19

EMERGENCY POWERS

19.1 It is well recognised that any government's first duty is to ensure the security of the state and the safety of its citizens, if either is threatened by events within the state or outside its borders. The ordinary powers of the police, border control authorities and officials of local and central government are available for this purpose. In most circumstances, nothing more is required.

19.2 Occasionally, however, an extraordinary danger threatens or occurs, such as a severe cyclone. Then, special powers may be needed for three reasons:

- to harness, in a coordinated way, the collective energies of the different state services, as well as ordinary citizens, to combat the danger and deal with its aftermath;
- to allow the executive to exercise additional powers, including the power to make regulations dealing with matters that would ordinarily be left to Parliament, and perhaps over-riding the laws made by Parliament;
- to permit either Parliament or the executive to make laws or regulations which, in normal times, would be unconstitutional because they interfere with the rights of citizens in ways not permitted by the Bill of Rights.

19.3 Usually, constitutions deal only with the last of these matters. They allow the Government, by law, to derogate from some rights in time of grave emergency. Other rights, like the right to life and freedom from torture, remain sacrosanct. To the extent that legal authority is required for the first two purposes listed above, that authority is conferred by ordinary Act of Parliament, in anticipation of a possible emergency.

EMERGENCY POWERS UNDER THE 1990 CONSTITUTION

19.4 The approach just outlined was implicit in the provisions of the 1970 Constitution. The only references to emergencies were for the purpose of allowing certain rights to be limited more extensively in time of "public emergency". That term was defined as meaning any period during which Fiji was engaged in any war, or there was in force a proclamation by the Governor-General declaring that a state of emergency existed.

19.5 The 1970 Constitution did not give the Governor-General any express power to declare a state of public emergency. The underlying assumption was that Parliament would enact laws permitting the Governor-General to make such a declaration in certain specified circumstances. The declaration would provide the trigger for the exercise of extraordinary powers by the executive, to the extent authorised by Parliament and by the Bill of Rights, taking account of all the limitations on those rights, including the permitted derogations in time of public emergency. However, no legislation conferring emergency powers has ever been enacted in Fiji.

19.6 The 1990 Constitution sought to fill the perceived gap. It re-enacted the provisions of the Bill of Rights allowing for derogations from certain rights in time of emergency, and all the accompanying safeguards. However, it included two new provisions which potentially sweep away the safeguards in the Bill of Rights.

19.7 Section 162 gives Parliament the power to pass an Act which recites that action has been taken or threatened by any substantial body of persons, whether inside or outside Fiji-

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

(b) to excite disaffection against the President or the Government;

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

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

(e) which is prejudicial to the security of Fiji.

Any provision of such an Act "designed to stop or prevent that action" is valid, even if it is inconsistent with the Bill of Rights or is "otherwise outside the legislative power of Parliament". Such an Act may be annulled by Parliament by resolution, but without prejudice to anything done under it, or Parliament's power to pass a new Act under the section. An Act can be passed at any time, not only during a state of emergency.

19.8 Section 163 gives the President the power to issue a Proclamation of Emergency, if "satisfied that a grave emergency exists whereby the security or economic life of Fiji is threatened." If Parliament is not sitting, the President is

required to summon it as soon as practicable. Until Parliament sits, the President may promulgate decrees having the force of law, if satisfied that immediate action is required. In exercising those powers, the President is required by section 88(1) to act in accordance with the advice of the Cabinet or a Minister acting under the authority of the Cabinet.

19.9 A Proclamation of Emergency or a decree that is not approved by Parliament lapses after six months, if not sooner annulled by Parliament. Any Parliamentary approval remains in force only for six months, but may be renewed for successive six month periods. Section 163(5) provides that no decree or Act of Parliament passed while a Declaration of Emergency is in force shall be invalid on the ground of inconsistency with any provision of the Constitution. Such a decree or Act lapses at the end of six months after a Proclamation of Emergency ceases to be in force, if it could not otherwise have been validly made.

19.10 A number of submissions expressed concern about the breadth of the powers conferred by these provisions. Both had their origin in the Malaysian Constitution which came to independence under the shadow of communist insurgency involving actual hostilities. To combat that situation, Parliament was given wider powers than it normally had under the federal constitution, which divided legislative authority between the central legislature and those of the states. The executive was given the power to proclaim a state of emergency and exercise legislative powers, subject to a measure of parliamentary control. Section 163 incorporates the more extensive provisions for the supervision of declarations of public emergency by Parliament which had been included in the 1970 Constitution. However, the Malaysian provisions preserved the application of some, though not all, individual and group rights protected by that country's constitution. Sections 162 and 163 of the 1990 Constitution did not include such safeguards.

A NEW APPROACH TO EMERGENCY POWERS

19.11 Even with their additional safeguards, the Malaysian provisions do not, in our opinion, provide a model for the type of provision which should be included in the Fiji Constitution. There has been no parallel in this country to the situation which confronted the authorities in Malaysia before and in the early years of independence and has coloured the approach to emergency powers and related matters ever since. The Commission considers that it is necessary to approach the question of emergency powers in the Fiji Islands afresh, starting from first principles.

19.12 Safeguards are included in the Bill of Rights for the very purpose of protecting the rights of citizens in a time of public emergency. In general, those

safeguards reflect the international standards. The Constitution should provide clear guidance about the circumstances in which emergency powers can derogate from the Bill of Rights, and the extent to which derogations are permissible. In doing so it should strengthen the present provisions for supervision by the Bose Lawa, in order to ensure, so far as possible, that the executive does not misuse the emergency powers it needs to have.

19.13 From this perspective, section 162 is not needed. The provision that an Act within its terms is valid, even if it would otherwise be outside the powers of Parliament, is not necessary in a unitary state like the Republic of Fiji in which Parliament does not share the legislative power with other legislatures. The power to over-ride anything in the Bill of Rights is not limited to the exercise of powers in time of emergency, and is in any case unjustifiable. A recital in an Act that there is a situation requiring the powers conferred by the Act does not empower the courts to determine whether that recital has any factual basis. Section 162 should be repealed and not replaced.

19.14 Section 163 should be evaluated to see if it, or some other provision, needs to be included in the Constitution, to clarify the source and extent of executive power to take the measures necessary to deal with various kinds of emergency.

THE SOURCE OF EMERGENCY POWERS

The common law

19.15 The imperative need to secure the survival of the state in all circumstances has led to the recognition, in the common law, of various sources of power that the executive may call upon in an emergency. They are the prerogative, state necessity, common law necessity and martial law. In an extreme case, the state might act without any lawful authority, and then promote an Act of Indemnity. In the absence of powers expressly conferred by Parliament or the Constitution, the state will, if necessary, seek to justify its actions by reference to these sources of power.

19.16 However, the authority for them is vague, and their scope ill-defined. The exercise of power under them is not, in general, subject to safeguards. Acting without authority in the expectation that Parliament will enact retrospective indemnifying legislation, if necessary by way of constitutional amendment, is objectionable in principle and should certainly not be relied upon as a matter of course.

The Constitution or statute

19.17 The Commission considers that, although the Constitution should not expressly exclude the possible sources of emergency powers under the common law, the powers needed in the Fiji Islands to deal with emergencies should, in principle, be conferred either by Parliament or by the Constitution. As to the choice between those alternatives, we have a strong preference for leaving it to Parliament to confer emergency powers.

19.18 It is virtually impossible to frame a constitutional provision that will, on the one hand, confer sufficient powers to deal with every conceivable situation that might have the character of "a grave emergency ... whereby the security or economic life of Fiji is threatened", and, on the other, prevent the executive from invoking drastic powers in a situation where their use is not justified. Under section 163, there is no limitation of any kind on the things that may be done by decree before Parliament sits, or by Parliament itself.

19.19 That could be remedied by including provisions that there are to be no derogations from certain rights, and facilitating intervention by the courts to determine whether there is in fact a situation calling for the exercise of emergency powers. The fact remains that a general emergency power, even with these safeguards, would impose few restraints on a government supported by a majority in the Bose Lawa, if it decides to advise the President to issue a Proclamation of Emergency and assume wide emergency powers.

19.20 We therefore propose that section 163 should be repealed. Instead, the constitutional provisions dealing with emergency powers should be based on the expectation that Parliament, in the exercise of its ordinary legislative power, will, by Act, confer on the President the power to proclaim a state of emergency in the Fiji Islands, or any part of them, in such circumstances as the Act prescribes. While the state of emergency is in force, the President should have such power as the Act confers to make emergency regulations.

19.21 The requisite Act or Acts should be passed in anticipation of a future emergency. The regulation-making powers given by the Act will remain in abeyance until triggered by the declaration of a state of emergency of the type to which the Act applies. In exercising the powers conferred by Act, the President should, as now, be required to act on the advice of the Cabinet or a Minister.

Sector emergency legislation

19.22 Parliament could, of course, pass an Emergency Powers Act that is just as wide in its scope as section 163. Most countries have had such legislation on the statute book at one time or another. It has all the disadvantages of a comprehensive constitutional power to deal with emergencies. However, leaving Parliament to confer emergency powers gives it the option of enacting "sector" emergency legislation. This is the modern approach to the grant of emergency powers. It enables the special powers granted to the executive to be specially tailored to the particular type of emergency. For example, the powers necessary to deal with a natural disaster and its aftermath are quite different from those that would be required in the case of actual or threatened armed conflict or civil insurrection.

19.23 The sector approach means that adequate powers can be granted to deal with each different type of emergency situation, but it is not possible to invoke far-reaching powers in situations where there is no need for them. Another advantage is that the powers which the executive is likely to need in a particular type of emergency can more easily be foreseen. For the most part, they can be conferred by Parliament in the legislation itself, in advance of the emergency. They do not have to be conferred hastily by emergency regulations, with the risk that, under the stress of the emergency, wider powers will be conferred than those which are strictly necessary.

19.24 Despite the advantages of the sector approach, we do not think that the Constitution should require legislation to confer emergency powers in a particular form. Parliament should be free to adopt the sector approach if it thinks fit. It should also consider including in all emergency legislation safeguards analogous to those which we now propose should be provided by the Constitution, if any derogation from the protections normally afforded by the Bill of Rights is to be permitted.

RECOMMENDATIONS

662. The Constitution should provide clear guidance about the circumstances in which emergency powers can derogate from the Bill of Rights, and the extent to which derogations are permissible. It should strengthen the present provisions for supervision of the exercise of emergency powers by the Bose Lawa if they involve such derogations.

663. Section 162 of the 1990 Constitution, giving Parliament the power to pass certain Acts, even if they are inconsistent with the Bill of Rights, should be repealed.

664. Although the Constitution should not expressly exclude the possible sources of emergency powers under the common law, the powers needed in the Fiji Islands to deal with emergencies should, in principle, be conferred either by Parliament or by the Constitution.

665. Section 163, giving the President the power to issue a Proclamation of Emergency, if "satisfied that a grave emergency exists whereby the security or economic life of Fiji is threatened", and conferring unlimited powers on the executive and Parliament, should be repealed.

666. The constitutional provisions dealing with emergency powers should be based on the expectation that Parliament, in the exercise of its ordinary legislative power, will, in anticipation of foreseeable emergencies, confer on the President the power to proclaim a state of emergency in the Fiji Islands or any part of them, in such circumstances as the Act prescribes.

667. Parliament should be encouraged to enact "sector" emergency legislation, enabling the emergency powers granted to the executive to be specially tailored to the particular type of emergency and incorporating some provision for monitoring by the Bose Lawa, but there should be no constitutional requirement to this effect.

668. A power conferred by Act to make emergency regulations should remain in abeyance until triggered by the declaration of an emergency.

THE CONSTITUTIONAL SAFEGUARDS

The Bill of Rights

19.25 Whether emergency powers are conferred by Parliament itself, or by regulations made by the executive in the exercise of a legislative power delegated by Parliament, emergency powers must be subject to the same constitutional safeguards. The first question is the extent to which those powers should be consistent with the Bill of Rights.

19.26 In most cases, there will be no difficulty in achieving consistency. As we have shown in Chapter 7, most rights may be limited by or under laws for the purposes prescribed, often on very wide grounds. For example, we have proposed that it should remain possible to limit the rights to freedom of expression, freedom of assembly and freedom of association, by a law "in the interests of defence, public safety, public order, public morality or public health" as long as the law can be shown to be reasonably justifiable in a democratic society. That standard is a flexible one. What may not be reasonably justifiable in normal times may well be justifiable in time of emergency. The Constitution should not confer any power to derogate in time of emergency from rights which can be limited on broad grounds. This approach, taken in the Bill of Rights in the 1970 Constitution and carried through into the 1990 Constitution, should be maintained.

The international standards

19.27 The extent to which, in time of emergency, the Constitution should authorise derogations from other rights, going beyond the relatively narrow limitations permitted in ordinary times, is a matter governed by the international standards. Article 4(1) of the *International Covenant on Civil and Political Rights* provides as follows:

> In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States 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 solely on the ground of race, colour, sex, language, religion or social origin.

19.28 Article 4(2) provides that no derogations may be made from the Articles of the Covenant recognising the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right not to be held in slavery, the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation, the right not to be subjected to retrospective punishment, the right to recognition as a person before the law, and the right to freedom of thought, conscience and religion. There are very similar provisions in Article 15 of the *European Convention on Human Rights* on which Fiji's Bill of Rights is based.

19.29 The following points emerge from the international jurisprudence about

the meaning of a "public emergency which threatens the life of the nation":

- There must be an actual or imminent emergency.
- Its effects must involve the whole nation.
- The continuance of the organised life of the nation must be threatened.
- The crisis or danger must be exceptional, in that the normal limitations of rights permitted for the maintenance of public safety, public health and public order are inadequate.
- The procedure for declaring a state of emergency must be clearly laid down. It must
  - provide for a formal proclamation or notification, and
  - involve the political organs of the state, that is Parliament and the Government.

International law allows to states a wide margin of appreciation in judging the presence of an emergency and the nature and scope of the measures necessary to avert or deal with it.

19.30 We consider that, in permitting derogations from the Bill of Rights in time of emergency, the Constitution should comply with the international standards. Those standards deal with two matters: the kind of emergency situation in which derogations are permissible, and the rights from which no derogations should be permitted in any circumstances.

Constitutional provisions permitting derogations

19.31 In granting or exercising emergency powers, Parliament and the executive should be able to derogate from the Bill of Rights only to the extent permitted by the Constitution. The Constitution should not permit any derogations unless a number of conditions are satisfied.

The nature of the emergency

19.32 The first condition should be the need for a belief on the part of the Cabinet, on reasonable grounds, that by reason of the actual or imminent situation within the Fiji Islands described in a proclamation of a state of emergency, the life of the Republic of the Fiji Islands is threatened, and that the situation is of such proportions or danger that it cannot be dealt with effectively by the exercise of powers conferred by law, in conformity with the Bill of Rights. Such a provision

would allow the need for emergency powers derogating from the Bill of Rights to be tested in the courts. The case law shows that the courts will usually be reluctant to substitute their judgment for that of the executive, but, even so, the possibility of challenge provides a safeguard.

19.33 The provision will allow Parliament to confer emergency powers in other, lesser situations not threatening the life of the nation, but in those cases, derogations from the Bill of Rights will not be permitted. To go back to our earlier example, there is no reason why emergency powers to deal with natural disasters should provide for a person's detention without trial on suspicion of being involved in a subversive activity.

The grant of the necessary powers by Parliament

19.34 The Constitution should permit derogations from the Bill of Rights only if the following further conditions have been met, among others:

- Parliament, acting on the advice of the Cabinet, has by Act conferred on the President, the power to proclaim a state of emergency in the circumstances referred to above;
- the President has issued such a proclamation;
- any emergency powers derogating from the Bill of Rights have been conferred by Act, or by the executive in the exercise of a power to make emergency regulations conferred by Act.

Parliamentary supervision of the exercise of emergency powers

19.35 Section 163 of the 1990 Constitution has the merit of providing for Parliamentary supervision of proclamations of emergency and the assumption of emergency powers. The Constitution should continue to require that supervision by providing that no derogations from the Bill of Rights are permitted unless the following conditions are met:

- The proclamation of the state of emergency remains in force only for an initial period of three months or such shorter time as it may specify.
- Immediate notice of the proclamation of the state of emergency must be given to the public and to the Bose Lawa, or, if the House is not then sitting, it must be summoned to sit as soon as practicable and be given notice of the proclamation as soon as it sits.

- The state of emergency terminates if not confirmed by resolution of the Bose Lawa within five sitting days from the date on which notice of it is given to the House.
- The state of emergency may be continued in force by proclamation for further periods of not longer than six months, if the continuation is confirmed by the Bose Lawa. (The number of renewals is not limited.)
- The Bose Lawa may revoke the state of emergency at any time. A motion that a state of emergency be revoked takes effect without a vote if parliamentary time is not made available for its consideration within three days of the date on which notices of motion are given by at least 18 members of the Bose Lawa.
- Emergency regulations cease to be in force as soon as the state of emergency terminates.
- All emergency regulations must be laid before the Bose Lawa within two days of being made, if the Bose Lawa is then sitting, or, if it is not, on the first day on which it next sits. The House may amend or revoke them at any time.
- A motion that emergency regulations be amended or revoked takes effect without a vote if parliamentary time is not made available for its consideration within three sitting days of the date on which notices of motion are given by at least 18 members of the Bose Lawa.

19.36 To make these rules effective, the Constitution should include procedures for bringing forward a session or a meeting of Parliament or a sitting of the Bose Lawa, if the President has proclaimed a state of emergency and it is desired to exercise powers derogating from the Bill of Rights. Section 80(5) already provides that

> If, after a dissolution and before the holding of the next following general election of members of the House of Representatives, the Prime Minister advises the President that, owing to the existence of a state of war or of a state of emergency in Fiji or any part thereof, it is necessary to recall Parliament, the President shall summon the Parliament that has been dissolved to meet.

The substance of this provision should be retained. It should include an express reference to "a state of national emergency" as well as any other state of emergency.

Permitted derogations

19.37 During a state of emergency proclaimed in compliance with the constitutional requirements listed above (a "state of national emergency"), the Constitution should permit some interference with certain rights, subject to prescribed safeguards. The affected rights are those to personal liberty, freedom from forced labour, not to be deprived of property, and to freedom of movement. For the reasons explained below, the existing power to derogate in an emergency from the right to equality under the law and freedom from discrimination on a prohibited ground should be repealed.

19.38 Section 6(7) of the 1990 Constitution permits the right to personal liberty to be limited by a law that

> authorises the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period.

Section 17 (1) provides that, where a person is detained under such a law,

> (a) he shall, as soon as reasonably practicable and in any case not more than seven days after the commencement of his detention, be furnished with a statement in writing, in a language that he understands, specifying in detail the grounds upon which he is detained;
>
> (b) not more than fourteen days after the commencement of his detention, a notification shall be published in the Gazette stating that he has been detained and giving particulars of the provision of law under which his detention is authorised;
>
> (c) not more than one month after the commencement of his detention and thereafter, during his detention at intervals of not more than six months, his case shall be reviewed by an independent and impartial tribunal established by law and presided over by a person appointed by the Chief Justice from among persons qualified to practise as barristers and solicitors in Fiji;
>
> (d) he shall be afforded reasonable facilities to consult a legal representative of his own choice who shall be permitted to make representations to the tribunal; and
>
> (e) at the hearing of his case by the tribunal he shall be permitted to appear in person or by a legal representative of his own choice.

19.39 Section 17(2) provides that, on any review, the tribunal may make recommendations concerning the necessity or expediency of continuing the detention, to the authority by which it was ordered, but unless it is otherwise provided by law, that authority shall not be obliged to act in accordance with any such recommendations. Section 17(3) provides that nothing in the section entitles a detained person to legal representation at public expense.

19.40 The Constitution should give an express power to derogate from the right to personal liberty for the purpose of taking, during a state of national emergency, such measures authorised by law as are reasonably justifiable for the purpose of dealing with the situation described in the proclamation of the national emergency. This formulation allows the courts to determine the reasonableness of the measures in the circumstances.

19.41 A detained person should continue to have the substantive rights provided by section 17(1) and (2), and, in addition, the procedural rights referred to in Recommendation 95 (d), (e), (g) (j), from which no derogation should be permitted. Those recommendations deal with the right of every detained person to legal aid, to have a family member or friend notified about the fact of detention, to habeas corpus, and to be treated with humanity and respect for their inherent dignity.

19.42 Section 7(3) qualifies the right not to be required to perform forced labour by excluding from the definition of "forced labour"

> any labour required during a period of public emergency or in the event of any other emergency or calamity that threatens the life or well-being of the community, to the extent that the requiring of such labour is reasonably justifiable, in the circumstances of any situation arising or existing during that period or as a result of that other emergency or calamity, for the purpose of dealing with the situation.

19.43 The substance of this provision should be kept, but not its approach which gives no constitutional protection, apart from that of "reasonableness", to a person whose labour is required during an emergency or calamity, even if no state of emergency has been declared. We believe that, if it is desired to use the labour of members of the public on a non-voluntary basis, it should be necessary to declare a state of national emergency. In language corresponding to that giving power to derogate from the right to personal liberty, the Constitution should give an express power to derogate from the right to freedom from forced labour, for the purpose of taking, during a state of national emergency, such measures authorised by law as are reasonably justifiable for the purpose of dealing with the situation described in the proclamation of the national emergency.

19.44 Section 9(2) modifies the normal protections against the taking of property by the state. It establishes a special regime to ensure the payment of compensation, and to protect in other ways the interests of the owner or other affected person, if the state takes possession of property compulsorily "during a period of public emergency, or in the event of any other emergency or calamity that threatens the life or well-being of the community".

19.45 The right not to be deprived of property is not an internationally protected human right (though international law does set conditions for the taking of property). Accordingly, we do not think that provision for a less rigorous regime for compensation after property has been requisitioned during a state of emergency, or in calamitous situations where no state of emergency has been declared, should be regarded as a "derogation" from the Bill of Rights. The substance of section 9(2) should be retained as a permissible limitation of the right not to be deprived of property, in situations including, but not limited to, a state of national emergency.

19.46 Neither the 1970 nor the 1990 Constitution conferred any power to derogate from the right to freedom of movement in an emergency, but that was because section 15 enables the right to freedom of movement to be quite drastically limited by law on wide grounds at any time. Under section 15(1) it is possible to limit the freedom of movement of a named individual. The Commission considers that such a power should not be available, except during a period of emergency. It therefore recommended the repeal of that subsection.

19.47 In substitution, the Constitution should give an express power to derogate from the right to freedom of movement, during a state of national emergency, for the purpose of imposing by law such restrictions on any person's freedom of movement or residence within the Fiji Islands, or right to leave the Fiji Islands, as are reasonably justifiable for the purpose of dealing with the situation described in the proclamation of the national emergency. A person whose freedom of movement is restricted in these circumstances should have the same substantive and procedural rights as a person who has been detained during a state of national emergency.

19.48 Section 16, conferring protection from discrimination on the grounds prohibited by the section, provides, in subsection (3)(g), that the right to freedom from discrimination may be limited by a law making provision

> for authorising the taking during a period of public emergency of measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period.

This provision is in conflict with that part of Article 4(1) of the *International Covenant on Civil and Political Rights* which provides that measures taken in derogation of the rights recognised by that Covenant (other than rights in respect of which no derogation is permitted) must not "involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". We think that this is a very important protection in a multi-ethnic country.

19.49 It should not be possible, during a period of national emergency, to take, on a discriminatory basis, measures derogating from other rights. A number of countries took such measures during World Wars 1 and 2, when they interned those of their own citizens who originally came from "enemy" countries, for no other reason than that. There was no suggestion that, as individuals, they were in any way disloyal. These measures are now generally recognised as having been unjustified and wrong.

19.50 We consider that section 16(3)(g) of the 1990 Constitution should be repealed. It should not be possible, during a time of national emergency, to deprive any persons of liberty or restrict their freedom of movement simply on a ground such as their race, ethnic origin or place of origin. If there is a need for measures directed against persons or groups of a particular race, ethnic origin or place of origin, then those measures should conform with what we have called the "standard" limitation of the right to equality under the law and freedom from discrimination. Having regard to their nature and to special circumstances pertaining to the person or group, the measures must be shown to be reasonably justifiable in a democratic society.

19.51 As we have explained, more drastic measures are likely to be found reasonably justifiable in a democratic society in time of national emergency than in ordinary times. The powers of the state to take effective measures during a state of national emergency will not be unduly fettered.

19.52 For the sake of clarity, the Constitution should provide that no derogations from the Bill of Rights are permitted other than those for which it expressly provides.

Other international obligations

19.53 Article 4(1) of the *International Covenant on Civil and Political Rights* allows states to derogate from protected rights (other than rights in respect of which no derogation is permitted) "provided that such measures are not inconsistent

with their other obligations under international law". The most relevant obligations are likely to be those arising under the 1949 *Geneva Conventions for the Protection of the Victims of Armed Conflict and Additional Protocols 1 and 2* to those Conventions. The Republic of the Fiji Islands is a party to the Conventions but not the Protocols. If the Government were ever faced with a situation within Fiji amounting to "armed conflict not of an international character", it would be bound, under common Article 3 of the four Conventions, to observe certain minimum standards of humane conduct towards those involved.

19.54 The Government might therefore be faced with a choice between taking, during a state of national emergency, measures which not only involve derogations from the Bill of Rights but also point to the existence of an armed conflict, or dealing with the matter as a civil disturbance. In the first situation, the obligations under the Geneva Conventions may limit the measures the Government is free to take. If the matter is dealt with as a civil disturbance, without invoking the more extreme powers that could become available in a national emergency, the persons concerned will have to be treated as persons suspected of having committed offences. All the constitutional protections will apply. Even in this situation, however, members of the armed forces could be used to assist the police in the manner explained in Chapter 12.

19.55 The country's international obligations therefore provide some protections to its citizens, even when the Government, by declaring a state of national emergency, has given itself power to derogate from the Bill of Rights in ways permitted by the Constitution. That document should provide that no law may authorise the exercise of an emergency power involving such a derogation, if that exercise would be inconsistent with the obligations of the Republic of the Fiji Islands under international law.

RECOMMENDATIONS

669. The Constitution should not confer any power to derogate in time of emergency from rights under the Bill of Rights which can be limited on broad grounds.

670. In permitting derogations from other constitutionally protected rights in time of emergency, the Constitution should comply with the international standards.

671. The Constitution should not permit any derogations from the Bill of Rights unless all the following conditions are satisfied:

(a) The Cabinet has reasonable grounds for believing that, by reason of the actual or imminent situation within the Fiji Islands described in a proclamation of a state of emergency, the life of the Republic of the Fiji Islands is threatened, and that the situation is of such proportions or danger that it cannot be dealt with effectively by the exercise of powers conferred by law, in conformity with the Bill of Rights.

(b) Parliament has, by Act, conferred on the President, acting on the advice of the Cabinet, the power to proclaim a state of emergency in the circumstances referred to in paragraph (a).

(c) The President has issued such a proclamation.

(d) Any emergency powers derogating from the Bill of Rights have been conferred by Act, or by the executive in the exercise of a power to make emergency regulations conferred by Act.

(e) Provision has been made for the exercise of the supervision of the Bose Lawa in the following manner:

- **The proclamation of the state of emergency remains in force only for an initial period of three months or such shorter time as it may specify.**
- **Immediate notice of the proclamation of the state of emergency must be given to the public and to the Bose Lawa, or, if the House is not then sitting, it must be summoned to sit as soon as practicable and be given notice of the proclamation as soon as it sits.**
- **The state of emergency terminates if not confirmed by resolution of the Bose Lawa within five sitting days from the date on which notice of it is given to the House.**
- **The state of emergency may be continued in force by proclamation for further periods of not longer than six months if the continuation is confirmed**

by the Bose Lawa. (The number of renewals is not limited.)

- The Bose Lawa may revoke the state of emergency at any time. A motion that a state of emergency be revoked takes effect without a vote if parliamentary time is not made available for its consideration within three days of the date on which notices of motion are given by at least 18 members of the Bose Lawa.
- Emergency regulations cease to be in force as soon as the state of emergency terminates.
- All emergency regulations must be laid before the Bose Lawa within two days of being made, if the Bose Lawa is then sitting, or, if it is not, on the first day on which it next sits. The House may amend or revoke them at any time.
- A motion that emergency regulations be amended or revoked takes effect without a vote if parliamentary time is not made available for its consideration within three sitting days of the date on which notices of motion are given by at least 18 members of the Bose Lawa.

672. The Constitution should include procedures for bringing forward a session or a meeting of Parliament or a sitting of the Bose Lawa, if the President has proclaimed a state of emergency and it is desired to exercise powers derogating from the Bill of Rights. The substance of section 80(5) providing for the summoning, in such circumstances, of the members of the former House, after a dissolution and before the next following general election, should be retained.

673. The Constitution should permit the following derogations from the Bill of Rights during a state of emergency proclaimed in compliance with the constitutional requirements (a "state of national emergency"):

(a) It should confer an express power to derogate from the right to personal liberty and the right to freedom from forced labour for the purpose of taking, during a state

of national emergency, such measures as are authorised by law and are reasonably justifiable for the purpose of dealing with the situation described in the proclamation.

(b) It should provide that a person detained under a derogation from the right to personal liberty should continue to have the substantive rights provided by section 17(1) and (2), requiring the review of the justification for the detention by a tribunal with recommendatory powers, unless an Act provides that the recommendations are binding. In addition, the detained person should have the procedural rights referred to in Recommendation 95 (d), (e), (g) and (j), from which no derogations should be permitted. (Those recommendations deal with the right of every detained person to legal aid, to have a family member or friend notified about the fact of detention, to habeas corpus, and to be treated with humanity and respect for their inherent dignity.)

(c) It should give an express power to derogate from the right to freedom of movement for the purpose of imposing , during a state of national emergency, such restrictions on any person's freedom of movement or residence within the Fiji Islands, or on any person's right to leave the Fiji Islands, as are authorised by law and are reasonably justifiable for the purpose of dealing with the situation described in the proclamation. A person whose movements are restricted under a derogation from the right to freedom of movement should have the same substantive and procedural rights as a person who has been detained during a state of national emergency.

674. The Constitution should provide that no other derogations from the Bill of Rights are permitted in any circumstances.

675. Section 9(2), which establishes a special regime to protect the interests of the owner or other affected person if the state compulsorily takes possession of property during a period of public emergency, or other emergency or calamity, should not be regarded as a "derogation" from the Bill of Rights. Its

substance should be retained as a permissible limitation of the right not to be deprived of property, in situations including, but not limited to, a state of national emergency.

676. Section 16(3)(g), providing that the right to freedom from discrimination may be limited by a law authorising the taking, during a period of public emergency, of measures that are reasonably justifiable for the purpose of dealing with the situation that exists in Fiji during that period, should be repealed. If, during a state of national emergency, there is a need for measures directed against persons or groups of a particular race, ethnic origin or place of origin, those measures should be shown to be reasonably justifiable in a democratic society, having regard to their nature and to special circumstances pertaining to the persons or groups concerned.

677. The Constitution should provide that no law may authorise the exercise of an emergency power involving a derogation from the Bill of Rights if that exercise would be inconsistent with the obligations of the Republic of the Fiji Islands under international law.