PREVENTIVE DETENTION IN SINGAPORE — A COMMENT ON THE CASE OF LEE MAU SENG

Preventive detention, or detention of persons considered by the government to be dangerous to the existing political order, is a natural weapon in any government's armoury. Not surprisingly therefore it involves an exception to those principles of social justice which are gaining universal endorsement,[1] if not acceptance: the right of free speech and free association; the right to personal liberty save for violation of the criminal law — this safeguard being intended to protect the individual from punishment for actions which he could not clearly have foreseen to be illegal, whereas preventive detention is for actions far less specific than under the criminal law; the right to an open trial in court — this being the means by which the executive actions are publicly and in theory impartially tested by the courts for their conformity with law.

It is an area involving high policy and confidential information, an area in which action is based on speculation rather than proof and for these reasons an area in which the courts can have only a limited role to play.

Preventive detention was introduced in Singapore by means of temporary regulations during the 1948 Malayan emergency. In 1955 when the first legislative assembly of the colony was established the Chief Minister, David Marshall, proposed to supersede these regulations with legislation which was in some respects more liberal than the former.[2] The legislation, the Preservation of Public Security Ordinance, was inspired by the preventive detention laws of India, Pakistan and Burma but, in the Chief Minister's opinion, was more liberal than these. For the first time the ultimate decision on whether to detain a person was entrusted to a panel of three judges and not to the executive itself.[3] Considering the seriousness of the civil disturbances at the time and the endemic strikes the legislation was indeed moderate. It was to remain in force initially for a period of three years, the Chief Minister

1. See United Nations, International Covenant on Civil and Political Rights.
2. See generally Singapore Legislative Assembly, Official Record, 1955-56. Vol. 1, pp. 695-706.
3. Preservation of Public Security Ordinance, ss. 5(4), 6, and 7.

stating that it was not intended to be permanent.[4] Subsequently on Singapore's entry into Malaysia in 1963 the Malayan Internal Security Act was extended to this country.[5] One year later the operation of the Preservation of Public Security Ordinance was suspended during the operation of the emergency regulations.[6]

The constitutional framework in Singapore is complicated. Singapore gained independence from Britain in 1963 when its new Constitution was passed by Order in Council and, with Sarawak and Sabah, it entered Malaysia as a State in the enlarged Federation. It was also subject to the Malaysian Constitution. In 1965 Singapore seceded from the Federation to become an independent State. Instead of formulating a new Constitution on independence, Singapore retained an amended form of the 1963 Constitution and by virtue of the Republic of Singapore Independence Act, an Act of the Singapore Parliament, various provisions of the Malaysian Constitution remained applicable to Singapore. Thus its constitutional law is derived from the 1963 Constitution (the Order in Council), various statutes of the Singapore Parliament, and the Malaysian Constitution.

Among the important Malaysian constitutional provisions kept in force in Singapore are those relating to fundamental rights of the individual, the emergency and preventive detention. The 1964 Emergency proclaimed in Malaysia by the Yang di-Pertuan Agong applied to Singapore and will continue in force until terminated in accordance with the Malaysian Constitution, that is either by the President or Parliament. Until such time the Internal Security Act remains in force, while the Preservation of Public Security Ordinance, with the provisions more favourable to the individual, remains in abeyance.

Thus the written constitution did not provide the rubric for legislation on preventive detention in the days of the Preservation of Public Security Ordinance. This is of course not the case with the virtually identical Internal Security Act which was enacted in the Federation in 1960 under the 1957 Merdeka Constitution. This Constitution grants as legal rights the human rights mentioned above and substantially limits the power of the legislature to abrogate them.[7] A special place is provided for laws on preventive detention in Article 149 of the Constitution,

4. Legislative Assembly, *op. cit.*, pp. 702-703.
5. L.N. 231/63.
6. L.N. 335/65: Regulations 6 and 7.
7. See Arts. 5, 7, 9, and 10.

which states that in certain circumstances such legislation is justified.[8] The Constitution thus controls only the passing of legislation not the use of that legislation once it has been passed. Such legislation is valid notwithstanding inconsistency with the fundamental rights contained in Articles 5, 9 and 10 of the Constitution. It must however comply with the requirements of Article 151 — that is, it must require the detainee to be informed of the grounds of his detention, the allegations of fact on which the order is based and it must enable him to present his case before an advisory board. Whether or not the meeting of the advisory board depends on the detainee's request or whether it is compulsory has not yet been decided.[9]

A detailed examination of the legislation on preventive detention demonstrates the limited power of the courts to control executive action. In two reported decisions the courts have struck down the government's action for failure to comply with mandatory procedural provisions and the detainees have been discharged from custody.[10] However, cases attempting to challenge the government motives in detaining a person have been unsuccessful. The most recent case, *Lee Mau Seng* [11] discusses many constitutional and administrative law issues raised by preventive detention laws, and above all demonstrates the judiciary's conception of its role in this field.

To understand the case it is necessary to outline some relevant provisions of the Internal Security Act. Under section 74 of the Act, any police officer may, inter alia, arrest a person whom "he has reason to believe" to have acted or to be likely to act in a manner prejudicial

8. Art. 149 *[Legislation against subversion]* reads:

(1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation —

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

(b) to excite disaffection against the Yang di-Pertuan Agong or any Government in the Federation; or

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

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

(e) which is prejudicial to the security of the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9 or 10, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

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

9. *Cf.* Art. 151(2).

10. *Lim Hock Siew & Ors.* v. *Ministry of Interior and Defence* [1968] 2 M.L.J. 219; *Soo Kua* v. *P.P.* [1970] 1 M.L.J. 91.

11. [1971] 2 M.L.J. 137.

to the security of Singapore and whose detention would be necessary to prevent him from so doing. The section then empowers his detention for a period not exceeding 28 days provided that an officer above the rank of superintendent so directs. If at the expiration of this period the President is satisfied that he should be detained, an order of detention must issue (otherwise he will be freed). It is in this period following the order that the detainee is entitled to a hearing before an advisory board chaired by a person with judicial qualifications and composed of two other members appointed by the President on the Chief Justice's Advice. The advisory board has many of the powers of a court but its decision is not final and conclusive nor does it bind the government. The board merely submits its recommendations to the President who takes them into account in reaching his decision. It can thus be seen that this legislation differs significantly from the Preservation of Public Security Ordinance,[12] and that under it the ultimate decision whether or not to detain rests with the executive.

Lee Mau Seng was arrested without warrant on 2nd May 1971 and detained in police custody for twenty days under section 74 of the Act. During this period he was denied access to his solicitors despite their requests to see him. On 22nd May, he was served with an order of detention under section 78 ordering his detention for a period of two years, and was supplied with the allegations of fact on which the order was based. His representations to the advisory board were unsuccessful and he applied for habeas corpus to obtain his release.

The first issue before the court was the legal consequences of the denial of counsel. The Attorney-General alleged that the right to counsel was not available to those arrested under the Internal Security Act because section 74 of that Act was inconsistent with Article 5 of the Constitution in which the right to counsel is stated. He urged that by virtue of Article 149 of the Constitution any law like the Internal Security Act enacted under that section is valid notwithstanding inconsistency with Article 5. The Attorney-General relied firstly on section 74(7) which states that "any person detained under the powers conferred by this section shall be deemed to be in lawful custody." He contended that this section raises an irrebutable presumption that the detained person is lawfully detained. Since the denial of counsel would render the custody illegal it cannot have been intended that the right should apply. Such an argument overlooks the importance of the words "deemed to be" which are designed merely to prevent the enforcement by habeas corpus of the law and are not intended to abrogate the laws themselves. To argue further that the legislature cannot have intended a right to exist without a remedy and that therefore the extinguishment of the remedy automatically indicates an intention to extinguish the right, is too subtle an argument to use when one is dealing with the abrogation of fundamental rights. The Chief Justice was of this opinion too.[13] He ruled that the fundamental right to counsel can only be taken

12. Cp. ss. 5, 6, and 7 of Preservation of Public Security Ordinance with Art. 151(2) of the Malaysian Constitution.

13. [1971] 2 M.L.J. 137 at p. 140.

away by express words.[14] He used the same reasoning to reject the Attorney-General's second argument that the whole of section 74 was "so heavily inconsistent" with Article 5 as to have impliedly done away with it. Since there was no provision expressly abridging the rights granted by the Constitution there was no inconsistency. This second argument of the Attorney-General involves the untenable assumption that Article 5 is indivisible, untenable because the Article grants a number of different and independent safeguards to the accused person.[15] Thus the fact that some of these safeguards are clearly abrogated by section 74 is no reason to infer that others were intended to be.

In holding that the right to counsel can only be abridged by express words the Chief Justice has given a strict interpretation of the concept of inconsistency in the context of human rights. This concept appears in Article 4 of the Constitution, which states that "any law passed after Merdeka day which is inconsistent with this Constitution shall to the extent of the inconsistency be void" and is implicit in Article 162 which entitles a court applying pre-Merdeka law to modify it "to bring it into accord with" the Constitution. In cases involving Article 162 it has been held that if a pre-Merdeka law is silent on the point of any fundamental right granted by the Constitution, the latter is to be read with the law[16] and, only if the law is in actual conflict with the Constitution, must the former be modified to accomodate the right in question.[17] The cases support the Chief Justice's interpretation of inconsistency.

It remains to be seen, however, whether the courts will insist as a matter of law that the legislature explicitly states its intention to abrogate fundamental rights or whether they will take the Chief Justice's principle as a strong presumption of legislative intention to be overriden only by the clearest possible indication that the abrogation of fundamental rights was intended. Under the former interpretation it will never be possible to take away fundamental rights impliedly; under the latter it will be possible but rarely. The former may be objectionable to some since the court would no longer be ascertaining legislative intention, as is their function, but rather would be laying down a rigid requirement for the legislature to follow. A far more important consideration however is that such an interpretation would be unworkable since a law can by its terms clearly leave no room for the operation of a fundamental right without expressly saying so. In such a case, an express statement that the right is abrogated would be superfluous. For these reasons it is submitted that the second interpretation must be taken. Furthermore it may be noted that the former would be a more stringent principle than that adopted by the Indian courts.[18]

14. See also Bose, J. in *Prabhakar* v. *Crown* I.L.R. 1943 Nag. 154, at pp. 162-163.

15. See Art. 5.

16. *E.g. Aminah* v. *Superintendent of Prison* [1968] 1 M.L.J. 92; *Assa Singh* v. *Mentri Besar, Johore* [1969] 2 M.L.J. 30.

17. *Surinder Singh Kanda* v. *The Federation of Malaya* (1962) 28 M.L.J. 169.

18. See for instance Subha Rao in *Kochuni* v. *State of Madras and Kerala* A.I.R. 1960 S.C. 1080. The many Australian cases on the notion of inconsistency are not directly relevant because their Constitution contains no list of fundamental rights.

It may be suggested that to insist so strongly on the right to counsel is merely academic since, as the detention cannot be challenged, lawyers can be of no assistance to the detainee. This overlooks the purpose of the first stage of detention. During this period the government will, presumably, be marshalling evidence and questioning the detainee in order to decide whether or not to make the detention order. The evidence obtained may be useful to supply the allegations of fact which must accompany the detention order and to assist the government's case before the advisory board. The advice of counsel, far from being irrelevant, might be crucial to protect the detainee or at the worst to offset the physchological disadvantage suffered by one not fully acquainted with the law.

Having ruled that Lee Mau Seng had been wrongfully deprived of counsel the court had then to decide whether habeas corpus was an available remedy. This involves a number of separate issues, one of which was dealt with by the Chief Justice.

1. Did the denial of counsel render the detention illegal (habeas corpus being the remedy for unlawful detention, as stated in Article 5 of the Constitution) ?

2. If so, was this illegality cured by the subsequent granting of counsel and/or the detention order ?

3. Even if habeas corpus would otherwise be available would it be barred by section 74(7)?

Because of the answers of the Chief Justice to the third question it was unnecessary for him to consider the wider issues raised by the first two questions. The third question will therefore be considered first.

Section 74(7) states that a person detained under powers conferred by the section shall be deemed to be in lawful custody. Thus according to the Attorney-General a detention which was not done in compliance with any mandatory requirements in section 74 would not attract the protection of the subsection, but so long as section 74 was complied with there could be no habeas corpus. The Chief Justice merely stated that habeas corpus was not an appropriate remedy for one detained under section 74(7). He thus tacitly agreed with the Attorney-General that the section raised an irrebutable presumption of the ousting of habeas corpus as a remedy except where the detention was not in compliance with those requirements. However, the opposite interpretation is equally convincing. Section 74(4) may be regarded as designed to prevent actions for habeas corpus in cases of false imprisonment or malicious prosecution where the detention was made without the President's being satisfied as required by section 74(1) —

(a) that there are grounds which would justify his detention under section 8; and

(b) that he has acted or is about to act in any manner prejudicial to the security of Singapore or any part thereof.

Under the common law the words "have reason to believe" in relation to powers of arrest impose an objective test, and thus the arresting officer must be able to show evidence to support his belief that the particular facts do exist.[19] It would indeed greatly restrict the government's use of preventive detention, and thus be a burden to them, if they were required in each case to prove the facts set out in sections 8 and 74(1). However why should they be protected for failure to observe provisions of the general law which are not particularly related to preventive detention ? Above all, from the provisions of fundamental rights granted by the Constitution ? The reason for excluding judicial review stated above does not apply to these provisions. In short, section 74(7) protects the executive from failure to observe section 74 itself but not from failure to observe the general law.

It should be noted that habeas corpus, like the right to counsel, is a fundamental right granted by Article 5. By his own reasoning, therefore, the Chief Justice should have required express words to allow it to be abridged. The words "shall be deemed to be in lawful custody" are not free from ambiguity; as explained above, they could have been designed to cover false imprisonment and malicious prosecution. Surely stronger language would be necessary to oust habeas corpus completely ?

Does the denial of counsel render the detention unlawful ? If so and only then, according to Article 5(2) will habeas corpus be available. The Chief Justice did not commit himself on this point. He referred to the American decision in *Johnson* v. *Zerbst*[20] in which the detainee had been released because of a prior refusal to grant him counsel at his trial. The logic of this American decision is apparent. The requirement to allow representation by counsel at one's trial is so fundamental that the breach of it renders the decision of the court a nullity; it is in other words an error of jurisdiction which renders the decision ultra vires. Any subsequent imprisonment based on the trial is obviously necessarily illegal. It is to be noted that the Indian courts have taken a more flexible approach and will allow the judgment in such a case to stand if the defendant has not been prejudiced by the denial of counsel.[21]

However the denial of counsel during custody may not be so damaging as the denial at the trial itself. The American courts for instance seem to differentiate the two situations and to state merely that any evidence taken during the period in which the accused was denied counsel may not be used at the trial or that a conviction based on such evidence must fall. In *Escobedo* v. *Illinois* [22] and *Miranda* v. *Arizona*,[23] the con-

19. See *e.g. Shaaban & Ors.* v. *Chong Fook Kam & Anor* [1969] 2 M.L.J. 219.

20. (1938) 304 U.S. 458.

21. See for instance *State of Madhya Pradesh* v. *Shobharan* 1966 A.I.R. 1910 S.C.; *Janardan* v. *The State of Hyderabad* [1951] S.C. 344.

22. (1964) 378 U.S. 478. Under the Indian Constitution, see *Moti Bai* v. *State* A.I.R. 1954 Rajasthan 241 for the scope of the right to counsel under the Indian Constitution.

23. 384 U.S. 436.

victions were quashed because of failure to grant access to counsel during the pre-trial period, but in both cases the conviction was based on evidence obtained during that period. The case on which the counsel for Lee Mau Seng relied, *Deshparde* v. *Emperor,*[24] itself relied on an earlier decision[25] in which it had been held that denial of counsel amounted to an abuse of power and entitled the detainee to an order addressed to the authorities requiring that he be granted counsel. In *Deshparde* v. *Emperor,* it was suggested that such an abuse of power might justify the detainee's release.[26] There were however no reasons given for this opinion, nor has it been acted upon in later cases. It cannot then be said that denial of counsel would necessarily have the result of rendering the detention unlawful.

Even assuming that habeas corpus would have been successful during the period when counsel was being denied, does it remain available once that period is concluded by the detention order ? In one nineteenth century English case there were dicta to the effect that habeas corpus was not available once the illegal detention had ceased since habeas corpus is not a punitive remedy.[27] Nevertheless, could the prior illegal detention sufficiently taint the subsequent one to make it illegal also ?

The Indian Supreme Court in the case of *Narnajan Singh* v. *State of Punjab*[28] affirmed a principle already enunciated by the Federal Court.[29] They stated:

> If any time before the court directs the release of the detainee a valid order directing his detention is produced the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether on the face of the later valid order the Court can direct the release of the petitioner.

Thus a writ of habeas corpus must be sought during the period of illegal detention. Of course, if one agrees with the Chief Justice that it is *not* available even during this period because of s. 74(7), then the remedy is indeed completely ousted — not a result one would have thought that the legislation itself dictates.

However, the preceding arguments demonstrates that, even without s. 74(7), habeas corpus would not have been an available remedy for a detainee who is being denied access to counsel. What then are his remedies ? His solicitors could have used the prerogative writs only at the time in order to enforce the right to counsel. The Chief Justice, it seems, contemplated the use of the prerogative writs, the appropriate

24. 1945 Nagpur 8.

25. *Prabhakar* v. *Crown* I.L.R. 1943 Nag. 154. (See especially *per* Bose J.).

26. See as cited in *Lee Mau Seng* at p. 141. However the case was only relied on in part by the Court.

27. *Barnado* v. *Ford* [1892] A.C. 326.

28. (1952) Cr. L.J. 656, at p. 662.

29. (1945) Cr. L.J. 559.

one presumably being mandamus to order the detaining officer to allow Lee access to counsel. This has since been used successfully to enforce a detainee's right to counsel,[30] but as the judgment was not written the judge's reasoning is not known. Alternatively a declaration could have been sought. These remedies would of course not avail a detainee who is not fortunate enough to have people "outside" willing to act on his behalf. In addition, there might lie subsequently an action in tort against the detaining officer for the denial of a constitutional right. It has been suggested[31] that the constitutional guarantees, such as Article 5 of the Constitution, constitute legal rights for which, in accordance with the principle *"ubi jus ibi remedium",* there must be a suitable remedy. Compensatory damages awarded through the law of torts have been suggested to be the most appropriate remedy. It certainly does seem desirable that this remedy, already developed in U.S.A.[32] should be adopted in Singapore and Malaysia. The lack of such a remedy in England,[33] where there is no written constitution, should of course not be a deterrent. In constitutional law further divergence from English law is both inevitable and desirable.

Finally it might seem appropriate to introduce the American rule from *Escobedo* v. *Illinois.* Since there is no court trial under the Internal Security Act and no strict rules of evidence, and since the advisory board's decision is not binding on the government, there seems little point in a rule of law that would require the exclusion of evidence obtained during the period in which the detainee was denied counsel. After the hearing of the advisory board, the government's decision whether to issue a detention order to release the detainee is purely discretionary. Therefore there is no way of preventing the government from taking account of evidence, which is *ex hypothesi* illegally obtained, in deciding whether or not to act upon the advisory board's recommendation. Firm adherence to the principle of the sanctity of constitutional rights might favour the adoption of such a rule for the simple reason that a weak remedy is better than no remedy at all. The adoption of such a rule must not however deflect the courts from developing

30. Straits Times, 6th May, 1972.

31. Thambiayah, Prakash and Loh in an unpublished article *"Lee Mau Seng* v. *Minister of Home Affairs,* the Case for a Constitutional Tort". (Faculty of Law, University of Singapore).

32. See particularly *Bivens* v. *Six Unnamed Agents of the Federal Narcotics Bureau* 403 U.S. 388.

33. The closest English case would seem to be *Ashby* v. *White* 92 E.R. 126. But see also *Rookes* v. *Barnard* [1964] A.C. 1129 in which it was recognized that punitive damages could be awarded for unconstitutional action. Devlin J., at p. 1226 of the reports makes the following statement "The 1st category is oppressive, arbitrary or unconstitutional action by the servants of the government. Where one man is more powerful than another it is inevitable that he will try to use his power to gain his ends and if his power is much greater than the other's he might perhaps be said to be using it oppressively. If he uses his power illegally, he must of course pay for his illegality in the ordinary way; but he is not to be punished simply because he is the more powerful. In the case of the government it is different for the servants of the government are also servants of the people and the use of their power must always be subordinate to their duty of service."

a more effective remedy, such as damages, that would be sufficiently strong to prevent the relevant authorities from taking their legal obligations too lightly.

The other major issue raised in *Lee Mau Seng* was whether or not the adequacy of allegations of fact required by Article 151 of the Constitution is a justiciable issue. Since there are a number of Indian decisions in point, a comparison between the Indian and the Malaysian constitutions is required. Unlike the Malaysian Constitution which requires the detainee to be furnished with the grounds of detention and the allegations of fact, the Indian Constitution requires only that the detainee be informed of the grounds of his detention. Furthermore the Indian Constitution prohibits the detention of a person for a period of longer than three months unless an advisory board has reported within the three months that there is in its opinion sufficient cause for such detention.[34] The Malaysian Constitution only requires the board to consider representations by the detainee and to make recommendations to the Head of State. The Indian courts have laid down that the detainee must be provided as soon as possible with sufficient allegations of fact to make out his case[35] — thus judicial interpretation has provided the same rule which is stated in the Malaysian Constitution — and in addition that these must be adequate for him to make out his case. The courts have undertaken the task of deciding whether or not the particulars are adequate subject to the proviso common to both Constitutions that the State need not disclose facts the disclosure of which would in its opinion be against the national interest.[36]

The issue of whether or not these Indian principles are applicable to the Malaysian Constitution had already been discussed exhaustively by the Federal Court in *Karam Singh's* case.[37] After detailed examination of the Indian cases, the Court had decided against adopting them in Malaysia. Faced with such a fully argued case in the Federal Court it is not surprising that the Chief Justice decided the same way. He mentioned the judgments in *Karam Singh* but gave his own additional reasons for his decision.[38] He relied in part on the differences between the two Constitutions. It is only necessary to deal with the most substantial of the differences he

34. See Art. 22 Indian Constitution.

35. *Vaidya* A.I.R. 1951 S.C. 157; *Rumashwan Shaw* v. *District Magistrate Burdwan & Anor.* A.I.R. 1964 S.C. 334.

36. It may be queried whether "in its opinion" would oust judicial review of the national interest or whether the kind of restriction postulated in *Conway* v. *Rimmer* might apply.

37. [1969] 2 M.L.J. 129. One ground given by Suffian J. was that whereas the Malaysian Constitution grants the detainee the right to additional particulars no such provision exists in the Indian Constitution. Thus it is argued the remedy for the Malaysian detainee in a case of vague particulars is to make a request for more; but there is probably no duty on the government to provide them. The Indian courts have recognised the right of the detainee to seek more particulars but this has not affected the principle that the adequacy of particulars is reviewable. The only relevance of the failure to make a request for further particulars is on a subsequent claim that the original facts supplied are bad for vagueness.

38. [1971] 2 M.L.J. 137, pp. 144-145.

claimed. The fact that the advisory board must meet under the Indian Constitution whereas *semble* in Singapore only on the request of the detainee is immaterial since the only issue is what must happen when it does meet. The fact that the Indian Constitution allows law to dispense with the advisory hearing whereas the Malaysian Constitution does not is immaterial for the same reason. The fact that there is no constitutional requirement in India to supply allegations of fact whereas there is under the Malaysian Constitution is also immaterial, since the question is not whether facts must be supplied but whether the adequacy of them is a justiciable issue.

The most compelling reason to support the Chief Justice's interpretation is that under the Indian Constitution the advisory board's decision is binding on the government and the release of the prisoner must be ordered if the advisory board reports that there is not sufficient cause for the order. The Chief Justice said:

> To hold otherwise [that is, to follow the Indian decisions] would in my opinion be wholly inconsistent with the scheme of the Act under which the power to issue a detention order has been made to depend on the existence of a state of mind in the President acting in accordance with the advice of the Cabinet which is a purely subjective condition so as to exclude a judicial enquiry into the sufficiency of the grounds to justify the detention.[39]

This statement closely echoes that made in *Karam Singh's* case by Suffian J.,[40] who himself was following the dissenting decision of Sastri C.J. in *Atma Ram's* case.[41]

However it is just not accurate to state that the Indian interpretation would put the courts in a position which is admittedly not intended by the Constitution, namely, that of substituting their view for that of the executive as to whether the allegations of fact if made out would be sufficient to justify the detention. The Indian cases merely allow the courts to ensure that the detainee is given sufficient facts to make out his case. The allegations of fact are guilty of "vagueness" if they are insufficient to enable the detainee to do so. The court is examining the facts for intelligibility and precision only, not for cogency. In short the sufficiency of the allegations of fact are assessed not in relation to the executive discretion to detain him but merely in relation to his right to make representations. The courts in these Indian cases have in effect applied the common law principle of natural justice that the right to a hearing must be effective. They have adopted the correct approach in natural justice cases by reading the common law rights into the statute which does not expressly or impliedly take these rights away. One would have thought that such a principle is just as important under the Malaysian Constitution as under the Indian. In fact, in view of the less secure position of the individual under the former the case for court's intervention becomes all the more compelling.

39. *Ibid.,* p. 145.

40. [1969] 2 M.L.J. 129, p. 150.

41. *State of Bombay* v. *Atma Ram* A.I.R. 1951 S.C. 157.

In *Karam Singh's* case, Suffian J. gave the leading judgment on the question of the adequacy of particulars. His reasons for not following the Indian decisions were firstly that the Malaysian Constitution entrusts preventive detention to the President acting on Cabinet advice and not to civil servants as may be the case under the Indian Constitution. However, if it is accepted that the issue does not involve questioning the executive policy, this difference between the repositaries of that policy is evidently irrelevant.

His second point, mentioned but not developed by the Chief Justice, was that Article 21 of the Indian Constitution protects the individual from deprivation of his liberty except "according to a procedure established by law" while the Malaysian Constitution merely states "except in accordance with law". Because of the word "procedure" in the Indian provision Article 21 was interpreted to impose a requirement of strict observance of procedural requirements which was not required by Article 5 of the Malaysian Constitution.[42]

Two comments may be made on this argument. Firstly, is this a question of procedure ? The Indian courts have indeed relied on Article 21 to require the executive to state which of the grounds for detention stated in the statute are in fact applicable to the particular detainee, but the requirement to provide *sufficient* particulars for him to present his case, although derived from the statute which grants him a right of hearing, is not a procedure laid down by it.

Secondly, even if one were to accept that this is a question of procedure, why should the Malaysian provision be interpreted to *exclude* questions of procedure ? For surely this is the only inference to be drawn from the judge's remarks. In cannot be a question of the procedure being more important under one Constitution than under the other. If procedure is included within the phrase "in accordance with law", the words of Article 5 require it to be complied with. Then, to exclude procedure is to make nonsense of the provision.

The question that has arisen in the Indian [43] and Burmese [44] courts is whether or not the word "law" should be construed to cover the common law rules of natural justice and therefore to give the constitutional provision a normative context. If these rules are excluded the provision remains merely a constitutional statement of one aspect of the rule of law, viz., that the authority of law is required to justify deprivation of life or liberty. In their wish to exclude rules of natural justice the Indian and Burmese courts have been forced to conclude that "law" in their respective articles means enacted law. Thus legislation is required to deprive a person of life or liberty — a rather strange and novel proposition when one considers the well established and reasonably satisfactory rules on arrest and detention that exist at common law.

42. [1971] 2 M.L.J. 137, p. 145. See also *Karam Singh's* case, at p. 148.

43. See the long judgment on this point in *Gopalan* v. *State of Madras* A.I R. 1950 S.C. 27.

44. *Tinsa Maw Naing* v. *The Commissioner of Police, Rangoon* [1950] Burma Law Reports 17.

The Malaysian courts are of course not compelled to follow these foreign courts, particularly when the Malaysian Constitution and its general historical context are different. Furthermore, the definition of the word "law" in the Malaysian Constitution includes common law "unless the context otherwise requires".[45] It would therefore be necessary for them to show that the context requires the narrower definition before they could apply it to exclude common law and hence the rules of natural justice.

The final argument put by counsel for Lee Mau Seng was that the court could inquire into the bona fides of the President in making the order and that if he was proved to be acting in bad faith the detention would be illegal.

Such a contention is based on the view that to act in bad faith is necessarily to act *ultra vires* since the legislature can not have intended to permit such action. In a matter of three short paragraphs the Chief Justice dismissed the argument and laid down a principle for which no authority was adduced. He stated that the good faith of the President, acting on Cabinet advice, was not a justiciable issue under the Internal Security Act. The fact that he acted on Cabinet advice seemed to add weight to this conclusion. The consequence of holding otherwise would in his view be for the court to substitute its own judgment for that of the President which would be contrary to the Act. He felt this his conclusion was reinforced by the fact that the Act makes the decisions of the President final and conclusive.

A number of comments are appropriate here. First, for the Chief Justice to state that an inquiry into mala fides involves a substitution of the court's view for that of the President, shows his misunderstanding of the nature of judicial review on this ground. Mala fides is the intentional abuse of power. It is very difficult to prove; it is only if there is virtually no evidence against the detainee to support the President's decision to detain that the court might infer that the President acted with an ulterior motive. If there is some evidence the court will not find mala fides merely because on its view this evidence is insufficient to justify detention,[46] or because the court feels that the President has been unduly harsh or unfair.

It is true then that if charged with mala fides the President would be called upon to produce some evidence to show that his action was taken for the purpose probably suggested by the detainee. The fact that the purposes in the Act are stated in very general terms will greatly assist the President to rebut the charge. *Stephen Kalong Ningkan's* case[47] in fact demonstrates the difficulty of proving mala fides.

It is understandable that the Courts should feel constrained not to question the motives of the President when he acts on his own discretion since to do so would indeed be to undermine the dignity of

45. Art. 160.

46. On *mala fides* generally see *R.* v. *Brixton Prison ex.p. Soblen* [1963] 2 Q.B. 243.

47. [1968] 2 M.L.J. 238.

the Head of State. If the President acts wrongly there is a sanction against him provided in the Constitution.[48] Besides, S1(1) of the Constitution provides him with immunity from court actions and this may be interpreted to extend to his private as well as to his official capacity. However when he acts on Cabinet advice, as here, it is the Cabinet who makes the decision and whose motives would be questioned in a claim of male fides.[49] The President's role in this case is a purely formal one — to act upon the Cabinet's decision. The President is often given power under statute. There seems no reason why the sanctity of the Head of State should be taken to cover these situations and thus to exclude judicial review.

Before considering arguments for and against review for mala fides the cases should be examined.

The Privy Council in *Stephen Kalong Ningkan* purported to reserve its judgment on the justiciability of the Agong's decision to call an Emergency under the Constitution. However from the fact that the Board considered the allegation of bad faith though deciding finally that it had not been proved, it can be seen that they were not prepared to dismiss the issue of bad faith as non-justiciable. The Privy Council's extreme caution in refraining from formulating a principle when it was not absolutely necessary for the decision is justifiable particularly when it is realised that this was a highly political case. The Privy Council stated:[50]

> When a Proclamation under statutory powers by the Supreme Head of the Federation can be challenged before the courts on some or any grounds is a constitutional question of far-reaching importance which, on the present state of the authorities, remains unsettled and debatable. Having regard to the conclusion already reached, however, their Lordships do not need to decide that question in this appeal. They do not, therefore, propose to do so, being of opinion that the question is one which would be better determined in proceedings which made that course necessary."

The Federal Court,[51] with Ong Hock Thye, F.J. dissenting, had decided against the justiciability of the Agong's proclamation of Emergency, but the three decisions on which they relied[52] do not compel this result. First, two of these cases dealt with the legislation requiring the personal satisfaction of Governor General and with the power to review for general *ultra vires,* not the extreme ground of mala fides. Secondly, in one of these cases[53] and in the famous English case, *Liversidge* v. *Anderson,* which was also cited, the possibility of relief for mala fides was admitted. *Liversidge* v. *Anderson* is however of no real help since it did not deal with judicial review of the decision of a head of State.

48. See Singapore Constitution, Art. 1(3).

49. See Singapore Constitution, Articles 5, 7, 8, 9, 12.

50. [1968] 2 M.L.J. at p. 21.

51. [1968] 1 M.L.J. 119.

52. *Bhagat Singh* v. *King Emperor* C.R. 58 I.A. 169; *King Emperor* v. *Benoari Lal Sarma & Ors.* [1945] A.C. 14. *Liversidge* v. *Anderson* [1942] A.C. 206.

53. *King Emperor* v. *Benoari Lal Sarma & Ors.* [1945] A.C. 14, at p. 21.

This case dealt with review of the power granted to the President by the Constitution, to proclaim an emergency. To prove mala fides in such a case might be so difficult as to make the remedy virtually useless. Furthermore it is not clearly settled that administrative law notions are appropriate when dealing with a power granted to the President by the Constitution rather than a power delegated to him by statute.[54]

However the possibility of judicial review for mala fides was admitted by the Federal Court in *Karam Singh,* a case subsequent to *Stephen Kalong Ningkan,* dealing with preventive detention. It was held that the onus of proof was on the person alleging mala fides. Counsel alleged that the order of detention issued by the Minister as required by the Internal Security Act showed a casual and cavalier attitude on the part of the authorities amounting to bad faith. Obviously the President's decision to detain under secion 8 of the Act is called into question by such a claim although it was the Minister's order which was the direct source of the complaint. In holding impliedly that mala fides is a justiciable issue the court showed that for the purposes of the Internal Security Act at least the President's decision can be challenged, albeit only collaterally.

Curiously enough the two Commonwealth decisions in which mala fides was considered were not mentioned in either *Stephen K. Ningkan's* case or *Karam Singh.* The earlier case, *Duncan* v. *Theodore* [55] has been taken as authority for the proposition that mala fides cannot be claimed against the Crown. This is however to overestimate the importance of the remark made in that case. Only two of the five majority judges in the Australian High Court, Isaacs and Powers, JJ. mentioned the point and on appeal the Privy Council ignored it.

It was Dixon J. in the *Communist Party* case in 1952 [56] who articulated the traditional view of the sanctity of the Crown so far as the courts are concerned in some detail. He said:

> The prerogative writs do not lie to the Governor General. The good faith of any of his acts as representative of the Crown cannot be questioned in a court of law *(Duncan* v. *Theodore).* An order, proclamation on declaration of the Governor General in Council is the formal legal act which gives effect to the advice tendered to the Crown by the Ministers of the Crown. The counsels of the Crown are secret and an inquiry into the grounds upon which the advice tendered proceeds may not be made for the purpose of invalidating the act formally done in the name of the Crown by the Governor General in Council. It matters not whether the attempt to invalidate an order, proclamation or other executive act is made collaterally or directly. One purpose of vesting the discretionary power in the Governor General is to ensure that its exercise is not open to attack on such grounds. . . .[57]

54. See by analogy the argument on *delegatus non potest delegare* in *Eng Keock Cheng* v. *P.P.* [1966] 1 M.L.J. 18.

55. (1919) 23 C.L.R. 510; see also Australian Digest, 2nd Ed., Vol. 8 at p. 891.

56. (1950-51) 83 C.L.R. 1.

57. *Ibid.,* at p. 179.

In this paragraph Dixon, J. is making a number of distinct points of which the most significant is the second, a statement of policy, that the deliberations of the Cabinet should not be subject to the scrutiny of the courts. Dixon, J. is frankly acknowledging that to question the bona fides of the President's act is to question Cabinet motives and that such a challenge is objectionable for that reason, not because the dignity of the Head of State is implicated. His other points are a consequence of this policy, firstly that there is in fact no way of challenging the good faith of the President by prerogative writ and *semble* that it should not be challenged collaterally. The second point arises from this policy as Dixon says that one can impute to the legislature the intention not to allow judicial review.

It is then the principle of the sanctity of the Cabinet deliberations that Dixon believes should be preserved. The reasons for this are perhaps partly traditional. In the United Kingdom, from which the Cabinet system was adopted by Australia, Malaysia and Singapore, the Cabinet is an institution which grew up outside the framework of the law. Its existence and the rules relating to it are part of the conventions of the Constitution. In Malaysia and Singapore the Cabinet, its composition, and its collective responsibility to Parliament, are provided for by the Constitution but its functions are not defined. It is given specific functions of course by statute, like for instance the Internal Security Act. For what other reason should the Courts decide that they cannot enquire into the motives of the executive ? It is of course well accepted in administrative law that the courts can question the exercise of power by a Cabinet Minister when he is acting under powers given by legislation.[58] Here if the legislation is read as stating "if the President, acting on Cabinet advice is satisfied" then, knowing also from the Constitution that the President has no discretion to refuse to accept Cabinet advice, it really can be said that the Cabinet has been given a power by statute and therefore the usual administrative law principles of *ultra vires* would apply to them.

Why is it then that the Cabinet has a sanctity that individual Ministers do not have ? Again to some extent as applied to the Cabinet it is perhaps historical that the doctrine of Crown immunity has not yet been reconciled with modern notions of administrative law. More important however the policy is based on the principle of separation of powers that the deliberations of policy in the Cabinet are the highest, purest expression of the executive function and should not therefore be interfered with by another branch of government, the judiciary.

However it must be argued with the strongest possible insistence that the doctrine of separation of power, as here applied, should not extend to bad faith. So long as the executive acts bona fide they are directing themselves to the powers given, and however erroneously their actions might be done, they are acting within the executive function granted them.

58. For instance see *Padfield* v. *Minister of Agriculture* [1968] A.C. 997.

However if they do not direct themselves to the purposes of the power given but use the power intentionally for another purpose then they are clearly acting in abuse of power. In a real sense of course they are not exercising the power given at all. It could be said quite logically that if the Cabinet acts in bad faith it cannot be said to be "satisfied" that a person warrants preventive detention. That each organ of the government should exercise their functions in good faith, is surely the basic tenet of constitutional government under a written constitution. Otherwise the rules regulating the functions of each branch of government are merely rhetorical and the whole democratic notion, which the constitution is aimed to uphold, that of the rule of law and responsibility of the governing to the governed is undermined.

If then to act mala fides is to breach the Constitution the question becomes one of deciding what form the sanctions should take. Is Dixon, J. just denying that the Courts are the appropriate body to provide the sanctions ? It is true that the executive is responsible to Parliament and it might be argued that this body, an elected legislature, should control the executive. And yet it is part of the judicial function to interpret the law (which, by definition, includes the Constitution) and to impose sanctions for its breach. In this way the courts are called the guardians of the Constitution. It does not need an express provision in the Constitution to entitle the Courts to keep the executive within the law since that is an inherent part of their functions.[59]

When the individual is directly involved there is of course even more reason to permit the courts to intervene. Indeed if the constitutional guarantee in article 5(1) that "no person shall be deprived of his... liberty except in accordance with the law" is to be at all meaningful then it seems imperative that the courts should intervene.

For the court to allow judicial review of Cabinet action for mala fides will require them to accept firstly that when the President is given a power it is in fact the Cabinet that exercises that power and secondly that the rule of law should override considerations of the secrecy of Cabinet deliberations.

This approach would not require any modification of existing principles of administrative law in the sense that it is already accepted in that law that a power given in subjective terms to a Minister who is responsible to Parliament should be interpreted subjectively, thus excluding ultra vires except on account of mala fides. In such a case the decision as to the relevance, reasonableness and proper purpose of the exercise of power is within the jurisdiction of the Minister to decide and is therefore not within the scope of the Court's power of judicial review. There remains unsolved however the problem of the method of challenging the Cabinet action. This could either be done collaterally as in *Karam Singh* and *Lee Mau Seng,* which were actions of habeas corpus, or possibly even directly against the government by an action for a declaration. What form should the action take ? Would one just sue the government ? For after all the government can be defined as the executive body, that is, the Cabinet[60] even though a wider definition could also be used. The troublesome technical question of the definition

59. For the classic statement on this, see *Marbury* v. *Madison* 1 Cranch 137.
60. Singapore Penal Code, Cap. 103, s. 17.

of the government should not be treated as sufficiently problematic to prevent judicial review. For the reasons outlined above it is submitted that to permit judicial review for mala fides is a desirable development, and one that is consonant with the growing policy of submitting the executive to the principles of administrative law.

Finally it is appropriate to mention that the court proceeded on the assumption that fundamental rights are part of the Constitution of Singapore. In fact, of course, fundamental rights were received into Singapore by the 1965 Republic of Singapore Independence Act and therefore enjoy no higher status than the ordinary laws. The 1965 Act itself states that articles in the Malaysian Constitution can be amended by a law enacted by the legislature.[61] When faced with legislation subsequent to 1965 the sole enquiry for the courts should be whether or not the law is inconsistent with fundamental rights for, if it is, the fundamental rights should to that extent be abridged. There can be no question of the law being unconstitutional and therefore void since fundamental rights, not being part of the Singapore Constitution, are subject only to section 6(2) of the Independence Act not to section 52 of the Singapore Constitution. This enquiry was not directly raised in *Lee Mau Seng* since article 149 grants the right to act contrary to article 5, the fundamental right in question. Therefore the only question there was whether or not the Internal Security Act had taken away fundamental rights. If the Act had not been one covered by article 149 it would have been impossible to avoid the question of the status of fundamental rights.

To summarise, the insistence by the Chief Justice on clear and unequivocal language to take away fundamental rights is most welcome. He did not however continue the rest of his judgment in quite the same spirit. Much of his reasoning amounts to a statement of the inability of the courts to interfere in preventive detention. He was understandably influenced by what is submitted to be the most important feature of the Internal Security Act, that the President is not bound to follow the Advisory Board in reaching his final decision. The underlying philosophy of the judgment is respect for the executive and the belief that it is better equipped than the courts to deal with preventive detention.

It has been the aim of the preceding discussion to demonstrate that the Singapore High Court in *Lee Mau Seng* and the Federal Court in *Karam Singh* could have decided in some respects differently from the way in which they did had they been prepared to take a more creative approach. To have done so would have been to act on the assumption that preventive detention is an exception to the fundamental rights of the individual and should be strictly construed and closely controlled by the courts. It would have been greatly to enhance the status of the courts as guardians of the Constitution in accordance with the time honoured principles of judicial review enunciated in *Marbury* v. *Madison.*

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61. S. 6(2) thereof.

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