21, 1968

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 4 of 1968

ON APPEAL FROM THE
FEDERAL COURT OF MALAYSIA

---

B E T W E E N :

STEPHEN KALONG NINGKAN — Appellant

- and -

GOVERNMENT OF MALAYSIA — Respondent

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RECORD OF PROCEEDINGS

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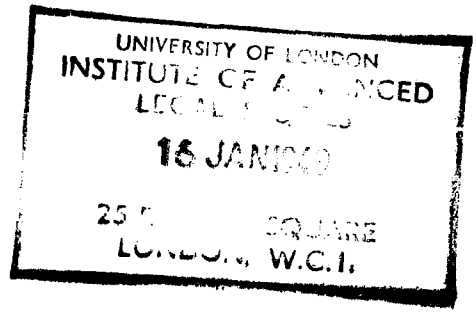


T.L. WILSON & CO.,
6 Westminster Palace Gardens,
London, S.W.1.
Solicitors for the
Appellant.

STEPHENSON HARWOOD &
TATHAM,
Saddlers' Hall,
Gutter Lane,
London, E.C.2.
Solicitors for the
Respondent.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 4 of 1968

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# RECORD OF PROCEEDINGS

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## INDEX OF REFERENCE

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DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

| Description of Document | Date |
|---|---|
| In the Federal Court of Malaysia | |
| Memorandum of Appearance for Government of Malaysia | 21st March 1967 |
| Notice of Appearance for Government of Malaysia | 21st March 1967 |
| Summons for Directions | 17th May 1967 |
| Order fixing date of hearing | 10th June 1967 |

| Description of Document | Date |
|---|---|
| Notice of Motion | 5th December 1967 |
| Affidavit in support of Notice of Motion | 5th December 1967 |
| Order granting Condition Leave to Appeal to His Majesty the Yang di-Pertuan Agong | 8th January 1968 |

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

No. 4 of 1968

ON APPEAL FROM THE
FEDERAL COURT OF MALAYSIA

B E T W E E N :

STEPHEN KALONG NINGKAN Appellant

- and -

GOVERNMENT OF MALAYSIA Respondent

RECORD OF PROCEEDINGS

In the Federal Court

No. 1

Notice of Motion.

24th January 1967.

No. 1

NOTICE OF MOTION

IN THE FEDERAL COURT OF MALAYSIA

(ORIGINAL JURISDICTION)

Application No. X. 1 of 1967

BETWEEN

STEPHEN KALONG NINGKAN ... APPLICANT

AND

GOVERNMENT OF MALAYSIA . PROPOSED RESPONDENT

(In the matter of Art.4 and Art.128 of the Federal Constitution and in the matter of Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966).

NOTICE OF MOTION

TAKE NOTICE that on Saturday the 18th day of February 1967, at 9.30 o'clock in the fore noon, or as soon thereafter as he can be heard Mr. T.O. Thomas of counsel for the above-named Applicant will move

In the Federal Court

No. 1

Notice of Motion.

24th January 1967 - continued

a Judge of this Honourable Court for an order that the Applicant be at liberty to commence proceedings against the Government of Malaysia, and any other party as the Judge may direct, for declaration of Court that the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, is invalid, and/or that Clauses 3, 4 and 5 of the said Act were invalid on the ground that they were ultra vires the Federal Parliament.

An Affidavit sworn by the Applicant is attached herewith marked "AF".

Sgd. Thomas & Co.

THOMAS & CO.,
Advocates for the Applicant

Dated at Kuala Lumpur this 24th day of January 1967.

(L.S.) Sgd.

CHIEF REGISTRAR,
High Court, Malaysia.

---

No. 2

Affidavit in support of Notice of Motion.

13th December 1966

No. 2

AFFIDAVIT IN SUPPORT OF NOTICE OF MOTION

IN THE FEDERAL COURT OF MALAYSIA

(ORIGINAL JURISDICTION)

IN THE MATTER OF ART.4 AND ART.128 OF THE FEDERAL CONSTITUTION

AND

IN THE MATTER OF EMERGENCY (FEDERAL CONSTITUTION AND CONSTITUTION OF SARAWAK) ACT, 1966.

STEPHEN KALONG NINGKAN,
74, Evergreen Estate,
Nanas Road, West,
Kuching. ... APPLICANT

A F F I D A V I T

I, Stephen Kalong Ningkan, Malaysian Citizen,

of No. 74, Evergreen Estate, Nanas Road, West, Kuching, the above-named Applicant, make oath and say as follows:

1. That I was appointed Chief Minister of Sarawak by Instrument under the public seal dated the 22nd day of July, 1963.

2. That the 17th day of June, 1966, His Excellency the Governor of Sarawak purported to declare that I had ceased to hold the office of Chief Minister of Sarawak and, on the same day the Governor purported to appoint Penghulu Tawi Sli Chief Minister in my place.

3. That on the 7th day of September, 1966, the High Court at Kuching in Civil Suit No. K.45 of 1966 wherein I was Plaintiff declared and adjudged, inter alia that "the Plaintiff is and has been at all material times Chief Minister of Sarawak" and granted me an injunction restraining Penghulu Tawi Sli from acting as Chief Minister of the State of Sarawak.

4. That on the 24th day of September 1966 the Governor purporting to act under powers conferred by the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, purported to dismiss me from my position as Chief Minister of the State of Sarawak and purported again to appoint the said Penghulu Tawi Sli Chief Minister in my place.

5. That as a result I commenced proceedings by Writ of Summons in the Kuching High Court Civil Suit No. K.88 of 1966 questioning the validity of the Emergency (Federal Constitution and Constitution) Act, 1966, inter alia, on the following grounds:

> "18. The said Act was ultra vires the said Parliament, null void and of no effect in that it purported to be passed by virtue of the said Proclamation of Emergency which was null void and of no effect.
>
> "19. Alternatively, and in addition, Clause 3 of the said Act was ultra vires the said Parliament null void and of no effect in that it purported to amend the Constitution of Malaysia contrary to section 161 E(2) of the said Constitution.

In the Federal Court

No. 2

Affidavit in support of Notice of Motion.

13th December 1966 - continued.

"20. Alternatively, and in addition, Clause 3 of the said Act was ultra vires the said Parliament null void and of no effect in that it purported to amend the Constitution of the State of Sarawak in a manner contrary to the said Constitution and was therefore ultra vires section 150 of the said Constitution.

"21. Alternatively, and in addition, Clauses 4 and 5 of the said Act were ultra vires the said Parliament, null void and of no effect in that they are ultra vires section 150 of the said Constitution as amended by Clause 3 of the said act or as unamended because they purport to amend the Constitution of the State of Sarawak in a manner contrary to the said Constitution.

"22. Alternatively, and in addition, Clauses 4 and 5 of the said Act were ultra vires the said Parliament, null void and of no effect in that they purport to amend the Constitution of the State of Sarawak in a manner contrary to the said Constitution and contrary to the international agreement known as the AGREEMENT RELATING TO MALAYSIA solemnly entered into between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore."

6. That as a result of an application by the defendants in the said Civil Suit No. K.88 of 1966, namely, Tun Abang Haji Openg (Governor of Sarawak) and Penghulu Tawi Sli, the Hon'ble the Chief Justice ordered that the above mentioned paragraphs of the Statement of Claim be struck out on the ground that they seek to question the validity of the law made by Parliament in a manner other than that provided by Parliament in Article 4(3) of the Constitution and in a Court other than that to which exclusive jurisdiction has been given by Article 128 of the Constitution.

7. That I am advised by my legal advisers and I verily believe that the said Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, is invalid for the reasons mentioned above.

In the Federal Court

No. 2

Affidavit in support of Notice of Motion.

13th December 1966 - continued.

8. That the Constitution of the State of Sarawak in Article 41 says that the Constitution of the State may be amended by an Ordinance enacted by the State legislature "but may not be amended by any other means".

9. That whether the Constitution of Sarawak has been lawfully amended is a matter of great public importance to Malaysia and Sarawak in particular, apart from my personal interest in the matter as the person immediately affected by the operation of the said Act of Parliament.

SIGNED by the said above-named deponent at Kuching this 13th day of December, 1966. ) Sgd. Stephen Kalong Ningkan

Before me,

Sgd. Chew Kui Sang,

HIGH COURT IN BORNEO.

CHEW KUI SANG,
Assistant Registrar,
High Court in Borneo,
Kuching.

---

No. 3

No. 3

Affidavit in opposition to Notice of Motion.

15th February 1967.

AFFIDAVIT IN OPPOSITION TO NOTICE OF MOTION

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT JOHORE BAHRU

(ORIGINAL JURISDICTION)

F.C. Civil Application No.X.1 of 1967

Between

STEPHEN KALONG NINGKAN ... APPLICANT

and

GOVERNMENT OF MALAYSIA ... PROPOSED RESPONDENT

In the Federal Court

No. 3

Affidavit in opposition to Notice of Motion.

15th February 1967 - continued.

(In the matter of Art.4 and Art.128 of the Federal Constitution and In the matter of Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966).

A F F I D A V I T

I, Syed Othman bin Ali of Attorney-General's Chambers, Kuala Lumpur, do hereby affirm and say as follows:

1. I am the Parliamentary Draftsman and I am authorised to make this affidavit on behalf of the Government of Malaysia.

2. I crave leave to refer to the Affidavit of the Applicant affirmed on the 13th day of December, 1966.

3. The Affidavit of the Applicant in whole or in part does not disclose any substance or merit upon which the Court may make a declaration that the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, is invalid, and/or that sections 3, 4 and 5 of the said Act were invalid on the ground that they were ultra vires the Federal Parliament.

4. The said Act was enacted consequent upon a Proclamation of Emergency issued on the 14th day of September, 1966, by the Yang di-Pertuan Agong (vide P.U. 339A) in respect of a grave emergency which the Yang di-Pertuan Agong is satisfied to exist in the State of Sarawak.

5. The said Act was enacted by virtue of the powers conferred by Article 150 of the Constitution, the very Article which is cited by the Applicant in his Affidavit.

6. In Civil Suit No. K.88 of 1966 referred to in the Applicant's Affidavit, the Applicant in paragraphs 2 to 15 of his Statement of Claim claims that the aforesaid Proclamation of Emergency is null and void and of no effect by reason of the fact that it was not made bona fide but was made in fraudem legis.

7. The Chief Justice of the Borneo States on the 2nd December, 1966, ruled among other things that

the matters contained in the said paragraphs 2 to 15 disclosed a cause of action within the jurisdiction of the High Court, and the ruling of the said Chief Justice is now the subject of an appeal before the Federal Court.

In the Federal Court

No. 3

Affidavit in opposition to Notice of Motion.

15th February 1967 - continued.

8. I therefore pray that this application be dismissed with costs.

Affirmed by the above-named Syed Othman bin Ali at Kuala Lumpur on the 15th day of February, 1967. ) Sgd. Syed Othman bin Ali

Before me,

Sgd. Soo Kok Kwong

Commissioner for Oaths
High Court, Kuala Lumpur.

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No. 4

No. 4

Order on Notice of Motion.

20th February 1967.

ORDER ON NOTICE OF MOTION

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(ORIGINAL JURISDICTION)

FEDERAL COURT CIVIL APPLICATION NO: X.1 of 1967

BETWEEN

STEPHEN KALONG NINGKAN .... APPLICANT

AND

GOVERNMENT OF MALAYSIA ... RESPONDENT

(In the matter of Art.4 and Art.128 of the Federal Constitution and In the matter of Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966)

BEFORE: SYED SHEH BARAKBAH, LORD PRESIDENT, FEDERAL COURT OF MALAYSIA

In the Federal Court

No. 4

Order on Notice of Motion.

20th February 1967 - continued.

IN OPEN COURT

THIS 20TH DAY OF FEBRUARY, 1967

O R D E R

UPON MOTION made unto Court this day by Mr. T.O. Thomas of Counsel for the Applicant and Inche Syed Othman bin Ali, Senior Federal Counsel for the Respondent AND UPON READING the Notice of Motion dated 24th January, 1967, the Affidavit of Stephen Kalong Ningkan affirmed on the 13th day of December, 1966 and the Affidavit of Syed Othman bin Ali affirmed on the 15th day of February 1967, AND UPON HEARING Counsel for the parties as aforesaid IT IS ORDERED that leave be and is hereby granted to the Applicant abovenamed to commence proceedings against the Government of Malaysia for declaration of Court that the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, is invalid, and/or that Clauses 3, 4 and 5 of the said Act are invalid on the ground that they are ultra vires the Federal Parliament.

GIVEN under my hand and the Seal of the Court this 20th day of February, 1967.

(L.S.) Sgd.

DEPUTY REGISTRAR,
FEDERAL COURT, MALAYSIA.

No. 5

Petition, with Annexure "T" thereto.

23rd February 1967.

No. 5

PETITION, WITH ANNEXURE "T" THERETO

IN THE FEDERAL COURT OF MALAYSIA

(ORIGINAL JURISDICTION)

FEDERAL COURT SUIT NO. X.1 OF 1967

BETWEEN: STEPHEN KALONG NINGKAN
Evergreen Estate
Nanas Road West
Kuching Sarawak ... Petitioner

and

GOVERNMENT OF MALAYSIA ... Respondent

In the Federal Court

No. 5

Petition, with Annexure "T" thereto.

23rd February 1967 - continued.

PETITION

To the Lord President and Judges of the Federal Court

THE PETITION OF STEPHEN KALONG NINGKAN shows:

1. That the Petitioner was appointed Chief Minister of Sarawak by Instrument under the public seal dated the 22nd day of July, 1963.

2. That on the 17th day of June, 1966, His Excellency the Governor of Sarawak purported to declare that the Petitioner had ceased to hold the office of Chief Minister of Sarawak and, on the same day the Governor purported to appoint Penghulu Tawi Sli Chief Minister in the Petitioner's place.

3. That on the 7th day of September, 1966, the High Court at Kuching in Civil Suit No. K.45 of 1966 wherein the Petitioner was Plaintiff declared and adjudged, inter alia, that "the Plaintiff is and had been at all material times Chief Minister of Sarawak" and granted your Petitioner an injunction restraining the said Penghulu Tawi Sli from acting as Chief Minister of the State of Sarawak.

4. That on the 14th day of September, 1966, on the advice of the Cabinet of Malaysia His Majesty the Yang di-Pertuan Agong proclaimed a State of Emergency in Sarawak, hereinafter referred to as the said proclamation of emergency.

5. That no grave Emergency had arisen in the State of Sarawak which could not effectively be dealt with under the proclamation made by the Yang di-Pertuan Agong and published in the Federal Gazette on the 7th day of September, 1964, by which the King in exercise of the powers conferred on His Majesty by section 47 of the Internal Security Act 1960 did, with effect from and including the 6th day of September, 1964, "PROCLAIM all areas in the Federation (other than the areas already declared to be security areas by our Proclamations made on the 11th day of August one thousand nine hundred and sixty-four and on the 17th day of August one thousand nine hundred and sixty-four under section 47 of the said Act) as security areas".

6. That the said proclamation of emergency was

In the Federal Court

No. 5

Petition, with Annexure "T" thereto.

23rd February 1967 - continued.

null, void and of no effect in that the said Cabinet well knew that no grave emergency existed whereby the security or economic life of Sarawak was threatened.

PARTICULARS

(i) (a) No disturbances, riots, strikes demanding special action took place.

(b) No extra troops, police were placed on duty.

(c) No curfew, travel restrictions or limitations on movement were found necessary.

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

(e) Hostile activities of Indonesia (called Confrontation) had already ended.

(ii) The Deputy Prime Minister Tun Abdul Razak, the then Acting Prime Minister, had by a statement made during a press conference on the 15th September 1966 given the reason for advising the Yang di-Pertuan Agong to sign a proclamation of emergency. The said statement inter alia reads:

"In Sarawak now there are 25 members of the Council Negri out of 42, who have clearly indicated that they have no confidence in the present Chief Minister, Dato Stephen Kalong Ningkan. They have written to the Speaker of Council Negri requesting him to hold a meeting. The Speaker has replied that he has no power to convene this meeting. They have also written to the Chief Minister and the Supreme Council requesting a meeting, and clearly the Chief Minister has stated he is not prepared to hold a meeting. The Governor has also made a request for a meeting of Council to be held but his request is also not being heeded.

"According to the judgment of the High Court of Sarawak recently the Governor has no power to dismiss the Chief Minister who no longer has the confidence of the majority of Council Negri, and that a vote of no confidence in the

Government should be demonstrated at the meeting of the Council Negri. So the Governor has no power to summon a meeting of the Council Negri. Clearly, in circumstances like these we have no choice but to intervene.

"We have decided to take these measures mainly to ensure that democratic practices are adhered to, and we propose to introduce legislation when Parliament meets on Monday to give the Governor power to convene a meeting of Council Negri, and to dismiss the Government or the Chief Minister who no longer enjoys the confidence of Council Negri".

(iii) The Deputy Prime Minister Tun Abdul Razak in a Statement to Parliament on Monday the 19th September 1966 on the situation in Sarawak said: "..... the Cabinet on Wednesday, 14th of September, 1966, had advised the Yang di-Pertuan Agong to proclaim under Article 150(1) of the Constitution a State of Emergency for the State of Sarawak and to summon Parliament so that necessary legislation be passed to deal with the situation".

"Mr. Speaker, Sir, I would like to state 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. As I have explained, the constitution and political position in Sarawak is that the Chief Minister who knows that he does not enjoy the confidence of the Council Negri is duty bound under democractic principles and conventions and the spirit of the Constitution not only to convene a meeting of Council Negri to test members' confidence in him but also to tender his resignation when he has lost their confidence. In the present circumstances, it clearly shows that he does not want to follow these accepted democratic practices. Therefore, it is proposed to introduce a Bill to this House immediately after this to fill a gap or lacuna 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 present Government of Sarawak may be put to test and also the power

In the Federal Court

No. 5

Petition, with Annexure "T" thereto.

23rd February 1967 - continued.

to dismiss the Chief Minister or the Government from office in that Government or that Chief Minister refuses to resign after he has received a vote of no confidence in the Council".

"There, Sir, it can be seen that the measures proposed by the Government are neither abnormal nor drastic. They are measures strictly in accordance with the principle of our democratic Constitution - measures which are designed to secure compliance with accepted democratic principles. If the present Government of Sarawak secures a majority support, then, of course, they carry on with the Government. But if they are defeated by a vote of no-confidence, then following accepted democratic practice, a new Government will take its place which will command the confidence of the majority. There is no suggestion of an administrative take-over, or of government by decree. The democratic process will take its course, and measures adopted to deal with the situation will have the full weight of the authority of Parliament. These measures are to ensure that democratic principles are upheld and adopted to the letter and the spirit of the Constitution".

(iv) That your Petitioner, as Chief Minister and as Chairman of the State Security Executive Committee, assured the Malaysian Cabinet by a telegram sent to the Deputy Prime Minister, Tun Abdul Razak, on the 17th September 1966 that a tense security situation did not exist in the State of Sarawak. The said telegram read:

"May I respectfully draw your attention to what I have already stated publicly. It is ridiculous and absolute nonsense to say that there is at the moment a state of emergency in Sarawak.

"This is merely an excuse to ride roughshod over Sarawak Constitution. I respectfully call on you, Sir, your colleagues in the cabinet and the Federal Government to show sincerity and have best interest of Sarawak at heart by immediately advising the Yang di-

Pertuan Agong to appoint an impartial Commission of Inquiry to come to Sarawak at once to investigate whether there is a state of emergency here before resorting to interference with our State Constitution and Council Negri Standing Orders by giving autocratic powers to the Governor".

(v) Your Petitioner's said public statement above-mentioned was a statement broadcast over Radio Malaysia Sarawak in his capacity as Chief Minister and Chairman of the State Security Executive Committee, after consulting all those concerned with State Security particularly the Commissioner of Sarawak Constabulary and satisfying himself that no tense security situation did exist in the State. The said statement inter alia, read:

"It has come to my attention that certain sections of the public have been led to believe that a tense security situation exists in Kuching.

"A local newspaper has described this as 'a campaign of fear'.

"As Chief Minister and Chairman of the State Security Executive Committee I wish to assure the public that such a situation does not exist. I give this assurance not as a politician but as Chief Minister of Sarawak responsible for the public welfare".

(vi) According to the text of a speech released by the Ministry of Information and Broadcasting as No. 127/11/66 on Monday, November 14, 1966, the Deputy Prime Minister, Tun Abdul Razak said, inter alia, at a dinner given by the Hock Hua Bank at the Sarawak Union Club on Sunday, 13th November, 1966:

"Alliance Executive Council had decided that Dato Ningkan no longer enjoyed the confidence of the Alliance party to remain as Chief Minister. The Alliance party therefore asked him to tender his resignation. Following accepted democratic practices it was the duty of Dato Ningkan to resign".

. . . . . .

In the Federal Court

No. 5

Petition, with annexure "T" thereto.

23rd February 1967 - continued.

"But Dat Ningkan did not want to follow accepted democratic practice and decided to bring this matter to court. This as you know is not strictly a matter for the court. It's not a legal matter, it's a political matter.

"You may be a Chief Minister in accordance with the law, but you may not be a Chief Minister politically. The Court here, interpreting the Constitution, declared that Dato Ningkan was Chief Minister, but 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 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 majority of the members of a Council or Parliament.

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

(vii) That His Excellency the Governor of Sarawak in a letter dated the 17th September 1966 addressed to your Petitioner said:

"You are also aware that the State of Emergency in Sarawak has been proclaimed by His Majesty the Yang di-Pertuan Agong on Wednesday, 14th instant, and that the Malaysian Parliament has been summoned to debate a Bill introduced by the Federal Government in order to ensure that "true democracy is practised in Sarawak and to ensure that the accepted democratic practices are complied with".

"You are aware, I am sure, 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 Council Negi to hold a meeting immediately so that a motion of vote of no confidence against your leadership as Chief Minister of Sarawak can be debated".

7. That the said proclamation was in fraudem legis in that it was made not to deal with 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.

8. That on the 19th day of September 1966 the Parliament of Malaysia purported to pass an Act entitled "The Emergency (Federal Constitution and Constitution of Sarawak) Act 1966", contrary to the Constitution of the Federation of Malaysia, the Constitution of the State of Sarawak and the Agreement Relating to Malaysia.

9. That the Federation of Malaysia came into being as the result of an Agreement known as the AGREEMENT RELATING TO MALAYSIA dated the 9th day of July, 1963, signed by duly authorised representatives of the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore, which is fully set out in Comnd. Paper 2094, printed and published by Her Majesty's Stationery Office, London. The text of the said Agreement is attached to this Petition, marked Annex T.

10. That in particular Article I of the said AGREEMENT RELATING TO MALAYSIA reads: "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". The Constitution of the State of Sarawak is one of the constitutional instruments referred to in the said Article I.

11. That the said AGREEMENT RELATING TO MALAYSIA was since incorporated into and became part of the law of Malaysia and of the United Kingdom by virtue of an Act of the Parliament of the Federation of Malaya known as the Malaysia Act (No. 26 of 1963) and an Act of the United Kingdom Parliament known as Malaysia Act 1963 (1963 c.35), respectively.

12. That the said Malaysia Act (No. 26 of 1963) was enacted by the Parliament of the Federation of Malaya in compliance with the undertaking given by the Government of the Federation of Malaya in

In the Federal Court

No. 5

Petition, with Annexure "T" thereto.

23rd February 1967 - continued.

Article II of the said AGREEMENT RELATING TO MALAYSIA to secure the enactment by the Parliament of the Federation of Malay "An Act for Malaysia" in form set out in Annex A to the said Agreement.

13. That by section 39 of the said Malaysia Act (No. 26 of 1963) Article 150 of the Constitution of the Federation of Malaya was amended by substituting Clauses (5), (6) and (6A) for Clauses (5) and (6).

14. That in the premises the purported amendment of Clauses (5) and (6) of Article 150 of the Constitution of Malaysia by "The Emergency (Federal Constitution and Constitution of Sarawak) Act 1966" is contrary to the AGREEMENT RELATING TO MALAYSIA and the provisions of the Malaysia Act (No. 26 of 1963).

15. That by an Order in Council made by Her Majesty the Queen, known as the Sabah, Sarawak and Singapore (State Constitutions) Order in Council, 1963, by virtue and in exercise of powers in that behalf under Section I of the said Malaysia Act 1963, the Constitutions of Sabah, Sarawak and Singapore set out as Annexes B, C & D, respectively, to the said AGREEMENT RELATING TO MALAYSIA were given the force of law on the 29th day of August, 1963.

16. That whereas Article 90 of the said Constitution of the State of Singapore provided, inter alia, "Subject to the provisions of the Federal Constitution and to the following provisions of this Article, the provisions of this Constitution may be amended by a law enacted by the Legislature", the amendment of the said Constitution of the State of Sarawak was not subjected to the provisions of the Federal Constitution.

17. That furthermore, Article 41 of the said Constitution of the State of Sarawak expressly provided certain special provisions for making an amendment to that Constitution, hereinafter referred to as the entrenched provisions and, included the express prohibition that that Constitution "may not be amended by any other means", unlike the said Constitution of the State of Singapore which includes no such prohibition whatsoever.

18. That your Petitioner never advised the Governor of Sarawak to give his consent under Article 161(E)

(2) of the Federal Constitution (as Governor of the Borneo State concerned), or otherwise, to the proposed amendment/s to the Constitution.

19. That the said Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, was ultra vires the said Parliament, null void and of no effect in that it purported to be passed by virtue of the said Proclamation of Emergency which was null void and of no effect.

20. That alternatively, and in addition, Clause 3 of the said Act was ultra vires the said Parliament null void and of no effect in that it purported to amend the Constitution of Malaysia contrary to Article 161 E(3) of the said Constitution.

21. That alternatively, and in addition, Clause 3 of the said Act was ultra vires the said Parliament null void and of no effect in that it purported to amend the Constitution of the State of Sarawak in a manner contrary to the said Constitution and was therefore ultra vires Article 150 of the said Constitution.

22. That alternatively, and in addition, Clauses 4 and 5 of the said Act were ultra vires the said Parliament, null void and of no effect in that they are ultra vires Article 150 of the said Constitution as amended by Clause 3 of the said act or as unamended because they purport to amend the Constitution of the State of Sarawak in a manner contrary to the said Constitution.

23. That alternatively, and in addition, Clauses 4 and 5 of the said Act were ultra vires the said Parliament, null void and of no effect in that they purport to amend the Constitution of the State of Sarawak in a manner contrary to the entrenched provisions in the said Constitution.

24. That alternatively, and in addition, Clauses 3, 4 and 5 of the said Act were ultra vires the said Parliament null void and of no effect in that they purported to amend the Constitution of the State of Sarawak contrary to the said AGREEMENT RELATING TO MALAYSIA and the provisions of the said Malaysia Act (No. 26 of 1963).

25. That on the 20th day of September 1966 the

In the Federal Court

No. 5

Petition, with Annexure "T" thereto.

23rd February 1967 - continued.

Governor of Sarawak purporting to act under the said Act and not acting on the advice of the Petitioner the Chief Minister of Sarawak as required by the Constitution of Sarawak called a meeting of the Council Negri of Sarawak.

26. That on the 23rd day of September 1966 the said Council met and purported to pass a vote of no confidence in your Petitioner.

27. That on the 24th day of September 1966 the Governor of Sarawak purporting to act under powers conferred by the said Act and contrary to the Constitution of Sarawak purported to dismiss the Petitioner from his position as Chief Minister of the State of Sarawak and purported to appoint the said Penghulu Tawi Sli Chief Minister in the Petitioner's place.

28. That in the premises the said calling, meeting and vote of the Council Negri were null and void and of no effect and the purported dismissal of the Petitioner and the purported appointment of the said Penghulu Tawi Sli as Chief Minister were illegal, null void and of no effect.

29. That from and after the 24th day of September 1966 the said Penghulu Tawi Sli has wrongly and illegally performed the functions of Chief Minister of the State of Sarawak.

The Petitioner therefore prays for:

(a) An Order declaring that the measure known as the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, is ultra vires the Federal Parliament invalid, null and void and of no legal force and effect

alternatively

(b) An Order declaring that Clauses 4 and 5 of the measure known as the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, are ultra vires the Federal Parliament invalid, null and void and of no legal force and effect.

Dated this 23rd day of February, 1967.

(Sgd.) T.O. Thomas
(T.O. Thomas)
Advocate for the Petitioner.

ANNEX "T"

In the Federal Court

No. 5

Petition, with Annexure "T" thereto.

23rd February 1967 - continued.

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

In the Federal Court

No. 5

Petition, with Annexure "T" thereto.

23rd February 1967 - continued.

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(2) 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 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 Governments 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.

In the Federal Court

No. 5

Petition, with Annexure "T" thereto.

23rd February 1967 - continued.

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

No. 6

In the Federal Court

No. 6

Notice of Petition.

(undated)

NOTICE OF PETITION

IN THE FEDERAL COURT OF MALAYSIA

(ORIGINAL JURISDICTION)

Civil Suit No. of 1967

BETWEEN: STEPHEN KALONG NINGKAN
Evergreen Estate
Nanas Road West
Kuching Sarawak ... Petitioner

AND

GOVERNMENT OF MALAYSIA ... Respondent

To the Hon'ble the Attorney-General for the Government of Malaysia

TAKE NOTICE that Stephen Kalong Ningkan of Evergreen Estate Nanas Road West Kuching Sarawak has commenced a suit against the Government of Malaysia.

A copy of the said Petition of the said Stephen Kalong Ningkan dated the 23rd day of February 1967 is attached hereto.

If you wish to defend this suit you are required to cause an appearance to be entered herein at the Central Registry of the Federal Court at Kuala Lumpur within fourteen days of the receipt of this notice. At the same time you should file in the said Registry a note of the name of your solicitor (if any) and of his or your address for service.

Under my hand at Kuala Lumpur, this day of 1967.

.....
CHIEF REGISTRAR
Federal Court of Malaysia
KUALA LUMPUR

In the Federal Court

No. 7

Defence.

28th April 1967

No. 7

DEFENCE

IN THE FEDERAL COURT OF MALAYSIA

(ORIGINAL JURISDICTION)

CIVIL SUIT NO. X. 1 OF 1967

Between

Stephen Kalong Ningkan
Evergreen Estate
Nanas Road West
Kuching Sarawak ... Petitioner

And

Government of Malaysia ... Respondent

DEFENCE

To the Lord President and Judges of the Federal Court. The Defence of the Respondent abovenamed.

1. Paragraphs 1, 2 and 3 of the Petition are admitted.

2. With regard to paragraph 4 of the Petition the Respondent state that 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.

3. Paragraphs 5, 6 and 7 of the Petition are denied. The Respondent states that 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 150(1) of the Constitution of Malaysia was made and published in Federal P.U. 339A dated 14th September, 1966. In any event the question as to whether or not the Proclamation of Emergency is valid is not one in respect of which leave was granted for the purpose of these proceedings and further it is the subject of another proceedings

to wit Borneo High Court Civil Suit No. 88/1966 before the High Court at Kuching in Sarawak and is not within the original jurisdiction of the Federal Court.

4. As to paragraph 8 of the Petition the Respondent admits that the Parliament of Malaysia passed the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 but denies that it was contrary to the Federal Constitution, the Constitution of the State of Sarawak and the agreement relating to Malaysia.

5. Paragraphs 9, 10, 11, 12 and 13 of the Petition are admitted.

6. Paragraph 14 of the Petition is denied.

7. Paragraph 15 of the Petition is admitted.

8. Paragraphs 16 and 17 of the Petition are denied.

9. As to paragraph 18 of the Petition the Respondent states that the concurrence of the Governor of a Borneo State is not required for the passing of the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 which amended the Federal Constitution.

10. Paragraphs 19, 20, 21, 22, 23 and 24 of the Petition are denied.

11. As to paragraph 25 of the Petition the Respondent states that the Governor, in summoning the Council Negri to meet on the 23rd day of September, 1966, was exercising the powers conferred on him under section 4(1) of the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966.

12. Paragraph 26 of the Petition is admitted.

13. As to paragrpph 27 of the Petition the Respondent states that 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

In the Federal Court

No. 7

Defence.

28th April 1967 - continued.

Gazette Notification No. 1790 dated the 24th September, 1966, the Petitioner ceased to be Chief Minister of Sarawak. The Respondent denies that the Governor of Sarawak was acting contrary to the Constitution of Sarawak.

14. The Respondent denies the allegations in paragraphs 28 and 29 of the Petition.

15. The Respondent humbly prays that the Petitioner's prayers be dismissed.

Dated this 28th day of April, 1967.

Sgd.
Attorney-General
For and on behalf of the Respondent
whose address for service is c/o
Attorney-General's Chambers,
Kuala Lumpur.

Filed this 28th day of April, 1967.

Sgd.
Chief Registrar,
Federal Court,
Kuala Lumpur.

No. 8

Affidavit in support of Petition.

9th May 1967.

No. 8

AFFIDAVIT IN SUPPORT OF PETITION

IN THE FEDERAL COURT OF MALAYSIA
(ORIGINAL JURISDICTION)

CIVIL SUIT NO. X.1 OF 1967

BETWEEN: STEPHEN KALONG NINGKAN
74, Evergreen Estate
Nanas Road West
Kuching. ... PETITIONER

AND

GOVERNMENT OF MALAYSIA ... RESPONDENT

A F F I D A V I T

I, Stephen Kalong Ningkan, Malaysian Citizen, of No. 74, Evergreen Estate, Nanas Road West,

Kuching, make oath and say as follows:

1. That I am the Petitioner above-named.

2. That the contents of my Petition dated the 23rd day of February 1967 filed herein are true to the best of my knowledge information and belief.

3. That with particular reference to paragraph 5 of my said Petition I solemnly and sincerely believe that no grave emergency had arisen in the State of Sarawak in September 1966 calling for a new proclamation of emergency, and I was never consulted by the Governor of the State or by the Respondent's Minister/s as to whether any emergency had arisen in the State of Sarawak calling for a new proclamation of Emergency. All powers under the said proclamation of August 1964 and September 1964 were and are still within the hands of the Central Government. From my experience as Chief Minister and as Chairman of the State Security Executive Committee (since it's very inception) I know that all those powers under the said two proclamations made in 1964 were/are sufficient to deal with the communist threat, just as they were sufficient to deal with the threat from Indonesia called confrontation.

4. That I further crave leave to refer to paragraph 6 of my said Petition and to say that:

(a) All the allegations contained in paragraph 6(i) are true to the best of my knowledge information and belief, the sources of my information were those concerned with State Security particularly the Commissioner of the Sarawak Constabulary and I consulted them in my capacity as Chief Minister and Chairman of the State Security Executive Committee.

(b) Extracts reproduced as paragraph 6(ii) from the statement alleged to be made by the Deputy Prime Minister Tun Abdul Razak on the 15th September 1966 were taken from the Respondent's Ministry of Information (Kuching) release headed SITUATION IN SARAWAK, numbered PEN. 9/66/207 (INF). That since then I also got a pamphlet headed STATE OF EMERGENCY IN SARAWAK - REASONS FOR CENTRAL GOVERNMENT ACTION under the name of Tun Abdul Razak bin Hassain,

In the Federal Court

No. 8

Affidavit in support of Petition.

9th May 1967 - continued.

Deputy Prime Minister, Malaysia, dated Kuala Lumpur, September, 15, 1966, published by the Respondent's Department of Information, printed by Kum Printers, Kuala Lumpur, which is also almost in identical words as the press release (PEN. 9/66/207 (INF)) above-mentioned.

(c) The quotations reproduced as paragraph 6(iii) alleged to be from the statement made to Parliament on Monday 19th September 1966 by Tun Abdul Razak, the Deputy Prime Minister, were taken from a release again from the Respondent's Ministry of Information (Kuching) headed TUN RAZAK ON SITUATION IN SARAWAK, numbered PEN. 9/66/257 (PARL), and is identical with the version appearing at pages 9 & 10 of PARLIAMENTARY DEBATES - DEWAN RA'AYAT (HOUSE OF REPRESENTATIVES) - OFFICIAL REPORT - THIRD SESSION OF THE SECOND PARLIAMENT OF MALAYSIA - MORNING 19th SEPTEMBER, 1966.

(d) That my telegram text of which is set out in paragraph 6(iv) was despatched to Tun Abdul Razak, the Deputy Prime Minister on the 17th September 1966 and published in newspapers on the 18th September 1966, including among them "Sunday Tribune", Kuching, of that date.

(e) The public statement broadcast over Radio Malaysia Sarawak and referred to in paragraph 6(v) was published in the press, among them "The Sarawak Tribune" dated Tuesday, the 13th September 1966.

(f) Deputy Prime Minister Tun Abdul Razak's speech referred to in paragraph 6(vi) was released on Monday, 14th November 1966 by the Respondent's Ministry of Information headed TEXT OF SPEECH BY THE DEPUTY PRIME MINISTER, TUN ABDUL RAZAK, AT THE DINNER GIVEN BY THE HOCK HUA BANK AT THE SARAWAK UNION CLUB ON SUNDAY, 13th NOVEMBER, numbered 127/11/66, and

I am prepared to produce to the Court all the above-mentioned documents and the letter from the Governor dated 17th September, 1966, containing the passages mentioned in paragraph 6(vii) of my said Petition.

5. That I wish to say further that Kuching High Court Civil Suit No. K.88 of 1966 mentioned in

paragraphs 5 and 6 of my affidavit dated 13th day of December 1966 filed herein (together with my application for leave to commence proceedings in this Honourable Court) has since been discontinued by Notice of Discontinuance under Order 26 rule 1 dated and filed on the 23rd day of February 1967.

Sworn by the above-named deponent in the High Court in Borneo at Kuching this 9th day of May, 1967 } Sgd. Stephen Kalong Ningkan

Before me,

Sgd. Chew Kui Sang

HIGH COURT
IN BORNEO

CHEW KUI SANG,
Ag. Senior Asst. Registrar,
High Court, Kuching.

In the Federal Court

No. 8

Affidavit in support of Petition.

9th May 1967 - continued.

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No. 9

No. 9

Notes of Argument of Syed Sheh Barakbah L.P.

5th September 1967.

NOTES OF ARGUMENT OF SYED SHEH BARAKBAH L.P.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(ORIGINAL JURISDICTION)

Federal Court Suit No. X.1 of 1967

Between

Stephen Kalong Ningkan .. Petitioner

and

Government of Malaysia .. Respondent

Cor: Syed Sheh Barakbah, Lord President, Malaysia
Azmi, Chief Justice, Malaya.
Ong Hock Thye, Judge, Federal Court.

NOTES OF ARGUMENT RECORDED BY SYED SHEH BARAKBAH, LORD PRESIDENT, MALAYSIA

5th September 1967.

In the Federal Court

No. 9

Notes of Argument of Syed Sheh Barakbah L.P.

5th September 1967 - continued.

Sir Dingle Foot, Q.C., with Thomas O.Kellock, Q.C., and T.O. Thomas Esq. for Petitioner.

Syed Othman with Au Ah Wah Esq. for Respondent.

Sir Dingle:

P.9 - Petition.

Art. 150(1) Constitution (5) (6).

(7) only applies to the Act, not to Proclamation.

Emergency (Federal Constitution & Constitution of Sarawak) Act, 1966.

3 Submissions:

1. That the Proclamation of Emergency made by the Agong was not a valid Proclamation. If that is right the invalidity of the Act would follow.

2. That it is not within the powers of the Federal Parliament to amend the Constitution of Sarawak.

3. That the Federal Parliament can only amend either the Federal Constitution or the Constitution of Sarawak in the manner provided by Articles 159(3) and 161E of the Federal Constitution.

Federation of Malaya Order-in-Council 1957.

Agreement - in pleadings p.23.

Permissible to look at matters leading up to the Statute.

Constitution of Sarawak.

Article 41 - "not be amended by any other means" - not in the Constitutions of other States.

Constitution of Malaysia.

Article 4(2), (3), (4).

Articles 73, 76, 77, 79, 9th Schedule.

Article 71.

Article 80.

Part XI - p. 93.

Articles 149, 150, 151 - Articles aimed at State of Emergency, not to change the Constitution.

Article 159.

Article 161E.

Constitution of Sarawak can be amended by 2/3 majority - but not by any other means.

No power given to Parliament to alter the Constitution of the State, certainly no power to alter Sarawak Constitution.

Stephen Kalong Ningkan's case - (1966) 2 M.L.J. 187, 188, 191.

Emergency (Federal Constitution & Constitution of Sarawak) Act, 1966.

The Speaker is the servant of the House.

Petition 4, 5, 6.

In the defence there was a general traverse - No sufficient or specific denial of the speech by the Deputy Prime Minister.

Article 150 is inept for this purpose.

Act was passed under Article 150.

Proclamation was not a valid proclamation.

How far and on what grounds the Courts can go behind the exercise by a public authority of a statutory discretion and decide whether or not it has been properly exercised.

Agong is Head of State and not a public authority. He is exercising not a prerogative power but a statutory power.

He does so on the advice of Ministers.

In the Federal Court

No. 9

Notes of Argument of Syed Sheh Barakbah L.P.

5th September 1957 - continued.

We are dealing here with Federal Government.

Court has to see that Governments observe the law.

Proclamation of Emergency.

Bhagar Singh v. King-Emperor - (1930-31) 58 L.R.I.A. 169, 171.

King-Emp. v. Benoari Lal Sarma - 1945 A.C. 14, 16, 21.

In these 2 cases there were no words of limitation.

Constitution of India - Article 352.

Failure of Constitutional situation - Article 356.

Nakkuda Ali's case - 1951 A.C. 66, 76.

Arthur Yates & Co. - (1946) 72 C.L.R. 37, 67 (bottom).

The Queen v. Vestry of St. Pancras - (1890) 24 Q.B.D. 371, 375.

The King v. Bd. of Education - (1910) 2 K.B. 165, 175 (2nd para.), 178, 180.

The King v. Supt. of Chiswick Police Station - (1918) 1 K.B. 578, 586, (It seems to me ...), 589.

Bd. of Edn. v. Rice - 1911 A.C. 179.

Eshugbayi Eleko's case - 1931 A.C. 662, 664, 665, 668.

The Queen v. Governor of Brixton Prison - (1963) 2 Q.B. 243, 256, 273, 302.

In re H.K. (An infant) - (1967) 2 W.L.R. 962, 963, 970, 972, 975.

Courts will intervene with the exercise of a statutory discretion by a public authority, (1) where the decision which is arrived at was not made bona fide, (2) where the public authority have committed an error of law, viz. where they have misdirected in the law, (3) where the public authority have taken into account some extraneous or irrelevant consideration.

Submission:

There were both an error of law and irrelevant consideration taken into account.

Bill - Emergency (Federal Constitution & Constitution of Sarawak) Act 1966.

Expl. statement para. 3.

P.12 Record, p.15.

Adjd. till 10 a.m. tomorrow.

Intld. S.S.B.
5.9.67

6th September, 1967.

6th September 1967.

Sir Dingle:

P.16 - letter by Governor.

Clear what was the purpose of the Proclamation and the Act which followed.

2nd submission:

Harris & ors. v. Minister of Interior - (1952)

2 S.A. (Appellate Division) 428, 437.

Gallagher v. Lynn - 1937 A.C. 863, 870.

Ladore v. Bennett - 1939 A.C. 468, 482.

You cannot do indirectly which you cannot do directly - a colourable device will not avail.

Pillai v. Mudanayake - 1953 A.C. 514, 521, 528.

Cobbold's Report of the Commission of Enquiry, North Borneo and Sarawak - 21st June 1962, para.148 pp. 51, 52, Section A.

The Agreement - p. 23 Article III.

Schedule IX Constitution p. 133.

Part V Constitution p. 36.

In the Federal Court

No. 9

Notes of Argument of Syed Sheh Barakbah L.P.

6th September 1967 - continued.

Part VI.

Article 80(3) - consent of the State.

Nowhere in Constitution that Federal Government can interfere with the Constitution of the State.

Article 71(3) - only to protect the Constitution, not to set it aside.

Article 159(3).

Article 161E.

Maxwell's Interpretation of Statutes, 11th Ed. pp. 78, 79, 153, 183, 221.

Article 150 is intended to apply to emergency in the proper sense.

King v. Chapman - (1931) 2 K.B. 606, 609.

Maxwell's Interpretation p. 275.

3rd submission:

Article 159 and Article 161E.

Summary:

1. It is open to the Court to gobehind the Proclamation and to inquire why it was made. In such a case as this where the instrument is sought to be impugned it is the duty of Court to make such inquiry.

2. If the Court finds that the Proclamation was made mala fide or on a wrong view of the law or for some extraneous and irrelevant reason then the Court must declare the Proclamation invalid.

3. If Court finds Proclamation invalid it necessarily follows that the statute is invalid as well. It is not a law at all.

4. Federal Parliament has no power to amend the Constitution of Sarawak.

5. The Sarawak Constitution can only be amended by the Sarawak Council Negeri which represents the

people of Sarawak and in the manner laid down by the Sarawak Constitution.

6. Even if contrary to my earlier submission it is open to the Federal Parliament to amend the Constitution of Sarawak that can only be done by Articles 159(3) and 161E.

7. If we are of opinion there is any repugnancy or ambiguity in the Articles of the Constitution such repugnancy or ambiguity must be resolved in favour of the Petitioner.

Syed Othman:

No Court of law can call any evidence to show that the Agong was acting in bad faith. Court to assume that Government is acting in best interest of the State and to permit no evidence to be adduced otherwise.

All authorities quoted relate to delegated authorities. The proclamation of Emergency does not fall under this category.

P. 35 para 3.

P.U. 339A - Agong satisfied with the existence of Emergency and Court cannot go behind it.

Question is whether Agong was satisfied.

Nothing in Petition to say that Agong was not satisfied.

Court should concern itself with whether Agong was satisfied. No mention in the Emergency Act of removal of the Petitioner from office.

Section 3 of Emergency Act.

Sections 4 and 5.

The Act did not contemplate Petitioner at all.

Council Negeri Debates Report.

P.18 Report.

Full complement of House is 42.

In the Federal Court

No. 9

Notes of Argument of Syed Sheh Barakbah L.P.

6th September 1967 - continued.

P.15B.

This is a matter of party discipline. Legally there is nothing wrong with this remark.

Paras 5 & 6. Petition.

Article 128.

Proclamation of Emergency cannot be categorised as a law.

Sovereign Act.

Article 150 does not envisage the Proclamation of Emergency being justifiable in the Court of Law. 10

The judge is the Agong. Court has no jurisdiction to inquire.

Robinson v. Minister of Town & Country Planning - 1947 K.B. 702, 712, 720.

In re An application by Beck & Pollitzer - (1948) 2 K.B. 339, 345.

Liversidge v. Anderson - 1942 A.C. 206, 278.

It is not for Court to inquire as to how and why the Agong was satisfied.

Zamora's case - (1916) 2 A.C. 77, 78, 106. 20

The New Commonwealth and Its Constitution by S.A. de Smith p.192.

Adegbenro v. A-G of the Federation (1962) 11 C.L.Q. pp. 920-933.

Nigerian Constitution by O.I. Odumosu p. 346.

Chandler v. Dir. of Public Prosecutions - (1962) 3 A.E.R. 142, 146, 147, 150, 152, 157, 160.

Basu - Commentary on Const. of India Vol. V. pp. 167, 169. 4th Ed. - Article 352.

3rd ground: 30

Article 150(2) and (3).

The Court would be usurping the powers of the two Houses by declaring the Proclamation invalid.

Safeguards provided by Article 150(3).

1. Court has no jurisdiction to determine whether or not the Proclamation is invalid.

2. If Agong before issuing the Proclamation has declared that he is satisfied that the state of emergency exists it is not for the Court to inquire as to whether or not he should have been satisfied. Court must accept the Proclamation as issued by the Agong.

3. Sufficient safeguards have been provided for in the Constitution in that it is subject to annulment by resolution by 2 Houses.

4. Sections 3, 4 and 5 of Emergency Act are intra vires the Federal Parliament.

Constitution of Malaya - Article 150(5) p.99 (Malayan Constitutional Documents) - refers to State List.

Compared with Article 150(5) Federal Constitution.

Articles 73, 74, 77.

Federal Parliament may make laws on any matter under the Emergency except under Article 150(6A).

In normal circumstances regarding Borneo States consent is required - Article 161E(2)(c).

Consultation - Articles 161A(3).

"Notwithstanding anything in this Constitution" means no consent, no consultation required.

Eng Keock Cheng v. P.P. - (1966) 1 M.L.J. 18, 20.

Article 160(2) - Definition of "law".

Article 41 (Sarawak Constitution).

Schedule 8 (Federal Constitution) Sec.19 p.131.

Federation of Malaya Agreement 1957 Clauses 3 p.11 (Malayan Constitutional Documents).

In the Federal Court

No. 9

Notes of Argument of Syed Sheh Barakbah L.P.

6th September 1967 - continued.

Article 4 (Federal Constitution) Article 75.

Article 41 (Sarawak) - void - inconsistent with Article 150.

No inconsistency with the Agreement.

Adjd. till 10.00 a.m. tomorrow.

Intld. S.S.B.
6.9.67

7th September, 1967.

7th September 1967.

Sir Dingle:

South African case: Wrong passage read.

Correct passage is at p. 470C.

Liversidge v. Anderson - 1942 A.C. 244 (Lord Aitkin).

Authority of Agong cannot be challenged in Court.

After Proclamation Parliament can legislate anything without limitation - (submission by S. Othman).

Such Proclamation not justifiable.

Compared with Declaration of War.

Declaration of War is an Act of State which the Court cannot challenge.

Vol. 7 Halsburys p. 279 paras 593, 594, 595, 597.

Here we are dealing with the exercise of a statutory power conferred by an Article of the Constitution.

"Satisfied" - Act upon the advice of his Ministers.

Was Agong properly satisfied?

Party discipline.

Article 128 Constitution.

Authorities quoted.

Judge decides the law - Minister the policy.

Robinson's case - p. 717 (Judgment of M.R.).

Beck & Pollitzer - (1948) 2 K.B. 339, 345.

Liversidge's case.

Zamora's case.

Nigerian Constitution - precise Article not quoted.

Chandler's case - (1962) 3 A.E.R. 157.

Basu's Commentary on the Constitution of India.

"Sarawak Constitution is the offshoot of the Federal Constitution".

9th July Agreement 1963.

29th August Order-in-Council 1963.

31st July Malaysia Act 1963.

Whether it is open to the Federal Parliament to invade the province of the State by Proclamation. No mention in the Federal Constitution regarding amendment of the State Constitution.

Oyama v. State of California - 332 U.S. 683.

Sei Fuji v. The State - 217 Pacific Rep. 2nd Series 481.

Article 150(5).

Consent - Articles 2, 38(4), 161C, E.

C.A.V.

Sgd. S.S. Barakbah
7.9.67.

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1st December, 1967.

1st December 1967.

T.O. Thomas for Petitioner.

Syed Othman with Ah Wah for Respondent.

In the Federal Court

Judgments delivered by L.P., C.J. Malaya and Ong F.J.

Order: Petition dismissed.

No. 9

Notes of Argument of Syed Sheh Barakbah L.P.

1st December 1967 - continued.

Sgd. S.S. Barakbah
1.12.67.

No.10

Notes of Argument of Azmi C.J.

5th September 1967.

No. 10

NOTES OF ARGUMENT OF AZMI C.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(ORIGINAL JURISDICTION)

FEDERAL COURT SUIT NO. X. 1 of 1967

Between

Stephen Kalong Ningkan ... Petitioner

and

Government of Malaysia ... Respondent

Coram: Barakbah, Lord President, Malaysia,
Azmi, Chief Justice, Malaya,
Ong Hock Thye, Judge, Federal Court.

NOTES OF ARGUMENT RECORDED BY AZMI, CHIEF JUSTICE, MALAYA

Kuala Lumpur, 5th September 1967.

Sir Dingle Foot, Q.C.
Thomas O. Kellock, Q.C., and } for Petitioner
T.O. Thomas

Tuan Syed Othman bin Ali and
Au Ah Wah for Respondent.

Dingle Foot: Parliament passed Act.

On 22.7.63 Petitioner appointed Chief Minister of Sarawak.

17.6.1966 the Governor declared Petitioner ceased to hold office and appointed another in his place.

Petitioner instituted proceedings in High Court, Kuching.

On 7.9.66 High Court declared Petitioner still Chief Minister.

14.9.66 - acting on advice of Cabinet, the Yang di-Pertuan Agong, declared State of Emergency in Sarawak - P.U. 339A.

On 20.2.1967 the Lord President made order under Article 4 granting leave for declaration Emergency (Federal Constitution and Constitution of Sarawak) Act 1966, invalid.

Act issued under Article 150 of Constitution.

Read Article 150 (1)

(5) as it stood before amendment.

(6) as it stood after amendment.

(6A)

(7)

Refer - Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 - page 545 Acts of Parliament 1966.

Clause 2 (2) - cloaked with absolute power.

Clause 3 (1)

(2)

Clause 4 (1)

(2)

(3) Speaker ceased to be servant of Council not of Government.

(4)

(5)

In the Federal Court

No.10

Notes of Argument of Azmi C.J.

5th September 1967 - continued.

My submissions are 3 in number.

(1) That the Proclamation of Emergency made by the Yang di-Pertuan Agong not a valid proclamation.

If that is right invalidity of the Act would follow.

If Court against me, I submit next point.

(2) It is not within power of Federal Parliament to amend Constitution of Sarawak.

If I am wrong, then I would make a third submission.

(3) Federal Parliament can only amend Federal Constitution or Constitution of Sarawak in the manner prescribed by Article 159(3) and 161(E) of the Federal Constitution.

Refer:-

(1) Federationoof Malaya Independence Order in Council 1957.

(2) Article 150 reads "by war or external agression or internal disturbance" occurred in original Constitution but not in amended article 150.

Refer to 3 Lists.

Read agreement relating to Malaysia - page 23 of Pleading.

Article I of Agreement relating to Malaysia.

Article II of Agreement relating to Malaysia.

Article III of Agreement - I will refer again to it.

Federation of Malaysia Act was passed in Malaysia and also in U.K.

Refer to Constitution of Sarawak.

Article 1
5
6
7
10

Part II - 1

Article 13

14(c)

15

Part III - Oath of Speaker or member swears allegiance to Constitution.

Article 24 (1).

Article 41 - Amendment of Constitution of Sarawak - "may not be amended by other means"

These words do not appear in the Constitution of Penang, Malacca or Singapore.

Refer Constitution of Malaya.

Article 4(2)

(3)

(4) - Under this Lord President granted leave to bring this action to the Federal Court.

(73) Extent of Federal and State Laws.

(74)

(76) - (2) & (3) "Mala fide"

(77) - residual power of legislation.

(79)

Refer 9th Schedule - Lists - p.133.

State list - Extensive

Item 6

Item 7 - Machinery of State Government - exclusively reserved to the State.

List IIA - Borneo State concurrent List.

In the Federal Court

No.10

Notes of argument of Azmi C.J.

5th September 1967 - continued.

Article 80 - Distribution of Executive power.

80(1)

80(2)

80(3) resolution of Legislative Assembly of State.

81 - Obligation of States towards Federation.

Article 71 - Marginal note.

(3)

8th Schedule - p.126.

Duty to preserve State Constitution and not take any power of State under State Constitution.

Article 149(1) There must be some kind of violence.

Article 150(1)

Article 151

Articles 149 - 151 grouped together.

Article 151 not apt for use to amend State Constitution.

If desired to make change it is necessary to go to Article 159.

Read Article 159 - page 100.

Article 161(E) - safeguard.

2(c) - important.

3.

Two types of federation namely - Canadian - residual power to Federation.

Australian - residual power to State.

Constitution of Sarawak - Article 41 2/3 majority in Council Negeri.

Parliament can alter Sarawak's constitution only by

consent of Governor of the State except in certain case - amendment of Constitution, a State matter.

Nowhere in Malaysian Constitution which gave power to Federal Parliament to alter the State Constitution. If that is intended, that would have been said in clear and express terms. No power to alter State Constitution - not power to alter Constitution of Borneo State which this Emergency Act purports to do.

It makes certain extremely important changes in themachinery of Government of Sarawak. Merely to look at facts in order to see whether there is a valid proof of emergency.

Facts set in judgment of Acting Chief Justice - reported in (1966) 2 M.L.J. 187.

Pages 187 - 188

Page 191 - bottom.

I am not asking this Court to express any view on the facts.

After that case Kalong Ningkan went to office.

Then the Emergency Act 1966 was passed.

Refer to petition - paragraphs 1, 2, 3 and 4.

Refer Article 138 of Constitution.

Read particulars.

Syed Othman objected to reference to statement made during Press conference etc.

(It was agreed Sir Dingle proceed with his address but Syed Othman may in his reply comment or object).

Paragraph 18 -

Following paragraphs matter of opinion.

Refer Rule 21 of Federal Court (Original and Consultative Jurisdiction).

I submit denial by Respondent not sufficiently specific.

In the Federal Court

No.10

Notes of Argument of Azmi C.J.

5th September 1967 - continued.

Read affidavit of Kalong Ningkan - page 35.

Refer Emergency Act 1966 Bill - explanatory statement - giving reasons for the Bill.

It is not suggested that either the speeches or that there was any basis, that security or economy was threatened.

Reason for the making of law that was clear.

Government resolved to Article 150.

I submit that was inept.

I submit the amendment of Sarawak Constitution cannot be valid by applying Article 150. 10

If the proclamation was invalid then the Act fell to ground.

Question of law: How far and on what ground Court can go behind the exercise by public authority of a statutory discretion and whether or not it has been properly exercised.

I submit His Majesty is not ordinary public authority but a head of state.

I submit this makes in different form he is exercising not a prerogative power but a statutory power, and he did so on advice of ministers. 20

It is a responsibility of Court that Government like anyone else observe the law.

Bhagat Singh v. The King Emperor - 58 Indian Appeals (1930-31) 169, page 171.

12.45 p.m.

Adjourned to 2.30 p.m.

Sd. Azmi.

Sir Dingle Foot: 30

Refer King Emperor v. Benorari Lal Sarma (1945) A.C.15

Read headnote.

Sec. 72 of the Government of India Act 1935.

Page 21 - "The Governor-General pin pointed ....."

Page 22 - "but a threat ..... sole judge."

No words of limitation.

"emergency"

Here words of limitation.

Usual for Acts now to have such words of limitation e.g. The Indian Constitution Act 352.

Separate provisions - Article 356 well observing these provision in Indian Constitution.

We have words of limitation in Article 150 in security and economy - I submit open to Court to consider security and economy is in danger.

Liversidge vs. Anderson 1942 A.C. 206

Nakkuda Ali vs. Jayaratne 1951 A.C. 76

Mutual passage at page 76.

"It would be impossible ....." page 77.

Refer Arthur Yates & Co. Proprietary Ltd. v. Vegetable Seeds Co. & Others - 1946 72 Commonwealth Law Report 37.

Headnotes.

Latham C.J. page 67 "The learned judge read relevant ..... financial interests of the Committee."

"If a power is conferred in terms which require it to be used only for a particular purpose, then the use of that power for any part purpose cannot be justified."

The Attorney-General for Alberta v. Attorney for Canada 1939 A.C. 117.

The purpose of the legislation is to be ascertained ..... administrative acts ..... for that purpose ..... for some ulterior object."

In the Federal Court

No.10

Notes of Argument of Azmi C.J.

5th September 1967 - continued.

I submit concise summary of the law is applied in the Commonwealth.

Many examples of such intervention that decision making power.

It is clear that if this power extended or wrongly exercised the Court would intervene.

Not necessary mala fide to mean wicked.

Public authority will in the best intention ..... Queen v. Vestry of St. Pancras - 1890 24 Q.B.D.371. Headnotes;

Page 375 Lord Esher M.R. "... exercise that discretion."

The King v. The Board of Education (1910) 2 K.B. 165. Headnote.

"I have carefully considered the ..... The appeal must be dismissed with costs." page 175.

page 178,

page 179,

page 180.

This case went to the House of Lords - 1911 A.C. 179.

The King v. Superintendent of Chiswick Station - 1918 1 K.B. 578 Ex parte Sacksteder.

Headnote:

page 586 "It seems to me ..... valid on face of it."

Warrington p. 589 "Can the Court in this case ...."

Eshugbayi Eleko v. Officer Administering the Government of Nigeria. 1931 A.C. 662.

Headnote.

Page 664 - provision of the Order - bottom "This order

page 668 "The appellant .....

page 669 "Counsel for the Government .....

page 670 "The Government ..... solely under executive ..... (to page 671)

Page 672 "It is only necessary .....

Queen v. Governor of Brixton Prison ex parte 1963 2 Q.B.D. 243

Headnotes:

256 - "The power of the Court .....

Page 273 "Then I found a formidable ... more difficult".

Page 302 "So then we have in this case .. exercise lawfully or not."

I submit it applies to this case as any other.

It is open to this Court to inquire whether purpose lawful or unlawful purpose.

Imrie H.K. an infant - 1967 2 W.L.R.962.

Headnotes:

page 970 "The Court was referred to ... 972 - Top

Blaine J. p. 975

It is duty of Court to interfere.

In my submission it answers this. The Court will intervene with exercise of discretion by a public authority (as a generic expression):

(1) When the order which is made or decision made is a sham.

(2) When public authority had committed an error of law i.e. when they have misdirected themsleves (St. Pancras' case).

(3) When public authority had taken into account some extraneous or irrelevant considerations.

In the Federal Court

No.10

Notes of Argument of Azmi C.J.

5th September 1967 - continued.

My submission, both error of law and extraneous matters taken into consideration. See explanatory notes of Bill - paragraph 3 - no evidence Government broken down -

My submission it is clearly extraneous consideration.

Article 150 read with 149 and 151.

See also Deputy Prime Minister's speech in Parliament - page 12.

Later he said at dinner -

Clear from these statement that it was intended to challenge the judgment of the Court - not in the usual way by way of appeal.

Look at the words of limitation Article 150 - "Whereby the security or economic ....."

Adjourned to 10 a.m. tomorrow.

6th September 1967.

6th September 1967.

Counsel as before.

Sir Dingle Foot:

Refer to letter at page 16 of Pleadings - paragraph VII - this makes it clear purposes of the Act.

(2) That within power of Federal Parliament to amend Constitution of Sarawak.

Alternatively even if it was within, it can do so under Article 149 read with 161(E).

Refer to following authorities

(1) Harris & Others v. Minister of Interior & Anor.

1952 South African Appellate Div. 428.

Headnote.

p.437 "The Supreme Court has the power to inquire into the question whether an alleged act ..... not a law."

(2) Gallagher v. Lynn 1937 A.C. 863.

Headnote:

page 870 "These questions .....

(3) La Dore & Others v. Bennett & Others - 1939 A.C. 468.

page 482 "It was suggested ..... colourable device will not avail.

(4) Pillai v. Mudayapan 1953 A.C. 514

page 521 - "The next step ....." to bottom of page.

page 528 "In these circumstances ..... The principle that a legislature cannot do indirectly what it cannot do directly has always been recognised by their Lordships' Board, ..... had no power to achieve directly." top of page 529.

Refer to Cobold report reported on 21.6.1962 paragraph 148 at page 51.

Section " - Recommendation on certain general matters.. ..... belongs to State".

The above corresponded to our State Constitution.

Refer to Article III of Agreement relating to Malaysia.

Refer to Constitution - Extent of Federation - is there a division of sovereignity and the Court to decide where division lies.

Court must step in to make the decision to prevent any abuse of power by Central Government, e.g. see the9th Schedule of Federal Constituion and the State List - I have made submission on this.

Look at the section of Constitution.

Part V.

Article 71(3) - I have made my comment on that.

In the Federal Court

No.10

Notes of Argument of Azmi C.J.

6th September 1967 - continued.

(4)

(5)

(7)

(b) These provisions exactly recommendation of Cobold report.

Article 73 (1), (2), (3)

Article 76 (1) - Power of Parliament to legislate for States in certain cases.

Article 77 - residual power lies with State.

Article 80(4)

Nowhere in Constitution which says Parliament may make amendment to Constitution of any State.

(Ong J. asks him to refer again to Article 71(3))

Article 161E - giving effect to Cobold Report.

161E (2) (c).

(Governor has to act as adviser of his Council).

Parliament may only legislate for State according to provisions of the Constitution.

Apparently what is being said is Article 150 enables Federal Parliament may tear up the Constitution.

Submit S. 150

11th Edition Maxwell Interpretation of Statutes pages 78 - 79 and pp. 153 and 154.

page 221 - "When language ..... sentence."

It would be manifest absurdity if Parliament may amend State Constitution.

I submit it was never the intention of Article 150 to be invoked for purpose of amending State Constitution.

I submit King v. Chapman 1931 2 K.B. 609

"Much argument has taken place and may yet take place ..... explains itself."

page 275 "Statutes which encroach on the rights ...

This encroachment into the rights of people of Sarawak therefore if there is any doubt Court ..... (?)

Third submission

Article 159 read with Article 161.

(1) It is open to Court to go behind proclamation to inquire as to reason why it was made. When instrument is sought to be impugned it is duty of Court to make such inquiry.

(2) If Court finds that the proclamation was made mala fide or on wrong view of the law or for some extraneous, irrelevant reason, then the Court must declare proclamation invalide.

(3) If the Court finds proclamation invalid, it follows that the Statute involved as well.

(4) Federal Parliament has no power to amend the Constitution of Sarawak.

(5) The Sarawak Constitution can only be amended by the Negeri Council of Sarawak which represents people of Sarawak and in manner laid down by the Sarawak Constitution.

(7) If the Court is of opinion that there is any repugnancy or ambiguity in the Articles of the Constitution, any repugnancy or ambiguity must be resolved in favour of the petitioner.

Short Adjournment.

Sd. Azmi.

Counsel as Before

Syed Othman: Allegations of Petitioner that Act of 1966 based on 3 grounds.

In the Federal Court

No.10

Notes of Argument of Azmi C.J.

6th September 1967 - continued.

(1) Act was made of a proclamation null and void.

(2) Provision of Act in Secs. 3, 4 and 5 ultra vires as they offend Article 159 and 161E and clause 2 C of the Constitution.

(3) The Act was against the Malaysia Act.

1st point:

No Court of Law can make an issue by calling in evidence to show whether or not bad faith. In act in nature of proclamation of emergency or declaration of war issued in accordance with the Constitution it is incumbent on the Court to assume Government acting in best interest of the State and not to permit any evidence to the Contrary.

Abuse of power relating to delegated legislation.

Paragraph 3 of Affidavit - page 35.

Allegation of bad faith.

Yang di-Pertuan Agong satisfied this was necessary, Court cannot go behind.

No allegation Agong not satisfied.

Reads paragraph 6.

Paragraph 7, alleges that the said proclamation was .....

No mention purpose was to remove Chief Minister.

S.4 and 5 relate to procedurial matters.

Council to demonstrate it had no confidence in the petitioner even after he refused to resign.

Sarawak Order in Council.

Refer page 15 (VI)

Refer to party discipline.

Article 128 of the Federal Constitution.

A proclamation cannot be categorised as a law.

It is a sovereign act of the Agong.

Article 160(2).

Article 150 does not envisage a proclamation of emergency should be justiciable in Court of law.

No reasonable grounds required.

Judge of fact is Yang di-Pertuan Agong.

Still less can anyone dispute it.

Refer: Robinson v. Minister of Town and Country Planning - 1947 K.B. 702.

page 712 "I now turn to matters to which the minister must be satisfied."

page 720 "It would need to my mind clear ..... in a Court of Law."

Re Beck Pollitzer's application (1948) 2 K.B.D. 330 Head notes.

page 345 "It has long been held that the Court had no jurisdiction to consider whether the minister was .....

Liversege v. Anderson 1942 A.C.

Page 278 bottom "My lords ..... All these are obiter.

Power given to Ministers with carte blanche - here necessary to control.

But in case of security of States I submit Court must accept proclamation

Agong was satisfied.

Therefore not up to Court to inquire as to how and why he was so satisfied.

The sole judge under Article 150 is Yang di-Pertuan Agong.

The Zamaras case - 1916 2 A.C. 77

page 78 - fact.

In the Federal Court

No.10

Notes of Argument of Azmi C.J.

6th September 1967 - continued.

page 106 - "On the whole question ..... in public."

Adjourned to 2.30 p.m. Sd. Azmi

Counsel as before

Syed Othman: In "Commonwealth and its Constitutions" by De Smith page 192 "The question whether the situation justifies the declaration of a state of emergency is non justifiable .....

Adegbenrow v. Attorney of Federation - 10

11 I.C.L.Q. pages 920 - 933.

Nigerian Constitution - by O.I. Odumosu M.A. D. Ph. at 346 "Parliament may at any time make such laws for Nigeria ... state of emergency exists." This method in Nigeria is different therefore it was not necessary to get a resolution by Parliament before.

Chandler v. Director of Prosecutions -

1962 (3) All E.R. 141. 20

F - page 146 - "who then is to determine what is and what is not prejudicial to public safety ..... be obtained."

D - page 147 "The Act must read as a whole ... to the present case."

page 150 (bottom) "The appellant ..... should be different.

page 152 D - "In China Navigation v. Attorney-General .....air field".

page 157 - G "The effect ..... 30 (evidence is one person is not satisfied).

H. to E. "Question of defence policy ... prejudicial to the State."

Refer to Basu's Commentaries (4th

Edition Vol V)

Read Article 132

page 169 - commentaries.

3rd Ground

Refer Clauses (2) & (3) of Article 150.

Crucial requirement is placed before House of Parliament.

No resolution.

It is up to Parliament to say against it - safeguard.

Second - Two Houses of Parliament to amend the proclamation.

If the Court annuls the proclamation it would be usurping the functions of the two houses.

I submit Court has no jurisdiction to determine.

Whether proclamation is invalid by reason of Article 128 because this Court only to determine validity of a law.

If the Yang di-Pertuan Agong declares he is not satisfied that a state of emergency exists it is not for this Court to inquire as to whether or not he should be satisfied. Court must accept proclamation.

Thirdly: Sufficient safeguard has been provided for in the Constitution and it is subject to annulment by the two houses.

What has been inquired into by Parliament cannot be inquired into by the Court.

2nd allegation of Petition - s. 3, 4, 5, of Emergency Act are ultra vires Parliament.

I submit the provisions are intra vires the Parliament. Question whether it should issue under Article 159.

In the Federal Court

No.10

Notes of Argument of Azmi C.J.

6th September 1967 - continued.

He had acted under Article 150(5) Section 3 of the Act.

Article 150 - Clause 5.

Also 20 and 23 Petition.

Article 150 (5) - crucial words "Subject to Clause (6A).

"Notwithstanding anything in this Constitution".

Refer to Malaysia Act.

page 10.

page 29 - Clause 39 (1)

150(5) amended in order to extend power of Parliament - before it was confined to any matter in State List - not now to any matter.

Some of legislative power by the Constitution therefore both of Federation and State.

Article 73.

Distribution of Executive powers - Article 80.

Except limited by Clause 6A of Article 150 - Parliament may make laws on any matter.

In normal time, Article 161E (2) (c).

Consultation - 161A - Clause (3) specially for Borneo States may be for Malaya.

Words "Subject to Clause (6A)" "Notwithstanding anything in the Constitution" - Parliament may take authority in the State - extended to relate to consent, concurrence of the Borneo States therefore Parliament not fettered by Articles 161, 161C and 161E.

The only shackle is Clause 6A of Article 150.

Refer to Eng Keock Cheng v. Public Prosecutor - 1966 1 M.L.J. 19.

Page 20 - left column - "In this connection it was emphasised ..... provided for in paragraph (97)".

"If this argument is based ..... written Constitution."

Articles 73 and 74 - "laws" - page 103.

"Written Law" - page 105

During emergency Parliament can amend any Constitution of any State if it wants to.

Sir Dingle Foot refers to Article 41 of Sarawak "may not be amended by any other means".

Offshoot of S. 19 - page 131.

S. 19(3) found there.

Refer to Penang and Malacca.

See Malayan Constitutional documents - show why Penang and Malacca.

Johore's Constitution was same as Sarawak.

Article 41 of Sarawak refer words "but may not be amended by any other means".

Found also in Kedah Constitution.

Further, Article 4(1) of Federal Constitution.

Article 75 -

Therefore Article 41 of Sarawak is inconsistent with Article 150.

Article 150(5) prevails.

In the Federal Court

No. 10

Notes of Argument of Azmi C.J.

6th September 1967 continued.

I therefore submit all sections of the Emergency Act are intra vires and legally enacted.

No inconsistency between the Malaysia Act and the Malayan Agreement.

Petitioner is not a party to the Agreement though a Chief Minister.

This Court has no power to hear complaints of breaches of the agreement.

4.15 p.m. Sd. Azmi

Adjourned to 10 a.m. tomorrow.

7th September 1967

Counsel as before: 7th September 1967

Sir Dingle Foot. I wish to correct a matter Page 470 - "Harris & Ors. v. Minister of the Interior & Anor. (1952) 2 S.A. 428

"To say ..... country".

Refer to Liversidge vs. Anderson - 1942 A.C. 206 page 244.

Arguments under 2 heads:

(1) Proclamation of Emergency is not justifiable. If Agong says he is satisfied no Court may inquire into it.

(2) After a proclamation of emergency Parliament can legislate on any matter subject to 6A.

We have here a Federal Constitution and State Constitution drawn up - position of rulers, holding of election ...

All these become meaningless if my learned friend is right.

Proclamation of Emergency, my learned friend said was justifiable (?) e.g. Article 96.

He compared declaration of emergency with declaration of war.

A proclamation of war is an act of State where it relates between nations.

See Halsbury Vol. 7 (3rd Edition) page 279 paragraph 593.

Paragraphs 594, 595

1906 1 K.B. 613 C A 639 paragraph 596 Salaman v. Secretary of State in Council of India.

Here you are dealing with exercise of statutory power by a particular Article of the Constitution.

Refer "satisfied" he said Agong himself must be satisfied except in certain cases, he must act on the advice of his ministers.

Question: Were there grounds on which he was satisfied?

Refer to party discipline - wholly improper reason - mala fide.

Article 128 of Constitution -

Open to Court to inquire into procedure.

All authorities cited by my learned friend refer to acts of Ministers - matter of policy.

Robinson v. Minister of Town and Country Planning - 1947 K.B. 702.

page 717 - "The inquiry is only a step in the process which leads to the result ..... overstepped the limits of his statutory powers, as for example .....do not exist."

I submit words extremely apt in this case.

Refer to Beck and Pollitzer - 1948 2 K.B. 339 comments at page 345

"It has long been .....

This case is not authority for saying Court

In the Federal Court

No. 10

Notes of Argument of Azmi C.J.

7th September 1967 continued.

cannot get behind him.

Refer - Liversidge v. Anderson Radcliffe -

Nakuda's case

Liversidge case - whether Home Secretary to be compelled to disclose - could not be compelled to give his reason.

Similar decision in Zamara - prize case - question whether Government entitled to requisition certain goods - I submit none of the authority help my learned friend.

Refer to Chandler v. D.P.P. 1962 3 All E.R. 142

I remind p. 157 E "In the Court of Criminal Appeal .....

Page 158 D - The Courts will not review the proper exercise of discretionary power but they will refer to Court excessive abuse.

Basu's Commentaries

Only one authority cited 1945 Madras Law Journal.

Refer - safeguards -

No reason to have two controls.

Refer State Constitution - offshoot of Federal Constitution.

It cannot be said that these constitutions are the offshoots of the Federal Constitution.

Refer 1966 M.L.J. Eng Keock Cheng v. Public Prosecutor 2nd Column p.20 - refer to passage.

Question here how far we can invade into rights of persons.

Nothing about State rights here.

Nothing in Federal Constitution to say in so many words that Parliament may amend the State Constitution.

I rely on Article 3 of Agreement.

Refer (1) Ovama v. State of California (1947) 332 U.S. 633.

(2) Seifuji v. State - 217 1910 Pacific Reports 2nd series.

Refer Constitution - Article 150 (5) - "notwithstanding ... in the constitution."

If it is contended this power may be used in order to abrogate the Constitution or rights of State, no doubt it would have said so. Words "or constitution of Sarawak" would have been inserted in the clause. "Any matter" there, must mean any matter within their own competence.

Read Article 38 (4) - "No law directly affecting privileges, position, honours etc. of rulers may be passed without consent of Conference or Rulers - safeguard of the Rulers.

Read Article 161E.

Very important safeguard of constitutional position of Borneo States.

All matters referred in this clause are not State matters as shown in 9th Schedule of the Federal Constitution, which gives lists of subject matters upon which Parliament and State Legislature may respectively legislate and also concurrent list.

Nothing even with consent of Governor of Sarawak entitles Parliament to alter Constitution of Sarawak.

Parliament may legislate by 2/3 majority all matters within State rights to legislate, for example in reference to land.

Read clause 150(5) - necessity of getting consent or consultation disappears for the

In the Federal Court

No. 10

Notes of Argument of Azmi C.J.

7th September 1967 continued.

time being whilst emergency legislation in force.

Nothing in this clause that gives power to Parliament to invade sphere of States - to alter the State Constitution.

11.25 p.m.

C.A.V. Sd. Azmi.

1st December 1967

1st December 1967

Coram: Barakbah, Lord President, Malaysia,
Azmi, Chief Justice, Malaya,
Ong Hock Thye, Judge, Federal Court.

T. Thomas for Appellant,

Syed Osman bin Ali with Mr. Ah Ah Wah for Respondent.

Application dismissed. Sd. Azmi.

NO. 11

In the Federal Court

No. 11

Notes of Argument of Ong Hock Thye, F.J. 5th September 1967

NOTES OF ARGUMENT OF ONG HOCK THYE, F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(ORIGINAL JURISDICTION)

Federal Court Suit No. X.1 of 1967

B E T W E E N:

STEPHEN KALONG NINGKAN Petitioner

- and -

GOVERNMENT OF MALAYSIA Respondent

COR: Syed Sheh Barakbah, Lord President, Malaysia, Azmi, Chief Justice, Malaya, Ong Hock Thye, Judge, Federal Court.

NOTES OF ARGUMENT RECORDED BY ONG HOCK THYE, F.J.

Tuesday 5th September 1967

Sir Dingle Foot, Q.C., with Thomas O. Kellock, Q.C. and

T.O. Thomas Esq., for Petitioner.

Syed Othman with Au Ah Wah Esq. for Respondent.

Sir Dingle:

22.7.'63 Petitioner appointed Chief Minister.

17.6.'66 Governor declared he ceased to be C.M. and appointed another.

Proceedings in High Court, Borneo.

7.9.'66 Harley, Ag. C.J. gave judgment.

In the Federal Court

No. 11

Notes of Argument of Ong Hock Thye, F.J. 5th September 1967 continued.

14.9.'66 His Majesty on advice of Cabinet proclaimed Emergency - Article 150 - P.U. 339[A]

20.2.'67 L.P. passed order under Article 4 of F. Const.

Article 150 (1), (4), (5), (6)

Emergency goes on indefinitely.

20.9.66 Amending Act.

Governor's absolute powers.

Submit -

(1) the proclamation of Emergency was not a valid proclamation - invalidity of Act follows:

(2) not within powers of Federal Parliament to amend the Sarawak Constitution:

(3) the Federal Parliament can only amend either the Federal Constitution or the Constitution of Sarawak in the manner provided by Art. 159 (3) and 161 E of the Federal Constitution.

Federation of Malaya Order in Council, 1957 Section 4

Agreement (see p.23 of pleadings)

Constitution of Sarawak:

Article (1), (5), (6), 7(1), (3), 10, 14, 15.

Speaker - servant of the House (see Oath).

Article 24 (1).

Article 41 - last 9 words don't appear in constitution of any other States.

Malayan Constitution Article 4(2), (3) & new (4)

Article 73, 76 "but only as follows" 77, 79

Ninth Schedule (6)

State Const. reserves very wide powers

Special protection for Borneo State

Article 80(2) Discharge of Executive powers

(3)

Article 71 - marginal note

(3) - and see Eighth Schedule.

Article 71 - positive duty on Federation to preserve State Constitution - not to take it away.

Part XI

Article 149 - not unlimited discretion

150 - "whereby etc."

151 -

Article 150 must be considered in light of whole of Article XI - external agression or internal disorder.

Article 150 not applicable to constitutional changes - for which one should go to Article 159

Article 161E - re Borneo State

(2) (c)

Residual power in State.

Each Borneo State given own constitution - alterable by 2/3 majority but not by any other means.

Federal Parliament has no power to alter any State Constitution - certainly not that of a Borneo State - that of Sarawak.

In the Federal Court

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Notes of Argument of Ong Hock Thye, F.J. 5th September 1967 continued.

Facts:

See judgment of Harley, Ag. C.J. (1966) 2 M.L.J. @ 187

Act 68 of 1966:

Are absolute powers to ruler consistent with democracy?

Position of Speaker!

Sir Dingle reads pleadings:

Petition:

Para 5 - no emergency

6 - and particulars.

Syed Othman - case - see para 10 of affidavit.

Sir Dingle continues reading petition.

Rule 21 - L.N. 282/63

Explanatory statement to Bill of Emergency Act.

Article 150 inept to solve a constitutional deadlock.

The Statute was expressly passed under Article 150 and in pursuance of Proclamation of Emergency. If no Emergency the statute falls to ground.

Submit the Proclamation was invalid.

How far and on what grounds can the Courts go behind the exercise by a public authority of a statutory discretion and decide whether or not it had been properly exercised.

His Majesty the Y.d.p. Agong is Head of State. But he was not exercising a prerogative power, but a statutory power and he does so on advice of Ministers. It is the responsibility of the Courts to see that Governments observe the law, like anyone else. As to the Proclamation of Emergency:

Bhagat Singh v. King-Emperor (1930-31) 58 L.R.I. A. 169, 171.

King-Emp. v. Benoari Lal Sarma - (1945) A.C. 14, 16, 21

Resumed at 2.30 p.m.

No words of limitation on powers of Governor-General but here, case is different.

Nowadays, words of limitation are usual - e.g. Indian Constitution - Article 352 and note Art. 356 (failure of constitutional machinery).

Nakkuda Ali v. Javaratne (1951) A.C. 66 at p. 76

Arthur Yates & Co. v. Veg. Seeds (72) C.L.R. 37 at p.67 Latham C.J. - bottom of p.67 to p.68.

A.G. Alberta v. A.G. Canada (1939) A.C. 117

Decision taken from best of motives - may yet be due to misconception of their powers.

The Queen v. Vestry of St. Pancras (1890) 24 Q.B.D. 371 at 375 - 376

The King v. Board of Education (1910) 2 K.B. 165 at 175 (C-H M.R.) & Farwell L.J. (p.178-9) and p.181 (whole page)

Board of Education v. Rice (1911) A.C.179

The King v. Supt. of Chiswick Police Station (1918) 1 K.B. 578.

(Court can go behind an order for arrest)

p.586 (bottom 1/3 of page)

p.589 Warrington L.J.

Eshugbavi Eleko's case - (1931) A.C. 662 @ 664-5 669, 670, 672 (bottom).

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Notes of Argument of Ong Hock Thye, F.J. 5th September 1967 continued.

The Queen v. Governor of Brixton Prison -

(1963) 2 Q.B. 243

(arguments p. 256) @ 273

p. 302 Lord Denning M.R.

In re H.K. (An infant) - (1967) 2 W.L.R.962

@ 970, 975

Courts will intervene with exercise of a statutory discretion by a public authority (1) where the decision which is arrived at or the order which is made is a sham (2) where the public authority have committed an error of law e.g. misdirected themselves as to the law (3) where the public authority had taken into account some extraneous or irrelevant consideration.

Submit:

Both error of law and irrelevant consideration taken into account.

Ref. explanation to Parliament - its object, to change constitution of Sarawak - clearly an extraneous consideration.

Compare Deputy P.M.'s statement to Parliament (p.12)

6th September 1967

Wednesday 6th September: (continued)

Purpose of Proclamation of Emergency was to deal with a constitutional question.

Compare letter of Governor to Petitioner (p.16)

"In order that true democracy etc."

2nd & 3rd submissions:

(2) not within powers of Federal Parliament to amend constitution of Sarawak.

(3) alternatively, even if within powers,

Federal Parliament could only do so under Article 159 read with Article 161 E.

Construing a constitution -

(a) Harris & ors. v. Minister of Interior

(1952) S.A. (App. Jurisdn.) @ p.437 headnote - events leading to passing of Act relevant.

(b) Gallagher v. Lynn (1937) A.C. 863 @ p.870 (L. Atkin)

(c) Ladore v. Bennett - (1937) A.C. 626 @ p.482 " "

(d) Pillai v. Mudanavake (1953) A.C. 514 @ 521, 528 (judicial notice).

Cobbold Report - 23.6.'62

para 148 @ p.51

Special circumstances of Borneo territory - safeguards -

Compare the Agreement - (p.23)

Jurisdiction a division of sovereign

Schedule IX of State & Federal Constitution.

Federal Constn. Part V, VI.

No over-riding powers in Federal Parliament

Re Article 71(3) -

Only duty Parliament has in regard to State Government - to protect State Constitution not to set it aside - only power of intervention by Federal Parliament.

Never suggested Parliament was acting under this Article.

In the Federal Court

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Notes of Argument of Ong Hock Thye, F.J. 6th September 1967 continued.

Article 159 requires 2/3 majority

Article 161E - giving clear effect to recommendations in Cobbold Report.

(2) (c) - consent of Governor?

Acting on advice of Supreme Council.

Under Article 150 is the Constitution to be torn up for an indefinite period?

Maxwell (11th Ed.) p.78-79 - presumption?

p.153 - repugnancy

p.183 - presumptions

p.221

King v. Chapman (1931) 2 K.B. @ 609

And compare Maxwell @ p.275

3rd Submission:

1. Open to Court to go behind the procedure and enquire into the reasons why it was made. In such a case where the instrument is sought to be impugned, it is the duty of the Court to make such enquiry.

2. If the Court finds that the proclamation was made mala fide or on a wrong view of the law for some extraneous or irrelevant reason, then the Court must declare the proclamation invalid.

3. If the Court finds the proclamation invalid then the statute is invalid as well, it is not a law at all.

4. Federal Parliament has no power to amend the constitution of Sarawak.

5. The Sarawak Constitution can only be amended by the Negri Council of Sarawak which represents the people of Sarawak and in the manner laid down

by the Sarawak Constitution.

6. Even if contrary to earlier submission, it is open to the Federal Parliament to amend the Constitution of Sarawak. That can only be done under provisions of Article 159 read together with Article 161 E.

7. If there was any repugnancy or ambiguity in the articles of the Constitution, such repugnancy or ambiguity must be resolved in favour of the petitioner.

Syed Othman:

Attack on 1966 Act on 3 grounds:

Answer to 1st ground -

No court of law can make it an issue whether Agong was acting in bad faith in proclaming an Emergency. Incumbent on court to assume that Government was acting in best interests of the State and to permit no evidence in contradiction. The circumstances leading to proclamation of Emergency are non-justiciable. True courts have control over exercise of discretion - but all authorities refer only to delegated legislation. A declaration of Emergency does not fall into such category.

As to Pleadings

See affidavit (page 35) para 3

Paras 3 & 4 only evidence before the court.

Allegation of bad faith - see P.U. 339[A]

1st preamble - "grave emergency etc." - court cannot go behind it.

Critical question is - was Agong satisfied?

Proclamation said nothing about Petitioner's removal from office.
Section 3, Article 68/66
Sections 4 and 5
} no reference to Petitioner.

In the Federal Court

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Notes of Argument of Ong Hock Thye, F.J. 6th September 1967 continued.

Tenders - Sarawak Council Negri Debates report -

see last page - resolution.

Pleadings - p.15 (vi) - matter of party discipline - legally there is nothing wrong.

Re para 5 & 6 of Petition, repeat this Court not competent to consider this question in view of Article 128 of Constitution. A Proclamation of Emergency cannot be categorised as a "law".

Re Article 150 - its provisions does not envisage the Proclamation of Emergency being justiciable in a court of law.

Judge of fact is Agong himself.

Robinson v. Minister of Town & Country Planning (1947) K.B. 702 @ 712, 720

Re DECK & Pollitzer's application (1948) 2 K.B. 330

Liversidge v. Anderson - 1942 A.C. 206, 278

Courts have no right to enquire how and why the Y.d.p. Agong was satisfied.

Zamora's case (1916) 2 A.C. 77 & 106

Resumed at 2.30 p.m.

The New Commonwealth & its Constitution by S.A. de Smith p. 192.

Nigerian Constitution by O.I. Odumosu p.346. Emergency powers.

Chandler v. Dir. of Public Prosecutions - (1962) 3 A.E.R. 142 @ 146, p.159 B4 - C4

Basu (4th Ed.) 5th Vol. p.169

Article 352

Reply to 3rd Ground:

Clause (2) & (3) of Article 150

Court would be usurping the powers of the 2 Houses, by declaring the Proclamation invalid.

The 1966 Act -

Submit Court has no jurisdiction to declare the Proclamation invalid by reason of Article 128. At any rate, if Agong declared he is satisfied that a State of Emergency exists, it is not for the Courts to inquire into question whether or not he should be satisfied.

Sufficient safeguards have been provided in Constitution - as Proclamation is subject to annulment by resolution of the two Houses.

Re sections 3, 4 & 5 of Act - ultra vires
Submit they are intra vires

Re s.3

Article 153(5)

Article 161E (2) (c)

Eng Keock Cheng v. P.P. (1966) 1 M.L.J. 19,20.

Re Article 41 - Sarawak Constitution

Compare s.19 of Eighth Schedule

Article 4 & 75

Submit - no inconsistency with the Malaysia Agreement.

Thursday, 7th September '67

7th September 1967

Sir Dingle:

A correction re South African case of Harris & Ors.

P.437 was argument of counsel, not judgment as to which, see correct passage at 470C. "To say etc." Liversidge v. Andeson - 1942 A.C. 244 (Lord Aitkin).

In the Federal Court

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Notes of Argument of Ong Hock Thye F.J. 7th September 1967 continued.

A general comment -

Argument under 2 heads -

(a) a Proclamation of Emergency by Agong is not justiciable

(b) after a Proclamation of Emergency, Parliament can legislate about anything in Federal or State sphere without limitation apart from 6A.

If right, logically it means that in Malaysia we have a Federation Constitution and various State Constitutions drawn up with elaborate care and pains - the provisions become meaningless.

Party discipline, over-riding?

Re Proclamation of Emergency not justiciable - a Proclamation of Emergency compared with declaration of War - latter is an Act of State affecting relations between nations.

7 Hals. 3rd Ed. p.279 para 593

A limitation, even on Acts of State!

A municipal court can decide whether an act is an Act of State or not.

Here - an exercise of statutory power - under an Article of the Constitution.

Words - "satisfied"

Agong sole judge.
But reasons, given, inescapable.

Counsel referred to D.P.P.'s speech as "political" Party discipline?

Article 128 -

Proclamation of Emergency a 'condition precedent'

Cases quoted by defendant are on 'matters of policy decided by Ministers - Courts

decide the law - Courts never held incompetent to decide Robinson's case - see page 717

"Different considerations, of course, apply etc."

Beck & Pollitzer - (1948) 2 K.B. 339, @ 345

Zamora's case - a prize case - not constitutional.

Makudda's case - but see L. Radcliffe

Chandler - (1962) 3 A.E.R. -

But see Lord Devlin at (p.157)

"It is true etc.... But etc. intervention in case of excess or abuse.

Basu's commentaries - only authority cited was 1945 Madras Law Journal - but judgment not cited.

Safeguard of Parliamentary control?

By annulment of Proclamation of Emergency by Parliament rendering judicial control unnecessary

Answer - why not both forms of control?

A safeguard has nothing to do with judicial control! e.g. whether question of ultra vires arises.

Parliamentary control does not, cannot, exclude judicial control.

State Constitution is offshoot of Federal Constn.

Agreement dated 9.7 - Act of Parliament 31.7

Malaysia Act - Order in Council 29.8 w.e.f. 16.9.63

Submit - true anology is U.S.A.

Compare F.M. O/C of 1957 - Constitution of Malaya, of Penang and Malacca.

In the Federal Court

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Notes of Argument of Ong Hock Thye F.J. 7th September 1967 continued.

Main issue -

Compare Eng Keock Cheng's case! at p.20

Question of State rights did not arise - but how far private rights affected.

Sarawak Constitution - Article 41

The relevant words appearing in other constitutions strengthens petitioner's argument.

Nothing in Federal Constitution providing for powers to amend State Constitution.

Moreover, State Constitution contains those words. 10

Petitioner relies on Article 3 of the Agreement But see Oyama v. California 332 U.S. 633

Sei Fuji v. The State - 217 Pacific Rep. 2nd Series 481

As to Main Point of Respondent - Construction of Article 150 (5)

Alter Federal Constitution in order to alter State Constn. "any matter" is matter within their competence n.b. "This" constitution. 20

"Consent" necessary in -

Article 2
" 38(4)
" 161 C

Reads Article 161E

(2) (c) - safeguards State rights.

Is rule of Law to continue in Malaysia?
C.A.V.

(sd) H.T. Ong
7.9.1967 30

1st December 1967

1st December, 1967:

T.O. Thomas for Petitioner
Syed Othman with Au Ah Wah for Respondent

L.P. reads judgment.
C.J. reads judgment.
I read my judgment
Application dismissed.

(Sd) H.T. Ong
1.12.67

In the Federal Court

No. 11

Notes of Argument of Ong Hock Thye F.J. 1st December 1967 continued.

NO. 12

No.12

JUDGMENT OF SYED SHEH BARAKBAH, L.P.

Judgment of Syed Sheh Barakbah L.P. 1st December 1967

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(Original Jurisdiction)

Federal Court Suit No. X. 1 of 1967

B E T W E E N:

STEPHEN KALONG NINGKAN — Petitioner

- and -

GOVERNMENT OF MALAYSIA — Respondent

COR: Syed Sheh Barakbah, Lord President, Malaysia.
Azmi, Chief Justice, Malaya.
Ong Hock Thye, Judge, Federal Court.

JUDGMENT OF SYED SHEH BARAKBAH, LORD PRESIDENT, MALAYSIA

This is a petition praying for:-

(a) an order declaring that the measure known as the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, is

In the Federal Court

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Judgment of Syed Sheh Barakbah L.P. 1st December 1967

ultra vires the Federal Parliament invalid, null and void and of no legal force and effect; alternatively,

(b) an order declaring that Clauses 4 and 5 of the measure known as the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, are ultra vires the Federal Parliament, invalid, null and void and of no legal force and effect.

The events which led up to this case may be summarised as follows:

On 22nd July, 1963, the petitioner was appointed Chief Minister of Sarawak. On 17th June, 1966, His Excellency the Governor of Sarawak issued a declaration that the petitioner had ceased to be the Chief Minister of Sarawak and purported to appoint another Chief Minister, Penghulu Tawi Sli, in his place. The petitioner instituted proceedings in the High Court in Borneo in order to challenge the validity of that declaration by His Excellency the Governor. On 7th September, 1966, the Acting Chief Justice of Borneo, Mr. Justice Harley, gave judgment for the petitioner in these proceedings. He held, and I quote his words, that: "the plaintiff (that is the petitioner) is and has been at all material times Chief Minister of Sarawak", and he granted an injunction restraining Penghulu Tawi Sli from acting as Chief Minister. On 14th September, 1966, His Majesty the Yang di-Pertuan Agong proclaimed a state of emergency under Article 150 of the Constitution of Malaysia. That Proclamation of Emergency reads:-

"WHEREAS WE are satisfied that a grave Emergency exists whereby the security of a part of the Federation, to wit the State of Sarawak, is threatened:

AND WHEREAS Article 150 of the Constitution provides that in the said circumstances WE may issue a Proclamation of Emergency:

NOW, THEREFORE, WE Tuanku Ismail

Nasiruddin Shah ibni Al-Marhum Al-Sultan Zainal Abidin, by the Grace of God of the States and territories of Malaysia Yang di-Pertuan Agong in exercise of the powers aforesaid do hereby proclaim that a State of Emergency exists, and that this Proclamation shall extend throughout the territories of the State of Sarawak."

As this case mainly depends on the true construction of Article 150 of the Constitution it will be necessary to quote the whole of the Article. It is as follows:-

"(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

In the Federal Court

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Judgment of Syed Sheh Barakbah L.P. 1st December 1967 continued.

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 or in the Constitution of the State of Sarawak, 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 or of the Constitution of the State of Sarawak.

(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom of 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 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".

On 20th September, 1966, the Federal Parliament of Malaysia met in a special session and passed the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, (hereinafter called the "Emergency Act"). It is "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." The relevant sections of the Emergency Act are sections 3, 4 and 5. Section 3 reads as follows:-

"(i) 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 sub-section (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

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Judgment of Syed Sheh Barakbah L.P. 1st December 1967 continued.

Agong on the fourteenth day of September, 1966 ceases to be in force."

Section 4 states:-

"(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."

Section 5 is as follows:-

"(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 officers 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."

On 20th February, 1967, the Lord President of this Court passed an order under Article 4 of the Federal Constitution granting leave to the petitioner to commence proceedings against the respondent Government. Hence this petition.

The petitioner's allegations can be listed roughly as follows.

(1) The Proclamation of Emergency made by His Majesty the Yang di-Pertuan Agong was not a valid proclamation and therefore the Emergency Act was bad because it was made on a Proclamation of Emergency which was null and void.

(2) It is not within the powers of the Federal Parliament to amend the Constitution of Sarawak and therefore the provisions of the said Act as contained in sections 3, 4 and 5 were ultra vires the Federal Parliament; in the alternative the Federal Parliament can only amend either the Federal Constitution or the

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Judgment of Syed Sheh Barakbah L.P. 1st December 1967 continued.

Constitution of Sarawak in the manner provided by Articles 159 (3) and 161E of the Federal Constitution.

With regard to the first issue, the Proclamation of Emergency was made under Clause (1) of Article 150 of the Constitution which states :-

> "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."

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.

Sir Dingle Foot, counsel for the petitioner, quoted a number of authorities in which the Courts had observed that where a discretionary power was given to any person or authority the Courts would have some sort of control to see to it that the power was properly exercised and that there was no excess or abuse of power. In my view those authorities relate only to delegated legislation and a Proclamation of Emergency by the Yang di-Pertuan Agong, who is the Head of State, does not fall under any of these categories. I am fortified in my view by the cases of Bhagat Singh v. The King-Emperor (1) in which Viscount Dunedin stated (at p.171):-

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(1) 58 I.A. 169, 171, 173

"Now the only case that is made here is that s.72 of the Government of India Act did not authorise the Governor-General to make the order he did constituting a special tribunal for the trial of the offenders who, having been convicted, are now petitioners here. Sect. 72, as amended in 1919, is as follows: 'The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature; but the power of making Ordinances under this section is subject to the like restrictions, as the power of the Indian Legislature to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature and may be controlled or superseded by any such Act.'

The petitioners ask this Board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition: It connotes a state of matters calling for drastic action, which is to be judged as such by some one. It is more than obvious that some one must be the Governor-General, and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance."

His Lordship went on to say (at p.173):-

"Their Lordships must add that, although the Governor-General thought fit

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Judgment of Syed Sheh Barakbah L.P. 1st December 1967 continued.

to expound the reasons which induced him to promulgate this Ordinance, this was not in their Lordships' opinion in any way incumbent on him as a matter of law".

This was followed by the case of King-Emperor v. Benoari Lal Sarma & ors. (2). See also the case of Liversidge v. Sir John Anderson & anor. (3)

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 for the Court to inquire as to whether or not he should have been satisfied.

With regard to the second and the alternative allegations of the petitioner, 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), 161A, 161C and 161E. 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 (6A)/. 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 are intra vires and have been validly enacted.

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(2) (1945) A.C. 14.
(3) (1942) A.C. 206.

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In the circumstances I would dismiss this petition.

Kuala Lumpur,
1st December 1967

(Sgd) S.S. Barakbah,

Lord President
Federal Court, Malaysia
Kuala Lumpur

Sir Dingle Foot, Q.C., Thomas O. Kellock, Q.C. and T.O. Thomas Esq. for Petitioner.

Tuan Syed Othman bin Ali and Au Ah Wah Esq. for Respondent.

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No. 13

Judgment of Azmi, C.J. 1st December 1967

NO. 13

JUDGMENT OF AZMI, C.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR (ORIGINAL JURISDICTION)

FEDERAL COURT SUIT NO. X.1 of 1967

B E T W E E N:

STEPHEN KALONG NINGKAN — Petitioner

- and -

GOVERNMENT OF MALAYSIA — Respondent

Coram: Barakbah, Lord President, Malaysia,
Azmi, Chief Justice, Malaya,
Ong Hock Thye, Judge, Federal Court.

JUDGMENT OF AZMI, CHIEF JUSTICE, MALAYA

This is a motion for a declaration of this Court that the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966, hereinafter referred to as the Emergency Act 1966, is invalid and/or that clauses 3, 4 and 5 of the said Act were invalid on the ground that they were ultra

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vires the Federal Parliament.

It is necessary to refer to some facts of this case.

In his affidavit sworn on the 13th December 1966, the applicant affirmed to the effect that he was appointed Chief Minister of Sarawak by an instrument under the public seal dated 22nd July 1963 and on the 17th June 1966 the Governor of Sarawak declared to the effect that he the applicant, had ceased to hold office as Chief Minister of Sarawak and on the 24th December 1966 dismissed him from his position as Chief Minister.

The applicant subsequently filed a suit - (Civil Suit No. K.45 of 1966) at the High Court at Kuching and on the 7th September 1966, the High Court declared that the applicant notwithstanding the declaration of the Governor was and is still the Chief Minister of Sarawak, and at the same time granted him an injunction restraining the person appointed by the Governor from acting as Chief Minister.

On the 14th September 1966, the Yang di-Pertuan Agong proclaimed a state of emergency in Sarawak (see Gazette Notification P.U. 339A).

On 20th September 1966, the Federal Parliament passed the Emergency Act 1966. This act amended both the Sarawak Constitution and the Federal Constitution, and in February 1967, the applicant filed this motion, after having previously obtained the leave of the Lord President.

The applicant urged before us the following reasons in support of this application:-

(1) that the proclamation of emergency made by the Yang di-Pertuan Agong (P.U. 339A) was an invalid proclamation, in the alternative

(2) that it is not within the power of Federal Parliament to amend the Constitution of Sarawak and in the alternative

(3) that the Federal Parliament can only amend the Federal Constitution or the Constitution of Sarawak in a manner provided by Article 159 clause (3) and Article 161 (E) of the Federal Constitution.

In reference to the first submission it is necessary to refer to Article 150 of the Federal Constitution. Clause (1) of that Article reads as follows:-

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

In reference to this point it is necessary to refer to two Privy Council cases namely:-

(1) Bhagat Singh & Others v. King Emperor - L.R.I.A. Vol. 58 (1930-31) 169, and

(2) King Emperor v. Benoari Lal Sarma - 1945 A.C. 14.

In the Bhagat Singh case, the facts would appear to show that in May 1930, the Governor - General of India in exercise of the powers given him by sec. 72 of the Government of India Act made and promulgated the Lahore Conspiracy Case Ordinance 1930 which transferred trial of a case to a special tribunal. The promulgation of the Ordinance was accompanied by a statement of the reasons moving the Governor-General to exercise his powers. The petitioners were tried and convicted by a tribunal constituted under the ordinance.

It was submitted before the Privy Council that the power under sec. 72 was subject to three conditions.

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(1) There must be an emergency.

(2) The ordinance must be for peace and good government.

(3) It must be one within the legislative powers of the Indian Legislature.

It was urged that the prosecution did not show that any emergency existed and in fact there was none. It was also urged that the ordinance was not one for peace and good government and that it exceeded the powers of the Indian Legislature.

Section 72 of the Government of India Act reads as follows:

> "The Governor-General may, in cases of emergency, make and promulgate Ordinances for the peace and good government of British India or any part thereof, and any Ordinance so made shall for the space of not more than six months from its promulgation, have the like force of law as an Act passed by the Indian Legislature; but the power of making Ordinances under this section is subject to the like restrictions, as the power of the Indian Legislature to make laws; and any Ordinance made under this section is subject to the like disallowance as an Act passed by the Indian Legislature and may be controlled or superseded by any such Act."

I will now quote a relevant passage in the judgment of the Privy Council:-

> "The petitioners ask this Board to find that a state of emergency did not exist. That raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition: It connotes a state of matters calling for drastic action, which is to be judged as such by some one.

It is more than obvious that that someone must be the Governor-General, and he alone. Any other view would render utterly inept the whole provision. Emergency demands immediate action, and that action is prescribed to be taken by the Governor-General. It is he alone who can promulgate the Ordinance.

Yet, if the view urged by the petitioners is right, the judgment of the Governor-General could be upset either (a) by this Board declaring that once the Ordinance was challenged in proceedings by way of habeas corpus the Crown ought to prove affirmatively before a Court that a state of emergency existed, or (b) by a finding of this Board - after a contentious and protracted inquiry - that no state of emergency existed, and that the Ordinance with all that followed on it was illegal.

In fact, the contention is so completely without foundation on the face of it that it would be idle to allow an appeal to argue about it".

In reference to the second point this is what the judgment said:

"It was next said that the Ordinance did not conduce to the peace and good government of British India. The same remark applies. The Governor-General is also the judge of that. The power given by s.72 is an absolute power, without any limits prescribed, except only that it cannot do what the Indian Legislature would be unable to do, although it is made clear that it is only to be used in extreme cases of necessity where the good government of India demands it."

It was urged before us that the Indian sec. 72 may be distinguished from

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our Article 150(1) in that in our Article there were qualifying words to the word "emergency" namely "whereby the security or economic life of the Federation or of any part thereof is threatened." And by reason of the existence of these words in the clause it becomes open to this court to enquire whether the security or economic life of the Federation, was indeed threatened at that time. With respect, in the Bhagat Singh case it was not open to the Courts to enquire whether the ordinance made in pursuance of the proclamation did or did not induce to peace and good government of British India because the Governor-General was held to be the sole judge of that, notwithstanding the words "for the peace and good government of British India."

In my view therefore notwithstanding the qualifying words the Yang di-Pertuan Agong in exercise of his power under clause (1) of Article 150 must be regarded as the sole Judge of that. He alone could decide whether a state of emergency whereby the security or economic life of the Federation was threatened, did exist.

There is something in the passage in the judgment of the other case King Emperor v. Benoari Lal Sarma that might suggest that it could still be open to the court to question the bona fide of the Yang di-Pertuan Agong. The passage is at page 21 of the report and reads as follows:-

> "It is to be observed that the section does not require the Governor-General to state that there is an emergency, or what the emergency is, either in the text of the ordinance or at all, assuming that he acts bona fide and in accordance with his statutory powers, it cannot rest with the courts to challenge his view that the emergency exists. In the present instance such questions are immaterial, for at the date of

> the ordinance (January 2, 1942) no one could suggest that the situation in India did not constitute an emergency of the most anxious kind. Japan had declared war on the previous December 7: Rangoon had been bombed by the enemy on December 23, and again on December 25th: earlier ordinances had recited that an emergency had arisen which required special provision being made to maintain essential services, to increase certain penalties, to deal with looting of property left unprotected by evacuation of premises, and so forth. Their Lordships entirely agree with Rowland J.'s view that such circumstances might, if necessary, properly be considered in determining whether an emergency had arisen; but, as that learned judge goes on to point out, and, as had already been emphasized in the High Court, the question whether an emergency existed at the time when an ordinance is made and promulgated is a matter of which the Governor-General is the sole judge. This proposition was laid down by the Board in Bhagat Singh v. The King Emperor and is plainly right."

At first sight it could be suggested particularly from the first part of the above passage that the court could still go into the question of the bona fide of the Governor-General, but in my view it is clear that the question whether an emergency existed at the time when an ordinance was made and promulgated was still a matter on which the Governor-General was the sole Judge and that, therefore, no court may inquire into it. In the circumstances it is no longer desirable that I should deal with all the cases cited to us dealing with the exercise of discretion of a statutory body. I would therefore say that the applicant's submission must fail.

In reference to the second submission namely that it is not within the power of

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Federal Parliament to amend the Constitution of Sarawak, it is necessary in my view to consider clause (5) of Article 150 of our Constitution. Clause (5) reads as follows:-

> "(5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution, or in the Constitution of Sarawak, 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 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".

Clause (6A) reads as follows:

> "(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 or 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."

In my view, clause (5) is very clear, that whilst a proclamation of 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.

It was urged as I understood it that words "any matter" in line 4 of the clause (5) above could only mean a matter within the Federal List. In my view that cannot be so because it is provided in clause (5) itself that it is to be subject to clause (6A) and clause (6A) specially exempts certain matters such as Muslim law or the customs of the Malays or the native law and customs in the Borneo States, which as can be seen from the 9th Schedule are matters in the State list.

It is obvious in my view, that if the words "any matter" were intended to be confined to a matter in the Federal List, clause (6A) would appear unnecessary.

It was also urged before us that any attempt to amend the Constitution of Sarawak would be contrary to Article 41 of the Sarawak Constitution.

Article 41 reads as follows:-

"(1) Subject to the following provisions of 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."

We were asked to note the clear words "but may not be amended by any other means." It was also pointed out to us that these words did not appear in any other State Constitution of the Federation. But I think Sir Dingle Foot admitted later that this was not quite right because similar words or words to that effect also appear in the Constitutions of Johore and Kedah among others. In my view, however, notwithstanding the existence of these words in the Sarawak Constitution, the Yang di-Pertuan Agong may in exercise of his authority under Article 150 of the Federal Constitution amend the Constitution

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of Sarawak under Article 150 clause (5) for reasons I have stated.

It was also pointed out to us that under Article 161E clause (2) no amendment to the Constitution of Sarawak may be made without the concurrence of the Governor of that State.

The said clause (2) reads as follows:-

"(2) No amendment shall be made to the Constitution without the concurrence of the Governor of the Borneo State either each of the Borneo States concerned, if the amendment is such as to affect the operation of the Constitution as regards, inter alia

(c) 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."

In my view, however, by reason of the words in clause 5 of Article 150, namely "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 any written law which requires any consent or concurrence to the passing of a law or in consultation with respect thereto" no concurrence of the Governor of Sarawak would appear to be necessary. For this reason this submission must also fail.

I do not think I need say anything in reference to the third submission, because in my view this judgment in reference to the first two submissions have sufficiently covered that point.

I would therefore say that this application should be dismissed.

Sgd. Azmi bin Haji Mohamed
CHIEF JUSTICE - MALAYA

Kuala Lumpur,
Date 1/12/67.
Sir Dingle Foot, Q.C. Thomas O. Kellock, Q.C. and T.O. Thomas Esq. for petitioner.
Tuan Syed Othman bin Ali and Au Ah Wah Esq., for Respondent.

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In the Federal Court

No. 14

Judgment of Ong Hock Thye, F.J. 1st December, 1967

JUDGMENT OF ONG HOCK THYE, F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(ORIGINAL JURISDICTION)

Federal Court Suit No. X. 1 of 1967

B E T W E E N:

STEPHEN KALONG NINGKAN — Petitioner

- and -

GOVERNMENT OF MALAYSIA — Respondent

CORAM: Syed Sheh Barakbah, Lord President, Malaysia,
Azmi, Chief Justice, Malaya,
Ong Hock Thye, Judge, Federal Court, Malaysia.

JUDGMENT OF ONG HOCK THYE, F.J.
MALAYSIA

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."

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

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the 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 even the ghost of a suggestion that His Majesty had descended into the arena 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 Engalnd.

The allegation of fraud was unmistakably made against the Cabinet as it was supported by particulars set out at length in the seven pages of paragraph 6 of the petition. If justice is not only to be done but be seen to be done, I do not believe that I can shirk my plain duty by turning a blind eye to the facts. It was repeatedly and publicly stated, in the plainest of terms, that it was on Cabinet advice that the Yang di-Pertuan Agong proclaimed the Emergency. This fact was never denied and no attempt was ever made by the Cabinet to disclaim responsibility. Neither of my learned brethren, however, considered this fact in the least bit relevant, since they said nothing about it. With all respect, therefore, I will not join in what I consider a repudiation of the Rule of Law, for I do not imagine, for a moment, that the Cabinet has ever claimed to be above the Law and the Constitution.

My learned brethren in their judgments never condescended to the material facts. With respect I do not feel at liberty to wield the editorial blue pencil as they have done, when stating the facts of this, or indeed any other, case when the issue is a question of fact. It seems to me that the omission of material facts from consideration must lay the Judiciary

exposed to reflections, which I need not particularise. It has also been said that when a case is weak on the facts reliance must be placed most strongly on questions of law. 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 Schedule IX of the Government of India Act, 1935, is manifestly not in pari materia with Article 150 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 plain fact is that the Governor-General of India, in the words of Viscount Simon L.C. in King Emperor v. Benoari Lal Sarma, (1) was not required by section 72 "to state that there is an emergency, or what the emergency is, either in the text of the ordinance or at all, and assuming that he acts bona fide and in accordance with his statutory powers, it cannot rest with the courts to challenge his view that an emergency exists." On the other hand, the inbuilt safeguards against indiscriminate or frivolous recourse to emergency legislation contained in Article 150 specifically provide that the emergency must be one "whereby the security or economic life of the Federation or of any part thereof is threatened." If those words of limitation are not meaningless verbiage,

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(1) (1945) A.C. 14, 21

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they must be taken to mean exactly what they say, no more and no less, for Article 150 does not confer on the Cabinet an untramelled discretion to cause an emergency to be declared at their mere whim and fancy. According to the view of my learned brethren, however, it would seem that the Cabinet have carte blanche to do as they please - a strange role for the judiciary who are commonly supposed to be bulwarks of individual liberty and the Rule of Law and guardians of the Constitution.

Since the principal issue in this case turns on an allegation of fraud, supported by precise and full allegations of fact, as required by established rules of pleading (see Lawrance v. Lord Norreys (2)), it is incumbent on me, irrespective of the views of my learned brethren, to apply my mind to the facts of this case. I shall, therefore, set out all the undisputed facts herein which are relevant and material as affecting the determination of the question in issue. They are gathered from the petitioner's petition dated February 23, 1967, his affidavit of May 9, 1967 verifying the contents of such petition, the defence dated April 28, 1967 filed on behalf of the respondent and the recital of relevant facts found by Harley Ag. C.J. (Borneo) as set out in his judgment in Kuching Civil Suit No. K.45 of 1966. (3) There being no appeal against such judgment, the findings of fact of course are res judicata and conclusive. In that case the present petitioner was the plaintiff.

On July 22, 1963 the petitioner was appointed Chief Minister of Sarawak. On June 14, 1966 there was a meeting of the Council Negri attended by the Speaker, the petitioner and 20 other members. Five members of the opposition were among the 21 members present, of whom 3 were ex officio. Bills were passed without opposition

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(2) 15 A.C. 210
(3) (1966) 2 M.L.J. 187

on that day: as the learned Acting Chief Justice found, "the fact remains that there has never been a motion of no confidence put in Council Negri, nor has there been any defeat of a Government bill."

On June 14, 1966 a letter addressed from Kuala Lumpur to the Governor of Sarawak by the Federal Minister for Sarawak Affairs (who was not a member of Council Negri himself) stated that "we the undersigned members of Council Negri ... no longer have any confidence in the Hon. Dato Stephen Kalong Ningkan to be our leader in the Council Negri and to continue as Chief Minister," that the latter was bound by Article 7(1) of the Sarawak State Constitution to tender the resignation of members of the Supreme Council and concluding with a request that the Governor take appropriate action under that Article as well as by appointing a new Chief Minister pursuant to Article 6(3) of the Constitution. A propos of this Harley, Acting C.J.'s finding was: "It is accepted that this letter was signed by 21 persons who are members of Council Negri (There are 42 members in all of Council Negri plus the Speaker)."

On June 16, the Governor's private secretary wrote to the petitioner that the Governor being satisfied, on the representation of the majority in the Council Negri that the petitioner had ceased to command their confidence, he, the petitioner, was requested to present himself forthwith to tender his resignation. On June 17, the petitioner replied, regretting his inability to attend at the Astana the previous evening, pointing out that "the proceedings of the Council Negri held on 14th, 1966, do not appear to support his Excellency's view that I have lost the confidence of the majority of its members", suggesting that "the proper course to resolve any doubts regarding my ability to command the confidence of the majority of Council Negri members is to arrange for the Council to be convened in order that the matter can be put to the

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constitutional test" and undertaking to abide by its outcome. He also asked for the names of Council members who had supported the representations.

On the same day, June 17, a letter from the Governor informed the petitioner that he and other members of the Supreme Council had ceased to hold office, and that Penghulu Tawi Sli had been appointed Chief Minister, with effect in both cases forthwith. The learned Acting Chief Justice's finding in this connection was that "it was only in this letter and after the dismissal that the names were provided and the names that were provided are a list of 21 names and are the same names that appear on the letter of 14th June."

The petitioner's reply, also of the same date, expressed surprise at the action taken by the Governor because, to quote the petitioner:

> "It is not true that I have refused to tender my resignation - the question of tendering my resignation did not arise until after I received a letter to my letter requesting for the names of the members of the Council Negri.
>
> It is clear from the list of names forwarded to me that the majority of the Council Negri members are not against me, as 21 cannot be the majority of 42."

On June 17 the Sarawak Government Gazette Extraordinary announced that the petitioner had ceased to be Chief Minister of Sarawak and that the four other persons therein named had ceased to be members of the Supreme Council. Another announcement proclaimed the appointment of Penghulu Tawi Sli as Chief Minister.

In the result the petitioner commenced action in the High Court at Kuching for a declaration that he was still Chief Minister and for an injunction restraining the new appointee from acting as Chief

Minister. In his judgment Harley, Acting C.J. held that "Article 7(3) clearly means that the Governor may dismiss Ministers but may not dismiss the Chief Minister in any circumstances," and he went on as follows:

> "If the Constitution, however, should be construed as giving to the Governor a power to dismiss, that power can only be exercised - and I think that this was conceded by Mr. Le Quesne - when both
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> (a) the Chief Minister has lost the confidence of the House, and
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> (b) the Chief Minister has refused to resign and failed to advise a dissolution.
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> I have already dealt with (a); as regards (b), I do not think that the Chief Minister of Sarawak was ever given a reasonable opportunity to tender his resignation or to request a dissolution.
>
> He was never even shown the letter on which the dismissal was based until court proceedings started. Although it is true that at the moment of dismissal a list of signatories was sent to him with the letter from the Governor dated 17th June that list and that letter were typed on the same date as the publication in the Gazette of the dismissal of the plaintiff, who was given no time at all to consider the weight or effect of the move against him. Plaintiff did not refuse to resign: he merely expressed doubts whether in fact he had ceased to command a majority and requested 'that the matter be put to the constitutional test' .... In the instant case, the Chief Minister has not refused to resign, and there is no power to dismiss him. He has already indicated through his counsel that he was prepared to

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consider a dissolution and presently an election. That political solution may well be the only way to avoid a multiplicity of legal complications."

In the event this view of the learned Acting Chief Justice turned out truly prophetic. Judgment was given in favour of this petitioner on September 7, 1966. On September 14, His Majesty the Yang di-Pertuan Agong proclaimed a State of Emergency in Sarawak. On September 15 the Deputy Prime Minister made a statement at a press conference which was reported in Ministry of Information (Kuching) release headed SITUATION IN SARAWAK, bearing number PEN.9/66/207 (INF). The gist of that statement was repeated subsequently in Parliament; so it need not detain me further by quoting therefrom.

In Parliament on Monday, September 19, 1966, the Deputy Prime Minister made a statement on the proclamation of the State of Emergency in Sarawak. In my opinion this is of such crucial importance in the determination of this case that I make no apology for reproducing the relevant portions at length:

"Mr. Speaker, Sir, the Government has asked for this Emergency Meeting of Parliament today in order to enable the Government to acquaint the Honourable Members of this House and of the Senate of the serious situation that has developed in Sarawak in the last several days. This serious situation poses a grave threat not only to the security of the State of Sarawak but also to the whole country. In order to deal with this situation, the Government has proposed to take measures which are contained in the Bill that I intend to introduce to this House immediately after this.

As Honourable Members are aware, for some months since the middle of June this year, there has been a constitutional and political crisis in Sarawak. This crisis started on the 14th of June, 1966, when twenty-one members of the

Council Negri wrote a letter to the Governor stating that they no longer had confidence in Dato' Stephen Kalong Ningkan as Chief Minister and this letter was handed to the Governor on the 16th of June, 1966. The Governor of Sarawak, after satisfying himself that these members really and truly had no confidence in the Chief Minister and that the Chief Minister had ceased to command the confidence of the majority of the members of the Council Negri, called on Dato' Stephen Kalong Ningkan to tender his resignation and that of the Members of the Supreme Council on the 16th of June, 1966. As Dato' Stephen Kalong Ningkan was ill and could not present himself at the istana to see the Governor, he wrote to the Governor indicating that he did not wish to tender his resignation; whereupon on the 17th of June, the Governor wrote to Dato' Stephen Kalong Ningkan stating that as he had refused to tender his resignation and that of the members of his Supreme Council, the Governor declared that Dato' Stephen Kalong Ningkan and members of his Supreme Council had ceased to hold office with immediate effect and appointed the Honourable Penghulu Tawi Sli, the leader of the majority group in the Council Negri, to form the Government and appointed him as the Chief Minister.

As a result of this, Dato' Stephen Kalong Ningkan instituted proceedings in the Sarawak High Court requesting a declaration by the Court that the Governor had acted unconstitutionally and that his dismissal as Chief Minister was ultra vires and void. The High Court of Sarawak declared in a judgment, announced on the 7th of September, that the Governor had no power to dismiss the Chief Minister under the present Constitution of the State of Sarawak and that the only way to show the loss of confidence of the Members of the Council Negri in its Chief Minister is by a vote on the floor of the House. The Court had, therefore, declared that Dato' Stephen Kalong

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Ningkan was still de jure Chief Minister of Sarawak. As a result of this, twenty-five out of the forty-two members of the Council Negri of Sarawak who had lost confidence in Dato Stephen Kalong Ningkan wrote a letter to the Speaker, with a copy to the Chief Minister, requesting the Speaker to convene a meeting of the Council Negri in order to test the confidence of the Council in Dato' Stephen Kalong Ningkan as Chief Minister. The Speaker replied to that letter stating that he had no powers to call a meeting of the Council Negri and that the Council Negri could only be convened at the request of the Supreme Council or of the Governor acting on the advice of the Council. Since that day, the twenty-five members had repeatedly made a request to the Governor to convene a meeting and the Governor wrote three times to the Chief Minister and twice to the Speaker requesting that a meeting of the Council Negri be held in order to resolve this deadlock.

Although the Court had declared Dato' Stephen Kalong Ningkan as de jure Chief Minister, it was clear that the majority of the members of the Council Negri had expressed a lack of confidence in him and following accepted democratic practice it would be the duty of the Chief Minister in such circumstances not only to convene a meeting of the Council Negri but also to tender his resignation.

Now it was clear that the Chief Minister had refused to do either and the Governor had no power to convene a meeting of the Council Negri. This political deadlock had caused the situation in Sarawak to deteriorate seriously during the last few days. It is clear that with the already serious security situation posed by the Communist Clandestine Organisation, the situation constituted a very grave security threat not only to Sarawak but to the whole of Malaysia.

Mr. Speaker, Sir, I would like to

inform Honourable members that the general security situation in Sarawak, despite the end of Confrontation and the signing of the Peace Treaty with Indonesia, remains very tense. This is clearly explained by the Government White Paper which is tabled before the House today. The strong and entrenched Communist Organisation has been in existence in Sarawak for several years. It now comprises over a thousand hard-core members and several thousand supporters and sympathisers throughout this region. An assessment of documents captured over the past few months and in the interrogation of captured Communist elements indicate, beyond any doubt, that the Sarawak Communist Organisation has been making preparations for an armed struggle in the State.

An important directing cadre of the Sarawak Communist Organisation attended a recent Afro-Asian Writers' Emergency Meeting held in Peking from the 27th June to the 9th of July. At this meeting, a resolution on 'North Kalimantan" was passed which reflects current intentions of the Chinese Communist Party towards Sarawak in the immediate future. The resolution stated that 'the line of struggle for national liberation of North Kalimantan is to take up arms and fight resolutely until Malaysia is completely crushed. And in order to wage armed struggle it is necessary to have the courage to stir up peasants and take roots in the rural areas because it is only in this way that it is possible to apply the strategy of using the rural areas to surround the towns and cities.

Now, also following the aftermath of the Brunei rebellion, it was estimated about seven hundred members and supporters of the Sarawak Communist Organisation had crossed the border into Indonesia to receive intensive indoctrination of Communist ideology and training in guerilla warfare by the Dartai Komunis Indonesia. A large number of these people, who have completed their

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training, have now returned to Sarawak to step up the guerilla war, and the remainder have now organised themselves into several armed units which are operating along the border from several established bases. Also, during the period of Confrontation, when Government Security Forces were busily engaged against external threat, Communist elements in Sarawak had taken the opportunity to prepare several bases for eventual armed struggle.

Within the last few months, there have been serious preparations and activities by the Sarawak Communists as clearly shown by the following facts:-

(a) Reliable reports of arms training in five separate areas of First Division;

(b) The discovery by Security Forces of four Communist jungle camps found in First, Second and another in Third Division;

(c) To Communist arms dumps recovered near Sibu earlier this year and, in August 1966, 3 arms dumps were recovered near the 30th mile along the Kuching/Serian Road. The latter contained Sten guns, hand grenades, T.N.T. slabs, anti-personnel mines and a large amount of miscellaneous ammunition;

(d) The discovery by Security Forces of seven secret, well-constructed and sophisticated hiding places - three in First Division, three in Second Division and one in the Third Division. These were to harbour armed returnees from Kalimantan and to be used as guerilla warfare bases. Reports of many others are under investigation;

(e) Lastly, there have been two major incursions by armed Sarawak

Communists into First Division this year. The aims of each were to set up a small Communist liberated area, train local Communist cadres and to expand guerilla warfare.

Now, Sir, in order to give the Communists and their supporters a chance to give up their struggle following the Bangkok talks, the Government issued surrender terms to all those who had taken up arms or joined illegal subversive organisations. So far only 10 persons have given up and it is quite clear that the remainder wish to continue their defiance of the Government.

Apart from the armed struggle, the Sarawak Communist Organisation has made considerable progress in its constitutional struggle. Honourable Members are already aware that Communist penetration of the Sarawak United People's Party (S.U.P.P.) is widespread at Branch level, and Communist presence there is reflected from time to time in various aspects of illegal activity often embarrassing to S.U.P.P. party leadership. The United Front is also working hard in the trade unions and in Sarawak schools. Thus the Communist United Front in Sarawak is well led and able to take advantage of any situation as it arises.

The Communist Organisation in Sarawak and along the Indonesian border has organised a widespread United Front and has passed the point of no return in its preparation for the armed struggle. The security situation in Sarawak is, in many ways, approaching the same state of preparedness for their armed struggle as was achieved by the Communist Party of Malaya in 1948.

Therefore, Mr. Speaker, Sir, it can be clearly seen that the security situation posed by the Communists in Sarawak is serious and the Government is taking appropriate measures to deal with the situation. However, with the withdrawal of the British and Commonwealth troops from Sabah and Sarawak,

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our own security forces will be completely stretched to deal with the Communist situation in Sarawak as well as on the borders between Thailand and Malaysia. Thus, if in addition to dealing with the serious Communist threat there is political unrest and uncertainty, quite obviously the Government, with its existing resources, might well find it difficult to cope with the situation. The Government's plan for meeting this Communist threat has been in the past, and still is at present, based on the assumption that there is political stability in the country and there is a stable Government both at the Federal and at the State level.

The Federal Government, therefore, taking all these factors into consideration, came to the conclusion that the present serious situation due to the constitutional and political crisis in Sarawak, in addition to the already serious security threat of the country by the Communist Organisation poses a grave threat to the security of Sarawak as well as the whole of Malaysia. The Federal Government, therefore, considered that in the interest of peace and security of Malaysia and of Sarawak, for which the Federal Government is responsible, it must take measures to bring an end to this political instability.

Having given careful and serious consideration to all these matters, the Cabinet on Wednesday, 14th of September, 1966, had advised the Yang di-Pertuan Agong to proclaim under Article 150(1) of the Constitution a State of Emergency for the State of Sarawak and to summon Parliament so that necessary legislation be passed to deal with the situation.

Mr. Speaker, Sir, I would like to state 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. As I have explained, the Constitutional

and political position in Sarawak is that the Chief Minister, who knows that he does not enjoy the confidence of the Council Negri, is duty bound under democratic principles and convention and in accordance with the spirit of the Constitution, not only to convene a meeting of Council Negri to test members' confidence in him but also to tender his resignation when he has lost their confidence. In the present circumstances, it clearly shows that he does not want to follow these accepted democratic practices. Therefore, it is proposed to introduce a Bill to this House, immediately after this, to amend 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 present Government of Sarawak may be put to test and also the power to dismiss the Chief Minister of the Government from office if that Government or that Chief Minister refuses to resign after he has received a vote of no confidence in the Council Negri.

Therefore, Sir, it can be seen that the measures proposed by the Government are neither abnormal nor drastic. They are measures strictly in accordance with the principle of our democratic Constitution - measures which are designed to secure compliance with accepted democratic practices. If the present Government of Sarawak secures a majority support, then, of course, they carry on with the Government. But if they are defeated by a vote of no-confidence, then following accepted democratic practice, a new Government will take its place which will command the confidence of the majority of the members of the Council Negri. There is no suggestion of an administrative take-over, or of government by decree. The democratic process will take its course, and any measures adopted to deal with the situation will have the full weight of the authority of Parliament. These measures are to ensure, as I said, that democratic principles are upheld and adopted

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to the letter and the spirit of the Constitution.

The Federal Government has indicated, on a number of occasions, that it resolved to introduce direct elections in the State of Sarawak as soon as practicable and preparations towards this end are now in train and it is confident that a General Election will be held some time next year.

The measures now proposed are designed merely to maintain political stability during the interim period until the General Election so that Sarawak will have a stable Government to enable us to face the serious Communist threat to the security of the State. I would also like to add, Sir, that the measures proposed are merely temporary to last only for the duration of the State of Emergency that has just been proclaimed. With the end of this State of Emergency, the provisions under the legislation which is before the House will now lapse. I repeat Sir, that these provisions are now temporary and will lapse under Article 157 of the Constitution, six months after the State of Emergency comes to an end."

There is of course, another side to the picture so ably and forcefully presented by the Deputy Prime Minister. The principles of natural justice should apply not only in the Courts but also in the proceedings of Parliament, of which judicial notice may be taken. At the second reading of the bill, Mr. D.R. Seenivasagam, the opposition member for Ipoh, replied to the points made by the Deputy Prime Minister. If truth were to prevail in any impartial inquiry it will not be served by hearing only one sie. Here, again, I make no apology for quoting Mr. Seenivasagam at length. In his speech he said:

> "Mr. Speaker, Sir, there are two points, which I would first like to refer to in the speech by the Honourable Deputy Prime Minister. The first is that the Honourable Deputy Prime Minister has tried very hard to link

up the necessity for this extreme legislation with the Communist threat in Sarawak. Now, the answer to that comes very simply from The Times, published in London of course - and I am reading an extract from the Straits Times - which says, 'the reasons given for a State of Emergency says the Times are thin. The Communist threat in the jungle is real, but it is hard to understand why it has suddenly become worse.' Mr. Speaker, Sir, let us not try to pull wool over anybody's eyes, because I think in this instance the Government has gone one step too far and no amount of trying to link up Communism with the present legislation before this House will work. There is already a declaration of an Emergency in Sarawak and in Malaysia. All powers under that declaration of Emergency are still within the hands of the Central Government and all those powers are sufficient to deal with the Communist threat. The present declaration of an Emergency gives no greater powers to deal with the Communist threat as such."

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"However, Sir, the important point is this. If the situation is what it is today as stated by the Deputy Prime Minister, who brought about this situation? Was it Dato' Stephen Kalong Ningkan, or was it the Alliance leaders who flew to Sarawak who advised on the Constitution and advised wrongly? Not only in this instance but in almost every instance of constitutional construction, this Government has been wrong according to judicial authorities."

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"Today, we are told that Dato' Stephen Kalong Ningkan should call a meeting of the Council Negri and put his popularity

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with the Council Negri members to the vote. Now, I agree that in normal circumstances that would have been the proper advice and I have no doubt the Chief Minister would have called a meeting, if the circumstances were normal. Here, I join issue with the Honourable Deputy Prime Minister, when he says that Dato' Stephen Kalong Ningkan refused to resign in his letter to Governor. I join issue and I say, produce the letter where he says he refuses to resign, because the information, if I am correct, if I am wrong I shall apologise, is that he never said in his letter he would not resign but that announcement was made by the Governor off his own bat. If that letter is available, I do ask that in the interest of everybody concerned it be read out to see whether the Chief Minister refused to resign. The information I have is that he did not refuse to resign.

Mr. Speaker, Sir, on his dismissal the Chief Minister took the matter to Court. A declaration was obtained, as said by the Deputy Prime Minister, stating that his dismissal was illegal and unconstitutional. What did the Honourable Penghulu Tawi Sli do just a few hours before judgment was delivered? He called an urgent meeting of the Alliance members of the Council Negri, and, according to the Press, he called that urgent meeting because he was afraid, or there were rumours, that there would be tamperings with these Alliance Members. All right, there you have the first signs of allegations of tamperings with members of the Council Negri. The next thing we hear is that the former Chief Minister is reinstated, and he goes back to his office. What do we hear next? Affidavits, sworn documents, by Members of the Council are filed and it was published to the whole world, "I have got affidavits". What are affidavits? Affidavits are sworn documents. Where were these documents sworn? They were sworn in the Governor's house. The Magistrate or the Commissioner for Oaths was called to the Governor's house and

the affidavits were signed in the Governor's house. Now they may seem innocent documents, but not to the man who signs an affidavit; and from court proceedings we hear that some of these members are very simple folks; they say: "Don't bother me, I am looking after my goats. I do not know how Bills were passed in the Council Negri even." What is the effect on the mind of these members? 'I have sworn an affidavit, if I go back on this affidavit, I can go to jail" - and I have no doubt that they were so threatened with being sent to jail if they change from the affidavits. What is the next we hear? A demonstration. The official version of the demonstration is - the official Central Government version on Television and Radio - that it was a peaceful demonstration which dispersed as soon as the Police arrived. Pictures in Sarawak newspapers show that it was a demonstration mainly of ladies carrying significant banners. "Ningkan has violated the Constitution of Sarawak". In any event, it was a peaceful demonstration. Then, what do we hear? All the Alliance Members of the Council Negri, or the majority of them, are herded into a house. Whose house? - that of the Honourable Member for Sarawak affairs. Together with the Honourable Tawi Sli, they were herded into the house. Then, the day before yesterday, one member said, "I want to go home. My wife is not well."
All right. Was he allowed to go home?
No. What does today's Straits Times say? The Honourable Penghulu Tawi Sli got him to sign a declaration, undertaking that he would appear at such a place on such a date, that he is against the Chief Minister. After signing that he and his son were allowed to go home.

Mr. Speaker, Sir, what are the inferences that rational human being are to draw from this? That the Honourable Penghulu Tawi Sli and his group are guilty of kidnapping and wrongful detention of

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Members of the Assembly. That is what it is. And if this Government wants to maintain law and order in Sarawak, arrest those persons and charge them for kidnapping, because they are the kidnappers and nobody else.

Mr. Speaker, Sir, what was the need for these Members to seek protection, as it was put? Against whom? Anybody in this House, any Police records, Police information to show one act of hostility, of violence, in Sarawak since this constitutional crisis arose? Throwing of stones on the Speaker's house? Certainly it cannot be by Dato' Stephen Kalong Ningkan's gang, if there is a gang. If anybody did it, it is the Alliance gang, because the Speaker stood up to his rights and the rights of the Constitution and the people of Sarawak. If anybody organised it, it is organised from the other side of the House.

Mr. Speaker, Sir, the throwing of a few stones cannot justify amendment to a Constitution of a country. I ask the Deputy Prime Minister to give us in detail what are the acts of violence attributable directly to the constitutional crisis in Sarawak which has brought about the necessity for this Amendment Bill and, in particular, for another declaration of an Emergency? If there are not acts justifying the new declaration of an Emergency, then there is no justification for that declaration.

Mr. Speaker, Sir, I have tried to look up as best as I could whether a new declaration of Emergency is necessary before this Amendment Bill can come to this House. Now, I have been advised that is not necessary, that an Amendment Bill of this nature could come before this House without the new declaration of Emergency. Now, if that is so, I am subject to

correction there, then the new declaration of Emergency is a sham, a bluff to sidetrack the real issue, to try and excite the people of Sarawak by saying, 'Oh, there is now a new danger in your country. Therefore, all these moves are necessary,' when, in fact, the danger has existed from 1963 onwards and 1964 when the declaration of Emergency was already made."

There was more in the same vein said by other members in opposition to the bill, but the points made generally were, first, that the petitioner was "well within his rights to choose to stay until 14th December 1966, when it will be mandatory on his part to convene the next meeting of the Council Negri"; secondly, that action be stayed because the petitioner had "fixed a meeting of all the five Divisional Advisory Councils on September 26, 1966. For if these five Divisional Advisory Councils, which are the electoral colleges which elect the Council Negri Members, express confidence in the Cabinet of Dato Stephen then it makes a hollow mockery of the Alliance claim that they command the majority vote in the Council"; and thirdly, a suggestion emanating from the petitioner "that an impartial Commission of Enquiry be appointed to go to Sarawak immediately to investigate if there is any emergency in the State:" (see speech of Dr. Tan Chee Khoon). The solutions proposed to settle the impasse included dissolution of the Council Negri, the Divisional Advisory Councils and District Councils and the acceleration of a general election; recourse, in the meantime, to a Caretaken Government and, alternatively a referendum to test the popularity of the petitioner.

The bill was duly passed by a majority of 118 to nil, with no absention. On September 23, 1966, the Governor summoned a meeting of the Council Negri, pursuant to the amendments made in the State Constitution,

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and by a majority of 25 to nil, with 3 absentions, they passed a vote of no confidence in the petitioner. From the above recital of events that have passed into history it is perhaps not at all surprising that he felt aggrieved not so much, perhaps over his dismissal, as by the manner in which it was in the first place achieved. The result has been further proceedings in Kuching and now in this Court.

Before I deal with the issue of fact, I would first of all state plainly what I conceive to be the duty and function of the judiciary. Even though inconveniences are liable to flow from a written Constitution, as happened in this case, it is outside the competence of the Courts to concern itself in any way with politics or the rights and wrongs in the manoeuvres of political factions. This is not an Elections Court. As Viscount Simon L.C. said in King Emperor v. Benoari Lal Sarma (1) at page 28, "Their Lordships feel bound to point out that the question whether the ordinance is intra vires or ultra vires does not depend on considerations of jurisprudence or policy."

The crucial question here 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. This finding of fact, nevertheless, does not ipso facto resolve the question entirely. My view, rightly or wrongly, is that this primary objective is not necessarily incompatible with a genuine concern - whether on adequate grounds or not is not for me to say - felt by the Cabinet as regards the security situation in Sarawak. I think it is true to say that the lessons of the twelve-year

Emergency in Malaya had not been forgotten. Now, Sarawak naturally cannot be compared with more advanced countries that possess a more sophisticated electorate and electoral system, in which political squabbles pose no problems imperilling national security. It may very well 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 farfetched. Therefore, after the most anxious consideration of the matter, on both sides, I have come to the conclusion that I am unable to say, with any degree of confidence, that the Cabinet advice to His Majesty was not prompted by bona fide considerations of security. I am also equally unable to gauge the degree or extent which such concern for security bears on such advice in relation to the Cabinet's primary objective. At any rate, the Minister for Home Affairs, who should be the best informed, had this to say:

> "I would be guilty, and I will be failing my duty if, for example, I were to wait for three months, and during those three months the Communists got the upper hand through political means, because we know that one of the objectives of the Communists is to erode the fabric of the Government, to go into the political parties, and we have a great deal of evidence there on this Communist threat to Sarawak."

Consequently, I am of opinion that the petitioner has failed to make out a case to my satisfaction for holding that the Proclamation of Emergency was invalid as being in fraudem legis. This decision on the facts, let me state it plainly, does not mean that I agree with the contentions of learned counsel for the Federal Government. My view, in general, is that the acts of the Executive which directly and injuriously affect the person or property

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or rights of the individual should be subject to the review by the Courts. In particular, 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.

In the petition there is also an alternative prayer, for an order declaring that clauses 3, 4 and 5 of the measure known as The Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 are invalid, null and void and of no legal force and effect. I would apologise to Sir Dingle Foot for not discussing his arguments at length on this point. Putting it briefly, it seems to me - although, not being well-versed in constitutional law, I hold no strong views on this question - the over-riding consideration of an emergency which justifies an amendment of the Federal Constitution itself must no less justify an amendment of the State Constitution, so far as may be strictly necessary. It may be deplored, as much as, for instance, preventive detention, but extraordinary times have justified extraordinary measures, with only good sense to serve as a restraint.

I would conclude, for the benefit of counsel for the Federal Government, by adding that I respectfully subscribe to the views expressed on Crown privilege by Lord Denning M.R. in the recent case of Conway v. Rimmer, (4) but even so, counsel's attempt herein to shut out the facts from the purview of this court seems to me hopelessly futile for the simple reason that, in the instant case, full reasons had been given for the Cabinet decision which are within the cognisance of this Court. This is vastly different from the category of cases in which the grounds of decision of executive action had been withheld. Furthermore, it is my view that the ratio decidendi in Robinson v. State of South Australia (No.2) (5) is

(4) (1967) 1 W.L.R. 1031
(5) (1931) A.C. 704

one binding on this Court.

Finally, as to costs, since there are no merits whatsoever in the arguments 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 bear their own costs.

(Sgd) H.T. ONG
JUDGE

FEDERAL COURT,
MALAYSIA.

Kuala Lumpur
1st December 1967.

Sir Dingle Foot, Q.C., Thomas O. Kellock, Esq. Q.C., and T.O. Thomas Esq., for the petitioner.

Tuan Syed Othman bin Ali and Mr. Au Ah Wah for respondent.

In the Federal Court

No. 15

Order
1st December
1967

NO. 15

ORDER

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(ORIGINAL JURISDICTION)

FEDERAL COURT SUIT NO. X.1 OF 1967

BETWEEN:

STEPHEN KALONG NINGKAN
Evergreen Estate
Nanas Road West
Kuching Sarawak — Petitioner

- and -

GOVERNMENT OF MALAYSIA — Respondent

CORAM: SYED SHEH BARAKBAH,
Lord President,
Federal Court,
Malaysia;

AZMI, Chief Justice,
High Court in Malaya;

ONG HOCK THYE, Judge,
Federal Court,
Malaysia.

IN OPEN COURT
THIS 1ST DAY OF DECEMBER, 1967

O R D E R

THIS PETITION coming on for hearing this 5th, 6th and 7th days of September, 1967, in the presence of the Right Honourable Sir Dingle Foot, Q.C., with him Mr. Thomas Kellock, Q.C., and Mr. T.O. Thomas, of Counsel for the Petitioner and Tuan Syed Othman bin Ali, Parliamentary Draftsman with him Enche Au Ah Wah, Senior Federal Counsel

In the Federal Court

No. 15

Order 1st December 1967 continued

for the Respondent AND UPON READING the pleadings herein AND UPON HEARING the Counsel aforesaid and the evidence adduced on behalf of the Petitioner and the Respondent, IT WAS ORDERED that judgment be reserved and the cause coming on this day for judgment in the presence of Mr. T.O. Thomas for the Petitioner and Tuan Syed Othman bin Ali, with him Enche Au Ah Wah for the Respondent IT IS ORDERED that the Petition be and is hereby dismissed.

Given under my hand and the seal of the Court this 1st day of December, 1967.

Sgd.

CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

(L.S.)

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No. 16

Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong Dated 5th February, 1968

## NO. 16

## ORDER GRANTING FINAL LEAVE TO APPEAL TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(ORIGINAL JURISDICTION)

FEDERAL COURT SUIT NO. X. 1 OF 1967

B E T W E E N:

STEPHEN KALONG NINGKAN — Appellant Petitioner

- and -

GOVERNMENT OF MALAYSIA — Respondent

Before: AZMI, CHIEF JUSTICE, HIGH COURT IN MALAYA,
SUFFIAN, FEDERAL JUDGE, MALAYSIA, and
MACINTYRE, FEDERAL JUDGE, MALAYSIA.

In Open Court
This 5th day of February, 1968.

O R D E R

UPON MOTION made unto Court this day by

In the Federal Court

No. 16

Order granting Final leave to Appeal to His Majesty the Yang di-Pertuan Agong Dated 5th February, 1968 continued.

Mr. T.O. Thomas of Counsel for the above-named Appellant/Petitioner in the presence of Mr. Ajaib Singh, Senior Federal Counsel on behalf of the Respondent AND UPON READING the Notice of Motion dated the 20th day of January, 1968, and the affidavit of Theempalengad Ouseph Thomas of Esquire affirmed on the 20th day of January, 1968, filed herein AND UPON HEARING Counsel as aforesaid IT IS ORDERED that final leave to appeal to His Majesty the Yang di-Pertuan Agong be and is hereby granted AND IT IS FURTHER ORDERED that the costs of this application be costs in the appeal.

Given under my hand and the seal of the Court this 5th day of February, 1968.

CHIEF REGISTRAR
FEDERAL COURT OF MALAYSIA.