SOME ASPECTS OF EXECUTIVE DETENTION IN MALAYSIA AND SINGAPORE

This paper argues that executive detention must be sanctioned by either Article 149 or 150 of the Constitution. The question of judicial review is considered with a view to showing that:- (i) a court may not inquire into the subjective satisfaction of the Minister or President who has ordered the detention; (ii) but a court may and should inquire whether a detainee has sufficient information with which to raise objections before the Advisory Board.

I. INTRODUCTION

IF a man is in some sense dangerous to the well-being and integrity of the community, if, for example, his continued presence is highly likely to foment violence and great disturbance, then his detention may be salutary, if not also necessary, on the basis that prevention is better than cure. This idea of preventive detention though by no means uncontroversial finds expression in, for example, section 12 of the Singapore Criminal Procedure Code[1] which provides that a judge

[1] Section 12 of the CPC reads:

(1) Where a person who is not less than twenty-one years of age —

(a) is convicted before the High Court or a District Court of an offence punishable with imprisonment for a term of two years or upwards; and

(b) has been convicted on at least two previous occasions since he attained the age of seventeen of offences punishable with such a sentence,

then, if the court is satisfied that it is *expedient with a view to his reformation* and the prevention of crime that he should receive training of a corrective character for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass, in lieu of any other sentence, a sentence of corrective training for such term of not less than two nor more than four years as the court may determine.

(2) Where a person who is not less than thirty years of age —

(a) is convicted before the High Court or a District Court of an offence punishable with imprisonment for a term of two years or upwards; and

(b) has been convicted on at least three previous occasions since he attained the age of seventeen of offences punishable with such a sentence, and was on at least two of those occasions sentenced to imprisonment or corrective training,

then, if the court is satisfied that it *is expedient for the protection of the public* that he should be detained in custody for a substantial time, followed by a period of supervision if released before the expiration of his sentence, the court may pass, in lieu of any other sentence, a sentence of *preventive* detention for such term of not less than five nor more than fourteen years as the court may determine.

(3) Before sentencing any offender to corrective training or preventive detention the court shall consider the physical and mental condition of the offender and his suitability for such a sentence.

(4) A person sentenced to corrective training or preventive detention shall be detained in a prison for the term of his sentence subject to his release on licence in accordance with the provisions of *Schedule C* to this Code, and while so detained shall be treated in such manner as may be prescribed by rules made under section *393 of* this Code.

may, in certain circumstances and where it is expedient for the protection of the public, pass a sentence of preventive detention on an habitual offender.

There are moreover laws in Singapore and Malaysia that provide for preventive detention of another kind. Here, it is the executive and not the judiciary that is entrusted with the determination of whether a person, though not judicially established to be an offender in law and in fact, is "dangerous". Furthermore, it is the executive and not the judiciary that is vested with the power to order the preventive detention of the person suspected of being "dangerous". This kind of preventive detention raises all manner of issues not present in the other. To take only one of them — and it is no doubt the principal issue — public freedom is more at stake with this kind of preventive detention than the other because the judgment of its necessity rests with the very people who are directly offended. Moreover, that judgment can so easily spring from rules of political expediency; and "persons holding (undesirable) creeds may be regulated out of the way, although never deed was done or word uttered by them that could be charged as a crime".[2] I have therefore for the sake of clarity sought to distinguish this kind of preventive detention from the judicial kind by calling it executive detention.

My purpose in writing this paper is to argue that executive detention must be sanctioned by either Article 149 or Article 150 of the Constitution if the law empowering it is to be constitutionally valid. The question of judicial review of the act of detention is considered with a view to showing that:-

(i) although a court may not inquire into the subjective satisfaction of the Minister or President who has ordered the detention;

(ii) a court may and should inquire whether a detainee has sufficient information with which to raise objections before the Advisory Board or the Board of Review.

II. Constitutional Basis of Executive Detention

Both in Singapore and Malaysia the principal Act which authorises and empowers executive detention is the Internal Security Act (ISA).[3] The Singapore Act is *in pari materia* with the Malaysian and the differences between them are of little practical significance.[4] The ISA

[2] *Rex* v. *Halliday* [1917] A.C. 260, *per* Lord Shaw of Dunfermline.
[3] Cap. 143, Statutes of the Republic of Singapore, Rev. Ed. 1985 (*in pari materia* with the Malaysian Act).
[4] H.F. Rawlings, "Habeas Corpus and Preventive Detention in Singapore and Malaysia", (1983) 25 Mal. L.R. 324.

purports to have been passed under sanction of Article 149[5] of the Constitution.

Additionally in Malaysia, certain detention provisions[6] were passed during the 1969 emergency under Article 150[7] of the Malaysian Constitution and it seems that they remain in force to this day.

We might look first at the general nature of these two constitutional articles so as to see how they clothe the executive with the power to order detention. Without at this point going into the details, Article 149 confers on the legislature extraordinary lawmaking powers for dealing with subversion while Article 150 confers on the executive in certain circumstances and on the legislature generally extraordinary lawmaking powers for dealing with emergencies. Read

[5] Article 149. — (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside Singapore —

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property;

(b) to excite disaffection against the President or the Government;

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence;

(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or

(e) which is prejudicial to the security of Singapore,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 9,13 or 14, or would, apart from this Article, be outside the legislative power of Parliament.

(2) A law containing such a recital as is mentioned in clause (1) shall, if not sooner repealed, cease to have effect if a resolution is passed by Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

[6] *E.g.* s.4(l) Emergency (Public Order and Prevention of Crime) Ordinance 1969.

[7] Article 150. — (1) If the President is satisfied that a grave emergency exists whereby the security or economic life of Singapore is threatened, he may issue a Proclamation of Emergency …

(4) Subject to paragraph (b) of clause (5), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the President for his assent, shall not apply to a Bill for such a law or an amendment to such a Bill.

(5) (a) Subject to paragraph (b), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

(b) Paragraph (a) shall not validate any provision inconsistent with the provisions of this Constitution relating to religion, citizenship or language.

[8] Unless the doctrine of lapse, *i.e.* that the emergency legislation have lapsed because the state of emergency in fact no longer exists, applies; as to which, see *Teh Cheng Poh* v. *P.P.* [1980] A.C. 458.

with Article 151,[9] it seems clear enough that these powers include the power to enact laws providing for executive detention because article 151 says that a law providing for preventive detention made in pursuance of this Part of the Constitution must conform to its terms and since Articles 149 and 150 are contained in this Part, the reference to preventive detention clearly envisages that there is power within those articles to enact such law subject to the limitations in Article 151. The use of the words "preventive detention" may suggest that the power is to vest in the judiciary but it is clear from looking at Article 151 that executive detention is meant; for Article 151 ensures that a detainee will have access to an administrative review board and it would be odd that that review should assume that form if the detention were first to be sanctioned by the judiciary.

How extraordinary these powers are that are conferred by Articles 149 and 150 is self-evident. Any provision of law passed under Article 149 is valid notwithstanding any inconsistency with Article 9, 13 or 14 or which would apart from the Article be outside the legislative power of Parliament. Clause 5(a) of Article 150 declares that no ordinance or Act of Parliament passed under the Article shall be invalid on ground of inconsistency with any provision of the Constitution. So if it be contended that the detention provisions in the ISA infringe say, Article 9(1) which provides that no person's liberty may be abridged save in accordance with law, if it be contended that executive detention violates the principle that a man cannot be judge of his own cause or that a person under suspicion has no less right than an accused person to an open and public "trial",[10] then the short answer will be that Article 149 will validate those provisions. Again, if it be argued that the power to order detention is a judicial power[11] and that any law conferring power to order detention on the executive is void as infringing Article 93 which vests the judicial power in the judiciary, the irrefutable answer will be that Article 149 precludes those detention provisions from being void even though they would, apart from the Article, be outside the legislative power of Parliament. By

[9] Article 151 — (1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention —

(a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be; and

(b) no citizen of Singapore shall be detained under that law or ordinance for a period exceeding three months unless an advisory board constituted as mentioned in clause (2) has considered any representations made by him under paragraph (a) and made recommendations thereon to the President.

(2) An advisory board constituted for the purposes of this Article shall consist of a chairman, who shall be appointed by the President and who shall be or have been, or be qualified to be, a Judge of the Supreme Court, and two other members, who shall be appointed by the President after consultation with the Chief Justice.

(3) This Article does not require any authority to disclose facts the disclosure of which would, in its opinion, be against the national interest.

[10] *Ong Ah Chuan* v. *P.P.* [1981] A.C. 648 has decided that Article 9 requires conformity of the law enacted to the fundamental principles of natural justice. If then no person's liberty may be abridged save in conformity with fundamental principles of natural justice, it follows that every accused person is entitled to trial before an impartial tribunal, for that is a fundamental principle of natural justice. A suspected person cannot have less right to a fair trial on the basis of that suspicion.

[11] Discussed at greater length on p. 243, *infra.*

virtue of these Articles, the constitutionality of any law that enjoys their protection can never be impeached.

But the problem is that, apart from the legislation above discussed, there are other sources of executive detention. There is section 30 of the Criminal Law (Temporary Provisions) Act (CL (TP) A)[12] which provides that the Minister, if satisfied that some person is associated with activities of a criminal nature, may with consent of the Public Prosecutor, detain such person for a maximum period of one year. A more recent example is afforded by s. 33 of the Misuse of Drugs Act (MDA)[13] which empowers the Director of the Central Narcotics Board Bureau virtually to detain a person where it appears to him necessary so to do for the purpose of treatment or rehabilitation. These sources[14] of executive detention share one common characteristic. Their propriety does not derive from and cannot be traced to Articles 149 and 150. If these sections are valid, their constitutional basis must be found elsewhere.

Under what authority, however, may the legislature, apart from Articles 149 and 150, enact that the executive may imprison or detain persons without trial? The test whether an Act of Parliament is *ultra vires* its legislative power depends on whether it is for the peace, order and good government of the country.[15] Suppose that test be applied. Would executive detention *per se* be *intra vires* the legislative power because it would be conducive to the peace, order and good government of the country? Blackstone conceded that "… the legislative power … whenever it sees proper, can authorise the Crown, by suspending the Habeas Corpus Act for a short and limited time, to imprison suspected persons without giving any reason for so doing."[16] In

[12] S.30: Whenever the Minister is satisfied with respect to any person, whether such person is at large or in custody, that such person has been associated with activities of a criminal nature, the Minister may with the consent of the Public Prosecutor —

(a) if he is satisfied that it is necessary that such person be detained in the interests of public safety, peace and good order, by order under his hand direct that such person be detained for any period not exceeding one year from the date of such order; or

(b) if he is satisfied that it is necessary that such person be subject to the supervision of the police, by order direct that such person be subject to the supervision of the police for any period not exceeding three years from the date of such order.

[13] S. 37(2) of the Misuse of Drugs Act, Cap. 185, 1985 (Rev. Ed.).

(2) If as a result of such examination or observation or as a result of a urine test, it appears to the Director of the Central Narcotics Bureau that it is necessary for any person to undergo treatment or rehabilitation at an approved institution or institutions, the Director may require that person to attend any such approved institution for treatment or rehabilitation for such period as the Director may, after consulting the institution, determine.

[14] The provisions for detention of lunatics are distinguishable because they are not predicated upon the commission of any offence: it is not an offence to be a lunatic. See s. 35 Mental Disorders and Treatment Act, Cap. 178, 1985 (Rev. Ed.) Also distinguishable are the "detention" provisions in the Restrictive Residence Enactments involved in, *e.g., Assa Singh* v. *Menteri Besar, Johore* [1969] 2 M.L.J. 30.

[15] For an application of that test in Singapore, see *Re Choo Jee Jeng* [1959] M.L.J. 217 where it was contended on behalf of the applicant for habeas corpus that s. 3(1) of the Preservation of Public Security Ordinance in providing also for the security of the Federation of Malaya thereby exceeded the legislative power of the Singapore Legislative Assembly.

[16] Comm. i, 136.

the leading English case of *R.* v. *Halliday* the scope and extent of this extended legislative power in effect fell for judicial decision. The offending regulation, or so it was alleged, was regulation 14B of the Defence of the Realm (Consolidation) Regulations of 1914 which empowered the Secretary of State (in what was then wartime England) to order the internment of any person of hostile origin or associations. The House by a majority held that the power of executive detention was validly conferred on the Secretary of State. Nevertheless, the majority were no doubt influenced by the special circumstance of war regulations, and they did not purport to establish a general power of executive detention unlimited by purpose, time and space.[17]

The common law then comprehends the phenomenon of executive detention. But it is not a general power of executive detention. It is limited. Its validity does not linger beyond a short and limited time. There must be a proper purpose; as when "a country is heavily engaged in an armed conflict with a powerful and dangerous enemy".[18] Thus it has been held in the Australian case of the *Australian Communist Party* v. *The Commonwealth*[19] that the Communist Party Dissolution Act of 1950 was invalid because in the state of peace extant there was no justification to maintain a law that conferred ministerial power to detain persons believed to be disaffected or of hostile association. The ministerial power of detention is supportable only if it is raised as the defence power, as so it has been termed.[20] The later case of *Ex parte Walsh*[21] suggests that though war is not necessary, what you must have is no less than a crisis situation.[22]

Dixon J. in the *Australian Communist Party* case takes pains moreover to say:[23]

> "But what the defence power will enable Parliament to do at any given time depends upon what the exigencies of the time may be considered to call for or warrant. The meaning of the power is of course fixed but, according to that meaning, the fulfilment of the object of the power must depend on the ever-changing course of events; the practical application of the power will vary accordingly."

The defence power may justify executive detention where a country is heavily engaged in an armed conflict with a powerful and dangerous enemy and perhaps where in a state of peace certain elements are suspected of fomenting rebellion. The cases are few, but the attitude to executive detention is manifestly set against its liberal application. The Singapore case of *Re Choo Jee Jeng*[24] is quite limited in scope. All it decides is that the precursor of the ISA, *viz.* the

[17] It was of course unfortunate that the extent to which the power exists needed no discussion; Lord Finlay roundly declared that it was beyond all dispute that Parliament had power to authorise the making of the regulation there in question.

[18] (1951) 83 C.L.R. 1, 195.

[19] (1951) 83 C.L.R. 1.

[20] The Commonwealth of Australia is a federal entity and the defence power is given to the Federal Parliament. But the concept of defence power clearly is a general one. It means legislation which has for its object the defence of the realm.

[21] (1942) A.L.R. 359.

[22] See also *Lloyd* v. *Wallach* (1915) 20 C.L.R.l, 299.

[23] (1951) 83 C.L.R. 1, 195.

[24] [1959] M.L.J. 217.

Preservation of Public Security Ordinance, is not *ultra vires* the legislative power of Parliament. If that was ever in doubt, the provisions in Article 149 would now of course set it beyond the pale of controversy. One rather suspects that while Blackstone might have had other proper purposes in mind, the trend of the cases has been that only what is termed the defence power will justify executive detention.

The reason in part that the legislative power does not go beyond authorising executive detention save in exceptional circumstances is that it would otherwise encroach upon the judicial power. The judicial power eludes definition but the attempt of Griffith C.J. in *Huddart Parker* v. *Moorehead*[25] is often cited, namely, that it is:-

> "... the power which every sovereign authority must of necessity have to decide controversies between itself and its subjects, or between its subjects, whether the rights relate to life, liberty or property..."

Of course it may not in some instances be easy to decide whether the legislation in question infringes the judicial power. But legislation providing for executive detention speaks like a court order, declares in effect the guilt of the detainee and arguably also imposes punishment for that guilt that there is little room for doubting that it is a usurpation of the judicial power.[26] The cases are legion which establish that the legislature may not vest the judicial power in the executive; because that power may only be vested in the judiciary.[27] To say that something wider than the defence power will justify executive detention goes clean contrary to the marked division of powers so evident in the Constitution. When regard is had to the particularities of Articles 149 and 150, it would be very surprising if they were not based on extensions[28] of the common law defence power.

The similarity in substance between them is too marked to be attributable to coincidence. Moreover, if this defence power exists independently of Articles 149 and 150, we would be left with an anomalous result; in that a person detained under the ISA would have available to him all the safeguards required by Article 151 which would include having his case reviewed by a Board of Review but a person detained under the CL(TP)A or MDA need not have been furnished with any of these safeguards. The CL(TP)A does in fact afford him safeguards[29] but the point is there is nothing in the common law to allow him recourse to a review board.

There is of course this difference between the CL(TP)A and the MDA. Being a preconstitutional enactment, the case of *Assa Singh* v. *Mentri Besar, Jphore*[30] establishes that a preconstitutional enactment is not necessarily void because it infringes Article 9 of the Consti-

25 (1909)81 C.L.R., 330.

26 See, *e.g., Liyanage* v. *The Queen* [1967] 1 A.C. 259; *cf. Kariapper* v. *Wijesinha* [1968]A.C. 717.

27 See, *e.g.,* the judgment of Griffith C.J. in *The Waterside Workers' Federation of Australia* v. *J. W. Alexander* [1918] 25 C.L.R. 434, 442.

28 See *infra* at p. 9.

29 *E.g.*, that orders of detention shall be referred to an advisory committee and subject to confirmation by the President.

30 [1969]2M.L.J. 30.

tution; rather the requirements of Article 9 are simply read into the enactment so as to bring it into conformity with the Constitution as required by Article 162. But we are met by insurmountable problems when we try to read the provisions of Article 151 into the CL(TP)A. We are unable to do so because Article 151 is a limitation on laws enacted under Article 149 and 150. There is, so to speak, a condition precedent to be satisfied which is that the CL(TA)A must have been passed under either Article 149 or 150, but it evidently was not. Comparing the ISA and the CL(TP)A[31] how could it be that where the danger is so great and imminent as to engage the application of the ISA its application transpired to be more onerous than where a matter of lesser moment attends? The enactment of Articles 149 and 150 does rather exclude the possibility of finding justification for executive detention elsewhere in some other guise. This, it is suggested, is the proper conclusion. If the executive detention cannot be covered by those Articles, it cannot be covered at all.

III. Corollaries Of Argument

Two corollaries follow from the above argument that Articles 149 and 150 are the sole and exclusive sources of executive detention powers. The first is the implication that it has with respect to the interpretation of Article 149. There are enumerated in that Article certain actions the prevention of which by legislation attracts its protection. For that law to be validated by Article 149, it must not only contain the prescribed recital that action has been taken or threatened by a substantial number of persons:-

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property;
(b) exciting disaffection against the President or Government;
(c) promoting feelings of ill-will and hostility between different races or other classes of population likely to cause violence;
(d) procuring the alteration otherwise than by lawful means of anything by law established;
(e) acting in a manner prejudicial to the security of Singapore;

but the Act must also be designed to stop or prevent that action. This means that the prescribed recital is not a mere formula for window dressing purposes but supplies what are in effect grounds for detention if the legislature should choose to act by furnishing the executive with the power of executive detention. Put more accurately, an Act authorising executive detention will be *ultra vires* Article 149 unless that Act, apart from containing the recital, is designed to stop or prevent certain circumstances from arising which are spelled out in the recital. Suppose that such an Act provided for executive detention on the ground that the Minister is satisfied that the person to be detained is an undesirable alien, then it would be *ultra vires* Article 149 because it is hard to see how detaining an undesirable alien will necessarily contribute to stopping or preventing those actions there enumerated.

[31] Article 9(6) expressly exempts statutes like the CL(TP)A and MDA from challenge on Articles 9(3) and 9(4) grounds. Could it be implied that Article 9(1) is similarly treated? Answer: it would be a strange principle of interpretation that could produce this result.

The enumerated circumstances clearly are vital; but how are they to be construed? The second circumstance envisages exciting disaffection against the President or Government. Will criticism of the President or Government furnish a ground for executive detention? The fourth circumstance speaks of procuring the alteration otherwise than by lawful means of anything by law established. Will illegally meeting in large numbers with a view to petitioning Parliament or importuning Parliament to alter a law justify detention? It is certainly possible to read the second and fourth categories widely. Nevertheless it is suggested that a wide construction would be unfortunate. Consider, as has been shown, that apart from Articles 149 and 150, there can be no justification for executive detention. How odd it would be if the second and fourth categories were to be read widely! But how proper if the recital is understood to be aimed at acts of violence, hostility and force which openly and unambiguously strike at the very root and being of government!

The second corollary is this. Regard to the common origin of the common law defence power and the extraordinary powers in Articles 149 and 150 brings into sharp relief the distinction between the purposes the ordinary criminal law is designed to serve and those served by laws made pursuant to the Articles. The ordinary criminal law concerns itself with injuries to the society but the "special laws" if they may be so called apply to attempts to destroy the fabric of society and thus include the laws of treason, sedition, corruption, peculation and serious public order offences. There cannot and ought not to be any point of coincidence between the two. It may be said that of course there is some difference between the two; the ordinary criminal law predicates a trial and conviction of guilt whereas the special laws empowering detention proceed on suspicion. That however is not the point. Suppose for the sake of argument that the suspicion must be shown to be reasonable on evidence and a person is sought to be detained for causing a fight and inflicting thereby grievous bodily harm on a number of persons. It would be a mistake to say that such person is as well guilty of a breach of the criminal law as of the special laws. No principle is more irrefragable than that it is the intention that counts. You must find what the intention was. If it was to bring about the destruction of the government and the society by an armed rebellion, he must be detained. If it was not he should be charged with criminal assault or at the most some minor public order offence.

Without intending to labour the point, we might consider a case such as *Yeap Hock Seng* v. *Minister of Home Affairs.*[32] Suppose a man is arrested and charged under the ordinary law of the land with murder. The case against him is dropped for want of evidence. Now as the man walks out of the court he is immediately picked up and detained under s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. If the allegations of fact for detention coincide with the subject matter of the criminal prosecution, and the detention is allowed, there would have been the use of the extraordinary provisions contained in the Articles for the purposes for which the ordinary law sufficiently serves.

[32] [1975]2M.L.J. 279.

Abdoolcader J. frames the question as one as to whether "the applicant's detention culminating as an aftermath in these circumstances is in effect a *mala fide* and improper exercise of the powers of detention …". He relies on the Indian cases and concludes in these terms: "Mere circumvention of the ordinary process of law cannot by itself amount to *mala fides* as otherwise this would in most cases virtually result in rendering moribund and impotent the laws legally enacted to provide for preventive detention for specified purposes." With respect, the Indian cases were dealing with public order offences[33] whereas the case before the judge concerned murder. Murder is something ordinarily dealt with by the ordinary process of law. When a man is acquitted of murder by the ordinary process of law and immediately detained for public order purposes, how is *mala fides* absent?

V. Judicial Review Of Executive Detention

Turning now to the question of judicial review, the principal submission is that there has been a failure to distinguish between two classes of review, namely:-

(i) reviewing the sufficiency of the grounds of detention and allegations of facts where these are furnished for the purposes of enabling the detainee to make representations before an Advisory Board under Article 151; and

(ii) reviewing the act of detention itself.

First, what is the scope of review of the executive act of detention itself? As a general observation, one of the principal failures of the English law of administration — administrative law — is the failure to devise a rational and coherent and easily workable principle of review. The general idea seems to be that it is a matter of construction of the statute having regard to all the circumstances and context and that there is no formula of words which determines when there exists judicial review. This much appears from the Privy Council decision in *A–G* v. *Reynolds.*[34] The plaintiff brought an action for false imprisonment and compensation for unlawful detention, having been detained, it transpired on no evidence at all, under regulations made by the Governor following a proclamation of emergency. The validity of those regulations depended on the interpretation of the opening words "If the Governor is satisfied". In ruling that these words meant that the Governor had to be satisfied that reasonable grounds existed to warrant detention, the Board said:[35]

> "The facts and background of the *Tameside case, Liversidge* v. *Anderson,* the *Nakkuda Ali* case and the present case are, of course, all very different from each other. This is why their Lordships have reached their conclusion … in reliance chiefly on the light shed by the Constitution, rather than on such light as may be thrown on that regulation by the authorities to which reference has been made."

[33] See, *e.g., Sahib Singh Dugal* v. *Union of India* A.I.R. 1966 S.C. 340, *MasoodAlam* v. *Union ofIndia* A.I.R. 1973 S.C. 897.

[34] [1980] A.C. 637.

[35] *Ibid.,* at p. 659.

The light shed by the Constitution was a proviso which said that nothing should be held to be inconsistent with fundamental liberties to the extent that it authorises the taking, during a period of public emergency, of measures *reasonably justifiable* for dealing with the situation. If these measures had to be reasonable it could not be that the satisfaction of the Governor was purely subjective. Whether a court can intervene then is regarded as a case-by-case matter. The so-called authorities may afford little help.

Each case stands more or less on its own. To take just one of the three cases mentioned, *Liversidge* v. *Anderson*[36] was, like *R.* v. *Halliday,* a case spawned by war in which a man was detained by the Secretary of State under wartime regulations which empowered the Secretary of State to do so where he had reasonable cause to believe that person to be of hostile association so that it was necessary to exercise control over him. Notwithstanding the regulations spoke of reasonable cause and necessity of control, the House of Lords by a majority declined to review the Secretary's order of detention. An explanation *of Liversidge* v. *Anderson* consistent with the case by case approach that has taken root would be this. Parliament did not intend there to be judicial scrutiny because executive action in times of war are not normally intended to be fettered but must be swift and unhampered by fears of reprisals. Moreover, the Secretary was required by the regulations to make regular reports to Parliament which therefore would exercise overall scrutiny. If so, then in the light of the context, review was precluded; the remark of Lord Diplock[37] that the time has come to acknowledge openly that the majority in *Liversidge* v. *Anderson* were expediently and perhaps excusably wrong would be unnecessary.

Liversidge v. *Anderson* was unusual in that the question of review arose in a suit based on false imprisonment. Typically where a detainee seeks to question his detention order, he will apply for a writ of habeas corpus. That writ normally requires the court to inquire into the evidence so as to determine whether the detention is lawful or not. Normally also, the burden of proof of the lawfulness of detention falls on the detaining authority. Nevertheless, in the words of Lord Atkinson in *R.* v. *Halliday*[38]*:*

> *"*... if the legislature chooses to enact that he can be deprived of his liberty and incarcerated or interned for certain things for which he could not have been heretofore incarcerated or interned, that enactment and the orders made under it, if *intra vires,* do not infringe upon the Hebeas Corpus Acts in any way, whatever, or take away any rights conferred by the Magna Carta, for the simple reason that the Act and these orders become part of the law of the land."

It is well within the power of Parliament, if it so wishes, to enact for subjective satisfaction in executive detention. It follows that the question whether the court can scrutinise a detention order as well as the question who bears the burden of proof are matters for case-by-

36 [1942]A.C. 206.
37 *I.R.C.* v. *Rossminster* [1980] A.C. 952.
38 [1917]A.C. 260, 272.

case analysis. The case of *Greene* v. *Home Secretary*[39] should be understood in this light. In that case, the detainee sought a writ of habeas corpus and the Secretary of State deposed an affidavit stating baldly that the detention complied with the requirements of the regulations (the same as in *Liversidge* v. *Anderson).* For the House of Lords that affidavit was a sufficient answer; the House in effect, declined to go behind the allegations of facts.

The result must be right because the case is indistinguishable from *Liversidge* v. *Anderson.* If the *Liversidge* court denied the claim for false imprisonment on the ground that they had no jurisdiction to review the detention order for badness in law in a suit for false imprisonment that is conclusive of a claim for wrongful detention in a writ for habeas corpus. To allow the court to examine the sufficiency of the facts alleged under guise of habeas corpus proceedings would be inconsistent with the *Liversidge* decision.

There have been attempts of course to distinguish *Greene's* case in a manner so as to maintain "inviolate" the cardinal principles of habeas corpus, it is said. One attempt[40] is based on recognizing that all the applicant said in answer to the Home Secretary's affidavit was that he did not know why he was being detained. That was hardly a sufficient reply to warrant eliciting anything more from the Home Secretary. On the facts, it is said that all the case decides is that unless there is a proper challenge, the Home Secretary's bare affidavit will be enough. But if you make out a proper challenge, the Home Secretary must go beyond his affidavit and show that the facts justify the detention. The point of distinction is very technical and one wonders whether it can be made in view of the very broad treatment of the issue manifested in *Greene's* case.

The leading case of *Karam Singh* v. *Menteri Hal Ehwal*[41] is regarded as having laid down the position authoritatively in Malaysia. The detainee sought by way of habeas corpus to challenge his detention order, which contained the following recital:

> "whereas the Yang di-Pertuan Agong is satisfied with respect to the undermentioned person that, with a view to preventing that person from acting in any manner prejudicial to the security of Malaysia/maintenance of public order therein/maintenance of essential services therein, it is necessary to make the following order."

The detainee was informed that the ground of his detention was in acting in a manner prejudicial to the security of Malaysia. He argued that there was such a defect of form in his order as to render his detention unlawful; in that while he was apparently being detained for one of three purposes (in alternative), yet according to the grounds of detention, he was detained because he had acted contrary to one object. The Court quite rightly threw the argument out and held that he was lawfully detained. The short answer would have been that a defect of form was not indicative of failure on the part of the executive to

[39] [1942]A.C. 284.
[40] See C. Newdick, "Immigrants and the Decline of Habeas Corpus" (1981) *Public Law* 89, 94.
[41] [1969]2M.L.J. 129.

apply its mind. The Federal Court nonetheless considered fully the question whether it had jurisdiction to review the detention order. Applying *Liversidge* v. *Anderson* and *Greene's* case, it held that it had no such jurisdiction.

Two strands of reasoning may be discerned in the judgments. First, if in *Liversidge* v. *Anderson* the words "has reasonable cause to believe" precluded review, than *a fortiori* the words "if the Yang di-Pertuan Agong is satisfied" dp so too. Secondly, it shows that the Minister's affidavit was a sufficient answer.

From what has been said at the beginning of section V. of the paper, doubts as to the correctness of *Liversidge* v. *Anderson* can be dispelled. It is with the court's reliance on *Greene's* case that some difficulty arises. Counsel for *Karam Singh,* addressing the Court on this point, contended that *Greene's* was not relevant where the remedy of habeas corpus was entrenched in the Constitution. The Court would appear to have dealt with the issue cursorily. Where habeas corpus is "freely floating" as it were, all it takes to displace it is an appropriate legislative enactment to that effect. Would the fact of constitutional entrenchment make a difference?

The so-called Westminster Model reasoning[42] suggests that the features of habeas corpus are not "universally" preserved. What is preserved would be that English position then obtaining at the time of the coming into operation of the Constitution; that position would include the ratio in *Greene's* case, and hence the power to give the go-by to the requirements of habeas corpus.

There is in truth no clear cut answer. The interpretation of the fundamental liberties provisions poses a difficulty born out of a number of factors. It is a difficulty well illustrated by two cases. The case of *Chia Khin Sze* v. *The Menteri Besar State of Selangor*[43] concerned an application by a "detainee" under the Restricted Residence Enactment, for legal representation and for calling witnesses at an inquiry. The Court held that Article 5 was intended to be merely declaratory of existing law and the law anterior to the Constitution contained no right of representation by counsel in respect of an executive act. In the later case of *Aminah* v. *Sup of Prison Pengkalan Chepa, Kelantan*[44] Wan Suleiman J. dissented from that ruling. He did not give reasons though it may be suggested that the reason was that he took Article 5 for what it was, unfettered by any words of restriction. Unfortunately again when in *Assa Singh* v. *Mentri Besar, Johore* the Federal Court disapproved of *Chia Khin Sze's* and approved of *Ammah's* case, no reasons were given. But the Singapore case *of Lee Mau Seng* v. P.P.[45] is most telling in giving effect to the plain meaning of the constitutional right to counsel unless there be express words curtailing or abridging that right. If the Westminster reasoning were uncontroversial, that result would be odd. No doubt where there is any inconsistency between a provision within Articles 149 and 150 and Article 9, it will be resolved in favour of that provision and not Article 9, if, as *Lee Mau*

42 See *Ong Ah Chuan* v. *P.P.* [1981] A.C. 648.
43 [1958] M.L.J. 105.
44 [1968] 1 M.L.J. 92.
45 [1971]2M.L.J. 137.

Seng shows, the inconsistency is express or if necessarily implied. But *Karam Singh* had to do with the question of subjectivity of the Ministerial satisfaction and surely where the provisions of Article 151 already exist, it is necessarily implied that habeas corpus is not available.

As for Singapore cases, *Re Choo Jee Jeng* concerned the question whether s.3(l) of the Preservation of Public Security Ordinance, a precursor of the ISA, imposed subjectivity. The Court held on the authority of *Liversidge* v. *Anderson* that it did. *Re Ong Yew Teck*[46] construed "reason to believe" in the Criminal Law (Temporary Provisions) Ordinance 1955 to be outside the scrutiny of the court. On the detention provisions in the ISA, *Lim Hock Siew's* case[47] regarded the legislature as having entrusted the absolute power or the complete discretion to detain to the President. *Lee Mau Seng* has also quoted with approval the decision in *Karam Singh.* In two other cases, *Lau LekEng's* case[48] and *Wee Toon Lip's* case,[49] Wee C.J. has respectively held that habeas corpus is not an available remedy relating to the manner and conditions of detention and that *(inter alia)* lack of good faith in prolonging detention is not justiciable. The Singapore position would appear to be the same as the Malaysian.[50]

VI. ARTICLE 151 — EXECUTIVE REVIEW OF DETENTION

But even if the judgment of the Minister or President that a person must be detained cannot be questioned in a court of law, it is another thing to say that it follows that the adequacy of the grounds of detention cannot also be questioned on the ground that they do not supply the detainee with enough for him to be able to make representations to an Advisory Board. Whether there can be such a challenge must depend, unlike review of the Minister's satisfaction, on interpretation of Article 151. Put another way, review of the Minister's satisfaction in the case of detention under the ISA depends on interpretation of a particular section, namely section 8. Review of the adequacy of the information supplied to the detainee would still depend on interpretation of Article 151, notwithstanding there were a section in the ISA which provided that there should be no such review. If Article 151 demanded that the detainee must be adequately informed and if there were such a section in the ISA, that section would simply be void and of no effect.

Article 151 lays down a minimum procedure for review with which any law passed pursuant to Article 149 or 150 must comply. It says broadly that a detainee must be informed of the grounds of his detention and be given an opportunity to raise objections before an Advisory Board. That Board having considered the matter should submit recommendations to the Head of State within a period of three

46 [1960]M.L.J. 67.
47 [1968]2M.L.J. 219.
48 [I972]2M.L.J. 4.
49 [1972] 2 M.L.J. 46.
50 In, *Yit Hon Kit* v. *Ministerfor Home Affairs,* Malaysia (11 April 1986) the applicant in a rare case succeeded on a writ of habeas corpus on the ground that the criminal activities alleged against the applicant were too remote in point of law to justify the making of the detention order.

months. The Head of State may order the detainee be released from detention. The importance of Article 151 cannot be overstated. The acceptability of executive detention may in reality come to rest mainly on the quality and independence of the Advisory Board and the ease and facility with which the detainee may put his objections before that Board.

Now considering Article 151 in that light, is it conceivable that the constitutional framers having gone to the length of establishing a solid, praiseworthy and untrammelled principle of executive review should then in the next breath render it without efficacy by intending that it should not matter whether the detainee knows clearly why he has been detained? Moreover, the fact that the detainee is entitled also to the allegations of facts on which his detention is based (unless disclosure would be against the national interest) must surely reinforce this submission. The case of *Karam Singh* v. *Menteri Hal Ehwal,* it may be argued, has authoritatively ruled that the detainee need not be furnished with such information as may be reasonably necessary to enable him to make representations before an Advisory Board. But when we examine that case, we find the reasoning by which the learned judges proceeded to be unsatisfactory. In construing somewhat similar legislation, Indian courts had established that the information supplied to the detainee could not be so vague, irrelevant and insufficient as to prevent the detainee from availing himself of the opportunity of making representations before an Advisory Board.[51]

The Court held the Indian position inapplicable because:-

(i) the Indian power of detention was vested in mere civil servants whereas the Malaysian detention authority was the highest authority answerable to Parliament;

(ii) the presence of the word "procedure" in the Indian due process clause distinguished it from the Malaysian position and justified a departure from upholding the full implications of Article 151;

(iii) when the power to issue a detention order has been made to depend on the existence of a state of mind in the detaining authority, which is a purely subjective condition,... it would be wholly inconsistent to hold that it is open to the court to examine the sufficiency of the same grounds to enable the person detained to make a representation;

(iv) unlike in India, the detainee already received adequate protection because he was entitled not only to be informed of the grounds of detention and to be heard, but moreover, he had access to the allegations of facts grounding his detention as well as further clarifications and particulars upon request.

The first reason is saying that where the animus of executive detention is the Minister and not some civil servant, more responsible performance may be expected. The doctrine of ministerial responsibility may ensure that that power is not abused. That expectation

51 Notably, *Dwarka Das* v. *State of Jammu & Kashmir* A.I.R. 1957 S.C. 164; *Ram Manohar* v. *State of Bihar* A.I.R. 1966 S.C. 740; *Jagannath Misra* v. *State of Orissa* A.I.R. 1966 S.C. 1140.

would be less sanguine if the Minister were actually enjoined by the law to make a regular report to Parliament.

The second reason argues too much; it implies that where the term "procedure" occurs, the detaining authority is enjoined to ensure that form and spirit are scrupulously observed but not otherwise. It is not convincing.[52]

What about the argument that it is impossible to assert in the same breath the non-justiciability of the issuance of an order of detention and the sufficiency of information for making a reply? The two requirements however are different. An investigation into the sufficiency of information for purposes of replying involves asking whether the grounds of detention are clearly stated, whether as stated they are covered by the acts mentioned in Article 149 or 150, whether if there are allegations of facts, these are likewise clearly stated and pertain to the acts mentioned. An examination of the issuance of a detention order goes much further and requires haying regard to the sufficiency of the evidence which prove the allegations of facts to be true and arriving at the conclusion that the allegations of facts found to be true produce the inference of danger and violence. To allow the examination of one would not therefore be a *defacto* examination of the other. If the examination of the order of detention is proscribed, it does not follow that *a fortiori* the examination of reply is proscribed. Indeed if one conclusion entailed the other, Article 151 should preclude provision of allegations of facts but it in fact does not. There is a short answer to the fourth reason; it fails to note that further particulars will only be supplied if the Minister sees fit. But the real point is that when the framers of Article 151 have taken pains to spell out that the detainee may ask for additional particulars, there would seem to be a stronger inference that the court can inquire into the sufficiency of the information supplied rather than that the court cannot.

In the Singapore case of *Lee Mau Seng* v. *P.P.* the Court followed the Malaysian approach and likewise rejected the Indian approach, citing additional reasons why they did so. The power of the Indian Parliament to make laws specifying the circumstances in which a detainee may be detained for longer than three months was said to be pertinent, for under the Singapore Constitution prolonged detention would be invalid unless the requirement of Article 151 was satisfied and there was nothing that Parliament could do about it. This may be supposed to be saying that because in India, Parliament may make laws so as to remove the right of representation entirely (although in specified circumstances) the Indian courts are thereby rightly more solicitous of the detainee's right of representation where that has not been legislatively removed. But if the Indian advisory boards have less in that they may be bypassed, they have more in that their recommendations must be adopted. Contrast the position here in which though Parliament may not bypass the Advisory Board, yet the Board has less influence in that the Head of State is not obliged to adopt their recommendations. The point of distinction is by no means conclusive. Then it was said that there was another vital difference. The Indian

[52] This was Lee Hun Hoe C.J.'s view in *Tan Boon Liat's* case [1977] 2 M.L.J. 108. See also *Athappen a/l Arumugam* v. *Menteri Hal Ehwal Dlm Negeri, Malaysia* [1984] 1 M.L.J. 67.

Central Government had to revoke a detention order if the advisory board reported the existence of insufficient cause for detention whereas the decision of the President could depart from the Board's recommendations, was final and could not be questioned in any court of law. But how is that relevant when the issue is sufficiency of information? The detainee is not seeking to challenge the President's decision which would require him to consider the evidence and likelihood as with the Minister. The appeal to this point of distinction would also seem to fail. The court decisions are, it is suggested, unsatisfactory. If they had rested entirely on the argument that reviewing the sufficiency of information for making representations would be inconsistent with the provision in section 8 of the ISA for subjective satisfaction, they would be clearly wrong; for they would have missed the whole point which is: notwithstanding section 8, what does Article 151 require? The matter would then have been *res Integra.* Nevertheless, although they rest on other grounds, this being a matter devoid of previous authority, it is suggested that the unsatisfactoriness of the reasoning as a whole makes the position *res integra*[53] and that a court ought to be able to exercise the very limited review here contended for.

VII. CONCLUSION

Briefly, to conclude: The problem of executive detention is how to wield a power designed to preserve the very existence of society and yet maintain it as an acceptable rule of action. Open trial and proof of guilt are anchors of a free society; secrecy and suspicion, the basis of executive detention. How then to guarantee that that power is not transformed from an instrument of preservation into destruction?

That guarantee, the Constitution gives in Articles 149, 150 and especially 151 and I have tried to show:-

(i) that these Articles alone supply the legal authority for executive detention legislation;

(ii) that where such legislation provides for detention on the subjective satisfaction of the Minister or President, no court of law is entitled to enter into the merits of the detention;

(iii) but a court of law may and should exercise judicial review to ensure that the detainee is furnished with reasonably sufficient information for the purpose of making representations to the Advisory Board

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[53] Although ordinarily faulty reasoning does not detract from the status of a decided case as authority, we are dealing here with constitutional issues.

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