# PROCLAIMATION OF EMERGENCY — REVIEWABLE?

*Stephen Kalong Ningkan* v. *Government of Malaysia* [1]

Can a proclamation made by the Yang di-Pertuan Agong under Article 150 of the Federal Constitution that there exists a state of emergency be challenged on the ground that it was not made *bona fide* but in *fraudem legis?* This was one of the two issues which the Federal Court had to decide in the recent case of *Stephen Kalong Ningkan* v. *Government of Malaysia.*

The facts of the case briefly are as follows: The petitioner was appointed Chief Minister of Sarawak and so acted as leader of the majority party in the Council Negri. Three years after, the Governor acting on representation, requested the petitioner to resign since the majority in the Council had lost confidence in him as Chief Minister. The petitioner did not comply with this request and as a result the Governor "dismissed" him and appointed Penghulu Tawi Sli as Chief Minister The petitioner then brought an action in the High Court of Kuching; the court declared the dismissal of the petitioner void[2] on the ground, *inter alia,* that the private representation made to the Governor by members of the Council did not show a lack of confidence in the petitioner which could only be assessed by a formal vote in the legislative. Penghulu Tawi Sli then requested the Speaker to convene the Council so that a proper vote of no confidence might be taken against the petitioner. This request was refused and the position in Sarawak became more tense and serious. A week after this decision, His Majesty the Yang di-Pertuan Agong proclaimed a state of Emergency in Sarawak. The Federal Parliament then passed the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, amending clauses (5) and (6) of Article 150 inserting after 'this Constitution* the words 'or in the Constitution of the State of Sarawak'[3] and providing further that, notwithstanding anything in the State Constitution, the Governor may summon the Council Negri, suspend standing orders and issue directions binding on the Speaker. Pursuant to this the Governor summoned a meeting of the Council Negri which passed a vote of no confidence in the petitioner; the petitioner was then dismissed.

The petitioner then commenced action claiming:

(1) that the state of emergency proclaimed by the Yang di-Pertuang Agong was null and void; and

(2) that the State of Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, was on that account null and void.

Counsel for the applicant, Sir Dingle Foot argued on the first issue that the power given to the Yang di-Pertuan Agong to proclaim a state of emergency was a statutory power conferred by a particular Article of the Constitution [4] and as such it was open to the court to inquire into the exercise of such statutory power.[5]

The Federal Court comprising Barakbah L.P., Azmi C.J. (Malaya) and Ong Hock Thye F.J. unanimously dismissed the appeal. The majority held on the first issue (with Ong F.J. dissenting) that the court could not inquire as to whether or not the Agong had been satisfied that a state of emergency existed. Ong F.J. on the other hand, held that this issue was justiciable.

The case becomes interesting when one examines the reasons of each of the Lordships for supporting their decision. The Lord President was the first to deliver the judgment of the court and he pointed out: [6]

1. [1968] 1 M.L.J. 119.
2. [1966] 2 M.L.J. 187.
3. The effect of this amendment was that power was now given to the Federal Parliament to amend the State Constitution of Sarawak without following the procedure laid down by Art. 41 of the State Constitution which provides that any amendment to the State Constitution must be amended by an ordinance enacted by the legislature of Sarawak.
4. Art. 150 of the Federal Constitution.
5. Straits Times, 6th September, 1967.
6. [1968] 1 M.L.J. 119 at p.122.

> 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.

After rejecting the submission of counsel for the applicant that where discretion was given to any person, the court had some control to see that the power was properly exercised, his Lordship then quoted two Indian cases[7] and held: [8]

> 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.

The Chief Justice of Malaya, Tan Sri Azmi, based his decision entirely on the authority of two Privy Council cases [9] from India, where it was held that the Governor-General of India was the sole judge as to whether a state of emergency existed. On the authority of these two cases, the Chief Justice came to the same conclusion that the Yang di-Pertuan Agong must be regarded as the sole judge in deciding whether a state of emergency existed.

Ong F.J. who dissented from the majority on the first issue went into great detail on the facts of the case. His Lordship then stated as follows: [10]

> 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, the "the circumstances which bring about a Proclamation of Emergency are non-justiciable".

His Lordship stated that His Majesty acted on the advice of the Cabinet and as such it was the Cabinet's decision that was being challenged. He then chided his two other brethren for not taking into consideration this fact.

With respect to His Lordship, it is submitted that this is not completely correct. It would seem that the Lord President did consider this fact when he said: ". . . in my opinion, it is incumbent on the court to assume that the *Government* [11] is acting in the best interest of the State and to permit no evidence to be adduced otherwise." [12]

The fact that the Lord President used the word 'Government' seems to suggest that he must have been fully aware of the fact that it was on the Cabinet's advice that His Majesty was so acting.

Ong F.J. then criticised the counsel for the government and his learned brethren for havng relied on the two Privy Council decisions.[13] His Lordships submitted: [14]

> Again with respect, I do not consider the *ratio decidendi* in those cases to be applicable herein because section 72 [15] of Schedule IX of the Government

7. *Bhagat Singh* v. *The King-Emperor* L.R. 58 I.A. 169; *King-Emperor* v. *Benoari Lal Sarma & Ors.* [1945] A.C. 14.
8. [1968] 1 M.L.J. 119 at p.122.
9. See footnote 7.
10. [1968] 1 M.L.J. 119 at p.125.
11. Italics supplied.
12. [1968] 1 M.L.J. 119 at p.124.
13. See footnote 7.
14. [1968] 1 M.L.J. 119 at p.126.
15. "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."

> of India Act, 1935, is manifestly not in *pari materia,* with article 150 [16] 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", His Lordship continued, "it is quite erroneous to argue by analogy from the Government of India Act to our Constitution as if those authorities were unquestionably conclusive." [17]

His Lordship, pointed out that unlike the position in India, there were in-built safeguards against indiscriminate or frivolous recourse to emergency legislation contained in article 150 which specifically provides that the emergency must be one "whereby the security or economic life of the Federation is threatened." This the learned Judge held did not confer on the Cabinet an untramelled discretion to cause an emergency to be declared at their mere whim and fancy. It is submitted that His Lordship should have considered the meaning of the Indian provision of 'peace and good government' in section 72 of the Government of India Act 1935 to see whether it differed from the Malaysian provision. In fact, counsel for the applicant had earlier argued that these provisions were different from one and another, but Azmi C.J. rejected this argument thus suggesting that the Chief Justice was of the opinion that these two provisions were similar. It is interesting to know that Ong F.J. made no comments on this holding, though he was not in agreement with it.

It is submitted that the Malaysian position is different from the Indian position and that other considerations should apply. Under Article 150 of the Federal Constitution, the Yang di-Pertuan Agong could proclaim a state of emergency only when "the security or economic life of the Federation ... is threatened." This is not so with the Indian position where there is no requirement for a proclamation to be issued before the Governor-General could promulgate ordinances "for the peace and good government of British India." Thus the constitutional position in Malaysia is distinct from the Indian position and as such the reasoning of the Indian Privy Council cases opposing judicial review should not be applicable under the Malaysian Constitution. As Sir Dingle Foot pointed out it should be the duty of the courts in Malaysia to consider whether the condition precedent laid down in Article 150 whereby the security or economic life of the Federation is threatened does in fact exist before a Proclamation of Emergency is issued and to see that the power conferred by Article 150 is used for no other purpose.

Further, the Yang di-Pertuan Agong acts on the advice of the cabinet whose advice on such a matter is binding on him. Therefore it is the Federal government's decision and not the Yang di-Pertuan Agong's decision that is being challenged. Thus it is the responsibility of the courts to see that the government like everybody else observes the law.[18] This is unlike the position of the Governor-General of India who exercises a prerogative power and whose decision cannot be challenged in a court of law.

It is further submitted that it should always be open to the courts to test the validity of any law passed even during emergency. As Ong F.J. earlier said: [19]

> . . . the acts of the Executive which directly and injuriously affect the person or property or rights of the individual should be subject to review by the courts. . . .

One should also remember the words of Lord Atkin in *Liversidge* v. *Anderson,*[20] ". . . amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace." [21]

16. "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."

17. [1968] 1 M.L.J. 119 at p.126.

18. See Sir Dingle Foot's argument in the *Straits Times*, 7th September, 1967.

19. [1968] 1 M.L.J. 119 at p.128.

20. [1942] A.C. 206.

21. *Ibid*., at p.244.

The second issue which the Federal Court had to decide was whether the Federal Parliament had the power to amend the State Constitution of Sarawak. Sir Dingle Foot argued, *inter alia,* that under article 159 Parliament could alter the Federal Constitution but there was no provision anywhere in the Malaysian Constitution which gave powers to the Federal Parliament to alter the Constitution of Sarawak.[22] The court however was of the unanimous opinion that the Federal Parliament had the power to alter the State Constitution. The court held that under article 150(5) of the Constitution, the Federal Parliament had powers to make laws with respect to any matter except those mentioned in clause (6A) of article 150. Thus the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 was held to be valid.

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22. Straits Times, 7th September, 1967.