act of 1952 and the Ordinance it replaced was in relation to the constitution of Advisory Boards. It was provided under Section 5 that the Central Government could for the purposes of the Act constitute one or more Advisory Boards, each consisting of two persons who were qualified to be Judges of a High Court. Under Section 6 the authority making an order of

preventive detention was required to communicate to the detenu, within a month of the date of detention, the grounds on which the order had been made to enable him to make a representation in writing against the order. It was the duty of the authority to inform the detenu of his right to make such representation and to afford him the earliest opportunity of doing so. The authority, however, was not required to disclose facts which it considered to be against public policy to disclose.

Section 7 provided that in every case where a detention order had been made or where an order had been passed under Section 10 (Control of Subversive associations) 11 (Control of news and information) or 12 (Prohibiting and regulating the printing or publication of certain matters), the authority making the order should, within three months from the date of the issue of the order, place before the Advisory Board the grounds on which the order had been made and the representation if any, made by the person affected by the order. The Advisory Board was required under Section 8 to submit a report to the Central Government after considering the materials placed before it and, if necessary, after calling for such further information from the Government or from any person concerned or affected. The person affected by the order was not permitted to attend personally or appear by any legal representative before the Advisory Board; nor was he allowed to produce witnesses before the Board. The report should specify in a separate part the opinion of the Board as to whether there was sufficient cause for the passing of the order. The report except the separate part in which the Board's opinion was given would

be confidential. On receipt of the report the Central Government should consider it and pass such order as appeared to it just and proper. The Central Government was also required to review all such orders every six months from the date of the order unless revoked earlier and, in the case of an original order of detention, inform the detenu of the result of the review.

Another important addition made in the Act was the special provision made for detention in certain cases. It was provided under Section 9 that any person detained with a view to preventing him from acting in any manner prejudicial to the defence or external affairs or the security of Pakistan or any part thereof might be detained without obtaining the opinion of an Advisory Board for one year from the date of his detention.

These were the only substantial departures from the Ordinance effected in the Security of Pakistan Act.

In Hassan Nasir v. The Crown (17) the applicant was detained under the Security of Pakistan Act in pursuance of an order made by the Central Government. The grounds of detention furnished to the detenu disclosed that "the Government of Pakistan are satisfied that you worked and were trained by a reputed Communist and were appointed as Secretary of the Karachi Communist Party. You were further engaged in directing the activities of the Communist Party under different assumed names and remained underground to escape notice. The Government of Pakistan were and are satisfied that your activities were

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(17) P.L.D. 1953 Sind 37.

and are prejudicial to the security of Pakistan". Following the decisions in Nek Muhammad and others v. The Province of Bihar (18) and Abdul Khaliq Azad v. The Crown (19), the Sind Chief Court held, that mere membership of a party, whether Communist, Muslim National Guard or R. S. S. could not furnish a valid ground for detention unless acts calculated to endanger the security of the State were ascribed to the detenu in question".(20) It also held that the grounds furnished must be such as would enable a detenu to make adequate representation. "The object of providing grounds," Lari, J., observed, "is to enable the detenu to make representation with a view to assure the detaining authority that he was not likely to act in a manner contemplated by the Act. The effect and the requisites of a similar section in various enactments in India have been considered by courts in that country and they have invariably come to the conclusion that the grounds furnished must be such as to enable a detenu to make adequate representation. The very section says that the grounds have to be furnished so as to "enable him to make if he wishes a representation in writing against the order". The detenu is not entitled to appear in person, and therefore the only method of meeting the alleged accusations against the detenu is to make a representation and no effective representation can be made unless he is aware of such particulars as are the basis of conclusions reached by the detaining authority".(21)

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(18) A.I.R. 1949 Patna 1.
(19) decided on August 28, 1951 by the Sind Chief Court, referred to in P.L.D. 1953 Sind 37, 39.
(20) Hasan Nazir v. The Crown, P.L.D. 1953, Sind, page 37, 39.
(21) id. pages 39-40.

In Sibte Hasan v. Crown,(22) the adequacy of the grounds of detention to be furnished by the detenu was further considered by the court. The grounds in this case disclosed that "the Government of Pakistan are satisfied that you were engaged, in conspiracy with other Communist leaders, in planning to overthrow the Government by law established in Pakistan. They were and are therefore staisfied that your activities were and are prejudicial to the security of Pakistan." In dismissing a habeas corpus petition on behalf of the detenu, the Lahore High Court held, following and quoting from, the judgement in Durgadas v. Rex(23), that "what information should be conveyed to the detenu which would be sufficient to enable him to make a proper representation would depend in each case upon the circumstances of that case and upon the grounds that had satisfied the detaining authority of the necessity for such detention. It is difficult to lay down any hard and fast rule about it".(24)

"I find myself in respectful agreement with that view", observed Rahman, J., in Sibte Hasan's case. "It was recognised in that case that the grounds for satisfaction of the authority concerned may be the past activities of the detenu, or information about his future intentions, or his association with others who had been acting in a prejudicial manner. The test, therefore, is whether in any particular case the grounds supplied to the person affected by the order of

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(22) P.L.D. (1954) Lahore 142.
(23) A.I.R. 1949 Allahabad 148.
(24) Durgadas v. Rex, A.I.R. 1949 Allahabad 148.

detention were in fact such as would enable him to make an effective representation against his detention, to Government or not."(25) It was further held that when the grounds furnished left him in no doubt as to what the accusation against him was, they should be considered adequate to enable the detenu to make his representation to the Advisory Board.

It was contended on behalf of the detenu who had been already in custody for over four months under the Bengal State Prisoners Regulation, 1818, when an order of detention under the Pakistan Public Safety Ordinance, 1949, was made against him that action under the Security Act was intended to be preventive rather than punitive and an order of detention could not have been passed in respect of a person who was already under detention and therefore could not from the very nature of the case have engaged in any subversive activity prejudicial to the security of Pakistan. Rahman, J., was, however, of the opinion that it would be open to the Government to consider the "antecedent of the petitioner to decide whether he was in their opinion a person likely to act in a manner prejudicial to the safety or security of Pakistan."(26)

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(25) Sibte Hasan v. The Crown, P.L.D. 1954 Lahore 142.
(26) id., 149.

ii. Martial Law in the Panjab

Martial law had to be proclaimed in Lahore in March 1953 when orthodox Muslims resorted to direct action against Ahmadiyas (or Mirzais), a Muslim sect following the teachings of Mirza Ghulam Ahmad (d. 1908), who claimed to be a prophet as well as to be the promised Messiah. Orthodox Muslims regard this claim as heretical and do not consider Ahmadiyas to be Muslims. This minority sect is reputed to have about 200,000 members in Pakistan and includes among its followers some distinguished men, like Sir Muhammad Zafrullah Khan who was the Foreign Minister of the country in 1953.

The objects of the anti-Ahmadiya agitation were to have the Ahmadiyas declared a non-Muslim minority, the dismissal of Zafrullah Khan and the barring from high public office of all members of the sect.(1) The methods employed for the purpose were the holding of public meetings, processions and the passing of impassioned resolutions.(2) At a meeting sponsored by the leaders of the agitation in January 1953 resolutions were passed to the effect that since Khwaja Nazimuddin, the Prime Minister, was not inclined to accept the demands of the All Muslim Parties Convention in respect of the Ahmadiyas, direct action had become inevitable to secure acceptance of the demands and that since the demand for the removal of Zafrullah Khan had not yet been

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(1) Report of the Court of Inquiry into the Panjab Disturbances of 1953 (Munir Report) page 127.

(2) "In default of effective democracy this (indulgence in such activities) has been the participation of the common man in politics", writes a student of Pakistan politics. (K. Callard, Pakistan, page 53)

conceded, the Convention demanded the resignation of Khwaja Nazimuddin, "so that the Muslims of Pakistan should be able to follow and preserve their religious beliefs and Islamic traditions"(3). Daultana, the Chief Minister of the Panjab, instead of nipping the agitation in the bud, indulged in the clever political move of making it known that, though he personally accepted the view that Ahmadiyas were non-Muslims, he was unable to act in the matter, which was within the competence of the Constituent Assembly and the Federal Government. The Panjab Muslim League also supported the forces of disorder. According to the list prepared by the police 377 members of the League "took part in processions, leading violent mobs, violating orders promulgated under Section 144 and collecting funds with a view to financing the movement"(4). The Central Government's policy as regards the movement was one of "indecision, hesitancy and vacillation".(5) It was an awkward moment for the government. The public at large, the religious leaders and many politicians regarded the Ahmadiya doctrine as heretical. Nazimuddin himself was a deeply religious man. Further the Constituent Assembly had decided that Pakistan should be an Islamic State. In these circumstances it was not easy for the government to declare that religious sentiment must be held in check so that the principles of cabinet government might be followed.(6) "The situation was allowed to drift until the agitators faced the

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(3) Munir Report, pages 131-132.
(4) id. page 266.
(5) id. page 283.
(6) K. Callard, Pakistan, page 206.

government with the choice of abdication or resistance".(7)

The Central Council of Action, set up by a resolution of the meeting held in January, had couched their demands in the form of an ultimatum which would expire on the 22nd of February. Direct action was planned to begin on the 27th. Hearing of alarming reports like the enrolment of 55,000 volunteers for the campaign, the Central Cabinet met at 2 ~~a.m.~~ o'clock in the morning of the 27th and decided to arrest the leaders of the agitation and to ban certain inflammatory newspapers.(8) But by this time the agitators were ready to go into action. Mass demonstrations interrupted normal life in Lahore and other towns in the Panjab. By March 4th certain areas of the walled city of Lahore had been taken over by the agitators and police lost all control of the situation. By 6th, communications were disrupted and the supply of electricity was partly cut. Civil government for all practical purposes ceased to exist and Daultana, on the verge of capitulation, made a desperate appeal to the people to help him in the maintenance of law and order, assuring them that their demands would be placed before the Central Government with a recommendation for their acceptance.(9) A few hours later, the local military Commander, Major-General Muhammad Azam Khan, with the approval of the Central Government, proclaimed martial law and the military forces restored order in a matter of six hours.

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(7) ibid.
(8) Munir Report, pages 144-145.
(9) id. page 167.

The military Commander constituted himself Chief Martial Law Administrator and conferred on himself authority to issue martial law regulations and orders and to appoint special courts for the trial and punishment of persons contravening such regulations and orders. He appointed the Chief Secretary to the Government of the Panjab as the Deputy Chief Administrator and six senior military officers, of whom two were Brigadiers and four Lieutenant Colonels, as Administrators with authority to them to appoint their sub-administrators. He issued a series of martial law regulations and orders. By Regulation No.1 the martial law area was divided into sectors and an administrator was put in charge of each of the sectors. By Regulation 1(a) he constituted special courts of two kinds:

(i) Special military courts

(ii) Summary military courts and their respective jurisdiction was clearly defined. The procedure to be followed by them and their power to pass sentences were similarly defined. By Regulation 2 ordinary criminal courts were permitted to exercise jurisdiction in respect of offences other than those created by the regulations or connected with the disturbances. By Regulation 8 certain offences were declared to be punishable by death, transportation for life or imprisonment which could extend to fourteen years.

On May 9, 1953, the Governor-General, acting under Section 42 of the Constitution Act, promulgated the Martial Law (Indemnity) Ordinance, 1953 (11 of 1953) indemnifying servants of the Crown and other persons in respect of acts done by them in good faith under martial law and validating sentences passed by military courts.

Section 2(2) defined the martial law period as "the period beginning on the 6th day of March 1953 and ending on such day as the Central Government may by notification in the official Gazette declare". Section 3 enacted that no suit, prosecution or other legal proceeding would lie in any court against any servant of the Crown for or on account of or in respect of any act ordered or done by him or purporting to have been ordered or done by him in the martial law area during the martial law period for the purpose of maintaining or restoring order or of carrying into effect any regulation, order or direction issued by any authority responsible for the administration of martial law to which he was subordinate provided that the act was done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served thereby. The same indemnity was granted to any other person in respect of any act done or purporting to have been done by him under any order of a servant of the Crown given for any of the purposes mentioned above.

Section 5 of the Ordinance rendered lawful the seizure, confiscation, or destruction of or damage to property under the direction of a servant of the Crown and made claims for restoration or compensation in respect of any such property inadmissible. Section 6 provided that all sentences passed during the martial law period by a court or other authority constituted or appointed under martial law and acting in a judicial capacity would be deemed to have been lawfully passed and all sentences executed according to the tenor thereof would be deemed to have been lawfully executed.

It was provided under Section 7 that "every person confined

under and by virtue of a sentence passed by a court or other authority constituted or appointed under martial law and acting in a judicial capacity shall continue liable to confinement until the sentence, reduced by remissions, if any, earned under the rules applicable to the serving of such sentence, is served, or until he is released by order of the Central Government".

Section 8 made Sections 6 and 7 applicable to sentences passed for offences which might have been committed before the beginning of the martial law period.

In Muhammad Umar Khan v. Crown re Maulana Abdusattar Khan Niazi, (10) a habeas corpus petition praying that Maulana Niazi whose detention was allegedly illegal be set at liberty, it was contended that the introduction of martial law and the constitution of the special military court which sentenced the Maulana were illegal, that the court did not act in a judicial capacity and in the procedure adopted by it, it did not conform to the ordinary form of criminal trials, that the necessity of martial law if ever it existed, had ceased on March 23, (the day on which the martial law administrator publicly admitted that the first phase of martial law which was to restore law and order was over and that the second phase, the object of which was a constructive one, had begun) and thereafter the continuation of the martial law regime and the functioning of special military courts were illegal and that the Indemnity Ordinance in as much as it gave to the Central Government the power to determine the

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(10) P.L.D. (1953) Lahore 528.

martial law period and purported to validate sentences which were essentially in the nature of advice tendered by special military courts to the Martial Law Administrator was ultra vires.

In dismissing the petition, the court held that when the legislative authority passed the Indemnity Ordinance it must have known in what manner and on what principles the martial law administration had been carried on and that the validating legislation must have been passed keeping in view the manner and principle of such administration, and that the legislature must be presumed to have approved the various regulations and orders by which courts were appointed, their powers and procedure defined and the law administered by them duly notified. If the legislature had passed an Act recognising or defining the principle on which martial law was in fact administered, no objection to it could have been taken on the ground that it did not contain the principle or policy of the legislation and that it delegated uncontrolled and unfettered legislative functions to the military Commander. What had been done could originally have been permitted to be done and no objection to such ex post facto legislation could be taken on the ground of retroactivity. No exception could be taken to the Indemnity Ordinance on the ground that it amounted to delegated legislation.

As regards the contention that the necessity for martial law, if it ever existed, ceased on March 23, the court observed that Major General Muhammad Azam Khan was not to be taken literally when he said that the first phase of martial law had been over. "He did not say that there was no necessity thereafter for the martial law to

continue or that there was no possibility of the recrudescence of disorders."(11)

The judgement delivered by Muhammad Munir, C.J., is probably of more interest for the illuminating discussion on martial law made by the learned Chief Justice than for the ratio. The meaning and scope of martial law were set forth with admirable lucidity in the course of the judgement. The following extracts from the decision, it is hoped, will present in a concise form the statement of law in regard to the true character of martial law.

"In constitutional jurisprudence", observed Muhammad Munir, C.J., "martial law is used at least in four different senses. In the first sense, it is used with reference to the law relating to discipline in the armed forces of the State which is administered by tribunals, called courts martial. These courts are constituted for the purpose of regulating the government of the military and their jurisdiction in no circumstances extends to the civilians. In our country, martial law in this sense means the law administered by Courts Martial constituted under the Army Act, the Naval Discipline Act, and the Air Force Act.

"In the second sense, the word (sic) 'martial law' means 'military government in occupied territory' and is used to describe the powers of a military commander in times of war in the enemy territory. In this sense, martial law is recognised by Public International Law as a part of the jus belli. The Duke of Wellington

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(11) id, page 548.

had this kind of martial law in mind when in a debate in the House of Lords he said:

"Martial law is neither more nor less than the will of the general who commands the army. In fact martial law means no law at all".

"In the third sense in which it is a part of English Constitutional Law, martial law means the rights and obligations of the military under the common and statute law of the country to repel force by force while assisting the civil authorities to suppress riots, insurrections or other disorders in the land. In American Constitutional Law, martial law in this sense is a form of the police power of the State and means the law which has application when the military arm does not supersede civil authority but is merely called upon to aid such authority in the execution of its civil functions. This form of martial law is well recognised by the law of England and there are several ancient statutes which make it incumbent not only on the citizens but also Crown servants, including the army, to assist civil authorities in suppressing disorders in the land. Cases illustrative of this law are Rex v. Kenneth (12) and Rex v. Pinney (13)".

After quoting a passage from Tindal, C.J.'s charge to the Bristol Grand Jury, (14) the Chief Justice further observed:

"It will be noticed that the justification of this form of martial law, if it can at all be so called is the common law of

(12) 5 Car and P. 282.
(13) 5 Car and P. 254.
(14) (1832) 172 E.R. 966.

England and several statutes which create rights in and impose obligations on citizens and servants of the Crown in the matter of suppression of riots..... The Privy Council..... observed in Marais v. G. O. C. Lines of Communications[15] that where war prevails the ordinary courts have no jurisdiction over the action of the Military but that it is for the Civil Courts to decide whether a state of war exists or not.

"In seeking to discover the source and reason of martial law, the best course to adopt is to find an answer to a few simple questions. In case of war or invasion do the military have a right to act suo moto? If so, do they have the same right where there is a riot, insurrection, revolt or rebellion which, if not suppressed immediately, may become a successful revolution? If the answer to both these questions be in the affirmative, a third question, and that is the most important question, immediately presents itself, namely, what are the powers of the military when called upon to act in any such contingency? Can they for the purpose of suppressing the riot or rebellion, make their own Rules and Regulations, set up their own courts to enforce such Rules and Regulations and thus infringe the right of freedom of person and of enjoyment of property to which citizens are entitled under the ordinary law in peace time? If constitutional jurisprudence furnishes an answer to these questions, that is martial law sui generis".[16]

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(15) 1902 A.C. 109.
(16) Muhammad Umar Khan v. Crown, P.L.D. (1913) Lahore 538, 539.

As to the limits within which martial law is available as a defence in the ordinary civil courts, the Chief Justice stated:

"Most constitutional writers affirm that when civil power is deposed, suspended or paralysed by domestic disturbances, the military are entitled to step in to fill up the void but these writers are equally clear in their opinion that while so acting the legality or excusability of any action taken by the military will be judged by "necessity" and that such judgement will be with the civil courts ex post facto. Thus martial law is the law of military necessity, actual or presumed in good faith. Whether where the defence of necessity and good faith cannot be founded on civil law, e.g. right of private defence or the use of force to disperse unlawful assemblies and there is no indemnity bill, it will be recognised by civil courts, is an open question though observations occur in several cases clearly indicating that such necessity will be recognised as a good defence (Phillips v. Eyre (17) and Tilonko v. Attorney General of Natal(18).) If martial law is law and its limits are prescribed by necessity, then:

(1) Not only the Crown has the prerogative to proclaim martial law but without any such proclamation the military can take over when by war, insurrection, rebellion or tumult civil authority is deposed, suspended or paralysed;

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(17) 1870 Q.B. 1.
(18) 1907 A.C. 93.

(2) all acts done by the military which are either justified by the civil law or were dictated by necessity and done in good faith will be protected even if there be no bill of indemnity;

(3) while preventive action for the duration of the martial law will be valid, punitive action will generally be invalid;

(4) martial law will cease ipso facto with the cessation of the necessity for it; and

(5) sentences of confinement by military courts will expire with the expiry of the martial law."(19)

If any or all of the above consequences that would ordinarily ensue upon the expiry of the period of martial law are to be prevented from taking effect, it is for the Legislature to pass an Act of Indemnity and make suitable provisions defining the extent to which the consequences emanating from the enforcement of martial law, after the expiry of the period of its enforcement, should not be given judicial effect by the ordinary civil courts.

Martial law, fourthly and finally, as a concept of international law assumes an aspect of jus belli. In this sense, it is'incidental to the state of solemn war and appertains to the law of the nations'. The municipal laws have nothing to do with it and cannot provide for martial law as understood in this context. It is for international law to determine the implications of this term when used in this sense.

Abdus Sattar Khan Niazi who in the meanwhile had been sentenced to death on a charge of sedition and whose capital sentence was later

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(19) P.L.D. (1953) Lahore 539, 540.

commuted to rigorous imprisonment for fourteen years presented a petition(20) to the Federal Court praying for special leave to appeal from the judgement of the Lahore High Court, contending:

(i) that on 23rd March, 1953, Major General Muhammad Azam Khan having made a declaration to the effect that the first phase of restoring peace and order having been achieved, the second phase of reconstruction had been begun, any action on the part of the military after March 23, was clearly beyond the scope of their legitimate function and contrary to the principles of constitutional law;

(ii) that the Martial Law (Indemnity) Act, 1953 (XXXII of 1953) which superseded the Martial Law (Indemnity) Ordinance, 1953, was ultra vires the Federal Legislature as it amounted to a delegatio of its own powers to the military personnel by giving them a free hand in the civil administration during the martial law period;

(iii) that while Section 6 of the Martial Law (Indemnity) Act which validated "all sentences passed during the martial law period by a court or other authority constituted or appointed under martial law and acting in a judicial capacity", implied the application of a judicial procedure as usually followed in courts of justice, contrary to this provision, some of the defence witnesses who were absent had not been re-summoned by the court martial for their reexamination.

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(20) Abdus Sattar Khan Niazi v. The Crown, P.L.D. (1954) F.C. 187.

As to the first contention the court held that it was not for the military authorities, but for the executive to determine when it could resume administrative functions with safety and without risk, since it was the executive which called the military to its aid.

As to the second contention, Akram, J., observed that the Federal Legislature was a legislative body possessing sovereign powers and no question therefore of ultra vires with regard to its legislative enactments could arise. The powers which the Federal Legislature exercised were as large and ample as those of the British Parliament itself. The Martial Law (Indemnity) Act was an Act of the Federal Legislature and no question of a delegation of its powers to anyone arose.

According to Cornelius, J., the powers of the Federal Legislature were derived from and were circumscribed by, the express provisions of the Government of India Act, 1935, as adopted in Pakistan. He was therefore of the opinion that the powers of the Federal Legislature (as distinguished from the Legislature of the Dominion under Section 6(2) of the Independence Act) were not, in the then existing circumstances, as wide as those possessed by the British Parliament. In regard to the vires of the Indemnity Act, he observed: "The contravention of constitutional provisions in relation to the administration of the martial law area during the material period was brought directly before the Federal Legislature when it was asked to enact the Martial Law (Indemnity) Act, 1953, and it was open to the Legislature in dealing with the Bill, to take such action as it thought fit, in relation to the executive authorities which were

responsible. Such action need not have involved any act of legislation, and consequently no question of abdication of legislative functions is involved in that aspect of the matter." Assuming that the Federal Legislature expressed no disapproval of the action of the executive authorities appointed under the Constitution that would indeed amount to ratification of that action, but again, for the reason mentioned immediately above, such ratification would not involve the legislative functions of the Federal Legislature.(21)

As to the third contention, it was held that the expression 'acting in a judicial capacity' meant mainly to emphasise the duty of adjudication as distinguished from administration and meeting the requirements of military exigencies. "The word 'capacity' here, said Akram, J., is not without significance; one may be vested with various capacities for exercising various kinds of functions, 'judicial capacity' describes only the character in which the work is to be performed"(22). In any event the calling or not calling of witnesses by the court martial or other authority constituted under martial law was no ground for an order of release under habeas corpus proceedings.

According to Cornelius, J., the words 'acting in a judicial capacity' were not merely words of indication but, were intended to be, and were, in fact, words of limitation. So much appeared to him to follow from giving to each word in the phrase its full and plain grammatical meaning, but he based this conclusion also upon

(21) id. pages 195, 196.
(22) id. page 190.

the consideration that when the Federal Legislature was considering the question of the extent to which the acts performed by 'self-appointed authorities' during the 'extra constitutional regime' represented by the martial law period could be maintained in their effect, it might well have considered that the saving should be confined to those particular acts, purporting to be acts performed in the administration of justice, which were in fact performed in compliance with the minimum requirements of the dispensation of justice. It was observed that acts of indemnity did not usually include this qualification as regards 'acting in a judicial capacity' and it was therefore reasonable to suppose, said Cornelius, J., that the words had been intentionally employed in the Act in question with a view to creating a salutary effect of limitation.

He was of the view that the minimum requirements of justice were satisfied in the procedure adopted in Niazi's case - "In respect of the presentation of his case in defence", remarked His Lordship, "the minimum requirements of justice are that an accused person should be allowed to present his plea, as well as a reasonable opportunity to support it, and to rebut the evidence led against him, by producing defence witnesses. The procedure actually followed would seem to satisfy these requirements"(23).

The petition for leave to appeal was therefore dismissed.

Cockburn, C.J., in Phillips v. Eyre(24) made certain observations about the legal import and character of Indemnity Act,

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(23) id, page 193.
(24) (1869) 4 Q.B. 225.

which would seem to be pertinent in this context.

"There can be no doubt", said the Chief Justice, "that every so called Indemnity Act involves a manifest violation of justice, in as much as it deprives those who have suffered wrongs of their vested right to the redress which the law would otherwise afford them and gives immunity to those who have inflicted those wrongs, not at the expense of the community for whose alleged advantage the wrongful acts were done, but at the expense of individuals who, innocent possibly of all offence, have been subjected to injury and outrage often of the most outrageous character. It is equally true, as was forcibly urged on us, that such legislation may be used to cover acts of most tyrannical, arbitrary and merciless character, acts not capable of being justified or palliated even by the plea of necessity, but prompted by local passions, prejudices or fears - acts not done with the temper and judgement which those in authority are bound to bring to the exercise of so fearful a power, but characterised by reckless indifference to human suffering and an utter disregard of the dictates of common humanity. On the other hand, however, it must not be forgotten that against any abuse of local legislative authority in such a case protection is provided by the necessity of the assent of the Sovereign, acting under the advice of Ministers, themselves responsible to Parliament. We may rest assured that no such enactment would receive the royal assent unless it were confined to acts honestly done in the suppression of existing rebellion, and under the pressure of the most urgent necessity. The present indemnity (25)

(25) The Act of Indemnity passed by the legislature of Jamaica after the rebellion of 1865.

is confined to acts done in order to suppress the insurrection and rebellion, and the plea contains consequently the necessary averments that the grievances complained of were committed during the continuance of the rebellion, and were used for its suppression, and were reasonably and in good faith considered by the defendant to be necessary for the purpose; and it will therefore, be incumbent on the defendant to make good these averments in order to support his plea".

Referring to the troublous days of the civil war which followed the assassination of Caesar, Cassius remarked,

"In such a time as this it is not meet
That every nice offence should bear his comment"(26).

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(26) William Shakespeare, Julius Caesar, IV, iii, 7-8.

iii. Constitutional Crisis in 1954-55

Under Section 8(2) of the Indian Independence Act, 1947, the power of the Governor-General or any Governor to act in his discretion or to exercise his individual judgement lapsed as from August 15, 1947.(1) The whole field of governmental activity was brought under the control of the Cabinet and the Cabinet responsible to the legislature was the real executive. The Governor-General was presumed to act on the advice of the ministers. Though there was little of discretionary power left to the Governor-General under the Government of India Act, 1935, as adapted in Pakistan, he, in fact, continued to enjoy wide and substantial powers, for the ministers were chosen by him and they held office during his pleasure. A minister could remain in office for ten months without being a member of the legislature. While retaining the power to proclaim an emergency under the Government of India Act, 1935, the Governor-General was empowered by the Government of India (Second Amendment) Act, 1948, to proclaim a state of emergency on a threat to the security or economic life of any part of the country arising from the likelihood of war, internal disturbance or mass movements of population. The Governor-General could legislate by ordinance in emergencies, irrespective of the fact whether the legislature was sitting or not,

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(1) Section 3(2) of the Pakistan Provisional Constitutional Order, 1947, promulgated by the Viceroy on August 14, 1947, also provided that the Governor-General and the Provincial Governors should lose their powers of acting independently of their ministers.

and there was no time limit fixed for the validity of such ordinances.[2] The exercise of substantial powers was also due to the personality of the holders of the post during the early years of the Dominion. Mr. Jinnah who was the first Governor-General was far more than Governor-General. He was the founder of Pakistan; he was the President of the Constituent Assembly and the ultimate authority in the Muslim League at a time when Muslim League and Pakistan were almost synonymous. It may be mentioned that his appointment as Governor-General, partly compelled by his own refusal to accept Lord Mountbatten as the Governor-General of both the new Dominions, was not in keeping with the longstanding British tradition that the Governor-General of a Dominion should be a ceremonial head of the State far above local and party politics.

After Jinnah's death Liaquat Ali Khan, who wielded real power at the time, elected to remain Prime Minister, an action calculated to make government by a parliamentary executive as effective as elsewhere in the Commonwealth. Khwaja Nazimuddin, who became the second Governor-General, appeared to be willing to discharge his duties as constitutional head of the State in the manner customary in the Commonwealth without wielding the real power which his predecessor had exercised. At Liaquat Ali's death, the erstwhile Governor-General chose to become the Prime Minister, as real power

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(2) It was only in 1950 that the Governor-General's power to lesgislate by Ordinances was brought within the control of the Federal Legislature by the Government of India (Second Amendment) Act, 1950.

lay in the Prime Minister's hands. But Nazimuddin did not prove a strong leader. When factions developed within the Cabinet, Ghulam Mohammad, the third Governor-General, took advantage of the situation and dismissed from the office of the Prime Minister Nazimuddin who still retained the confidence of the Legislature. The Governor-General was able to do this because a group within the Cabinet was in league with him. This dismissal "caused bewilderment in all constitutional quarters".(3) This was the only instance up to the time of the dissolution of the Constituent Assembly in 1954 when the Governor-General acted except on the advice of the Cabinet. With the appointment of Muhammad Ali as Prime Minister, it seemed that the Cabinet would be subservient to the Governor-General. But the new Prime Minster soon secured the confidence and support of the Constituent Assembly and was able to exercise the powers normally attached to his office in the Commonwealth. The Assembly which was growing impatient of the Governor-General's continued exercise of substantial powers amended Sections 9, 10, 10A, 10B of the Government of India Act, 1935, as adapted in Pakistan, so as to make it obligatory on the Governor-General to act on the advice of his ministers, to appoint as Prime Minister the member of the Federal Legislature who enjoyed the confidence of the majority and as other ministers the nominees of the Prime Minister. The legislature could also compel a resignation of the Cabinet by a no-confidence resolution.

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(3) G. W. Choudhury, Parliamentary Government in Pakistan, Parliamentary Affairs Vol. XI, No. 1, page 85.

The Governor-General was divested of his powers to dismiss the ministry. The ministers would no longer hold office during the pleasure of the Governor-General, but would now be individually and collectively responsible to the Federal Legislature. This constitutional coup which these amendments envisaged was effected in somewhat dramatic circumstances. Ghulam Muhammad was away on tour; when the Amendment Bill was introduced and passed in great haste with practically no discussion; it was passed immediately after the repeal of the Public and Representative Offices (Disqualification) Act, 1949, when proceedings under it were pending against some members of the legislature. Ghulam Muhammad retaliated by dissolving the Constituent Assembly, asserting by proclamation that "the constitutional machinery has broken down". He declared a state of emergency and claimed that "the Constituent Assembly as at present constituted has lost the confidence of the people and can no longer function". He directed the Prime Minister to reform the Cabinet "with a view to giving the country a vigorous and stable administration". He also announced his intention of summoning a new Assembly as soon as possible.

Though the Constituent Assembly had not carried out its function of preparing a constitution for Pakistan during the seven years of its deliberations, when it was dissolved on October 24, a draft constitution was expected to be ready for signature on October 25, and would have been reported to the Assembly on October 27.(4)

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(4) Ivor Jennings, Constitutional Problems in Pakistan, page 3.

The President of the Constituent Assembly, Moulvi Tamizuddin Khan denied that the Governor-General had power to dissolve the Assembly. He petitioned the Chief Court of Sind for a writ of mandamus under Section 223A of the Government of India Act, 1935, which had been inserted by the Government of India (Amendment) Act 1954, to restrain the Federal Government from giving effect to the dissolution of the Assembly and also for a writ of quo warranto under the same section against some of the new Ministers on the ground that they were not qualified to be ministers under Section 10 of the Government of India Act as substituted by the Government of India (Fifth Amendment) Act, 1954.

The Advocate General for Pakistan contended on behalf of the Federation that the Government of India (Amendment) Act, 1954, and the Government of India (Fifth Amendment) Act, 1954, were invalid because they had not received the Governor-General's assent and that the Governor-General as representative of the Queen had power to dissolve the Assembly. A full bench of the Chief Court found for Tamizuddin Khan on the mandamus and so far as Ministers appointed on or after the dissolution of the Assembly was concerned on the quo warranto also. (5) The Chief Court held that Section 6(3) of the Indian Independence Act, 1947, which laid down that "the Governor-General.....shall have full power to assent.....to any law of the Legislature of that Dominion and so much of any Act as relates to the disallowance of laws by His Majesty or the reservation of laws for the

(5) Tamizuddin Khan v. Federation of Pakistan, P.L.D. (1955) Sind,96.

signification of His Majesty's pleasure thereon shall not apply to laws of the Legislature of either of the new Dominions", did not mean that assent was essential to the validity of the laws, but merely provided that if assent was necessary the Governor-General's power to give or withhold assent was not to be controlled by any external authority. It further held that the power to dissolve the Assembly could not be claimed as a prerogative power of the Crown which the Governor-General could exercise as the Queen's representative, especially because the Crown's power had not been exercised for two and a half centuries and the right of the Head of any Dominion to dissolve the Dominion Legislature was laid down in statutes. So if there was power to dissolve, it should be found in the Constitution Act. Section 5 of the Independence Act which stated that "there shall be a Governor-General who shall be appointed by His Majesty for the purposes of the government of the new Dominion....." could mean only that the Governor-General represented the Crown for governing the Dominion in accordance with the adapted Act of 1935, and not for all purposes. He had only such powers as were granted to him under the Constitution or under his commission. The Independence Act had made no provision as to the duration of the Constituent Assembly. The Governor's power to dissolve the Provincial Assembly had been retained in Section 62 of the adapted Act of 1935, but no such power for the Governor-General was kept alive. As the prerogative of dissolution is covered by the Independence Act and as the prerogative could not be exercised concurrently with the statutory power, the Governor-General could not be deemed to have been empowered to dissolve the

Constituent Assembly.

The Federation of Pakistan and the Ministers appealed to the Federal Court which held (Cornelius, J., dissenting) that the assent of the Governor-General was essential to the validity of the legislation of the Constituent Assembly, and that therefore the Sind Chief Court had acted without jurisdiction in that Section 223A not having received such assent was not part of the law of Pakistan. Muhammad Munir, C.J., who delivered the principal judgement maintained that Pakistan being a Dominion its laws required the assent of the Crown or its representative. The Crown's prerogatives continued to exist, except in so far as they were covered by the Independence Act and the fact that the power of veto had not been used for a long time did not imply that assent was not essential. The Crown is still an integral part of the Dominion Legislature. No distinction could be made between Constitution Acts which expressly declared that the Crown was an integral part of the Legislature and the provisional Constitution of Pakistan under which the legislative power was exercised by the Constituent Assembly. Under Section 8 of the Independence Act the provisional Constitution could be amended only by a law of the Constituent Assembly and Section 6(3) gave the Governor-General full power to assent to a law of the Legislature of the Dominion. If under Subsection (1) of Section 8 the Legislature of the Dominion was the Constituent Assembly, under Subsection (2) it was the Federal Legislature when exercising legislative power under the Act of 1935 as adapted in Pakistan. 'Legislature of the Dominion' in Section 6, could not be restricted to the Federal Legislature,

because Legislature of the Dominion could, under the Act, enact laws outside the competence of the Federal Legislature. The power of assent could not be held to derogate from the independence of the Dominion, as the Governor-General is appointed on the advice of the ministry of the Dominion. Further the power is normally exercised on ministerial advice.

The United Kingdom Parliament, it was pointed out, was unlikely t have envisaged a situation in which assent should be deemed necessary for laws passed by the Constituent Assembly when acting in one capacity and unnecessary for laws passed when it was acting in another capacity. If this position were admitted, it would be possible for the Constituent Assembly to eliminate assentaltogether by passing laws within its powers as Federal Legislature while acting as a constitution-making body.

The expression 'government of the Dominion' in Section 5 (There shall be a Governor-General..... for the purpose of the government of the Dominion) could not be restricted to government under the Act of 1935 as adapted. Government should include not only the execution of constitutional laws, but also the making of them. Section 5 would therefore vest in the Governor-General the power to exercise royal prerogatives subject to any statutory provision to the contrary.

Cornelius, J., in his dissenting judgement pointed out, among other things, that as all the organs of the State had hitherto acted upon the belief that for constitutional laws assent was unnecessary, the established constitutional practice was to be upheld. He referred to three cases, two of them decided by the Federal Court itself in

which the decision implied that the Governor-General's assent was not essential for the validity of constitutional laws. In M. A. Khuhro v. The Federation[6] the appellant challenged the Public and Representative Offices (Disqualification) Act, 1949, as invalid on the ground that it had not received the assent of the Governor-General. On behalf of the Federation it was asserted that no such assent was necessary because the Act was passed by the Constituent Assembly sitting as a Constitution-making body and not as Federal Legislature. The Sind Chief Court held that no assent was necessary, interpreting Section 6(3) of the Independence Act to mean that "in cases where the assent of His Majesty may be necessary, it shall be given in His Majesty's name".

In Khan Iftakhar Hussain v. The Crown [7] the validity of the same Act was questioned before the Federal Court on the ground that it should have been passed by the Federal Legislature and should, therefore, have received the assent of the Governor-General. The court accepted in full the argument of the Federation that the Act was constitutional law and therefore fell within the purview of the words 'for the purpose of making provision as to the Constitution of the Dominion' (Section 8(1) of the Independence Act) and the appeal by the Khan of Mamdot was accordingly dismissed.

In a third case, Akbar Khan v. The Crown [8] it was contended by the appellants that the Rawalpindi Conspiracy (Special Trials) Act,

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(6) P.L.D. (1950) Sind. 49.
(7) P.L.D. (1951) F.C. 51.
(8) P.L.D. (1954) F.C. 87.

1951, was a law within the federal sphere of legislation and that as it had not received the assent of the Governor-General it was invalid. The Federal Court again held that it was constitutional law. The implication in the two last mentioned cases was clearly that for constitutional law assent of the Governor-General was not necessary.(9)

The decision of the Federal Court in Tamizuddin's case implied that all Acts passed by the Constituent Assembly otherwise than in exercise of powers as the Federal Legislature were invalid because none of them had received the assent of the Governor-General, including an Act of 1950 by which the Assembly had purported to amend its own composition by adding six members to it, and because its composition thus amended was invalid, its Acts as Federal Legislature since 1950 should also be regarded as invalid. In this situation the Governor-General issued a proclamation of emergency under Section 102 of the Government of India Act, 1935, and an Emergency Powers Ordinance under Section 42 of the same Act and 'all other powers in that behalf', purporting to validate thirtyfive out of the fortyfour Acts deemed to have been invalidated by the decision in Tamizuddin's case. The validity of the Ordinance was challenged in the Lahore High Court in Akbar Khan v. The Crown,(10) but before the argument in the case was concluded another case Usif Patel v. The Crown(11) came up before the Federal Court in which it was held that the Governor-General had no power to give retrospective validation to constitutional

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(9) Federation of Pakistan v. Tamizuddin Khan, P.L.R. (1956) W.P.306.
(10) referred to in Jennings, Constitutional Problems in Pakistan, p.5.
(11) P.L.D. 1955 F.C. 387.

legislation and that the Ordinance was therefore invalid. The court pointed out that under Section 42 the Governor-General could not validate laws on a subject matter over which neither he nor the Federal Legislature was empowered to legislate.

The Governor-General thereupon assented to the thirtyfive Acts scheduled to the Emergency Powers Ordinance, 1955, appreciating fully well that this assent would not have retroactive effect. He issued a proclamation summoning a Constitutional Convention to exercise constitution-making powers. He issued another proclamation assuming to himself such powers as were necessary to validate and enforce the laws that were needed to avoid a breakdown in the constitutional and administrative machinery of the country and to preserve the State and maintain the Government of the country in its existing condition and in the exercise of those powers retrospectively validated and declared enforceable the laws mentioned in the Schedule to the Emergency Powers Ordinance, 1955. These powers were exercised subject to the opinion of the Federal Court in its advisory jurisdiction on a reference to it made under Section 213 of the Constitution Act of 1935. Two questions were referred to the court.

(i) What are the powers and responsibilities of the Governor-General before the new Constituent Convention passes the necessary legislation?

(ii) Is there any provision in the Constitution or any rule of law by which the Governor-General can validate legislation and acts done under it, where their invalidation endangers the state, until the question of their validation is determined by the new Constituent Convention?

Subsequently as suggested by the Federal Court in an interim order two further questions were referred:

(i) Whether the Constituent Assembly was rightly dissolved?

(ii) Whether the Constituent Convention will be competent to exercise the powers of the Constituent Assembly?

On May 10, 1955, the Federal Court gave its opinion that the dissolution of the Constituent Assembly was valid and that if a new Constituent Assembly (not a Constituent Convention) could be summoned with the same composition and powers as the old one, the invalid Acts might be revalidated as an interim measure until the approval of the new Constituent Assembly could be obtained for them. The court observed in regard to the dissolved Assembly that although it had functioned for more than seven years it had failed to frame a constitution, that it had in course of time ceased to be a representative body, that it had for all practical purposes assumed the form of a perpetual legislature and that it had throughout asserted contrary to law that the constitutional laws made by it were valid without the assent of the Governor-General.

The Independence Act envisaged a representative Constituent Assembly for the Dominion. Periodic accountability of representatives to electors is a basic principle of democratic constitutions. If the Constituent Assembly lost its representative character by lapse of time, it could no longer function as the Constituent Assembly set up under the Independence Act. When it assumed the position that the assent of the Governor-General was unnecessary for the constitutional laws passed by it, it was functioning outside the Constitution. Its

composition itself was tainted with illegality when it added six members to its personnel by an Act (12) passed without the required assent. In such a situation as this where the Constituent Assembly had failed to perform its function, the Governor-General might exercise the prerogative of dissolution.

In regard to the validation of laws, opinions differed. Muhammad Munir, C.J., who delivered the opinion of the majority of the court observed that the power claimed under the validating proclamation was for a temporary period and with a view to preventing the State from dissolution and the constitutional and administrative machinery from breaking down. This distinguished the issue from that in Usif Patel's case in which the Governor-General had claimed a permanent power of validation. The situation presented by the reference was governed by rules which were part of the common law of all civilised states and which every written constitution of a civilised people took for granted. This branch of the law was, the law of civil or state necessity. In the proceedings against George Stratton and others,(13) Lord Mansfield observed that an otherwise illegal act would be justified if there was imminent danger to the government and individuals, if the mischief were extreme and such as would not admit a possibility of waiting for a legal remedy provided that the act did not go further than what the necessity obliged. There were times of tumult when for the sake of legality itself the rules of law might

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(12) The Increase and Re-distribution of Seats Act, 1949.

(13) 21 Howell's State Trials, 1046.

have to be broken, placing reliance upon an Act of Indemnity. The court therefore held that as an interim measure the Governor-General might retrospectively validate the invalid measures under the common law of civil or state necessity.

Two members of the court (Cornelius and Sharif, J.J.) dissented on the question of validation of the legislation. Both of them held the view that on constitutional matters the Governor-General was not competent to legislate and could not therefore by his own act make valid laws which he himself could not enact. The power in respect of political initiative vested exclusively in the Constituent Assembly and the Governor-General could not claim any share in the positive exercise of that power. The Governor-General, according to Cornelius, J., could stay proceedings which challenged the invalid measures in all courts except the Federal Court, pending their validation by the new Constituent Assembly. Sharif, J., observed in relation to the doctrine of state necessity that maxims like salus populi suprema lex and 'necessity makes lawful what is otherwise unlawful' had sometimes been invoked in times of war or other national disaster, but they had never been extended to embrace changes in constitutional law under the stress of circumstances created by some particular interpretation of law. It might lead to dangerous consequences if the constitutional structure could be tampered with in any real or supposed emergency of which the head of the state alone must be the judge. "It has a sanctity of its own which is not to be violated".(14)

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(14) Special Reference No. 1 of 1955. P.L.R. (1956) W.P. 598.

In October 1955 the new Constituent Assembly passed the Validation of Laws Act, 1955, validating thirtynine laws deemed to have been held invalid by the decision of the Federal Court in Tamizuddin's case. It then seriously devoted itself to the task of drafting the new Constitution which was introduced into the Assembly on January 9, 1956, and passed on February 29. The new Constitution came into force on March 23, 1956 ushering in the Islamic Republic of Pakistan.

iv. Governor's Rule in the Provinces

As we have seen, powers existed under Section 93 of the Government of India Act, 1935, for a provincial Governor, on behalf of the Federal Government, to take over the administration of a province if it was found that the normal constitutional machinery had broken down. Section 93 was repealed by the Pakistan Provisional Constitution Order, 1947. Mr. Jinnah, who wielded unquestioned authority, acting under the extraordinary powers granted to the Governor-General by Section 9 of the Independence Act which empowered him, inter alia, to make such provisions as appeared to him to be necessary or expedient for making omissions from, and additions to, and adaptations and modifications of, the Government of India Act, 1935, inserted by order Section 92A into the Act.

The Section reads as follows:

"92A(1). If at any time the Governor-General is satisfied that a grave emergency exists whereby the peace and security of Pakistan or any part thereof is threatened, or that a situation has arisen in which the Government of a Province cannot be carried on in accordance with the provisions of this Act, he may by proclamation direct the Governor of a Province to assume on behalf of the Governor-General all or any of the powers vested in or exercisable by any provincial body or authority; any such proclamation may contain such incidental and consequential provisions as may appear to the Governor-General to be necessary or desirable for giving effect to the objects of the proclamation including provisions for suspending in whole or in part the operation of any provisions of this Act relating to any

provincial body or authority, provided that nothing in this Subsection shall authorise the Governor-General to direct the suspension of any of the powers vested in or exercisable by, a High Court, or to suspend either in whole or in part the operation of any provisions of this Act relating to High Courts.

(2) Any such proclamation may be revoked or varied by a subsequent proclamation".

The original Section 93 had been unsparingly used during the war in consequence of the resignation, on the orders of the Congress High Command, of the Congress ministers in the Provinces where Congress had secured overwhelming majorities in the legislatures. Rule under Section 93 was not therefore kindly looked upon by politically conscious persons in India who regarded the Section as devised to deal with cases where a provincial ministry was unwilling to accept the implications of British rule. Section 92A, on the other hand, could be represented as a normal part of the working of federal political relations between the Centre and the Provinces. It is noteworthy that whereas Section 93 vested the power of suspension of the provincial constitution in the Governor, under Section 92A it was exercised by the Governor-General.

The Section was first brought into operation in Panjab in 1949. The first Chief Minister of the Province was the Khan of Mamdot who was dismissed in 1949 and subjected to a judicial inquiry under the Public and Representative Offices (Disqualification) Act, 1949,(1)

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(1) See In the matter of Khan Iftikhan Hussain Khan of Mamdot, P.L.D. 1950 Lahore 12.

which empowered the Governor-General and the Provincial Governors to disqualify from public office persons found guilty of maladministration after judicial inquiry. With the existing provincial Assembly it seemed impossible to find a stable ministry. The Governor-General therefore vested the executive power of the Province in the Governor who continued to rule as delegate of the Centre until the elections were held in 1951. After the elections Daultana became Chief Minister, but was compelled to resign after the disturbances of 1953. He was succeeded by Firoz Khan Noon who had been Governor of East Bengal. Though he was not popular with the Assembly, he retained his position as long as he remained persona grata with the Centrsl Government, which needed his support for the policy of integrating the provinces of West Pakistan into a single unit. Eventually he lost favour with the Central Government and with the Provincial Governor over the election of members to the second Constituent Assembly. He was in his turn dismissed and his place was taken up by H. K. Dasti.

Governor's rule under Section 92A was imposed on Sind from December 1951 to May 1953. Mr. Khuhro, the Chief Minister was accused of maladministration and corruption and was dismissed in 1948. As a result of judicial inquiry under the Public and Representative Offices (Disqualification) Act, 1949, he was disqualified from holding public office for three years. His successor Pir Ilahi Bakhsh was deposed and disqualified as a consequence of the findings of an election tribunal which had conducted an investigation into his part in the election of 1946. Two more Chief Ministers assumed office before Khuhro succeeded in having his disqualification set aside on the

ground that the tribunal which had enquired into his case and recommended his disqualification was not constituted as required by the Public and Representative Offices (Disqualification) Act, (2) and became Chief Minister a second time. He was again removed by the Governor; an investigation was again conducted and he was again disqualified from public office along with Fazlullah who had, under pressure, yielded his Chief Ministership to him. As there was no likelihood of a stable government being formed, the Governor-General under Section 92A directed the Governor to exercise discretionary powers and the Provincial Assembly was dissolved preparatory to new elections.

The length of the period of Governor's rule in the Panjab and also in Sind was ascribed to the need to prepare for the first experiment in elections based on adult franchise, but it also "provided a period of political manoevre in which to influence the composition of the future legislature"(3).

In March 1954 the provincial constitution was suspended under Section 92A in East Bengal for a period of two weeks. This, it would appear, was not a political manoevre. The term of the old legislature had expired and it seemed desirable to have Governor's rule during the period of elections and the installation of a new government. However, it proved necessary again to have recourse to Section 92A and from May 1954 to June 1955 Governor's rule obtained in East Bengal. A coalition composed of two major and

(2) Khuhro v. Federation of Pakistan, P.L.D. 1950 Sind 49.
(3) Callard, K. Pakistan, page 160.

several minor parties called the United Front, held together by a common desire for autonomy for East Bengal and a shared determination to defeat the Muslim League, emerged as the victor in the elections. The Governor had no choice but to call on Fazlul Huq, the leader of the United Front, to form a Cabinet. According to one observer,(4) Huq "immediately began to demand freedom from domination and exploitation by Karachi.. He first called for provincial autonomy, with responsibility for only defence, currency, and foreign affairs to be vested in the Center; but later he spoke of undoing partition altogether and of a return to union with India. It was reported that he also went to the extreme of establishing a provincial foreign affairs ministry."(5) When there was a serious breakdown of law and order in the paper mills in the Chittagong Hill Tracts, the Central Government took advantage of the situation and Fazlul Huq was dismissed from office on the ground that his government was no longer able to maintain law and order. Not only was the Cabinet dismissed,but the Assembly was not allowed to meet. The Huq ministry was replaced by Governor's rule under General Iskander Mirza, who had been until that time the Secretary of the Ministry of Defence. 'Martial law was declared and troop reinforcements poured into East Pakistan".(6)

The United Front had defeated the Muslim League at the provincial elections mainly by the appeal to the desire of East Bengal to achieve greater freedom fron control from Karachi. Though some of the

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(4) S. Maron, The Problem of East Pakistan, Pacific Affairs, Volume XXXVIII, No. 2, page 134.
(5) ibid.
(6) id, 136.

belligerant statements attributed to Huq were foolish and disloyal it is submitted that by suspending the provincial constitution and introducing discretionary rule so soon after the elections, the opportunity was lost of testing an essential of democratic rule in a federation, the continuance of government, notwithstanding that different political parties were in control of the Central and Provincial Governments. "A democracy is not necessarily a form of government that is administered efficiently by men who know what is best for the citizens".(7)

The Prime Minister made a statement on May 30, 1954, that the Governor's rule under Section 92A would "remain in force for the minimum time necessary to restore law and order and public confidence so that Parliamentary government can function successfully".(8) But six months later, the then Minister of the Interior said: "One thing is certain - the Centre will never allow this province to again incur the danger of disintegration. The well-being and happiness of the masses, as always, will be the paramount consideration. There are many schemes to be completed and I am convinced that the 92A Administration can still do more solid work for the people and further tone up the basic administration."(9)

By the middle of March 1955 Prime Minister Muhammad Ali went on an official mission to East Bengal with the authorisation of the Cabinet, it was reported, to select any eligible candidate for the

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(7) id, 137.
(8) Broadcast, May 30, 1954.
(9) Dawn, November 18, 1954.

Chief Ministership of the province except Fazlul Huq, who, according to the Prime Minister, was a "self confessed traitor to Pakistan"(10). Muhammad Ali had long conferences with the principal political leaders of the province and came to the unhappy conclusion that only Fazlul Huq would be able to gather sufficient support to establish a stable government. As there was a split over the Premier's proposal to re-instate Huq, with General Iskander Mirza, who by this time had been transferred from Governorship of East Bengal to Ministry of the Interior at the Centre, strongly opposing the suggestion, the reestablishment of Parliamentary government in the Province was postponed.

In June 1955, however, Abu Hussain Sarkar, a United Front member of the Central Cabinet, with Cabinet approval, moved to East Bengal to head a new ministry.

It would appear that it was not always on the report of the Governor that action under Section 92A was taken.

During the proceedings under the Public and Representative Offices (Disqualification) Act, instituted against Mr. Hameedul Huq Chowdhury, Minister of Finance and Commerce in East Pakistan, the Chief Secretary revealed in September 1950 that under instructions from the Central Government he had effectively stopped the export of steel drums to India which had been ordered by Mr. Chowdhury.(11) Since then it was often asserted by members of the East Bengal

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(10) Broadcast on June 1, 1954.
(11) Dawn, Karachi, September 20, 1950.

Legislative Assembly[12] as also by members of the Constituent Assembly[13] that the Chief Secretary used to send fortnightly reports on the activities of provincial Ministers to the Central Government.

Though it could be said that when Liaquat Ali Khan was Prime Minister, the Central Government was controlled by the Muslim League politicians, under Ghulam Muhammad as Governor-General the power of the Muslim League politicians declined steadily mainly owing to the indecisiveness and inept policies of Khwaja Nazimuddin, the Prime Minister, with the result that it looked as if the civil servants led by the Governor-General and supported by the army officers had extended their influence over the Central Government itself.[14]

The Muslim League Governmentt of Khwaja Nazimuddin at the Centre was declared by the Munir Report to be jointly responsible along with the West Panjab Muslim League Government of Daultana for the religious riots in West Panjab. If there had been an alternative political party, it would appear, the politicians would have retained power. "But the Muslim League, by taking credit for the establishment of Pakistan, took care that no alternative party arose to challenge their position".[15] The Governor-General's summary dismissal of the Prime Minister in April 1953 clearly indicated who exercised effective political power.

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(12) id, March 2, 1951.
(13) Constituent Assembly of Pakistan Debates, Volume I. No. 68 February 9, 1956, page 2778.
(14) K. B. Sayeed, The Political Role of Pakistan's Civil Service, Pacific Affairs, Volume XXX1, No.2, page 133.
(15) ibid.

When Ghulam Muhammad in October 1954 dissolved the Constituent Assembly, a year and a half after the summary dismissal of Nazimuddin from Premiership, and chose his "cabinet of talents", it could be said that the Viceroy's Executive Council was reincarnated and real power came to be exercised by the permanent civil service of the country.

Expounding the political philosophy of the new government, Iskander Mirza, who was then the Minister of the Interior, of States and Frontier Regions, declared:

"Some undeveloped countries have to learn democracy, and until they do so they have to be controlled. With so many illiterate people, politicians could make a mess of things. There was nothing undemocratic in declaring the state of emergency, because 95 per cent of the people welcomed it.

The people wanted an honest government and they would get it. They would also get law and order, and prompt justice. There was no point in having the fine British administrative system with good traditions that Pakistan had inherited unless it was run in the British way."(16)

When once Ghulam Muhammad decided to integrate the three provinces and a number of other political units of West Pakistan into a united West Pakistan Province, he ensured, by a repeated recourse to Section 92A, the elimination of all those Chief Ministers who opposed integration.(17) The Chief Ministers of Sind, Bahawalpur, the North West Frontier Province and West Panjab fell from office in

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(16) The Times (London) October 30, 1954.
(17) K. B. Sayeed, op. cit. page 134.

quick succession.(18)

Ghulam Muhammad who had been in indifferent health ever since he assumed office in 1951 had by the middle of 1955 exhausted his energies; In July 1955 Major General Iskander Mirza whose views on "controlled" democracy have been quoted above, assumed office in an officiating capacity. In October he became Governor-General and on March 23, 1956, with the inauguration of the new Constitution he became the President of the Islamic Republic.

The Times (London) remarked about the turn of events in Pakistan: "It draws attention to the recurrent conflict in Pakistan between those who want the ablest leaders to exercise supreme power, irrespective of popular support and those who think it more important that the Chief Minister should be supported as widely as possible by the dominant party".(19) The comments made by the Observer were more pointed and as it turned out, even prophetic: It said, "The political complexion of Pakistan in the future will be largely determined by the extent to which these British-trained senior administrators and army officers consider that they are the only ones qualified to control the evolution of the country's institutions".(20) Dawn (Karachi) commented caustically: "If you play about with eugenics, freak offsprings often result; similarly if Power tries artificial insemination with democracy, democratic institutions can become freaks. Such is what our disgusted people now behold."(21)

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(18) ibid.
(19) The Times, April 26, 1956.
(20) The Observer (London) September 4, 1955.
(21) Dawn (Editorial, "This Madhouse") May 24, 1956.

The implications of democracy in Pakistan were well brought out in the Constituent Assembly in September 1955 by Mr. Suhrawardy (22) who described the position of the Prime Minister as follows: "So, Sir, to be the Prime Minister of Pakistan which has been held by certain honourable gentlemen who have been turned out, taken by the ears and thrown out as it suited the ruling coterie is not a matter of very great honour". (23)

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(22) Later Prime Minister of Pakistan (September 1956 to October 1957)

(23) Constituent Assembly of Pakistan Debates, September 10, 1955, Volume I No. 21, page 652.

CHAPTER VIII

EMERGENCY POWERS IN THE REPUBLIC OF PAKISTAN

i. Emergency Provisions in the Constitution

The Constitution of Pakistan, 1956, like the Constitution of India, formed a logical continuation of the scheme of government envisaged in the Government of India Act, 1935. Many of the terms and even whole clauses of the Act were transferred to the new constitutional instrument. Whereas the Constitution Act of 1935 was a grant of powers by the United Kingdom Parliament, the Preamble to the Pakistan Constitution of 1956 predicated that it was a grant of powers by the people to whom the Almighty had entrusted authority to be exercised within prescribed limits. Furthermore the Islamic Provisions (in Part XII) inter alia, made it obligatory that no law in the statute book should be repugnant to the injunctions of Islam as laid down in the Holy Quran and Sunnah,(1) otherwise the Constitution was an adaptation, modelled to a large extent on the Constitution of India, of the Constitution Act of 1935, deemed suitable to conditions in Pakistan. Not a few of the provisions were verbatim or near reproductions of the Articles of the Indian Constitution. A clear instance of such reproduction, with occasional and slight alterations, was the emergency provisions of the Constitution. As the provisions in the Indian Constitution have been already dealt with, it is only necessary to point out the

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(1) Article 198.

differences between these documents with regard to these provisions.

Like the Indian Constitution, the Pakistan Constitution provided for three types of emergencies. But the first type of emergency which may be referred to as a general emergency could be proclaimed in Pakistan in slightly different circumstances. While the Indian Constitution contemplates guarding against a threat to the security of India or any part thereof by war or external aggression or internal disturbance, the Pakistan Constitution provided against ~~for~~ threat to the security or economic life of Pakistan or any part thereof by war or external aggression or internal disturbance beyond the power of a Provincial Government to control.(2) Thus in Pakistan, a threat to economic life would justify a proclamation of grave emergency. It is arguable, however, that 'security' in Article 352 of the Indian Constitution connotes and includes economic security also. If that interpretation is accepted, the distinction is without a difference. A similar argument may be urged as to the other distinction made in regard to internal disturbance. If the internal disturbance is one that can be put down by the unit concerned, it need not be considered a grave emergency in either country. The difference in the phraseology of the Pakistan provision may therefore be regarded as arising ex abundanti cautela.

While in India a proclamation of grave emergency will entitle the Union executive to give directions to any state as to the manner in which the executive power of the latter is to be exercised, in Pakistan, in like circumstances the President could also by Order

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(2) Article 191 (1)

assume to himself or direct the Governor of a Province to assume on behalf of the President the functions of the Government of the Province and the powers exercisable by any authority in the Province and make incidental and consequential provisions for giving effect to the object of the Proclamation, including provisions for suspending the operation of any provisions of the Constitution relating to any authority in the Province, except the High Court.(3)

It would appear that Parliamentary control of a proclamation of emergency was sought to be more effective under the Pakistan Constitution. It was provided that a proclamation was to be laid before the National Assembly "as soon as conditions make it practicable for the President to summon that Assembly" and if approved by the Assembly it would remain in force until revoked and if disapproved, would cease to operate from the date of disapproval.(4) Whether conditions existed which made it practicable to summon the Assembly would not be a justiciable issue, but a matter to be decided by the President; so this safeguard might not prove effective. Further, while in the Indian Constitution it is provided that the proclamation will cease to operate at the expiry of two months unless before the expiry of that period it has been approved by resolution of both Houses, it would be possible in Pakistan for a proclamation to remain in force for nearly six months before Parliament could have the opportunity of disapproving it, for the Constitution provided that a period of six months was not to intervene between the last sitting of

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(3) Article 191 (2) (c)
(4) Article 191 (6)

the Assembly in one session and its first sitting in the next session.(5) Under the Indian Constitution, even when the House of the People has been dissolved, the Constitution provides some measure of Parliamentary control of this power, for the proclamation cannot remain in force longer than two months unless approved by the Council of States. But in similar circumstances in Pakistan, no Parliamentary control could be exercised when the unicameral legislature stood dissolved. Though the President could be impeached not only for violating the Constitution, but also for "gross misconduct", a non-existent Assembly would not be able to prefer a charge against him. Thus the failure to provide for a time-limit to the operation of the proclamation in the absence of Parliamentary approval would tend to tilt the balance in favour of the dictatorship of the executive.

Differing from the position in India, under the Pakistan Constitution, there was no automatic suspension of the fundamental rights on the proclamation of an emergency. The President could, however, declare, by order, that the right to move any court for the enforcement of such of the fundamental rights as might be specified in the Order and all proceedings pending in any court for the enforcement of the rights so specified, would remain suspended for the period of the emergency.(6) This is similar to the provision in Article 359 of the Indian Constitution.

Article 193 which made provision for the failure of constitutional machinery in a Province had, adopted, almost verbatim, Article 356 of the Indian Constitution, "though in a somewhat milder form"(7).

(5) Article 51.
(6) Article 192(1)
(7) Newman, K.J., Essays on the Constitution of Pakistan, page 193.

Under the Pakistan Constitution, if the National Assembly extended the operation of the proclamation, it could do so only for another four months after the expiry of the first two months during which the proclamation would be effective if not earlier disapproved by the Assembly. Thus whereas in India such a proclamation can remain in force for a maximum period of three years, in Pakistan it could remain so only for six months altogether. "Six months would seem a somewhat short period" (8) to rectify the more obvious effects of misgovernment, to arrange fresh elections if that was necessary and to restore parliamentary government as soon as possible.

Another difference from the Indian provision was that in Pakistan action under the Article would be taken if the President was satisfied, "on receipt of a report of a Governor of a Province", that the provincial government could not be carried on in accordance with the Constitution, whereas in India a report from the Governor is not essential and suspension of the State Constitution may be made as a result of the failure of the State government to comply with a direction given by the Union. Hence a wider power for the Centre is contemplated in the Indian Constitution.

Article 193 was brought into operation for the first time in May 1956 after the Speaker of the East Pakistan Assembly had ruled on procedural grounds that the budget might not be presented. An emergency under Article 193 was therefore proclaimed and the Central Government provided an interim budget for two months. After a week

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(8) A. Gledhill, Pakistan, page 96.

the Cabinet was restored.(9) It was employed again from August 31 to September 6, 1956, after the Sarkar ministry had resigned.(10)

In West Pakistan it was employed for political reasons in March 1957. A nominated Chief Minister continued in power "by intrigue and manipulation" till the budget session of 1957 when he was compelled to resign.(11) But the Opposition party was not allowed to form a Cabinet. The emergency provision under Article 193 was brought into operation and the democratic process was suspended. "When it was restored, the same party (the Republicans) were put into power through back doors".(12)

Article 193 was employed again in East Pakistan when, on March 31, 1958, the Awami League Cabinet advised the Governor to prorogue the Assembly because it found that it was losing support and was likely to be defeated. The Governor declined to accept this advice and dismissed the ministry. The Central Government, which was anxious to keep the Awami League in power to ensure its support at the Centre, thereupon dismissed the Governor and appointed a new Governor, who, within a few minutes after his assumption of office, dismissed the Cabinet which had been appointed by his predecessor in office.(13)

When the Assembly met in June, the Awami League ministry was defeated in the House. Mr. Sarkar, the leader of the Opposition, who had been dismissed earlier, was invited to form a Cabinet, but

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(9) Pakistan Observer, May 23, 27 and June 2, 1956.
(10) Dawn, September 1 and 7, 1956.
(11) G. W. Choudhury, Failure of Parliamentary Democracy in Pakistan, in Parliamentary Affairs, Volume XII, No.1. page 65.
(12) ibid.
(13) ibid.

his Cabinet did not last more than three days. In less than a week, two Cabinets were overthrown by the Assembly. "This was mainly due to the activities and policies of a leftist party, the National Awami Party, whose aim was to create chaos and confusion"(14). In these circumstances it was thought desirable to proclaim President's rule under the emergency provisions of the Constitution, which was ended after a few weeks. When Parliamentary government was restored in August, political bickerings between the contending parties had developed to such an extent that open fighting ensued in the Assembly Hall resulting in the beating of the Speaker, in the death of the Deputy Speaker and in severe injuries to some other members.

In addition to the provisions relating to a general emergency, and to the breakdown of the constitutional machinery in a province, there was another provision(15) in the Constitution intended to safeguard the State against threats to its financial stability or credit. This provision also differed from the corresponding Indian provision in two points.

(1) Whereas in India the President can make a proclamation of financial emergency if he is satisfied that the financial stability or credit of India or any part thereof is threatened, in Pakistan, a similar action on the part of the President necessitated, in addition to his satisfaction, on ministerial advice, prior "consultation with the Governors of the Provinces or with the Governor of the Province concerned, as the case

(14) ibid, page 66.
(15) Article 194.

may be."(16)

(ii) In India, a proclamation of financial emergency, if approved by Parliament, would continue in operation until revoked. But in Pakistan the maximum duration for the operation of a similar proclamation was limited to six months, as there the proclamation required the same parliamentary approval and operated for the same maximum period as a proclamation suspending the provincial constitution. "There again one may doubt whether the maximum period (was) adequate"(17).

Article 196 of the Pakistan Constitution which provided for indemnity enactments by the Parliament in relation to acts done in connexion with martial law administration was in all essentials a reproduction of the Indian provision under Article 34. In the Pakistan Constitution, it would seem, this provision was placed in a more logical position under 'Emergency Provisions' than in the Indian instrument where this Article providing for indemnity for temporary negation of fundamental rights has been placed in the part dealing with these rights.

As indemnity was provided for, the Constitution must be deemed to have recognised the administration of martial law as part of the law of the Republic of Pakistan.

The validity of any proclamation issued or order made under the emergency provisions could not be questioned in any court.(18)

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(16) Article 194 (1)
(17) A. Gledhill, Pakistan, page 97.
(18) Article 195(2)

In this connexion, the observations made by Kayani, J., in Akram Shah v. The Crown,(19) are of interest though made before the promulgation of the Constitution: "That the emergency must be real and not a supposed emergency is an assumption without which we cannot proceed and which is based on common intelligence. The observations in Usif Patel's case(20) that every kind of power should not be invoked in the name of emergency and that 'a more incongruous position in a democratic constitution is difficult to conceive' still hold the field. If the law of civil necessity is a part of the law of every civilised country, the democratic character of such law should be unquestionable and nothing is democratic which tends to absolutism. And you may take it that what does not permit of judicial scrutiny at any stage will tend to absolutism".(21)

"In all the Safety and Security Acts", he further observed, "there is a provision that where a certain authority is satisfied that with a view to preventing a person from acting in a manner prejudicial to public safety or order, it is necessary to do so, he may arrest and detain that person. It is now settled law that the satisfaction should be that of the arresting authority, not of the court, but it is equally settled that the court can examine attendant circumstances to see that the arresting authority is in good faith satisfied. Whether the judgement of that authority is defective is a different matter, but if the judgement itself is based on bad faith, the court

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(19) P.L.D.(1955) Lahore 464.
(20) P.L.D.(1955) F.C. 387.
(21) Akram Shah v. The Crown, P.L.D. (1955) 464, 478.

will not be satisfied. Now let me make it clear that when these Safety Acts were first enacted, it was not the intention of the draftsmen or the Government, so far as intention can be gathered from words, that the court should be allowed to fight with the satisfaction of the arresting authority. The courts, nevertheless, held that if 'satisfaction' was prostituted by bad faith, a fraud will have been committed on the statute, and to defraud a statute is to do a very despicable thing. We stifle fraud wherever we meet it, and we stifle it twice when it is committed on the law of the land itself. That is because such a fraud-in the case of the "satisfaction" of the arresting authority, for instance - betrays the infinite confidence which the statute, as an expression of the legislative fiat of the country, reposes in the arresting authority. In the case of a head of a State who finds it necessary to act in an emergency without having time to consult the accredited representatives of the people, the precaution is ever so much more necessary. The least, therefore, that could be said is that the good faith of 'civil necessity' is a justiciable issue".(22)

His Lordship illustrated the position taken by him by an example. Said His Lordship, "The line between necessity and its good faith is, in my opinion, very thin. To take an intelligible and extreme example, if the head of a democratic State declared an emergency and decided to continue in office beyond his appointed term, evidence led to prove want of necessity would really be evidence to prove bad faith

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(22) ibid, 479.

I am inclined to hold, however, that subject to certain mental reservations, necessity is a justiciable issue". (23)

As a proclamation of emergency is assumed to be induced by necessity, these observations of the learned Judge may be considered pertinent to the interpretation of the expression 'if the President is satisfied' in ~~the~~ Articles 191, 193 and 194 of the Constitution.

It would therefore appear that the validity of a proclamation of emergency could be challenged only on the ground of the mala fide exercise of the power to make such proclamation; "but the proof of circumstances on which the mala fides of Government could be exhibited is necessarily a difficult matter". (24)

The President (25) and the Provincial Governor (26) in Pakistan had powers similar to those of their counterparts in India to promulgate ordinances when the legislature was not in session and immediate action was considered necessary. The provision as to the control by legislature of such ordinances was the same as under the Indian Constitution. The Pakistan Constitution specifically stated that at any time when the National Assembly stood dissolved the President might, if he was satisfied that circumstances existed which rendered such action necessary, make and promulgate an ordinance authorising expenditure from the Federal Consolidated Fund, whether the expenditure was charged upon that fund by the Constitution or not, pending compliance with the requirements of the Constitution in regard

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(23) ibid, 482.
(24) A. K. Brohi, Fundamental Law of Pakistan, page 282.
(25) Article 69.
(26) Article 102.

to laying the annual financial statement before the National Assembly and the procedure relating to such statement and to Appropriation Bill.(27) After the date of the reconstitution of the National Assembly, any ordinance promulgated under this provision was to be laid before the Assembly as soon as might be. And within six weeks of the reconstitution the provisions relating to annual financial statement and Appropriation Bill were to be complied with. A similar power to promulgate an ordinance authorising expenditure from the Provincial Consolidated Fund was vested in the Provincial Governor. Expenditure charged on the Provincial Consolidated Fund included the emoluments and pensions of the Governor, the judges of the High Court, the members of the Provincial Public Service Commission, the Speaker and Deputy Speaker of the Provincial Assembly as well as the administrative expenses of the High Court, the Public Service Commission, debt charges, and money necessary to satisfy decrees and awards against the Province.(28) The Provincial Governor's powers of legislation by ordinance was coextensive with the powers of the Provincial Legislature with the result that the powers were subject to the restriction that he could not, without the President's previous instructions, promulgate an ordinance containing provisions which would be invalid, if contained in an Act of the Provincial Legislature which had not received the President's assent.(29) For instance, an ordinance restricting movement of goods into and out of

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(27) Article 69(3)
(28) Article 97.
(29) Article 102.

a province or an ordinance on a subject in the concurrent list with provisions repugnant to a Federal Act on the same subject could not be promulgated without previous instructions from the President.

The ordaining power of the Head of the State in Pakistan has an unhappy history. The power vested in the Governor-General under Section 43 of the Government of India Act, 1935, to legislate by ordinance even when the Legislature was in session was continued for quite a long time in Pakistan. Further an ordinance occasionally sought to confer on the Governor-General unlimited constituent power. The Emergency Powers Ordinance, 1955 (IX of 1955) is an instance in point. It was promulgated when the Constituent Assembly stood dissolved; hence there was no 'dominion legislature'; nor was there any provision made to bring one into existence. The Legislature of East Bengal was not permitted to meet; and by amalgamating the provinces of West Pakistan under the powers granted by the Ordinance, the Governor-General was to terminate the existence of the provincial legislatures in West Pakistan.(30) Thus having contemplated what may be called a state of constitutional and legal chaos because of the non-existence of the legislative bodies and the invalidation of forty-four Acts as a result of the decision of the Federal Court in Tamizuddin Khan's case(31), the Emergency Powers Ordinance promulgated by the Governor-General conferred upon him power to make

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(30) The Governor-General may by order make such provision as appears to him to be necessary or expedient (a) for constituting the Province of West Pakistan (Section 6 amending Section 46 of the Government of India Act, 1935).

(31) Federation of Pakistan v. Tamizuddin Khan, P.L.R. (1956) W.P. 306.

provision for a future Constitution. Section 10 of the Ordinance read as follows:

"10. Provision for future Constitution:- The Governor-General shall by order make such provision as appears to him to be necessary or expedient for the purpose of making provision as to the Constitution of Pakistan and for purposes connected therewith, and any such order may contain such incidental and consequential provisions as the Governor-General may deem necessary or expedient"

It is difficult to see how executive authority could be carried further.

An instance of the exercise of the ordaining power by the President under the Constitution may also be given. The Security of Pakistan Act, 1952, was passed on May 5, 1952. It was to remain in force for three years. It was extended by the Security of Pakistan (Amendment) Ordinance, 1955 (XV of 1955) and thereafter by the Security of Pakistan (Amendment) Act, 1956, which received the assent of the President on April 16, 1956. This Act amended the Security of Pakistan Act, 1952, so as to extend the life of the latter Act up to April 30, 1957. Before the expiry of the Act on April 30, 1957, the Security of Pakistan (Amendment) Ordinance, 1957 (III of 1957) was passed by the President, whereby the Security of Pakistan Act, 1952, was amended so as to extend the life of the Act up to April 30, 1958. The National Assembly met on August 22, 1957, and was prorogued on August 31, 1957. The Ordinance was not laid before the National Assembly. However, another Ordinance, the Security of Pakistan

(Second Amendment) Ordinance, 1957 (XI of 1957), was promulgated by the President before the expiry of six weeks from the meeting of the Assembly. According to this Ordinance, the Security of Pakistan Act was extended up to April 30, 1958. The National Assembly met on January 8, 1958, and passed the Security of Pakistan (Amendment) Act, 1958, which extended the life of the Security Act up to June 30, 1958.

In Momina Khatoon v. The Government of Pakistan, (32) it was contended on behalf of the detenu S. M. Hasan, who had been detained under an order passed after the Act of 1958 had received the assent of the President, that the National Assembly having met after the President had promulgated the first amending Ordinance of 1957, the President had no power to promulgate the second amending Ordinance. When the President had passed an Ordinance and the National Assembly met thereafter and the Ordinance was not laid before the National Assembly, the Ordinance ceased to operate after the expiry of six weeks from the meeting of the National Assembly. The first Ordinance, it was contended, ceased to be operative after the midnight of October 2, 1957. It was further contended that the Act having expired on October 2, 1957, it could not be amended as there was no existing Act to amend. It was argued that the Act of 1958 could not therefore be said to be in operation when the order of detention was made and hence any action taken under it would be illegal.

Inamullah, J., in his judgement observed that if it were held that the Act of 1958 was valid and in operation, it would not be

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(32) P.L.D. (1958) Karachi 530.

necessary to consider the question whether the President could legally promulgate the second Ordinance. As the legislature had full power to re-enact and revive an Act which had expired, the question turned on whether the Security of Pakistan (Amendment) Act, 1958, purported to re-enact the Security of Pakistan Act, 1952. His Lordship said that on a perusal of the Act of 1958, he had no doubt that the Legislature intended to re-enact the Security of Pakistan Act, 1952. Quoting Section 2 of the Act of 1958 which amended Section 1 of the Act of 1952 in the following terms: "For Subsection (3) of Section 1 of the Security of Pakistan Act, 1952 .....the following shall be and shall be deemed always to have been substituted, namely:

(3) It shall come into force at once and shall remain in force until the thirteenth day of June, 1958," the learned Judge observed: "The words 'shall be and shall be deemed always to have been substituted ' are very significant. To my mind the Legislature intended, while introducing these words, to re-enact the Security of Pakistan Act, 1952. The effect of these words is that the Security of Pakistan Act, 1952, was brought to life from the 5th of May, 1952, when it came into operation and was to continue till the 30th June, 1958. ..... a question may arise as to why the Legislature called Act XIII of 1958 an Amendment Act. The reason, to my mind, is clear. If once an expired Act is revived, it would be deemed to have been revived as a whole, and then, if any change is to be effected therein, it could only be done by an amendment. Act XIII of 1958, after reviving Act XXXV of 1952 brought about a number of changes therein. Moreover, Act XIII of 1958 would not be illegal

merely because it is called an Amending Act, if it was otherwise valid".

As the Act of 1958 was held to be a valid enactment, it was not necessary to go into the question of the validity of the second Amendment Ordinance of 1957.

In Emperor v. Benoari Lal(33) their Lordships of the Privy Council held with respect to the scope of the ordinance-making power of the Governor-General under Section 72 of the Government of India Act that the Governor-General was the sole judge of the existence of emergency and "assuming that he acts bona fide and in accordance with the statutory power, it cannot rest with the courts to challenge the view that emergency exists". This would imply that mala fide exercise of the ordinance-making power could be subject to judicial review.

"The increasing crush of legislative efforts and the convenience to the executive of a refuge to the device of Orders-in-Council would increase (the grave constitutional and public danger lurking in a transition to arbitrary government) tenfold were the judiciary to approach any such action of the Government in a spirit of compliance rather than of independent scrutiny. That way also would lie public unrest and public peril".(34)

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(33) A.I.R. 1945 P.C. 48.
(34) per Lord Shaw in Rex v. Halliday (1917) A.C. 260)

ii. Military Dictatorship and Martial Law

Late at night on October 7, 1958, President Iskander Mirza proclaimed martial law throughout Pakistan and abrogated the Constitution of 1956. He appointed the Commander-in-Chief of the Pakistan Army, General Muhammad Ayub Khan, as Chief Martial Law Administrator and placed all the armed forces of Pakistan under his command.

In the proclamation he issued on the action he had taken he stated that he had been watching "with the deepest anxiety the ruthless struggle for power, corruption, the shameful exploitation of our simple, honest, patriotic and industrious masses, the lack of decorum and the prostitution of Islam for political ends". These despicable activities, he said, had led to a dictatorship of the lowest order. He expressed the view that the mentality of the political parties had sunk so low that elections would not improve the chaotic internal situation and enable the country to form a stable and strong government. "The same group of people", he said, "who have brought Pakistan to the verge of ruination will rig the elections for their own ends. They will come back more revengeful because I am sure that the elections will be contested mainly on personal, regional and sectarian bases. When they return they will use the same methods which have made a tragic farce of democracy and are the main cause of the present widespread frustration in the country."

"However much the Administration may try", he continued, "I am convinced, judging by the shifting loyalties and the ceaseless and

unscrupulous scramble for office, that elections will neither be free nor fair. They will not solve our difficulties. On the contrary they are likely to create greater unhappiness and disappointment leading ultimately to a really bloody revolution".

He deplored the fact that the country's foreign policy was subjected to "unintelligent and irresponsible criticism" not for patriotic motives but from selfish view points, often by the very people who were responsible for it. Against India, for instance, they screamed for war, knowing full well that they would be nowhere near the firing line.

For the past three years, he said, he had been doing his utmost to work the Constitution in a democratic way. For that purpose he had laboured to bring about coalition after coalition, hoping that it would stabilise the administration and that the affairs of the country would be run in the interests of the masses. His appraisal of the internal situation, he said, had led him to believe that a vast majority of the people no longer had any confidence in the present system of government and were getting more and more disillusioned and disappointed and were becoming dangerously resentful of the manner in which they were exploited.

"The Constitution", he declared, "which was brought into being on March 23, 1956, after so many tribulations, is unworkable. It is so full of dangerous compromises that Pakistan will soon disintegrate internally if the inherent malaise is not removed."

"To rectify them the country must first be taken to sanity by a peaceful revolution. Then it is my intention to collect a number

of patriotic persons to examine our problems in the political field and devise a Constitution more suitable to the genius of the Muslim people. When it is ready and at the appropriate time, it will be submitted to the referendum of the people".

In these circumstances, "to save Pakistan from complete disruption", the President decided that:-

(i) the Constitution of March 23, 1956, would be abrogated,

(ii) the Central and Provincial Governments would be dismissed with immediate effect,

(iii) the National Parliament and Provincial Assemblies would be dissolved,

(iv) all political parties would be abolished,

(v) until alternative arrangements were made, Pakistan would come under martial law.(1)

Soon after martial law was declared, army personnel occupied all offices of the Central Government, the Municipal Corporation, the railway station building and Radio Pakistan. Troops also took over the Karachi Port and all key buildings, including the Central Telegraph Office and the General Post Office.

On October 10, 1958, General Ayub Khan told the correspondent of the (London) Daily Mail; "we have a 16 per cent literacy and you can't have a western type of deomcracy. They have a 98 per cent literacy rate. Democracy without education is hypocrisy without limitation".(2)

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(1) P.L.D. (1958) Central Statutes, page 577 - 579.
(2) quoted in The Asian Recorder, October 25-31, 1958, page 2310.

At a press conference held on the same day he said that it was the constitutional responsibility of the President to call a halt to the state of affairs which prevailed in Pakistan before the proclamation of martial law. If he had not done this, then it would have become the responsibility of the army to save the country in an emergency. The task of the armed forces was to "restore sanity" and make Pakistan a better place for law-abiding citizens to live in.(3)

About the future form of government, he said that the country did not have sufficient man power to run a federal form of government. Personally, he would prefer a unitary form of government.(4)

On October 8, 1958, the President constituted an Advisory Council consisting of the Chief Secretary to the Central Government and the Secretaries of the Ministries of Defence, Interior, Finance, Industry, Commerce, Economic Affairs and Works, Irrigation and Power. The Advisory Council would meet periodically under the chairmanship of the President or the Chief Martial Law Administrator.

At a meeting of the Secretaries to the Government of Pakistan held on the same day under the chairmanship of the Chief Martial Law Administrator, it was decided that the administrative organisation of the Chief Martial Law Administrator would consist of a civil wing and a military wing. In running the administration in accordance with the military regulations issued from time to time, the civil agencies would be utilized to the maximum extent possible.

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(3) id, page 2311.
(4) ibid.

The Laws (Continuance in Force) Order, 1958, promulgated by Iskander Mirza (who still styled himself President after having abrogated the Constitution of which the President formed a part) provided that, notwithstanding the abrogation of the Constitution, and subject to any order of the President, or Regulation made by the Chief Martial Law Administrator, Pakistan would be "governed as nearly as may be in accordance with the late Constitution". The Order declared that all courts in existence immediately before the Proclamation of October 7 would continue in being, that the law declared by the Supreme Court would be binding on all courts in Pakistan and that the Supreme Court and the High Courts would have power to issue the writs of habeas corpus, mandamus, prohibition, quo warranto and certiorari. No writs, however, could be issued against the Chief Martial Law Administrator, or his Deputy or any person exercising powers or jurisdiction under the authority of either. Further, no courts nor any person could call, or be permitted to call, in question the Presidential proclamation, any order made in pursuance of this proclamation, any martial law order or regulation or any finding, judgement or order of a military court. The Order also continued in force all laws and regulations which were valid under the late Constitution, "so far as applicable and with such necessary adaptations as the President may see fit to make". No court was to call in question any such adaptation made by the President.

The powers of a Provincial Governor, it was provided, would be those which he would have had, the President directed him to had

assume on behalf of the President all the functions of the Provincial Government under Article 193 of the late Constitution. The Governor's power of promulgating ordinances was also continued. But he was to act subject to any directions given to him by the President or by the Chief Martial Law Administrator or by the latter's delegate. In case of repugnancy between an ordinance promulgated by a Governor and a regulation or order issued by the Chief Martial Law Administrator or by any person authorised by him, the latter would prevail.

All persons who were in the service of the State before the Proclamation could continue to be in service on the same terms and conditions.

The Order also stated that any provision in any law providing for the reference of a detention order to an Advisory Board would be of no effect.

The name of the 'Republic' was changed to 'Pakistan' dropping the adjective 'Islamic' adopted in the late Constitution.

By October 10 the offices of all political parties were sealed and the Government passed orders freezing the funds in banks of all those parties.(5)

Between October 7th and 17th thirtynine martial law regulations and nine martial law orders were issued by the Chief Martial Law Administrator. Some of the regulations had a filial affinity to those issued in 1953 in connexion with the Panjab Disturbances.

Under the Martial Law Regulations, the whole of Pakistan would be considered a martial law area, divided into three zones,

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(5) Asian Recorder, op. cit. page 2313.

(i) Karachi Federal area including Malir,

(ii) West Pakistan excluding Karachi and Malir and

(iii) East Pakistan, each under a Martial Law Administrator.

Regulation 1-A provides for the constitution of Special Courts of criminal jurisdiction of the following two classes:

(i) Special military courts and

(ii) Summary military courts.

Special Military and Summary Military Courts as well as ordinary criminal courts are given power under the Regulation to try and punish any person for contravention of martial law regulations or orders or for offences under the ordinary law.

An Administrator of Martial Law is empowered to convene Special Military Courts in his area of aministration for the trial of any offence committed in any area to which the Regulations extend. A Special Military Court is to be constituted in the same manner and is to exercise the same powers and follow the same procedure as a Field General Court Martial convened under the Army Act,(6) save, that a Magistrate of the first class or a Sessions Judge may be appointed a member of the court. While the court is empowered to pass any

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(6) A Field General Court Martial is normally convened by the Commander-in-Chief or any other officer empowered by Government. It consists of not less than three officers, each of whom as well as the Judge Advocate takes the oath to try fairly. The accused may object to being tried by any member. The Evidence Act applies. All findings are by a majority: if the members are evenly divided, the decision is in the accused's favour, but, in matters other than challenge, finding and sentence, the President has a casting vote, and a two-thirds majority is necessary for a death sentence.

sentence authorised by law or by Martial Law Regulations, all sentences of death have to be reserved for confirmation by an Administrator of Martial Law. A regular summary of evidence is not required to be recorded: an abstract of evidence in lieu of summary of evidence will be sufficient. It is further provided that any Army, Naval, or Air Force Officer, a Public Prosecutor, a Police Prosecutor, a Police Official or a civilian Lawyer may be appointed as a prosecutor.

A Martial Law Administrator may empower any Magistrate of the first class or any military, naval or air force officer to hold, in his area of administration for the trial of any offence committed in that area, a Summary Military Court which is to follow the same procedure and exercise the same powers as a Summary Court Martial held under the Army Act,(7) except that no other officer shall be required to attend such proceedings, that the court shall not be required to record more than a memorandum of the evidence or to frame a formal charge, that the court may try any offence without reference to superior authority, that the court may pass any sentence except death, transportation, or imprisonment exceeding one year or whipping exceeding fifteen stripes, and that the proceedings of the court shall be forwarded for review to the Martial Law Administrator

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(7) A Summary Court Martial is convened by a Commanding Officer, and consists of the officer directed to hold it, but the Army Act requires two other officers to attend.

in the area in which the trial was held.

A Martial Law Administrator may give directions as to the distribution among the Summary Military Courts of cases to be tried by them.

Regulation 2 specifically states that the ordinary criminal courts will continue to exercise jurisdiction over persons accused of all offences committed under the ordinary law and also under these regulations.

Regulation 3 which in the main deals with scales of punishment, like death, transportation for life, also defines the word 'recalcitrant' in the Regulation as including any external enemy of Pakistan and mutineers or rebels or rioters and any enemy agent.

Regulation 4 imposes precensorship of publication of any matter touching martial law and a contravention of the Regulation entails a maximum punishment of seven years rigorous imprisonment.

On October 8, the Chief Martial Law Administrator ordered all newspapers not to make any comments on the imposition of Martial Law or on orders issued by the President until further notice. Despite the order, after a hesitant twentyfour hours, almost the entire Press of Pakistan began commenting in glowing terms on the Martial Law Administration and the two prime movers of the "peaceful revolution". No action was taken against the Press.(8)

Press censorship was lifted on October 15. A Press Note issued by the Ministry of Information said that the Press was no longer required to submit material for pre-censorship. It added,

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(8) Asian Recorder, op cit. page 2313.

however, that "this does not mean that other relevant provisions of the Martial Law Regulations or of any laws of the country for the time being in force do not apply, or that the Press is now free to contravene them. There is no objection to factual reporting".(9)

Under Regulation 5 it is provided that any person who attempts to contravene, or abets the contravention of any of the Regulations will be punished as if he had contravened that Regulation.

Regulation 6 provides that if any person with intent to help the "recalcitrants" does any act which is designed or is likely to give assistance to the operations of the "recalcitrants" or to impede operations of Pakistan forces, he will suffer death and no less punishment. The same punishment, under Regulation 7, visits any person who joins or attempts to join the "recalcitrants".

Regulation 8 provides maximum death penalty for an offence involving wilful damage to public property or property which is employed for the maintenance of public services or of supplies to Pakistan forces or to the civil population. The same maximum penalty is provided for looting which is defined in Regulation 9 as committing "theft (a) when public order is disturbed by actual or apprehended recalcitrant attack, or by panic or rioting, or (b) during a black-out or a period during which lighting has been reduced or controlled or (c) in respect of any property left, exposed or unprotected in consequence of war conditions or (d) in any premises damaged by war operations or destroyed or vacated for military reasons."

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(9) Asian Recorder, November 15-21, 1958, page 2351.

Death is the maximum penalty provided for dacoity. The same penalty may be inflicted on any person who assists or harbours any "recalcitrant" by giving him information, necessaries of life, weapons or means of conveyance or who assists such person in any way to evade apprehension.

Regulation 12 prohibits the actual or constructive possession of any firearm, ammunition, explosive or sword without a bona fide licence except by Commissioned Officers of Armed Forces and by those persons who are exempted under law to possess them without licence.(10) The Administrator may, however, ban the carrying or possession of any weapon (including those with licence) except by special permits issued by him. All such articles not covered by such permit are to be handed over as directed by the Administrators. Contravention of this Regulation entails a maximum punishment of fourteen years rigorous imprisonment.

Death as maximum punishment may be imposed upon any person "who attacks, resists, or injures, or causes to be attacked, resisted, or injured" any member of the forces or any civil official. Any damage done to or interference with the working of any public means of communication or any other government property may entail the same penalty.

Transportation for life is the maximum punishment provided for wilful failure on the part of any person to give full information if he sees or comes in contact with the "recalcitrants" or who has

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(10) This exemption was provided by Regulation 35 issued on October 13.

knowledge of the movements or whereabouts of the "recalcitrants".

Disobedience or neglect to abey any martial law order, or obstruction to or interference with any person who is acting in the execution of his duty under martial law, or making false statements to obtain a pass or permit under martial law is made punishable with a maximum of fourteen years rigorous imprisonment.

The maximum penalty of death may be imposed on any person who gives false evidence or who refuses to give evidence in any investigation or trial held under the Martial Law Regulations.

Regulation 20 provides that "no person shall commit any act or be guilty of an omission or make a speech:

(a) which is to the prejudice of good order or the public safety; or

(b) which is calculated to mislead or hamper movements of, or imperil the success of, or tamper with the loyalty of forces under my command".

Contravention of the Regulation is punishable by ten years rigorous imprisonment.

Death is the maximum punishment for hoarding food grains in violation of existing orders while a sentence of fourteen years rigorous imprisonment may be passed against any person for wilful adulteration of any kind of food. Imprisonment for the same term may be imposed for hoarding, wilful indulgence in unwarranted dilution or mixing, or unauthorised manufacture of medicines.

Spreading reports calculated to create alarm or despondency

amongst the public or calculated to create dissatisfaction towards the armed forces or the police or any member thereof is punishable by imprisonment for the same term. The same punishment may visit a person who hoards any article of public necessity or refuses to declare his stock of commercial commodities when required to do so by any military or civil authority or fails to put on sale goods meant for public purchase.

'Black marketing' is also declared punishable by rigorous imprisonment for fourteen years.

Regulation 27 prohibited smuggling of all kinds. It declares that any one caught in the act of smuggling or found in possession of smuggled goods knowing them to be such(11) or found helping a smuggler or who withholds information about smugglers or fails to pass on such information to military and civil authorities will be punishable, death being the maximum penalty. The samemaximum punishment is provided for child lifting and abduction of women.

Rigorous imprisonment for ten years may be given to a person who strikes, or helps to bring about a strike or propagates a strike in educational institutions and public utility works and installations.

Regulations 30, 31 and 32 are designed to prevent corruption among public officers. A maximum punishment of fourteen years imprisonment may visit a person who offers or attempts to offer a bribe or illegal gratification or who accepts such bribe or illegal gratification. A person who uses his official position to bestow

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(11) The underlined words were inserted by Regulation 40 of October 20, 1958.

patronage or favours to the disadvantage of the State or by any act of nepotism deprives any person of his legitimate rights may be subjected to the same punishment. The same will be the position of a person who misuses or attempts to misuse facilities provided by the State for official use or who commits other malpractices.

Regulation 34 prohibits the spreading of "news, rumours or reports on provincial, sectarian and linguistic basis calculated towards territorial or administrative dismemberment of Pakistan" (sic) under a penalty which may extend to fourteen years rigorous imprisonment.

Regulation 36 provides for the imposition of a maximum penalty of fourteen years rigorous imprisonment on "whoever by word of mouth or in writing or otherwise:-

(a) brings into hatred or contempt the Armed Forces or any part or member thereof; or

(b) causes disaffection among, or prejudices, prevents or interferes with the discipline of, or the performance of their duties by, members of the Armed Forces; or

(c) promotes feelings of enmity or hatred between members of the Armed Forces; or

(d) seduces any member of the Armed Forces from his allegiance or his duty".

Regulation 38 makes impersonation and attempt at impersonation of any member of the Armed Forces or of any government official an offence punishable with ten years rigorous imprisonment.

Under Regulation 39 the maximum punishment of fourteen years

rigorous imprisonment is provided for the commission, attempt or abetment of the commission of theft in respect of any arms or ammunition belonging to the government and for exchange, attempt or abetment to exchange of such arms or ammunition with non-Government pattern arms and ammunition and also for unauthorised possession of such Government arms or ammunition.

Martial Law Orders issued by the Chief Martial Law Administrator on October 11, provide that offences for which the sentence of death is prescribed should not be tried by a Magistrate below the rank of a first class Magistrate specially empowered under Section 30 of the Code of Criminal Procedure.(12) All sentences of death awarded under the Martial Law Regulations both by ordinary criminal courts and by Special Military Courts are to be reserved for confirmation by the Chief Martial Law Administrator. All proceedings of Special Military Courts are to be sent to the Judge Advocate General, General Headquarters, Rawalpindi, for final review.

Criminal Courts while trying offenders under the Martial Law Regulations are to follow the procedure prescribed for the trial of summons cases under the ordinary law. They are empowered while trying such offenders to award the punishments prescribed under the Regulations irrespective of their power of punishment as laid down under the ordinary law.

All offenders sentenced under Martial Law Regulations to rigorous imprisonment are to be treated as ordinary criminals irrespective of

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(12) Supra, Chapter III, iv, footnote (28)

their status or position.

Sub-Administrators are empowered to convene Special Military Courts and Summary Military Courts. While power to issue Regulations are vested in the Chief Martial Law Administrator and Martial Law Administrators, Sub-Administrators are empowered to issue necessary orders and delegate powers of issuing orders to any officer in their own areas as they deem fit. The Regulations and Orders issued by Administrators and orders by Sub-Administrators are not to be in conflict, but to conform, with the Regulations and Orders passed by the Chief Martial Law Administrator.

Major General Umrao Khan, Martial Law Administrator in East Pakistan on October 9, issued fortyeight Martial Law Regulations and several Martial Law Orders. The first Regulation divided the Province into five sectors, namely Jessore, Rajshahi, Dacca, Comila, and Chittagong. The commanders of the military forces in these sectors were appointed Sub-Administrators of Martial Law in their respective Sectors.

Under the first Order issued by the Administrator, maximum punishment of ten years imprisonment is provided for the publication of any printed literature which contains any news or comments other than the communiques issued by the Martial Law authorities without prior authorisation by the Censor Officer at Martial Law Headquarters.

The second Order provides the same punishment for the publication or possession of any literature calculated to promote or attempts to promote feelings of enmity or hatred against the Government or between different classes or sects. Any person who knows or has reason to

believe the existence of such literature is to report it, under pain of the same penalty, to the Sector Commander.

The previous day the Administrator had told a news conference that the Martial Law Administration would not affect the normal life of the people in any manner. Honest and law-abiding people had nothing to fear; for such people martial law would be a boon, he said.(13)

On October 9, in a broadcast over Dacca Radio the Administrator said that the object before the Martial Law Administration was the welfare of the people. To achieve this end it was necessary that smuggling, blackmarketing, profiteering, and all kinds of corruption must stop. The Martial Law Administration was not going to show any mercy to the human sharks who feed themselves and prosper on the people's sufferings.(14)

In spite of military dictatorship now in evidence in Pakistan, it would seem that the ideal of democracy is not abandoned there. In the broadcast already referred to of October 8, General Ayub Khan declared: "let me announce in unequivocal terms that our ultimate aim is to restore democracy but of the type that people can understand and work". On October 10, in an interview with foreign correspondents he re-iterated this assurance.... "Pakistan is not forsaking democracy on a permanent basis. We have got to go back to democracy. We must make it work".(15) He disclosed that he was

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(13) Asian Recorder, op. cit. page 2313.
(14) ibid.
(15) G. W. Choudhury, Failure of Parliamentary Deomocracy in Pakistan, in Parliamentary Affairs, Volume XII, No.1. page 70.

thinking in terms of an electoral college where five hundred or perhaps even five thousand people might elect a person who in turn would choose an official. That, he said, was one way to achieve the spread of democracy.

In the State v. Dasso[16] the question arose whether writs issued by the High Court under the provisions of the last Constitution had abated under the provisions of the Laws Continuance in Force Order, 1958. The Supreme Court held that they had, as the late Constitution itself had now disappeared.

In a learned discussion on the subject of 'victorious revolution' Muhammad Munir, C.J., maintained that such a revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution. "If the attempt to break the Constitution fails," observed the Chief Justice, "those who sponsor or organise it are judged by the existing Constitution as guilty of the crime of treason. But if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. ..... the essential condition to determine whether a Constitution has been annulled is the efficacy of the change..... If the territory and the people remain substantially the same, there is, under the modern juristic doctrine,

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(16) P.L.D. (1958) S.C. (Pak.) 533.

no change in the corpus or international entity of the State and the revolutionary government and the new Constitution are, according to International Law, the legitimate government and the valid Constitution of the State. Thus a victorious revolution or a successful coup d'etat is an internationally recognised legal method of changing a Constitution.

"After a change of the character I have mentioned has taken place, the national legal order for its validity depends upon the new law-creating organ. Even courts lose their existing jurisdictions, and can function only to the extent and in the manner determined by the new Constitution".(17)

In support of his view the learned Chief Justice quoted Hans Kelsen, who said, in part:

"From a juristic point of view, the decisive criterion of a revolution is that the order in force is overthrown and replaced by a new order in a way which the former had not itself anticipated. Usually the new men whom a revolution brings to power annul only the Constitution and certain laws of paramount political significance, putting other norms in their place. A great part of the old legal order remains valid also within the frame of the new order. But the phrase 'remains valid' does not give an adequate description of the phenomenon. It is only the contents of these norms that remain the same, not the reason of their validity. They are no longer valid by virtue of having been created in the way the old Constitution

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(17) ibid, page 539.

prescribed. That Constitution is no longer in force; it is replaced by a new Constitution which is not the result of a constitutional alteration of the former. If laws which are introduced under the old Constitution continue to be valid under the new Constitution, this is possible only because validity has ~~been~~ expressly or tacitly been vested in them by the new Constitution..... The laws which, in the ordinary inaccurate parlance, continue to be valid are, from a juristic view point, new laws whose import coincides with that of the old laws. They are not identical with the old laws, because the reason for their validity is different. The reason for their validity is the new, not the old, Constitution, and between the two continuity holds neither from the point of view of the one nor from that of the other. Thus it is never the Constitution merely but always the entire legal order that is changed by a revolution.

"This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy. And they have been so deprived not only de facto but also de jure."(18)

The learned Chief Justice continued to observe: "If what I have already stated is correct, then the revolution having been successful it satisfied the test of efficacy and becomes a basic law-creating fact. On that assumption the Laws Continuance in Force Order, however transitory and imperfect it may be, is a new legal order and it is

(18) Hans Kelsen, General Theory of Law and State, pages 117-118 quoted in State v. Dasso, P.L.D. 1958, S.C. (Pak.) 533, 539-40.

in accordance with that Order that the validity of the laws and the correctness of the judicial decisions have to be determined".(19)

Commenting on this judgement, the Indian Premier said that presumably so far as "Pakistan courts are concerned, factual success of a military government is enough law."(20)

It is submitted that while the comity of nations demands that international law should place it outside the power of any other state to concern itself with the means whereby a country changes its constitution, it is to misrepresent the scope of international law to argue that this rule extends to prohibiting a Pakistan citizen from complaining in a Pakistan court that the constitution has been changed otherwise than by the procedure provided in the Constitution.

It is not clear how martial law in any of the senses in which it is understood, as explained by Muhammad Munir, C.J., in Muhammad Umar Khan v. The Crown,(21) when he was the Chief Justice of the Lahore High Court, could be justified in Pakistan. Its administration in Pakistan cannot be regarded as part of military law or international law; if it is to be considered municipal law forming part of common law which Pakistan inherited along with India, then it is not administered there to repel force by force, for there is no rebellion or any similar civil disturbance there. Presumably a new law-creating fact which lays down new juridical norms can also alter the connotation of well established legal terminology. It is probable

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(19) State v. Dasso, P.L.D. (1958) S.C. (Pak.) 533, 540.
(20) Asian Recorder, November 22-28, 1958, page 2367.
(21) P.L.D. 1953 Lahore 528; supra.

that a military dictatorship which has as its basis the will of the military commander with the support of the military arm behind him is euphemistically called 'martial law', though, as Premier Nehru remarked, there is nothing veiled about the "naked military dictatorship in Pakistan".(22)

The day this judgement was delivered, (October 27) there was another instance of the operation of the newly propounded rule of public law in Pakistan that "he may take who has the power and he may keep who can". General Ayub Khan who had been sworn in during the forenoon as the Prime Minister of Pakistan removed without ceremony the President who had appointed him, assumed plenary powers and declared himself President. Iskander Mirza, the former President had no ground for complaint. When he abrogated the Constitution on October 7, he must be deemed to have deprived himself of the office of President, for the office of President was created by the Constitution.

President Ayub Khan announced that he was setting up a Presidential form of government; but a Presidential form of government itself presupposed election of the President by the people.

He appointed a Presidential Cabinet of twelve persons, consisting mostly of non-politicians. The newly appointed Law Minister declared that the new constitution would have to be made after careful thought so that it might not also be abrogated.

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(22) Asian Recorder, November 22-28, 1958, page 2366.

After assumption of office as President, General Ayub Khan issued a few more Martial Law Regulations and Martial Law Orders. Under one of the Orders, (23) General Muhammad Musa, who had been previously made Commander-in-Chief of the Pakistan Army, Vice-Admiral Siddiq Chaudri, Commander-in- Chief, Pakistan Navy, and Air Vice-Marshal Asghar Khan, Commander-in-Chief, Pakistan Air Force, were appointed Deputy Chief Martial Law Administrators.

The Martial Law Regulations issued between October 30 and November 8, dealt, in the main, with the control of prices of food grains and other commodities, income tax returns, surrender of foreign exchange and similar welfare measures. It may be recalled that as early as October 17, General Ayub Khan had declared that martial law would not be lifted until the political, social, economic and administrative mess in the country had been cleared. He said: "There seems to be a fear in the minds of the people that if Martial Law is lifted soon the old order will return with its attendant weaknesses and evils and all the good that has been done will be lost. Let me assure everyone that whereas Martial Law will not be retained a minute longer than is necessary, it will not be lifted a minute earlier than the purpose for which it has been imposed has been fulfilled. That purpose is the clearance of the political, social, economic and administrative mess that has been created in the past". (24)

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(23) No. 11 of October 28, 1958.
(24) Asian Recorder, November 15-21, page 2349.

It was to facilitate this "clearance" that further Martial Law Regulations were issued.

Regulation 42 provides that the Central Government will control the prices of imported goods, goods manufactured within Pakistan and selected food grains. For a number of goods including textiles, sugar, tea and shaving blades, the prices will be fixed by the Central Government. No person, it is provided, shall sell or re-sell any goods at a price higher than the maximum price determined under the Regulation.

Regulation 43 permitted any person who had filed an incorrect return of his income under the Income Tax Act for the assessment year 1954-55 or any year thereafter to file a revised return of his true income by December 15, 1958. No action would then be taken against him for the original submission of an incorrect return.

Regulation 46 provides, inter alia that any person being assessable to any tax under the provision of the Income Tax Act, the Business Profits Act, the Sales Tax Act, or the Estate Duty Act, makes any statement in writing required to be made by him under the provisions of any of these Acts, which is false, will be punished with rigorous imprisonment for seven years and with fine, unless he can show that at the time of making it he believed it to be true.

Martial Law Foreign Exchange (Surrender and Declarations) Regulation, 1958 (No.45) declares that any person who holds any foreign exchange in any country other than Pakistan and who has reason to believe that such holding is not lawful, may surrender it to any authorised dealer or declare to the State Bank of Pakistan before

December 1, 1958, in the case of persons who are in Pakistan on the date of the Regulation, and within thirty days from the day of their entry into Pakistan in the case of those who are outside Pakistan on the date of the Regulation. He would then escape the penalty of seven years imprisonment provided for persons in illegal possession of foreign exchange.

Regulation 46 provides for the imposition of a maximum punishment of ten years' rigorous imprisonment on any person who makes any mis-declaration or mis-statement in regard to kind, quality, quantity or value of goods imported or exported.

M. A. Khuhro, the former Defence Minister of Pakistan was accused of selling a car in the black market, an offence punishable by a maximum sentence of fourteen years rigorous imprisonment under Martial Law Regulations. On October 28, the District and Sessions Judge of Karachi rejecting a bail application said that bail should not be granted to Mr. Khuhro and to the two others arrested along with him and added: "The maximum sentence that can be inflicted on them, if they are convicted under Martial Law Regulations is fourteen years, which puts it at par with transportation for life sentence."(25)

On October 31, the Karachi Bench of the West Pakistan High Court also refused bail to Mr. Khuhro. Rejecting the bail application, Abdul Hamid Khan, J., said that a study of the facts revealed a prima facie case against the accused.

The same day, the police filed charges of forgery and cheating

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(25) Asian Recorder, November 15-21, 1958, page 2352.

the Government against Mr. Khuhro, alleging that he had bought four motor cars on false permits during the past three years.

On November 11, the Government of Pakistan announced its decision to withdraw with immediate effect all troops assisting the civil authorities and wind up military courts in the centrally administered area of Karachi. However, official announcements made from Lahore, Dacca and Karachi on November 26 said that military courts had been revived throughout Pakistan. The announcement made by the West Pakistan Martial Law Administrator from Lahore said that the revival of the military courts was ordered with immediate effect to deal effectively and promptly with offences of smuggling.(26)

Speaking to pressmen in Quetta on December 2, 1958, President Ayub Khan reiterated his preference for a Presidential form of government. He said that Pakistan would not copy the Constitution of any country. It would have a Constitution entirely of its own, in keeping with the social and economic conditions of the country. He said: "Once we have solved vital problems such as the resettlement of refugees, land reforms and modifications of the educational and legal systems, we will consult the best brains and ascertain the feelings of the people to draw up a Constitution. The people should be given the right to elect a President either on the basis of universal suffrage or through electoral colleges. Once elected he should be given fairly wide powers to run the affairs of the country so that there is no legpulling (sic) by legislatures every day." On the role of the legislatures, he expressed the view that they should

(26) Asian Recorder, December 20-31, 1958, page 2419.

only frame the laws and not interfere in the administration. The parliamentary system could be worked only if politicians strictly followed the spirit of the Constitution and the electorate was educated enough to compel its representatives to do the right thing.(27)

In the meantime, although martial law continues to be in operation, the army has been withdrawn from the administration and the military courts set up under martial law have been wound up.(28)

However, on April 19, the freedom of the press in Pakistan suffered a further blow under military dictatorship when four newspapers were taken over by the Government under an Ordinance issued that day. The Ordinance which amends the Security of Pakistan Act, 1952, is intended to provide for the banning of publication and distribution of newspapers containing "matters likely to endanger the defence, external affairs or security of Pakistan". It gives wide powers to the Government including authority to change the management of a newspaper and remove the owner, director, or any other person in a newspaper establishment from control or management.

Giving reasons for the promulgation of the Ordinance, an official announcement stated that it had been known to the Government for some time that there "exist printing and publishing organisations in the country which are foreign directed and foreign subsidized and which seek to promote an ideology subversive to the best interests of Pakistan".(29)

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(27) Asian Recorder, December 21-30, 1958, page 2419.
(28) G. W. Choudhury, Failure of Parliamentary Democracy in Pakistan, op. cit. page 70.
(29) The Times, April 20, 1959.

Within minutes of issuing the Ordinance, Progressive Papers, Limited, of Lahore was served with a notice dissolving its board of directors. Progressive Papers, Limited, owned four newspapers, the English daily Pakistan Times of Lahore, generally considered pro-left, two Urdu dailies - Imroze, of Karachi and Imroze, of Lahore - and an Urdu weekly at Lahore. An administrator was appointed to run Progressive Papers, Limited.(30)

Speaking in the Town Hall, New York, on May 8, 1950, Liaquat Ali Khan, the then Prime Minister of Pakistan had declared what he meant by the Islamic way of life, for the safe preservation of which Pakistan had been demanded and formed. He said, "We believe in democracy, that is, in fundamental human rights, including the right of private ownership and the right of the people to be governed by their own freely chosen representatives. We believe in equal citizenship for all whether Muslims or non-Muslims, equality of opportunity, equality before law. We believe that each individual man or woman, has the right to the fruit of his own labours. Lastly we believe that the fortunate amongst us whether in wealth or knowledge or physical fitness, have a moral responsibility towards those who have been unfortunate. These principles we call the Islamic way of life." (31)

Again on May 13, 1951, at the University of Kansas City, he said, "We believed then and we believe now that the demand of the Muslims in Bpitish India to have a separate state of their own was,

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(30) ibid.
(31) Liaquat Ali Khan, Pakistan, page 33.

both on human and geopolitical grounds, a very reasonable demand. To millions of Muslims it meant the only opportunity for genuine freedom and genuine self-government".(32)

If military dictatorship continues with its consequential negation of fundamental human rights and if "the genuine freedom and genuine self-government" of its founders' dreams vanish into thin air, the raison detre of Pakistan ceases to be obvious.

As Pakistan, in spite of the military dictatorship that reigns supreme there, is still a member of the Commonwealth, it would be of interest to notice what two Prime Ministers of Commonwealth countries thought of the recent developments in Pakistan.

Premier Nehru in a written statement to the Indian Parliament on November 20, 1958, reviewed the situation in Pakistan and declared that Pakistan had "ceased to be, even in name or form, a free country, in the democratic sense". President Mirza's proclamation of October 7 abrogating the Constitution, he commented, put an end to any kind of free or representative government in Pakistan. "It is true," he said, "that Parliamentary institutions in Pakistan had been deprived of much content because of the failure to hold elections ever since independence came eleven years ago. Nevertheless, there was the form of such institutions. The proclamation of martial law ended this. For the first time dictatorial rule was established in a member country of the

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(32) ibid, page 57.

Commonwealth. The very basis of the Commonwealth has been democratic institutions and the parliamentary form of government. Both these were suddenly ended by the coup d'etat of President Mirza.

In fact, not only was the Constitution of Pakistan abrogated, but all its laws, judiciary and economic structure could only function within the limitations imposed by the martial law authorities. The old sanctions ceased to exist; the new sanction was the will of the President or the martial law administrator."

After reviewing the events of October 27, he continued: "Whatever reasons there might be for these repeated and far-reaching changes, the fact emerges that a dictatorial regime with military control, which is normally not approved of by those who believe in free institutions and democracy, was established in Pakistan."

It was for the people of Pakistan, he said, to choose their own form of government, and India had never desired to interfere in any way; but they could not help regretting a development "which from all normal standards was a set back both politically and economically" (33).

Mr. Diefenbaker, Prime Minster of Canada, it would appear, held a different view of the situation in Pakistan. On November 9, he declared in Delhi that he believed the new Pakistan leaders were sincerely concerned for the betterment of conditions and would revive democratic institutions as soon as possible.(34)

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(33) The Times, London, November 21, 1958.
(34) ibid.

One hopes that Mr. Diefenbaker's optimism will be justified by the event, though one inclines to agree with Sir Percival Griffiths who does "not expect to see in the near future any kind of return to the full parliamentary system".(35) In the meanwhile it may be said that if any one in the present day world could confidently declare "L'Etat, c'est moi", it is President Ayub Khan of Pakistan.

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(35) Sir Percival Griffiths, Democracy under Strain in South Asia, Asian Review, April 1959, page 88. "When some return is made I imagine it will be partial return", says Sir Percival, "I don't think we shall see in the foreseeable future the resumption of parliamentary institutions as they were in Pakistan before the change took place; nor am I at all certain that it is desirable that we should." (ibid)

CHAPTER IX

EMERGENCY POWERS IN CEYLON

1. Ceylon's Legal System

If "the British Empire in India was the unexpected and on the whole unwanted result of the loss of the spice trade", (1) Ceylon was acquired in what has been called a fit of absence of mind. This other "precious stone set in the silver sea" was acquired by Britain to deny its use to the French. In August 1795 Trincomalee was attacked to prevent its being used by the French as a base for military operations, and it fell after a brief siege. In September Jaffna was captured. In February 1796 Colombo surrendered to the British on generous terms. The Maritime Provinces of the Island were taken by right of conquest, and ceded by the Treaty of Amiens, 1802.

In February 1815 Governor Brownrigg, after his successful invasion of Kandy, issued a proclamation announcing the annexation of the Four Korales in the Kandyan Provinces. On March 2, 1815 was proclaimed the Kandyan Convention by which the chiefs (2) on behalf of the inhabitants ceded to "the Sovereign of the British Empire" "the dominion of the Kandyan Provinces" including those already annexed. Thus these Provinces were ceded to the British, though at first taken by right of conquest.

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(1) L. A. Mills, Britain and Ceylon, page 11.
(2) In Summut v. Strickland, 1930 A.C. 678 it was held that cession by the people of a territory has the same effect as cession by a sovereign.

Ceylon was therefore a conquered or ceded Colony and the rule in Campbell v. Hall[3] would apply to the Island. Accordingly, Roman-Dutch law as administered by the Dutch continued in operation in the Maritime Provinces. It was Roman-Dutch law as expounded by the jurists but modified by local customs which included Muslim law, Mukkuva law and Thesavalamai and by the statutes of Batavia and local legislation.[4] The Kandyan law remained in operation in the Kandyan Provinces subject to certain exceptions like the abolition of torture and mutilation, in accordance with the provisions of the Convention of 1815.

When Lord North was appointed Governor in 1798, the Letter Patent conferred legislative power on him, while reserving a right of legislation to the King. By the Instructions simultaneously given to the Governor, the King declared it to be his will and pleasure that for the present, and during his will and pleasure, the temporary administration of justice and police should, as nearly as circumstances would permit, be exercised by the Governor in conformity to the laws and institutions that subsisted under the ancient government of the United Provinces, subject to such deviations in consequence of sudden and unforeseen emergencies or to such expedients and useful alterations, as might render a departure therefrom, either absolutely necessary or unavoidable, or evidently beneficial and desirable.

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(3) (1774) Cowper page 204. "The laws of a conquered country continue in force until they are altered by the conqueror".

(4) Ivor Jennings and H. W. Tambiah, The Dominion of Ceylon, page 197.

The Dutch law, as has been said before, remained in operation until Lord North, acting under his Instructions, modified it in certain respects by proclamations. He required that legal proceedings must be in public and in open court, abolished the practice of torture of suspected persons for procuring confession, provided that persons convicted of capital offences were to be hanged, abolished mutilation, breaking on the wheel and other barbarous modes of punishment, established a single criminal court, extended the jurisdiction of certain civil courts, re-established the Land Raads,(5) created a Court of Appeal consisting of the Governor, the Military Commander, and the Secretary to Government and allowed liberty of conscience and the free exercise of religious worship to all persons "who quietly and peacefully enjoy the same without offence or scandal to the Government". He enacted that persons who were slaves by the existing laws of the Island would continue to be the property of those to whom they belonged and might be transferred according to Dutch law, but were not to be sold away out of the Island and no slaves were to be imported.(6)

The Charter of Justice issued in 1801 established a Supreme Court for the Island, prescribed its jurisdiction and laid down rules, which approximated to those of English law, for its procedure. Despite the procedure adopted, it was provided that in

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(5) Land Courts.
(6) Legislative Acts of the Ceylon Government, 1796-1833, I. page 4.

matters of inheritance and succession, contract and dealings between party and party, Sinhalese, Tamil or Islamic law was to be applied where the parties were Sinhalese, Tamils or Muslims, and that the defendant's law was to be applied if the parties were of different communities. Thus Thesavalamai was applied to the Tamils, Islamic law to the Muslims and Roman-Dutch law to the Sinhalese.(7) The Court was given an equitable jurisdiction to administer justice in a summary manner, "according to the law now established in the said settlements in the Island of Ceylon and in point of form, as nearly as may be, according to the rules and proceedings of our High Court of Chancery in Great Britain."

The Charter of 1810 introduced trial by jury in criminal cases.

It was when English legal conceptions were thus seeping into the variegated legal system of the Island that the revolt of 1817-18 broke out and martial law was declared under the Common Law rule as a state necessity.

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(7) During the Portuguese and Dutch occupation, Sinhalese law had almost disappeared, except in Kandy, though Sinhalese law of land tenure and the institution of rajakarya (forced labour) were recognised by the Dutch.

ii. Martial Law in Ceylon

The chiefs in the Kandyan Provinces did not like the new administrative arrangements made by the Government as they found that they were losing status though they were allowed to continue in power and retain their special rights and privileges. Though there was no interference with their religion the Buddhist priests were suspicious of the new regime for it was a Christian and foreign regime.(1) The common people had suffered oppression owing mainly to rajakarya (forced labour) but they were used to such oppression. The chiefs as well as the common people were attached to the institution of monarchy and wanted a King whom they could see and from whom they could obtain summary justice.(2) They did not like innovations, even innovations like the British system of justice which tended to view everyone as equal under the law.

In these circumstances it was easy for a pretender to the throne to get popular support when he established himself in the jungle and secured the assistance of the Buddhist priests to incite the Province to revolt. When any district rose in revolt one or two military posts were established in it and martial law proclaimed. It was first proclaimed in October 1817. Though the revolt was apparently quelled by the end of December 1817 martial law continued to be in operation until October 1818. Two of the rebel leaders were tried by Court Martial and beheaded. The Courts Martial appointed by the Governor were composed of five members of whom at

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(1) C. Collins, Public Administration in Ceylon, pages 47-48.
(2) L. A. Mills, Ceylon under British Rule, page 160.

least one was a field officer. An experienced civil servant or military officer was appointed as Judge Advocate to each court. Sentences of death were confirmed by the Governor.(3)

In 1848 another rebellion broke out in the Kandyan Provinces mainly because of "the growing lawlessness of the Kandyans, the inefficiency of the Civil Service, the alienation and declining influence of the Kandyan nobles and the partial demoralisation of the raiyats due to the development of the coffee industry"(4). 'To crush the rebellion at its outset' and to prevent it from spreading, martial law was proclaimed on July 29, in the District of Kandy and on July 31 in the Seven Korales. Several prisoners were tried by Court Martial and shot, including one of the pretenders to the throne. Even after the suppression of the revolt, Lord Torrington, the Governor, approved the retention of martial law to prevent the people from persevering in rebellious tendencies and to serve as 'a check upon the evil propensities' of the priests and nobles who had undoubtedly sponsored the revolt. On September 21 another pretender was captured and on October 10 martial law was withdrawn. An Act of Indemnity was unanimously passed by the Legislative Council on October 23.

Torrington's opponents in Ceylon contended that the revolt was caused by the new taxes he imposed and the Road Ordinance he promulgated requiring every inhabitant of Ceylon to work six days annually in the repair or construction of public roads or else to pay a commutation tax of three shillings. They also maintained that

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(3) L. A. Mills, Ceylon under British Rule, page 196.
(4) L. A. Mills, Ceylon under British Rule, page 176.

the revolt was little more than a series of riots, that the proclamation of martial law and its continuance for ten weeks were unwarranted and that the sequestration of property and the severe sentences imposed by the courts martial were absolutely criminal. Though Lord Grey, the Secretary of State, entirely approved of Torrington's actions, the Governor's opponents eventually managed to have a Committee of Inquiry of the House of Commons appointed to inquire into the conduct of the Governor. The Committee included among its members Disraeli, Peel, Gladstone, Hume and Baillie.

The Inquiry made by the Committee is of interest for the opinions on martial law expressed by the Judge Advocate General.

The majority of the witnesses were members of the Ceylon Civil Service, most of whom defended Torrington's measures. In his favour it was said by Major Skinner that his stern measures were "decided by the course of mercy, as in forty-eight hours the revolt would have spread rapidly".(5)

The Chief Justice of Ceylon was of the opinion that the Civil Servants who advised the Governor greatly exaggerated a futile and contemptible attempt at rebellion and that the proclamation of martial law was unnecessary since the civil power could have subdued the outbreak with the assistance of the troops.(6)

Sir David Dundas, the Judge Advocate General, said in the course of his evidence that while military law was strictly defined and limited by statutes, martial law was vague, undefined and not

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(5) Parliamentary Papers, H.C. 106 of 1850. Vol. XII, 298.
(6) Parliamentary Papers, H.C. 36 of 1851. Vol. VIII, 607.

governed by regulations. Under martial law there were no definite rules determining the composition or procedure of the court; the right of the accused to a fair trial depended entirely on the wisdom and sense of justice of the presiding officer. Martial law was unwritten; it followed no precedents. "I know of no rule except the rule of common sense and humanity" said the Judge Advocate General. The Government was entitled to proclaim martial law in cases of 'paramount necessity' and if it were administered honestly, rigorously and vigorously with as much humanity as the case will permit' Parliament could and should pass an Act of Indemnity.(7)

General Fitzroy Somerset, the Secretary to the Commander-in-Chief at the time, stated that there were no written instructions that he could find in any quarter for the administration of martial law.(8)

As martial law was proclaimed under the common law it is of interest to know what English jurists and constitutional lawyers in and near about the middle of the last century thought of martial law. "The only principle on which the law of England tolerates martial law" said the law officers of the Crown in 1838, "is necessity; its introduction can be justified only by necessity; its continuation requires precisely the same justification of necessity, and if it survives the necessity on which alone it rests for a single minute, it becomes instantly a mere exercise of lawless violence.(9) To

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(7) Parliamentary Papers H.C. 106 of 1850. Vol.XII. 176-87.
(8) Parliamentary Papers H.C. 36 of 1851. Vol.VIII. 1. 718.
(9) Quoted in R. O'Sullivan, Military Law and the Supremacy of the Civil Courts, page 24.

Forsyth it meant not a code of rules but a state of society in which absolute power was assumed by the military authorities who were temporarily placed above the ordinary law and beyond the jurisdiction of the ordinary courts, for the purpose of suppressing an insurrection or resisting an invasion.(10)

In Regina v. Eyre(11) it was held that if a state of war existed inside the country, martial law was justified and legal without the necessity for a proclamation; if a state of war did not exist, a proclamation could not make martial law legal. Martial law, like the right of self-defence, is justified by necessity and by nothing else.

Sir James Stephen, writing in 1883, stated that the views expressed by Sir David Dundas appeared to him to be "substantially correct". Sir James paraphrased them saying: "According to them the words 'martial law' as used in the expression 'proclaiming martial law' might be defined as the assumption for a certain time, by the officers of the Crown, of absolute power, exercised by military force, for the purpose of suppressing an insurrection or resisting an invasion. The 'proclamation' of martial law, in this sense, would only be a notice to all whom it might concern that such a course was about to be taken".(12)

Professor Hood Phillips sums up the position when he says, "What on rare occasions has been called martial law since 1628 by British Constitutional writers has been a state of affairs outside

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(10) Forsyth, Cases and Opinions on Constitutional Law, (1869) p.559.
(11) (1868) Finlanson's Report, 74.
(12) A History of the Criminal Law of England. I, page 214.

Great Britain, in which owing to civil commotion, the ordinary courts were unable to function and it was therefore necessary to establish military tribunals. It is merely an extended application of the principle ..... that the Executive have such powers as are necessary for the preservation of public order".(13)

Martial law was again proclaimed in Ceylon on June 2, 1915 and continued to be in operation until withdrawn by an Order in Council on August 30, 1915. It was proclaimed in consequence of street fights in Kandy and the spread of the riotous spirit to Colombo following the attack on a procession of Buddhists who were celebrating the birthday of the Lord Buddha in Kandy Town.(14) The Hambaya Muslims(15) who attacked the Buddhists insisted that Buddhist processions should pass in silence in front of their mosques. The Buddhist priests claimed the right, under the Kandyan Convention of 1815, to conduct their religious ceremonies in the customary manner with singing and beat of drums.

These disturbances occurred during a period in which, owing to the outbreak of war between Great Britain and Germany, the Imperial Order in Council of October 26, 1896 was in operation in the Island. The effect of that Order in Council was to make all persons for the time being within the limits of the Colony subject to military law, as if they were persons actually accompanying His Majesty's troops. When martial law was proclaimed, the General

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(13) Hood Phillips, Constitutional Law, p.546.
(14) P. Ramanathan, Riots and Martial Law in Ceylon, page 58.
(15) Muslim immigrants from the east coast of India.

Officer Commanding the Troops was placed in charge of the maintenance of order and the defence of life and property in the provinces to which the proclamation applied and he was authorised to take all steps of whatever nature that he might deem necessary for those purposes. The General Officer Commanding the Troops by an order dated June 3, 1915 provided that no persons except officers, soldiers, police, postmen and telegraph messengers in uniform and special constables should be permitted to be in the public streets or roads between the hours of 6p.m. and 6a.m. without special passes. The prohibited period was altered to 7p.m. to 5a.m. by a subsequent order dated 9th June.

In a case(16) which arose out of the breach of the second order, it was held that a breach of the order was an offence under Section 185 of the Penal Code which provided punishment for disobedience of an order issued by a public servant, lawfully empowered on that behalf.

It was contended on behalf of the appellant that whenever an offence was created by martial law it was triable by court martial alone by virtue of a proviso to Clause III of the Order in Council of October 26, 1896 which reads as follows:- "Provided that a person who is by virtue of this Order subject to martial law shall, unless the Governor directs otherwise, be tried by a competent civil court, and not by a court martial, for any offence with which he would be triable if he were not subject to martial law". Construing the

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(16) Sub-Inspector of Police v. James Sinno, (1915) N.L.R. 283.

proviso, Wood Renton, C.J., observed: ".....a person subject to the application of the Order in Council who is alleged to have committed an offence under martial law, shall be tried by a competent civil court, unless the Governor gives direction to the contrary. But it does not follow - the proviso certainly does not say - that where an offence amounting to a breach of military law is also an offence under the Penal Code, he must be tried by courts martial alone. It would certainly in many cases not be in the interest of the subject that the proviso should be construed in this sense. For, as we are all aware, the procedure before courts martial is far more summary than that which the Municipal law recognises, and it may be added that the sentences for which martial law provides are frequently more severe than those embodied in the Penal Code".(17)

In an Application for a Writ of Habeas Corpus for the production of the Body of W. A. De Silva(18) the applicant was arrested and detained in military custody by the General Officer Commanding the Troops who justified the arrest and the detention on the grounds that he was acting in the exercise of his powers under martial law. While refusing the application on the ground that the acts of the military authorities in the exercise of their martial law powers were not justiciable by the municipal courts, Wood Renton, C.J., observed: "(The municipal courts) have the right to inquire, and

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(17) Ibid, page 285.
(18) (1915) N.L.R. 277.

the duty of inquiring, into the question of fact, whether an "actual state of war" exists or not. But when that question has been answered in the affirmative, the acts of the military authorities in the exercise of their martial law powers are no longer justiciable by the municipal courts".(19)

Dealing with the contention that as the civil courts had been sitting all along, martial law had ceased to exist, the learned Chief Justice observed: "The question whether an actual state of war....exists or not is purely one of fact. The circumstance that the ordinary courts are open may constitute evidence, and material evidence, against the existence of such a state of war. But it is not conclusive. It is least of all conclusive where a country is in a state of unsettlement at a time when actual acts of violence may for the moment have ceased. The authorities when they have to deal with such circumstances as these may well regard the keeping open of the municipal tribunals as being itself a part of the healing process which it must be their endeavour to induce.... No authority was cited to me.....and I am aware of none which prevents the continuance of the exercise of the powers compendiously described as existing under 'martial law' during such a period of unsettlement."

Referring to the proclamation of martial law, His Lordship stated that such a proclamation "is in no way necessary to give martial law its efficacy and validity, any more than it would constitute an ultimate justification for acts in excess of what

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(19) Ibid.

the needs of the hour require. It is merely, what it purports in terms to be, a declaration to the whole community of the assumption by the Executive Government of powers which it already possesses".(20)

In Application for a Writ of Prohibition to be directed to the Members of a Field General Court Martial in the matter of Edmund Hewavitharatna(21) the Supreme Court held that it had no power to issue a mandate in the nature of a writ of prohibition to a court martial, as its powers were strictly defined and limited by the Courts Ordinance, 1889. Section 46 of the Ordinance enabled the Supreme Court to grant, inter alia, a mandate in the nature of a writ of prohibition, "against any District Judge, Commissioner, Magistrate or other person or tribunal". It was contended on behalf of the applicant that the expression "or other person or tribunal" included courts martial. In reply De Sampayo, A.J., observed: "It is clear to my mind that it refers to persons and tribunals ejusdem generis with District Judges, Commissioners and Magistrates and that the Courts here contemplated are the Courts established in the Island...., "for the ordinary administration of justice", and not courts martial, which exercise not an ordinary but an extraordinary jurisdiction under circumstances of paramount necessity of state".(22)

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(20) ibid, 280. In Tilanko v. Advocate-General of Natal, it was observed that"a proclamation of martial law is usually issued in order to give due notice and to call attention to the state of war, but in itself the proclamation has no effect" (1907) A.C. 93.

(21) (1915) N.L.R. 334.

(22) ibid. 339.

During the period of martial law instructions were given by the Officer Commanding the Troops to the Superintendent of Police, Central Police, to instruct his men in the drill prescribed for street blocking. In Wickramasinghe v. Coore[23] the facts were that the appellant, an Inspector in charge of about fifty constables, was engaged in carrying out the prescribed drill at a spot where it was expected that trouble might occur, and for the purpose of the manoeuvre two police officers crossed the drain on to the respondent's compound and one of them stood close against the verandah of the respondent's house. The respondent ordered them off, but they refused to go. A struggle ensued. The respondent was arrested and taken to the police station and subsequently charged with obstructing the police in the discharge of their duty, but was aquitted. He thereupon brought an action for damages for false imprisonment and malicious prosecution. The Court held that the police were justified in entering the respondent's compound by the direction of the military authorities and were not trespassers and the respondent had no right to eject them and that the act of obstruction of the police in the execution of their duty justified immediate arrest without warrant and entitled the appellant to prosecute the respondent before the Magistrate.

It was contended on behalf of the respondent that neither the proclamation of martial law nor the 'actual state of war' existing in the Island at the time would justify acts in excess of what the necessity of the situation required, and that the direction to drill

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(23) (1916) N.L.R. 97.

in a manner involving the necessity of trespass on private property, and in particular the actual drill undertaken by the appellant and his men, involving as it did an entry on the respondent's compound, were unnecessary and in excess of the needs of the occasion.

Referring to these contentions, Shaw, D.C.J., in the course of his judgement, observed:

"So far as the first part of this proposition is concerned it is perfectly correct, and an excessive and unnecessary interference with the persons or property of individuals would be illegal and justiciable by the tribunals of the country after martial law had been removed, unless the acts came within the protection of the proclamation or Act of Indemnity then issued or passed. I am quite unable, however, to accept the contention that the orders of the Officer Commanding as to the drills to be undertaken, or the conduct of the police in carrying them out as they did in this particular instance were unnecessary or in excess of the requirements of the circumstances".

"The directions were thought to be necessary by the officer to whom had been entrusted the safety of the Province, and it would certainly appear to me to be a most reasonable and proper precaution to prepare the police force to cope with the anticipated disturbance before it actually occurred, even if doing so involved a slight trespass on private property".(24)

Pedris v. The Manufacturers Life Insurance Company Limited,(25)

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(24) ibid, 100.
(25) (1917) N.L.R. 321.

raised "questions of great public interest and importance"[26]. The administrator of the estate of one Pedris brought an action to recover from the defendant company a sum of Rupees 25,000 due upon a policy of life insurance. The undertaking to pay in the event of death was a general one and not limited to death in any particular manner. Pedris was convicted by a Field General Court Martial of four charges including treason and sentenced to death. The sentence having been confirmed by the General Officer Commanding the Troops, he was shot in jail on July 7, 1915. On August 30, 1915 the Ceylon Indemnity Order in Council was promulgated. Section 4 of the Order provided that "the several sentences and orders pronounced by Military Courts held in the Colony during the continuance of martial law are hereby confirmed, and all persons tried by such courts and confined in any prisons.....shall continue to be confined there.... and such sentences shall be deemed to be sentences passed by duly and legally constituted courts of the Colony...."

It was held that Section 4 of the Order in Council prevented any question being raised for any purpose as to the jurisdiction of the Court by which the sentence was pronounced either over the charges on which the trial proceeded or over the person tried. The Order in Council did not amount to a declaration by statute that Pedris was guilty of the offences of which he was convicted. It was open to the plaintiff to lead evidence to prove that Pedris was not in fact guilty of the offences, though the record of the conviction was <u>prima facie</u> evidence of his guilt. The mere fact

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(26) ibid, 321. (per Wood Renton, C.J.)

that Pedris died at the hands of justice did not, the Court held, prevent his administrator from recovering on the policy.

Referring to the Indemnity Order in Council, Wood Renton, C.J., observed that it was an enactment which was not merely retrospective in character, but was brought into operation after the right sought to be asserted in the present action had accrued. "In the law administered by military courts", His Lordship observed, "an express distinction is drawn between the 'findings' of these tribunals and the sentences passed by them. If the framers of the Order in Council had intended to validate the former as well as the latter nothing would have been easier than for them to have said so..... Applying to the enactment in question the well established rule of law as to the interpretation of legislation of this character, I am not prepared to hold that there is anything in it which precludes Pedris's administrator from challenging the propriety of his conviction on the merits".(27)

The learned Chief Justice dealing with the argument ab inconvenienti which might arise from his decision, stated:

"If the guilt of Pedris has not been conclusively established by the Ceylon Indemnity Order in Council, 1915, is it so established by the production of the record of his conviction? An argument ab convenienti arises, in this connexion, in favour alike of the defendants and of the administrator. A person accused of murder is tried by a Judge of the Supreme Court with a jury at Criminal Sessions, is convicted, and sentenced to death. On a

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(27) ibid, 324.

case reserved on certain points of law, the propriety of this conviction is affirmed by the Supreme Court. If the contention of the administrator in this case is upheld, the legal representative of the convict may reopen the whole question of his guilt or innocence and have the charge of murder incidentally retried in an action on an insurance policy. On the other hand, human justice is fallible. Let us suppose that, after the execution of a person convicted of murder, conclusive proof is forthcoming that he was not the murderer. Is there any rule of public policy which makes it necessary to debar his relatives from proving his innocence for the purpose of recovering a sum of money for which his life had been insured? If we must choose between the inconvenience of reopening a criminal trial as a collateral issue in civil proceedings, and the injustice of preventing the relatives of a person, who has been wrongfully condemned and executed, from proving that fact in such an action as this, I prefer to incur the risk involved in the former alternative".(28)

Shaw, J., agreed with the learned Chief Justice stating the law as follows:

".....there is no reason to suppose that the object of the enactment (The Ceylon Indemnity Order in Council) was to give to the findings of the military courts any greater effect than those of the civil courts of the Colony, which were sitting and trying very similar cases at the same time, and I am unable to see that any principle of public policy requires the finding of a Military

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(28) ibid, 324-5.

Court not to be open to challenge in subsequent civil proceedings in cases where such challenge would be permissible had the finding been one of a Civil Court".(29)

The case was sent back to the District Court for further inquiry and adjudication.

If in re De Silva(30) the Supreme Court decided, in line with Irish and South African authorities,(31) that it was for the court to say whether such a state of necessity existed that martial law could be put into operation, in Pedris's case, the Court followed a hitherto untrodden path, guided by the light of the general rule of common law that a conviction for felony is of itself "no evidence in any civil proceeding that the person convicted has committed the felony",(32) in that it applied the rule to a court martial, giving a strict interpretation to the Indemnity Ordinance in favour of the subject.

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(29) ibid, 329.
(30) (1915) N.L.R. 277.
(31) Rex v. Allen, (1921) I.R. 241.
Rex v. Strickland, (1921) I.R. 317.
Ex parte Marais, (1902) A.C. 109.
(32) Leymer v. Latimer, (1878) L.R. 3 Ex.D.352.

iii. Defence Legislation during the Second World War.

After the outbreak of the war in Europe, the British Emergency (Defence) Acts, 1939 and 1940, were applied to Ceylon by an Imperial Order in Council. The Ceylon Defence (Miscellaneous) Regulations, on the lines of the British Defence Regulations were framed under the Acts. A few of them which were litigated upon in the courts are noticed below.

Regulation 1(1) of the Defence (Miscellaneous No.3) Regulations, 1940, provided for preventive detention. It enacted that "if the Governor 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 that he may be detained".

In a case in which the validity of an order of detention which did not set out the grounds for the Governor's belief to make the order was challenged, the Supreme Court held that it was not essential to set them out in the order. Don Philip Gunawardena, a member of the State Council, who was detained in pursuance of an order made by the Governor under this Regulation, escaped from custody. In Gunawardena v. Kandy Police[1] it was contended on his behalf that the custody from which he escaped was not lawful on the ground that the order of detention, on the face of it, was

(1) 1944 N.L.R. 399.

invalid in that it did not set out the conditions precedent to the making of such an order, that is to say, that the Governor had reasonable cause to believe that a certain state of things existed and that by reason thereof it was necessary to exercise control over the appellant. The court held that it was not essential to the validity of the order that it should set out the conditions precedent to the making of the order. Following obiter dicta in Rex v. Brixton Prison ex parte Pitt-Rivers[2], Moseley, J., observed that it would be desirable to include in the order the Governor's belief on reasonable grounds as to the category into which the detainee fell, but I am quite unable to say that the omission of such a statement is fatal to the validity of the order".[3]

In Vivienne Goonewardene v. Wijeyasuriya, [4] on a report by an officer of the Criminal Investigation Department to the Magistrate of Colombo that the Governor, under Regulation 1(9) had made an order against Mrs. Goonawardene, "which was deemed to be a warrant for her arrest" and that she had absconded or was concealing herself so that the warrant could not be executed, the Magistrate published a proclamation requiring Mrs. Goonewardene to appear at a specified place and time and also issued an order for the attachment of her property. The attorney of Mrs. Goonewardene filed an affidavit in the Magistrate's Court to the effect that Mrs. Goonewardene had told him five months prior to the Governor's order that she was leaving

(2) 1942 A.E.R. Volume I, 207.
(3) Gunawardena v. Kandy Police, 1944 N.L.R. 399 at 402.
(4) 1942 N.L.R. 487.

Ceylon immediately and that he had not seen or heard from her since that date. He believed that he carried out her intention and moved the court to cancel the order of attachment. The Supreme Court dismissed the application in revision holding that the attorney had no status to move the court to rescind the order, as Mrs. Goonewardene must be deemed to be in contempt till she came forward in response to the proclamation.

Regulation 14 provided, inter alia, that no person should have in his possession "any document or any record whatsoever containing information of any matter which would or might, directly or indirectly, be useful to the enemy". The proviso to the Regulation stated that no person would be adjudged guilty of an offence against the Regulation if he showed that the possession by him of the document or record in respect of which a charge had been made was not likely to prejudice the defence of the Island or the efficient prosecution of the war.

Under the proviso, it would be a defence if it could be proved that the information in the possession of the accused was not likely to be communicated to the enemy. In Sinniah v. Trincomalee Police(5) the accused was charged with attempting to obtain information relating to the conveyance of secret dispatches which would or might be directly or indirectly useful to the enemy in breach of Regulation 14(1)(f). The defence was that the questions put by the accused to a member of the Royal Artillery while travelling by train

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(5) 1943 N.L.R. 501.

as to whether the latter was carrying despatches for the Army or the Navy and where he dropped and picked up despatches on the line and whether he was returning to Colombo the next day were not likely to prejudice the defence of the Island or the efficient prosecution of the war. It was held that as evidence was led to prove that the accused was not likely to disclose confidential information to anyone much less to the enemy, the failure of the Magistrate to apply the proviso to the regulation to the defence of the accused was a serious misdirection which vitiated the conviction. The conviction was therefore set aside.

Regulation 19 prohibited the printing and publication of documents likely to cause disaffection among His Majesty's subjects and Regulation 20 prohibited publications which might prove prejudicial to public safety, the maintenance of public order or the efficient prosecution of the war. In King v. Wickrema Singhe(6) the accused was charged inter alia, with endeavouring to "cause disaffection among His Majesty's subjects in Ceylon by causing to be printed and published "a certain article in the Sinhalese newspaper 'Jana Saktiya' in contravention of Regulation 19(1) (a) and with endeavouring to influence public opinion, by the printing and publishing of the article, in a manner likely to be prejudicial to public safety, the defence of the Island, the maintenance of public order or the efficient prosecution of the war in contravention of Regulation 20(1)(a). The prosecution in establishing that the

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(6) 1941 N.L.R. 313.

accused was in fact the publisher, editor, and manager of the newspaper proved certain facts which invested the accused with such a degree of suspicion as to demand an explanation from him. It was held that in the absence of an explanation the court was entitled to form the opinion that the accused was directly responsible for the printing and publication of the articles.

It was further held that the statement in the article to the effect that 'the Government of Ceylon does not hesitate to do any wrong, whether it is to kill people in cold blood or to disseminate falsehoods in order to bring about race-hatred" amounted to an endeavour to cause disaffection among His Majesty's subjects in Ceylon. It was also held that the statement to the effect, "we remember 1915 Martial Law.....They (the Government) want to repeat the 1915 incidents in a greater measure..... This police power should be checked by the people" was prejudicial to the public safety and to the maintenance of public order.

Regulation 20A prohibited the publication of any report or statement relating to matters connected with the war which was likely to cause alarm or despondency. The proviso to the Regulation stated that "a person shall not be convicted of an offence against this Regulation if he proves:

(a) that he had reasonable cause to believe that the report or statement was true; and

(b) that the publication thereof was not malicious and ought fairly to be excused".

The accused in Attorney General v. Gunaratne (7) was charged

(7) 1942 N.L.R. 553.

with publishing, in contravention of this Regulation, an article entitled 'The fatal blow that Raja Rata would receive' in a Sinhalese newspaper, 'Sinhala Baudhaya'. The article contained the following sentences:

"A rumour has spread throughout the Anuradhapura District that our Ceylon Government has fixed dynamite at the sluices of ..... tanks which contain water sufficient for the production of adequate foddstuffs for the whole of the North-Central Province. There is a feeling among the people that, in the event of there being any danger from the enemy, the dynamite would be caused to explode and that the water would be made to flow out. Then the water in all these tanks would, like a sea flowing over the land, carry the whole of Anuradhapura with the people into the ocean". It was held that the article was likely to cause alarm and despondency within the meaning of the Section. The publication of a rumour, though it was expressly stated to be a rumour, was penalised by the Section. It was further held that mens rea was not an essential ingredient of the offence, Keuneman, J., observing, that in this Regulation, "no mental state is made an ingredient of the offence, but instead we find a proviso, which exempts the accused person from conviction, if he proves two things contained in provisos (a) and (b). I think it is not possible to resist the conclusion that the words "knowingly" or "intentionally" were deliberately omitted, and the burden definitely placed on the accused to prove the matters mentioned in

the proviso in order to escape conviction"[8].

Luveneris v. Vandriesen [9] indicates to what extent the court felt the need to curtail freedom of expression in a period of crisis. The appellant in the case was charged with contravention of Regulation 20 A for having gone to another person's house and said in the hearing of the members of that person's family words in Sinhalese to the effect "Your English and your English Government will be ruined when the Japanese come". "That statement which was made a few weeks after the raid in April was likely to cause alarm or despondency as found by the learned Magistrate," observed Wijeywardene, J. The court held that "the Regulation does not require any proof by evidence that certain witnesses thought that the statement would have that effect or that certain persons were in fact alarmed or made despondent. It is for the court to examine the statement and decide whether the statement is likely to have that effect". [10]

Though the civil rights of the subjects were thus curtailed during the war, it is remarkable that the Commander-in-Chief who was given control of the civil government did not arrogate to himself all the powers of the government, but permitted the civil government to be carried on by the Governor and the Board of Ministers.

In March 1942, Admiral Sir Geoffrey Layton was appointed Commander-in-Chief of Ceylon. As it was of paramount importance that there should be unified command during the emergency, in order

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(8) ibid page 358.
(9) 1943 N.L.R. 235.
(10) idem. page 236.

to ensure that military and civil defence measures were properly co-ordinated, the Commander-in-Chief was given control over the civil government. Admiral Layton, however, held his powers in reserve[11] and left the civil administration in the hands of the Governor and his Ministers. To facilitate close co-operation between the civil and military authorities, a war council consisting of the Commander-in-Chief, the Governor, the Ministers and the representatives of the Navy, the Army and the Air Force was set up. Thus, though there was some control of civil affairs, for the more efficient prosecution of the war, the civil administration was not taken over by the military authorities.

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(11) "When he (Admiral Layton) attempted to act as though the Board of Ministers could be ignored in the matter of taking important decisions, D. S. Senanayake (the Prime Minister) was roused to protest and to say that the Ministers might as well resign and leave everything to the Commander-in-Chief. A stormy scene nearly developed; but after some discussion Senanayake and the Admiral emerged from the Conference the best of friends." (John Kotelawala, An Asian Prime Minister's Story, page 57)

iv. Reserve Powers of the Governor

After a brief period of unsuccessful rule of its territories in the island by the Governor-General of India as part of its South Indian dominions, the British Government in 1802 decided to administer the territories as a separate unit with the status of a Crown colony, legislative, executive and judicial powers being vested in the Governor. To assist him in the exercise of these powers he had a council consisting of not more than five officials whose advice he was not obliged to follow. During the first years of its existence the members of the Council were the Chief Justice, the Officer Commanding the Troops, the Principal Secretary to the Government and two other officials nominated by the Governor. The Governor had the power to suspend or dismiss a member, while a member who disagreed with the Governor on any matter under discussion had the right to enter a protest in the minutes of the Council.

As a result of the recommendation of the Colbrooke Commission a change in the system was effected in 1833 by constituting a government by the Governor and Executive and Legislative Councils in place of the rule of the Governor and his Advisory Council. The Executive Council consisted of some of the principal officials in the country while Legislative Council had as its members nine officials and six non-officials, all the non-officials being nominated by the Governor. All laws and financial measures required the consent of the Legislative Council. Before Bills were submitted to the Council they were discussed by the Executive Council, but until 1860 the Governor's permission was required

before any Bill or subject for debate could be introduced. The Governor had the power to veto any Bill. In the beginning it was not certain whether the Governor could require the official members to vote for measures which he considered essential. On occasions he complained that he was "powerless and yet responsible", because official members at times declined to support his policy while the non-officials opposed it. It was later decided that the officials who were members of both Councils must support in the Legislative Council the policy which had already been decided upon in the Executive Council. The officials who were members of the Legislative Council only continued to insist that they should be free to vote against measures recommended by the Governor. But by the end of the 19th Century their freedom in this matter was curtailed, the Colonial Office laying down the rule that they must support the Governor when required to do so or else resign from the Legislative Council though not necessarily from the Civil Service. The Colonial Office expressed the opinion that the Governor's control of the official vote was "the essence of a Crown Colony". The purpose of the Legislative Council, it was pointed out, was merely to enable the Governor to learn the point of view of the public. It was purely an advisory body and the sole responsibility for all decisions was with the Governor. He could not possibly be held responsible for results if he was compelled to accept decisions of which he disapproved.

Both the Councils were purely advisory bodies; the Governor had the right to overrule their decision and adopt his own course of action.

He was responsible only to the Secretary of State for the Colonies. In fact, the Interpretation Ordinance, 1901 stated that "the Government shall mean the Governor". (1)

The Governor's powers remained through the years virtually unaffected though the membership of the non - officials in the Legislative Council was increased from time to time. In 1920 when the Ceylon (Legislative Council) Order in Council, 1920, creating a Legislative Council containing an non-official majority was brought into operation, the Governor was empowered to stop the proceedings in relation to any measure if he certified that it would affect the safety and tranquillity of the Island. The Order in Council provided that if the Governor declared that the passing of any measure was of paramount importance to the public interest, only the votes of the official members would be recorded in such a case and if a majority of such members voted in favour, the measure would be deemed to have been passed by the Legislative Council.

The Governor was required under the Royal Instructions issued to him in 1920 not to give his assent, except under very limited circumstances, to certain classes of Bills. They included Bills

(i) for the divorce of persons joined together in holy matrimony,

(ii) whereby any grant of land or money, or other donation or gratuity may be made to himself,

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(1) In strict legal theory, this position continued up to the end of 1947, but during the period of Donoughmore Constitution, this definition was virtually an anachronism.

(iii) affecting the currency of the island or relating to the issue of bank notes,

(iv) establishing any banking association or amending or altering the constitution, powers or privileges of any banking association,

(v) imposing differential duties,

(vi) the provisions of which would appear inconsistent with obligations imposed upon His Majesty by treaty,

(vii) interfering with the discipline or control of His Majesty's forces by land, sea or air,

(viii) of any extraordinary nature and importance, whereby the royal prerogative, or the rights and property of British subjects not residing in the island, or the trade and shipping of the United Kingdom and its Dependencies might be prejudiced,

(ix) ~~Any Bill~~ whereby persons not of European birth might be subjected or made liable to any disabilities or retrictions to which persons of European birth or descent were not also subjected or made liable,

(x) containing provisions to which the royal assent had been once refused, or which had been disallowed by His Majesty (subject to certain reservations).

Certain minor changes in the provision for certification of bills were effected by the Ceylon (Legislative Council) Order in Council, 1923. The Governor could now exercise the powers of certification himself or through an ex-officio member of the Council authorised in this behalf by making a declaration either before or after the votes were taken that the Bill, amendment or resolution was of paramount importance

to the public interest. Further, while stipulating that the votes of the official members only were to be taken into consideration, it did not prohibit the non-official members from exercising their vote or their votes being recorded.

The 1923 Order in Council as amended in 1924 set up a Constitution which the Donoughmore Commission described as "an unqualified failure".

With reference to the power of certification, the Commission observed:

"While remaining responsible to the Secretary of State, and ultimately to Parliament, for the good government of the country, he (the Governor) has been deprived of the power to enforce his policy except in legislative matters of "paramount importance". The value of this safeguard, if standing alone, is unquestionably small..... The Governor's powers of certification have never been used in Ceylon, and so far as we are aware have only once been threatened".(2)

Under the Constitution created by the Ceylon (State Council) Order in Council, 1931 on the recommendations of the Donoughmore Commission, the Governor's powers were increased on the principle, enunciated by the Commission, that every increase of self government must be accompanied by an increase in the Governor's reserve powers. Article 49 vested in him powers to act in emergencies. The article reads as follows:

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(2) Ceylon: Report of the Special Commission on the Constitution, 1928, page 24.

"49(1). Notwithstanding anything contained in this Order, whenever the Governor shall consider that a state of emergency has arisen or 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, provided that, in every such case, he shall make a full report immediately to the Secretary of State, and provided, further, that if the Governor with the advice and consent of the Council shall make provision by law to the satisfaction of the Secretary of State for the exercise by the Governor of such emergency powers, the Secretary of State may declare that this clause of this Article shall cease to have effect and on the publication of such declaration in the Government's Gazette, this clause of this Article shall cease to have effect accordingly.

(2) The Governor shall not consent to any Bill repealing or amending any such law as aforesaid unless he shall have previously obtained His Majesty's instructions through the Secretary of State."

The power under this Article does not appear to have been exercised during the period when the Donoughmore Constitution was in operation.

Under Article 22 the power of certification of bills was increased to cover a wider variety of circumstances. Previously this power could be exercised in matters which in the Governor's opinion were of paramount importance. Now in addition to such circumstances it could be exercised if the Governor considered that the Bill, resolution or vote in question was "essential to give effect to the provisions of this Order". Further it was provided that the Governor or an official

authorised in this behalf might declare by message addressed to the Speaker either before or after the votes of the members were taken that a Bill was of paramount importance or was essential to give effect to the provisions of the Order in Council, and "thereupon such Bill... shall have effect as if it had been passed by the Council".

Mr. Bandaranaike,(3) comparing this provision with the provision in the 1924 Order-in-Council said, "Under the previous Order in Council by which the Legislative Council of 1924 was inaugurated the power was exercised after full discussion in the House and it was exercised in this method. Some official on behalf of the Government was entitled to declare that the matter was of paramount importance, whereupon the only effect was that the votes only of the official members were counted. The result was a foregone conclusion. But that provision has been done away with under the present Article 22 of the Order in Council, and now at any stage an officer of State is entitled on behalf of His Excellency the Governor to declare a matter of paramount importance without the necessity of taking a vote at all. That means that the right is exercised before a full discussion takes place; and a full discussion of a measure with a view to airing out for what they are worth the opinions and views of the majority of the House is not permitted. (4)

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(3) Prime Minister of Ceylon from 1956.

(4) Quoted in S. Namasivayam; The Legislatures of Ceylon, page 42.

As the provision proved defective in working, the Ceylon (State Council) Amendment Order in Council, 1937 was passed to enable the Governor to exercise wider and more effective powers of legislation. Under the amended Order it was provided that if the Governor considered that it was necessary in the interests of public order, public health, or other essentials of good government or to give effect to any of the provisions of the Order, that provision should be made by legislation, he might, by message to the State Council addressed to the Clerk of the State Council explain the circumstances which in his opinion rendered legislation necessary and either

(a) enact forthwith as a Governor's Ordinance, a Bill containing such provisions as he might consider necessary or

(b) attach to his message a draft of the Bill which he considered necessary. If the Governor adopted the second alternative, he might at any time after a period of one month from the date of his message, enact as a Governor's Ordinance, the Bill proposed by him either in the form of the draft attached to his message or with such amendments as he might deem necessary after having considered any address which might have been presented to him within the period by the State Council with reference to the Bill.

Thus the amending Order enlarged the scope of the circumstances in which the power of certification could be exercised; more important still, it altered the method of its exercise.

From 1937 certification could be effected independently of the Council. The proposed Bill need not be read or declared in the Council as before, a mere message addressed to the Clerk of the Council, irrespective of the fact whether the Council was in session or not, was sufficient to effect the certification of a Bill. This change was the result of a series of actions by the Council to prevent the exercise of the power of certification by the Governor by resorting to a technical use of its procedure. On three occasions in 1937 it prevented certification of a Bill relating to increased salaries for certain police officers by moving motions of adjournment. Thus under Article 22 of the 1931 Order, it was in a position to have certification indefinitely postponed, by a member moving an adjournment motion as soon as the declaration relating to certification was to be made and thus shelving the matter for the time being.

Though the power of certification was widened and strengthened, it was not often used. It was exercised in 1932 for the enactment of certain provisions of the Income Tax (Amendment) Bill, 1932 and for the passing of the temporary levy on salaries of the Public Servants Enabling Bill, 1932 and for certain supplementary estimates relating to passages, holiday warrants and salaries of some European officers.

Under Royal Instructions issued to the Governor in 1931 he was required to exercise his veto in relation to a few new classes of Bills.

They were Bills

(i) whereby the rights and privileges of public servants might be prejudiced,

(ii) whereby in the opinion of the Governor the financial stability of the island might be endangered,

(iii) relating to questions of defence or public security, or any matter affecting naval, military, or air forces or volunteer corps or the control of aerial navigation or aircraft or the transport or means of communication of naval, military or air forces,

(iv) relating to or affecting trade outside the island, or docks, harbours, shipping, or any lands, buildings or other matters of naval, military or aerial interest or imperial concern,

(v) whereby persons of any particular community or religion were made liable to any disabilities or restrictions to which persons of other communities or religions were not also subjected or made liable, or were granted advantages not extended to persons of other communities or religions,

(vi) the principle of which had evoked serious opposition by any racial, religious , or other minority, and which in the opinion of the Governor was likely to involve oppression or unfairness to any such minority,

(vii) relating to or affecting the administration of justice in the island.

One class of Bills, (that is, Bills whereby persons not of European birth or descent might be subjected to or made liable to any disabilities

or restrictions to which persons of European birth or descent were not also subjected or made liable) to which the Governor's veto was attached under the Royal Instructions of 1920 was omitted in the Instructions of 1931. All the other classes along with the new classes mentioned above were listed in paragraph IV of the Royal Instructions dated April 22, 1931.

As under earlier Orders in Council the Governor was given power to reserve Bills for the signification of His Majesty's pleasure. (5) He was also empowered to attach to his assent to a law the condition that it be witheld from operation for a period not exceeding six months. (6) He could refer back to the Council for further consideration any Bill, with amendments proposed by him, and also could require that any bill which in his view involved an important question of principle should not be presented to him for his assent until it was passed by a two thirds majority of all the members of the Council, excluding the officers of the State and the Speaker or other presiding members. (7)

The Donoughmore Constitution which in many respects "resembled an English Borough Council, with ideas borrowed from the League of Nations system of committees (8) provided for ratification by the

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(5) Article 77
(6) Article 78
(7) Article 80
(8) L. A. Mills, Britain and Ceylon, page 40.

Governor of certain decisions of an Executive Committee under a Minister before any direction regarding that decision could be given to a Government department. Article 45(1) provided that "when the decision of an Executive Committee requires that any direction shall be given to any Government department concerned with subjects or functions in the Committee's charge, every such direction shall be conveyed to the head of such department by the Minister, or in writing by the Clerk to the Committee by the direction of the Minister but ..... no such direction shall be given until the approval of such decision by the Council and the ratification of the same by the Governor shall have been received by the Minister.....".

In 1940 this reserve power of the Governor led to what many considered a constitutional crisis in the island. It arose out of what was popularly called the Mooloya Incident in which a policeman who had gone with some other members of the police force to an estate to suppress certain disturbances, shot an Indian labourer. This led to a number of prosecutions in the Kandy Police Court. The State Council in the meanwhile had appointed a Commission to make a comprehensive inquiry into the incident. As it was thought advisable that the cases should not be decided during the inquiry, the Minister for Home Affairs directed the Inspector-General of Police to instruct

the Police Officers in charge of the prosecution not to oppose any applications for the adjournment of these cases. The Inspector General refused to carry out the direction on the ground that the Minister's decision had neither been authorised by the Executive Committee for Home Affairs nor been ratified by the Governor as required by Article 45. The Governor upheld the conduct of the Inspector General and questioned the constitutional propriety of the procedure adopted by the Home Minister with the result that the entire Board of Ministers resigned. The Ministers and the Governor differed in their view regarding the application of the Article. The Governor's view at first was that if an order and not a mere request, was given to a departmental head, a strict observance of the provisions of the Article was required especially if the order related to the administration of justice or to the execution of statutory duties by public officers. The ministerial view was that it had become almost a convention for ministers to give orders to departmental heads without seeking authorisation from the Executive Committee or ratification from the Governor. The Ministers urged in support of their view the fact that under paragraphs 3 and 4 of Article 45 action had never been taken for the purpose of specifying the decisions for which prior approval and ratification were

necessary and those for which such approval and ratification were unnecessary. (9)

The crisis was resolved by the Governor agreeing not to interfere with the issuing of instructions to heads of departments until a Select Committee had reported on the class of decisions and instructions of Executive Committees that needed reference to the State Council and to the Governor.(10)

The Governor was given power to dissolve the State Council at any time by proclamation. He was required to dissolve it at the expiration of four years from the completion of the last preceding general election if it had not been sooner dissolved. He was also required to dissolve it, if it rejected the whole of any appropriation bill, or if, in his opinion, by reason of the decision of the Council on any financial measure or on any motion expressly directed to test the confidence of the Council in the Board of Ministers, it was evident that the Board no longer retained the confidence of the House.

" The most striking constitutional development in the Governor's position was the great decrease of his executive

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(9) Sir Baron Jayatilake, the leader of the State Council said, "In actual practice, to a very large extent we have reduced Article 45 to a dead letter of the law. I have issued instruct-ions on behalf of my Ministry thousands of times without any reference to the Council, without getting the prior ratification of the Governor. I beleive it is the same case with my fellow ex-Ministers". (Debates in the State Council, 1940, Vol. 1. page 491).

(10) John Kotelawala, An Asian Prime Minister's Story, page 51

powers. This diminution naturally gave rise to certain compensatory safeguards, such as the increase in the classes of Bills to which the Governor's veto could be applied and the strengthening of his powers of certification, but these safeguards were intended only to be used very occasionally when some fundamental issue was at stake".(11)

Under the Constitution set up by the Ceylon (Constitution) Order in Council, 1946, which followed in the main the recommendations of the Soulbury Commission, no legislative powers were vested in the Governor-General, who replaced the Governor, but he was required to reserve for the signification of His Majesty's pleasure Bills dealing with

(i) Defence,

(ii) Orders in Council relating to defence and external affairs,

(iii) External affairs,

(iv) Currency and bank notes,

(v) The Royal prerogative,

(vi) Minorities,

(vii) Constitutional Amendments.

The Soulbury Constitution was fully in operation for a few months only, as the Ceylon Independence Act was passed by the United Kingdom Parliament in December 1947 and by February, 1948, the Dominion of Ceylon with "fully responsible status" came into being.

Under the Dominion Constitution the Governor-General was to

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(11) S. Namasivayam, The Legislatures of Ceylon, 48-49.

act, in the exercise of his powers and functions, "in accordance with the constitutional conventions applicable to the exercise of similar powers, authorities and functions in the United Kingdom by His Majesty".(12)

(12) Section 4(2) Ceylon (Constitution) Order in Council, 1946.

v. Emergency, 1958 - 1959.

The Public Security Ordinance, 1947, (No. 25 of 1947) like the (British) Emergency Provisions Acts of 1920 and 1953, is a permanent statute intended to provide for the enactment of emergency regulations in the interest of public security, the preservation of public order and for the maintenance of supplies and services essential to the life of the community. The Ordinance was amended by Public Security (Amendment) Acts of 1949 and 1953.(1) The summary given below is of the amended enactment as it was during the period of emergency in 1958-59.

Part I of the Ordinance deals with general provisions in regard to proclamation of emergency and Part II treats of emergency regulations which may be passed during the period when such proclamation is in operation.

Section 2 provides that 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 safety and the preservation of public order or for the maintenance of supplies and services essential to the life of the community, he may by proclamation declare that the provision of Part II of the Ordinance shall come into operation forthwith or on such date as may be specified. The provisions thus brought into operation will continue to be in operation for one month, but without prejudice to

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(1) It was further amended in 1959 by the Public Security (Amendment) Act (No.8 of 1959. See below).

the earlier revocation of the proclamation or to the making of a further proclamation at or before the end of that period. When a proclamation is made, the occasion for it should forthwith be communicated to Parliament and if Parliament is then separated by any such adjournment or prorogation as will not expire within ten days, it is required that a proclamation should be issued for the meeting of Parliament within ten days. The fact that the occasion of the making of a proclamation cannot be communicated to Parliament by reason that either House or both Houses does not or do not meet when summoned to meet, will not in any way affect the validity or operation of the proclamation or of the provisions of Part II or anything done under that Part, provided that Parliament is again summoned to meet as early as possible.

Under Section 3 the fact of the existence or imminence of a state of public emergency cannot be called in question in any court.

Section 4 provides that the revoca tion or expiry of a proclamation will not affect the past operation of anything duly done or any offence committed, any right or liberty, acquired or penalty incurred, or the institution of any action, or enforcement of any remedy under the Regulations while Part II was in operation.

Part II (Emergency Regulations) begins with Section 5(1) which empowers the Governor-General, on the recommendation of the Prime Minister or any other Minister authorised by the Prime Minister to act on his behalf in case of the latter's temporary absence or incapacity, to make such emergency regulations 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 maintenance of supplies and services essential to the life of the community.

Section 5(2) specifies, without prejudice to the generality of the powers conferred by the preceding Subsection, matters on which regulations may be made. It enacts that emergency regulations may:-

(a) authorise and provide for the detention of persons,

(b) authorise the taking of possession or control, by government, of any property or undertaking and the acquisition by government, of any property other than land,

(c) authorise the entering and search of any premises,

(d) provide for amending any law, for suspending the operation of any law or for applying any law with or without modification,

(e) provide for charging fees for permits, licences and other documents issued under the provisions of the Regulations,

(f) provide for payment of compensation and remuneration to persons affected by the Regulations, and

(g) make provision for the apprehension and punishment of offenders and for their trial by such courts other than courts martial and in accordance with such procedure as may be provided for by the Regulations and for appeals from the orders or decisions of such courts and the hearing and disposal of such appeals.

Section 5(3) enacts that any Emergency Regulation may be added to, altered or revoked by resolution of the House of Representatives or by Regulation made by the Governor-General under the preceding provisions of the present Section.

Section 6 provides for delegation of powers to authorities or persons specified in the Regulations to make orders and rules for the purposes for which the Regulations are authorised to be made. It is provided that Emergency Regulations may also contain such incidental or supplementary provisions as appear to the Governor-General to be necessary or expedient for the purposes of the Regulations

By Section 7 it is provided that Emergency Regulations and orders and rules made under the Regulations will have effect notwithstanding anything inconsistent with them in any other law so long as such Regulation, order or rule remains in force.

Under Section 8 no Emergency Regulation, and no order, rule or direction made or given thereunder is to be called in question in any court.

Section 9 provides for indemnity from legal proceedings for the government, officers and other persons for anything done in good faith in pursuance or supposed pursuance of any Regulation or order or rule made or direction given under the Regulation.

Under Section 11 every emergency Regulation is to come into force forthwith upon its being made and shall be deemed to be as valid and effective as though it were enacted in the Ordinance.

The provision for preventive detention under Section 5(2) has had a strange history. In the Ordinance of 1947 it appeared in the

Subsection as "(a) make provision for the detention of persons". By the amending Act of 1949 this paragraph (a) was repealed. But by the amending Act of 1953 it reappeared in a slightly different form as "(a) authorise and provide for the detention of persons".

Under the Ordinance of 1947 the Head of the State was empowered to make emergency regulations on the recommendation of the "appropriate Minister" who was defined as the "Chairman of the Executive Committee which, or the officer of State who, by or under the Ceylon (State Council) Order in Council, 1931, is given charge of the subject or function to which the proposed regulation relates". The substitution of the words "the Prime Minister or any other Minister authorised by the Prime Minister to act on his behalf under this Section in case of his temporary absence of incapacity" was necessitated by the change in the constitutional setup. But this amendment as well as the reintroduction of the provision for preventive detention was given retrospective effect by Section 5(2) of the amending Act of 1953 to validate action taken to suppress the general strike in Ceylon which began on August 12, 1953. Section 5(2) of the Act of 1953 declared that these two amendments would be "deemed for all purposes to have come into force on August 11, 1953, and any regulation made or act or thing done on or after that date under or by virtue of Part II " of the principal enactment would" be deemed to be and to have been as valid and effectual" as though the amendment had on that date been made.

The general strike of August 12, 1953, was intended to be a protest against Government's decision to increase the price of rationed rice. A fortnight before the strike the Prime Minister gave an assurance in the Parliament that his Government would not fail to see that law and order were maintained and that the people of the country would be able to go about their normal business peacefully in spite of threatened strikes. He said that hooligans would not be allowed to get the better of the right thinking and honourable citizens of the country. The Government had not, however, foreseen and was not prepared to meet the emergency caused by the complete standstill of public transport on August 12. There were sporadic outbreaks of violence and considerable damage to property, which made it necessary to take drastic action to prevent further violence. A state of emergency was declared. "A curfew was imposed and rigorously enforced. Some people thought that the Government's countermeasures were too severe.(1a) writes Sir John Kotelawala, who was then Minister for Transport.

The amending Act of 1953 which was assented to by the Governor-General on August 19 had to be given retroactive operation to validate the counter-measures taken by the Government.

The communal riots of 1956 and 1958 might have had their inspiration in the 'Sinhalese only' campaign which helped Mr. Bandaranaike's ministry win the last election. Politicians avid for power often forget that it is easier to create communal tension than

(1a) J. Kotelawala, An Asian Prime Minister's Story, page 90.

to restore public tranquillity. About two months after Mr. Bandaranaike became Prime Minister, communal disturbances between the Sinhalese and the Tamils broke out in the Eastern Province, particularly in the Gal Oya Development area, and some one-hundred-and-fifty people were reported to have been slaughtered by mobs. But this did not impel him to call an emergency. According to one observer, he survived that conflict because the police had acted firmly, "even against Government party politicians who were inciting people to riot."(2)

A Commission of Inquiry appointed to inquire into the outbreaks of civil disturbance in the Eastern Province between January 1 and September 30, submitted an interim report on December 22, 1956. The Commission was of the opinion that "both the Sinhalese and the Tamil communities appear to be living harmoniously and peacefully and the people seem anxious to forget the unfortunate events that occurred so suddenly"(3) The Commission felt that "a probe now into the unfortunate events that occurred so long ago, might have the tendency of not only raking up events which people generally desire to be forgotten and opening up wounds which are fast healing, thereby exacerbating their feelings; but may even have the possibility of stirring up communal discord again".(4) The Commission came to the conclusion that it would not be in the national interest to pursue the inquiry into particular incidents at that stage.

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(2) T. Vittachi, Emergency, 1958, page 46.
(3) The Interim Report of the Commission, Sessional Paper III - 1957. page 2.
(4) ibid pages 2-3.

In May 1958 communal conflicts again broke out. On May 23 the Federal Party Convention of the Tamils met, and while it was in session hooliganism spread. The first train derailment took place that day. Though law and order were set at nought and people were murdered in the public streets, no effective preventive action was taken; no state of emergency was declared. The Governor-General, it is reported, defying convention, paid a personal visit to the Prime Minister at his home in Rosemead Palace to impress upon him the need for firm, urgent action.(5) He hoped to persuade him to advise the Governor-General to proclaim a state of emergency, but the Prime Minister, it would appear, was confident that he would survive the period of disorder with a little luck and some judicious 'tide-watching', a phrase current in Ceylon, which is explained as "a common political game, perfected in newly-freed Asian countries where expediency takes the place of principle, and politicians spend their time watching, like surfboard riders, for the tide which is likely to carry them furthest".(6) Mr. Bandaranaike, who remembered that the proclamation of emergency in 1953 had been the death knell of Dudley Senanayake's Premiership, could not possibly take the recommended course, which he feared would render him unpopular with the people who voted him to power.

By May 26 communal bitterness in the provinces spread to Colombo "where cars were overturned and set on fire, and men were dragged out of buses, trolley buses and cars and beaten and robbed

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(5) T. Vittachi, Emergency 1958, page 54.
(6) T. Vittachi, op. cit. page 46.

in broad daylight in full view of hundreds".(7) Armed police parties were rushing from one trouble spot to another trying to quell the rioting. But the mob too went from place to place beating and robbing.

In the afternoon of May 27 the Governor-General declared a state of emergency under the Public Security Ordinance throughout the island and called out the armed forces to maintain law and order. The Tamil Federal Party and the Jatika Vimukta Perumana, a party formed by Sinhalese to preserve the Sinhalese language, were banned. The whole island was put under curfew from 6 p.m. to 6 a.m. and a Press censorship was imposed.

It was necessary to take this step, announced the Prime Minister, "in the interests of the whole country and the effective maintenance of peace, and law and order".(8) He appealed to all Ceylonese to assist the Government to maintain peace, law and order.(9)

"The declaration of a state of emergency" wrote the Times Correspondent on June 29, 1958, "came a day or two too late. Had it come earlier fewer lives would have been lost and a considerable amount of property would have been saved from fire and looting".(10)

The Correspondent was inclined to believe that the riots were engineered by a well-organised body of persons. "There has undeniably been a pattern," wrote he, "in the events that took place in Ceylon in the last week of May that suggests that a well-organised

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(7) The Times, (London), May 27, 1958.
(8) Announcement on May 27, 1958; Asian Recorder, May 24-30, 1958. page 2065.
(9) The Times, May 28, 1958.
(10) The Times, June 30, 1958.

body of persons, with money to spend, contributed to the acts of violence which were committed in various parts of the island. In Colombo, for instance, arson, looting and assault, in one area were invariably committed by hooligans whose normal haunts were other areas. In many instances they were transported to and from their scenes of crime in lorries, vans or cars. They made no mistake about whose houses they were to burn or whose shops they were to loot. Sometimes they acted with such expedition and despatch that it appeared that they had rehearsed their crimes beforehand.....This is not to say that this organisation - whatever it was - instigated and started all the violence which was committed between May 23 and May 27. The seeds of discontent had already been sown by the language controversy, and the organisation merely made the most of existing bitterness".(11)

Violence was so widespread on May 25, May 26, and May 27 that on these days the language issue was ignored; people were conditioned by mob feeling, and the situation had so deteriorated that it was impossible to maintain law and order. The proclamation of the state of emergency and the calling out of troops on May 27 immediately changed the situation for the btter.(12)

By June 29 Ceylon newspapers were permitted to print "comment and articles" on the emergency without censorship. The Prime Minister told a group of pressmen that day that they should decide what should be kept out of their newspapers if any matter was likely

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(11) The Times, June 30, 1958.
(12) ibid.

to rekindle friction between Tamils and Sinhalese. Restrictions on news reports and Parliamentary debates were to continue until the tension ceased.(13)

Commenting on the press censorship one critic remarked: "It is difficult to find a parallel for the harshness of the censorship imposed on the national press of Ceylon. Even during the Battle of Britain, when the British people, almost overpowered by a well-prepared and well-equipped Luftwaffe, were fighting back with their knees and their knuckles for their very existence, the press had never been gagged as tightly. News which was likely to create 'alarm and despondency' was left out and reports of troops, naval and air force movements were necessarily censored. But comment was always free. The British press and the reading public were still free to comment on and criticise the conduct of the war by the Government."(14)

The same critic, however, admits how beneficial it was to have kept the destruction of the Buddha image in the Nagadipa Vihare by the Tamils a secret. "If its destruction had not been kept a tight secret, all the vigilance and the guns of the armed forces would not have prevented a wholesale massacre of the Tamils."(15)

As under the Ceylon Constitution British conventions have to be followed, it is not easy to understand why the Prime Minister by a sheer self-effacement made the Governor-General the virtual ruler of the island during the emergency. During the war the King in the

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(13) The Times, June 30, 1958.
(14) T. Vittachi, Emergency, 1958, page 72.
(15) ibid, page 63.

United Kingdom declared a state of war on the advice of the Prime Minister who was authorised to carry on the war. Thus Sir Winston Churchill, the Premier, was in full control of the conduct of the war. In Ceylon, on the other hand, the picture presented was different. It was the Governor-General who was more in evidence in dealing with the situation. Two reasons are usually suggested for this. "The first and obvious reason was that Mr. Bandaranaike felt inadequate to deal with a situation which could not be tackled with words, however polished and eloquent they might be. The time for decision and action had arrived".(16) The varied experience of Sir Oliver Goonetilleke, the Governor-General, as a public servant, Minister, diplomat, negotiator, war councillor and Civil Defence Commissioner during the Second World War had fitted him exceedingly well to deal with an island-wide emergency.

At least one critic thinks (17) that "there was also a keener and more subtle reason for Mr. Bandaranaike's uncharacteristic self-effacement. His experience of tide-watching has given him a sharp prescience about the force and direction of the next wave of popular emotion. He realised that the administration of the Emergency Regulations, and the military activity necessary to bring the extremists under control, while giving a sense of temporary relief throughout the country, would inevitably cause a strong reaction among the people - both Sinhalese and Tamils. As most of the disorders were in the predominantly Sinhalese districts and since

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(16) Vittachi, op. cit. 76.
(17) id. page 77.

more Sinhalese were likely to be jailed, beaten up or killed by the armed services, the reaction from the Sinhalese against the Government was bound to be powerful.....The Prime Minister had decided to allow the Governor-General to take the spotlight so that he could also take the rap."

If there is anything to be learnt from the experience of Ceylon in handling the situation, especially from the delay in proclaming a state of emergency and the general attitude of Mr. Bandaranaike's government, it is that a proclamation of emergency should not be left to political parties in South Asia whatever be their number in the legislature, for political parties in South Asian countries are for the most part <u>not</u> parties founded to further political principles; some are little more than factions supporting the ambitions of a particular leader, but the object of most of them is to advance racial, religious, or linguistic interests. Administration of emergency powers with its consequent suspension of fundamental rights can only be left to the political party which commands a majority in the Legislature, if the political parties in the country are agreed on maintaining the Constitution and on other basic principles such as the necessity of immediate effective action to maintain the public tranquillity, and the use of the minimum necessary force for the purpose.

The Prime Minister's "uncharacteristic self-effacement", it would seem, was resolved when the Public Security (Amendment) Bill, sponsored by the government was sought to be passed. Soon after giving his assent to the Bill as passed by the Legislature, the

Governor-General, on March 13, 1959, issued a proclamation lifting the state of emergency which had been continued for nearly ten months. The Public Security (Amendment) Act, 1959 (8 of 1959) empowered the Prime Minister to call out the armed forces for the maintenance of public order, where circumstances endangering the public security in any area have arisen or are imminent and the Prime Minister is of the opinion that the police are inadequate to deal with such situation in the area.

The Act of 1959 amended the long title of the Public Security Ordinance of 1947 by substituting for the words "enactment of Emergency Regulations", the words "enactment of Emergency Regulations or the adoption of other measures."

As it was thought that any proclamation of emergency under Section 2 of the principal enactment would of necessity apply to the whole of the island, the Section was amended to specify that the proclamation would "come into operation throughout Ceylon or in such part or parts of Ceylon as may be so specified".(18)

Section 4 of the amending Act seeks to enhance the immunities given to persons exercising powers under emergency regulations or orders. The Section repeals Section 9 of the principal enactment and substitutes the following:

"No prosecution or other criminal proceeding against any person for any act purporting to be done under any provision of any emergency regulation or of any order or direction made or given thereunder

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(18) Section 3 of the Amendment Act.

shall be instituted in any court except by, or with the written sanction of, the Attorney General; and no suit, prosecution or other proceeding, civil or criminal, shall lie against any person for any act in good faith done in pursuance or supposed pursuance of any such provision."

The amending Act adds to the principal enactment a new Part (Part III) which confers special powers on the Prime Minister. As has been noted above, under Section 12(1) it is provided that "where circumstances endangering the public security in any area have arisen or are imminent and the Prime Minister is of the opinion that the police are inadequate to deal with such situation in that area, he may, by order published in the Gazette, call out all or any of the members of all or any of the armed forces for the maintenance of public order in that area".

Section 13 authorises any police officer or any member of the armed forces who is called out by order made under Section 12 to seize and remove any gun or explosive in the possession of any person and, for the purpose of such seizing and removing, enter any premises or place and search such premises or place or any person present therein, if a written authorisation to do so is issued to the police officer or member of the armed force by the Prime Minister or by any person appointed by the Prime Minister to act on behalf of the Prime Minister under the Section.

Under Section 16 the Prime Minister is empowered to make curfew orders in any specified area. Contravention of a curfew order will

be punishable by rigorous imprisonment for a month or a fine of one hundred rupees or both.

It is provided by Section 17 that the Prime Minister may declare by order any service to be an essential service where he considers it necessary in the public interest to do so. Where a service is declared an essential service, any strike or incitement to strike will be an offence, except when any cessation of work occurs in consequence of a strike commenced by a registered Trade Union solely in pursuance of an industrial dispute. A person found guilty of an offence under this Section after summary trial before a Magistrate is liable to rigorous imprisonment for a term not less than three months and not exceeding five years or to a fine not less than five hundred rupees and not exceeding five thousand rupees or to both such imprisonment and fine.

Section 18 provides for arrest, without warrant, of offenders and suspected offenders under Sections 16 and 17.

It is provided by Section 21 that an order made under Section 12, Section 16 or Section 17 will be in operation for a month from the date of its publication in the Gazette, but without prejudice to the earlier recission of the order or to the making of a further order at or before the end of that period. When an order is made under the above sections, the occasion for making it should forthwith be communicated to the Parliament in the same way as a proclamation of emergency by the Governor-General is required to be communicated under Section 2(3) of the Public Security Ordinance. If Parliament is then not in session, on account of an adjournment or prorogation

which will not expire within ten days, it is necessary that a proclamation should be issued for the meeting of Parliament within ten days. The fact that the occasion of the making of an order under the above sections cannot be communicated to Parliament by reason that either House or both Houses does not or do not meet when summoned to meet, will not in any way affect the validity or operation of the order or of the provisions of Part III or anything done under that Part, provided that Parliament is again summoned to meet as early as possible.

Subsection 3 enacts that an order made under Section 12 or Section 16 or Section 17, or the circumstances necessitating the making of such order shall not be called in question in any court.

An order made under any of these Sections may be amended or rescinded by resolution of the House of Representatives or by another order made under that Section.

Section 22 is specially remarkable in that it provides that "the provisions of this Part and of any order made under Section 12, Section 16 or Section 17 shall have effect notwithstanding anything inconsistent therewith or contrary thereto contained in any other law".

Section 23 confers that same protection as under Section 9 on any person for any act purporting to be done under any provision of this Part or any order made thereunder and for any act in good faith done in pursuance or supposed pursuance of any such provision.

Though the powers of the Governor-General to bring into operation, on the advice of the Cabinet, the provisions of Part II are still retained, the new Part confers very wide and effective

powers on the Prime Minister. He is empowered to call out the armed forces for the maintenance of public order in any area; he or his delegate can order the seizure and removal of any gun or explosive from any person and, for the purpose of such seizure and removal, order the entry by the police and the military of any place or premises and the search of any place, premises or person; he can issue curfew orders in any area; he can declare any service an essential service and prohibit cessation of work in the service; he can issue orders repugnant to any existing law and they cannot be called in question in any court. Recalling the fact that it was the 'Sinhalese Only' campaign which brought the present Prime Minister to power at the last elections, the minorities in Ceylon are apprehensive that the provisions of the new Part were intended to be used against them. It may be observed that the final phase of the last emergency centred mainly on religious differences rather than on linguistic divisions. The fears of the minorities are therefore probably justified. Anyway it is doubtful whether the assertion that "Ceylon affords an excellent illustration of the successful application of British forms of government to a country with an alien culture"(19) can any longer go unchallenged. For democracy in Britain and in other democratic countries of the west is not merely the rule of the majority, but the rule of the majority with adequate safeguards for the rights of the minority, whether these safeguards

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(19) S. Namasivayam, Aspects of Ceylonese Parliamentary Government, in Pacific Affairs, March 1953, page 76.

are enshrined in a Bill of Rights, or in an innate sense of justice permeating the public conscience. Freedom from fear is one of the fundamental rights to which minorities are entitled. It would appear that democracy in the sense in which it is understood in the west is on the wane in the "utmost Indian isle Taprobane".(20)

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(20) Milton, Paradise Regained, iv, 75.

CHAPTER X

CONCLUSION

In the preceeding chapters an attempt has been made to present a picture of the development of emergency powers, their variety and scope, the ways in which they are provided for and exercised and the controls which the Legislature and the courts seek to exercise over them. As these powers principally affect the civil liberties of the subject vis-a-vis the administration, some comments have been offered on the relationship between the executive and the citizen; how in the name of public order or efficiency, these liberties have been given scant regard by the executive. It remains to consider how emergency powers may be exercised efficiently and well without unduly interfering with civil liberties and tending to create in the subjects a habit of helotage which in the long or short run will culminate in the subversion of all democratic principles.

But before suggestions about improving emergency provisions are attempted, it is necessary to make a few further observations. Democracy in the South Asian countries is a top-dressing on a soil that is essentially undemocratic. The society there is hierarchical and the average man is not particularly unhappy about it. There has been no democratic tradition; the republics of ancient India, it would appear, were more oligarchic than democratic in character, notwithstanding the assertions of a few publicists who argue to the contrary. The average man in India is not obsessed with the notion that government is his business. He is apt to endorse Pope's

couplet, if a slight emendation is adopted,

For forms of government, let dons contest,

What e'er is best administered is best.

What he wants is not so much democratic government as good government which will help to provide him with the necessaries of life and possibly a few comforts too. It would be no great exaggeration to say that if Mahatma Gandhi in India or Quaid-i-Azam Jinnah in Pakistan desired to establish a dynasty of his own, there would have been no serious opposition to it except from some newspapermen, a few lawyers and a fewer university teachers, who would have failed to gain popular support for their views. If, after about a dozen years of democracy, it is suggested that Rajiv Gandhi(1) should be declared Mr. Nehru's heir apparent in the Premier's gadi, it requires no wild imagination to assume that, though there would be some opposition, it would be unlikely to prove effective.(2) As could be judged from recent events, a threatened resignation from Mr. Nehru would be sufficient to put an end to all serious opposition for the time being.

When the average Indian is thus indifferent to forms of government, the typical (and possibly unemployed) university

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(1) Premier Nehru's grandson.
(2) Consider the election of Srimati Indira Gandhi, the Premier's daughter, to the presidentship of the Indian National Congress. If a Nehru dynasty is not sought to be set up, it would appear, it is more due to the good sense of the Prime Minister than to the democratic sense of the Indian populace.

graduate who, almost invariably, gives political leadership to the masses looks wistfully at the progress made by Russia and China in recent years and declares:

What is best industrialised is best.

Congress leadership too seems to turn a deferential ear to expressions of this view, either because it believes in it or because it is inclined to adopt it as a vote-winning device. Congress, like the religion of the majority of its adherents, has a sponge-like quality of absorption. By use of the technique whereby Hinduism caused Buddhism practically to disappear from the land of its birth, Congress has stolen the thunder from the socialist parties by enunciating the ideal of a socialist pattern of society; it may not be long before Congress absorbs Communism into itself. Mr Nehru once said, "In India when we want to kill something, we deify it first."(3) It would not be surprising if India added Marx to its already huge pantheon. As has been observed, "the Marxists might end by wearing special caste marks".(4) This trend is evident in the recent draft issued by the Congress party's economic sub-committee. It was prepared by some Congress Ministers, the former President of the Congress and some others, and was discussed with Mr. Nehru. It contains some explosive material. The central theme of the draft is that planning cannot be effective so long as private enterprise is there to disrupt it. Everything

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(3) quoted in Alexander Campbell, The Heart of India, page 216.
(4) ibid.

therefore must be nationalised or managed as a co-operative. "The only private sector left shall be the self-employed. The State should control the co-operatives and the self-employed alike. Nobody except the State should be allowed to hire or fire unless the State expressly gave permission and even the self-employed would not be allowed to spend their savings on acquiring more of the means of production."(5)

Apart from the average Indian's indifference to forms of government, the economic condition of the masses also tends to tilt the balance against a democratic way of life. "From Aristotle down to the present, men have argued that only in a wealthy society in which relatively few citizens lived in real poverty could a situation exist in which the mass of the population could intelligently participate in politics and could develop the self-restraint necessary to avoid succumbing to the appeals of irresponsible demogogues."(6) A society divided between a large impoverished mass and a small favoured elite would result either in oligarchy or in tyranny.(7) "It is possible that Max Weber was right when he suggested that modern democracy in its clearest forms can only occur under the unique conditions of capitalist industrialisation".(8)

In this context, it may be mentioned that the optimism

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(5) Taya Zinkin, The Manchester Guardian, May 15, 1959, page 11.
(6) S. M. Lipset, Some Social Requisites of Democracy, The American Political Science Review, March 1959, page 69.
(7) ibid.
(8) ibid.

entertained by some enthusiastic democrats in the west about the Indian experiment in Parliamentary government, because India has not gone the way of Pakistan and Burma, does not appear to be well-founded. This optimism which may have a tonic effect on the western democratic spirit owes more to wishful thinking than to an accurate assessment of the realities of the Indian situation.

The situation in Pakistan and Ceylon is not entirely dissimilar. If Marxist tendencies are less prominent in Pakistan there has been far more enthusiasm for autocratic rule than for parliamentary democracy. Pakistan, it would seem, abhors a dictatorial vacuum, and only General Ayub Khan could fill the gap created by the loss of Jinnah and Liaquat Ali. The complacent attitude of the Pakistani population to the military dictatorship is proof enough that it is not specially wedded to the ideal of democracy.

In Ceylon, the facile acceptance of the monarchic principle by the common people may be illustrated from an intriguing practice which was followed in the Queen's House, the residence of the Governor-General. Until very recently the servants there referred to the Governor-General as Rajjuruwo (The King). "This grated so much on the supra-sensible ears of the Secretary ..... that he issued a general order laying down a new form of address: Utumano (the Noble One)".(9) Mr. D. S. Senanayake, the then Prime Minister of Ceylon, is reputed to have informed the Conference of Commonwealth Prime Ministers in April, 1949, "We had Kings of Ceylon

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(9) T. Vittachi, Emergency, 1958, page 70.

long before there were Kings of England"[10] and the Ceylonese probably see no reason why they should change a tradition which may have begun as early as 483 B.C. and which has continued through the Kings of Kandy and the British Crown for over 2,400 years.

The influence of the Marxists in Mr. Bandaranaike's coalition ministry is also a factor that should not be lost sight of. Thus dictatorship whether of the right wing or of the left is likely to be in the offing and this trend has been recently fortified by the Public Security (Amendment) Act, 1959, which vested extraordinary powers in the Prime Minister.

It may be that the divinity which once hedged a King in South Asia has vanished, but the pomp attached to the Kingly office has passed to the person in whom the reality of executive power is vested. One occasionally hears a session of the Indian Parliament described as a durbar held by Mr. Nehru and it would appear that there is unfortunately some substratum of truth in it.[11] India's ideal

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(10) quoted in Jennings and Tambiah, The Dominion of Ceylon, page 71.

(11) The fact that a few members of Parliament, including some members of the Congress Party, persistently interrogate ministers does not substantially affect the position taken up here. Sir Percival Griffiths seems to believe that they are "determined not to let their own government get away with anything" (Democracy under Strain in South Asia, Asian Review, April 1959, page 94). But the unpleasant truth is that the government does get away with almost anything it wants and the inquisitors cannot prevent it. The passing of the Hindu Code legislation, 1955-56, may be cited as a typical example, for it is impossible to believe that a majority of the elected Hindu members of Parliament could have any sentiment other than misgivings for such revolutionary legislation, profoundly disturbing their private lives.

ruler, in popular imagination, is the enlightened despot and not the plebian democrat. It may be that the Asoka Chakra symbolises the attitude of the majority of Indians.(12)

It is in the context of the complex situation in South Asia, in which a few dream of parliamentary democracy, and more gaze on the Marxist vision of the future, while the majority are politically inactive, beyond having a sentimental leaning towards enlightened despotism, that the provisions for, and the exercise of, emergency powers are to be reviewed. For the boundary between the curtailment of civil liberties during a crisis in accordance with a constitutional provision and their abrogation by a dictator relying only on his political power is easily crossed. That a victorious revolution or a successful coup d'etat is a legitimate method of amending a Constitution now appears to be a rule of constitutional law in Pakistan.(13)

It is sometimes said that a democracy cannot act with the same speed and effectiveness in an emergency as can a totalitarian or dictatorial government. This allegation seems to be groundless when one looks back upon the efficiency of the British democracy during the Second World War or of the American democracy in the Spring of 1933 or the Winter of 1941-42. It may be that in a

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(12) Asoka Chakra (Asoka's Wheel), seen on the Indian flag and the Indian coins, probably foreshadows India's wheel of fortune. It may not be long before the wheel makes a full circle, ushering in a beatific millennium of the enlightened despot.

(13) State v. Dosso, P.L.D. (1958) S.C. 533.

democracy only a real emergency will justify the suspension of constitutional limitations on the activities of the State and produce prompt and effective action. A fabricated emergency there would die a natural death. It may, however, be conceded that in a country where democratic institutions are not firmly established, and kept alive by the living breath of public opinion,(14) it may be necessary, as has happened more than once in British overseas possessions, to preserve democratic institutions by their temporary suspension.

It has been already observed that the interests of democracy are not best served by entrusting emergency powers to the majority party in the legislature in the special circumstances of the South Asian countries, where political parties are not necessarily composed of persons agreed on a programme of strictly political activities, but, when not mere factions, are usually formed to foster racial, communal, religious or linguistic interests. As democracy presupposes the guarantee of their rights to minorities, if a State is to continue to remain safe for democracy during a period of crisis, the emergency powers should not be exercised by a party prone to disregard the rights of minorities; the powers should be vested in a person or body of persons who are regarded as impartial

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(14) It has been said that "British democracy.....is a reality not so much because of careful observance of democratic forms and parliamentary usage, as because of the great potential influence of public opinion which is the keystone of the Constitution ....." (Lord Stamp in his Preface to Jennings, The British Constitution, page ix).

and above party affiliations. In the Constitution of India, these powers are formally vested in the President. "If the President is satisfied that a grave emergency exists ..... he may, by Proclamation, make a declaration to that effect."(15) It is commonly held that the President being a constitutional head is expected to make such a proclamation on the advice of the Council of Ministers, because, when India adopted the British Parliamentary form of government, it adopted the British constitutional conventions too. Furthermore a constitutional provision has to be viewed in its historical setting, and interpreted with its historical background in mind. Thus it was the British system of responsible government in which the Cabinet has the powers of ultimate decision, that was sought to be introduced into India by instalments during the British period and it was that system with which the Founding Fathers of India were familiar when they set about their task of making the present Constitution. In a democracy the popularly elected leader of the majority party is the real ruler of the country, in normal times as well as in times of crisis.

On the other hand, it may be argued that in a Constitution which makes provision for all conceivable eventualities(16) the omission to mention the advice of the Council of Ministers as a

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(15) Article 352.
(16) e.g. Article 220 which provides that no person who has been a permanent Judge of a High Court shall practise as a lawyer in any court except the Supreme Court and the other High Courts.

prerequisite for a proclamation of emergency may not be due to oversight(17). If historical background is taken into account, it may be pointed out that the Founding Fathers were familiar with the exercise of the emergency powers by the Governor-General in his discretion and there is no clear evidence that they expected the President to exercise these powers otherwise than in the same manner and on the same considerations as they were used by the British Governor-General. Lastly it is arguable that the President, though indirectly elected, is no less a leader and representative of the people than the Prime Minister. He is bound to preserve the Constitution and may be impeached for its violation, while the Ministers are protected under Article 74(2) which provides that what advice was tendered by the Ministers to the President will not be inquired into in any court. It would seem that the Founding Fathers who invested the President with certain express powers and made him responsible for his actions, could not have intended him to be a mere figurehead or rubber-stamp, even though he was not meant to be a President of the American type. A literal interpretation of the

(17) It is doubtful whether the general provision under Article 70 that there shall be a Council of Ministers to aid and advise the President in the exercise of his functions will cover a situation of emergency in which the President may make a Proclamation if he is satisfied that an emergency exists (Articles 352 and 360) or on receipt of a report from a Governor of a State or otherwise, that the constitutional machinery in the State has failed (Article 356). If, for instance, the President on receipt of a report from the Governor of a State is satisfied that the constitutional machinery in the State has failed, and if his Ministers who may be inclined to maintain in power the political party favoured by them, advises against a proclamation, is he bound by the advice, in view of his oath of office "to preserve, protect and defend the Constitution" and the unambiguous language employed in Article 356?

Indian Constitution would undoubtedly favour the view that the President exercises this power in his discretion(18).

Thus even if it be held, contrary to the common view, that the President makes a proclamation of emergency in his discretion, it would seem, that it is neither wise nor safe to leave the exercise of emergency powers entirely in his hand. For as has been pointed out before,(19) he may prove ambitious and entrench himself as a virtual dictator in the constitutional set-up. It may also happen that a well-meaning President will believe and act upon the belief that "the people have no right to do wrong"(20). When Mr. Iskander Mirza, the former President of Pakistan, spoke of 'controlled democracy' and President Sukarno of Indonesia of 'guided democracy', they were only endorsing the view expressed by the President of Eire. "It is a characteristic of almost every anti-democratic philosophy that it purports to serve the welfare of the people but refuses to trust the judgement of the people on questions affecting their welfare"(21).

If it is imprudent to entrust the Head of the State with emergency powers and if in the peculiar circumstances of the South

(18) The Supreme Court, it would seem, interprets the Constitution more like a statute than an organic document. For instance, it observed through Das, J., delivering the majority opinion in Keshav Madhava Menon v. The State of Bombay (1951) S.C.R. 228 at 232) "a court of law has to gather the spirit of the Constitution from the language of the Constitution. What one may believe or think to be the spirit of the Constitution cannot prevail if the language of the Constitution does not support that view. It is therefore quite clear that the court should construe the language.....according to the established rules of interpretation and arrive at its true meaning uninfluenced by any assumed spirit of the Constitution".

(19) A. Gledhill, Republic of India, pages 107-109. See Chapter VI.

(20) De. Valera, quoted in Sean O'Faolin, De Valera, page 115.

(21) H. S. Commager, Majority Rules and Minority Rights, page 57.

Asian countries, it is unsafe to leave them in the hands of the Prime Minister, who is to exercise these extraordinary powers in a period of crisis? One solution that suggests itself is the setting up of a Constitutional Council which may be empowered to declare a state of emergency and when once the declaration is made, the Cabinet can carry on the governmental powers including those prescribed by the Constitution to be exercised in an emergency. It may be suggested in the alternative that the President who is deemed to be above party politics may be granted the power to make a proclamation of emergency in his discretion, but the proclamation must be subject to confirmation by the Constitutional Council within, say, three days. Even if he is to make a proclamation on the advice of the Council of Ministers, confirmation by the Constitutional Council should be provided for.

The Constitutional Council might consist of the Vice-President, the Speaker of the House of the People, the President of the National Institute, former Presidents of the Republic and three members selected by the members already designated, not being members of Parliament or a State Legislature, or a Civil Service, or the armed forces; one of whom being an economist of outstanding reputation, another a former Chief Justice of a High Court and third, a scientist of recognised ability and integrity.

The Constitutional Council should be empowered not only to confirm a proclamation, but also to advise the President to make a proclamation and the President should be obliged to accept the advice.

In addition to this control of emergency powers by the Constitutional Council, it is necessary to provide for immediate and effective Parliamentary control. It is suggested that the Constitution should be amended so as to provide that Parliament should re-assemble within fifteen days of the issue of a proclamation of emergency, and that the House of the People should not be subject to dissolution while such a proclamation is in force.

The measures taken to meet the emergency, including the suspension of fundamental rights, should be adopted in consultation with the Constitutional Council.

In cases of proclamation of emergency due to failure of the constitutional machinery in a State, though confirmation by the Constitutional Council should be provided for, it may not be necessary to amend the present provision for Parliamentary control, envisaged under Article 356. There is no good reason why the House of the People should not be dissolved while a State constitution is suspended.

It would be desirable to set up Standing Committees of the House of the People and of the various State Legislatures, (of the Lower House where there are two Chambers) which may be empowered to review and confirm or reject certain emergency measures taken by the appropriate governments. These Committees might consist of members of all parties in the Legislature in proportion to their number in that body, and would be obliged to reside at the capital of the State throughout the year; if a member was unavoidably absent, the leader of the political party to which he belonged might be empowered to

appoint a substitute.

A declaration of martial law should be made subject to approval by the appropriate Committee. The practice of granting a general indemnity in a Martial Law Ordinance tends to create a number of little local sovereigns. These Dogberrys "clothed in a little brief authority" need protection, but it should be provided by the Legislature by ordinary legislation and not by Presidential or gubernatorial Ordinance. If the Legislatures are vigilant and refuse to grant immunity for acts done by way of misapplication of power (detournement de pouvoir), the public officers clothed with extraordinary powers under Martial Law Regulations would be less reckless in the exercise of their powers.(22) The practice of couching the immunity provision in such wide terms as to cover any act in good faith done or purported to have been "done in pursuance or supposed pursuance"(23) of any provision of a martial law regulation or other emergency provision is to be deprecated.

The power to make ordinances which though made by an individual or by the Cabinet, have the same force as an Act made after full debate by a legislature, should, in addition to being subject to parliamentary control as at present, be submitted to the Standing

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(22) As administered at present, martial law may even remind one of Shakespeare's lines:
"Like flies to wanton boys, are we to the gods;
They kill us for their sport." (King Lear, IV, i, 36-37)
with the difference that the place of the celestial god is taken by the common soldier. The British soldier soon found a place in Indian demonology; to-day the mere mention of martial law causes a contraction of the Ceylonese heart.

(23) These words appear in the (Ceylon) Public Security Amendment Act, 1959, Sections 9 and 23. (emphasis added).

Committee for approval before promulgation. The Standing Committee could be required to communicate their approval or disapproval within twentyfour hours. The present practice of presenting the legislature with a fait accompli made under an ordinance, when it is often impossible for the legislature to do anything but acquiesce, tends to deprive the legislature of a most important function. The Standing Committee, consisting of the members of all parties in proportion to their membership in the Legislature would be the legislature in minature and its approval, subject to the further approval of the Legislature at a later date, would ensure genuine parliamentary control. A convention would probably develop that an ordinance approved by the Standing Committee before promulgation, should not be thrown out by the Legislature, with the result that the time required for a detailed discussion of the ordinance in the Legislature would be saved.

Delegated legislation during a period of emergency presents special difficulties, as time may be an important factor to be reckoned with. But at least some of the safeguards suggested by Sir Cecil Carr could be adopted even during a crisis.(24)

"The delegation should be a trustworthy authority commanding the national confidence." If it is intended that the authority to whom a delegation is made should be authorised to make a further delegation of its powers, the Legislature should specify the

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(24) Concerning English Administrative Law, pages 49 ff.

subordinate authorities to whom such sub-delegation may be made, making sure that they are authorities in whom trust can be reposed. It would be desirable in appropriate cases to impose certain conditions to the exercise of the delegated powers by the authority to whom the delegation is made. "The limits within which the delegated power is to be exercised ought to be definitely laid down." These limits instead of hampering the authority, it is submitted, would enable it to act freely and easily within the well defined ambit.

Sir Cecil's recommendation regarding 'the prior consultation of interests specially concerned' may not in all cases be practicable in times of emergency. But it is desirable to consult them, when possible, as they could often put forward facts and circumstances which a public authority would be glad to take into account when drafting a statutory instrument.

The justification for delegation of legislative power is the waste of time, and the insuperable difficulties involved in making conprehensive laws dealing in detail with complex matters and changing circumstances. The Legislature should lay down the broad principles leaving the details to be worked out by the authority to whom delegation is made. Hence legislation empowering delegation must not grant powers to legislate on matters of principle. In some delegated legislation, the delegated authority has been empowered to legislate so as to by-pass existing legislation.(25)

(25) e.g. Section 22 of the (Ceylon) Public Security (Amendment) Act, 1959, which enacts that certain orders made under the Act "shall have effect notwithstanding anything inconsistent therewith or contrary thereto contained in any other law".

When the Mother of Parliaments tends to remove Henry VIII clause from the statute book, her young daughters seem inclined to emulate the foibles of her youth.

In the absence of a Select Committee on Statutory Instruments as set up in the United Kingdom by an Act of Parliament, it would be desirable to submit all statutory regulations and orders, including (to borrow Sir Cecil's descriptive phrase)(26) "the grand-children of the Act" to the scrutiny of the Standing Committee of the appropriate Legislature. If the Committee disapproves any regulation or oder, it may be withdrawn; or in the alternative it may be amended and resubmitted to the Committee.

Further, the statutory instruments may be laid before the Legislature with the recommendations of the Standing Committee.

The suggestions made above as applicable to India may mutatis mutandis be applied to Pakistan, if and when a democratic constitution is adopted in that country. In Ceylon, it would be desirable to enact a Bill of Rights in addition to adopting the suggestions given above. It may also be provided that the Bill of Rights should never be suspended except with the prior approval of the Constitutional Council. In the special circumstances of Ceylon, it is particularly necessary that a body which is above party and faction, and in whom the minorities have confidence, should be empowered to maintain a constitutional balance of power.

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(26) Concerning English Administrative Law, page 88.

In Ceylon, it would be feasible to provide that Parliament should meet within five days, after the issue of a proclamation of emergency, but only after the Constitutional Council has approved of the proclamation.(27) For it is not difficult in the small island for all the members of the Parliament to meet within a short period.

The provision suggested above, if adopted, may prevent the democratic principle in South Asia from being lost in a wilderness of arbitrary emergency proclamations, regulations, rules and orders, though it has been said that "laws and constitutions are but the paper safeguards of liberty. A people must have a will to be free."(28) But democracy is not achieved by acts of will alone: men's wills, through action, can shape institutions and events in directions that would reduce or increase the chances for the development and survival of democracy.(29) As observed by Mr. Justice Felix Frankfurter: "The liberties that are defined in our Bill of Rights are, on the whole, more living realities in the daily lives of Englishmen without any formal constitution because they are in the marrow of the bone of the people. Such habits become a national tradition <u>through constant renewal in thought and deed</u>".(30)

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(27) In the event of disapproval, the proclamation would cease to have effect.
(28) Carr, op. cit. 92.
(29) Lipset, op. cit. 103.
(30) Frankfurter, <u>Mr. Justice Holmes and the Supreme Court</u>, page 63 (emphasis added).

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