. 21, 1968

No. 4 of 1968

JUDICIAL COMMITTEE OF THE
IN THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

HOLDEN AT KUALA LUMPUR

(ORIGINAL JURISDICTION)

B E T W E E N :

STEPHEN KALONG NINGKAN (Petitioner) Appellant

- and -

GOVERNMENT OF MALAYSIA (Respondent) Respondent

CASE FOR THE APPELLANT

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1. This is an appeal from a Judgment and Order of the Federal Court of Malaysia holden at Kuala Lumpur (herein also referred to as "the Federal Court"), dated the 1st December, 1967, whereby the Appellant's Petition to that Court for an Order declaring that the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 (herein also referred to as "the impugned Act") is invalid being ultra vires the Federal Parliament, or alternatively, for an Order declaring that Sections 3, 4 and 5 of the said Act are, on the same ground, invalid, was dismissed. pp.79-123 p.124

The Appellant's Petition was presented in pursuance of an Order of the Federal Court, dated the 20th February, 1967 granting him leave to do so; and this appeal from the said Judgment and Order of the Federal Court, dated the 1st December, 1967, is presented in pursuance of Leave to Appeal to His Majesty the Yang di-Pertuan Agong which was granted to the Appellant (herein also referred to as "the Petitioner") by Orders of the Federal Court, dated the 5th December, 1967, and the 5th February, 1968, pp.125-126

2. The main point for determination on this appeal

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is whether or not the impugned Act or Sections 3 4 and 5 thereof are ultra vires the Federal Parliament and, therefore, invalid.

Annexure

3. The impugned Act (together with the Official Explanatory Statement appended at the Bill stage), the Proclamation of Emergency (following which the impugned Act was enacted), and relevant portions of the Agreement Relating to Malaysia, the Constitution of Malaysia (herein also referred to as "the Federal Constitution"), and the Constitution of the State of Sarawak (herein also referred to as "the Sarawak Constitution") are included in an Annexure hereto.

4. The facts, briefly stated, are as follows:-

p.9,ll.1-21
p.80

On the 22nd July, 1963, the Appellant was appointed Chief Minister of Sarawak. Following certain representations made by his political adversaries who were anxious to remove the Appellant from his office, the Governor of Sarawak purported to dismiss the Appellant from the office of Chief Minister of Sarawak and purported to appoint one Penghulu Tawi Sli as Chief Minister in his place. The Appellant challenged the Governor's said dismissal in appropriate proceedings which he instituted in the High Court in Borneo (Kuching Registry). The case was heard by Harley J., the Acting Chief Justice of Borneo, who, by his Judgment in favour of the Appellant, dated the 7th September, 1966, held that the Appellant was, and had been, at all material times, Chief Minister of Sarawak, and that an injunction should issue restraining the said Penghulu Tawi Sli from acting as Chief Minister.

5. The Appellant's reinstatement as Chief Minister of Sarawak did not meet with the approval of his political adversaries at Kuala Lumpur (the Federal Capital) as will be apparent from the sequence of events which followed.

p.9,ll.22-26
pp.80-81

On the 14th September, 1966, - within a week of the Appellant's reinstatement - His Majesty the Yang di-Pertuan Agong (herein also referred to as "His Majesty"), acting, presumably, on the advice of the Cabinet, as he is required to do by Article 40 (1) of the Federal Constitution, proclaimed a

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State of Emergency throughout the State of Sarawak under Article 150 of the said Constitution. In the said Proclamation His Majesty expressed himself as "satisfied that a grave Emergency exists whereby the security of a part of the Federation, to wit, the State of Sarawak, is threatened."

The Proclamation was issued despite the strong assurances to the Federal Authorities at Kuala Lumpur given by the Appellant (as Chief Minister of Sarawak) that conditions in Sarawak were normal and that no extraordinary measures in defence of its security were called for. pp.12-13

6. The relevant portions of Article 150 of the Federal Constitution are:-

150. (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency. Annexure

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in the Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.

(5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a Law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into

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force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

(7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period.

Annexure

7. Section 3 of the impugned Act, which was purported to be passed as a consequence of the Proclamation of Emergency under the said Article, introduced amendments to Clauses (5) and (6) of Article 150 by adding the words "or in the Constitution of the State of Sarawak" after the word "Constitution" where that word first occurs in Clause (5) and the words "or of the Constitution of the State of Sarawak" after the word "Constitution" at the end of Clause (6).

Annexure

8. Direct intervention in Sarawak affairs followed. Notwithstanding anything in the Sarawak Constitution, Section 4 (1) of the impugned Act purported to empower the Governor of Sarawak, in his absolute discretion, to summon the Council Negri (the Sarawak State Legislature) to meet whenever he thought fit; and if the Standing Orders of the said Council were inconsistent with any such course, they were, to that extent, to be deemed to be suspended. Further, to ensure that any meeting of the Council, summoned as aforesaid, would be duly held and any business which the

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Governor considered expedient would be transacted thereat, Section 4 (2) of the impugned Act purported to empower the Governor, in his absolute discretion, to direct that any of the Standing Orders of the Council should be suspended and otherwise to give any special directions which he considered necessary. The Governor's directions were to be given in the form of a message to the Council addressed to the Speaker (Section 4 (3)); and, if the Speaker failed to comply with the directions Section 4 (4) of the impugned Act purported to empower the Governor to nominate any member of the Council to act as Speaker with all a Speaker's powers.

9. The provisions of Section 5 of the impugned Act illustrate, in the Appellant's respectful submission, the true raison d'etre of the Proclamation of Emergency and the Emergency legislation which followed. This will be apparent also by an examination of the Explanatory Statement of the Federal Government which accompanied the impugned Act at the Bill stage. In the Appellant's submission it is clear that the true object of the impugned Act was to make possible, or to facilitate, by official intervention, the Appellant's removal from his office. Annexure

Section 5 of the impugned Act purports to empower the Governor of Sarawak to dismiss the Chief Minister of Sarawak and Members of the Supreme Council, if at a meeting of the Council Negri (the Sarawak State Legislature), a resolution of no confidence is passed by a majority of those Members present and voting and the Chief Minister fails forthwith to resign his office. The Supreme Council, it should be explained, is constituted under Article 6 of the Sarawak Constitution to advise the Governor in the exercise of his functions. It consists of the Chief Minister and eight members of the Council Negri who are appointed to the Supreme Council by the Governor acting on the advice of the Chief Minister. It is collectively responsible to the Council Negri. The resignation of its Members must be tendered to the Governor if the Chief Minister ceases to command the confidence of a majority of the Members of the Council Negri - unless the Governor, at the Chief Minister's request, dissolves the Council Negri. Subject to these provisions a member of the Supreme Council (other than the Chief Minister) holds office at the Annexure

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Governor's pleasure.

The Sarawak Constitution, as originally enacted, contains no provision which empowers the Governor to dismiss the Chief Minister.

pp.17-18

10. On the 20th September, 1966, the Governor of Sarawak, acting under the impugned Act (and not on the advice of the Appellant, the Chief Minister, as required under the original Sarawak Constitution) purported to summon a meeting of the Council Negri and the Members who appear to have attended this meeting on the 23rd September, 1966, appear to have passed a vote of no confidence in the Appellant. On the 24th September, 1966, the Governor, acting under powers conferred on him by the impugned Act, purported to dismiss the Appellant from his high office and to appoint in his place, as Chief Minister, the same Penghulu Tawi Sli whose previous attempt to displace the Appellant had ended in failure. (See paragraph 4 hereof).

p.18,11.9-15

11. Aggrieved by this fresh dismissal from office the Appellant instituted these proceedings in the Federal Court of Malaysia against the Government of Malaysia, having been granted leave to do so as stated in paragraph 1 hereof.

The Appellant's case was, and is, that the issue of the Proclamation of Emergency on the 14th September, 1966, was contrary to law, that all Federal legislation enacted on the basis that a valid Proclamation of Emergency had been issued was necessarily unlawful, and that inasmuch as the impugned Act purported, in effect, to amend the Federal and Sarawak Constitutions, it was ultra vires the Federal Parliament and invalid.

pp.8-22

12. In his Petition to the Lord President and Judges of the Federal Court, dated the 23rd February, 1967, the Appellant set out the events which had occurred from the 22nd July, 1963, (the date of his appointment as Chief Minister by Instrument under Public Seal) to the 24th September, 1966, (the date when the Governor of Sarawak, acting under the impugned Act, purported to dismiss him and appoint a successor in his place).

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The Appellant's prayer for relief is stated in paragraph 1 hereof. It was based on the following, among other, grounds:- p. 18

(A) The Proclamation of Emergency which was issued on the 14th September, 1966, was null and void because on the said date there was already in operation a Proclamation which had been published in the Federal Gazette on the 7th September, 1964, and which was more than sufficient to deal with any threat to the security of any part of the Federation. pp.9, 10

(B) The said Proclamation of Emergency of 1966 was null void and of no effect in that those responsible for its issue well knew that no grave emergency existed whereby the security and economic life of Sarawak was threatened and that there were no factors in existence in Sarawak from which any inference as to any emergency could possibly be drawn. In support of this ground the Appellant referred to the following facts relating to Sarawak all of them of public knowledge:-

(a) There were no disturbances, riots, or strikes demanding special action. p.10, ll.1-15

(b) No extra troops or police had been placed on duty.

(c) No curfew, travel restrictions or limitations on the movement of people had been found to be necessary.

(d) No request for the declaration of an emergency had emanated from the Sarawak Government.

(e) Indonesian hostile activities or "confrontation" had already ended.

13. The Appellant's said Petition contained the following particulars from which, it is submitted, it is reasonable to infer that the said Emergency powers were invoked and exercised not to cope with any Emergency in Sarawak, grave or slight, but in fraudem legis - in furtherance of political rivalries or jealousies which would be satisfied

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only by the dismissal of Sarawak's Chief Minister and his Government:-

p.10, l.16 to p.11, l.13

(A) The Deputy Prime Minister of the Federation had, on the 15th September, 1966, in a statement made during a Press Conference, explained as to why the Federal Cabinet had asked His Majesty to sign the said Proclamation. He had then said that the request was made following the decision of the High Court (Harley J.) that the Governor of Sarawak had no power to dismiss the Chief Minister in the absence of any vote of no confidence at a meeting, regularly held, of the Council Negri. The Federal Cabinet therefore had "no choice but to intervene." The extraordinary measures were taken mainly to ensure that "democratic" practices (as understood presumably by those responsible for the said measures) were adhered to.

p.11, ll.24-28

(B) The same Deputy Prime Minister had, on the 19th September, 1966, in a statement to Parliament, again said that "the measures proposed by the Government are merely to see that real democracy is practised in Sarawak and accepted democratic practices are adhered to". Continuing, he had, on that occasion, said:-

p.11, l.39 to p.12, l.1

"It is proposed to introduce a Bill to this House immediately after this to fill a gap or <u>lacuna</u> in the Constitution of the State of Sarawak to give the Governor powers to convene a meeting of the Council Negri in order that the question of confidence in the <u>present</u> Government of Sarawak may be put to the test and also the power to dismiss the Chief Minister .....

p.12, ll.6-10

"The measures are <u>neither abnormal or drastic</u>. They are measures strictly in accordance with the principles of any democratic constitution."

In regard to the words underlined, it is instructive to note that the measures which were taken were considered by those

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resposible for them as being neither "abnormal" nor "drastic" and yet it was found necessary to take them under the protective cloak of "Emergency". It is significant also that they were, admittedly, taken against the "present Government", i.e. the Appellant and the Government of which he was the Chief Minister, and not against his successors in office, whose political affiliations would, presumably, have a greater appeal to the Federal Cabinet.

(C) On the 13th November, 1966, the same Deputy Prime Minister had again said (this time according to the text of a speech released by the Ministry of Information) that it was for the maintenance of democracy alone (as of course the Federal Cabinet understood "democracy" to be) that the extraordinary Emergency powers had been resorted to. On this occasion, the Deputy Prime Minister had, inter alia, said:-

"We in the Central Government must see to it that accepted political or democratic practice is adhered to. It was clear to us that the majority of the Members of the Council Negri no longer had confidence in Dato Ningkan" /the Appellant/ "as Chief Minister. As you know in a democracy we cannot have a Prime Minister or Chief Minister who does not enjoy the confidence of the majority of Members of a Council or Parliament. p.14,ll.10-23

"That is why we had to take action to see that the accepted democratic practice is adhered to."

14. As Chief Minister of Sarawak and as Chairman of the State Security Executive Committee, the Appellant had, on the 17th September, 1966, assured the Malaysian Cabinet, by telegram, that in Sarawak there was no tense situation, that it was ridiculous and absolute nonsense to say that a state of Emergency existed there, that any assertion to the contrary was a mere excuse to ride roughshod over the Sarawak Constitution, and that the situation called for an impartial Commission of Inquiry. p.12, l.28 to p.13, l.2

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p.13, ll.8-16 Previously, the Appellant, as Chairman of the State Security Executive Committee, had stated on Radio Malaysia Sarawak, that after consultations with all concerned with State Security, and particularly with the Commissioner of the Sarawak Constabulary, he was satisfied that no tense situation existed in Sarawak.

p.14, ll.24-43 15. In further support of his emphatic statement that there was no grave emergency in Sarawak, the Appellant, in his said Petition, referred to a letter of the Governor of Sarawak, dated the 17th September, 1966, addressed to himself in which the Governor had said that, following the Proclamation of Emergency in Sarawak on the 14th September, 1966, the Malaysian Parliament had been summoned "to debate a Bill introduced by the Federal Government in order to ensure that the accepted democratic practices are complied with," and that "this measure was taken by the Federal Government as a result of your unwillingness to accede to many requests by the majority Members of the Council Negri to hold a meeting immediately so that a motion of no confidence against your leadership as Chief Minister of Sarawak can be debated."

pp.24-26 16. In its Defence, dated the 28th April, 1967, the Respondent to the Petition, the Government of Malaysia, denied generally the specific allegations which were set out in the Petition. Without offering any explanation of the events which the Appellant had set out in detail in his Petition and which had caused him to complain of the use in fraudem legis of the Emergency powers contained in Article 150 (1) of the Federal Constitution, the Respondent said:-

p.24, ll.19-24 "2. ..... in accordance with Article 150 (1) His Majesty the Yang di-Pertuan Agong proclaimed a State of Emergency in the State of Sarawak and published in Federal P.U. No.339A, dated the 14th day of September, 1966."

p.24, ll.26-32 "3. ..... a grave emergency existed whereby the security of part of the Federation, to wit, the State of Sarawak was threatened and the Proclamation of Emergency under Article

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150 (1) of the Constitution of Malaysia was made and published in Federal P.U. 339A dated 14th September, 1966."

"4. ..... the Respondent admits that the Parliament of Malaysia passed the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966" [i.e. the impugned Act] "but denies that it was contrary to the Federal Constitution, the Constitution of the State of Sarawak and the Agreement Relating to Malaysia." p.25

"13. ..... the Governor in exercise of the powers conferred upon him by Clause (3) of Article 6 of the Constitution of the State of Sarawak appointed the Penghulu Tawi Sli to be Chief Minister of the State of Sarawak and this appointment was published as Sarawak Gazette Notification No. 1791 dated 24th day of September, 1966. By Sarawak Gazetted Notification No. 1790, dated.the 24th September, 1966, the Petitioner ceased to be Chief Minister of Sarawak." pp.25-26

17. The Petition was heard in the Federal Court of Malaysia by a Bench of three Judges consisting of Syed Sheh Barakbah (Lord President of Malaysia) Azmi (Chief Justice, Malaysia) and Ong Hock Thye (Judge, Federal Court, Malaysia) who by their Judgment and Order, dated the 1st December, 1967, dismissed it. pp.79-123

18. In his Judgment dismissing the Petition, Syed Sheh Barakbah, Lord President, said:-

"In my view the question is whether a Court of law could make it an issue for the purpose of a trial by calling in evidence to show whether or not His Majesty the Yang di-Pertuan Agong was acting in bad faith in having proclaimed the emergency. In an act of the nature of a Proclamation of Emergency, issued in accordance with the Constitution, in my opinion, it is incumbent on the Court to assume that the Government is acting in the best interest of the State and to permit no evidence to be adduced otherwise. In short, the circumstances which bring about a Proclamation of Emergency are non-justiciable." And, later, he said:- p.86, ll.14-27

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p.88, ll.9-13 "In my opinion, the Yang di-Pertuan Agong is the sole judge and once His Majesty is satisfied that a state of Emergency exists it is not possible for the Court to enquire into as to whether or not he should have been satisfied."

In the Appellant's respectful submission the learned Lord President's views on the non-justiciability of questions connected with the issue of the Proclamation of Emergency were expressed in terms that are far too wide and not in accordance with the accepted principles of constitutional law and practice as applicable to a modern Federation.

The Appellant respectfully submits that while it might not be possible to question in a Court of law the correctness or otherwise of an inferential decision of His Majesty that a State of Emergency threatening the security of the Federation or its economic life exists in the Federation or any part thereof, the following questions nevertheless are justiciable, bearing in mind that not every "emergency" would justify resorting to the constitutional Emergency powers but only one which threatens the security, or economic life of the Federation or any part thereof:-

(1) as to whether or not there were circumstances or factors from which it was, as alleged here by the person aggrieved, plainly obvious or reasonably certain that the Emergency powers had been resorted to in fraudem legis; and

(2) in any event, whether or not there were any circumstances or factors from a consideration of which any conclusion as to the existence or otherwise of an emergency could possibly be arrived at.

19. As to the argument advanced on behalf of the Petitioner that the Federal Parliament is not, and in view of the relevant statutory provisions, cannot be, empowered to amend the Sarawak Constitution, and that, therefore, Sections 3, 4 and 5 of the impugned Act are ultra vires the said Parliament and invalid, the learned Lord President said:-

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"In my view the important words in Article 150 (5) of the Constitution are: 'Subject to Clause 6A', 'while a Proclamation of Emergency is in force', 'notwithstanding anything in this Constitution' and 'make laws with respect to any matter if it appears to Parliament that the law is required by reason of the emergency'. It is my view that because of these words Parliament is not fettered by Articles 159 (3), 161 A, 161 C and 161 E. The expression 'notwithstanding anything in this Constitution' overrides the provisions relating to 'concurrence' and 'consent'. During an Emergency the powers of Parliament are not extended only to matters respecting Muslim law, native customs, etc. /Article 150 (6 A)/. p.88, ll.16-32

"I therefore hold the view that under Article 150 of the Constitution the Federal Parliament has power to amend the Federal Constitution and the Constitution of Sarawak and Sections 3, 4 and 5 of the Emergency Act" /i.e. the impugned Act/ "are intra vires and have been validly enacted." p.88, ll.32-38

In the Appellant's respectful submission the expression "notwithstanding anything in this Constitution" must be so interpreted as to refer to the Constitution as it stood before the enactment of the impugned Act; and nothing in the said Article 150 (5), as it then stood, or in any other provision of the Federal Constitution, can, on any reasonable interpretation thereof, be said to empower the Federal Parliament to amend the Federal Constitution by any method other than that expressly laid down in Article 159 thereof or, in view of the provisions of Article 41 of the Sarawak Constitution, to amend that Constitution by any method whatsoever.

20. In his Judgment dismissing the Petition, Azmi C.J., Malaya, referred to the decision of the Board in King-Emperor v Benoari Lal Sharma /1945/ A.C.14. The learned Chief Justice said that it could be suggested from a passage in the Board's Judgment at page 21 of the said Report that a Court of law could enquire into the bona fides of the Governor General of India who had acted upon his judgment that an emergency existed. In the pp.89-98 p.94, l.26 to p.95, l.42

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view of the learned Chief Justice however the question of the existence of an emergency at the material time was, in that case, still a matter on which the Governor General of India was the sole judge and his judgment could not be enquired into by a Court of law.

p.95, l.48 to p.96, l.4

As to the argument advanced on behalf of the Petitioner that Article 150 (5) of the Federal Constitution does not authorise the Federal Parliament to amend the Federal Constitution or the Sarawak Constitution, the learned Chief Justice said (contrary, it is submitted, to law and the true interpretation of Article 150 (5)) that, under the said Article 150 (5), "while a Proclamation of

p.96, l.38 to p.97, l.1

Emergency is in force, Parliament may make any law on any matter whether such matter is a matter in the Federal List, State List, or Concurrent List, or any other matter that may come under Article 77. Article 77 deals with the residual power of legislation by the Legislature of a State." The learned Chief

p.97, ll.2-17

Justice did not accept the argument that the expression "any matter" in Article 150 (5) refers only to matters within the Federal List, for Article 150 (5), he said, was made subject to Article 150 (6A) and the latter exempted matters within the State List.

pp.99-123

21. In his Judgment, dismissing the Petition, Ong Hock Thye, Federal Judge, Malaysia, differing strongly from the other two Members of the Bench on the point said, on the subject of a judicial enquiry into the issue of the Proclamation of Emergency:-

p.99, ll.18-28

"I have had the advantage of reading the Judgments of the learned Lord President and the learned Chief Justice of Malaya.

"With all respect I am unable to share their view that under Article 150 of the Federal Constitution His Majesty the Yang di-Pertuan Agong is the 'sole judge' whether or not a situation calls for a Proclamation of Emergency, in other words 'that the circumstances which bring about a Proclamation of Emergency are non-justiciable'.

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"His Majesty is not an autocratic ruler since Article 40 (1) of the Federal Constitution provides that 'In the exercise of his functions under this Constitution or Federal law, the Yang di-Pertuan Agong shall act in accordance with the advice of his Cabinet. In this Petition, therefore, when it was alleged by the Petitioner 'that the said Proclamation was in fraudem legis in that it was made, not to deal with a grave Emergency whereby the security or economic life of Sarawak was threatened, but for the purpose of removing the Petitioner from his lawful position as Chief Minister of Sarawak', there never was the ghost of a suggestion that His Majesty had descended into the area of Malaysian politics by taking sides against Sarawak's legitimate Chief Minister: With the greatest respect it is unthinkable that His Majesty, as a constitutional Ruler, would take on a role in politics different from that of the Queen of England. p.99, l.29 to p.100, l.17

"The allegation of fraud was unmistakably made against the Cabinet as it was supported by particulars set out at length..... p.100, ll.18-20

"If justice is not only to be done but to be seen to be done, I do not believe that I can shirk my plain duty by turning a blind eye to the facts." p.100, ll.21-24

22. Continuing, on the justiciability of questions related to the existence or otherwise of an Emergency which is proclaimed under Article 150 of the Federal Constitution, the learned Federal Court Judge (Ong Hock Thye, F.J.) said:-

"Counsel for the Federation Government has plainly concentrated on the legal quibble that the ostensible decision to proclaim an Emergency being that of His Majesty himself, the question raised by the Petitioner was on that account not justiciable. Disregarding the clear provisions of Article 40 (1) he has relied on two Indian cases, decisions of the Privy Council in 1931 and 1944 which have found favour with my learned brethren. Again, with respect, I do not consider the ratio decidendi in those cases applicable herein because Section 72 of and Schedule IX of the Government of India Act, 1935, is manifestly not in pari materia with Article 150 p.101, ll.5-29

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of the Federal Constitution, nor is the constitutional position of the Malaysian Cabinet comparable, or similar, to that of the Governor General of India. Hence, it is quite erroneous to argue by analogy from the Government of India Act to our Constitution as if those authorities were unquestionably conclusive."

The learned Federal Court Judge then supported his views with reasons which he set out

p.101, ll. 39-46 in detail. In doing so he stressed the fact that, unlike Section 72 of the Government of India Act, Article 150 of the Federal Constitution had "built-in safeguards" against indiscrimate emergency legislation in that such legislation could only be resorted to if the security or economic life of the Federation, or any part thereof, was threatened.

p.102, l. 13 - p.106 23. On the issue as to whether or not the Emergency powers had been invoked <u>in fraudem legis</u>, the learned Federal Court Judge referred to, and examined, the particulars in support of the allegation which had been set out in detail in the Petition, the events which had preceded the taking of the Emergency steps (inclusive of the proceedings which had resulted in the Petitioner's re-instatement as Chief Minister), and subsequent facts, prior to the institution of the present proceedings.

p.106-114 The learned Judge then referred to the statement of the Deputy Prime Minister on the said Proclamation of Emergency and the enactment of the impugned Act, made in the Federal Parliament on the 19th September, 1966. In the view of the

p.106,ll.22-25 learned Judge this was a matter of "crucial importance" in the determination of this case and he therefore considered it proper to refer to the said statement in detail. He referred also, in

pp.114-119 detail, to the answer which, in Parliament, had been given to the Deputy Prime Minister's statement by a member of the Opposition. His examination of the said statement and answer led him to the clear conclusion that the Federal Government had resorted to the enactment of the impugned Act under the Emergency powers set out in the Constitution for no reason other than to maintain political stability in Sarawak during the

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interim period before the General Election.

24. On the true objects of the impugned Act, the learned Federal Court Judge said:-

"The crucial question is whether the Proclamation was made (a) not to deal with a grave Emergency whereby the security or economic life of Sarawak was threatened but (b) for the purpose of removing the Petitioner from the office of Chief Minister of Sarawak. In my opinion there can be no two views that the primary objective was the removal of the Petitioner. The Deputy Prime Minister himself said so in unambiguous terms." p.120, ll.28-38

But (contrary, it is submitted, to reason) the learned Judge's view was that "this primary objective is not necessarily incompatible with a genuine concern - whether on adequate grounds or not it is not for me to say - felt by the Cabinet as regards the security situation in Sarawak." On this aspect of the case he said also that it might be true that "political instability in Sarawak could possibly have serious repercussions on the security of the State, although some may quite honestly consider it improbable or far fetched." He was therefore "unable to say with any degree of confidence that the Cabinet advice to His Majesty was not prompted by bona fide considerations of security." His decision was that the Petitioner had failed to make out a case to his satisfaction for holding that the Proclamation of Emergency was invalid as being in fraudem legis - but his view remained nevertheless that "when an Emergency is proclaimed by Parliament it is still open to challenge in Court on the ground that it is ultra vires where cause can be shown." p.120, ll.41-46; p.121, ll.7-12; p.121, ll.15-19; p.121, ll.37-41; p.122, ll.2-6

On the question of costs, the learned Federal Court Judge said

"Since there are no merits whatsoever in the argument of Counsel for the Federal Government - indeed his rather surprising contention was that the Cabinet action was purely a matter of Party discipline - I have given the question of costs special consideration and propose that the parties should bear their own costs." p.123,ll.2-11

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25. In the Appellant's respectful submission Emergency legislation under Article 150 of the Federal Constitution cannot, because of its very nature and the terms upon which the power to enact it is conferred, have both a primary and a secondary objective - it can, it is submitted, have only one objective which must be clearly and directly and solely concerned with the removal of a threat to the security or economic life of the Federation or any part thereof. If, therefore, as found by the learned Federal Judge, the primary objective of the impugned Act was the removal of the Appellant from his office (which cannot be, and was not alleged to be, associated with any threat to the security and economic life of Sarawak) then any secondary objective - whether or not associated with any such alleged threat - must necessarily be disregarded and cannot be relied upon as any justification for resorting to the said Emergency powers; for to do so would be to throw overboard the primary cause in favour of the secondary, assuming of course that there was a secondary cause.

26. Against the said Judgment and Order of the Federal Court, this appeal is now presented, in pursuance of Leave to Appeal to His Majesty the Yang di-Pertuan Agong granted to the Appellant as stated in paragraph 1 hereof.

In the Appellant's respectful submission the appeal should be allowed, with costs throughout, for the following among other

REASONS

1. BECAUSE the declaration of Emergency was not made because the Yang di-Pertuan Agong was satisfied that a grave emergency existed whereby the security or economic life of the Federation or any part thereof was threatened but for wholly different reasons and was therefore ultra vires and invalid.

2. BECAUSE Syed Sheh Barakbah, Lord President, and Azmi, Chief Justice, were wrong in holding that it is not open to the Courts to enquire into the validity of the Proclamation of the

Emergency and in this respect, the judgment of Ong Hock Thy, F.J. was right and should pro tanto be upheld.

3. BECAUSE the impugned Act was ultra vires the Federal Parliament and is invalid.

4. BECAUSE the said Act was enacted in fraudem legis as is plain from the very nature of its provisions (which bear no relation to any real emergency) and the official explanations given for its enactment.

5. BECAUSE the said Act was officially stated to have been enacted for the preservation of democracy but, however desirable the rule of democracy may be, it is, as an ideal, apt to be differently interpreted and applied by those entrusted with political responsibility and being associated with such uncertainty its maintenance cannot lawfully or reasonably be regarded as a ground for resorting to the Emergency powers enacted in Article 150 of the Federal Constitution.

6. BECAUSE the said Emergency powers were invoked by the Respondent not to remove any threat to the security or economic life of Sarawak and not even to maintain democracy in Sarawak but merely, for political reasons, to remove the Appellant from his office as Chief Minister of Sarawak to which office he had been lawfully appointed and in which he had successfully functioned.

7. BECAUSE in the exceptional circumstances of this case and in view of the said official explanations, the nature of the Emergency said to exist in Sarawak, the existence or otherwise of factors from which any conclusion as to an Emergency could possibly be arrived at, the validity or otherwise of the Proclamation (issued upon the advice of the Federal Cabinet) and, inasmuch as it purported to amend both the Federal Constitution and the Sarawak Constitutions, the validity or otherwise of the impugned Act, were all justiciable matters which should have been decided in the Appellant's favour.

8. BECAUSE inasmuch as it purported unlawfully to amend the Federal Constitution by amending Section 150 thereof and to thereby give to the Federal Parliament extended Emergency powers under which the Federal Parliament then purported to act, the impugned Act was invalid for the reason, inter alia, that its enactment contravened the provisions of Section 159 of the Federal Constitution.

9. BECAUSE inasmuch as it purports to amend the Sarawak Constitution the impugned Act is invalid as the amendments it contains are in contravention of the clear and emphatic terms of Article 41 of that Constitution and of the Agreement Relating To Malaysia entered into between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore of which Agreement both the Sarawak Constitution and the Federal Constitution are properly regarded as part.

10. BECAUSE further or in the alternative the Federal Parliament can only amend the Constitution of Sarawak in the manner provided by Articles 159 (3) and 161 (E) of the Federal Constitution and the requirements of these articles were not satisfied in the present case.

DINGLE FOOT

THOMAS O. KELLOCK

T.O. THOMAS

ANNEXURE

The Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966

("The impugned Act")

An Act to amend the Federal Constitution and to make provision with respect to certain constitutional matters in the State of Sarawak, consequent upon a Proclamation of Emergency having been issued and being in force in that State.

Whereas a Proclamation of Emergency has on the fourteenth day of September, 1966 been issued by the Yang di-Pertuan Agong in respect of a grave emergency which the Yang di-Pertuan Agong is satisfied exists in the State of Sarawak:

And Whereas it appears to Parliament that the following provisions of this Act are required by reason of the said Emergency:

Now, therefore, be it enacted by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Ra'ayat in Parliament assembled, and by the authority of the same, as follows:

1. This Act may be cited as the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966. — Short title

2. (1) In this Act - — Interpretation

"Chief Minister" means the Chief Minister of the State of Sarawak;

"Council Negri" means the Legislature of the State of Sarawak;

"Governor" means the Governor of the State of Sarawak;

"Speaker" means the Speaker of the Council Negri;

"State Constitution" means the Constitution of the State of Sarawak;

"Supreme Council" means the Supreme Council of the State of Sarawak.

(2) Where by any provision of this Act the Governor is empowered to do any act in his absolute discretion, the Governor shall not be obliged, notwithstanding anything in the State Constitution, to consult with the Supreme Council, or to act in accordance with any advice tendered by the Supreme Council or any member thereof, in the exercise of his discretion.

Amendment of Article 150 of the Constitution

3. (1) In Article 150 of the Constitution -

(a) in Clause (5), after the word "Constitution" where it first occurs, there shall be inserted the words "or in the Constitution of the State of Sarawak"; and

(b) in Clause (6), after the word "Constitution" at the end thereof, there shall be added the words "or of the Constitution of the State of Sarawak".

(2) The amendments made by subsection (1) of this section shall cease to have effect six months after the date on which the Proclamation of Emergency issued by the Yang di-Pertuan Agong on the fourteenth day of September, 1966 ceases to be in force.

Governor may summon Council Negri, suspend Standing Orders, and issue directions binding on Speaker

4. (1) Notwithstanding anything in the State Constitution the Governor may, in his absolute discretion, summon the Council Negri to meet at such place and on such day or dates and after such period of notice as he shall think fit, and the provisions of the Standing Orders of the Council Negri shall, to the extent that they are inconsistent with the directions of the Governor contained in the Summons, be deemed to be suspended.

(2) In order to ensure that any meeting of

the Council Negri summoned as aforesaid is duly held and that any business which it is expedient, in the opinion of the Governor, should be transacted thereat is duly transacted and concluded, the Governor may, in his absolute discretion, direct that any of the Standing Orders of the Council Negri be suspended and give any special directions which he may consider necessary.

(3) Any such directions as aforesaid shall be in the form of a message to the Council Negri addressed to the Speaker, and the Speaker shall comply therewith.

(4) If the Speaker fails to comply with any direction given by the Governor as aforesaid, the Governor may, in his absolute discretion, nominate any member of the Council Negri to act as Speaker and the member so appointed shall have all the powers of the Speaker, for the purposes of that meeting.

Resignation of Chief Minister and members of Supreme Council after vote of no confidence

5. (1) If at any meeting of the Council Negri, whether held in pursuance of the provisions of section 4 of this Act or otherwise, a resolution of no confidence in the Government is passed by the votes of a majority of those members present and voting, and if after such a resolution is passed the Chief Minister fails forthwith to resign his office and to tender the resignation of the members of the Supreme Council, the Governor may, in his absolute discretion, dismiss the Chief Minister and the members of the Supreme Council.

(2) Where the Chief Minister and members oF the Supreme Council have been dismissed as aforesaid they shall forthwith cease to exercise the functions of their respective offices and the provisions of the State Constitution shall thereupon have effect for the purpose of appointing a new Chief Minister and members of the Supreme Council and for all other purposes pursuant thereto.

EXPLANATORY STATEMENT AT BILL STAGE

1. A constitutional crisis has occurred in

Sarawak which the Yang di-Pertuan Agong is satisfied constitutes a grave emergency whereby the security of Sarawak is threatened.

2. There is already in force a Proclamation of Emergency issued on 3rd September, 1964, in respect of the whole Federation, the occasion for which is a matter of public knowledge.

3. The Yang di-Pertuan Agong, in exercise of his powers under Article 150 of the Constitution, has on the 14th September, 1966, issued a further Proclamation in respect of Sarawak only, in order to deal with the present crisis as a distinct emergency additional to the emergency already proclaimed. In a recent judgment of the High Court in Borneo it was held that the question whether the Chief Minister commands the confidence of a majority of the members of the Council Negri cannot be resolved otherwise than by a vote in the Council itself. It was further held, in the same judgment, that the State Constitution confers no power on the Governor to dismiss, or by any means to enforce the resignation of, a Chief Minister, even when it has been demonstrated that he has lost the confidence of a majority. This is a serious lacuna in the State Constitution, and one which enables a Chief Minister whose majority has become a minority to flout the democratic convention that the leader of the Government party in the House should resign when he no longer commands the confidence of a majority of the members. The occurrence of such an event, resulting in the breakdown of stable Government and thereby giving rise to the spreading of rumours and alarm throughout the territory, is in the opinion of the Yang di-Pertuan Agong, as expressed in the Proclamation of Emergency, a threat to the security of Sarawak.

4. Clause 3 of the Bill is designed to remove any doubt as to whether the power of Parliament to make laws pursuant to a Proclamation of Emergency extends to making laws inconsistent with the provisions of a State Constitution, as it does in relation to the Federal Constitution - Article 150 (5) and (6). The proposed amendment of the Constitution is intended to be a temporary one,

which will cease to have effect six months after the Proclamation of Emergency ceases to be in force.

5. Clause 4 is designed to enable the Governor, without being obliged to act in accordance with the advice of the Supreme Council as provided in Article 10 of the State Constitution, to cause a meeting of the Council Negri to be held so that the question of confidence in the Government may be put to the test at an early date. Special provisions have been inserted in this Clause with the object of enabling the Governor to ensure that any business which it is in his opinion expedient to transact at a specially summoned meeting of the Council Negri shall be duly transacted and concluded at that meeting.

6. Clause 5 is designed to provide for the dismissal by the Governor of a Chief Minister and Ministers who refuse to resign after it has been demonstrated by a vote in the Council Negri, that they have lost the confidence of a majority of the representatives of the people in the legislature of the State.

AGREEMENT RELATING TO MALAYSIA

The United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore;

Desiring to conclude an agreement relating to Malaysia;

Agree as follows:-

ARTICLE I

The Colonies of North Borneo and Sarawak and the State of Singapore shall be federated with the existing States of the Federation of Malaya as the States of Sabah, Sarawak and Singapore in accordance with the constitutional instruments annexed to this Agreement and the Federation shall thereafter be called "Malaysia".

ARTICLE II

The Government of the Federation of Malaya will take such steps as may be appropriate and available to them to secure the enactment by the Parliament of the Federation of Malaya of an Act in the form set out in Annex A to this Agreement and that it is brought into operation on 31st August, 1963 (and the date on which the said Act is brought into operation is hereinafter referred to as "Malaysia Day").

ARTICLE III

The Government of the United Kingdom will submit to Her Britannic Majesty before Malaysia Day Orders in Council for the purpose of giving the force of law to the Constitutions of Sabah, Sarawak and Singapore as States of Malaysia which are set out in Annexes B, C and D to this Agreement.

ARTICLE IV

The Government of the United Kingdom will take such steps as may be appropriate and available to them to secure the enactment by the Parliament of the United Kingdom of an Act providing for the

relinquishment, as from Malaysia Day, of Her Britannic Majesty's sovereignty and jurisdiction in respect of North Borneo, Sarawak and Singapore so that the said sovereignty and jurisdiction shall on such relinquishment vest in accordance with this Agreement and the constitutional instruments annexed to this Agreement.

ARTICLE V

The Government of the Federation of Malaya will take such steps as may be appropriate and available to them to secure the enactment before Malaysia Day by the Parliament of the Federation of Malaya of an Act in the form set out in Annex E to this Agreement for the purpose of extending and adopting the Immigration Ordinance, 1959, of the Federation of Malaya to Malaysia and of making additional provision with respect to entry into the States of Sabah and Sarawak; and the other provisions of this Agreement shall be conditional upon the enactment of the said Act.

ARTICLE VI

The Agreement on External Defence and Mutual Assistance between the Government of the United Kingdom and the Government of the Federation of Malaya of 12th October, 1957, and its annexes shall apply to all territories of Malaysia, and any reference in that Agreement to the Federation of Malaya shall be deemed to apply to Malaysia, subject to the proviso that the Government of Malaysia will afford to the Government of the United Kingdom the right to continue to maintain the bases and other facilities at present occupied by their Service authorities within the State of Singapore and will permit the Government of the United Kingdom to make such use of these bases and facilities as that Government may consider necessary for the purpose of assisting in the defence of Malaysia, and for Commonwealth defence of and for the preservation of peace in South-East Asia. The application of the said Agreement shall be subject to the provisions of Annex F to this Agreement (relating primarily to Service lands in Singapore).

ARTICLE VII

(1) The Federation of Malaya agrees that Her

Britannic Majesty may make before Malaysia Day Orders in Council in the form set out in Annex G to this Agreement for the purpose of making provision for the payment of compensation and retirement benefits to certain overseas officers serving immediately before Malaysia Day, in the public service of the Colony of North Borneo or the Colony of Sarawak.

(2) On or as soon as practicable after Malaysia Day, Public Officers' Agreements in the forms set out in Annexes H and I of this Agreement shall be signed on behalf of the Government of the United Kingdom and the Government of Malaysia; and the Government of Malaysia shall obtain the concurrence of the Government of the State of Sabah, Sarawak or Singapore, as the case may require, to the signature of the Agreement by the Government of Malaysia so far as its terms may affect the responsibilities or interests of the Government of the State.

ARTICLE VIII

The Government of the Federation of Malaya, North Borneo and Sarawak will take such legislative, executive or other action as may be required to implement the assurances, undertakings and recommendations contained in Chapter 3 of, and Annexes A and B to, the Report of the Inter-Governmental Committee signed on 27th February, 1963, in so far as they are not implemented by express provision of the Constitution of Malaysia.

ARTICLE IX

The provisions of Annex J to this Agreement relating to Common Market and financial arrangements shall constitute an Agreement between the Government of the Federation of Malaya and the Government of Singapore.

ARTICLE X

The Governments of the Federation of Malaya and of Singapore will take such legislative,

executive or other action as may be required to implement the arrangements with respect to broadcasting and television set out in Annex K to this Agreement in so far as they are not implemented by express provision of the Constitution of Malaysia.

ARTICLE XI

This Agreement shall be signed in the English and Malay languages except that the Annexes shall be in the English language only. In case of doubt the English text of the Agreement shall prevail.

In witness whereof the undersigned, being duly authorised thereto, have signed this Agreement.

Done at London this Ninth day of July, 1963, in five copies of which one shall be deposited with each of the parties.

For the United Kingdom:

HAROLD MACMILLAN
DUNCAN SANDYS
LANSDOWNE

For the Federation of Malaya:

T.A. RAHMAN
ABDUL RAZAK
TAN SIEW SIN
V.T. SAMBANTHAN
ONG YOHE LIN
S.A. LIM

For North Borneo:

DATU MUSTAPHA BIN DATU HARUN
D.A. STEPHENS
W.K.H. JONES
KHOO SIAK CHIEW
W.S. HOLLEY
G.S. SUNDANG

For Sarawak:

P.E.H. PIKE
T. JUGAH
ABANG HAJI MUSTAPHA
LING BENG SIEW
ABANG HAJI OPENG

For Singapore:

LEE KUAN YEW
GOH KENG SWEE

CONSTITUTION OF MALAYSIA

("The Federal Constitution")

Part I

THE STATES, RELIGION AND LAW OF THE FEDERATION

The name States and territories of the Federation

1. (1) The Federation shall be known, in Malay and in English, by the name Malaysia.

(2) The States of the Federation shall be

(a) the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negri, Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Trengganu; and

(b) the Borneo States, namely, Sabah and Sarawak; and

(c) the State of Singapore.

(3) The territories of each of the Statess mentioned in Clause (2) are the territories comprised therein immediately before Malaysia Day.*

Supreme law of Federation

4. (1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

(2) The validity of any law shall not be questioned on the ground that -

(a) it imposes restrictions on the right mentioned in Article 9 (2) but does not relate to the matters mentioned therein; or

* September, 16, 1963 - LN. 214/1963

(b) it imposes such restrictions as are mentioned in Article 10 (2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

(3) The validity of any law made by Parliament or the Legislature of any State shall not be questioned on the ground that it makes provision with respect to any matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws, except in proceedings for a declaration that the law is invalid on that ground or -

(a) if the law was made by Parliament, in proceedings between the Federation and one or more States;

(b) if the law was made by the Legislature of a State, in proceedings between the Federation and that State.

(4) Proceedings for a declaration that a law is invalid on the ground mentioned in Clause (3) (not being proceedings falling within paragraph (a) or (b) of the Clause) shall not be commenced without the leave of a judge of the Federal Court; and the Federation shall be entitled to be a party to any such proceedings, and so shall any State that would or might be a party to proceedings brought for the same purpose under paragraph (a) or (b) of the Clause.

Exercise of concurrent legislative powers

*79. (1) Where it appears to the presiding officer of either House of Parliament or of the Legislative Assembly of any State that a Bill or an amendment to a Bill proposes a change in the law relating to any of the matters enumerated in the Concurrent List, or to any of the matters enumerated in the State List with respect to which the Federation is exercising functions in accordance with Article 94, he shall certify

* See Articles 92 (2), 146 (1) and 150 (6)

the Bill or amendment for the purposes of this Article.

(2) A Bill of amendment certified under this Article shall not be proceeded with until four weeks have elapsed since its publication, unless the presiding officer, being satisfied that the State Governments, or as the case may be, the Federal Government, have been consulted, allows it to be proceeded with on the ground of urgency.

Proclamation of emergency

150. (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency.

(2) If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required.

(3) A Proclamation of Emergency and any ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2).

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.

(5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution, make laws with respect to any

matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his Assent.

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom of the Malays, or with respect to any matter of native law or custom in a Borneo State; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.

(7) At the expiration of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the Proclamation and, to the extent that it could not have been validly made but for this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period.

Amendment of the Constitution

159. (1) Subject to the following provisions of this Article and to Articles 161E and 161H, the provisions of this Constitution may be amended by Federal law.

(2) (Repealed by 25 of 1963)

(3) A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this Clause) shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.

(4) The following amendments are excepted from the provisions of Clause (3), that is to say, -

(a) any amendment to Part III of the Second or to the Sixth or Seventh Schedule;

(b) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of this Constitution other than Articles 74 and 76;

(bb) subject to Article 161E any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modification made as to application of this Constitution to a State previously so admitted or associated;

(c) any amendment incidental to or consequential on the repeal of a law made under Clause (2) or consequential on an amendment made under paragraph (a).

(5) A law making an amendment to Article 38, 70, 71 (1) or 153 shall not be passed without the consent of the Conference of Rulers.

(6) In this Article "amendment" includes addition and repeal and "State" includes any territory.

Safeguards for constitutional position of Borneo States

161E.(1) As from the passing of the Malaysia Act no amendment to the Constitution made in connection with the admission to the Federation of a Borneo State shall be excepted from Clause (3) of Article 159 by Clause (4) (bb) of that Article; nor shall any modification made as to the application of the Constitution to a Borneo State be so excepted unless the modification is such as to equate or assimilate the position of that State under the Constitution to the position of the States of of Malaya.

(2) No amendment shall be made to the Constitution without the concurrence of the Governor of the Borneo State or each of the Borneo States concerned, if the amendment is such as to affect the operation of the Constitution as regards any of the following matters:

(a) the right of persons born before Malaysia Day to citizenship by reason of a connection with the State, and, (except to the extent that different provision is made by the Constitution as in force on Malaysia Day) the equal treatment, as regards their own citizenship and that of others, of persons born or resident in the State and of persons born or resident in the States of Malaya;

(b) the constitution and jurisdiction of the High Court in Borneo and the appointment, removal and suspension of judges of that Court;

(c) the matters with respect to which the Legislature of the State may (or Parliament may not) make laws, and the executive authority of the State in those matters, and (so far as related thereto) the financial arrangements between the Federation and the State;

(d) religion in the State, the use in the State or in Parliament of any language and the special treatment of

natives of the State.

(e) the allocation to the State, in any Parliament summoned to meet before the end of August, 1970, of a quota of members of the House of Representatives not less, in proportion to the total allocated to the other States which are members of the Federation on Malaysia Day, than the quota allocated to the State on that day.

(3) No amendment to the Constitution which affects its operation as regards the quota of members of the House of Representatives allocated to a Borneo State shall be treated for purposes of Clause (1) as equating or assimilating the position of that State to the position of the States of Malaya.

(4) In relation to any rights and powers conferred by federal law on the government of a Borneo State as regards entry into the State and residence in the State and matters connected therewith (whether or not the law is passed before Malaysia Day) Clause (2) shall apply, except in so far as the law provides to the contrary, as if the law had been embodied in the constitution and those rights and powers had been included among the matters mentioned in paragraphs (a) to (e) of that Clause.

(5) In this Article "amendment" includes addition and repeal.

CONSTITUTION OF SARAWAK

Part V

GENERAL PROVISIONS

Amendment of Constitution

41. (1) Subject to the following provisions of this Article, the provisions of this Constitution may be amended by an Ordinance enacted by the Legislature but may not be amended by any other means.

(2) Subject to Clause (3), a Bill for making an amendment to this Constitution shall not be passed by the Council Negri unless it has been supported on the second and third readings by the votes of not less than two-thirds of the total number of members thereof.

(3) Clause (2) shall not apply to a Bill for making -

(a) any amendment consequential on a law prescribing the number of elected members of the Council Negri; or

(b) any amendment for the purpose of bringing this Constitution into accord with any of the provisions of the Eighth Schedule to the Federal Constitution as for the time being in force.

(4) In this Article "amendment" includes addition and repeal.

J.C. of the No. 4 of 1968

IN THE PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

HOLDEN AT KUALA LUMPUR

(ORIGINAL JURISDICTION)

B E T W E E N :

STEPHEN KALONG NINGKAN
(Petitioner)
Appellant

- and -

GOVERNMENT OF MALAYSIA
(Respondent)
Respondent

C A S E FOR THE APPELLANT

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