Privy Council Appeal No. 4 of 1968

S. K. Ningkan – – – – – – – – – *Appellant*

v.

Government of Malaysia – – – – – – *Respondent*

FROM

THE FEDERAL COURT OF MALAYSIA

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH JULY 1968

Present at the Hearing:
LORD MACDERMOTT
LORD HODSON
LORD UPJOHN
LORD DONOVAN
LORD PEARSON

[*Delivered by* LORD MACDERMOTT]

The appellant was appointed Chief Minister of the State of Sarawak on 22nd July, 1963, and continued to hold that office after Malaysia Day when Sarawak became one of the States of the Federation of Malaysia. The Constitution of Sarawak, which in its present form came into force just before Malaysia Day and will be referred to as the Constitution of 1963, provides by Article 13 that the State Legislature shall consist of the Governor and one House to be known as the Council Negri. The executive authority of the State is vested in the Governor by Article 5. By Article 6 a Supreme Council, or Cabinet, is set up to advise the Governor. It consists of the Chief Minister with five other members, all appointed by the Governor from the membership of the Council Negri, and three *ex officio* members. Article 7 deals with the tenure of office of members of the Supreme Council. If the Chief Minister ceases to command the confidence of a majority of the Council Negri he is to tender the resignation of the appointed members of the Supreme Council, unless at his request the Governor dissolves the Council Negri. An appointed member may resign at any time and his appointment, if he is not the Chief Minister, may be revoked by the Governor on the advice of the Chief Minister. Members, other than the Chief Minister and the *ex officio* members, are to hold office at the Governor's pleasure. The Constitution of 1963 makes no specific provision for the dismissal of the Chief Minister by the Governor.

The evidence bearing on the events which led up to the present litigation is not extensive and may be briefly summarised. Until June, 1966, it would appear that no motion of no confidence in the appellant's administration had been put forward in the Council Negri, and that no Government Bill had been defeated; but by a letter of the 14th of that month from the Federal Minister for Sarawak affairs at Kuala Lumpur to the Governor of Sarawak it was stated that those who appended their signatures no longer had any confidence in the appellant "to be our leader in the Council Negri and to continue as Chief Minister". These signatures were of 21 members of the Council Negri, the full membership of which was then 42 excluding the Speaker. On 16th June the

Governor's private secretary wrote to the appellant stating that as the Governor was satisfied that the appellant had ceased to command the confidence of the majority of the Council he was requested to present himself forthwith to tender his resignation. On the 17th June the appellant replied joining issue on the view that he had lost the confidence of the majority, suggesting that the matter be put to the test by convening a meeting of the Council for the purpose, and undertaking to abide by the result. Later the same day the Governor wrote informing the appellant that he and the other members of the Supreme Council had ceased to hold office. These dismissals were duly published and so was the appointment of Penghulu Tawi Sli as the new Chief Minister. The appellant thereupon commenced an action in the High Court at Kuching seeking a declaration that he was still Chief Minister of Sarawak, and an injunction restraining his successor from acting in this capacity. On 7th September, 1966, Harley J., the Acting Chief Justice of Borneo, gave judgment in these proceedings in the appellant's favour. He held that the Governor had no power to dismiss the appellant who still was and had at all material times been the Chief Minister of Sarawak, and granted an injunction restraining the recently appointed Penghulu Tawi Sli from acting in that office. This judgment appears to have been accepted and the appellant was reinstated as Chief Minister. It also appears that after this success the appellant was no longer willing to submit the question of confidence to the Council Negri.

The development of this situation produced a vigorous reaction on the part of the Federal Government of Malaysia. On 14th September, 1966, a week after the judgment of Harley J., the Supreme Head of the Federation of Malaysia, the Yang di-Pertuan Agong, acting, it may be presumed, on the advice of the Federal Cabinet as required by Article 40(1) of the Federal Constitution, proclaimed a state of emergency throughout the State of Sarawak under Article 150 of that Constitution. The material clauses of this Article were then in these terms—

> " 150. (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency.
>
> (4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in the Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.
>
> (5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.
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> (6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.
>
> (6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom of Malays, or with respect to any matter of native law or custom in a Borneo state; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.

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

The Proclamation of the 14th September read as follows—

" 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."

There can be no doubt that this Proclamation was directed to the constitutional impasse which had come about in Sarawak as already described, and that its immediate purpose was to enable the Federal Parliament to exercise the further legislative powers provided for by Article 150 (5) of the Constitution. This the Federal Parliament purported to do on the 19th September, 1966, when it passed the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966. This is the statute which is now challenged by the appellant and it will be referred to hereafter as the " impugned Act ". It commenced by reciting the Proclamation of Emergency and that ". . . it appears to Parliament that the following provisions of this Act are required by reason of the said Emergency." Of these provisions section 3 amended clause (5) of Article 150 of the Federal Constitution by adding to the words " notwithstanding anything in this Constitution " the words " or in the Constitution of the State of Sarawak ", and then made a similar amendment in clause (6) of the same Article; section 4 drastically enlarged the powers of the Governor of Sarawak in regard to summoning meetings of the Council Negri and the transaction of business thereat; and section 5 enacted specifically that the Governor might, in his absolute discretion, dismiss the Chief Minister and the members of the Supreme Council if (*a*) at any meeting of the Council Negri a resolution of no confidence in the Government was passed by a majority of members present and voting, and (*b*) the Chief Minister after the passing of such a resolution failed to resign and to tender the resignation of the members of the Supreme Council. The main aim of these provisions was to make good the lack of powers on the part of the Governor on which Harley J. had based his judgment. They were temporary provisions in the sense that, under Article 150 (7) of the Constitution, they were to cease to have effect six months after the termination of the Emergency. But it was not disputed that they involved a modification, albeit temporary, of the 1963 Constitution of Sarawak and would have been beyond the powers of the Federal Parliament before the Declaration of Emergency.

On the 23rd September, 1966, the Council Negri met and passed a vote of no confidence in the appellant and on the next day the Governor of Sarawak, purporting to act under the provisions of the impugned Act, dismissed the appellant from his position of Chief Minister and appointed the said Penghulu Tawi Sli to be Chief Minister in his stead. The appellant then commenced proceedings by petition in the Federal Court seeking a declaration that the impugned Act was, or alternatively that sections 3, 4 and 5 thereof were *ultra vires* the Federal Parliament and of no effect. On 1st December, 1967, the Federal Court, consisting of Syed Sheh Barakbah (Lord President, Malaysia), Azmi (Chief Justice, Malaya) and Ong Hock

Thye (Judge of the Federal Court), delivered judgments dismissing the petition, and it was from that decision, with the leave of the Federal Court, that the appellant appealed.

Counsel for the appellant attacked the impugned Act on two main grounds, submitting first, that the Proclamation of Emergency was *ultra vires* and invalid and that the impugned Act which was founded upon it accordingly fell with it in its entirety; and secondly that even if the Proclamation of Emergency were valid, sections 3, 4 and 5 of the impugned Act purported to amend the 1963 Constitution of Sarawak in a manner which had been committed by Article 41 of that Constitution to the Legislature of Sarawak alone and was therefore beyond the powers of the Federal Parliament to enact.

The first of these submissions went the length of saying that there had been no emergency within the meaning of Article 150, and that (in the words of paragraph 7 of the appellant's petition)—

> ". . . 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."

Reliance was also placed on the fact that earlier Emergency provisions had been made or enacted in 1964, in relation to the whole Federation, which were still in operation and (it was said) sufficient to deal with any threat to the security of any part of the Federation. It was further contended on behalf of the appellant that the evidence showed that none of the usual signs and symptoms of " a grave emergency " existed in Sarawak at or before the time of the Proclamation. No disturbances, riots or strikes had occurred; no extra troops or police had been placed on duty; no curfew or other restrictions on movement had been found necessary; and the hostile activities of Indonesia (referred to as the Confrontation) had already ended.

This first submission was met on behalf of the respondent, the Government of Malaysia, in two ways: (1) issue was joined on the allegation that there had been no true or sufficient emergency within the meaning of Article 150; and (2) it was contended that that allegation was not justiciable, as the Proclamation of Emergency was conclusive and not assailable on any ground. It will be convenient to consider these points in the order stated and on the assumption, when dealing with point (1), that the issue to which it relates is in law justiciable.

Making this assumption, their Lordships can entertain no doubt that the onus was on the appellant to prove the allegations on which his first submission depended. In circumstances such as those with which this appeal is concerned, the onus of proof on anyone challenging a Proclamation of Emergency may well be heavy and difficult to discharge since the policies followed and the steps taken by the responsible Government may be founded on information and apprehensions which are not known to, and cannot always be made known to, those who seek to impugn what has been done. Considerations of this nature, however, can seldom remove or shift the onus and in the present case it was not suggested that it rested elsewhere than on the appellant. The sole question on this branch of the argument was whether he had established his assertions.

In the opinion of their Lordships the appellant failed to do so. It may be accepted, in the absence of anything to show the contrary, that, as he alleged, there was no actual or threatened outbreak of violence or breach of the peace in Sarawak at any time relevant to the Proclamation of Emergency. But the word " emergency " as used in Article 150 (1) cannot be confined to the unlawful use or threat of force in any of its manifestations. While Article 149 of the Federal Constitution is aimed at stopping or preventing subversion of that character, the terms of Article 150 are much less restricted. Although an " emergency " to be within that Article must be not only grave but such as to threaten the security or economic life of the Federation or any part of it, the natural meaning of the word itself

is capable of covering a very wide range of situations and occurrences, including such diverse events as wars, famines, earthquakes, floods, epidemics and the collapse of civil government. As Lord Dunedin observed when delivering the judgment of the Board in *Bhagat Singh and others v. The King Emperor*, L.R. 58 I.A. 169, " A state of emergency is something that does not permit of any exact definition: it connotes a state of matters calling for drastic action. . . ."

In the explanatory statement issued by the Government of Malaysia while the impugned Act was a Bill in Parliament the following passages appear in reference to the events in Sarawak that have been mentioned already:

> " 1. A constitutional crisis has occurred in Sarawak which the Yang di-Pertuan Agong is satisfied constitutes a grave emergency whereby the security of Sarawak is threatened.
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> 2. There is already in force a Proclamation of Emergency issued on 3rd September, 1964, in respect of the whole Federation, the occasion for which is a matter of public knowledge.
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> 3. The Yang di-Pertuan Agong, in exercise of his powers under Article 150 of the Constitution, has on the 14th September, 1966, issued a further Proclamation in respect of Sarawak only, in order to deal with the present crisis as a distinct emergency additional to the emergency already proclaimed. In a recent judgment of the High Court in Borneo it was held that the question whether the Chief Minister commands the confidence of a majority of the members of the Council Negri cannot be resolved otherwise than by a vote in the Council itself. It was further held, in the same judgment, that the State Constitution confers no power on the Governor to dismiss, or by any means to enforce the resignation of, a Chief Minister, even when it has been demonstrated that he has lost the confidence of a majority. This is a serious lacuna in the State Constitution, and one which enables a Chief Minister whose majority has become a minority to flout the democratic convention that the leader of the Government party in the House should resign when he no longer commands the confidence of a majority of the members. The occurrence of such an event, resulting in the breakdown of stable Government and thereby giving rise to the spreading of rumours and alarm throughout the territory, is in the opinion of the Yang di-Pertuan Agong, as expressed in the Proclamation of Emergency, a threat to the security of Sarawak."

It is not for their Lordships to criticise or comment upon the wisdom or expediency of the steps taken by the Government of Malaysia in dealing with the constitutional situation which had occurred in Sarawak, or to enquire whether that situation could itself have been avoided by a different approach. But, taking the position as it was after Harley J. had delivered judgment in September, 1966, they can find, in the material presented, no ground for holding that the respondent Government was acting erroneously or in any way *mala fide* in taking the view that there was a constitutional crisis in Sarawak, that it involved or threatened a breakdown of stable government, and amounted to an emergency calling for immediate action. Nor can their Lordships find any reason for saying that the emergency thus considered to exist was not grave and did not threaten the security of Sarawak. These were essentially matters to be determined according to the judgment of the responsible Ministers in the light of their knowledge and experience. And although the Indonesian Confrontation had then ceased, it was open to the Federal Government, and indeed its duty, to consider the possible consequences of a period of unstable government in a State that, not so long before, had been facing the tensions of Confrontation and the subversive activities associated with it. That the appellant regarded the Federal Government's actions as aimed at himself is obvious and perhaps natural; but he has failed to satisfy the Board that the steps taken by the Government, including the Proclamation and the impugned Act were *in fraudem legis* or otherwise unauthorised by the relevant legislation.

Their Lordships would add that, in their opinion, the continuing existence of earlier Emergency Proclamations or Acts (whether under Article 149 or Article 150 of the Federal Constitution) could not, in the circumstances, justify a different conclusion. The emergency, the subject of this appeal, was distinct in fact and kind from those that had preceded it, and the powers conferred by Article 150 were in being and not spent when it arose.

For these reasons their Lordships find against the appellant on his first submission and would hold that the Emergency Proclamation of 14th September, 1964, was *intra vires* and valid.

The issue of justiciability raised by the Government of Malaysia led to a difference of opinion in the Federal Court, the Lord President of Malaysia and the Chief Justice of Malaya holding that the validity of the Proclamation was not justiciable and Ong J. holding that it was. Whether a Proclamation under statutory powers by the Supreme Head of the Federation can be challenged before the Courts on some or any grounds is a constitutional question of far-reaching importance which, on the present state of the authorities, remains unsettled and debateable. Having regard to the conclusion already reached, however, their Lordships do not need to decide that question in this appeal. They do not, therefore, propose to do so, being of opinion that the question is one which would be better determined in proceedings which made that course necessary.

The appellant's second submission, being alternative to his first, must now be examined. With the Proclamation valid and Article 150 (5) of the Federal Constitution in consequence effectual, were sections 3, 4 and 5 of the impugned Act *ultra vires* the Federal Parliament as amending or providing for the amendment of the Constitution of Sarawak? That these sections do seek to amend that Constitution may, as already indicated, be accepted and the question therefore turns only on the extent of the Federal Parliament's powers. The Federal Constitution provides for the distribution of legislative power between the Federation and the States and contains certain provisions enabling the Federal Parliament to legislate in certain events with respect to State affairs. These provisions, however, do not bear immediately on the question in hand which falls to be decided on the true meaning of two of the documents annexed to the Agreement Relating to Malaysia made on 9th July, 1963, between the United Kingdom, the Federation of Malaya, North Borneo, Sarawak and Singapore. These documents are the draft marked " A " of the Malaysian Federal Constitution and the draft marked " C " of what has been referred to as the 1963 Constitution of the State of Sarawak.

By Article 41 (1) of that Constitution it is enacted that—

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

Taken by itself this enactment is in plain terms, but it has to be read in conjunction with the Federal Constitution for it, no less than the 1963 Constitution of Sarawak, was agreed to by the contracting States and Federation, and the question accordingly becomes whether the legislative powers of the Federal Parliament, as enlarged by Article 150 (5) during the operation of an Emergency Proclamation, were intended to include a power to modify the Sarawak Constitution and thus override Article 41 (1) thereof.

The Federal Court held that the Sarawak Constitution could be modified in this way and their Lordships share that view. The Federal Constitution must have been accepted by the contracting parties as the supreme law of the Federation in view of Article 4 thereof, but this in itself does not appear to their Lordships to be conclusive. More to the point are the terms of Article 150 (as modified pursuant to clause 39 of the draft Bill which is annexure " A " to the Agreement of 9th July, 1963) for they go to show that the parties to that Agreement must have realised that the powers of the Federal Parliament conferred by that Article, during the

currency of a Proclamation of Emergency, might be used to amend, for the time being, the provisions of the Sarawak Constitution of 1963. On its face, clause (1) of Article 150 is capable of applying to a grave emergency threatening the security or economic life of any of the States of the Federation, and it could hardly have failed to be within the contemplation of the parties to the Malaysia Agreement that the powers needed to meet such a situation might include power to modify, at any rate temporarily, the Constitution of the part of the Federation which was principally affected. Again, clause (4) of Article 150 states in plain terms that while a Proclamation of Emergency is in force the executive authority of the Federation is to extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or any officer or authority thereof. This provision is plainly capable of conflict with the 1963 Constitution of Sarawak, particularly Article 5 thereof, and in itself indicates that a Proclamation of Emergency under Article 150 was intended to have consequences which might be contrary to the provisions of a State Constitution. Clause (5) of Article 150 points in the same direction. The legislative power which it confers on the Federal Parliament is expressed to be subject to clause (6A) and that clause provides that clause (5) is not to extend the powers of the Federal Parliament with respect to any matter of Muslim law or the custom of the Malays or with respect to any matter of native law or custom in a Borneo State. These subject-matters, however, are placed by the Federal Constitution in the State List, that is to say, in the List setting out the legislative powers of the States. The limiting provisions of clause (6A), therefore, indicate that the legislative power conferred by Article 150 (5) was intended to extend to matters which normally were within the legislative competence of the States. But, perhaps most significant of all, is the width of the language of clause (5) of Article 150. Subject to clause (6A), while a Proclamation of Emergency is in force, the power conferred upon the Federal Parliament is a power to make law " with respect to any matter " if it appears to Parliament that the law is required by reason of the Emergency. These words could scarcely be more comprehensive. In the view of the Board they reflect the fact that a grave Emergency can assume many forms and may make demands upon the Federal Government which could only be met if the widest powers were available.

The terms of Article 41 (1) of the 1963 Constitution of Sarawak are sufficiently explicit to make it difficult as a matter of implication to construe the Federal Constitution as empowering the Federal Parliament to amend the Constitution of Sarawak permanently and at its pleasure. But a temporary amendment on exceptional grounds stands on a different footing, and the considerations mentioned lead their Lordships to the conclusion that Article 150 (5) was intended to arm the Federal Parliament with power to amend or modify the 1963 Constitution of Sarawak temporarily if that Parliament thought such a step was required by reason of the Emergency, and further, that such an intention must be imputed to the parties to the Malaysia Agreement of 9th July, 1963. Their Lordships, accordingly, hold against the appellant on his second submission and are of opinion that in so far as the impugned Act had the effect of modifying or amending the 1963 Constitution of Sarawak it was *intra vires* and valid.

For these reasons their Lordships were of the opinion that the conclusion reached by the Federal Court of Malaysia was right and that the appeal should be dismissed.

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In the Privy Council

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v.

GOVERNMENT OF MALAYSIA

DELIVERED BY

LORD MACDERMOTT

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