WICREMABANDU
v.
HERATH AND OTHERS

SUPREME COURT
H. A. G. DE SILVA, J.,
BANDARANAYAKE, J.,
FERNANDO, J.,
KULATUNGA, J.,and
RAMANATHAN, J.,
S. C. APPLICATION No. 27 OF 1988,
NOVEMBER 2, 3, 6, 7, 8, 9 and 10, 1989.

Fundamental Rights – Detention Orders – Regulation 17 of the Emergency Regulations – Articles 11, 13(1), 13(2), 13(4), 15(7), 16(1), 17, 126 and 168(1) of the Constitution – Emergency Regulations under Section 5(2)(a) of Public Security Ordinance – Section 8 of the Public Security Ordinance.

Vires of Regulations – Article 155(2) – Does the right to "restrict" include total denial or extinction of the right? – Nature, scope and extent of the powers of Court to examine the validity of detention orders.

Held :

1. If in respect of a fundamental right recognised by Article 13(1) or (2), an Emergency Regulation imposes a restriction which is permitted by Article 15(7), such regulation does not over-ride, suspend or amend any provision of the Constitution ; it is a restriction permitted by the Constitution and is both *intra vires* and consonant with the Constitution, and therefore does not "over-ride" the Constitution, Article 15(7) permits *inter alia*, restriction in the interests of national security and public order. The State may not have any burden of establishing the reasonableness of the restriction placed by law or Emergency Regulations but if this Court is satisfied that the restrictions are clearly unreasonable they cannot be regarded as being within the intended scope of the power under Article 15(7). But the test is not wholly objective for the court must not usurp the discretion of the authorities constitutionally entitled to impose restrictions. In a time of grave public emergency, provision for preventive detention is not unreasonable even if judged by a wholly objective test where it is authorised for the purpose of preventing conduct prejudicial to the national security or the maintenance of public order. The obvious fact that such a power may be abused does not render the regulation invalid; such abuse of power is by no means beyond challenge. The question whether, in relation to the interests of national security and public order, a particular restriction is unreasonable may involve some consideration whether it is just and fair – balancing the interests of the individual and the community. But there can be no independent requirement that it be just or fair. Can the right to "restrict" include total denial or extinction of the right? In many contexts the right to "restrict" would presuppose the survival, even in an attenuated form, of the right restricted. But this is not an inflexible rule particularly in relation to a right which has but one aspect; thus if the right to be informed of the reason for arrest can be restricted, as Article 15(7) contemplates the restriction will almost inevitably be a denial. There can well be circumstances in which the same considerations which justify arrest and detention, legitimately and imperatively require non-disclosure of the reason for such arrest and detention. Regulation 17 is not *ultra vires* on this ground.

2. Regulation 17(9) enables the Secretary to deprive a detenu of the right to make representations to the President and the Advisory Committee (set up under Regulation 17). There is no reason why a citizen should be deprived of the right to make representations to the Head of the Executive, and to the Advisory Committee, which in any event has only limited powers. The total exclusion of the right to seek review through the Executive would have been unreasonable in the circumstances of the Emergency then prevailing. It is therefore *ultra vires*.

3. Apart from Regulation 17(9), Regulation 17 is *intra vires* the Constitution.

4. Section 8 of the Public Security Ordinance and Regulation 17(10) which provide that such an order shall not be called in question in any court on any ground, do not affect the jurisdiction of the Supreme Court.

5. Under Article 168(1) of the Constitution existing written laws continue in force except as otherwise expressly provided in the Constitution. Articles 17 and 126 confer jurisdiction on the Supreme Court in respect of infringements of fundamental rights and this is an express provision which prevails over any existing written law to the contrary including Section 8 of the Public Secrurity Ordinance. Article 16(1) of the Constitution saves the Public Security Ordinance (since it is written law) but only from invalidation on

the ground of inconsistency with fundamental rights; it does not validate any inconsistency with Articles 17 or 126 of the Constitution.

The power to make Emergency Regulations does not include the power to make regulations overriding the provisions of the Constitution (Article 155(2)). Regulation 17(10) cannot override or in any way affect the jurisdiction of the Supreme Court under Articles 17 or 126. The exercise of that jurisdiction will be subject to the common law principles applicable to the judicial review of adminstrative orders.

The relevant question would be whether it was reasonable for the authority on whom the power is conferred to be satisfied of the existence of the facts, the existence of which empowered him to make the order and all discretion, even when there is a subjective element in it, must be exercised reasonably, and in good faith, and upon proper grounds. It is the test of reasonableness, in the wide sense, that the court has to apply

6. The absence of a limit to the period of detention does not make Regulation 17 *ultra vires.*

7. Under Regulation 17(6) the duty of giving the grounds of the order and sufficient particulars is on the Chairman of the Advisory Committee, to be complied with at the meeting to consider the detenu's objections. If upon such communication the detenu applies for time to prepare his case, the Advisory Committee should grant a postponement.

8. Preventive detention does not constitute punishment and Article 13(4) has no application to preventive detention. Preventive detention is permitted by S. 5(2)(*a*) of the Public Security Ordinance read with Articles 168(1) and 155(1) of the Constitution provided it does not have the effect of overriding, amending or suspending the provisions of the Constitution.

9. The requirements of Article 13(1) and (2) cannot be regarded as absolute.

Cases refered to :

(1) *Weerasinghe v. Samarasinghe* 68 NLR 361.
(2) *Gunasekera v. Ratnavale* 76 NLR 316, 329.
(3) *Namasivayam v. Gunawardena S.C.* 166/87 Supreme Court Minutes of 24.09.1987.
(4) *Hawker v. New York* 170 U.S. 189.
(5) *Dent v. West Virginia* 129 U.S. 114.
(6) *U. S. v. Lovett* 328 U.S. 303, 324.
(7) *Cummings v. Missouri* (1866) 4 Wall 277.
(8) *Re an Advocate* 52 NLR 559.
(9) *Yapa v. Bandaranayake* [1988] 1 Sri LR 63, 73, 74, 75.
(10) *Kumaranatunga v. Samarasinghe* 2 FRD 347, 350 – 352.
(11) *Menaka Gandhi v. Union of India AIR* 1978 SC 597.
(12) *A. G. for Ontario v. A. G. for the Dominion* (1896) AC 348, 363.

(13) *Hidramani v. Ratnavale* 75 NLR 67, 84.

(14) *Liversidge v. Anderson* (1942) AC 206, 246–247, 254 1941 3 All ER 338.

(15) *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* (1977) AC 1014, 1047, (1976) 3 All ER 665, 660.

(16) *Re W (an infant)* (1971) AC 682, 700.

(17) *Lynch* (1886) 32 Ch D 72, 89.

(18) *Demetriades v. Glasgow Corporation* (1951) 1 All ER 457, 463.

(19) *Associated Provincial Picture House Ltd., v. Wednesbury Corporation* (1948) I KB 223, 229.

(20) *Janatha Finance v. Liyanage* 2 FRD 373, 384, 387.

(21) *Teo Soh Lung v. Minister of Home Affairs* C. A. Singapore – Minutes of 8.12.1988.

(22) *Nkondo v. Minister of Law S.C. Youth Affairs* – Minutes of 18.2.86.

(23) *The Zamora* (1916) AC 77.

(24) *Rex v. Halliday* (1917) AC 260, 269.

(25) *Green v. Secretary of State* (1942) AC 284.

(26) *Liyanage v. The Queen* 68 NLR 265.

(27) *Joseph Perera v. The Attorney-General* S.C. Application 107–109/96 – S.C. Minutes of 25.5.87.

(28) *Gopalan v. State of Madras AIR* 1950 SC 27, 91, 92.

(29) *Edirisuriya v. Navaratne* (1985) 1 Sri LR. 100, 109, 118, 120.

(30) *Kruse v. Johnson* (1898) 2 QB 91.

(31) *Christie v. Leuchinsky* (1947) AC 573.

(32) *Muttusamy v. Kannangara* 52 NLR 324.

(33) *Gunasekera v. De Fonseka* 75 NLR 246, 250.

(34) *Yasapala v. Wickramasinge* 1 FRD 143, 159.

(35) *Siriwardena v. Liyanage* 2 FRD 310, 320, 322, 323, 328.

(36) *Shibban Lal Saksena v. State of U.P.* AIR 1954 SC 179.

(37) *Sasanasiritissa Thero and others v. P.A. De Silva and others* S.C. Application 13 – 15/88 S.C. minutes of 27.7.89.

(38) *Siriyalatha v. Baskaralingam* Court of Appeal No. 7/88, C.A. minutes of 7.7.88.

(39) *Nallanayagam v. Gunatilake and others* (1987) 1 Sri LR 293.

(40) *Witanachchi v. Cyril Herat, Leelaratne v. Cyril Herath* SC. Nos. 144 – 45/86 S.C. minutes of 1.7.88.

(41) *Visuvalingam v. Liyanage* (1984) 2 Sri LR. 123, 132

APPLICATION for infringement of fundamental rights.

R. K. W. Goonesekera with *D. W. Abeykoon, Sanath Jayatilleke, Javid Yusuf* and *M. Underwood* for the petitioner.

Sunil de Silva, P.C., Attorney-General with *Tilak Marapana, P.C.*, Additional Solicitor-General, *Rienzie Arsecularatne, S.S.C., Kolitha Dharmawardena, S.S.C.*, and *D. Dassanayake, S.C.* for respondents

Cur.adv.vult.

H. A. G. DE SILVA, J.

Applications Nos. 27/88, 28/88 and 34/88 were referred to a bench of five Judges by His Lordship the Chief Justice for the determination of the following questions of law of public importance :

(1) Whether Regulation 17 of the Emergency Regulations under which the Petitioners in the above applications were taken into custody is *ultra vires* the Public Security Ordinance and/or the Constitution of 1978.

(2) Assuming that Regulation 17 is valid, the nature, scope and extent of the power of this Court to examine the material relied on by the Executive for the purpose of making such detention orders.

(3) The nature, scope and extent of the power of the Court to examine the material relied on by the Minister in making orders under Section 9(1) of the Prevention of Terrorism Act, No. 48 of 1979.

At the outset it was agreed that Application No. 28/88 would not be taken up for consideration ; if it was held in the other two Applications that Regulation 17 was *ultra vires,* Application No. 28/88 would be heard subsequently merely to determine the relief to be granted to the Petitioner ; if it was held that Regulation 17 was *intra vires,* then Application No. 28/88 would stand dismissed. We then proceeded to hear submissions in respect of Applications Nos. 27/88 and 34/88.

This judgment sets out the views of my brother Fernando and myself. We will first deal with the facts and the questions of law raised in Application No. 27/88, as these questions of law are also germane to Application No. 34/88 : the facts relevant to the latter are dealt with in a separate judgment.

In Application No. 27/88 the Petitioner alleges that he was arrested by the 2nd Respondent at his father's residence at 2.00 a.m. on 23.6.1987 ; on inquiring why he was being arrested, the 2nd Respondent merely said "We cannot give you reasons. This is an order from the higher authorities" ; when asked for the order, the 2nd Respondent said he would show it at the Police Station, but this was not done. This is confirmed by the affidavit (XI) of the Petitioner's father. In his affidavit the 2nd Respondent stated that at the time of arrest he

informed the Petitioner that the arrest was upon an order made by the 5th Respondent under Regulation 17(1). The Petitioner states that he was taken to the Magazine Prison, and at about 9 a.m., a Detention Order dated 20.06.87 was served on him. The Petitioner has thus been informed of the **ground** of detention, but not the **reasons** therefor. Up to 29.02.88, when this Application was filed, the Petitioner had not been produced before any judicial officer ; he further alleges that there had been delays in serving the subsequent Detention Orders issued in repect of him ; in particular, the Detention Order for July 1987 was served only in December 1987. The meals served were insufficient and unhygienic, and meals were not allowed to be brought from outside. He was permitted to speak to his brother (who filed the main supporting affidavit) only for 10 minutes at a time ; during the first month he was taken out of his cell only for half an hour a day ; access to books and newspapers was denied. The Commissioner of Prisons denied these allegations in his affidavit. These conditions of detention, though burdesome and harsh, do not suffice to constitute a violation of Article 11, and it is unnecesary to consider whether these allegations have been proved.

It is alleged in the petition that the Petitioner had been "active politically in criticising the repressive measures adopted by the Government and critical of the acts of the Armed forces and Police powers to curtail individual rights" ; that the 2nd Respondent had no warrant or order for his arrest, and that the subsequent detention at the Magazine Prison was illegal, and made *mala fide* in furtherance of the political interest of the U.N.P.;that the Detention Orders were made *mala fide* for the suppression of the political activities of the Petitioner in actively and lawfully condemning the repressive acts of the Government. Later, the Petitioner tendered his own affidavit, signed on 9.8.88 ; specific allegations of political ill-will and *mala fides* have been scored off by him prior to signing, and his Counsel, rightly, did not pursue those allegations, involving infringement of Article 14 (1) (*a*).

The petition finally states that the Detention Orders, P1 to P 8 covering the period 23.6.87 to 18.2.88, purported to have been made by or on behalf of the 5th Respondent -

"are illegal and invalid on the following grounds :

(*a*) they are *ultra vires* the statutes under which they purport to have been made.

(*b*) they are made in pursuance of Regulation issued contrary to the Constitution.

(*c*) they are made in pursuance of powers conferred by Regulations which are not valid in law.

(*d*) they are made under Regulations which set no guide lines for exercise of powers.

(*e*) they are made under Regulations which are an unreasonable exercise of powers conferred by statute."

He claims that there has been a violation of the fundamental rights guaranteed to him by Articles 13 (1), 13 (2) and 13 (4).

The 5th Respondent admits the arrest of the Petitioner at 2.00 a.m. on 23.6.87, on a Detention Order made by him on 20.6.87 under Regulation 17 (1) ; it was submitted that there was no need to produce the Petitioner before a judicial officer as he was detained in terms of Regulation 17(1). He has stated the reasons for the detention : according to the information available, the Petitioner has been an active member of the J.V.P. even prior to 1971, and had been involved in 1971 insurgency : he had been arrested and sent to rehabilitation camp : after his release, from 1978 to 1983, he was quite active in the affairs of the J.V.P., but these activities were legitimate as the J.V.P. was again proscribed only on 30.7.83 ; in 1989 there were continuing and widespred acts of violence by J.V.P. activists, and there was information that the Petitioner was continuously advising and supporting the J.V.P. After considering the material available, and the advice of the National intelligence Bureau, the 5th Respondent was convinced that the Petitioner was likely to act in a manner prejudicial to the national security and the maintenance of public order, and ordered his arrest and detention. There is a serious discrepancy in the 5th Respondent's second affidavit, dated 10.2.89, in which he states that "there was information obtained from reliable sources that the Petitioner was responsible for **launching** a campaign of violence **to obstruct the implementation** of the Indo-Sri Lanka Peace Accord by instigating the young people of the area to resort to violence in order to distrupt the peaceful life of the community" ; this suggests activity by the Petitioner **after** the Accord. Since the Petitioner was

arrested more than a month **before** the Accord of July, 1987, there could not have been any such information, and the Detention Order dated 20.6.87 could not have been based on any such information. Although this creates some doubt about the nature and reliability of the information which the 5th Respondent says he had, this would seem to be an error, attributable to carelessness in the preparation of the second affidavit, rather than a deliberate falsehood, and it does not suffice to lead us to the conclusion that he acted *mala fide, unreasonably or perversely.* In his first affidavit the 5th Respondent set out the other material available to him, and the Petitioner replied that he was "totally unaware" of these averments, seemingly denying even involvement and arrest in connection with the 1971 insurgency – a matter which his Counsel did not contest at the hearing before us.

The first question for decision is whether Regulation 17 (1) is *ultra vires.* Under Section 5 (2) (*a*) of the Public Security Ordinance regulations may be made to authorise and provide for the detention of persons, and it has been held in *Weerasinghe v. Samarasinghe*[1] (followed in *Gunasekara v. Ratnavale*[2] that similar regulation was valid. The Ordinance and the delegation of legislative power to the Executive to make Emergency Regulations were held to be constitutional ; Article 16 (1), 155(1) and 168 (1) would not confirm that position. Learned Counsel for the Petitioner advisedly restricted his attack to the question of unconstitutionality, relying particularly on Article 155 (2), and contended that Emergency Regulations may have the legal effect of **over-riding,** amending or suspending laws, *"except the provisions of the Constitution" ;* preventive detention as provided for by Regulation 17 was *ultra vires* because, firstly, it was "punishment" within the meaning or Article 13 (4), (which could not be made subject to any restriction, other than by Article 15 (8) which is not relevant here) ; secondly, even if it was not "punishment", it was inconsistent with Article 13 (1) and (2), and was therefore prohibited by Article 155 (2) ; and finally, even if Article 13 had to be considered with Article 15 (7), it was not permitted "restriction".

It was the submission of the Attorney-General that "if Regulation 17 was *intra vires* the Public Security Ordinance, it could not be *ultra vires* the Constitution on account of it being inconsistent with any provision

preceding Article 16 of the Constitution". However, Article 16 (1) only preserves existing written laws despite some inconsistency with fundamental rights, and we hold that it does not validate post-Constitution regulations made under such (valid) existing written laws.

Taking Article 13 as a whole, "arrest" in paragraph (1) includes an arrest in connection with an alleged or suspected commission of an offence, as well as any other deprivation of personal liberty (as, for instance, in *Namasivayam v. Gunawardene*[3]. Paragraph (2) refers to the consequences of such arrest : the person arrested may be "held in custody", "detained", or "otherwise deprived of personal liberty" – which would cover, for instance, house arrest, or a restriction order limiting freedom of movement to a particular area or during specified periods. Paragraphs (3) to (6) provide safeguards in respect of trial, punishment, burden of proof and retroactive criminal liability. In that sequence and context there is no reason to depart from the ordinary meaning of "punishment" :

> "Punishment presupposes an offence, not necessarily an act previously declared criminal but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking, all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practise medicine because he has been convicted of a felony, *Hawker v. New York,*[4] or because he is no longer qualified, *Dent v. West Virginia,*[5]" (Franfurter, J. dissenting. in *U. S. v. Lovett,*[6] citing *Cummings v. Missouri.*[7])

In *Cummings v. Missouri* (at 320, 322) the U. S. Supreme Court rejected the argument that "to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all," and held that "punishment" extended to "the deprivation [or suspension] of any rights, civil or political previously enjoyed, ... the circumstances attending and the causes of the deprivation determining this fact", where such deprivation was on account of past conduct or upon an assumption of guilt. We therefore cannot accept Mr. Goonesekera's submission that the ordinary meaning of punishment is to cause suffering. The disqualification

generally imposed on an Attorney-at-law, (or a doctor), convicted of an offence involving moral turpitude, undoubtedly causes suffering : its purpose is not punitive, but preventive, to protect the interest of *litigants, (or patients), and the profession (Re An Advocate,*[8]). Restraints on liberty can be imposed either as a **punitive** measure,or as a **preventive or precautionary** measure,and we respectfully agree with the reasoning in *Yapa v. Bandaranayake,*[9] that preventive detention is not punishment, despite similarity in effects and consequences.

Detention for the primary purpose of preventing conduct prejudicial to national security or the maintenance of public order, or other unlawful conduct, is thus not "punishment". However, Mr. Goonesekere submitted that express provision in Article 13 (4) that "arrest, holding in custody ..... pending investigation or trial shall not constitute punishment", necessarily implied that any such deprivation of liberty **was** punishment, if it was not "pending investigation or trial". If this contention is correct, it would follow that deprivation of liberty in relation to persons of unsound mind, or suffering from specified diseases, (under the Contagious Diseases Ordinance, (Cap. 223), the mental Diseases Ordinance (Cap 227) and the Lepers Ordinance (Cap. 228) or under Chapter XLVII of the Civil Procedure Code, would also be punishment – since such deprivation is not "pending investigation or trial". We are of the view that the references to public health and public order in Article 15 (7) were necessary to ensure that legislation could authorise deprivation of liberty in situations of that kind. That portion of Article 13 (4) has been inserted *ex abundanti cautela,* and does not extend the ordinary meaning of "punishment". This is clear from Article 13 (7) : deprivation of liberty resulting from a removal order or a deportation order under Immigration laws would have come within the ambit of Article 13 (1) and (2), even though such orders were not "pending investigation or trial" ; Article 13 (7) had to be enacted not as a proviso to Article 13 (4), but to the entirety of Article 13. We therefore hold that preventive detention, as well as other forms of deprivation of liberty not "pending investigation or trial", are not "punishment" within the meaning of Article 13 (4), but come within the ambit of Article 13 (1) and (2). We are of the view that *Kumaranatunga v. Samarasinghe*[10] and *Yapa v. Bandaranayake*[9] were correctly decided.

We have now to consider whether Regulation 17, which provides for preventive detention not complying with the safeguards in Article 13 (1) and (2), is *ultra vires* by reason of Article 155 (2). The fundamental rights

recognised by Article 13 (1) and (2) cannot be understood without considering Article 15 (7) which is in the nature of a proviso thereto. As in the case of a Bill, the question of inconsistency cannot be determined by reference only to one part of an Article, or to an Article ignoring its proviso, or to one Article ignoring another which is inextricably linked. If in respect of a fundamental right recognised by Article 13 (1) or (2), an Emergency Regulation imposes a restriction, which is permitted by Article 15 (7), such regulation does not override, suspend or amend any provision of the Constitutions ; it is a restriction permitted by the Constitution, and is both *intra vires* and consonant with the Constitution, and therefore does not "over ride" the Constitution.

Article 15(7) permits, *inter alia*, restrictions in the interests of national security and public order. The learned Attorney-General contended that the Court could not interpolate "reasonable" into that provision, and hence could not inquire into the reasonableness of a restriction. It is not a matter of interpolation, but of interpretation : can we assume that the power conferred by the Constitution was intended to be used unreasonably, by imposing unreasonable restrictions on fundamental rights ? The State may not have any burden of establishing the reasonableness of the restrictions placed by law or Emergency Regulations, but if this Court is satisfied that the restrictions are clearly unreasonable, they cannot be regarded as being within the intended scope of the power under Article 15(7). We do not think, however, that the test is wholly objective, for this Court must not usurp the discretion of the authorities constitutionally entitled to impose restrictions. That, however, need not be decided now, because in a time of grave public emergency, provision for preventive detention is not unreasonable, even if judged by a wholly objective test, where it is authorised for the purpose of preventing conduct prejudicial to the national security or the maintenance of public order. The obvious fact that such a power may be abused does not render the regulation invalid ; such abuse of power is by no means beyond challenge. Mr. Goonesekera next submitted that a restriction must be just and fair. The question whether, in relation to the interests of national security and public order, a particular restriction is unreasonable may involve some consideration whether it is just and fair – balancing the interests of the individual and the community ; but there can be no independent requirement that it be just or fair. He relied on the *Menaka Gandhi* case[11] in support of a contention that "**procedure** established by law" in Article 21of the Indian Constitution

(which corresponds to our Article 13(1)) required a "just and fair" procedure, and he stated that in India Articles 19, 21 and 22 could be suspended in times of emergency : presumably, even if it was not reasonable, or "just and fair", to do so. If that be so, observations as to what is a constitutionally permissible "procedure" in relation to a fundamental right which can be suspended in its entirety, can be but of little relevance to the very different question as to the nature of the "restrictions" permitted by Article 15(7) in relation to a fundamental right which cannot be so readily "suspended".

Mr. Goonasekera submitted that Article 15(7) permits only a restriction, or abridgement, but not a total denial or extinction of the right ; he contended that Regulation 17 completely deprived a detenu of the only two safeguards in Article 13(1) and (2), namely the right to be informed of the reason for arrest, and the right to any form of "judicial supervision" of his detention. It has been held that "a power to regulate, naturally if not necessarily, assumes, unless it is enlarged by the context, the conservation of the thing which is to be made the subject of regulation" *(A. G. for Ontario v.A. G. for the Dominion*[12]) and we agree that in many contexts the right to "restrict" would presuppose the survival, even in an attenuated form, of the right restricted. But this is not an inflexible rule : particularly in relation to a right which has but one aspect ; thus if the right to be informed of the reason for arrest can be restricted, as Article 15(7) contemplates, the restriction will almost inevitably be a denial. There can well be circumstances in which the same considerations which justify the arrest and detention, legitimately and imperatively require non-disclosure of the reason for such arrest and detention. Regulation 17 is not *ultra vires* on this ground. The Regulation provides for an Advisory Committee, though not for its composition and procedure, and a detenu has the right to make representations to that Committee, which is then required to inform him of the grounds on which the Detention Order was made and sufficient particulars as are, in the opinion of the Chairman of that Committee, sufficient to enable him to present his case. The Secretary, Ministry of Defence, may, but is not obliged to, revoke a Detention Order if the Committee so recommends. These are serious limitations on liberty, but are not *ex facie* unreasonable in a time of grave public emergency. The submission that the Regulation permitted indeterminate detention is not tenable as a fresh Detention Order has to be made every month, and the Secretary must exercise his discretion upon every such renewal.

Although Regulation 17 was a permissible restriction during the period relevant to this Application, having regard to the circumstances then prevailing (cf. *Hirdaramani v. Ratnavale*[13]), it does not follow that it will at all times and under any circumstances be a permissible restriction ; that would depend on whether or not the material then placed before the Court establishes that such restrictions are unreasonable.

Regulation 17(9) enables the Secretary to deprive a detenu of the right to make representations to the President and the Advisory Committee ; there is no reason why a citizen should be deprived of the right to make representations to the Head of the Executive, and to the Advisory Committee, which in any event has only limited powers. Even if detention was subject to judicial review on totally objective criteria, the total exclusion of the right to seek review through the executive would have been unreasonable in the circumstances of the Emergency then prevailing. It is therefore *ultra vires*. Regulation 17(10) does not affect the jurisdiction of this Court under Article 126, and it is unnecessary to consider its *vires*. Had judicial review been totally excluded, then arbitrary detention at the unfettered discretion of the Executive would have been possible, and the question whether this was a permitted restriction would have arisen. Apart from Regulation 17(9), Regulation 17 is *intra vires* the Constitution.

The learned Attorney-General stated in the Course of his submissions that he would recommend the omission of Regulation 17(9), and further invited this Court to indicate in what respects the rigour of Regulation 17 could be mitigated ; he said that in a previous instance observations by this Court met with a positive response. Solely in response to that invitation, we would observe that even if judicial **control** of detention is excluded, yet some degree of judicial **supervision** for instance, as to the place and conditions of detention – seem desirable ; some provision designed to ensure the independence and objectivity of the members of the Advisory Committee seems desirable, as well as provision for prompt notification of the reasons for detention, subject to the interests of national security ; some limitation of the overall period of detention, under successive Detention Orders, together with an element of judicial control thereafter, may usefully be considered.

The second matter for consideration is the scope of judicial review of an executive order for preventive detention made under Regulation 17.

We are of the view that Section 8 of the Public Security Ordinance and Regulation 17 (10), which provide that such an order shall not be called in question in any court on any ground, do not affect our jurisdiction. Firstly, existing written laws continue in force "except as otherwise expressly provided in the Constitution" (Article 168(1)) ; Articles 17 and 126 confer jurisdiction on this Court in respect of infringements of fundamental rights, and this is express provision which prevails over any existing written law to the contrary, including Section 8 – whatever the position might have been prior to the Constitution. Article 16 (1) saves the Public Security Ordinance (since it is existing written law) but only from invalidation on the ground of inconsistency with fundamental rights ; it does not validate any inconsistency with Articles 17 or 126. Secondly, the power to make Emergency Regulations does not include the power to make regulations overriding the provisions of the Constitution (Article 155 (2)) ; Regulation 17 (10) therefore cannot override or in any way affect the jurisdiction of this Court under Articles 17 or 126.

The exercise of that jurisdiction will be subject to the common law principles applicable to the judicial review of administrative orders. The learned Attorney-General contended that the Secretary's order flowed from an opinion based on a purely subjective discretion, while Mr. Goonesekera contended that the opinion could be reviewed objectively, citing Lord Atkin's famous dissent in *Liversidge v. Anderson,*[14] that the words "If the Secretary of State has reasonable cause' to believe" does not mean "if the Secretary of the State **thinks** he has reasonable cause to believe". While respectfully agreeing that the exercise of a discretion granted in objective terms is liable to be reviewed on objective (and not subjective) criteria, it must be noted that here the discretion is subjective : the Secretary is empowered to make a detention order in respect of a person "if he is of opinion . . . . . that with a view to preventing such person from acting in a manner prejudicial to the national security [etc.]" it is necessary to do so. It is nevertheless not unfettered. A different standard of reasonableness is applicable, especially as the opinion relates not to the commission of past acts but to possible future conduct. Such an opinion comes near to being "pure judgment" (*Tameside*[15]). As Lord Denning observed in the Court of Appeal in that case :

> ". . . . much depends on the matter about which the Secretary has to be satisfied. If he is to be satisfied on a matter of opinion, that is one

thing. But if he has to be satisfied that some one has been guilty of some discreditable or unworthy or unreasonable conduct, that is another."

"No one can properly be labelled as being unreasonable unless he is not only wrong but unreasonably wrong, so wrong that no reasonable person could sensibly take that view."

Wade (Administrative Law, 5th ed., pp 393-4, 399) observes that the Minister may be a free agent to the extent that no objective test is possible, and even where it is a question of discreditable or unreasonable conduct the court may hold that the facts supporting the exercise of discretion are not open to review because of the nature of the legislation ; the evident intention of words such as "if the Minister is satisfied" is to make the Minister the sole judge of the existence of the conditions which make the power exercisable : they indicate that instead of judging objectively whether the conditions in fact exist, the court is merely to judge subjectively whether the requisite state of mind exists in the Minister. Nevertheless the courts are able to penetrate behind the ostensible "satisfaction" and deal with the realities : the Minister must act reasonably, in good faith and upon proper grounds, but in some situation it is plain not only from the language but also from the context, that the discretion granted is exceptionally wide, the most obvious example being that of emergency powers, particularly in time of war. Wade discusses the tests applicable in detail (ibid. 362-5).

"Decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into the merits ..... Two reasonable persons can perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable. *"Re W"*[16].

"It is often expressed by saying that the decision is unlawful if it is one to which no reasonable authority could have come". *Lynch,*[17] ; *Demetriandes V. Glasgow Corporation,*[18] 'so unresonable as to be perverse'.

"A person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant . . . . . .there may be something so absurd that

no sensible person could ever dream that it lay within the powers of the authority ..... the example of the dismissal of the red-haired teacher, dismissed because she had red hair. This is unreasonable in one sense. In another it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith ; and in fact all these things run into one another. "*Wednesbury Corporation*[19].

"Unreasonableness is a generalised rubric covering not only sheer absurdity or caprice, but also illegitimate motives and purposes, a wide range of errors commonly described as 'irrelevant considerations', and mistakes and misunderstandings which can be classified as self-misdirection, or addressing oneself to the wrong question."

Mr. Goonesekera submitted the *Hirdaramani* decision to a very searching analysis, and submitted that a purely subjective test had been applied, following *Liversidge v. Anderson,*[14] limiting review to *mala fides* in the narrowest sense of ill-will or bias. It is clear from the judgment of Fernando, C.J, that he did not restrict *mala fides* or confine the grounds of review, but considered the Secretary's order to be liable to review if he had not formed the required opinion (p 77), or in fact held a different opinion (p 79), or if the truth of the stated reason or opinion could be disproved (p. 79), or shown to be mainfestly absurd or perverse (p 79) ; whether the opinion was unreasonable or irrational (p. 82). Indeed his ultimate decision was that while the Petitioner was right in contending that an inference was reasonably possible that he had been taken into custody for the ulterior purpose of facilitating an investigation (pp. 75 - 76), yet upon the facts known to the Secretary it was not unreasonable or irrational for him to have formed the opinion that the activities of the Petitioner may have assisted the insurgents (p 82). Thus the tests of improper purposes, unreasonableness and bad faith were applied : "all these things [which] run into one another". In *Janatha Finance v. Liyanage,*[20]. Ranasinghe, J., (as he then was) held that "even where power has been conferred in a "subjective" form which at first sight would seem to exclude judicial review, on the basis that it is a matter of pure judgment, the Court would disregard subjective language if there is any indication that the action complained of is outside the scope of the power relied upon as justifying such action. The relevant question would be whether it was reasonable for the authority on whom the power is conferred to be satisfied of the existence of the facts, the

existence of which empowered him to make the order," and all discretion, even when there is a subjective element in it, must be exercised reasonably, and in good faith, and upon proper grounds." It is the test of reasonableness, in the wide sense, that we have to apply.

Mr. Goonesekera relied heavily on *Teo Soh lung v. Minister of Home Affairs* [21] which he described as a landmark judgment of the Court of Appeal of Singapore delivered on 8.12.86 (and briefly reported in (1988) 3 interights Bulletin page 14). Dealing with a provision very similar in Regulation 17 (1), it was observed that the notion of, subjective or unfettered discretion is contrary to the Rule of Law, that all power has legal limits, and the Rule of Law depends that the Courts should be able to examine the exercise of discretionary powers those responsible for national security are the sole judges of what action is necessary in the interests of national security, but that does not preclude the judicial function of determining whether the decision was in fact based on grounds of national security. However the Court held that judicial review did not extend, in the circumstances, to deciding whether the evidence justified the decision, but was limited to the normal judicial review principles of "illegality, irrationality or procedural impropriety" : a conclusion wholly in accord with the principles long accepted by this Court. The decision of the Appellate Division of the Supreme Court of South Africa in *Nkondo v. Minister of law* [22] delivered on 18.2.86, was also cited. There the preventive detention was authorised where the Minister" is satified that a person **engages in activities** which endanger or are calculated to endanger the security of the State or the maintenance of law and order. . . . . ." the words emphasised suggest a much less subjective discretion than under Regulation 17 (1). However, that decision did not turn on an interpretation of that provision, but an entirely different question - whether by reason of non-compliance with a procedural requirement that the detenu be furnished with a written statement of the **reasons** for detention, as well as so much of the supporting **information** as could be disclosed without detriment to the public interest. The Court held that a mere repetiton of the **ground** of detention did not satisfy the requirement of furnishing **reasons,** and that the orders were invalid.

The fact that the Petitioner was a very active member of the J.V.P., in 1971, is a circumstance probably too remote, by itself, to have justified detention ; that he supported the J.V.P., from 1978 to 1983 when it was not proscribed is again, by itself, not a ground for detention. But this

establishes a long and close connection with the J.V.P., and the 5th Respondent had reason to believe that even after proscription he continued to be an active member and adviser of the J.V.P. which was responsible for numerous acts of violence which continued even after his detention. On this information, it cannot be said that the 5th Respondent acted unreasonably in forming the opinion that the detention of the Petitioner was necessary. The allegations of *mala fides*, and ulterior or political motives, were not pursued. It is a legitimate inference that there was no change in this state of affairs up to 18.4.88 when the Detention Order was renewed for the tenth time. On 10.5.88 the order of proscription was revoked, and although the 5th Respondent filed affidavits dated 24.5.88 and 10.2.89, there is no material whatsoever as to the circumstances in which the continued detention of the Petitioner was considered necessary. It was his link with the J.V.P. which justified his initial detention ; the allegations of violence in connection with the July 1987 Accord are clearly mistaken ; if the organisation which he had assisted and advised ceased to be proscribed, the need for his detention had necessarily to be re-examined, soon after 10.5.88, and certainly on 18.5.88. Applying the above tests, the only inference from the available material is that, at the time the renewed Detention Order was made on 18.5.88 the 5th Respondent did not form an opinion that his detention was necessary. Each of the subsequent detention orders had to be justified, and in the absence of any material his detention from 18.5.88 until his release on 22.9.88 was unlawful ; it is not merely excessive detention, but illegal detention. The 5th Respondent has not acted maliciously, but in good faith, though wrongly, on the basis that he did not have to consider the need for the Petitioner's detention after the proscription ceased ; and in those circumstances, we do not think an order for compensation should be made against him personally. The Petitioner has furnised material as to the actual loss and damage suffered by him. We hold that the Petitioner's fundamental rights under Article 13 (2) read with Article 15 (7) have been violated by reason of his detention from 18.5.88 to 22.9.88, and direct the State to pay a sum of Rs. 15,000 as compensation together with a sum of Rs. 1,500 as costs.

Fernando, J. – I agree.

Compensation Ordered.

April 06, 1990

KULATUNGA, J.

This application and applications Nos. 28/88 and 34/88 have been referred to a Bench of Five Judges by a direction of My Lord, The Chief Justice in terms of Article 132(3) of the Constitution for consideration of the following issues :–

(1) Whether Regulation 17 of the Emergency Regulations under which the petitioners in applications Nos. 27/88, 28/88 and 34/88 were taken into custody, are *ultra vires* the Public Security Ordinance (Cap. 40) and or the Constitution of 1978 ;

(2) Assuming Regulation 17 is valid, the nature, scope and extent of the power of the Court to examine the material that is relied on by the executive for the purpose of making such detention orders ;

(3) The Scope, nature and extent of the power of the Court to examine the material relied on by the Minister in making order under S. 9(1) of the Prevention of Terrorism Act, No. 48 of 1979.

At the commencement of the hearing of this application and Application No. 34/88, this Court made an order that application No. 28/88 will not be taken up for hearing and can be taken up on a subsequent date. Any further hearing in application No. 28/88 will be confined to the question of *ultra vires* or otherwise of Regulation 17. In the event of this Court holding in applications Nos. 27/88 and 34/88 that Regulation 17 is *ultra vires,* application No. 28/88 will be heard to decide on the redress to which the petitioner is entitled. In the event of this Court holding in applications Nos. 28/88 and 34/88 that Regulation 17 is not *ultra vires,* then 28/88 will stand dismissed. Both Counsel for the petitioners as well as the Attorney-General agreed to this step. Accordingly, we heard arguments in applications Nos. 27/88 and 34/88 ; I shall confine this judgment to determining application No. 27/88 but my ruling herein on the validity of Regulation 17 will apply to application No. 34/88 in respect of which I shall write a separate judgement.

The petitioner who is an Attorney-at-Law was arrested by the 2nd respondent on 23.06.87 on a detention order made by the 5th respondent under Regulation 17 of the Emergency Regulations. He had since his admission to the Bar in 1977 been practising at the

Avissawella Bar. After his arrest, he was detained at the Magazine Prison, Welikada for 15 months on detention orders made monthly until he was released on 22.09.88.

This application was filed on 29.02.88 supported by affidavits from the petitioner's father and brother and his Attorney-at-Law. Subsequently, the petitioner himself made an affidavit on 09.08.88. The application alleges that the petitioner was not informed of the reason for his arrest besides a statement that it was on an order from the higher authorities ; that when his brother visited him he was not allowed to talk to his brother for more than 10 minutes ; that during the first month he was taken out of the cell for only half an hour a day and was not allowed to read any paper or books ; that he was not getting sufficient food and the prison cell was unhygienic ; and that his arrest was *mala fide* to suppress his political activities in criticising the repressive measures of the government. The petitioner also alleges that his detention is illegal, *inter alia,* on the ground that it was made under a regulation which is *ultra vires* the statute and the Constitution ; he complains that his fundamental rights under Articles 11, 12, 13(1), 13(2), 13(4) and 14(1) have been violated and seeks a declaration and relief accordingly.

In his affidavit dated 09.08.88, the petitioner had dropped the allegation that his detention was for political reasons ; during the hearing Mr. R. K. W. Gunasekera his Counsel informed us that he would not press the allegation of express malice but would maintain that the detention is vitiated by constructive malice. The petitioner's affidavit otherwise affirms the initial allegations made in his application ; he further states that on account of his illegal detention his professional practise of 10 years which is the sole source of his income suffered ; his marriage which was scheduled to take place at the end of 1987 did not materialise as the intended bride changed her mind ;

And he fell into arrears of loans he had obtained from the State mortagage and Investment Bank and the Bank of Ceylon, totalling Rs. 72,952.66.

The position of the 5th respondent according to his affidavits dated 24.05.88 and 10.02.89 is that the petitioner is a person who was arrested during the 1971 Janatha Vimukthi Peramuna insurgency ; he was sent to a rehabilitation camp and subsequently released ; prior to 1971 he had organised classes and enlisted members for the

movement ; in 1978 he conducted a fund collecting campaign for the JVP ; in 1979 he formed an organisation called "Rathugataw" ; he contested Development Councils election as a JVP candidate ; actively campaigned and addressed meetings of the JVP; in 1982 he was elected as a Committee Member of the electoral committee of the JVP and a party office was established in his house. After the proscription of the JVP on 30.07.83 he continued his support to the JVP while showing a superficial silence to the law enforcement authorities ; there is information that he was an adviser and consultant to the JVP and was responsible for launching a campaign of violence with the young people against the implementation of the Indo-Sri Lanka Peace Accord. The 5th respondent states that on the basis of reports and advice of the National Intelligence Bureau he was convinced that the petitioner was a person likely to act in a manner prejudicial to national security and public order and hence, ordered his arrest and detention.

The petitioner does not deny his arrest and detention during the 1971 insurgency or his membership of the JVP but denies that he is a prominent member of the JVP ; he admits having supported the JVP in the 1982 Referendum but denies any involvement with its activities after its proscription ; he also denies responsibility for any of the violence said to have been committed by the JVP or yet being committed.

The 1st and 2nd respondents in their affidavits support the 5th respondent. The 3rd respondent denies the ill treatment and undue restrictions alleged by the petitioner during his detention at the Magazine Prison. In any event, it appears from the 3rd respondent's affidavit as well as the petitioner's affidavit that whilst there were stringent restrictions on the petitioner's conversations with visitors immediately after his detention, such restrictions and other restrictions were relaxed after the lapse of about one month ; the available evidence does not establish any violation of the petitioner's rights guaranteed by Article 11 of the Constitution.

It is clear from the petitioner's affidavit dated 09.08.89 that he has abandoned the charge that his detention was for suppression of his political activities ; this was conceded by his Counsel at the hearing. In the result, there is no evidence of any violation of his rights under Article 14(1) of the Constitution. As regards the alleged breach of Article 13(1), the position is that (assuming the vires of Regulation 17) the petitioner was arrested on an order of detention under Regulation 17(1) of the Emergency Regulations ; in such a case there is no requirement of the

law to inform him of the reason for his arrest as in the case of an arrest of a person for an offence ; as such there has been no violation of the petitioner's rights under Article 13(1). His rights to be afforded an opportunity of making representations against the detention order and to be informed of the grounds of such order and other particulars are contained in paragraphs (5) and (6) of Regulation 17.

Vires of Regulation 17 of the Emergency Regulations

Emergency Regulations are made by the President under S.5 Part II of the Public Security Ordinance (Cap. 40) which may be brought into operation by the President by a Proclamation under S.2. The learned Counsel for the petitioner made the point that the Ordinance constitutes colonial legislation enacted under the Ceylon (Constitution) Order in Council (Cap. 379) ; it remains in force upto-date subject only to certain amendments. In *Weerasinghe v. Samarasinghe* [1] it was held that the Public Security Ordinance is *intra vires* and S.5 which empowers the making of Emergency Regulations is a valid delegation of the legislative power of Parliament as laid down in the Constitution ; consequently regulations made in terms of S.5 and an order made by the Permanent Secretary to the Ministry of Defence and External Affairs for the detention of the petitioner's brother under Regulation 26(1) were valid.

Regulation 26(10) removed the power of the Court to issue a writ of *habeas corpus* during the emergency ; the only safeguard provided to a detenu was the right to make objections against his detention for consideration by an Advisory Committee appointed by the Governor-General under S.26(4).

S. 5(2) of the Public Security Ordinance empowers the making of Emergency Regulations, *inter alia,* for the following purposes :–

(i) "authorise and provide for the detention of persons" (S.5(2)(*a*));

(ii) "make provision for the apprehension and punishment of offenders....." (S.5(2)(*g*)).

It is significant that until the enactment of the 1972 Constitution fundamental rights were not guaranteed; rights of persons in respect of arrest or detention were only those conferred by ordinary laws written and unwritten (e.g. The Criminal Procedure Code and the relevant principles of Common Law); these rights could be amended, modified or

suspended by Emergency Regulations (S.7 of the Public Security Ordinance) and the powers and jurisdiction of the Courts were contained in ordinary law (e.g. The Courts Ordinance) over which Emergency Regulations prevailed.

The Public Security Ordinance and the regulations thereunder substantially followed the pattern of war time legislation in the United Kingdom; in interpreting these laws the then Supreme Court applied the rulings in English decisions laid down in construing the corresponding provisions in the United Kingdom. Thus, the decision in *Weerasinghe v. Samarasinghe (Supra)* adopts the approach in *The Zamora*[23] and similar decisions in Colonial Courts; it also finds support in the House of Lords decision in *Rex v. Halliday* [24] which held (Lord Dunfermline dissenting) that Regulation 14B of Regulations made under the Defence of the Realm Act 1914 providing for preventive detention was not *ultra vires*. *Hirdaramani v. Ratnavale*[13] and *Gunesekera v. Ratnavale* [24] on detention orders made under Regulation 18 of the Emergency Regulations adopted the subjective test applied in *Liversidge v.* Anderson[14] and *Green v. Secretary of State*[25] (Lord Atkin dissenting) on the power of the Home Secretary in making a detention order under Regulation 18B of the Regulations made under the Emergency Powers (Defence) Act, 1939.

The judgement in the *Hirdaramani case* was delivered on 30.12.71 whilst the judgement in the *Gunasekera case* was delivered on 26.05.72; the former decision being prior to the promulgation of the 1972 Constitution was unaffected by any considerations referable to fundamental rights which were for the first time enshrined in Article 18 of the 1972 Constitution which was promulgated on 22.05.72; the latter decision though delivered on 26.5.72 concerned a detention order of 21.01.72 and was presumably prepared at a time when fundamental rights had no relevance to judicial review of such orders.

Thus Alles, J., said –

"There is a significant difference in the law regarding preventive detention in India and Ceylon.

In India the liberty of the subject is recognised as a fundamental right" (76 NLR 316, 325).

During that period, Emergency Regulations and orders made thereunder were fortified by a variety of preclusive or ouster clauses directed against judicial review. S.8. of the Public Security Ordinance decrees that they shall not be questioned in any Court. Regulation 18(10) relating to an order of preventive detention is to the same effect whilst Regulation 55 removed the jurisdiction of the Court under S. 45 of the Courts Ordinance to issue the Writ of *Habeas Corpus:* in the Gunasekere case it was held (Wijayatilake, J. disenting) that Regulation 55 ousted the jurisdiction of the Court to review a detention order valid on its face even on the issue of good faith, a view which did not commend itself to the majority of the Judges in the Hirdaramani case. The Court also held that Regulation 18(1) (now Regulation 17 (1)) is *intra vires* the Public Security Ordinance.,

The above decisions upholding provisions impinging on the liberty of the subject and the jurisdiction of the Court can be understood firstly in the context that fundamental rights were not guaranteed during that period; secondly – and more relevently – on the basis that such provisions had been made by or under law enacted by a sovereign Parliament enjoying full legislative power. In *Liyanage v. The Queen*[26] the Privy Council held that the Ceylon (Constitution) Order in Council 1946 and the Ceylon Independence Act, 1947 gave to the Ceylon Parliament the full legislative powers of a sovereign independent state. It would seem, therfore, that during that period sovereignty was vested in Parliament as in the United Kingdom which in turn made it possible for our Courts to conveniently apply English decisions relating to war time legislation in interpreting similar laws in this country. However, the 1972 and 1978 Constitutions have completely altered the position in regard to sovereignty and fundamental rights; and it seems to me that the theme of Mr. Gunasekera's submission is that this Court must view these laws and in particular Regulation 17 of the Emergency Regulations in the context of such changes. He contends that the decisions in *Kumaranatunga v. Samarasinghe*[10] and *Yapa v.* Bandaranaike [9] which held Regulation 17(1) to be *intra vires* have failed to adopt the correct approach and have been wrongly decided.

S.3 in the 1972 constitution vests sovereignty in the People. S.18(*b*) and (*c*) provide that no person shall be deprived of life, liberty or security of person **or detained** and no citizen shall be arrested, held in custody, imprisoned **or detained,** except in accordance with the law. Under

S.18(2) the exercise and operation of fundamental rights and freedom shall be subject to such restrictions as the law prescribes in the interests of *inter alia* national security, public safety or public order. Under S.18(3), all existing laws shall operate notwithstanding any inconsistency with fundamental rights. S.12 provides, *inter alia,* that all laws written and unwritten shall, *mutatis mutandis ;* and except as otherwise expressly porvided in the Constitution, continue in force. Chapter XIV makes provision for a hiarachy of Courts but leaves it to the National State Assembly to create them by law ; S. 121 (1) refers to the power of the highest Court with original jurisdiction to issue writs but the National State Assembly may exclude such power by law ; there is no provision entrenching the jurisdiction of Superior Courts nor special provision for the enforcement of fundamental rights. S. 134 provides, *inter alia,* that the Public Security Ordinance, shall, *mutatis mutandis,* and subject to the provisions of the Constitution be deemed to be a law enacted by the National State Assembly.

It would appear that under the 1972 Constitution it was competent to make provision for preventive detention –

(*a*) by or under any law within the ambit of S.18(*b*) or (*c*) read with S.18(2) of the Constitution ; or

(*b*) by regulations made under S.5(2)(*a*) of the Public Security Ordinance read with Section 12, 18(3) and 134 of the Constitution.

The 1978 Constitution has reaffirmed the principle that sovereignty is in the people and has further provided that sovereignty includes, *inter alia,* fundamental rights (Articles 3 and 4(*d*)), Article 13 guarantees freedom from arbitrary arrest, detention and punishment and prohibition of retroactive penal legislation. Fundamental rights relating to arrest and detention are secured by Articles 13(1) and 13(2) ; the exercise and operation of these rights shall be subject to such restrictions as may be prescribed by law in the interests of *inter alia,* national security or public order. "Law" in this respect includes regulations made under the Public Security Ordinance (Article 15(7)) ; existing written law and unwritten law shall be valid and operative notwithstanding any inconsistancy with fundamental rights (Article 16) ; Article 168(1) provides *inter alia,* that all laws, written laws and unwritten laws, in force immediately before the commencement of the Constitution shall, *mutatis mutandis,* and except as otherwise expressly provided in the Constitution, continue in force.

Chapter XVIII of the Constitution makes special provisions relating to public security. In terms of Article 155(1) the Public Security Ordinance shall be deemed to be a law enacted by Parliament. Under Article 155(2) the power to make Emergency Regulations under the Public Security Ordinance or the law for the time being in force relating to public security shall include the power to make regulations having the legal effect of overriding, amending or suspending the operation of any law, **except the provisions of the Constitution.**

Article 17 provides for the enforcement of fundamental rights as provided by Article 126 by the Supreme Court in the exercise of the exclusive jurisdiction vested in it in respect of any infringement or imminent infringement of such rights. The jurisdiction of the Supreme Court as well as the jurisdiction of the Court of Appeal including the power to issue the Writ of *Habeas Coupus* are entrenched in the Constitution ; neither the fundamental rights nor the provisions for their enforcement can be suspended even during an emergency as in India.

Under Article 358 of the Indian Constitution where an emergency relates to war or external aggression the rights under Article 19 (our Article 14) stand automatically supended to the extent that the legislature can make laws contrary to Article 19 and the executive can take action which it is competent to take under such laws. There are no express guidelines for the exercise of such legislative power. Under Article 359, the President may by order suspend the right to move any Court for the enforcement of all other fundamental rights except the rights under Article 20 (protection in respect of conviction for offences) and Article 21 (right to life and liberty). Article 22 (corresponding to our Article 13 (1) and (2), with further provisions relating to preventive detention) is one of those articles the enforcement of which can be sc suspended.

In considering the vires of Regulation 17, I agree that the constitutional changes since 1972 should be borne in mind ; but the decision on this issue, especially on the question as to whether this regulation is just fair and resonable must be reached after considering all matters including the safeguards contained in the 1978 Constitution which I have discussed above.

No serious argument was addressed to us in support of the view that Regulation 17 is *ultra vires* the Public Security Ordinance. On the contrary, S.5(2)(*a*) of the Ordinance provides for detention of **"persons"**

as distinct from **"offenders"** for whose apprehension and punishment S.5(2)(*g*) makes provision. I therefore, hold that Regulation 17 is *intra vires* the Public Security Ordinance. However, it was strongly contended that Regulation 17 is *ultra vires* the Constitution in that it is a denial of the rights guaranteed by Article 13(1) and (2) of the Constitution and cannot be justified under Article 15(7) which only permits restrictions ; that in any event it provides for unlimited detention, contains no effective safeguards for the detenu, permits arbitrary detention, open to abuse and as such is not just, fair and reasonable. The argument that an Emergency Regulation which seeks not only to "restrict" but also to "deny" or "suspend" a fundamentel right is invalid was raised in *Janatha Finance v. Liyanage* [20] but this Court held that the Regulation 14(7) which came up for consideration is not a denial of rights and rejected the challenge to the order made thereunder for sealing the petitioner's printing press. As regards the requirement that a regulation, if it is to be valid, must be just, fair and reasonable, Counsel relied in particular on the decision in *Menaka Gandhi v. Union of India* [11]. Counsel also submitted to us for reconsideration, the contention which has been twice rejected by this Court in *Kumaranatunga v. Samarasinghe* (Supra) and *Yapa v. Bandaranayake* (Supra) namely that preventive detention constitutes a punishement which is prohibited by Article 13(4) which Article is not even subject to any restrictions which may be prescribed by Article 15(7) and hence, Regulation 17 is *ultra vires* the Constitution.

Article 155(2) of the Constitution prohibits the making of Emergency Regulations which have the effect of overriding, amending or suspending the provisions of the Constitution. The expression "overriding" in Article 155(2) which does not appear in S.7 of the Public Security Ordinance which provides for the supremacy of Emergency Regulations over law has been included not so much with the object of expanding that supremacy as is for the object of ensuring that no regulation which is inconsistent with the Constitution may be made ; in the absence of the expression "overriding" it might have been possible to argue that a regulation would be *ultra vires* only if it has the effect of amending or suspending the Constitution but not if it is merely inconsistent with the Constitution. The makers of the Constitution have by so wording Article 155(2) effectively secured the supremacy of the Constitution over Emergency Regulations ; and it is in the background of such supremacy that we have to determine the vires of Regulation 17. *Janatha Finance v. Liyanage*[20] *Joseph Perera v. The Attorney-General*[27].

I am unable to agree with the submission that arrest and detention under Regulation 17 amount to punishment where no investigation or trial is pending. I agree with the view taken in the previous judgments of this Court that Article 13(4) has no application to preventive detention ; as the Attorney-General submitted, Article 13(4) is not looking at detention, but punishment ; and preventive detention is not "punishment" within the contemplation of that Article, but a precautionary measure ; *Kumaranatunga's case*[10] *Yapa v. Bandaranayake*[9]. In the first of these cases, Soza, J. considering this point cited *Rex v. Halliday*[24] ; *Liversidge v. Anderson*[14] and *Gopalan v. State of Madras*[28]. In the second case, L. H. de Alwis, J. reached the same view and further cited *Shukla – The Constitution of India p. 134.* He rejected the argument that the decision in *Kumaranatunga's case* has given an "unduly restricted meaning" to the word "punishment" in Article 13(4).

Article 13(1)–(6) are generally concerned with the arrest, custody and detention of persons, their production before a Judge, trial and punishment; presumption of innocence and the rule against retroactive penal legislation. The context of these provisions has no relevence to preventive detention; but that does not mean that preventive detention in the traditional sense is excluded by the Constitution; Article 4(1) of the Covenant on Civil and Political Rights itself provides as follows:–

> "In the time of public emergency which threatens the life of the nation and the existence of which is officialy proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures.....do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".

In the instant case, we are considering the vires of a regulation made during a public emergency which has been officially proclaimed and the validity of which is not in issue; it is also relevent to note that the detention which the impugned regulation provides for is permitted by S.5(2)(*a*) of the Public Security Ordinance read with Articles 168(1) and 155(1) of the Constitution.

Preventive detention is vital to the law enforcement process; it is an indispensable social necessity and is resorted to in times of war, rebellion, insurrection of even during peacetime. There is nothing

inherently unjust in the concept provided that any law for preventive detention should not be arbitrary and should provide adequate safeguards against oppression and deprivation of personal liberty. Thus, the Indian Constitution expressly provides for the making of laws relating to preventive detention and prescribes the minimum safeguards for ensuring that such law will be fair and resonable. During the deliberations of the Constituent Assembly, Dr. Ambedcar defending the draft provisions of Article 22 said –

"If all of us follow purely constitutional methods to achieve our objective, I think the situation would have been different and probably the necessity for having preventive detention might not be there at all. But I think that in making law we ought to take into consideration the worst and not the best.....there may be many parties and persons who may not be patient enough to follow constitutional methods but are impatient in reaching their objective and for that purpose, they resort to unconstitutional methods, then there may be a large number of people who may have to be detained by the excutive....."

(*Vide* Constitutional Law of India Mahajan 6th Ed. 208–209).

I am unable to discover any intention in our Constitution to exclude preventive detention. I am inclined to agree with the Attorney-General that although our Constitution has made no express provision for preventive detention it has been achieved through Article 15(7). Paragraph 7 of Article 13 saves removal orders or deportation orders made under the Immigrants and Emigrants Act or the Indo-Ceylon Agreement (Implementation) Act, No. 14 of 1967 from the operation of that Article. I think that this paragraph has been enacted *'ex abuntandia cautelae'* and will not bar preventive detention by implication. In any event, S.5(2)(*b*) of the Public Security Ordinance read with Articles 160(1) and 155(1) permits the making of regulations for preventive detention subject however to the conditions in Article 155(2) that such regulations must not have the effect of overriding, amending or suspending any provisions of the Constitution. This brings me to the more serious objections levelled by Mr. Gunesekera against Regulation 17.

The learned Counsel confidently submits that Regulation 17 is *ultra vires* in that it is *ex facie* in conflict with the provisions of Article 13(1) and (2); it is not just, fair and reasonable and being a denial of fundamental

rights cannot be defended by reference to the restrictions permitted by Article 15(7). He has given reasons for his contention which I enumerate as follows :–

(1) We have no law of preventive detention which is preserved as an existing law under Article 16. Preventive detention is imposed in terms of Regulation 17 which is sought to be justified under Article 15(7). However, the restrictions imposed by Regulation 17 on the rights under Article 13(1) and (2) cannot be defended as permitted derogations.

(2) There can be no new law which takes away the right of a person to be informed of the reason for his arrest and the right to a judicial order for further detention, which is what Regulation 17 does. The right of a person arrested and detained under Regulation 18 for an offence to be produced before a Magistrate has been preserved under Regulation 19 *(Edirisuriya v. Navaratne*[33]) but this right is denied to a person detained under Regulation 17.

(3) There is no limit placed on the period of detention except that it expires each month with the emergency and is renewed monthly. There is nothing to guarantee the right of the detenu to make his objections to the Advisory Committee monthly. It is doubtful whether the Advisory Committee reviews each case monthly.

(4) The composition of the Advisory Committee is not set out. Although the detenu has to be informed of his right to make his objections to the Advisory Committee, he is not at this stage given any particulars or reasons relating to his detention.

(5) There is no time frame for making objections or the consideration of the detenu's case or the making of the Committee's report. The Secretary is not bound by any recommendation made by the Committee.

(6) The rights of appearing before the Advisory Committee is taken away from a detenu if the Secretary certifies that he is suspected to be or have been a member of a proscribed organisation.

The learned Counsel annotated his reasoning with the submission that whilst the U.N. Covenant is an endevour to spread out human rights, States do violate human rights under the cover of exceptions ; that in the context one of the matters for consideration in deciding upon the vires of Regulation 17 is whether it is capable of abuse. Whillst I agree that a

regulation which impinges on personal liberty should be strictly scrutinised, I cannot ageee that the possibility of abuse is a ground for declaring it *ultra vires* ; the remedy against abuse is judicial review. Council contends that the regulation is inherently capable of abuse but that would not make a difference unless of course it can be demonstrated that the regulation is manifestly unjust or involve gross interference with the rights of persons as could find no justification in the minds of reasonable men ; *Kruse V. Johnson*[30] (Lord Rusell C.J.)

On the basis of the reasons which I have enumerated above, Counsel contends that the arrest and detention of a person under Regulation 17 cannot be defended as being "according to procedure established by law" within the meaning of Article 13(1) and (2) and cannot be defended as being a proper application of the restrictions prescribed by Article 15(7) ; he submits that Article 13 is the "testing stone of Regulation 17". The Attorney-General's answer is that Article 13 provides what may be done in peace and normalcy as a general rule but during an emergency there can be restrictions or derogations which are permitted by Article 15(7) ; that if preventive detention is permitted by the Constitution, the only question is whether Regulation 17 is within the permitted restrictions ; that the question of indeterminate period of detention is not relevant as the order has to be renewed each month ; that the relevant question is whether the last detention order was validly made ; and that the impugned regulation provides adequate saferguards to the detenu. In the course of his submissions, the Attorney-General informed us that no certificate has been issue under paragraph 9 of regulation 17 depriving the petitioner of his right to make objections to the Advisory Committee on account of the petitioner's membership of a proscribed organization and that he would advice the Secretary Defence to delete that paragraph.

The reasoning of the Counsel for the petitioner creates the impression that he regards the provisions of Article 13(1) and 13(2) as absolute ; such an approach in the teeth of Article 15(7) is not warranted. In terms of Article 13(1) and 13(2) the arrest and subsequent production before a Judge and the order for further custody or detention of any person shall be in "accordance with procedure established by law". He is also entitled to be informed of the reason for his arrest. The duty of taking him before a Judge is mandatory. The arrest of a person cannot be at the discretion of the executive and the order for continued detention cannot be at the exclusive-discretion of

the Judge himself. Thus the police cannot decide in their discretion as to who can be arrested, why and how. They cannot decide the period within which any person arrested may be brought before a Judge. The order of the Judge for further detention, e.g. its duration, conditions, etc. cannot be left to him alone. The police and the Judge have to be guided by procedure prescribe by law e.g. the code of criminal which is the means adopted both at Common Law and under Article 13 for avoiding arbitrary deprivation of personal liberty. Such procedure may be varied by the imposition of restrictions prescribed by Article 15(7). Whether such restrictions are valid or not on the ground of constitutionality or reasonability is another question. In this view of the matter, the requirements of Article 13(1) and (2) cannot be regarded as absolute.

Edirisuriya v. Navaratne (Supra) is no authority for the proposition that the right of an arrested person to be brought before a Judge cannot be restricted by Emergency Regulations. It only decided that Regulation 19(1) which states that the provisions of Sections 36, 37 and 38 of the Code of Criminal Procedure Act shall not apply to a person arrested under Regulation 18 leaves untouched and unaffected the requirement of Article 13(2) for production of such person before a Magistrate ; Wanasundera, J., proceeded to state –

> "If it is intended to restrict the requirement of 13(2) – which undoubtedly can be done by a suitable wording of the regulation so as to have a direct impact on Article 13(2) itself, when national security or public order demands it – this must be specifically done. Article 13(2) cannot be restricted without a specific reference to it. But this has not been done. Instead, we have a restriction imposed on the operation of Sections 36 – 38 of the Code. In the result, the constitutional requirement that a detained person "shall be brought before the Judge of the nearest competent Court" remains unaffected. Though it will continue to exist in a truncated form still being a constitutional requirement : it must be complied with in a reasonable way and within a reasonable time" (1985) 1 SLR 100, 120.[29]

Although in terms of this decision, the right of an arrested person to be brought before a Judge could be taken away, the amended Regulation 19(1) did not do so, but only required a detenu to be produced before a Magistrate within 30 days. The restriction of the requirement to produce the detenu before a Magistrate is presumably in

consequence of policy and not on account of any absolute right to such production. It follows that if national security or public order demands, the right of the detenu under Article 13(1) to be informed of the reason for his arrest itself may be restricted, even though in the circumstances of a particular situation it may not be possible to make a valid regulation having the effect of a total denial of that right. I do not agree with Mr. Gunasekera's submission that it was too easily assumed in *Edirisuriya v. Navaratne* that Emergency Regulations could restrict Article 13(1) and (2).

I am of the view that the absence of a limit to the period of detention does not make Regulation 17 *ultra vires*. A detention order expires with the Emergency which has to be renewed each month. If, as apprehended by Counsel, the Secretary makes fresh orders each month without applying his mind at all to the necessity of such orders or the detenu is not informed of his right to make representations to the President in respect of each such order or the Advisory Committee fails to consider the objections made by the detenu, the appropriate remedy in each such case would be to question the validity of the detention on any such appropriate ground. S. 2A of the Public Security Ordinance as amended by Act No. 28 of 1988 provides for the continuance of Emergency Regulations and orders made thereunder subject to variation, amendment or revocation upon the extention of an emergency by a further proclamation as the case may be. If, in the circumstances, it is shown that a continued detention is manifestly unwarranted or excessive, then also, the validity of the detention may be questioned on merits the question of the vires of the Regulation does not arise in the given situation.

If as I have shown, rights under Article 13(1) and (2) may be restricted by regulation in the interests of national security or public order, the next question is whether the provisions of Regulation 17(1), (2) and (3) which by necessary implication deny the right of the detenu to be brought before a Judge of a competent Court or the provisions of Regulation 17 (4) and (5) which permits a delay in informing him of the grounds for his arrest would result in a "denial" of his rights under Article 13(1) and (2) which is not permitted by Article 15(7). This question brings into focus the concept of preventive detention and the history of the provisions contained in Article 13(1) and (2) :

"The essential concept of preventive detention is that the detention of a person is not to punish him for something he has done but to prevent him from doing it. The basis for detention is the satisfaction of the executive of a reasonable probability of the likelihood of the detenu acting in a maner similar to his past acts and preventing him by detention from doing so . . . . . It may or may not relate to an offence".

Shukla – The Constitution of India 7th Ed. p. 134. In the words of Lord Finlay in *Rex v. Halliday*[24] the question in preventive detention is "whether circumstances of suspicion exist warranting some restraint . . . . . No crime is charged".

As a matter of principle the requirement in Article 13(1) that an arrested person shall be informed of the reason for his arrest may no longer be limited to a person accused of a crime. In the context of the freedom from arbitrary arrest it can extend to a person arrested under any law for preventive detention. However, at Common Law this right was given to a person accused of a crime - *Christie v. Leuchinsky*[31] ; *Muttusamy v. Kannangara*[32]. The information of the ground of the arrest or of the offence has to be given, *inter alia*, to afford to the suspect an opportunity to show that there is some mistake as to identity – *Gunasekera v. de Fonseka*[33]. It is this right which has been elevated to a fundamental right. Viewed in this background there can be no objection to a restriction of this right in its application to a person in preventive detention who is not arrested on suspicion for an offence, even though a total denial of the right may be questioned. Presumably for this reason laws for preventive detention including our Regulation 17 do not insist on the requirement to notify the ground of suspicion at the time of arrest.

The right of a person arrested to be brought before the Judge of a competent Court is much more associated with a person accused of an offence for it is by such Court that he will be eventually tried. Such Court would also have the power to enlarge him on bail. These considerations do not apply to a person in preventive detention and hence such person may not be brought before a Judge of a competent Court.

Accordingly, I am of the view that Regulation 17 does not amount to a denial of fundamental rights enshrined in Article 13(1) and (2) of the

Constitution. This leaves me with the final objection to this regulation namely that it is not just, fair and reasonable.

In *Menaka Gandhi's case,* the Supreme Court held that "personal liberty" protected by Article 21 of the Constitution includes the right to go abroad ; that a law for depriving that right would, if it is not 'right, just and fair', be violative of Article 21 ; that S. 10(3)(*c*) of the Passport Act, 1967 which authorised the impounding of a passport "in the interests of the general public" is not bad for vagueness and is constitutionally valid. The Court however, struck down the impounding order on the ground that –

(*a*) *Menaka Gandhi* was not given a fair opportunity of being heard upon the order or the reasons for the impounding contrary to the rules of natural justice ;

(*b* the passport was impounded not merely in the interests of the general public but because in the opinion of the government her presence was necessary for giving evidence before a Commission of Inquiry.

Apart from the importance of the principle that a law should be "right, just and fair" which I shall adopt for deciding the challenge to Regulation 17, this decision is, in the circumstances, not of much assistance to the petitioner.

No doubt that despite the enshrinement of fundamental rights in the Constitution Regulation 17 has been repeated substantially in the same terms and existed in colonial times ; paragraph (9) of this regulation which denies to a detenu certified as suspected to be or to have been a member of a proscribed organisation the right to make representations is obnoxious to Article 13 and is not permitted by Article 15(7) ; a revision of this regulation in the light of the constitutional developments is appropriate even in respect of the composition of the Advisory Committee. Inclusion of express provision to deliver a copy of the detention order to the detenu and to furnish him with the grounds for the order at the time he is informed of his right to make objections is desirable. Nevertheless, I am unable to hold that Regulation 17 except paragraph (9) thereof is in substance unfair.

It was submitted that the Advisory Committee procedure in England and in India is superior to ours ; and that the composition of the

Committee, particularly in India where it consist, of High Court Judges is ideal. Under the Defence of the Realm Act, 1914 the Advisory Committee was headed by a Judge of the High Court. However, this provision was excluded from the Emergency Powers (Defence) Act 1939. The Home Secretary gave an undertaking to establish an Advisory Committee and other safeguards for the liability of the subject. During the Second World War, a detention order was signed after the papers had, as a rule been considered by a barrister acting in an advisory capacity whilst the Advisory Committee had as its Chairman Norman Birkett K.C.. Each case was carefully considered and where appropriate detenu were released. In the light of the Indian and the English provision, I am of the view that the composition of the Advisory Committee is a matter of policy. Each country must decide what is best suited to it. I also think that comparison with the Indian provisions is not of much benefit in view of the fact that under the Indian Constitution some constitutional rights are automatically suspended whilst the right to enforce other rights enshrined in the Constitution including Article 22 providing safeguards to detenees can be suspended by the President during an Emergency.

Regulation 17(1) protects the interests of "national security" and "public order". Counsel submits that these terms are not defined. However, the expression "national security" cannot be characterised as vague. In fact, it has a clearly well defined meaning. The expression "public order" was explained by Sharvananda, J., (as he then was) in *Yasapala v. Wickremasinghe*[34] as follows :-

> "Public order' is an expression of wide connotation and signifies the state of tranquility which prevails among members of a political society. Preservation of public order involves the prevention of public disorder".

This definition was followed by Wimalaratne, J., in *Siriwardena v. Liyanage*[35]

The rights of a detenue are found in paragraphs 4-8 of Regulation 17 ; they consist of provision for the following matters :–

(*a*) appointment of one or more Advisory Committees by the President to hear objections of persons aggrieved by detention orders (Regulation 17(4)) ;

(*b*) duty of the Secretary to secure –

(i) that a detenu is afforded the earliest possible opportunity of making to the President representations against the order ;

(ii) that the detenu is informed of his right to make his objections to an Advisory Committee (Regulation 17(5)) ;

(*c*) at the meeting of an Advisory Committee the Chairman is required to –

(i) inform the objector of the grounds for the order ;

(ii) furnish the objector such particulars as are in the opinion of the Chairman suficient to enable him to present his case (Regulation 17(6))

(d) the Advisory Committee is required to report to the Secretary with respect to such objections ; the Secretary may upon such report revoke the order to which the objections relate (Regulation 17(8)).

Although there is no provision in Regulation 17 for serving on a detenu a copy of the detention order at the time of his arrest I am of the view that the detenu should at least be informed of the fact of his arrest on such order except where the exigencies of a case preclude it. A copy of the order should be given to the detenu. Under Article 22(5) of the Indian Constitution, the duty to afford the detenu the earliest opportunity of making representations against the order as well as to inform him of the grounds of the order are in the Authority making the order. The Supreme Court has held that in order to make the right of making representations effective, the detenu should also be furnished with particulars of the grounds of his detention sufficient to enable him to make a representation. *Shibban Lal Saksena v. State of U.P.*[36]. Shukla in the Constitution of India 7th Ed. p. 133 explaining the distinction between "grounds" and "particulars" states –

> "The grounds are reasons or conclusions of fact from facts on which the order is based. The latter are facts on which the grounds themselves are based ..... some details of the activities on which the conclusion that 'he has acted in a manner prejudicial to public order' is based".

Shukla mentions the following example of a communication which discloses the ground on which the detention order is based.

> "You are being detained because as a member of the Communist Party of India you have formented troubles among the peasants in the Province and have thereby acted in a manner prejudicial to the maintenance of public order".

Under Regulation 17(6) the duty of giving the grounds of the order and sufficient particulars is placed on the Chairman of the Advisory Committee to be complied with at the meeting to consider the detenu's objections. No doubt this procedure would hamper the formulation of his objections but since the regulation clearly contemplates the giving of such grounds and particulars at the comencement of the inquiry, I do not think that it will lead to injustice. If upon such communication the detenu applies for time to prepare his case, the Advisory Committee should grant a postponement. Further the fact that the sufficiency of particulars is made subject to the opinion of the Secretary cannot be construed as giving the Chairman an arbitrary power to withhold particulars which are vital to a fair hearing. However, the Secretary may decline to furnish particulars which he cannot disclose, in the public interest.

Accordingly I hold that Regulation 17, except paragraph 9 thereof which is not permitted by Article 15 (7), is *Intra vires* the Constitution. Paragraph 9 is *ultra vires* the Constitution.

The Nature, Scope and Extent of the Court's Power to Review a Detention Order

The Court has the undoubted power to review the impugned order. The right to invoke this power which is the foundation of the Court's jurisdiction is enshrined in Article 17, in the Chapter on fundamental rights whilst the procedure for its exercise and the nature of the reliefs the Court may grant are spelled out in Article 126 of the Constitution. The parties are at variance not on the existence of the power but on its scope and extent. On this question, the Attorney-General is not prepared to concede any wider powers of review than what has been laid down in *Hirdaramani v. Ratnavale* namely that in the absence of an allegation of *mala fides* strong enough to shift the onus to the Secretary, the production of an *ex facie* valid detention order is the complete answer to the petition unless of course the available material establishes

that the Secretary did not in fact form the opinion he claims to have entertained. He submits that when the gravity of the situation endangers security, individual rights must give way. Thus it appears that the Attorney-General's contention is that notwithstanding the constitutional changes subsequent to the decision in the Hirdaramani case and the rights under Article 13 of the Constitution the maxim *"Salus populi suprema lex"* operates with the same vigor.

In support of his submission that the Court's powers of review is limited, the Attorney-General also called in aid the provisions of S. 8 of the Public Security Ordinance, Regulation 17 (10) and S. 22 of the Interpretation Ordinance which purport to take away the power of Courts to call in question any emergency regulation or order made thereunder. This is a submission which has been rejected by this Courts in *Liyanage v. Siriwardena*[35] *Janatha Finance v. Liyanage*[20] *Visuvalingam v. Liyanage.*[41] *(1984) 2 SLR 123, 132 and Edirisuriya v. Navaratne*[29]. In the Janatha Finance case Ranasinghe J. (as he then was) explained that "It is now settled law. . . . . that such exclusion would be operative only in respect of acts done in good faith and *ex facie* regular, and which are not tainted by malice or any abuse of power". He proceeded to demonstrate that in any event, the right of persons under Article 17 of the Constitution to apply to the Supreme Court as provided by Article 126 does not have to give way to such provisions. I am of the view that such provisions do not in any way limit the scope and extent of the powers of the Supreme Court to review any emergency regulation or order made thereunder in exercise of its jurisdiction under Article 126 of the Constitution.

The substance of Mr. Gunasekera's submission is that in the light of the provisions in the 1978 Constitution relating to the sovereignty of the People, powers of the government and the rights guaranteed by Article 13, the power of this Court to review a detention order is wider than what is permitted by the principles laid down in the Hirdaramani case. He explained that the petitioner is not asking that a subjectively phrased rule be treated otherwise but is applying for a widening of the power of the judicial review. He submitted that there is a more extended right of judicial review today in cases where the subjective test applies. I shall examine this submission in the light of preventive detention orders made particularly in times of emergency or such orders made in the interests of public safety. I agree with the view expressed by Wimalaratne, J. in

Siriwardena v. Liyanage[35] that such order made under Regulation 17 has to be reviewed differently from an order made under Regulation 14(3) prohibiting the printing or publication of a newspaper for the purpose of determining the degree of judicial control which may be exercised. Indeed any approach which ignores the classification of the order based on the nature and the object of a power and the occasion for its exercise would lead to a great deal of academic discussion which could otherwise be avoided. Such classification is vital for determining the degree of judicial control, the onus on the parties, the quantum of evidence and other incidental matters. The nature of the rights affected by the exercise of the power, e.g. whether they are ordinary or entrenched rights is also relevant. Viewed in this light the question whether a power is phrased in subjective or objective language is relevant but not decisive.

In my judgment in *Sasanasiritissa Thero and Others v. P.A. de Silva and Others* [37] I traced the constitutional developments and the growth of judicial review in this sphere subsequent to the decisions in Liversidge and Greens cases and declared the impugned detention orders invalid by the application of the rules laid down in the Hirdaramani case in particular with reference to *mala fides* in the broad sense of improper exercise or abuse of power. In the instant case, we have called upon to pronounce the principles which are appropriate in the current context for the guidence of parties coming before this Court to enable them to agitate their rights uninhabited by the Liversidge, Greene and Hirdaramani decisions.

An order under Regulation 17(1) may be made where the Secretary is of the opinion that it is necessary to do with a view to preventing the detenu, *inter alia*, from acting in any manner prejudicial to the national security or the maintenance of public order. Such considerations are often referred to as the "grounds" but are more accurately the "objects" or "purposes" of the order which are invariably set out in the order itself. The orders p 1-p8 issued on the petitioner repeat, these purposes verbatim. The "grounds" would be broader e.g. that he was involved in the activities of the JVP; and "particulars" would be more specific, e.g. that he was responsible for launching a campaign of violence against the Indo-Lanka Peace Accord and instigated the youth of the area to resort to violence. The detenu is entitled under Regulation 17(6) to be informed of such "grounds" and to be furnished with such "particulars".

The power to make a detention order is subjectively worded. In the exercise of judicial control over such power, the Court has to resolve the conflict between the security of the State and liberty of the subject which is always a conflict difficult to resolve. Jain in 'Indian Constitutional Law' 3rd Ed. p.514 states –

> "The Courts have achieved this by construing relevant provisions of Article 22 liberally, by insisting that the provisions of the law be observed scrupulously and by applying vigorously and creatively some of the principles of Administrative Law controlling administrative discretion. The Courts have adopted not a mechanical view of their role but a purposeful approach to draw a fine balance between individual freedom and social control".

Some of the judicially established propositions which appear in the books are noted below :–

(1) The subjective satisfaction of a detaining authority is not open to objective assessment by a Court. This matter lies within the competence of the advisory board. Jain p. 515

(2) It is not the province of the Court to examine the sufficiency of the grounds of the detention. The Courts can examine the grounds disclosed by the government to see if they are relevant and not whether they are sufficient.
Chaudhury and Chaturvedi's Law of Fundamental Rights 3rd Ed. p. 582.

(3) The grounds for subjective satisfaction must exist. For example the mere statement that the detenu is a dangerous person cannot be said to form part of the subjective satisfaction making an order of detention imperative. The grounds must be germane to the purpose of detention, though such satisfaction is presumed unless rebuted by the detenu.
Chaudhury and Chaturvedi's p. 584.

(4) The grounds must have a rational connection with the object mentioned in the Act for which a person may be detained. Thus if the grounds for detaining a person under the Preventive Detention Act is that he published a defamatory phamphlet

against a Judge of the High Court the ground is irrelevent because the Act does not authoris detention for contempt of Court. Shukla's Constitution of India 7th Ed. p. 137-138.

In the *Hidaramani case*[13] H.N.G. Fernando, C.J., in declining to apply the principles established by the Indian Supreme Court said –

"In my understanding, the principle recognised by the Supreme Court of India is that if the making of a detention order is not accompanied by a statement of grounds which satisfies the requirements of Article 22(5), then the detention order itself is vitiated for the reason specified in Article 21, namely that the detention is not in accordance with the procedure established by law. In other words, a detention order in India, which is not accompanied by a due statement of grounds of detention is void as being in breach of Article 21 of the Constitution.

It is now apparent that any resemblance between the purely conditional requirement in our regulation 18 for a statement of grounds by an Advisory Committee, and the peremptory constitutional requirement contained in Article 22 of the Constitution of India, is only superficial and has led to a serious misconception. It suffices to add that any omission of the Permanent Secretary ..... to furnish grounds for detention in an afffidavit ... cannot be compared with the failure on the part of a detaining authority in India to comply with a provision of the Constitution designed for the protection of a fundamental right".

The fundamental right against deprivation of personal liberty contained in Article 21 of Indian Constitution is now enshrined in Artilce 13 of our Constitution and hence the requirements in our Regulation 17 for a statement of grounds by an Advisory Committee, still conditional upon the detenu first making objection to such Committee, has received the character of a constitutional protection against arbitrary detention. Indeed it is having regard to the availability of this safeguard that I have held this regulation to be valid. If the detenu chooses to make objections to an Advisory committe he is entitled to be informed of the grounds for his detention in which event he may challenge such grounds and obtain his freedom from the Secretary. If, however, he is constrained by circumstances to apply to this Court for relief and alleges that he is in unlawful detention, the existence of grounds become relevant whether

bad faith is alleged or not and the Court will not, in the teeth of the constitutional right to personal liberty, presume the existence of grounds. The Secretary must, subject to any privilege he may claim in the public interest, disclose the grounds even though the power of the Court to review the order is limited. The mere production of an order is no longer sufficient. If the Secretary discloses relevant grounds the onus will shift to the petitioner to establish legal cause for relief.

This is also the test adopted by Lord Atkin in the *Greenes case*[25] where the Secretary of State referred to the particulars given by the Advisory Committee which he insisted were correct and made affidavit that he acted on information of trustworthy informants ; he also claimed privilege. Lord Atkin agreed with the Divisional Court that the applicant had failed to satisfy that there was an absence of reasonable cause and proceeded to hold that the Secretary had established reasonable cause for belief both as to hostile associations and the need to control. *(1942) AC 206, 246 – 247.*[14]

In Siriyalatha v. Baskarasingham[38] Sarath Silva, J., allowed an application for a Writ of *Habeas Corpus* on the finding that the orders had been made as a mere formality without considering whether detention was in fact necessary. On this finding the applicant was entitled to relief even according to the decision in the **Hirdaramani case** but Sarath Silva, J. proceeded to the matter in the light of the 1978 Constitution and right to personal liberty. By an analysis of Regulation 17(1) with which I do not quite agree he placed the case within the second situation referred to in the judgment of H. N. G. Fernando, C. J., in the **Hirdaramani case** and ruled that a detention order is subject to review on the ground of reasonability. The tenor of his judgment is to the effect that the order is open to objective assessment by a Court. This is an erroneous view of the law and as such I over-rule the decision in that regard.

Decision on merits of the case

At the commencement of this judgment I have summarised the allegations of the petitioner and the position taken by the 5th respondent. The 5th respondent adduced grounds for the impugned arrest and detention in this affidavit, dated 24.05.88 which he set out morefully in his affidavit, dated 10.02.89. I am satisfied that he has thereby disclosed relevant grounds for the impugned arrest and

detention during the period the JVP was under proscription. The petitioner was an active member of the JVP and was detained as a preventive measure in view of his alleged participation in the activities of the proscribed party including a campaign of violence with young people against the Indo-Lanka Peace Accord. Such conduct but violence would in normal times constitute legitimate political action which is protected by Article 14 of the Constitution. During the period of proscription such conduct would amount to an offence under Regulation 48 of the Emergency Regulations read with Regulation 68(3). The petitioner has not been prosecuted for any such offence. Presumably, therefore, his detention was on suspicion. As such, the qestion whether his detention after the revocation of the proscription is excessive has to be considered.

The proscription of the JVP was revoked on 10.05.88 but the petitioner continued to be detained by fresh orders made each month until 27.07.88 from which date he remained in continued detention by virtue of an amendment to the Public Security Ordinance until he was released on 22.09.88. The 5th respondent who had every opportunity of disclosing relevant grounds for such continued detention has not done so either in his affidavit dated 10.02.89 or thereafter. Giving the 5th respondent every creidt I am of the view that the petitioner's detention subsequent to 10.05.88 is excessive. In the absence of an explanation for such detention it cannot be assumed that subsequent to 10.05.88 the petitioner was individually more a threat of national security or public order than the JVP itself which ceased to be a proscribed organization with effect from that date. Even according to the Attorney-General's submission it should be shown that the last detention order was validly made ; this has not been done. I hold that the detention subsequent to 10.05.88 is unlawful.

For the foregoing reasons, I dismiss the application against the 1st, 2nd and 3rd respondents and allow it against the 4th and 5th respondents on the ground of excessive detention violative of Article 13(2) of the Constitution. On the question of relief which may be granted to the pettitioner it is relevant to note that the petitioner has been detained for period of 15 months out of which over 4 months or 136 days is excessive. He is an Attorney-at-Law. He has stated, *inter alia,* that on account of his illegal detention his profossional practice of 10 years which is the sole source of his income suffered ; and fell into arrears of loans he had obtained from the State Mortage and Investment

Bank and the Bank of Ceylon, totalling Rs. 72,952.66. In *Nallanayagam v. Gunatilake and others*[39] this Court directed the State to pay the petitioner who had been detained by the Police under Regulation 19(2) of the Emergency Regulations, a sum of Rs. 5,000 for excessive detention for a period of three days in breach of Article 13(2) of the Constitution.

Colin Thome, J. said (p. 298) –

> "Article 13(2) embodies a salutary principle safeguarding the life and liberty of the subject and must be exactly complied with by the executive. In our view this provision cannot be overlooked or dismissed as of little consequence or as a minor matter. To vindicate this principle which is of such significance, we would direct that the petitioner be paid a sum of Rs. 5,000 for the violation of his constitutional right."

In *Withanachchi v. Cyril Herat, Leelaratne v. Cyril Herat* applications were filed by lawyers in their name on behalf of two persons who had been detained by the Police under Regulation 19 (2) of the Emergency Regulations. This Court directed one of them to be paid Rs. 10,000 for 46 days of unjustified detention and other Rs. 25,000 for 44 days of unjustified detention in violation of Article 13 (2) of the Constitution.

The quantum of relief which may be granted would depend on the facts and circumstances of each case. After a careful consideration of all the facts and circumstances of this case including the fact that the arrest and detention of the petitioner was effected under Regulation 17(1) upon considerations of national security or public order and in the background of a widespread insurrection I direct the State to pay the petitioner a sum of Rs. 15,000 for the violation of his constitutional right together with costs which I fix at Rs. 1;500.

RAMANATHAN, J. – I agree.

BANDARANAYAKE, J. –

I have had the advantage of reading the judgments of my brothers and I respectfully agree with their conclusions and I concur with the orders they have made.