Florida State University Journal of Transnational Law & Policy

Volume 3 | Issue 1 Article 6

1994

The Regimes for States of Emergency in Commonwealth Caribbean Constitutions

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THE REGIMES FOR STATES OF EMERGENCY IN COMMONWEALTH CARIBBEAN CONSTITUTIONS

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This essay examines the constitutional provisions and case law relating to States of Emergency in the Commonwealth Caribbean.[1] The constitutional provisions all occur in the chapters on Fundamental Rights and Freedoms (hereinafter the Bills of Rights) and highlight the significance for these rights and their impact on governmental powers of States of Emergency.

I. THE NEED FOR EMERGENCY POWERS

All states, whatever the ground of their political being, claim a right to take, during periods of crisis, special measures which may involve a breach of the laws, principles and practices normally applicable. This 'right and duty' is premised on the belief that as a first priority of political life, the state or organized society must be preserved. The preservation of the state, which may or may not involve the safety of the people, translates in legal terms into a doctrine of necessity.[2] The doctrine forms one of the theoretical bases of the emergency power, and at common law was one of the legal bases of the power of the Crown to act in emergency.

Necessity must arise out of temporary and exceptional circumstances in which the normal authority is temporarily incapacitated.

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1. The term Commonwealth Caribbean, refers to the states in the Caribbean Sea or with a Caribbean coast, which were formerly territories of the British Crown. They comprise: Antigua-Barbuda (ANT-B); The Bahamas (BAH); Barbados (BDS); Belize (BEL); Dominica (DOM); Guyana (GUY); Grenada (GRE); Jamaica (JCA); St. Christopher-Nevis (STC-N); Saint Lucia (STL); Saint Vincent (ST-V); Trinidad and Tobago (T&T). The names in brackets are abbreviations used hereinafter to indicate the state names.

2. For a list of the conditions governing reliance on the doctrine of necessity at common law, *see* NWABENZE, CONSTITUTIONALISM IN THE EMERGENT STATES 181 (1973). The doctrine of necessity can serve both the constitutionally established government and the 'rebels,' as it may legitimate action taken by the latter during the rebellion or revolution. *See, e.g.*, Madzimbamuto v. Lardner Burke [1969] 1 A.C. 645, 732-33. In the Commonwealth Caribbean, the doctrine has been held to validate beyond the termination of the emergency, a court system set up by a revolutionary government in Grenada, a validation effective for an unspecified and indefinite period. *See* Regina v. Andy Mitchell [1986] L.R.C. (Const.) 35. The continued legitimacy of the court may well however be explained on grounds other than necessity, such as its legitimation by the established and effective post-emergency regime by means of a law validating it. *See* Confirmation of Validity Act, PEOPLES LAWS INTERNIM GOVERNMENT PROCLAMATIONS AND ORDINANCES (Grenada, 1985).

The common law power in the Crown to take action "justified by the necessity of actual war" was re-asserted in *Tikonko v. A-G of Natal*,[3] and supported by the citation of a line of ancient precedent.

Also forming a major source of emergency power was the prerogative, to act under law, either in conflict with the rules of law, or in the absence of law, to preserve 'the people', and state. The power was described thus by Locke:

> For the legislators not being able to foresee and provide by laws of all that may be useful to the community . . . and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require; nay 'tis fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of nature and government—viz. that as much as may be all the members of the society are to be preserved.[4]

Locke stated a prerogative power not a prerogative of necessity; and the two bases of action in an emergency may well be indistinguishable.

Both concepts—'prerogative' and 'necessity'—highlight a principal feature of emergency regimes, namely the concentration of powers in the Executive. This is manifest chiefly in the delegation by Parliament of law making power to the executive, and the removal (as permitted) of certain matters from the normal jurisdiction of the courts. For those states in which governmental powers are limited by the constitutional enshrinement of fundamental rights and freedoms, the concentration of power in the executive may, during an emergency, involve the non-observance of some of the limitations on governmental power which rights and freedoms create and which are a feature of normal constitutional government. In the framing of constitutional documents in these states, provision must therefore be made for the state to derogate from rights and freedoms in times of emergency and for the identification of the situations which constitute an emergency. Thereafter, an attempt may be made in the constitution to see that the state is not totally free to do whatever it perceives to be necessary and expedient and in derogation from the rights and freedoms.

Accordingly, most West Indian constitutions expressly: (a) empower derogation from rights and freedoms; (b) describe the circumstances which constitute an emergency; and (c) limit the state

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3. [1907] A.C. 93, 95, *cited in* R. v. Allen, [1921] 2 I.R. 241. 'Actual War' in *Tilonko* was a reference to *internal* rebellion resulting in the imposition of martial law.

4. JOHN LOCKE, TRUE END OF CIVIL GOVERNMENT, ch. 14, *cited by* Viscount Radcliffe in Burmah Oil Co. v. Lord Advocate [1965] A.C. 75, 117.

to the taking of measures reasonably justifiable to deal with the circumstances of the emergency. In constitutional regimes, the emergency power has as its rationale, the ultimate protection of the very system which guarantees the rights and values of normal times. It is therefore logically demanded that certain standards be maintained even in emergencies and it is noticeable in this connection, that while many international regimes of rights and freedoms also recognize the need for emergency powers, these do not permit derogations from certain rights—even during states of emergency. The non-derogable rights common to all their instruments are those to life, freedom from slavery and forced labour, and freedom from torture and inhumane degrading punishment and treatment. The longest list of non-derogable rights in an international instrument seems to be that in the Inter-American Convention on Human Rights.[5]

The foregoing presupposes an Executive acting under a Constitution and in the first place proclaiming a State of Emergency as provided for by law. The existence of a group of persons or a person identifiable as the Executive or the Executive Head, ceases to be an academic issue where no person or persons can be so readily identified. In Grenada, in the period following a supposed counter—coup (that itself came several years after a 'revolutionary coup' that had abrogated the independence Constitution), the status of sole repository of legal authority on the island was ascribed to the Governor-General.[6] This repository of executive authority, deploying the decree-making power, promulgated anew, the Bill of Rights in the suspended Constitution and then declared a state of emergency as provided for thereunder.[7] Technically then, the Emergency was proclaimed under the constitutional set up, but in substance, the Governor-General might be viewed to have acted under some power inherent in his status as Head of State. This power could well be described as a prerogative of necessity.[8]

II. THE DEROGATION POWER UNDER THE CONSTITUTION

The function of the emergency derogation clause which appears in the Bills of Rights, is to validate the operation of laws or action

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5. Art. 27.2. For the text of the Convention, *see* 9 I.L.M. 673 (1970).

6. The survival of this officer as representative of the Queen is one of the major eccentricities of the Grenada affair. By Peoples' Law No. 3 (proclaimed by the 'original' revolutionary government), the Queen remained Head of State represented by the Governor-General.

7. Proclamation No. 3 of 1983, 101:52 GOVERNMENT GAZETTE (Grenada) (Nov. 4, 1983).

8. A similar line of reasoning would presumably apply to the alleged action of the Governor-General in inviting troops of foreign states to "rescue' Grenada, if such invitation was indeed made.

thereunder, which might otherwise constitute infringements of the provisions of the Bills. The constitutions of the Eastern Caribbean states have a derogation clause which declares that nothing done in or under the authority of a law enacted by Parliament shall be held inconsistent with or in contravention of the sections conferring rights—the *rights to personal liberty and freedom from discrimination, to* the extent that the law authorizes the taking, during any emergency, measures that are *reasonably justifiable* for dealing with the circumstances of the situation.

A distinct derogation clause as such is absent from the constitutions of Barbados and Jamaica, but the respective sections[9] setting out the rights to personal liberty and freedom from discrimination, contain a subsection allowing for derogations therefrom in a period of emergency, being measures which are reasonably justifiable for dealing with emergency. Section 20(9) (Constitution of Jamaica) additionally, allows derogations from its fair trial provisions for the criminally accused, but preserves from derogation the sub-section proscribing *retroactivity for criminal offenses* and the imposition of *penalties increased* subsequent to the time of the commission of an offense.[10]

Following perhaps the model set in the European Convention on Fundamental Rights and Freedoms, three constitutions (those of The Bahamas, Belize and Guyana) allow for the derogation from most of the provisions of their Bills—these are specified thus making those not mentioned non-derogable, even in states of emergency.[11] The rights excepted from emergency power derogations are the right to life, protection from retroactivity in the criminal law and from greater punishment than that subsisting at the time of commission of an offense, freedom from inhuman treatment, slavery and forced labor. The Guyana section specifically excludes forced labor from *non-derogation* whilst Belize shields from derogation the right of *freedom of conscience,* in addition to those listed here.

The affirmation of certain rights in the context of a public emergency operates as a *partial* continuation of the Bill of Rights' restraint on the near-absolute government which characterizes a state of emergency. It is therefore quite remarkable that among the constitutional provisions for an Emergency situation, the Trinidad and

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9. CONST. OF BARBADOS, § 13(5) and § 23(3)(d). This last subsection, however, relates only to discriminatory laws as distinct from discriminatory treatment (by the state) – seeming then to allow derogation from the right to be free from such treatment.

10. CONST. OF JAMAICA, § 20(9).

11. CONST. OF THE BAHAMAS, § 29(2); CONST. OF BELIZE, § 18(10); CONST. OF GUYANA, Art. 150(2).

Tobago section appears to permit the derogation from *all* provisions of the Bill of Rights. The substantive rights in this Constitution all occur in sections 4 and 5. The derogating clause in section 7(3) declares that an Act passed during a period of emergency and regulations made under subsection 7(10) and expressly declared to have effect only during that period are to have effect notwithstanding inconsistency with sections 4 and 5. A safeguard, but hardly a substitute for a provision specifying non-derogable rights, is that the Act takes effect only insofar as its provisions *are shown not to be reasonably justifiable* for the purpose of dealing with the situation that exists during that period. Putting this situation in the international context, Trinidad and Tobago, on acceding to the International Covenant on Civil and Political Rights, entered a reservation (premised on section 7), to Art. 4(2) of the Covenant which specifies the non-derogable rights.[12] At least one state, the then Federal Republic of Germany, entered an objection stating that the reservation was incompatible with the objects and purposes of the Covenant.[13]

The St. Lucia derogation clause follows that of Trinidad and Tobago, but specifies the two rights relating to personal liberty and non-discrimination as being the ones from which there may be derogation whereas the Trinidad and Tobago clause is applicable to all the rights conferred in sections 4 and 5. In both states, the effect of the phrase "shown not to be reasonably justified" is to change the position of the burden of proof involved, from the state onto the challenger of the law or regulations.

A matter of some importance is raised by the varying forms of the reference to 'law' authorizing derogations. The clauses of the Eastern Caribbean States, except St. Lucia, specify a "law enacted by Parliament." This *should* exclude common law rules and notions derived from the prerogative powers, justifying derogating laws or action thereunder. In principle, this formulation enhances the protection of rights and freedoms rather than the power in the executive to derogate. By contrast, the constitutions of the remaining states, omitting St. Lucia and Trinidad and Tobago, refer simply to "any law." This *prima facie* includes unwritten rules of law, and 'law' is specifically so defined, for example, in the Jamaica Constitution.[14]

In Trinidad and Tobago and St. Lucia, the law permitting derogation must be one *passed during a period of emergency*. The restricting effect of the need to get parliamentary approval for a law, is in these

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12. 6 I.L.M. 368 (1967).

13. For the reservation and objection, *see* "Multilateral Treaties Deposited with the Secretary General," (status as of December 31, 1990), 29 I.L.M. 1464 (1990).

14. CONST. OF JAMAICA, Ch. I. § 1(1).

states greatly counter-balanced by the power to make regulations under the constitution itself.

A provision in eight states contemplates the presence, during a state of emergency, of members of the 'disciplined forces' of foreign states but precisely what action it 'validates' is a matter of difficulty—associated with the meaning to be given to action done under 'the disciplinary law of that force'.[15]

III. THE EXISTENCE OF A STATE OF EMERGENCY

A. The Power To Declare a State of Emergency

The three earliest independence constitutions—those of Jamaica, Trinidad and Tobago, and that of Dominica—did not expressly declare the power of the Head of State to make a declaration of proclamation of emergency. This power is written into the constitutions of the Eastern Caribbean States except Dominica and Belize, and since 1976, Trinidad and Tobago. The absence of the power in the Jamaica Constitution and formerly in Trinidad and Tobago's formed the basis of challenges to the validity of proclamations in *Beckles v. Dellamore*[16] and *R. v. Nunn and Rudolph Green (Ex parte Brown and Grange)*[17]

In *Beckles*, the Trinidad and Tobago Court of Appeal was able to find the power to proclaim an emergency in the then—extent but now—repealed Emergency Powers legislation. It then made the exercise of the power subject to the provisions of the Constitution, which set out the 'data' that a valid proclamation or declaration should contain. In the Jamaican cases, the power was not to be found in the legislation which had on several occasions been amended, removing the express power which had existed therein before the constitution came into force. Instead, the court found the power in section 26(5)(b) of the constitution (similar to a section in the Trinidad and Tobago legislation mentioned above), and which prescribed the duration of an emergency. The conclusion of the court was, in effect, that the power to proclaim an emergency had been given by implication. The reasoning was that the sub-sections, though part of a definition clause, could as such confer power; it would moreover have been idle to have separate legislation merely

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15. CONST. OF ST. VINCENT, § 18(4)) states: "In relation to any person who is a member of a disciplined force of a country other than Saint Vincent that is lawfully present in Saint Vincent, nothing contained in or done under the authority of the disciplinary law of that force shall be held to be inconsistent with or in contravention of any of the provisions of this Chapter." [The Bill of Rights].

16. 9 W.I.R. 299 (1965) (Trinidad and Tobago).

17. 23 W.I.R. 139 (1976).

to state the power. More cogently, it was noted that the sections conferring the right to liberty and protection from discrimination expressly contemplated that they could be derogated from in a period of emergency. Since it was the scheme of the Bill of Rights to derogate from rights only on the basis of a legal power, the proclamation had to have a basis in law, even though not an express one. It is unlikely that *Beckles* and *Brown and Grange* seriously conflict. They merely illustrate what in the context of the judicial process, is a respectfully unexpressed truism—that a power exists where it can be found. Nor can it be imagined that any court of law, however zealous of the protection of rights and freedoms, is likely to assert that a state lacked the power to declare a state of emergency.[18]

B. Circumstances Constituting an Emergency

The multitude of constitutional sections and sub-sections establish five 'situations' in which a state of public emergency could exist. These situations determine or should determine the type of powers which are necessary in the particular case.

1. State of War.

In Jamaica, Barbados, Belize, The Bahamas and the two republics, the relevant sections refer to a period during which the named state is "engaged in any war." The remaining jurisdictions use the phrase "Her Majesty is at War." The sections could give rise to many technical imponderables but these are not considered here. The omission of a reference to Her Majesty in some of the monarchical constitutions may anticipate an independent declaration from the state concerned that it is at war; the reference to her majesty, and apparently therefore to the United Kingdom Crown *in the first instance*, appears to put the states concerned into a state of war on a declaration by *the United Kingdom government*, in the same manner as before independence.

A matter of interest here, going to the question of judicial control of proclamations of emergency, is whether the courts can inquire

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18. *See* In re Newton & Ors, Nos. 60-67 (Dominica 1981) 6 WEST INDIES L.J. 126-128. The content of the proclamation is specified in all the constitutions save those of Guyana, Grenada and The Bahamas.

Though not directly concerned with the power to proclaim an emergency, one might mentioned here the case of A-G (St. C-N) v. Reynolds, [1980] A.C. 637 (P.C.) in which the Privy Council in deciding on the valid powers of the Governor-General under an emergency, took an approach similar to that in *Beckles*, in that the court decided that the unlimited powers given the Head of State by pre-Bill of Rights legislation was to be read in light of the Bill of Rights provisions so as to make the power of detention exercisable on reasonable grounds only.

into the existence of a state of war. The general issue is adverted to below.

2. *Imminence of War*

A state of emergency exists when a declaration or proclamation of emergency declares that the Head of State is satisfied that a public emergency is at hand as a result of the imminence of war between the country and another. In the three constitutions which do not prescribe the content of proclamations, this head is not a stated ground establishing an emergency.[19] In no case, except St. Kitts-Nevis, is there a reference to "Her Majesty," and the implicit notion that under this head the state itself determines whether it is about to engage in a war sits uncomfortably with the formulation of the `state of war' criterion which does make that reference.

3. *Occurrence of Natural Disaster or Other Calamity*

The sections list a number of occurrences, including earthquakes and hurricanes, and (Belize excepted) add the ambiguous "other calamity whether similar or not" as establishing a public emergency. A proclamation of emergency under this head made in Dominica in 1979 was followed on the same day by a proclamation under the head next described.

4. *Action or Threatened Action Endangering Public Safety and Essential Services and Supplies*

The typical sub-section adapts the opening phrases of the *unamended* first section of the Emergency Powers Act (U.K. 1920), and provides that a public emergency exists when "action has been taken or is immediately threatened by any person of such a nature and on so extensive a scale as likely endanger the public safety or to deprive the community or any substantial portion of the community of supplies or services essential to life."[20] The inclusion of public safety is an innovative departure from the model supplied by the United Kingdom Act and at least one jurisdiction slips into its essential services clause, both public safety and *public order*; public order

19. The typical section states that a period of public emergency exists when the state (or Her Majesty) is at war *and* when there is in force a declaration or proclamation of emergency. Another sub-section then sets out what the proclamation must contain and this in turn includes the imminence of war as a circumstance which may be set out in the proclamation.

20. Emergency Powers Act (1920) § 1 (United Kingdom).

having been the basis of a proclamation of an emergency of long duration in that state.[21]

It may be assumed that organized or persistent use of violence for political ends endangers public safety even though this is incidental to the object of violence, normally the overthrow of a government regime. Here, the meaning of subversion, which is a separate ground for the declaration of an emergency, meets that of danger to public safety and a threat to essential supplies and services. Essential services are undefined in the constitutions and Acts, but a comprehensive definition appearing in the Jamaican Emergency Powers Regulations (1976)[22] should reflect the accepted understanding of the phrase. That definition refers to the collection and distribution (and manufacture) of water, gas and electricity, public transport, public health and electronic communication.

5. Subversion

A parliamentary resolution asserting that democratic institutions in the state are threatened by subversion creates a state of public emergency in seven of the twelve states.[23] In five jurisdictions, the resolution must be carried by a two-thirds majority of the members of each House or the House, as applicable; in Belize, a two-thirds majority of members present and voting is needed to make, extend or revoke the resolution. Art. 150(4) of the Guyana Constitution allows a resolution to remain in force for up to two years and without prejudice to the making of further resolutions on the terms prescribed.

The significance of this head is that it bases the existence of a public emergency on something other than the executive's perception of the need for emergency government. But the involvement of Parliament in this way does not necessarily constitute a control on the executive, but rather could give a distinct and additional basis for the exercise by the executive of emergency powers. In those situations in which Parliament, or the elected members thereof, largely constitute the executive, the subversion resolution could become a mere tool in the hands of the government of the day.

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21. CONST. OF ST. CROIX-NEVIS, § 3(1)(b); The Emergency Powers Act, No. 15 (St. Croix-Nevis 1967).

22. The Emergency Powers Regulations, XCIX:69 THE JAMAICA GAZETTE (SUPPLEMENT) 291 *et seq.* (Saturday, June 19, 1976) (Jamaica).

23. CONST. OF ANTIGUA-BARBUDA, § 21(4)(b); CONST. OF BARBADOS, § 25(1)(c); CONST. OF BELIZE, § 18(1)(c); CONST. OF DOMINICA, § 17(2)(c); CONST. OF GUYANA, Art. 150(1)(c); CONST. OF JAMAICA, § 26(4)(c); CONST. OF TRINIDAD & TOBAGO, § 104(4)(c).

The foremost legal issue posed by this means of creating a public emergency is its amenability to judicial control. To the question whether courts can scrutinize the executive determination of the existence of an emergency has been added that of the power to question the parliamentary determination.

While it is left to Parliament, in passing this resolution, to decide what it views as subversion, were courts to assume the power to review the resolution, they would have this task of definition. Subversion and subversive activity relate in normal usage to the overthrow of a government by unlawful means. "Democratic institutions" may be a grandiloquent substitute for the "government," but institutions do include the holding of elections, sittings of Parliament and possibly the Constitution itself, all of which would be endangered by attempts at violent overthrow of the government.

It is not clear, however, that the meaning of subversion stated here is the one understood by politicians or the supposed intelligentsia of West Indian countries. In one jurisdiction, the formation of a political party calling itself "democratic socialist" was clearly viewed as subversive, as was the teaching of Marxist theory at the University of the West Indies. Would it then be far-fetched to envisage a parliamentary resolution under the relevant sub-sections being provoked by something rather less than an immediate or real threat to overthrow a government by force?

Perhaps the greatest concern to which this form of emergency declaration could give rise is the use to which it could be put by an executive having firm control of a Parliament, despite the special majorities, where these are specified. This seems like the undermining of the constitutional framework itself under the guise of dealing with an emergency. The postponement of elections comes to mind, but in a region in which the subversion resolution has not so far been employed, one government has found it possible and apparently desirable to call an election during the subsistence of an emergency based on a threat to public order.[24]

The constitutions do not provide for the creation of an emergency on the basis of an economic crisis, as such. When an emergency is declared under a specified head, as in the threat to essential services, laws and regulations having economic ramifications could be made where these were reasonably needed to deal with that threat. In the state of emergency in Dominica, declared after the 1979

24. The Jamaican Emergency of June 19, 1976, ended on June 6, 1977; during which time, on December 14, 1976, a General Election was held.

hurricane, regulations were made to control the price of building materials.

In an economic crisis in which a state might wish to take measures impinging on rights and freedoms, Trinidad and Tobago and Jamaica might avail themselves of the special derogating facility in their constitutions which empowers the enactment by special majorities of laws inconsistent with the rights conferred. This is difficult because the special exception provisions contemplate permanent measures antithetical in character to the temporary nature of emergency measures.

In including within the meaning of "emergency," war, threats to internal security, natural, and other disasters, the state may have been given the extensive powers associated with war, to be deployed in time of peace and exercisable against its citizens and persons within the state jurisdiction. This undesirable feature is not diminished by the stipulation that laws, regulations and measures thereunder are to be those reasonably required for dealing with the given situation.

IV. EXECUTIVE PERCEPTION OF THE EXISTENCE OF AN EMERGENCY

Declarations of emergency in the region have almost invariably been grounded on a threat to public order. The Trinidad and Tobago declarations have generally recited both the public safety and essential services or supplies ground without separating out public safety as the particular ground in the specific situation, as have the proclamations in other states. This practice was approved in *Beckles v. Dellamore*.[25]

One is left with the general suspicion that declarations of emergency have been deployed in substitution for political processes, including the enactment of legislation for reaching solutions to issues arising within the polity. Accordingly, opposition to proposed legislation seems to tip the balance in favor of the creation of a state of emergency, and certainly has facilitated the *judicial* perception that a situation justifying the calling of an emergency exists. So in *Beckles v. Dellamore* (arising from a 1965 emergency), the Chief Justice (Trinidad and Tobago) summarized the features of what was described as a "crisis in the sugar industry." He added:

> . . . on top of all this came controversy over the Industrial Stabilization Bill which the freedom fighters (a group within a sugar union so describing themselves) and the unions supporting them were vehemently campaigning against because in the language of the

25. 9 W.I.R. 299 (1965).

> pamphlet in respect of which the defendant was charged, it was putting an end to free labour and collective bargaining. In my assessment therefore, it was an explosive situation with which the Regulations were designed to deal.[26]

It is somewhat disturbing that in a democracy debate over a bill should be seen as going towards a state of emergency.

Of the achievements of the 1976 Jamaica emergency, the Minister of National Security was moved to make this observation:

> It is therefore reasonable to say that the objective of smashing the link between politics and violence has been achieved to a large extent. Political tension has certainly been relieved as a result of a lessening of political activities.[27]

The statement indicates a belief that violence was politically motivated. This would suggest to some that the declaration was a political initiative, deploying emergency powers in order to suspend political activities and constitutionally guaranteed rights. This lessening of political activities, unless of course 'political activities' is synonymous with violence, has a peculiar ring in the context of a supposed democracy.

To take another example, when plantation owners declined to tend their estates, a solution thought apt was the proclamation of a State of Emergency extending to these estates and buttressed by a regulation giving the competent authorities the right to cultivate, re-cultivate, rehabilitate and re-plant sugar cane in the emergency area.[28]

Perhaps the most dubious use of the emergency power is evidenced in the 1977 declaration in Trinidad and Tobago.[29] The proclamation covered the state and recited the ground of emergency—danger to public safety. At the time, it was impossible to identify circumstances occurring which answered the description of an extensive threat to public safety or to supplies and services of an essential nature. Without exception, the regulations made during the period and under subsection 7(1) of the Constitution (obviating the need for an Act of Parliament) related *only* to the international airport and its environs. The regulations in the main created offenses for littering and loitering and going through the "green line"

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26. *Id.* at 309E.

27. MINISTRY OF NATIONAL SECURITY, REVIEW OF THE STATE OF EMERGENCY § 33 (Ministry Paper No. 22, June 1977) (Jamaica).

28. Proclamation S.R.O. No. 34 of 1974. October 21, 1974 (St. Croix-Nevis).

29. Proclamation No. 32, G.N. No. 156, 16:316 GAZETTE (Oct. 23, 1977) (Trinidad and Tobago. There appears to have been no resolution extending the initial duration of the Emergency. The last Order under the Regulations discovered is dated December 20, 1977.

when knowingly having goods to declare.[30] The questionable aspect of the matter was the use of a period of emergency created by executive regulation that, in part at least, could and should have been done by parliamentary enactment.

Although there have been no permanent states of emergency so far in the Commonwealth Caribbean, one is left with the impression that on a significant number of occasions the executive has been unduly keen to avail itself of the power to rule by executive decree through the device of an emergency.

V. CONTROLS ON THE POWER TO CREATE A STATE OF EMERGENCY

A. Parliamentary Control Over Proclamation of a Public Emergency

In the current West Indian constitutions an attempt is made to give Parliament some control over the executive act of proclaiming or declaring an emergency. Using slightly varying phrasing, the constitutions all cause a declaration to lapse after a stated period unless it is approved by a parliamentary resolution, as prescribed. As a fetter on the executive, the device is negative in form and function.

The Bahamas and Guyana provisions allow one extension on the resolution approving the proclamation, effective after its expiration date.[31] In five states, the duration of a declaration depends on whether or not Parliament is in session; the effect is to make the period of validity shorter when Parliament can readily support (or not) the declaration. Few constitutions, however, make mandatory, parliamentary consideration of the declaration, or specify procedures for the recall of a Parliament that has been prorogued or dissolved. The Antigua-Barbuda provision appears to make it optional for the Head of State to recall a dissolved Parliament; in Guyana and the Bahamas, copies of the proclamations must be laid before the House or Houses (as appropriate) as soon as practicable and Parliament must be summoned where sittings have been adjourned or Parliament prorogued.

The obligation to recall a dissolved Parliament is specifically catered for in The Bahamas, where the Governor-General must recall the Houses as constituted before dissolution.[32]

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30. *See* Emergency Powers (Airports) Regulations (1977) (Trinidad and Tobago) and the similarly entitled regulations, No. 2 dated October 23, 1977 and November 17, 1977, respectively.

31. CONST. OF GUYANA, Art. 150(3)(c); CONST. OF THE BAHAMAS, § 29(5).

32. CONST. OF THE BAHAMAS, § 66 to which § 29(3) refers. The Governor-General may, if satisfied that a general election can be held within seven days, summon the Houses of the new

Section 9(1) (Constitution of Trinidad and Tobago) mandates the presentation to the House of Representatives, within three days of a Proclamation, a statement setting out the specific ground on which the decision to declare the existence of a public emergency was based. A debate must follow within fifteen days of the proclamation. This last provision is the one most strongly directed to creating a power in the legislature to scrutinize and pass on the "merits" of the exercise of the executive discretion to create a state of emergency. No special arrangements are, however, set out requiring the recall of a prorogued or dissolved House.

The lapsing of the proclamation in the absence of an approving resolution is, however, but one aspect of the constitutional arrangement considered. For, attached to the resolution requirement, is the power in Parliament or House to extend the period of emergency on the making of the resolution, for periods as extensive (in some cases) as one year. This is accomplished by conferring on the resolutions a life varying from three months to a year and coupling this with another provision that the declaration of Emergency is to survive for the duration of the resolution. Subsequent resolutions can create further extensions.[33] The extension on the initial resolution is, in all cases except St. Kitts-Nevis, by a simple majority.[34]

The character of the arrangements described here makes the parliamentary resolution *as much a means of enhancing the executive power involved as of controlling it,* and the evidence of successive extensions in certain states confirms this view. Likewise, the power to extend by resolution is without prejudice to the power in the executive to make fresh proclamations. The scope for creating prolonged emergency government has a distinct and additional legal basis.

Parliament as soon as practicable after the election. The section appears to assume the appointment by the time of the summons for the "new" members of the Senate.

33. The St. Vincent provision allowing for resolutions of one year's duration is illustrative. CONST. OF ST. VINCENT, §§ 17(5) and (6) read as follows:

> (5) A declaration of emergency that has been approved by resolution of the House in pursuance of subsection (2) of this section shall, subject to the provisions of subsection (3) of this section, remain in force so long as the resolution remains in force and no longer.
>
> (6) A resolution of the House passed for the purposes of this section shall remain in force for twelve months or such shorter period as may be specified therein: Provided that any such resolution may be extended from time to time by a further such resolution, each extension not exceeding twelve months from the date of the resolution effecting the extension; and any such resolution may be revoked at any time by a further resolution.

34. A two-thirds majority is needed for the making of the first resolution and for those proposing further extensions. CONST. OF TRINIDAD AND TOBAGO, § 10(2) details procedures for further extensions.

B. *Judicial Control Over Proclamations of an Emergency*

The constitutions set out the requirements of a valid declaration. In a system in which there is power in the judiciary to review Acts of Parliament and executive action, a court could adjudge a declaration or proclamation not in constitutional form to be defective. Of greater importance and interest is the question whether the courts have power to pass on the executive determination that an emergency exists, given that the historical antecedents of the common law, precedent and doctrine from the United Kingdom and Commonwealth, suggest and in some cases strongly assert a negative answer.[35] It is suggested here, however, that in the Commonwealth Caribbean where courts are charged with the protection of rights and freedoms, and where the rules relating to emergency government are set out as a species of exception to a regime of rights and freedoms, judicial review of the validity of a proclamation should, in principle at least, be possible. This means that a court could question the correctness of the belief that an emergency situation in fact existed or even the *bona fides* of the government in making a proclamation or declaration of emergency. It is, however, doubtful that West Indian courts would be in the vanguard of an attempt to question the executive's determination and a strong hint of this was given in *Beckles v. Delamore*.[36] A universal inclination to deference to the executive in this area has been noticed in both municipal and international contexts.[37]

In *Lawless v. Ireland*,[38] a case considering emergency derogations from the rights given by the European Convention on Human Rights and Fundamental Freedoms, the court decided that it could make its own determination of the existence of an emergency under the Convention. Notwithstanding, it stated a doctrine of discretion in states, giving them a "margin of appreciation" such as would in fact allow the European Human Rights Court *not* to interfere with the executive determination. The European Commission had previously explained that emergencies presented, "problems of appreciation and timing for a government which may be most difficult . . . in a democracy."[39] Further, Art. 15 (dealing with Emergency Derogations) stated, "in the context of the rather special subject matter with which it deals: the

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35. E.C.S. WADE, CONSTITUTIONAL AND ADMINISTRATIVE LAW 251-55 (A.W. Bradley ed., Longman Pub., 10th ed. 1985).

36. 9 W.I.R. at 306.

37. *See, e.g.*, George J. Alexander, *The Illusory Protection of Human Rights by National Courts during Periods of Emergency*, 5 HUMAN RIGHTS L.J. 1 (1984).

38. 1 EUROPEAN HUMAN RIGHTS REPORTER 15 (1979-80).

39. *Id.* at §§ 22-28.

responsibilities of a government for maintaining law and order in a time of war or any other public emergency threatening the life of the nation."[40] The words, though spoken in the context of an international convention, may well reflect the attitude of municipal courts. The case law, on the question whether the executive determination that a state of emergency exists can be judicially reviewed, is far from helpful and the assertion in *Ningkon v. Gov. of Malaysia*[41] that the question was undecided still holds true.

In the case of *Bhagat Singh v. The King-Emperor*,[42] the Privy Council regarded it as self-evident that someone had to be the judge of the existence of a state of emergency and, under the relevant legislation that person was the Governor-General who determined whether the promulgation of ordinances under the legislation was for the peace, order, and good government of India. The "sole judge" view of the executive power or discretion to determine the existence of an emergency was reasserted in *King-Emperor v. Beroari Lal Serma*,[43] but in so doing it was pointed out that the legislation concerned did not require the Governor-General to state that there was an emergency or the nature of the emergency and that on the assumption that he had acted *bona fide*, there could be no challenge. It is suggested, that where legislation or a constitution sets out certain requirements that have to be observed on the making of a proclamation, a review can be made where either these requirements have been ignored or where there has been bad faith.

In *Ningkon*,[44] where the issue of justiciability of a declaration was left open, the Privy Council did consider an allegation that certain legislation declaring an emergency and making certain constitutional arrangements were made *fraudem legis*. Proceeding, as it must have done, on an assumption of justiciability, the Privy Council failed to find that the applicant had provided sufficient evidence to show that the Malaysian government had no ground for declaring an emergency or that there had been *mala fides*. It is of some interest to observe here that the declaration of emergency had been prompted by a constitutional impasse and that the applicant had asserted that there had been none of the "manifestations" traditionally associated with a state of grave emergency such as riots and insurrections or similar civil disturbance. Further, there had been no perceived need for curfews, the calling out of troops and other activities which generally

40. *Id.*
41. [1970] A.C. 379.
42. [1931] L.R. 58 I. A. 169 (P.C. appeal from India).
43. [1945] A.C. 14.
44. *Supra*, note 41.

occur when there is a grave emergency. The failure of the appellant to discharge the burden of proof once again enabled a court to avoid the basic issue before it.

Finally, one may consider *Teh Cheng Poh v. Public Prosecutor*,[45] in which a proclamation of a *security area*, not an emergency, was challenged. The relevant legislation permitted proclamations in given circumstances when such proclamations were necessary for suppressing organized violence. The Privy Council asserted that the conferral by Parliament of a discretion, in principle, permitted review for *ultra vires* or an exercise in bad faith. The court had recourse to the notion of "condition precedent,"[46] whereby on the purported exercise of a discretion which is subject to such a condition, the court could satisfy itself that those conditions had been fulfilled.[47] The challenge failed nonetheless and as stated earlier, was not concerned with an emergency as such.

Even in the absence of any denial of jurisdiction to make its own determination, the question of discharging the burden of proof—placed on the challenger—is great, and as indicated in *Ningkon*, near undischargeable. This was so because

> the policies followed and steps taken by the responsible Government may be founded on information and apprehensions which are not known to, and cannot always be made known to those who seek to impugn what has been done.[48]

It may be surmised then, that there is little practical likelihood of a judicial determination of the existence otherwise of an emergency as proclaimed by the executive, though there is no compelling reason in law to deny such a power.

Even murkier is the court's role in relation to the creation of a state of emergency by parliamentary resolution asserting that democratic institutions are threatened by subversion. Whatever the difficulties presented by parliamentary privilege, and the operation of presumptions of procedural regularity, the court could investigate the "fact" of such a resolution as the supposed basis of the existence of an emergency.

It is a matter of some interest that discussion of judicial review of laws, perhaps understandably, forgets the important place given by

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45. [1980] A.C. 458.

46. Review on this basis is well exemplified in the House of Lords' decision in Khawaja v. Secretary of State for the Home Department, 2 W.L.R. 321 (1983).

47. *Supra* note 45 at 472.

48. *Id.* at 379.

West Indian constitutions to *resolutions* of Parliament[49] in a few areas and in the present case one which trenches ultimately on the Bill of Rights regime.

The argument for review is that the particular form of emergency creation, like the others, allows for abrogation of rights and therefore needs judicial surveillance. On the other hand, the Constitution, in failing to set out conditions that must exist to justify the resolution, i.e., in failing to give some meaning to the word "subversive", can arguably be said to leave it to the legislature to determine what constitutes a subversive situation may not contemplate that courts should scrutinize the legislative judgment.

VI. EMERGENCY POWERS REGULATIONS, MADE UNDER THE CONSTITUTION

In three states, the Head of State has the power to make regulations "directly" under the Constitution requiring no Act of Parliament for this purpose.[50] The Trinidad and Tobago and St. Lucia sections specify only the power to make regulations providing for the detention of persons, without prejudicing the generality of the power given to make regulations.[51] The extent and reach of the regulation-making power is not further elaborated, but it should be the case that the criterion of validity—"reasonably justifiable"—is applicable to the regulations themselves, as a species of measures taken in a state of emergency.

Section 18(a) (Constitution of Belize) details matters and objects to be secured by the regulations and the Governor-General is given power to amend or suspend the operation of laws other than the Constitution or a law altering the Constitution. Section 18 (10) expressly sets out the criterion of validity marked in the preceding paragraph, *as applicable to the regulation making power.* It seems unlikely that questions of excessive delegation, can in this context be otherwise than academic, and is not further elaborated on. In these two states, it may be that the test for the exercise of the power is that

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49. *E.g.*, the role of parliamentary resolutions in establishing electoral boundaries in Trinidad and Tobago. *See* CONST. OF TRINIDAD AND TOBAGO, § 72.

50. CONST. OF BELIZE, § 18 (a); CONST. OF TRINIDAD AND TOBAGO, § 7; CONST. OF ST. LUCIA, § 14(1). In the last two states, there exists an Essential Services Act, (No. 3 of 1975) (St. Lucia) and the Disasters Measures Act (No. 4 of 1978) (Trinidad and Tobago).

51. The generality of the power is well illustrated in the Regulations decreed during the most recent state of Emergency in 1990. These prohibited, for example, the possession of documents the dissemination of which could lead "to breach of the peace or to cause disaffection or discontent among persons," and *expressly* suspended the writ of *habeas corpus* for detainees refused bail, the refusal of which being effectively enjoined by the regulation itself. Legal Notices No. 142 (July 28, 1990) (Trinidad and Tobago).

delegation be "reasonably justifiable" for the purposes of dealing with the circumstances of the emergency.

VII. THE EMERGENCY POWERS LEGISLATION

A. Constitutional Control on Acts

Acts and regulations thereunder are both included in the word "law" as it occurs in the derogation clauses of the Bill of Rights,[52] and must comply with the Constitution. The principal fetter on the power to derogate from the provisions of the Bills is that the derogating "law authorizes the taking . . . of measures that are reasonably justifiable" for dealing with the circumstances of the emergency. Acts must otherwise comply with the Constitution and subsidiary legislation and regulations must comply with the Act under which they are made.

Subsequent to the enactment of the Bills of Rights, a number of cases raised issues as to the relation of the constitutional provisions to emergency powers legislation and in particular the unfettered powers given the colonial governors as compared with the stipulations of the emergency derogation clauses. In *Charles v. Phillips & Sealy*,[53] the emergency law was struck down for inconsistency with the Constitution as the Governor had been authorized to exercise "dictatorial powers" as they were characterized by the court, to make measures considered by him to be necessary or expedient. This view was confirmed by the Privy Council in *A-G (St. Kitts-Nevis) v. Reynolds*,[54] though that court decided that it was possible to give a modified reading to the emergency law concerned so that the Head of State could then only take reasonably justifiable measures.

In two Dominican cases, the court was invited to invalidate both the emergency powers legislation and regulations made thereunder. In *In re Newton*,[55] the court considered the validity of section 2(1) of Dominica's Emergency Powers Ordinance as amended. The section which empowers the Head of State to declare an emergency, "if at any time it appears to him that certain action threatens the public safety," was held to give the Head of State unlimited jurisdiction subject only to the good faith requirement.[56] This was tantamount to a refusal to review the enactment for consistency with the

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52. So held in the unreported case of R. v. Green & Minister of National Security (*ex parte* Williams & Spencer), Nos. 44 and 45 of 1976, (Jamaica) at p. 31 of the typescript.

53. 10 W.I.R. 423 (St. Croix-Nevis) (1967).

54. [1980] A.C. 637 (P.C., St. Kitts-Nevis).

55. Nos. 6067 (1981 (Dominica), 6 WEST INDIES L.J. 126-128. *See* note 18.

56. *Id.*

Constitution or to say that it was to be construed in accordance therewith. The logic of *Phillips and Sealy* and *Reynolds* was thus rejected.

In *Maximea and Ors v. A.G.*,[57] the appellate court rejected the idea that the Dominican Head of State had been given dictatorial powers and found instead that emergency powers were limited to the subjects set out in section 3 of the Ordinance. This section confers certain powers of regulation, control and restriction and authorizes the taking of any measure which the Head of State deems essential to the public safety and life of the community.

B. Power to Make Regulation

The creation of this power is perhaps the principal function of emergency powers legislation and a section pertaining to the making of regulations is common to all the Acts. It is the main empowering one, as the bulk of action taken in emergencies is through and under regulations made under the Acts. The subject areas of application of the regulations are particularized in varying degrees and in some cases regulations have been codified in legislation. Section 30(20 of the National Security (Miscellaneous Provisions) Act (Guyana)[58] and section 4 of the relevant Act in St. Vincent and the Grenadines are the most comprehensive in scope.

The power to make regulations for the detention of persons is specified in most states but is absent in a few, as for example Barbados.[59] Challenges to detention orders are often based on the claim that the detention regulation is *ultra vires* to the emergency powers legislation. This would parallel the situation litigated in the English case of *Rex v. Halliday*,[60] in which the legislation gave a power "to issue regulations for securing the public safety and the defense of the realm." A majority of the House of Lords rejected the view that there was no power to make a regulation for the internment of any person of hostile origin or association. Lord Shaw alone was of the view that Parliament could not have meant the power of internment to be *implied* from the section giving the power set out above. Notice, however, that any *Halliday*-type argument in the West

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57. 21 W.I.R. 548 (1974).

58. Cap. 16:02 (as amended) (Guyana).

59. The limitations sub-clause on the right to freedom of movement (as distinct from the right to personal liberty) in this Constitution and that of Jamaica, give powers of detention with detailed provisions for detention regimes, such as figure in detention regulations made under Emergency Powers Legislation. CONST. OF BARBADOS, §§ 22(4) and (5); CONST. OF JAMAICA, §§ 22(4) and (5).

60. [1917] A.C. 260.

Indies should be modified away from the "intention of Parliament" to a test of reasonable justifiability.

As the reach and extent of the regulation-making power and the breadth of the regulation itself invites the challenge of unconstitutionality, as was the case in *Reynolds*,[61] some states have either altered the statement of the regulation-making power in the Act subsequent to the promulgation of Constitutions containing Bill of Rights, or introduced new legislation to conform with the Constitution. But emergency legislation still authorizes the making, for example, of "any orders" whatsoever which [the Cabinet] considers to be in the public interest,"[62] or regulations which the Governor-General or Head of State "considers necessary or expedient."[63]

The breadth, generality, and even vagueness of the regulations which have been made during emergencies are well illustrated by Regulation 14(1)(a) (Trinidad and Tobago) (1970):

> Any person who shall—
>
> (a) endeavor whether orally or otherwise to influence public opinion in a manner likely to be prejudicial to public safety and order shall be guilty of an offense under these regulations.

In *Edwards & Ors v. Sgt. Alleyne*,[64] a conviction and sentence to twelve months imprisonment with hard labor was set aside by the Court of Appeal on the ground of a lack of evidence to support the charge and not on any defect in the regulation.

Many states make provision for the cessation of regulations on the termination of the emergency, the effectiveness and validity of regulations inconsistent with other law(s), penalties on breach of the regulations, and so forth.

Some measure of parliamentary control over regulations (and orders) exists when the Act prescribes the laying of regulations before one or both Houses of Parliament and makes their continuance in force dependent on a resolution of either or both Houses. In *In re Benn*,[65] it was decided that it was not a condition of the validity of emergency regulations that they be laid before Parliament, and this proposition would appear to hold good in the absence of a laying requirement in the emergency legislation itself.

Regulations must be published before they can be legally acted upon, a matter which perhaps explains section 12(2) of the

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61. [1980] A.C. 637 (P.C.)
62. § 3(1) Ch. 161 (Barbados).
63. Emergency Powers Act, § 3(2) (No. 8 of 1974) (The Bahamas).
64. 17 W.I.R. 358 (1970).
65. 6 W.I.R. 500 (1964).

Constitution of Trinidad and Tobago, which permits detention to be made under regulations even though these have not been published, once a proclamation has been made.[66]

Many of the Acts assert that the powers conferred are to be in addition to those conferred by other law. Legislation in some states specifically enjoins the making of regulations providing for one or more of the following matters: compulsory military service; industrial conscription; trial by military courts; alteration of criminal procedures or the imposition of punishment without trial.

C. *Detention Regulations*

Reg. 35(1) of the Emergency Powers Regulations 1976 (Jamaica) reads as follows:

> The minister if satisfied that any person has been concerned in acts prejudicial to the public safety or public order or in the preparation or instigation of such acts and that, by reason thereof, it is necessary to exercise control over that person, may make an Order (hereinafter referred to as a Detention Order).[67]

The phrase "if the Minister is satisfied" is common to *all* the detention regulations so far made in the region. The meaning or effect of this regulation was considered in the unreported case of *R. v. Green and the Minister of National Security (ex parte Williams and Spencer)*, in which the applicants challenged detention orders.[68] In a judgment heavily reliant both on the dissenting and majority judgments in *Liversidge v. Anderson*,[69] it was held that where the term "if the Minister is satisfied" is used, "unlimited discretion is given to the Minister assuming that he acts in good faith." The phrase was distinguished, on the authority of a *dictum* in Lord Atkin's dissenting judgment in *Liversidge*, from that involving the Minister's reasonable belief and it was concluded that the word "satisfied" allows for a subjective test.

The appearance of the words "by reason thereof," it was asserted, made no difference to a court's inability to probe the basis of the Minister's decision, so no objective assessment of the Minister's "satisfaction" was possible, and the respondents at no point had a

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66. In Kelshall v. Pitt, 19 W.I.R. 136 (1971), decided under Trinidad and Tobago's 1962 Constitution, and which did not contain an analogue of § 12(2), detention were held invalid where arrests had been made before the legislation was published. This was a *habeas corpus* proceeding.

67. The Emergency Powers Regulations, *supra* note 22, § 35(1).

68. *Supra* note 52.

69. [1942] A.C. 206. This case was concerned with the Minister's 'reasonable belief,' which the dissenting law lord insisted, created an 'objective' test.

burden to establish that the detainees had in fact been concerned in or in the preparation of acts prejudicial to public safety. The conditions into which a court could inquire, and which when satisfied made the detention *prima facie* lawful, were: (1) that the detainees be identified; (2) that there be in fact a state of emergency; and (3) that the requirements of the regulations be complied with. Any burden on the Minister was to show that he had received information, that he honestly believed the information and that the person ought to be detained.

The result was that the detainees could only succeed on a showing of actual bad faith on the part of the Minister. But the most significant consequence of the interpretation of the regulation in this case is its implications for the major constitutional fetter on the executive—what must be the objective test—that measures be reasonably justifiable in the circumstances of the emergency. The decision means that merely by framing regulations in subjective terms, executive action in a period of emergency is exempted from the braking effect built into the emergency derogation clauses. It is out of step not only with the Constitution, but with more recent trends in which the formulation of a discretion even in subjective terms may yet subject its exercise to judicial scrutiny.[70]

D. The Meaning of 'Reasonably Justifiable'

Two questions are raised by the phrase "reasonably justifiable." First, as to precisely what is to be reasonably justified, and secondly, as to the approach which the court must take in determining the issue. These matters were addressed chiefly in the cases of *Beckles v. Dellamore* and *Williams and Spencer.*

Contrary to the view taken here, the judgment in *Williams and Spencer,* was premised on the judicial perception that the phrase "reasonably justifiable," as it occurs in the sections permitting derogation was not conceived of as a brake on the power to derogate but rather empowered it. The learned judge asserted in response to the objective test argument:

> It is more to the point that the framers of the Constitution were being mindful of what steps could properly be taken in time of grave national crises to preserve the safety of the nation.[71]

Since the derogation clauses state what can be done in terms of the measures being reasonably justifiable, the view is untenable.

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70. *See, e.g.,* Secretary of State for Education and Science v. Metropolitan Borough of Tameside [1976] 2 All E.R. 665.

71. *Supra* note 52.

As to what is to be reasonably justified, the applicants in *Williams and Spencer* asserted that the court had to decide whether *specific measures* taken under the law and regulations were reasonably justifiable in this case, the detention orders made by the Minister and the detention of the applicants thereunder. The court decided that its power was limited to a consideration of the *vires* of the legislation and regulations, in light of the factual situation existing in the period of emergency and that it would not examine particular measures.

The court found it inconceivable that the framers of section 15(5) (Constitution of Jamaica) in allowing emergency derogation from the right to personal liberty, intended that every individual action taken during a period of public emergency could be tested, so as to allow courts to determine objectively whether such action was reasonably justifiable. Precedent was found in *Beckles* and more precisely in *Lipton v. Ford*,[72] in which it was asserted that the issue before the court was "whether the regulation [was] one that [was] *reasonably capable* of being a regulation for securing the public safety, etc." No attempt was made, however, to assess the regulations in terms of the quoted words,[73] and it is in any event to be doubted that the issue as stated therein is that before West Indian courts under the derogation clause. As to the distinction between measures, and laws and regulations, it is suggested that the formulation of the derogation clause makes it near indisputable that measures may be reviewed to establish whether they are reasonably justifiable.

Herbert v. Phillips and Sealy,[74] however, required that *measures*, as distinct from laws, were to be shown by the *state* to be reasonably justifiable. Once a challenge to a measure (in that case a detention order) was made, the burden fell on the state to put evidence before the court to justify it. But, in *In re Christopher Adams*, it was asserted that the onus lay on the *applicant* to prove his allegation that the measures taken were not reasonably justifiable.[75]

On the other hand, section 7(3) (Constitution of Trinidad and Tobago) because of its particular formulation, places the burden on the applicant to show that the provisions under emergency powers legislation or regulations made under section 7(1) of the Constitution, are *not* reasonably justifiable. The sub-section validates

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72. [1917] 2 K.B. 647, 654. (Emphasis added.)

73. This is not surprising since it is hardly to be doubted that regulations empowering detention are *reasonably capable* of securing public safety. This is highlighted when it is considered that the English case was concerned with a requisitioning regulation and that the measure complained of was the taking of raspberries for troops.

74. 10 W.I.R. 423 (1967).

75. No. 268 of 1979 (H.C.) (St. Vincent and the Grenadines).

derogations from rights and freedoms, except in so far as the relevant provisions "may be shown not to be reasonably justifiable for the purpose of dealing with the situation."

In *Beckles v. Dellamore,* the appellant had been convicted for possession of a pamphlet which opposed an industrial relations bill, asserting that it would put an end to free labor and collective bargaining and replace them with "forced labor and fiat."[76] The regulation to be considered by the Court of Appeal made it an offense to possess or have control over documents of such a nature that the dissemination of copies thereof would be likely to cause a breach of the peace or discontent among persons. The court, being of the view that the regulation created an offense similar to that of *sedition,* concluded that, in order to determine whether the regulation had been shown not to be reasonably justifiable, it was necessary to "appreciate what the *appellant* showed the situation was."[77] The situation was a strike, and an intra-union dispute in the "sugar belt," the latter being substantially the area to which a state of emergency had been extended. The court added to the picture of the situation, the fact that there was controversy over the proposed legislation, and concluded that, "it was an explosive situation with which the regulations were *designed* to deal."[78]

The court then merely decided that there was in fact an emergency and that the regulation contemplated it. Judicial concern was with the regulation, an abstract rule of law, but presumably every rule created under emergency powers is designed to deal with an emergency. From this "design," it seems to flow as a natural consequence that a regulation is "reasonably justified" for dealing with the circumstances.

Finally, the observation of the court on sedition would have in any event made its finding on reasonable justification inevitable. The compatibility of sedition, that is, seditious libel, with freedom of expression, is itself an issue when the latter is constitutionally guaranteed. The sedition law referred to by the court was valid law in Trinidad and Tobago by virtue of the special savings clause, and no doubt under the theory of inherent limitation on rights expounded by the presiding judge in other cases.[79] The validity of the offense in ordinary law and in non-emergency situations would have made it

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76. 9 W.I.R. at 309.

77. *Id.*. (Emphasis added.)

78. *Id.*

79. *See, e.g.,* Collymore v. H-S (Trinidad & Tobago), 12 W.I.R. 5 (1967). A *special* savings clause in five states preserves against Bill of Rights challenges, laws and actions thereunder, where the laws challenged pre-date the promulgation of the Constitution.

unlikely that a court, seeing a parallel between the offense created by the regulation and seditious intent, would be satisfied that the regulation was shown not to be reasonably justifiable in an emergency.

Evidently, no attempt was made in any of the cases considered to set a standard by which to determine the reasonable justifiability either of regulation, law, or measures taken. This might have been done by reference, for example, to whether the thing challenged was "necessary"; "the only means by which" or "the least restrictive means by which" to achieve the permitted aim; namely, dealing with the situation of the emergency. In addition, the question as to what must be the subject of the court's inquiry, as to its reasonable justifiability, has hardly received uniform or principled treatment.[80]

West Indian courts seem to consider their review function as discharged when, by a subjective test, regulations are believed by the Minister to be empowered by the enabling legislation. The test of validity in the constitution is, however, applicable only on an objective view of its function.

In the most recent United Kingdom case in the area of emergency regulations, *McEldowney v. Forde*[81] a majority of the House of Lords affirmed the subjective test—what the Minister believed or thought fit—in order to achieve the purpose permitted by the legislation. In this case, the regulation impugned and which was made under legislation for peace, order and good government, effectively proscribed certain organizations. There were two dissents: Lord Diplock required an objective test of the *effect* of the regulation, whilst Lord Pearce saw the review task as going beyond the application of a subjective test on the ministerial perception qualified only by ministerial bad faith.[82] Both dissenters found the regulation too vague and overbroad. The approach of the dissenters is consonant with the task imposed on West Indian courts, by the constitutions, in determining reasonable justifiability.

The foregoing leads to the conclusion that in practice the phrase considered provides an insignificant brake on the enlarged powers of the state during an emergency and constitutes an insubstantial attempt to tilt the balance back in favor of fundamental rights and freedoms.

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80. *Williams and Spencer, supra* note 52, at 31 of the typescript. In *Williams and Spencer*, it was observed, "[i]f emergency regulations provided for search of persons or premises without warrant, or curfew by day or night, or detention without charge or trial, or for the deliberate maiming of adult males, or compulsory separation of all wives from their husbands," they could be inquired into by courts to determine whether they were reasonably justified or not. *Id.*

81. [1971] A.C. 632.

82. *Id.* at 651B-665.

VIII. LIBERTY OF THE PERSON IN EMERGENCIES

A. Special Regimes For Detainees

In an apparent attempt to afford some protection to persons detained at executive discretion and in derogation of the right to personal liberty and freedom from arbitrary arrest, all the constitutions provide for a system of review of detention cases by a non-judicial tribunal. The provisions fall into two "families." One type is found in the constitutions of the Eastern Caribbean states and Belize, and the other is exemplified in the provisions of the remaining states, with the Barbados and Bahamas provisions forming a half-way house between the two.

The common and significant feature of all the sections is, however, that the executive is *not* obliged to act in accordance with the recommendations of a tribunal concerning the expediency or necessity of continued detention. The balance is struck by the constitution in favor of the executive and the particular expression of concentrated power in the end must outweigh real protection of the abrogated right.

The constitutions of the Eastern Caribbean States and Belize detail procedures and requirements to be met on a detention. Accordingly, the detainee must be informed with reasonable promptitude, of the reasons for the detention and be furnished with a written statement thereof in English; the detention order must be published in an official Gazette within a specified period and must particularize the law under which the detention is authorized; reasonable facilities for communication with a legal advisor is prescribed, and the detainee is to be permitted to make legal representations through his legal representative to the tribunal, and to appear in person before such a body. Provisions corresponding to the above are found in the Bahamas and Barbados constitutions, but are absent in Trinidad and Tobago, Jamaica, and Guyana.

One requirement differs significantly in the two types of provisions. In the former Associated States and Belize, reviews by detention tribunals are to take place *not more* than a month after detention and at intervals of not more than three months (six in Grenada). The detainee's case must also be reviewed by an independent tribunal appointed by the Chief Justice. In the corresponding provisions in Trinidad and Tobago and Jamaica, no minimum time is set for the *first* tribunal review and the detainee is entitled to apply for review "at any time" during the detention. The Barbados and Bahamas clauses, in providing for review of detention "from time to time," do not answer the question—which is, in all cases,

whether an immediate or almost immediate review is possible. Again, the *maximum* period *between* reviews, found in the constitutions of the Eastern Caribbean States, is replaced in the four last-named states by a *minimum* period, so that the second and subsequent review is to take place *not earlier* than six months (three months in Barbados and Bahamas) after a previous one.[83] Finally, in these four states, review is on the request of the detainee and there appears to be no duty on the state to hold a review in the absence of such request.

The availability or existence of a tribunal, at the time of detention, as trenching on the validity of the detention order was litigated in *Kelshall v. Pitt*[84] (Trinidad and Tobago) and *R. v. Nunn and Rudolph Green (ex parte Brown & Grange)*[85] (Jamaica), with differing results. In *Kelshall*, the non-existence of a tribunal at the time of the applicant's arrest, with the consequential inability of the detainee to apply to it, "at any time after arrest," vitiated the detention. In the Jamaican cases, however, the serving of a fresh order (and a first order in one case) on the date on which appointments to a tribunal were published, saved the detention.

The conclusion is that the words "at any time" occurring in both constitutions give in Trinidad and Tobago a right to an immediate review, in the absence of which a detention becomes unlawful, whilst in Jamaica the words, as was actually decided, mean within a "reasonable time." Such time is apparently to be determined by the court, and fourteen days after detention is not unreasonable. The Jamaica court, in addition, was of the view that the question of a review could not so react on a detention order, *prima facie* valid, as to invalidate it. The Trinidad and Tobago court, however, effectively treated the exercise of the right to request a review as an integral aspect of the constitutionality of the power to detain and of the detention order itself.

The giving of notice of the grounds for detention, specified in some *constitutions*, has given rise to litigation. Regulation 39(9) (Jamaica) (1976) stated:

> [t]he Minister shall as soon as practicable after an order is made furnish the person against whom such order was made with the

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83. CONST. OF THE BAHAMAS, § 15(6); CONST. OF BARBADOS, § 13(c); CONST. OF JAMAICA, § 14(4); CONST. OF TRINIDAD & TOBAGO, § 11(1).

84. 19 W.I.R. 136 (1971).

85. 23 W.I.R. at 139.

necessary particulars to enable him to present his case to the tribunal.[86]

R. v. Minister of National Security (Ex parte Grange)[87] concerned an application for the issue of an order of *mandamus* to compel the Minister to supply particulars as required by the applicant. The Minister had refused to disclose evidence in his possession as to the illegal issue of firearms by the applicant and as to other activities prejudicial to the public safety. In addition, he had refused to disclose the names of persons supplying the information about persons to whom the arms had been allegedly issued by the applicant, on the ground that "it would not be good for public safety." The majority decision was that the Minister could refuse information in the exercise of a discretion to determine what is in the interest of public safety, even though (for the dissenting and for one concurring judge) the information requested constituted "necessary particulars" within the regulation.[88]

Since the regulation concerned stated the ministerial duty in mandatory terms, the wider implication of the decision is that emergency regulation restraints on the executive are susceptible to an overall discretion to promote the public interest (including public safety) as the executive deems fit. Notice in *Ex parte Grange* and in all of the Jamaican emergency cases, the extensive reliance on precedents arising from *wartime emergencies* in the United Kingdom. It reveals a judicial perception of an emergency proclaimed to safeguard public safety as akin to a wartime situation, justifying acquiescence in executive action, to be countenanced, if at all, at a time when a state is at war, in the sense in which the phrase is popularly understood. This perception, quite absent in the Trinidad and Tobago cases, was articulated in *Ex parte Grange,* when it was said that the state of emergency "*under which we are existing at the moment is but one step removed from an actual war.*"[89] The view ignores the differences in the actual situation and additionally, that the constitutional framework in which the emergency powers of the state are set in Jamaica and the West Indies, differ from those of the United Kingdom at the

86. The Emergency Powers Regulations, *supra* note 22, § 39(9).

87. 15 JAM. L.R. 50 (1976); 24 W.I.R. 513 (1976).

88. The majority judgments relied on Duncan v. Campbell Laird, [1942] 1 All E.R. 587, for the principle that documents were not to be produced where disclosure would be injurious to the public interest or public safety, and in sidestepping the decision in Conway v. Rimmer, [1968] 1 All E.R. 874, held the court powerless to review a ministerial claim of public interest which the circumstances could be seen to warrant.

89. *Supra,* note 17 at 149.

time. The United Kingdom itself must now be mindful of its obligations under the European Human Rights Convention.

Regulations made during the 1970 and 1971 emergencies in Trinidad and Tobago placed restrictions on reporting of proceedings before detention tribunals to make it unlawful to publish or broadcast in Trinidad and Tobago, or to cause to be published or broadcast outside this state, anything but the information specified in the regulations amounting to the barest details and making it difficult to conceive just what information could be given. The denial of publicity involved diminishes the effectiveness of the tribunal scheme as a form of protection for detainees.

Comprehensive directions for the discipline and punishment of breaches of discipline by detainees were issued in July 1970 in Trinidad and Tobago. Regulations made in 1981 in Dominica pertaining to visits to detainees and the censoring of mail, illustrate other rights-related matters arising within the detention regimes.

The conclusion is that the special detention regimes provide an inherently imperfect attempt at safeguarding or ensuring certain standards of governmental behavior in relation to detainees, and particularly this is so as regards the liberty of the person. They do, however, constitute some attempt at addressing one of the main problems in devising an emergency powers regime which does take some account of fundamental rights and freedoms.

B. Suspension of Habeas Corpus *in Times of Emergency*

The writ of *habeas corpus* has in English law been regarded as its greatest guarantee of individual liberty. While the constitutions clearly anticipate deprivation of liberty by executive order during an emergency, it cannot be said that the relevant provisions (save for one state), without more, operate to suspend the availability of the writ to challenge the legality of a detention.

The Trinidad and Tobago Constitution, however, uniquely enshrines in its Bill of Rights in section 5 the "remedy" of *habeas corpus*, so it is possible to speak of *habeas corpus* proceedings as something more than a procedural device existing in the general body of law; in short, there is a constitutional right to the issue of the writ. The emergency abrogation clause, however, gives power to derogate from sections 4 and 5, the two sections in which *all* the rights are stated. Legislation and regulations can therefore provide for suspension of the writ, and in the 1990 Regulations *habeas corpus* writ was expressly suspended in relation to detainees.[90]

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90. *See supra* note 46.

In other states, *habeas corpus* does not appear in the Bill of Rights and there is thus no *prima facie* emergency powers "right" in the state to suspend the writ. Its suspension could in this case be seen merely as the usurpation and destruction (even if temporary) of part of the High or Supreme Court's jurisdiction. A challenge to a law suspending *habeas corpus* would probably be met by a non-justiciability argument. It may, however, be the case that where the constitution (as in Belize and Guyana) gives a power to suspend the application of laws, that a power to suspend that writ by legislation would be permissible. Regulation 19 of both Emergency Regulations codes of 1970 and 1971 (Trinidad and Tobago), declared that the writ of *habeas corpus* was not to be available in the case of persons denied bail, namely persons held on detention orders, and arrested for breach of regulation or for acting in a manner prejudicial to public order and safety. The specific power was not, however, contained in or derivable from the existing legislation or the emergency clauses of the then extant constitution. In *Weeks v. Montano*[91], the court asserted its power to let the writ issue and to free a detainee, where a detention order was found to be invalid on its face. The courts did not have, therefore, to discuss the issue raised here—whether emergency powers regulations can validly suspend the writ. The valid and constitutional suspensions of *habeas corpus* under the provisions of the republican Constitution is therefore in the light of the foregoing a strong possibility. The promulgation of regulations similar to those cited here, during the short-lived 1990 state of emergency, was unchallenged.

IX. CONCLUSION

The attempt to devise constitutional provisions which seek to control the vast powers of the executive in an emergency, and thereby to allow some recognition of rights and freedoms, may be measured against a number of suggested criteria, summarized as follows:

(1) the clauses should specify the effect of the Emergency on the rights of the citizen and on the powers of the state;

(2) there should be an enumeration and definition of the situations which base a declaration of a State of Emergency;

(3) the procedure for declaring an Emergency should be defined;

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91. 16 W.I.R. 425 (1970).

(4) the duration of States of Emergency should be specified and provision made for reviews of the need for the Emergency regime.[92]

The preceding papers suggest that the West Indian constitutions by and large fulfill these criteria. There may be some difficulty as regards the first criterion, particularly in those states in which only two Bills of Rights clauses are expressly made subject to derogation but in which in fact most other rights may well be subject to derogation. The duration of states of emergency is not specified in the constitutions and it appears that the imposition of a strict time limit for the use of the concentrated powers associated with an emergency has not been a firm feature of modern constitutional regimes.[93]

A fifth criterion could well be that certain rights and freedoms, as for example those protecting against torture and against inhuman and degrading treatment, should be non-derogable. This too is catered for in all the constitutions save apparently, that of Trinidad and Tobago.

As to the question, however, of the actual brake that the provisions create on executive powers during an Emergency, the conclusion may well be that it is not overly effective and that the evidence for judicial inclination in favor of the executive is quite strong. The striking down of detention orders in certain Trinidad and Tobago cases arising during the emergencies of 1970 and 1971 were based on the findings of technical defects in the detention orders, and the judgments do not constitute an attempt to substantively review the activity of the executive. Nevertheless, these cases did secure the liberty of the detained citizens and may be contrasted with the Jamaican cases and the unreported judgments in the Dominican case of *In re Newton*,[94] which in the spirit of the Jamaican cases, seems to assert some unlimited discretion in the Head of State to take action during an emergency, subject to the good faith requirement.

Declared states of emergency have been a real issue since the days of independence or "semi-independence" and the conclusion may be drawn from all of the foregoing is that for the West Indies as for other states in other times, there are "no *ultimate* institutional safeguards" which can ensure that the sole purpose to which emergency powers will be put will be that of "preserving the constitutional order itself."

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92. INTERNATIONAL COMMISSION OF JURISTS, STATES OF EMERGENCY 432-34 (Geneva, 1983)
93. C. FRIEDRICH, CONSTITUTIONAL GOVERNMENTS AND DEMOCRACY 245 (Boston, 1946).
94. Nos. 60-67 (1981) (DOM), 6 WEST INDIES L.J. at 126.