

HUMAN RIGHTS UNDER EMERGENCY SITUATIONS.

by

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Introduction :

After the two horrific and devastating World Wars people began to be concerned about human rights and the protection of such rights. But before that, as early as in 1215, that venerable document, the Magna Carta, proclaimed: "to none will we sell, deny or delay right or justice."¹

The French declaration of 1789 :

The French Declaration on the Rights of Man and Citizens, 1789 echoing Voltaire, Rousseau and Montesquieu in its second article declared: "The aim of all political association is the conservation of the natural and inalienable rights of man. These rights are liberty, property, security and resistance to oppression."²

The American Declaration of Independence of 1776 :

The America Declaration, in its preamble held these truths to be self evident; that all men are created equal, that they are endowed by their creator with certain inalienable rights, that among these are life, liberty and the pursuit of happiness.³ It is apparent therefore that human rights have been cherished and been struggled for since time immemorial and it has always been endeavoured to protect the individual against tyrannies of those in power.

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1. A. H. Robertson, *Human rights in The World*, 2nd Edition, 1982 p. 5.
2. *Ibid.* p. 4.
3. Preamble to the American Declaration of Independance adopted by the Continental Congress in Philadelphia on July 4th, 1776.

The Universal Declaration of Human rights :

On the 10th of December, 1948, the Universal Declaration of Human Rights stated in its preamble that recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world and that disregard and contempt for human rights have resulted in barbarous acts which has outraged the conscience of mankind⁴:

Echoing these documents different states recognise or incorporate in their national constitutions a table or Bill of Rights which seeks to guarantee those basic rights which are generally known as human rights. These fundamental rights are recognised as basic to the existence of human beings as human beings. The idea of derogation of these fundamental rights or fundamental principles in times of emergency is common to all legal systems.⁵ Generally it is seen that all constitutions or special laws make provisions in legal terms for situations of crisis when States of Emergency may be invoked. These provisions are not always clear and are often set forth in ambiguous terms referring to such vague concepts such as "maintenance of peace or of public order, imminent national danger, internal disorder, subversion, insurrection and danger threatening the fundamental, liberal and democratic order." The primary justification seems to be the threat of imminent danger and the concept of self defence in order to thwart this danger.⁶ Now, what does the world 'Emergency' connote. Emergency may be defined as an unexpected occurrence; an event not usual or foreseen. It is an unforeseen combination of circumstance which calls for immediate action. It is a situation which results from temporary conditions which place institutions of the state in a precarious position which

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4. For text of Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly, 217 A (1) of 10.12.48 see Human Rights in International Law, basic Texts, pub. by the Directorate of Human Rights, Council of Europe, Strasbourg, 1985.
 5. Stephen P. Marks, Chapter on Principles and Norms of Human Rights applicable in Emergency Situations. Under development, Catastrophies and armed Conflicts in the International Dimension of Human Rights. Karl Vasak, General Editor, Vol. I, 175.
 6. UN Document E/CN. 4/Sub 2/1982/15 (UN Economic and Social Council)

leads the authorities to feel justified in suspending the application of certain principles.⁷

In emergency situations states are faced with conflicting obligations - on the one hand the commitment to protection of individual rights of its citizens and on the other the protection of the existence of the state itself in extreme conditions, or in less severe conditions the safeguarding of public order and safety.⁸ Leaders are often compelled to compromise the rights of the individual in the face of threat to the state itself or to order and safety. Most people would naturally support the view that there are some basic rights which ought never to be compromised. It is widely recognised that the worst human rights abuses occur in cases where individual rights can be curtailed on the excuse that the security of state requires such curtailment. The Secretary General of the International Commission of Jurists in his introduction on an ICJ report on States of Emergency opined that the most serious violations tend to occur in situations of tension when those in power are or think they are threatened by forces which challenge their authority if not the established order of the society. That is why he thinks that there is an understandable link between cases of grave violations of human rights and States of Emergency.⁹ Nevertheless states as well as international bodies have always recognised the necessity for derogation of certain rights in times of urgency or emergency. It is regarded not only as prudent, justified or necessary but vital in cases to arm the executive body or those in authority with wide powers which are 'almost plenary' in nature, to face situations where there may, in truth, be a grave urgency

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7. Stephen P. Marks; Chap. on Principles and norms applicable in Emergency Situations. Under Development, Catastrophes and Armed Conflicts in the International Dimensions of Human Rights, Karl Vasak, General Editor, Vol. I, p. 175.
 8. Brendan Mangan; Protecting Human Rights in National Emergencies: Shortcomings in the European system and a Proposal for Reform; pub in the Human Rights Quarterly 10 (1988) by The Johns Hopkins University Press p. 373.
 9. See ICJ Report on *States of Emergency*, Their Impact on Human Rights (Geneva 1983); introduction by Secy. Gen-Niall Mac Dermot.

which threatens the nation.¹⁰ It cannot be disputed that there may, in truth, be situations where the state may be under threat of widespread violence or grave and dangerous risk of disturbance. Examples are the situations prevailing in Kashmir or Sri Lanka or a dozen Latin American Countries. These countries which are mostly underdeveloped and economically backward with tottering and temporary governments often tend to be poised on a volcano which at any moment may explode. The Honorable former Chief Justice of India P. N. Bhagwati once said that the tendency to advocate draconian measures to protect the society against real and imagined ills appear plausible even to the most human rights conscious, or in his own words, 'well intentioned citizen'. He points out however that a look at history will show examples of 'disastrous consequences of the smothering and suppression of human rights by the dictates of Expediency' and therefore he strongly contends that there should be some non-derogable rights, such as right of personal liberty, to life, of freedom from *ex post facto* criminal laws which cannot be taken away; that care should be taken to ensure that in no situation, however grave, should basic human rights be allowed to be derogated from, because once there is a derogation for an apparently able cause, there is always a tendency in the wielders of power in order to perpetuate their power, to continue derogation of human rights in the name of security of state.¹¹ States of Emergency provide ample opportunity to dictators and oppressors to perpetuate an oppressive regime, destroy democratic processes and to deprive a large part of the citizens of a country of their basic human rights. These states of Emergency 'spill over their permissible edges with depressing regularity' and as a result grave and horrible injustices occur.¹²

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10. See F. K. M. A. Munim, *Legal Aspects of Martial Law*; Pub. by The Bangladesh Institute of Law and International Affairs, p. 147.
 11. See paper delivered by the Hon. P. N. Bhawati, Former Chief Justice of India during the The Conference on Constitutional Principles and Issues: Feb. 18, 1988, Manila, Phillipines.
 12. Book Review on ICJ report on *States of Emergency*; Their Impact on Human rights - in the Human Rights Quarterly, pub. by Johns Hopkins University Press Vol. 6. No. 1. Feb. 1984 p. 125.

ICJ report:

In 1983 The International Commission of Jurists published a report on the impact on human rights brought about by States of Emergency.¹³ This report dealt with the legal and historical background as well as the current position of States of Emergencies proclaimed in fifteen countries around the world including India, Canada, Colombia etc. South American countries have provided examples of, 'the paradigm state of emergency' where emergency is declared by a military government which after seizing power by means of a *coup d'état*, has suspended or dissolved parliament, reduced the judiciaries power drastically and has practiced flagrant abuses of human rights.¹⁴ To give an example of such a Latin American country we may take the case of Colombia. Article 121 of the Colombian Constitution of 1886 gives the President the power in cases of 'external war or internal disturbances' to declare a 'State of Siege', This gives the Government the power to decree that certain crimes committed by civilians will be tried by Military Court Martial under Military Penal Law. Since 1957 there has been numerous applications of Art. 121 and 'solutions of problems which could have been dealt with by the democratic institutions has been delegated to the armed forces.' These states of siege have been declared to combat guerrilla movements in Colombia but has not been confined to only such movements where the need for special measures may have been rightfully felt. They have been used in cases of labour unrest, political disturbances etc. Frequent recourse was had to legislative decrees under the States of Siege. An example of one such decree is decree no. 0070, 1978 which gave special criminal immunity to members of the police or armed forces who commit homicide when investigating kidnappings, extortion, or drug trafficking. On April 13th 1984 a group of secret police agents broke into a house in Bogota which they suspected was the hiding place of kidnappers, waited till they returned home and opened fire, killing seven people who were totally

13. ICJ Report on *States of Emergency*. Their Impact on Human rights 1983.

14. Book Review on *ibid.* Pub. in the Human Rights Quarterly, Johns Hopkins University Press, Vol. 6 No. 1 Feb 1984, p. 126.

unconnected with the kidnapping. To cut a long story short, the States of Seige of Emergency declared in this typical Latin American state has, in the opinion of the Inter American Commission on Human Rights, to a certain extent hampered the full enjoyment of civil freedoms and rights.¹⁵

India:

Closer to home we may cite the example of India which is the largest democracy in the world. Article 352 of the Indian Constitution of 1950 proclaims that 'if the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or internal disturbance, he may, by proclamation make a declaration to that effect. Art 359 states that when the proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (which guarantees certain fundamental rights) as may be mentioned in the order and all proceedings pending in any Court for the enforcement of the rights so mentioned shall remain suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order. During the States of Emergency declared, preventive detention laws were used widely. State of Emergency was proclaimed in 1962 which continued till 1967, in 1971 again and in 1975 when the Government of Indira Ghandi was in danger of being swept out of power. Questions arose as to the legitimacy or the necessity of the proclamation of Emergency in 1975. The consequence of such a proclamation was the increased use of preventive detention measures against political opponents, suspension of the rights to apply to courts for enforcement of fundamental rights which resulted in ill-treatment of prisoners, increase of corruption, nepotism etc. Fundamental rights which guaranteed equality before law, protection of life and property, civil liberties, protection against arrest and detention without being

15. See 'States of Seige in Colombia; ICJ report on *States of Emergency*, 1983, p. 43 to 68.

informed of the grounds of arrest duty to produce arrested persons before a magistrate within 24 hours were suspended. From the Indian experience so far mentioned we see that even in a country which has a strong commitment to the rule of law, developed system of checks and balances, a strong legal system, vigilant judiciary etc. emergency powers are liable to be extended both in time and in scope beyond what is strictly¹⁶ required by the exigencies of the situation.

Emergency under municipal law:

Four types of legislation generally provides for States of Emergency. *Firstly* Emergency Regimes Proper, where in advance of the situation constitutional provisions or special laws provide for measures to counteract conventional states of war, siege, disturbances, internal crisis, disorder, disturbance, catastrophe etc. *Secoundly* Measures of legislative Empowerment where the constitution empowers the transfer to the Executive of legislative powers whereby the Executive is authorised in specific cases to legislate by 'orders', 'emergency laws', 'decree laws' regulatory decrees, proclamations etc. *Thirdly*, not *a priori* but *posteriori* by means of ratification. *Fourthly* and lastly Emergency Powers Through Self Empowerment by the Executive which is sometimes called 'special powers' and here the Parliament does not intervene; the head of the Executive is only required to notify in advance certain official bodies e. g. Council of Ministers.¹⁷

In practice we see examples of cases where states of Emergency are not notified although a state may be under an obligation by an international instrument to notify other states which are parties to such instrument. Again even after being officially terminated we see examples of cases where a State of Emergency continues. As a result various measures are taken which curb and take away rights and guarantees of the citizens of a country which can only officially be taken or done during emergency e. g. as in the cases of Surinam

16. The state of Emergency in India; ICJ report on *States of Emergency*, 1983 p.169 to 191.

17. UN Docu. E/CN. 4/Sub. 2/1982/15. p. 21-22.

and Uganda etc. In Haiti and Paraguay, States of Emergency became permanent as a result of there being no time limit provided for in the constitution of those countries. There may again be cases where there is a tendency to 'institutionalise emergency regimes by those in power who try to logicate by talking of restricted or gradual democracy."¹⁸

Effects:

Apart from effects on human rights directly, States of Emergency result in the subjugation and subordination of the legislative and judicial powers of the government to the Executive and even that to the military powers. Usually, like in the cases of Liberia and Bolivia, the Parliament stands suspended and the legislative powers are exercised solely by the Executive. The Judicial powers are also brought, whether directly or indirectly, within the control of the Executive either by the Executive appointing reliable judges i. e. judges loyal to them or by the maintenance of superiority of Emergency courts over ordinary courts.

Effect on the Rule of Law:

The effect of states of Emergency on the Rule of Law is that there seems to be a tendency towards heightened secrecy, restrictions on the right of defence, the death penalty being used more frequently, extension of the factors that constitute complicity e. g. Uruguayan Legislation provides for punishment of assistance to political prisoners by placing it in the same category. One of the basic principles of the Rule of Law i. e. presumption of innocence is undermined, the principle of non-retroactivity of criminal law is violated.¹⁹

International treaties:

Almost all national constitutions contain Emergency provisions. International and regional instruments also make provisions for derogation of rights in cases of Emergency. This means that

18. *Ibid.* p. 26-31.

19. *Ibid.*, p. 35-38.

measures for the protection of human rights contained in these instruments may be derogated from in times of national crises.

International Covenant on Civil and Political Rights:

The International Covenant on Civil and Political Rights allows the States Parties to the Covenant to take measures derogating from their obligations under the Covenant in times of public emergency which threatens the life of the nation. Article 4(1) states 'In times of public emergency which threatens the life of the nation and the existence of which is officially 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 are not inconsistent with their other obligations under international law and do not involve discrimination on the grounds of race, colour, sex, language, religion or social origin.' Art. 4(3) states that 'any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other State Parties to the present Covenant, through the intermediary of the Secretary General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was activated. A further communication shall be made through the same intermediary on the date on which it terminates such derogation.'²⁰

American Convention on Human Rights:

Another important landmark in the development of human rights is the American Convention on Human Rights adopted in 1969 by the Organisation of American States. Art. 27 of the convention, like other treaties for the protection of human rights allows state parties to derogate from their obligation in times of emergency. Art. 27, states: 'in time of war, public danger, on other

20. For Text of International Covenant on Civil and Political Rights (New York 1966), entry into force 23.3.76 see *Human Rights in International law*. Basic Texts, published by the Directorate of Human Rights, Council of Europe, Strasbourg 1985 p. 28, 29.

emergency that threatens the independence or security of a State Party, it may take measures derogating from its obligations under the present Convention’ As in the case of other treaties certain articles of the American convention on Human Rights are made non-derogable and the State is required under clause 3 of Art. 27 to inform other State Parties through the Secretary General of the OAS of the suspension of rights, the reasons for suspension and the date set for the determination of the suspension. The Inter American Commission on Human rights, one of the organs established by the American Convention for its implementation has the power to review suspected derogation *sua sponte* which means that theoretically at least, the Inter American Commission may respond with great efficiency to violation of human rights under so called States of Emergency.²¹ According to the Commission’s annual report of 1980-81 during that period six parties to the American Convention - Bolivia, Colombia, El Salvador, Grenada, Haiti and Nicaragua suspended guarantees although out of these six only two complied with the provision requiring parties to the Convention to notify such suspensions under Art. 27(3). The Commission itself raised the question of compliance in the case of Bolivia only and no other State Parties complained.²²

It is quite clear therefore that although treaties such as those discussed above do provide measures for the protection of human rights by trying to ensure that these rights are not derogated from unless strictly necessary nevertheless in the absence of greater enforceability of such provisions individual liberty during such situations continue to be hampered.

European convention for the Protection of Human Rights and Fundamental Freedoms:

In the European context the European convention for the Protection of Human Rights and Fundamental Freedoms in Art. 15

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21. For Text of American Convention on Human Rights, (San Jose, 2. XI, 1967) see *Human Rights in International law. Basic Texts*, Strasbourg 1985.
 22. Thomas Buergenthal, Robert Norris, Dinah Shelton *Protecting Human Rights in the Americas* : 2nd revised Edition 1986; pub. by the Int. Institute of Human Rights, Strasbourg. p. 218.

also allows any 'High contracting Party' to take measures derogating from its obligations under the European Convention in times of war or other public emergency threatening the life of the nation to the extent strictly required by the exigencies of the situation. Clause (3) of Art. 15 requires any derogation to be notified to the Secretary General of the Council of Europe of the measure and the reasons for them as well as the date of termination.²³ The famous Greek case is an example of how powerful these convenuous can be. The Greek Govt. by royal decree of April 1967, of which the Secretary General of the Council of Europe was notified, suspended the application of various artcles of the Greek constitution in view of internal dangers threatening public order, safety and security of the state. The Greek govt. invoked Art. 15 of the European Convention as basis for suspension. Four countries independantly, Denmark, Sweden, Norway and the Netherlands, applied to the European Commission of Human rights that the Greek Govt. had violated various Articles of the Convention relating to fair trials, protection against retroactivity of criminal law, freedom of throught, conscience religion, expression etc. They contended that the Greek Govt. failed to show that the conditions necessary for permitting derogations from the Convention was in fact prevailing. The respondent Greek Govt. submitted that the commission was not competent to examine the applications because they concerned the actions of a revolutionary Govt. and also as regards Art. 15 of the Convention that a government enjoyed a margin of appreciation in deciding whether there existed a public emergency threatening the life of the nation and the measure required to be taken. The European Commission undertook extensive investigation in order to see whether the Greek govt. was guilty of gross human rights violations or not and after careful evaluation of all evidence at its disposal concluded that torture had been inflicted in various cases. The Commission opined that there was no public emergency threatening the life of the nation and therefore the Greek deroga-

23. For Text of the European Convention for the Protection of Human Rights and Fundamental Freedoms, ROME 1950 see Human rights in International Law. Basic Texts pub by the Directorate of Human Rights, Council of Europe, Strasbourg, 1985.

tions were invalid. To cut a long story short the Committee of ministers of the Council of Europe, on the basis of the Commissions report was of the opinion that Greece ought to be suspended from membership of the organization. Greece in the end itself withdrew from the Council of Europe and it was only after the restoration of democracy in 1974 that she resumed her membership in the Council.²⁴

It is obvious therefore that most international and regional instruments for the preservation of human rights also provide exceptions where suspension of guarantees lawfully take place. Most of these treaties have attempted to provide strict guidelines in order to ensure that these allowable suspensions are not taken advantage of. How much State Parties adhere to these guidelines is in reality questionable and most Lawful human right abuses continue to take place unabatedly in emergency situations.

National Constitutions:

As mentioned earlier national constitutions also provide suspension clauses where in cases of emergency, seige etc protection of fundamental rights become less important than in times of peace. The ICJ report on States of Emergency provides an extensive study on such situations of States of Exception or States of Siege where different Countries have used or misused the derogation clauses contained in their constitutions. To name a few countries whose constitutions contain such clauses : Argentina, Canada, Eastern Europe, Ghana, Greece, India, Malaysia, Northern Ireland, Zaire, Uruguay etc.

The Bangladesh Context:

In Bangladesh, State of Emergency has been declared four time since its birth. The Constitution of the People's Republic of Bangladesh came into force exactly one year after its independence as a sovereign nation on the 16th of December, 1972. Initially this

24. For the Greek case see A. H. Robertson; *Human Rights in the World* p. 92-96 and ICJ report on States of Emergency 1983.

constitution containing a list of fundamental rights which were guaranteed to the citizens of Bangladesh. Article 26 of the Constitution declares that all laws inconsistent with the fundamental rights guaranteed by the Constitution shall be void to the extent of the inconsistency and that the state shall not in future make any law repugnant to the fundamental rights.²⁵ The fundamental rights which found place in Part III of the constitution followed the principle laid down in the Universal Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966 and the Optional Protocol to the Int. Covenant on Civil and Political Rights 1966. After 1972 various Constitutional amendments were made which resulted in curtailment of the fundamental rights guaranteed initially by the 1972 constitution. The 2nd Amendment to the Constitution 1973, among other things inserted Part IX A relating to Emergency provisions.²⁶

The new provisions contained in Articles 141 A, 141 B and 141 C empowered the President to issue a Proclamation of Emergency on being satisfied that 'a grave emergency exists in which the security or economic life of Bangladesh, on any part thereof, is threatened by war or external aggression or internal disturbance,'²⁷ This proclamation required for its validity the counter signature of the Prime Minister and may be revoked by subsequent Proclamation. It shall be laid before the Parliament and shall cease to operate at the expiration of one hundred and twenty days i. e. four months unless approved by the parliament. Art. 141 B provided for the suspension of certain Articles during Emergency including those guaranteeing freedom of movement of assembly, association,

25. For Text of Constitution of the People's Republic of Bangladesh, 1972 see publication by the Ministry of Law, Parliamentary Affairs and Justice; Govt. of the People's Republic of Bangladesh (Dhaka, Govt. Printing Press, 1972).

For History of Adoption of Constitution see A. B. M. Mafizul I. Patwari; State of Fundamental Right to Personal Liberty in Bangladesh (Institute of Law and International Affairs, Dhaka, 1975).

26. See the Constitution (Second Amendment) Act No XXIV of 1973, 22,973 ART. IXA, 'Emergency provisions.'

27. Art. 141A *ibid.*

freedom of thought and conscience, of profession or occupation and rights to property.²⁸ Art. 141C inserted by the 2nd Amendment provided also for the suspension of enforcement of fundamental rights during emergencies. It provides that the right to move any Court for the enforcement of the fundamental rights conferred by the constitution as well as all proceedings pending in any court for the enforcement of such rights shall remain suspended during the Proclamation of Emergency or for a specified shorter period.²⁹ Thus what started of as a perfect Constitution guaranteeing the rights of the people soon began to be used as means of perpetuating various regimes by the suppression of those rights which in any way might provide the citizens the means of fighting against oppression.

On December 28th, 1974 the then President Muhammadullah proclaimed a State of Emergency which was countersigned by the Prime Minister Sheikh Mujibur Rahman.³⁰ The right of any person to the rights conferred by articles 27, 31, 32, 33, 34, 36, 37, 38, 39, 40, 42, and 43 of the constitution and all other proceeding pending in any court for the enforcement of the said rights was to remain suspended for the period during which the Proclamation of Emergency was in force.³¹ These articles whose enforcement were suspended included the right to equality before law,³² right to protection of law,³³ of life and personal liberty,³⁴ safeguards as to arrest and detention,³⁵ protection in respect of trial and punishment,³⁶ freedom of movement,³⁷ assembly,³⁸ association,³⁹ of thought and conscience,⁴⁰ of profession of occupation,⁴¹ rights to

28. Art. 141B *ibid.*

29. Art 141 C *ibid.*

30. See the Bangladesh Gazette Extraordinary, Govt of the People's Republic of Bangladesh, Ministry of Cabinet Affairs; No 3(50)/74-CD(CS) dtd 28.12.74.

31. See Constitution of People's Republic of Bangladesh, 1972.

32. Art. 27 *ibid.*

33. Art. 31. *Ibid.*

34. Art. 32 *Ibid.*

35. Art. 33 *Ibid.*

36. Art. 35 *Ibid.*

37. Art. 36 *Ibid.*

38. Art. 37 *Ibid.*

39. Art. 38 *Ibid.*

40. Art. 39 *Ibid.*

41. Art. 40 *Ibid.*

property⁴² and protection of home and correspondence.⁴³ The constitution of 1972, ideal at its inception soon turned into something less than perfect where the Executive could use its own sweet will to curtail the basic rights of those for those protection provisions had been made in part III of the Constitution of Bangladesh. The State of Emergency proclaimed on 28th of Dec. 1974 continued upto the 26th of Nov. 1979 i. e. even after changes in the Government had taken place and various events such as the assassination of Sheikh Mujibur Rahman, the military *coup d'etat* of 15th August 1975, the declaration of Martial law, Khondokar Moshtaque Ahmed taking over as President on the 15th of August 1975, had taken place. In spite of the attempts by the Executive to erode the rights in the constitution the judiciary has been vigilant in trying to safeguard, as far as possible within the limitations imposed by States of Emergency, the people's rights. In the case of Akram Hossain Mondol vs. Govt. of Bangladesh, the Additional District magistrate passed an order of detention with a view to preventing the detenu from acting in a manner prejudicial to the security of Bangladesh and/or the maintenance of the public order within the meaning of rule 2(e) of the Emergency Powers Rule, 1975, The grounds stated in the order of detention were prejudicial acts as defined by rule 2(e) and these prejudicial acts were grounds of preventive detention as they were included in 5(i) of the said Rules. The detaining authority had mentioned the grounds of detention disjunctively as it was not quite sure as to which of the prejudicial acts the detenu was likely to act. It did not know definitely whether the detenu acted or was even likely to act prejudicially to the security of the state or the public safety or the maintenance of public order. This showed that the detaining authority passed the order without due application of mind and the order was passed rather casually and such order of detention could not be justified and accordingly would be declared to be made without lawful authority.⁴⁴ This was only one of the case where

42. Art. 42 *Ibid.*

43. Art. 43 *Ibid.*

44. 31 D. L. R. (1979) 127 per Abdul Malek J. at pp. 138-139 See also *AMARESH CHANDRA CHAKRABARTY Vs. BANGLADESH AND OTHERS*, 31 D. L. R. (1979) 240; *MRS. SALEHA BEGUM Vs. GOVT. OF BANGLADESH*, 29 D. L. R. (1977) 59.

the Judiciary of Bangladesh played a laudable role in safeguarding the fundamental rights of the people.

In 1977 Major-General Ziaur Rahman became President and remained so until the 30th of May 1981 when he was assassinated in Chittagong. The Acting President Justice Abdus Sattar issued a Proclamation of Emergency on that day (i. e. the 30th of May 1981), and again the right to move any court for the enforcement of the fundamental rights was suspended. This State of Emergency lasted till Sept. 1981. Again in 1982 another upheaval took place and Martial law was proclaimed by the then Chief of Army Staff Lieutenant General Hussain Muhammad Ershad who became the Chief Martial Law Administrator. Later on he became the president and on November 27th, 1987 and then in Nov. 1990 two other States of Emergency was proclaimed under Art. 141A of the Constitution. It was quite obvious that instead of a grave emergency threatening the security of Bangladesh or internal disturbance, war on aggression it was in order to perpetuate that particular regime when it came under threat of being toppled by mass upsurge that the provisions relating to States of Emergency were used. Human Rights violations become rampant, specially in a country like ours which is not only economically backward but also politically unstable.

Conclusion:

It is clear, therefore, that although emergency provisions find place in most National, International and Regional treaties and though they aim at confronting situations which threaten national security they are used usually as measures or means of putting down what may sometimes be a quite justifiable and popular uprising against an autocratic regime. The Universal Declaration of Human Rights in its preamble states; whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,⁴⁵ Thus in order to prevent situations where the

45. For Text of Universal Declaration of Human Rights, adopted and proclaimed by the General Assembly, 217A(I) of 10.12.48 See Human Rights in International Law, basic Texts, pub. by the Directorate of Human Rights, Council of Europe, Strasbourg, 1985.

Government or the Executive is confronted with an unmanageable mass campaign human rights of all citizens ought to be valued and protected. This will prevent them from taking recourse to violent rebellion to counteract which Emergency provisions are used. The Emergency provisions contained in the National, Regional and International treaties must have rigid guidelines within which they may be used and not otherwise. There has to be rules which must make clear what exactly is meant by emergency, whether it includes threat to the government to mean internal strife, whether such states of exception can continue indefinitely etc. It must be remembered that situations of emergency do not automatically justify human rights violations - there must be certain fundamental rights which must be made truly inalienable and non-derogable, even in the most provoking situations. The Constitution must contain a list of rights which are considered by International law to be non-derogable and specifically state that they will not be affected by States of Emergency or for that matter any other situation. The Constitution should also enumerate the situations which justify departure from the normal legal order. Legislative approval must be required and the duration of the State of Emergency must be for a specific period and no longer. Judicial remedies are important safeguards of human rights and Courts should have jurisdiction in cases of human rights violations. It ought to become the duty of the judiciary to ensure that the Executive does not, in order to perpetuate its power and cover its misdeeds, cross the limits placed on its power to declare a State of Emergency.⁴⁶ The constitution must not become the curtain or cloak behind which the dictator wields power. Steps have to be taken which will ensure that wherever a citizens legal right is derogated from steps are taken to identify and implement safeguards against its abuse.⁴⁷

Personal liberty of citizen can only be hampered on the most serious of grounds and any detention order must be based strictly on

46. See summary of Recommendations in the I. C. J. report on States of Emergency, 1983; p. 459-464.

47. *Ibid.*

legal rules and human rights violations of detainees must be guarded against vigilantly. The civilian judiciary must have the power during the continuance of the State of Emergency to review individual cases of detention to ensure that the stated grounds, for detention are valid and sufficient, that proper procedures have been followed and that the detention is lawful.

On the termination of the State of Emergency the fundamental rights that have been suspended must be automatically restored and the opportunity given to all those persons who have grievances and allegations of abuses of human rights of going to Court. In short we require a committed Executive which aims at the protection of peoples rights and not of its own power. This can come only through a system of checks and balances when any abuse by the Executive is automatically countered by a strong legislature and a vigilant judiciary i. e. a system of Separation of Powers. The legislature ought to comprise of persons who are truly representative of the people so that they can guard against any attempts by the Executive to encroach upon the rights of the citizen. The Judiciary's role is of course that of a protector. Judicial somnambulism, indifference or timidity has been called a greater threat to human rights enforcement than the aggression of violators because the greatest bulwark against state authoritarianism or arbitrariness would then be gone.⁴⁸ In times of Emergency when the Executive has taken advantage of derogation clauses it must be ensured that persons arrested or detained under Emergency law are not held incommunicado, all arrests must be made public and administrative internment of unlimited duration must be prohibited.⁴⁹

In the International and regional levels universal ratification of human rights treaties governing States of Seige must be encouraged together with the right of individuals to petition directly.⁵⁰ The machineries of the UN should be used to persuade ratification of international conventions, covenants, bills of rights at the earliest opportunity by all countries. In this connection it

48. Speech by the Hon. P. N. Bhagwati on Human Rights at the Int. conference on Constitutional Principles and Issues, Phillipines 1988.

49. Un Docu. E/CN. 4/Sub. 2/1982/15pp. 41-43.

may be mentioned that Bangladesh has not ratified the International Covenant on Economic, Social, and Cultural Rights, 1966; the International Covenant on Civil and Political Rights, 1966; the Optional Protocol to the International Covenant on Civil and Political Rights, 1966. Ratification will ensure to a certain extent that countries, where frequent changes of government occur, will not be able, on any plea whatsoever, to circumvent or take away the basic rights of its citizens. The United Nations as well as other regional organizations should take appropriate steps to ensure that states which are parties to the International covenant and other treaties do not deviate from the requirements which must be fulfilled before a State of Emergency can validly be declared. State Parties must be vigilant to protest against human rights violations in other countries and the human rights committee must take the help of the UN General Assembly and its relevant subsidiary bodies to guard against gross violations of human rights in the countries under its purview. What we require is thus a strengthening of the the consciousness of individuals as well as individual states so that not one single violation of human rights go unchallenged. 'The need to maintain law and order cannot be denied. An extraordinary situation may require extraordinary measures, but the rule of law is to maintain law and order in accordance with law and not in disregard of it.' We may echo these words and say that situations may require special measures to protect national security and to maintain peace, law and order but this must be done not in disregard of the rights of the very people whose collective security means national security. It is quite possible to protect the nation without endangering individual rights. Short term security is not worth it if it means that individuals have to suffer.⁵¹

50. Summary of recommendation in the I.C.J. report of States of Emergency p. 459 to 463.

51. See paper delivered by Param Cumaraswamy, Ex-President, Malaysian Bar Council during the Int. Conference during on Constitutional principles and Issues, Phillipines, 1988.