PREVENTIVE DETENTION AND CONSTITUTIONAL SAFEGUARDS IN SELECTED THIRD WORLD COUNTRIES

I. INTRODUCTION

There comes a time during the life of almost every nation when situations arise which threaten its peace and security. At such a time the government may need to acquire certain additional powers to help it combat the danger.

The use of detention without trial has now become commonplace,[1] particularly in developing countries. It was defended by President Nyerere of Tanzania on the grounds that:

> Our nation has neither the long tradition of nationhood, nor the strong physical means of national security, which older countries take for granted. While the vast mass of the people give full and active support to their country and its government, a handful of individuals, can still put our nation into jeopardy, and reduce to ashes the effort of millions ... Here in this union, conditions may well arise in which it is better that 99 innocent people should suffer temporary detention than that one possible traitor should wreck the nation.[2]

This opinion was given in 1964. But in 1984, again, the need of the power to detain people without trial was defended, this time by the Minister of Justice, Legal and Parliamentary Affairs of Zimbabwe, The Hon EJM Zuobgo who wrote:

> I wish to stress that in our British-made Constitution, the power is given to the Executive to use preventive detention during a state of emergency. In the light of our security situation, we have in some cases found it necessary to resort to that power.[3]

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[1]John Hatchard, "Detention Without Trial and Constitutional Safeguards in Zimbabwe" (1985) 29 *Journal of African Law* 38.

[2]See Thomas Frank, *Human Rights in Third World Perspective*, (1982) at 245.

[3]EJM Zuobgo "The Zimbabwe Constitution After Four Years of Independence" (1984) *Journal of Public Law* 448.

Again in December 1993, the Home Ministry Parliamentary Secretary of Malaysia, Mr Ong Ka Ting said that the government did not plan to repeal the Internal Security Act (ISA 1960) as the legislation was necessary to ensure stability, peace and continued economic development in the country.[4]

The need for a nation to protect itself cannot be denied and this is widely recognised. For example, article 4 of the International Covenant on Civil and Political Rights (1966) recognises the rights of governments "in time of public emergency which threatens the life of the nation" to derogate from certain of their obligations under the Covenant" to the extent strictly required by the exigencies of the situation.[5] The recognition is based on the condition that the emergency situation must exist and there must be a declaration of emergency by the executive.

This article will examine some aspects of preventive detention in selected third world countries. Firstly, the discussion focuses on the constitutional basis of a preventive detention. This will then be followed by a discussion of the constitutional rights of the detainee. And for this purpose, references are made to some important constitutional provisions and decisions in Malaysia, Singapore, India and some African countries.

II. THE CONSTITUTIONAL BASIS OF PREVENTIVE DETENTION

In most of the developing countries, the origin of preventive detention goes back to the pre-independence period. For example, in Malaysia, preventive detention was introduced by means of a temporary regulation (Regulation 17 of the Emergency Regulations 1948) during the first emergency declared by the British High Commissioner to combat the subversive activities of the communists.[6] In Southern Rhodesia, the law of preventive detention was introduced in 1959 to deal with the internal security laws of the country and represented a response by the

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[4]New Straits Times, December 9, 1993.

[5]Similar provisions exist in the European Convention on Human Rights (article 15) and American Convention on Human Rights 1969 (article 27).

[6]See speech of Tun Abdul Razak, Deputy Prime Minister at the Parliamentary Debate on 21 June 1960 in Kuala Lumpur. See also Abu Bakar Munir, "Preventive Detention and Public Security in Malaysia" in *Preventive Detention and Security Law: A Comparative Survey*, A Harding and J Hatchard (eds) (1993) at 135.

white minority to the rising tide of African nationalism.[7] In India, the British used preventive detention to control criminal activities until the end of their rule in 1947.[8]

After independence, the practice was written into the constitutions of many countries.[9] Part II of the Malaysian and Singapore Constitutions grant certain fundamental liberties and limit the power of the legislature to abrogate them. However, Part XI of the Malaysian and Part XII of the Singapore Constitution contain the permanent provisions under which the legislature may legislate in special circumstances in a fashion which would otherwise be unconstitutional. One of the provisions is article 149 of both the constitutions.[10]

Article 149 of the Malaysian Constitution provides that 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 diPertuan Agong or any government in the Federation; or
(c) to promote feelings of ill-will and hostility between different races or other classes of population likely to cause violence; or
(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public in the Federation or any part thereof; or
(f) which is prejudicial to public order in, or the security of the Federation or any part thereof,

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[7] *Supra* n 1 at 39.
[8] *Supra* n 2.
[9] *Ibid.*
[10] The terms of both articles are quite similar.

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 articles 5, 9, 10 or 13.[11]

This provision, in comparatively few words, gives great powers of government to Parliament when Parliament chooses to exercise its powers.[12] The Act must "recite" that action has been taken or threatened. The actions or threats which could give rise to such recitation appear as broad as language could provide for. The body of persons should be "substantial"; but "substantial" is not defined. This body can be anywhere in the world.[13] They need only to cause "fear", not actual harm and this again, is not defined. To "excite disaffection" against the Yang diPertuan Agong or any government in the Federation, is sufficient. But what is "disaffection" and what "excites" it? Promoting feelings of ill-will and hostility between races or other classes of population likely to cause violence may be sufficient for Parliament to invoke its awesome powers. In Malaysia's pluralistic society, inciting violence between races and classes is deplorable. But can Parliament reasonably control all such actions or threats? Could an appeal by one seeking political office for the support of his own ethnic group fall within the prohibited sphere? Malaysian authorities, according to the Amnesty International, "have repeatedly interpreted non-violence activities and views of an individual as constituting a threat to national security".[14] Whatever the interpretation might be, the effect of article 149 is that an Act of Parliament containing the necessary recital cannot be held invalid on any ground.[15]

The important Acts passed under the provision of article 149 of the Malaysian and Singapore Constitutions are the Malaysian Internal Security Act 1960 and the Singapore Internal Security

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[11]Article 5 provides for the liberty of the person and the right to be defended by a legal practitioner of his choice; article 9 provides for prohibition of banishment and freedom of movement; article 10 for freedom of speech, assembly and association; and article 13 for the rights of property.

[12]LA Sheridan and HE Groves, *The Constitution of Malaysia and Singapore* (1979) at 369.

[13]*Ibid.*

[14]See Suhaimi Azman "Tales of Torture" in *Far Eastern Economic Review*, January 12, 1989, at 20.

[15]*The British Commonwealth: The Development of Its Law and Constitution, Malaya and Singapore*, LA Sheridan (ed) (1961) vol 1 at 562.

Act 1963 (Revised 1985). These Acts authorise and empower the detention without trial by the executive.[16] Section 8(1)(a) of the Singapore Internal Security Act provides as follows:

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

These powers are similar to those which previously existed in the Federation of Malaya under the Emergency Regulation Ordinance 1948.[17]

In India, a law for preventive detention can be enacted by Parliament exclusively under entry 9, List 1 in the Seventh Schedule for reasons connected with defence, foreign affairs and the security of India.[18] Furthermore, under entry 3 Concurrent List (List III) in the Seventh Schedule, the Parliament and legislature of any state can concurrently make a law for preventive detention for reasons connected with the security of a state, maintenance of public order or maintenance of supply and services essential to the community.[19] The Parliament can thus enact a law providing for preventive detention for reasons connected with all the six heads mentioned in Lists I and III.

In Zambia, Part III of its constitution provides for the protection of the fundamental rights and freedom of the individuals. Article 26, however, provides the justification for actions depriving detainees of these liberties and freedom. It provides that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contradiction of articles 15, 18, 19, 21, 22, 23, 24 and 25[20] to the extent that it is shown that the law in question authorises the taking, during any period when the republic is at war or when the declaration of

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[16]The Malaysian Internal Security Act 1960 is in *pari materia* with the Singapore Internal Security Act 1963 (Revised 1985).

[17]*Supra* n 15.

[18]See article 26(1) of the Indian Constitution.

[19]Article 246(2) of the Indian Constitution.

[20]These articles provide for fundamental rights and freedom of the individuals.

article 30[21] is in force, of measures for the purpose of dealing with any situation existing or arising during that period; and nothing done by any person under the authority of any such law shall be held to be in contravention of any of the said provisions unless it is shown that the measures taken exceeded anything which, having due regard to the circumstances prevailing at the time, could reasonably have been thought to be required for the purpose of dealing with the situation in question.

In Zimbabwe, the provision which allows derogation from fundamental rights of freedom is section 25 of its constitution. It provides that notwithstanding the foregoing provisions of the chapter on the Declaration of Rights an Act of Parliament may in accordance with Schedule 2 derogate from certain provisions of that chapter in respect of a period of public emergency. Paragraph 1 of the Second Schedule of the Constitution says that action taken during a period of public emergency for the purpose of dealing with any situation arising therefrom shall not be a contravention of, *inter alia*, section 13[22] and further that there is no contravention of section 13 to the extent that the law provides for preventive detention during the period when a situation exists which may require the preventive detention of persons in the interest of defence, public safety or public order.

There is a difference between both the Malaysian and Singaporean preventive detention provisions and those of other countries like Zambia and Zimbabwe. In the former the power to detain people without trial is used in times of peace without any need for the declaration of an emergency, whereas in the latter such power can only be exercised in a declared emergency situation. In this respect, reference may be made to the Malaysian case of *Teh Cheng Poh* v *Public Prosecutor*.[23] In that case, Lord Diplock, in giving their Lordships' opinion, said:

> Article 149 is quite independent of the existence of a state of emergency. On the face of it the only condition precedent to the exercise by Parliament of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating

[21]This article authorises the President to proclaim emergency.
[22]Section 13 provides for the liberty of the citizen.
[23][1979] 1 MLJ 50.

that something had happened in the past viz that action of the kind described has been taken or threatened.[24]

The Privy Council commented that the purpose of the article is to enable the Parliament, once subversion of any of the kinds described has occurred, to make laws providing not only for suppressing it but also for preventing its recurrence.

The safety of the nation is necessary to the very existence of the Constitution itself, and must therefore override some of its prohibitions and limitations in a situation of grave danger to it. By this supreme law of necessity, the organs of state are entitled, in the face of such a grave danger, to take all appropriate actions, in order to safeguard law and order and preserve the state and society. The doctrine does not operate from outside the law, but it is implied in it as an integral part thereof. It is implicit in the constitution of every civilised community.[25] This is so because no constitution can anticipate all the different forms of phenomena which may beset a nation.[26]

A. Constitutional Safeguards Against Preventive Detention

It is common to provide safeguards in a constitution that permits preventive detention.[27] Paragraph 2 of the Second Schedule of the Zimbabwe Constitution elucidates the safeguards which must be followed with regard to a detainee:

1. He shall be informed as soon as reasonably practicable after the commencement of the detention, and in any event not later than seven days thereafter, the reasons for his detention (Paragraph 2(1)(c));
2. He shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own

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[24] *Ibid* at 54.

[25] *Per* Muhammad Munir CJ in *Federation of Pakistan* v *Shah* (1955) quoted in Jennings, *Constitutional Problems in Pakistan* (1957) at 357.

[26] *Lakanmi* v *The Att Gen* (West) SC 58/69 of April 1970 (Nigeria) *per* Ademola CJ.

[27] See for example article 151 of the Constitution of Malaysia and Singapore, article 22 of the Indian Constitution, paragraph 2 of Schedule 2 of the Zimbabwean Constitution and article 27 of the Constitution of Zambia. See also section 9 of the Malaysian and Singapore Internal Security Act.

choice and to hold communication with him (Paragraph 2(1)(a));

3. His case shall be submitted not later than thirty days (if during a period of public emergency) after the commencement of the detention for review to a tribunal (Paragraph 2(1)(b));
4. Such tribunal shall review the case forthwith and thereafter his case shall be reviewed at intervals of one hundred and eighty days (if during a period of public emergency) from the date on which his case was last reviewed, the detainee or legal representative of his own choice being permitted to appear (Paragraph 2(1)(b) and (c)).

A quite similar provision exists in the Constitution of Zambia. In Malaysia, Singapore and India the constitutions provide that the detaining authority should as soon as may be communicate to the detainee the grounds on which the detention order has been made, and afford him the opportunity to make a representation against the detention order. There are two common safeguards provided by the constitutions. First, the right of the detainee to be informed of the grounds of his detention and secondly, the right of the detainee to make a representation before a tribunal.

In addition, the constitutions of Zambia[28] and Zimbabwe, explicitly provide for the access of the detainee to a legal representative. In contrast, in India, the right to legal representation of the detainee before the advisory board is denied by clause (1) read together with clause 3(b) of article 22 of the Indian Constitution while in Malaysia and Singapore, by article 149(1) of the Malaysian and Singapore Constitutions. Therefore in Malaysia and Singapore, the right to legal representation is not guaranteed. In practice, however, it is not unusual for the lawyer to appear for the detainee before the Advisory Board. It is also not unusual for the detainee to appear without legal representation in Malaysia. As Amnesty International puts it, "they and their families are afraid that any legal action could jeopardise their chances of obtaining an early release".[29] The Indian Court, however,

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[28]Article 27(1)(d) of the Zambian Constitution provides that the detainee shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the authority by which the restriction or detention was ordered or to any tribunal established for the review of his case.

[29]*Supra*, n 14.

has taken the view that permitting authorised legal representation to the government or the detaining authority and denying the same to the detainee would amount to a breach of article 14, namely equality before the law.

These principles were laid down by the Supreme Court in the case of *Francis Coraline Mullin* v *Administrator, Union Territory of India*.[30] The Court stated:

> The right of a detenu to consult a legal adviser of his choice for any purpose is not necessarily limited to defence in a criminal proceeding but also for securing release from preventive detention ... and a prison regulation may, therefore, regulate the right of a detenu to have interview with a legal adviser in a manner which is reasonable, fair and just; but it cannot prescribe an arbitrary or unreasonable procedure for regulating such an interview and if it does, so it would be violative of article 14.[31]

Therefore, according to Professor Jain,[32] if the detaining authority or the government takes the aid of a legal practitioner before the board, the detainee must be allowed the same facility. This amounts to doing "indirectly" that which cannot be done "directly".

In Malaysia and Singapore, the detaining authority must not only inform the detainee of the grounds for his detention but also the allegations of fact on which the order is based. However, there are exemptions from doing so, if the disclosure of fact would, in the opinion of the detaining authority be against national interest.[33]

1. Right to be Informed of the Reasons for Detention

As discussed earlier, the right of the detainee to be informed of the detention is provided by the Constitutions. In Zimbabwe, the scope of this right was examined in the High Court by Smith J in *Paweni* v *Minister of State (Security)*[34] in 1984. Here the petitioner had been served with an article 21 detention order

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[30][1981] 1 SC 608.
[31]*Ibid* at 609.
[32]See MP Jain, *Indian Constitutional Law* (1987) at 626.
[33]See article 151(1)(a) of the Constitution of Malaysia.
[34][1985] LRC (Const) 612.

alleging in general terms that he had been engaged in "acts of economic sabotage against the State and People of Zimbabwe" and further stating that "[i]t is considered that your activities pose a threat to the economic security of Zimbabwe". It was argued on behalf of the petitioner that the reasons given were so vague as to fail to comply with the Schedule. Although this was the first time a Zimbabwean Court was faced with this point, the matter had been discussed in a number of cases cited before the Court from other jurisdictions.

In the Indian case of *The State of Bombay* v *Atma Ram Vaidya*,[35] Kania CJ stated:

> If the ground which is supplied is incapable of being understood or defined with sufficient certainty it can be called vague. It is not possible to state affirmatively more on the question of what is vague. It must vary according to the circumstances of each case.[36]

However, the learned Chief Justice further stated that, if the grounds furnished were sufficiently definite to enable the detained person to make a representation against the order, they could not be called vague. Similarly in the West Indian case of *Herbert* v *Philips and Seely*,[37] Lewis CJ stated that the grounds for detention must furnish sufficient information to enable the detained person to know what is alleged against him and to bring his mind to bear upon it.[38]

Finally, in *Kapwepwe and Kaenga* v *The People*,[39] Baron JP in the Court of Appeal of Zambia, after referring with approval to the previous cases, stated the test as follows:

> The detainee must be furnished with sufficient information to enable him to know what is being alleged against him and to make meaningful representation.[40]

Having referred with approval to the other cited cases and adopted the test in *Kapwepwe and Kaenga*, the learned Judge in

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[35]AIR 1951 SC 167.
[36]*Ibid* at 184.
[37][1967] 10 WIR 435.
[38]*Ibid* at 452.
[39][1972] ZR 248.
[40]*Ibid* at 262.

Paweni held that the reasons furnished to the petitioner in the instant case did not comply with the Schedule being so vague as to preclude any meaningful representation from being made.

The case of *Paweni* was affirmed by the Supreme Court in the case of *Minister of Home Affairs and Another* v *Austin and Another*.[41] In this case, the Minister appealed against the decision of the High Court which declared that the detention order signed by the first appellant under section 17(1) of the Emergency Powers (Maintenance of Law and Order) Regulation 1983 was invalid because it did not "inform" the detainees the reasons for the detention as required by section 17(2) of the Regulation. One of the grounds of appeal was that the learned Judge erred in holding that the reasons given to the detainees were inadequate.

The detainee in this case was detained and the charge read: "... you are a South African espionage agent, that you passed intelligence information to South Africa which is to the detriment of Zimbabwe's security and that you are a threat to the security of Zimbabwe". Dumbutshena CJ referred with approval the test given by Chandrachud CJ in the Indian case of *the State of Punjab and Others* v *Talwandi*.[42]

In that case, the learned Chief Justice said:

> The question which we have to consider in the light of these decisions is whether sufficient particulars of the first ground of detention were furnished to the respondent so as to enable him to exercise effectively his constitutional right of making a representation against the order of detention.[43]

The learned Chief Justice Dumbutshena in his judgment reminded the detaining authority to appreciate the position of the detainee to prepare his case and make effective representation. He stated:

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[41][1987] LRC (Const) 567.
[42][1985] LRC (Const) 600.
[43]*Ibid* at 607.

> In drawing up grounds of detention it is incumbent upon the detaining authority to appreciate that the detainees will prepare their representations to the review tribunal on inadequate grounds. It is more than important that the detainee must be furnished with sufficient information or particulars to enable him to prepare his case and to make effective representations before the review tribunal.[44]

The Court went on to say that a bare statement that the detainee was a spy was not good enough and held that the learned trial Judge was right in declaring the respondent's detention unlawful. Accordingly the appeal was dismissed.

The question of what constitutes sufficient information to enable an "effective representation" obviously varies from case to case. And it will fall to the court to ensure adequate protection of the detainee by critically examining in each case whether the detainee could make an effective representation in response to the allegations against him.

The question of vagueness of grounds has also been considered in many cases in Zambia.[45] For example in the case of *Att Gen* v *Musakanya*,[46] the appeal hinged on the question of whether the grounds for detention can be said to be vague merely on account of a failure to state in it a specific date on which the detainee allegedly participated in activities prejudicial to public security. It was argued on behalf of the appellant that although failure to specify a date in a ground may in some cases have the effect of depriving a detainee of the opportunity to put forward an alibi it did not in itself constitute vagueness. Silungwe CJ referred with approval the test and illustration of Baron DCJ in *Kapwepwe*[47] case concerning the application of the test. Baron DCJ said at lines 29-44 that if the ground was:

> ...[T]hat during the months of January and February 1972 you addressed meetings in Lusaka of which you advocated the use of violence against persons of different political or tribal affiliations ...

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[44]*Supra* n 41 at 574.
[45]N Muna and K Turner, *Civil Liberties Cases in Zambia* (1984) at 201.
[46]Cited in *ibid.*
[47]*Supra* n 40.

> [t]his would enable the detainee to make representations on the basis of alibi or mistaken identity and also on the merits. For instance, he could say "I have never addressed meetings in the place" or "during the months in question I was engaged in a course of study in Dar es salam" or the detainee might say "it is true that I addressed meetings in Lusaka during the months in question, but I deny that I advocated violence of any kind".

He further said that the information given could not be held to be inadequate only for that reason.

In Zambia, there is a provision that the ground furnished to the detainee must be in writing and in a language that he understands.[48] The question that emerges immediately is what is the position where the grounds served to the detainee is in a language that he cannot understand. This was the issue in the case of *Attorney General* v *Juma*.[49] Here, the detainee was served with a detailed statement in writing in the English language which he could neither read nor understand. However, it had been proven that the grounds contained in the statement were "fully explained" to him in the language that he could understand. The Supreme Court held that the constitutional requirements in article 27(1)(a) are clear and unambiguous and must be observed, even in the case of an illiterate detainee. The Court further stated that as a general rule, constitutional requirements are to be regarded as mandatory but exceptionally some of them may be treated as directory, so that a defect in compliance may be curable. The requirement that the statement be in a language understood by the detainee was directory in character and here the spirit of the constitutional requirement had been observed, for the written grounds had been fully explained to the detainee in his own language so as to enable him to make meaningful representations to the authorities and to the Detainees Tribunal.[50]

The object of furnishing a detainee with grounds for his detention in language that he understands, is to enable him to know what is alleged against him so that he can bring his mind to bear upon

[48]See article 27(1)(a) of the Zambian Constitution.
[49][1985] LRC (Const) 634.
[50]*Ibid* at 637-638.

it and to enable him to make meaningful representations. The principle is that the spirit of the constitutional requirement would be observed if the grounds of detention are fully explained to the detainee.

2. Right to Legal Representation

The right of a detained person to obtain and instruct a legal representative of his own choice is fundamental. This right is protected by the vast majority of constitutions throughout the world and with justification, for every detained person must have the opportunity of obtaining legal advice in order to know his rights and be able to deal with the case against him. It is enshrined in, for example, the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1966) and has the complete support of the International Commission of Jurists. As the Commission points out, the only known justification for suspending this right is the fear that a legal representative may smuggle contraband to the detained client or carry message which could represent a danger to security.[51] It is thus difficult to find the justification for guaranteeing the right in other arrest cases and denying it in cases of preventive detention.[52]

In Zimbabwe, the right of the detainees to have access to the legal representation was raised for the first time in 1982 in the case of *Dabengwa and Masuku* v *The Minister of Home Affairs and Others*.[53] In this case two detainees had been detained under section 17 of the Emergency Power (Maintenance of Law and Order) Regulations 1980. They were prohibited from communicating with their legal representatives by an order issued under section 43 of the 1980 Regulations. This section enabled the Protecting Authority to prohibit a detainee from communicating or receiving any communication from any person outside the

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[51]*Supra* n 1 at 49.

[52]For example in Malaysia, article 5(3) of the Constitution provides that when a person is arrested he shall be informed as soon as may be of the ground of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice. This right, however, is denied by article 149, *see supra* n 11. See too the situation in Singapore and India.

[53](1982) 4 SA 301.

place of detention if it is of the opinion that hindrance was otherwise likely to be caused to the process of investigation or the administration of justice.

The applicants, who were the wives of the detainees brought a motion before the High Court seeking an order that their husbands be granted access to their legal representatives.

The learned Judge ruled that the Regulations whereby the Executive could prevent access by detainees to lawyers were unconstitutional and he ordered access.

The Supreme Court reaffirmed the decision of the High Court by saying that the right of a detained person to obtain and instruct legal representatives of his choice was enshrined in the Second Schedule of the Constitution and could not be derogated by any other provision. Fieldsend CJ said,

> In my view, the learned trial Judge was clearly right in reaching the conclusion that, in so far as it conflicts with para 2 of Schedule 2, Section 43 of the regulations is not saved by Section 26(2) and that the instructions issued under the regulation prohibiting the respondent from instructions and consulting their legal advisors were at variance with the provisions of para 2 of Schedule 2 and that they are therefore *ultra vires* to that extent.[54]

In the case of *Paweni* v *Minister of State Security*, referred to earlier, the Court of Zimbabwe had also dealt with this point. In this case the petitioner was denied access to his legal representatives by the officers of the Central Intelligence Organisation (CIO). Smith J in the High Court, strongly criticised this action and, after referring with approval to the *Dabengwa* case, continued:

> The judgement in that case was issued on 19th June 1982, and yet in March 1984 CIO officers were apparently still denying detained persons as one of the rights, and most important one at that, conferred on them by the Constitution. It is inconceivable that the existence and inviolability of this right is not known to all CIO officers of any standing. This court takes a very serious view of such deliberate flouting of the provisions of the Constitution by CIO officers. Counsel conceded that the CIO officers had acted improperly denying the

[54](1984) 2 SA 345 at par 308B.

> petitioner the right to consult his legal practitioner in private. He said that if the petitioner had applied for mandamus to secure this right the State would not have opposed it. I fail to understand however, why it should be necessary for a detained person to have to apply to Court for a mandamus before he can exercise the rights which are conferred upon him by the Constitution.[55]

The Court accordingly ordered the first respondent to ensure that the petitioner was permitted to exercise freely the right to hold private communications with his legal practitioner. It appears that the Court upheld the fundamental right to legal representation and placing this above all other considerations, argued that, there could be no circumstances in which this right could be curtailed or abrogated.

In Malaysia, Singapore and India the right to a legal representative is provided in one article[56] but derogated from in another article.[57] In the case of *Lee Mau Seng* v *Minister for Home Affairs Singapore*,[58] Wee Chong Jin CJ held that legislation against subversion under article 149, in providing for detention without trial, was not *ipso facto* inconsistent with the right to consult a legal practitioner of one's choice.

3. Right to Review

Paragraph 2(1)(b) of the Second Schedule of the Zimbabwe Constitution provides that where a person is detained under any law providing for preventive detention his case shall be submitted not later than fourteen days (or during a period of public emergency - thirty days) after the commencement of the detention for review by a tribunal and shall be reviewed by such tribunal forthwith. The question is: what constitutes a review "forthwith"? The word "forthwith" appears in many different contexts and its meaning varies accordingly. In cases not involving personal liberty the word has normally been held to

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[55](1985) LRC (Const) at 622.

[56]Articles 5(3), 9(3) and 22 of the Constitution of Malaysia, Singapore and India respectively.

[57]See article 149 of the Constitution of Malaysia and Singapore and article 359 of the Constitution of India.

[58][1971] 2 MLJ 137.

mean "within reasonable time".[59] In the Southern Rhodesian case of *R* v *West and Wild*,[60] a case involving a statutory provision requiring that a person arrested without a warrant be informed forthwith as to the cause of the arrest, Beadle J, as he then was, held the word meant "nothing more than as soon as possible in the circumstances".

There is no such word in the Constitution of Zambia. It was provided under section 33(8) of the Zambian Preservation of Public Service Regulations, that the case must be reviewed not more than one month after the commencement of the detention. The purpose of the review is to enable the detainee to make a representation either with or without legal representative.[61]

In Malaysia the advisory board shall, within 3 months of the date on which such person was detained, consider such representations and make recommendations thereon to the Head of the State[62] who is vested with power to make rules as to the manner in which representations may be made and to regulate the procedure of advisory boards.[63]

In the Zimbabwean case of *Dabengwa and Masuku* referred to earlier, McNally J said that in matters concerning the liberty of the subject it is important that decisions be given speedily and the tribunal is there to protect the individual against executive action where necessary and, it is argued, therefore has a responsibility to deal with all detention cases as a matter of urgency. It is thus unfortunate that no time scale for review by tribunal appears in the schedule, except for the requirement that the detention shall be reviewed by such tribunal forthwith.

One important question is whether the court can permit a delay to occur before a review takes place? In the case of *Minister of Home Affairs and Another* v *Dabengwa*[64] the Supreme Court held that the Constitutional requirement that detention cases should receive an early review by a tribunal was part of

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[59]See for example *London Borough of Hillington* v *Cutler* [1967] 2 All ER 361.
[60](1953) 2 SA 675.
[61]Paragraph 2(1) of the Second Schedule of the Constitution of Zimbabwe and article 27(1)(e) of the Constitution of Zambia provide that at the hearing of his case by such tribunal he shall be permitted to appear in person or by a legal representative of his own choice.
[62]See article 151(1)(b) of the Constitution of Malaysia, and see also section 12 of the Internal Security Act of Singapore and Malaysia.
[63]See section 11(3) of the Malaysian Internal Security Act.
[64]*Supra* n 54 at 360. [1985] LRC (Const) 581.

a scheme providing safeguards for persons who have been detained under a law providing for preventive detention. The Court went further to say that these safeguards should be made as effective as possible in achieving the ends to which they were directed.

Beck JA giving the judgment of the court said,

> A period of four months had elapsed when the notice of motion was filed on 25th October 1983 and having regard to the time intervals set out in the Constitution and the Regulation, I have no doubt that what was done was not done "forthwith" within the meaning of the statutes.[65]

He commented upon the responsibility for compliance with the safeguards in the Schedule as follows:

> Although different authorities are charged with the performance of functions under the regulations and the Second Schedule of the Constitution, the reality is that it is the Executive which, acting through these authorities, is responsible for the observance of all safeguards attached to preventive detention and no matter where the responsibility may immediately lie for the failure to provide the means for ensuring reasonably prompt review, the duty in the final result rests on the Executive to make measures to remedy the situation.[66]

Thus the responsibility has been placed squarely on the Executive to ensure that the rights of detainees are upheld and that delay in dealing with reviews caused by administrative problems cannot be condoned.

The interpretation of article 151(1)(b) of the Malaysian Constitution was given by the Federal Court in the case of *Re Tan Boon Liat*.[67] Here, the three appellants had been detained for a period of two years under detention orders made by the Minister of Home Affairs, pursuant to section 4(1) of the Emergency (Public Order and Prevention of Crimes) Ordinance 1969. They

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[65] *Ibid* at 598 (LRC).
[66] *Ibid*.
[67] [1977] 2 MLJ 108.

made representations to the Advisory Board within two weeks of their detention. In respect of two of the appellants the Advisory Board heard them and considered their representations within three months from the date of the detention orders. But the Board made its recommendations to the Yang diPertuan Agong only after the expiry of the three-month period. In the case of the remaining appellant, the Board considered and made recommendations after the expiry of the three-months period. Nevertheless, the Yang diPertuan Agong had, acting on advice, confirmed the detention orders. Suffian LP, delivered the judgment of the Court and held that it was a condition precedent for further detention that the Advisory Board make its report within three months and that this condition should be satisfied before a person could remain in detention beyond three months. He went on to say that the provision breached was not just procedural but "substantive". The condition for the detention of the appellants after the period of three months is fundamental: that condition had to be satisfied before the order could be made; it was a condition precedent. He concluded that the condition precedent had not been satisfied and that the detention was therefore unlawful.[68]

In the Singaporean case of *Lee Mau Seng* v *Minister of Home Affairs, Singapore*[69] the same interpretation was given by Wee Chong Jin CJ to article 151(1)(b) of the Constitution of Singapore. He said that a detainee could not be detained longer than three months unless an independent advisory board had considered any representation made by him and made recommendations to the President.

It may be right to say that article 151(1)(b) envisages two kinds of detention. First, detention for a period not exceeding three months and second, the detention for a period exceeding three months. It is equally right to say that while a citizen may be detained for a period not exceeding three months without any intervention on the part of the Board, he may not be detained for a period exceeding three months unless within that period the Board has considered his representations and made recommendations thereon to the Yang diPertuan Agong. The article does not expressly say that the Board must act within that period,

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[68] *Ibid* at 109

[69] *Supra* n 58.

but the use of the words "has considered" necessarily implies that the intervention of the Board is a prerequisite.[70]

B. Consequences Arising From Breach Of The Safeguards

Once it has been determined that there has been a failure to deal with a detainee in accordance with the relevant procedures, the crucial issue as to the consequence of such breach becomes relevant. Should it lead inexorably to the granting of a writ of habeas corpus or should the court merely issue a writ of mandamus requiring compliance with the relevant procedure? This has been the subject of considerable discussion in recent years in a number of jurisdictions and there remains a considerable divergence of opinion thereon.

The first point for determination is whether the constitutional safeguards found in the constitution are mandatory or merely directory.[71] Quite rightly, it is argued that there has been a general acceptance by the courts that such safeguards are mandatory. The next question concerns the validity of a detention, if there was any defect in the making of the detention order. The defects can be in various forms such as misdirection, improper purpose or disregard of relevant consideration.[72] In Zimbabwe, on a number of occasions the courts have held that such defect invalidates the detention and have ordered the release of the detainee. For example, in *Holland* v *Commissioner of the Zimbabwe Republic Police*[73] a police officer had issued a detention order made under section 21 of the Regulations which, as had been seen, requires the arresting officer to have reasons to believe that there were grounds for detention under section 17 of the Regulations. In this case the officer merely obeyed the order from a superior to detain the applicant and accordingly Pitman J in the High Court held that the detention order was void and ordered the release of the applicant.

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[70]*Per* Suffian LP in *Re Tan Boon Liat supra* n 67.

[71]See for example *York* v *The Minister of Home Affairs* [1982] 4 SA 496.

[72]GL Peiris "Wednesbury Unreasonableness: The Expanding Canvas" (1987) *Cambridge Law Journal* at 53.

[73]HC-H-228-82 (unreported).

In a similar case[74] from India, the Privy Council quashed the detention order issued by the Home Secretary. The order was issued merely on the recommendation of the police without the Home Secretary being personally satisfied on the materials placed before him, whether it was necessary for such an order in the particular case or not. The Privy Council's decision was based on the ground that the Home Secretary had not applied his mind to the question of issuing the order and that his personal satisfaction in each case of detention was a condition precedent to the issue of such an order.

As regards the defect of improper purpose, reference may be made to the case of *Karpal Singh s/o Ram Singh* v *Minister of Home Affairs, Malaysia.*[75] The applicant in this case had been placed under detention by virtue of a detention order issued by the Minister of Home Affairs under section 8 of the Internal Security Act 1960. The order of detention, grounds of detention and allegations of fact were served on the applicant. There were six allegations against the applicant which formed the basis of the detention order. The present case centred on the sixth allegation within which the applicant, at the place, time and on the date stated in the detention order, used the issue of appointing non-Mandarin qualified Headmasters and Senior Assistants in the national-type Chinese primary schools to incite racial sentiments of the Chinese community. This allegation was later admitted by the Minister to be an error as the detainee did not on that date, time and place speak of the issue. The applicant argued that this showed the casual and cavalier attitude in regard to the issue of the detention order as to amount to *mala fide*. Peh Swee Chin Jin J, said that *mala fide* did not mean at all a malicious intention. It normally meant that a power was exercised for a collateral or ulterior purpose, *ie* for a purpose other than for which it was professed to have been exercised. He stated:

> Viewed objectively, and not subjectively, the error in all the circumstances would squarely, in my view, amount to the detention order being made without care, caution and a proper sense of responsibility.[76]

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[74] *Emperor* v *Sibnath Banerji* AIR 1954 PC 156.
[75] [1988] 1 MLJ 468 HC, [1988] 3 MLJ 29 SC.
[76] *Ibid* at 474 (HC).

The learned Judge, accordingly ordered the issue of the writ of habeas corpus. In the Supreme Court, the decision was strongly criticised. Abdul Hamid LP delivering the judgment of the Court said that the learned Judge had failed to distinguish between grounds of detention stated in the detention order and the allegations of facts supplied to the detainee. According to him, the learned Judge had also failed to recognise that whilst the grounds of detention were open to challenge on judicial review, the allegations of facts upon which the subjective satisfaction of the Minister was based were not.

The Court specifically referred to the judgment of Lord Parker in the old cases of *Zamora*[77] and *Liversidge* v *Anderson*[78] for its non-interventionist approach. The Court stated,

> In other words, reasonable cause is something which exists solely in the mind of the Minister of Home Affairs and that he alone can decide and it is not subject to challenge or judicial review unless it can be shown that he does not hold the opinion which he professes to hold.[79]

The Court in this case recognised the importance of the national security to be placed under the responsibility of the government as stated by Lord Parker in the *Zamora* case. But the Court has failed to recognise the danger of arbitrary arrest and detention contrary to article 9(1) of the International Covenant on Civil and Political Rights by their reluctance to interfere.

The English courts have shown their disapproval (implicitly or expressly) in a number of cases. For example in the case of *Inland Revenue Commissioner* v *Rossminster Ltd*,[80] Lord Diplock said,

> For my part I think the time has come to acknowledge openly the majority of this House in *Liversidge v Anderson* were expediently and, at the time, perhaps inexcusably wrong and the dissenting speech of Lord Atkin was right.[81]

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[77][1916] 2 AC 77.
[78][1942] AC 206.
[79]*Supra* n 75 at 32.
[80][1980] AC 952.
[81]*Ibid* at 1011.

It seems that the ghost of *Liversidge* which has been laid to rest in relation to detention statutes that employ the '"reason to believe" formula still haunts the law in Malaysia.

The most controversial area, however, concerns the situation where a detention order is validly made but later one of the constitutional safeguards in the Constitution is contravened. In Zimbabwe the discussion originated in the case of *York* v *The Minister of Home Affairs and the Director of Prisoners.*[82] Here, there had been a failure by the Minister to submit the detainee's case to the review tribunal within thirty days of his arrest. Dumbutshena J as he then was, in the High Court, ordered their release holding that the orders were *void ab initio* as the failure on the part of the Minister went to the root of the detention. In a well reasoned judgment, the learned judge followed the West Indies decision of *Kelshell* v *Pitt, Munroe and Bernard, exparte Kolshall,*[83] where in similar circumstances Malone J held a detention unlawful, stating:

> ... [T]o hold otherwise it would have to be maintained that the order of the Minister can override a provision of the Constitution with which it conflicts. That cannot be for the constitution is the highest legal authority we know.[84]

The "Supremacy of the Constitution" argument was not discussed in the appeal by the Minister to the Supreme Court in the *York* case, the matter being decided on other grounds. It is unfortunate that the Supreme Court did not have or take the opportunity of dealing with the supremacy argument and the point did not come before the Supreme Court until *Minister of Home Affairs* v *Dabengwa.*[85] However, the decision of the Lower Courts was upheld, Fieldsend CJ merely expressing support for the view that a breach of the safeguards did entitle a person to be released. In the Supreme Court, Beck JA citing a wide range

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[82] *Supra* n 71.
[83] [1972] 19 WIR 136.
[84] *Ibid* at 146.
[85] *Supra* n 64.

of authority from Ireland, the West Indies, Zambia, Uganda and England in support of his decision, held that mandamus was the remedy for the respondent. According to his Lordship:

> ... [T]he violation of a safeguard relating to continued detention subsequent to the making of the order would not, without more, invalidate the detention, but must, initially, be remedied by way of an order to ensure that the safeguard in question is afforded to the detainee.[86]

The case was followed in turn by *Moyo and Others* v *Minister of Home Affairs*[87] in which McNally J summarised his interpretation on the later *Dabengwa* case where he said:

> The principle now enunciated is that the breach of one or more mandatory safeguards enshrined in the Constitution for the protection of detainees does not necessarily require the Court to order the summary release of the detainee. It may be possible, preferable and expedient to order the State, by way of mandamus, to grant the detainee the right which he has been denied rather than to order his release. Of course if a detention order is invalid from the very beginning, the Court must declare it so and order the release of the detainee. But it seems to me to be evident, now that the remedy of mandamus is accepted as being available, the State must be allowed an opportunity to put right its mistakes unless the mistakes are *mala fide* ...[88]

His remark on the *York* case deserves quotation. The learned Judge said,

> In all the circumstances it seems to me that the restatement of the law in yesterday's decision of the Supreme Court creates a new situation in which the judgment of the Court a quo in *York and Another* v *Minister of Home Affairs and Another* is no longer applicable.[89]

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[86] *Ibid* at 596.
[87] HC-H-478-83 (unreported).
[88] *Ibid.*
[89] *Ibid.*

In Malaysia, a number of cases challenged the validity of the preventive detention through the application of habeas corpus before the High Courts and Federal Court. But with not much success.[90] In the case of *Karam Singh* v *The Minister of Home Affairs*[91] the Federal Court dismissed an appeal against the decision of the High Court dismissing an application by the appellant for writ of habeas corpus. The appellant had been detained under an order of detention signed by the Minister of Home Affairs under section 8(1)(a) of the Internal Security Act 1960. In the appeal it was argued, *inter alia*, that the allegations of fact supplied to the appellant were vague, insufficient and irrelevant; this hampered the appellant in the exercise of his right to make representations and consequently the original order of detention was invalidated. The argument was based on some Indian cases which had held that the detention was rendered unlawful if the particulars supplied to the detainee were vague, insufficient and irrelevant as such particulars would prevent him from effectively making representation. The Federal Court held that the vagueness, insufficiency or irrelevance of allegations of fact supplied to the appellant did not relate back to the order of detention and could not render unlawful detention under a valid order of detention.

The Court explained why it would not follow the Indian cases. First of all, the power of detention in Malaysia was given to the highest authority in the land, acting on the advice of Ministers responsible to and accountable in Parliament, not to mere officials. The second ground proferred was that detention in Malaysia, in order to be lawful, must be in accordance with law (prescribed by article 5(1) of the Malaysian Constitution), not as in India where it must be in accordance with procedure established by law (article 21 of the Indian Constitution).

Reference may also be made to the case of *Che Su binti* v *Superintendent of Prisons, Pulau Jerejak, Penang*,[92] where section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, authorises preventive detention on certain grounds. Section 5(2)(b) requires that the detainee be furnished

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[90]See MP Jain, *Administrative Law of Malaysia and Singapore* (1988) at 444.
[91][1969] 1 MLJ 129.
[92][1974] 2 MLJ 194.

by the Minister with the grounds of his detention. In this case, the grounds were served, not by the Minister, but by a departmental official, under his direction. The Court did not regard it as a flaw vitiating detention and rightly so for only a ministerial act was performed by the official, but the High Court went on to say in the judgment: "... failure, if any, to observe in full this section ... cannot invalidate the order made by the Minister under section 4(1)".

This appears to be rather a wide proposition. Supposing no grounds were served at all on the detainee, will the detention still be valid? In this case, the High Court left the question open.

The next question is what is the position if the Advisory Board fails to make its report within three months as stipulated by article 151 of the Constitution? In a number of High Court decisions, the view was expressed that the detention did not become invalid, as non-compliance with a procedural requirement would not make the detention invalid.[93] The Federal Court of Malaysia ruled, on the other hand, in the *Tan Boon Liat* case, referred to earlier, that the detention became invalid and accordingly, issued habeas corpus to quash the detention.[94]

Whatever has been the position both in Malaysia and Singapore in the cases discussed above regarding the procedural matters of the preventive detention, there will be no such cases in future. This is due to the inclusion of section 8B and section 8(B)(2) in the latest amendment to the Malaysian and Singapore Internal Security Act respectively. The effect of both sections is that, any act done or decision made by the Yang diPertuan Agong or the Minister in Malaysia and the President or Minister in Singapore in the exercise of their power in accordance with the Act relating to the compliance of any procedural requirement, can no longer be reviewed by any court.

The effect of the insufficiency of detail furnished to the detainee was also the issue in the case of *Republic of Kenya* v *Commissioner of Prisons, ex parte Wachira and Others*.[95] In

[93]*Supra* n 67. See also *Subramaniam* v *Minister of Home Affairs* [1977] 1 MLJ 82.
[94]*Supra* n 67.
[95][1985] LRC (Const) 628.

this case the Court admitted that the statement of grounds for detention served on the detainees provided insufficient detail. The Court however, held that the insufficiency did not render the detentions invalid. Simpson CJ distinguished this case from the case of *Attorney-General of St Christopher, Nevis and Anguilla* v *Reynolds*[96] where the detention was held invalid by the Privy Council. The learned Chief Justice said:

> In that case not only were there no grounds for detention shown in the statement but no grounds were shown in a subsequent inquiry. It was not merely insufficiency of detail.[97]

He referred with approval the decision of Sir Udo Udomo, CJ in *Uganda* v *Commissioner of Prison, exparte Matovu*[98] wherein he said that insufficiency of statement of the grounds of detention served on the applicant was a mere matter of procedure. It was not a condition precedent but a condition subsequent.

The Indian Courts, however, have insisted on a strict observance of the procedural requirement and have thus been able to develop a few rules to protect personal liberty of the people against undue encroachment by the administration.[99] In India the service of grounds on the detainee is regarded as a mandatory procedural requirement.[1] The satisfaction of the detaining authority on which the order of detention is based is open to challenge and the detention order is liable to be quashed if some of the grounds supplied to him are so vague that they would virtually deprive the detainee of the statutory rights of making a representation.[2] In this context, reference must be made to the case of *State of Bombay* v *Atma Ram*.[3] In this case, the respondent was detained under the Preventive Detention Act 1950, under an order made by the Commissioner of Police. Nine days later the grounds for his detention were supplied to him. They were in the following terms:

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[96][1980] AC 637.
[97]*Supra* n 95 at 631.
[98][1966] EA 514.
[99]MP Jain, "Judicial Creativity & Preventive Detention in India" (1975) *Journal of Malaysian and Comparative Law* at 2261.
[1]*Bhutnah* v *West Bengal* AIR 1974 SC 806, *Togla* v *West Bengla* AIR 1975 SC 255.
[2]*Supra* n 91 at 149, *per* Suffian FJ.
[3]*Supra* n 35.

> That you are engaged or likely to be engaged in promoting acts of sabotage on railway and railway property in Greater Bombay ...

In his petition for habeas corpus he contended that the ground was "delightfully" vague and did not mention when, where or what kind of sabotage or how the applicant promoted it. The Supreme Court agreed that a detainee should have sufficient information to enable him to make a representation and if it was not sufficient the order of detention was invalid. Sastri J, in his judgment said this:

> If this procedure [prescribed by Clause (5) and (b) of Article 22] is not complied with, detention under the Act (Preventive Detention Act] may well be held to be unlawful, as it would then be deprivation of personal liberty which is not in accordance with the procedure established by law.[4]

The principles laid down by that case are as follows. First, mere vagueness of grounds standing by itself and without leading to an inference of *mala fide* or lack of good faith is not a justifiable issue in the court of law for the necessity of making the order in as much as the ground or grounds on which the order of detention was made is a matter for the subjective satisfaction of the government or of the detaining authority. Secondly, the particulars of the grounds in absence of specific provisions in a statute are to be furnished to the detainee within a reasonable time so that he may have the earliest opportunity of making a representation against the detention order. What is reasonable time is dependant on the facts of each case. Thirdly, the failure to furnish the grounds with the speedy addition of such particulars as would enable the detainee to make a representation at the earliest opportunity against the detention order can be considered by a court of law as an invasion of a fundamental right of the detainee.

It appears that there is no exception for the detaining authority in India from the strict observance of the procedural norms. It was clearly pronounced by the Supreme Court in the case of

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[4] *Ibid* at 166.

State of Punjab and Others v *Talwandi*.[5] Chandrachud CJ when delivering the judgment of the Court, stated,

> Preventive detention is a necessary evil but essentially an evil. Therefore, deprivation of personal liberty, if at all, has to be on the strict terms of the Constitution. Nothing less.[6]

III. CONCLUDING REMARKS

The use of the preventive detention is clearly a violation of individual rights and to restrict a person's liberty in this manner leaves open the possibility of serious injustice occurring. In addition, respect for and confidence in the Constitution may well be undermined if fundamental rights enshrined therein can be abrogated at the stroke of a Minister's pen.[7]

As has been seen, the International Covenant on Civil and Political Rights, has recognised the right of a nation to resort to detention without trial. Accordingly it must be accepted that such action is a necessary part of the government powers but, it is argued, there must be clear limits to its use.

The Honourable Justice TO Elias of the International Court of Justice at the Hague argues that certain criteria must be met before a state can drastically curtail the elementary rights of its citizen.[8] First there should be a breakdown of law and order within a state or a threat to its security and political independence arising from internal insurrection or external aggression. Secondly, there should be an official proclamation of an emergency by the government before measures drastically limiting the basic freedom of the people are taken to quell such threats to its security. Thirdly, the situation must be such that no alternative measure other than the curtailment of individual fundamental liberties may be considered appropriate to control the situation.

The rigours of the preventive detention as it operates in some third world countries thus need to be softened by providing

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[5][1985] LRC (Const) 600.
[6]*Ibid* at 607-608.
[7]See J Hatchard, *supra* n 1.
[8]General Report on "Government Action, State Security and Human Rights" given to the 10th African Conference on the Rule of Law, Lagos 1961, 42-55.

some more safeguards to the detainee. For example, (1) detention cases should be reviewed periodically, say at an interval of three months, so that those whose detention no longer appears to be necessary may be released, (2) there should be a constitutional obligation on Parliament to prescribe the maximum period of detention, (3) the detainee should be provided with legal assistance in preparing his representation for it may be quite difficult for an inarticulate detainee to draft his representation, (4) lawyers should be permitted to appear before the advisory boards to represent the detainee.[9]

Nevertheless, the existence of any enforceable individual rights in practice depends on the role of the Judiciary in upholding those rights. A weak Judiciary can sound the death knell for individual freedom.

In the final analysis, preventive detention is an inescapable fact of life in many countries but, it is argued, it must only be of transitory nature and the Judiciary must ensure that individual liberties are protected to the greatest extent possible.

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[9] *Supra* n 32.