# VALIDITY OF EMERGENCY LEGISLATION AND THE SAGA OF TEH CHENG POH'S CASE

*Teh Cheng Poh* v. *Public Prosecutor*
[1979] 1 M.L.J. 50

One of the most interesting and significant cases in Constitutional law decided by the Privy Council on appeal from Malaysia would perhaps be *Teh Cheng Poh* v. *PP*. Their Lordships stated a number of important points of law regarding Articles 149 and 150 of the Malaysian Constitution. In an almost instant response, the Malaysian Parliament passed the Emergency (Essential Powers) Act 1979 to counter the decision.

This case has tremendous implications for the development of constitutional law both in Malaysia and Singapore.

The writer proposes to discuss the case as follows:

Part I — (a) A brief summary of the facts, issues and the decision itself and;

(b) a critical analysis of the decision and its relationship with other decided cases.

Part II —The effect of the Emergency (Essential Powers) Act 1979 on the decision in Malaysia.

Part III — The consequences of the decision for Malaysia and Singapore.

*Part I*

The appellant was found in possession of a revolver and ammunition in Penang,[1] a security area, on January 13, 1976. He was subsequently charged under Section 57(1) of the Internal Security Act ("I.S.A.") which carries the death penalty. He could have been charged under the Arms Act 1960 which carries, for unlawful possession of a firearm, a maximum of seven years imprisonment or a fine of $10,000 or both. As the offences were "security offences" within the meaning of the Essential (Security Cases) Amendment Regulations 1975,[2] he was also subjected to the special trial procedure[3] prescribed by those Regulations. He was found guilty and sentenced to death. His appeal to the Federal Court was dismissed.[4]

The issues before the Privy Council were:

(1) The validity of the Essential (Security Cases) Amendment Regulations 1975 ("the Regulations").

[1] Penang, as well as other parts of Malaysia, had been declared a security area for the purpose of Part II of the Internal Security Act by a proclamation of the Yang di-Pertuan Agong on 15 May 1969.
[2] Enacted on November 1 1975 by the Yang di-Pertuan Agong pursuant to section 2 of the Emergency (Essential Powers) Ordinance 1969 which was made on 15 May 1969 in reliance upon the powers conferred on the Yang di-Pertuan Agong by Article 150(2) of the Constitution of Malaysia.
[3] This mode of trial is substantially different from the procedure prescribed by the Criminal Procedure Code.
[4] [1977] 2 M.L.J. 66, 73.

(2) Whether the security area proclamation having been made on 15 May 1969 was still in force on January 13, 1976.

(3) The legality under the Constitution of the decision of the Attorney-General to prosecute the appellant for an offence under the I.S.A., instead of under the Arms Act.

1. *Validity of the Regulations*

Two preliminary points were decided in relation to this issue:

(a) *Whether the Proclamation of Emergency is issued by the Yang di-Pertuan Agong on advice.*

The Privy Council held that the Yang di-Pertuan Agong acts on the advice of the cabinet in the exercise of his functions under Article 150(2) as required by Article 40(1). Thus their Lordships finally laid to rest doubts entertained by some writers[5] as to whether the proclamation of an emergency under Article 150(2) was a "royal prerogative", a matter in which the Yang di-Pertuan Agong acts in his personal discretion.

Regrettably, however, their Lordships did not discuss whether and to what extent, the validity of a proclamation is justiciable. The Malaysian judicial pronouncements are varied. Pike CJ. in *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg & Tawi Sli (No. 2)*[6] was of the opinion that there could be no judicial review "provided it (the proclamation) was made *bona fide."* However, Azmi FJ. (one of the two judges in the majority) in *Stephen Kalong Ningkan* v. *The Government of Malaysia*[7] (Federal Court) dismissed such a possibility. The other judge, Lord President Barakbah, expressed no opinion on this matter.

It is respectfully submitted that the court may not inquire into the sufficiency of grounds for a proclamation of emergency, since this is a given discretion. Nevertheless, as the issuance is essentially upon the advice of the Cabinet, this exercise of executive power is subject to the ordinary principles of administrative law. This means that, at the very least, a proclamation should be justiciable on the ground of *mala fides.* This is highly desirable as it operates as a check on any gross abuse of power by those who exercise it,

(b) *Meaning of the word "sitting" in Article 150(2).*

In P.P. v. *Khong Teng Khen & Anor.*[8] the Federal Court interpreted this word to mean "sitting and actually deliberating." This means that the Yang di-Pertuan Agong's power to make laws revives whenever Parliament takes its week-end recess.[9] The absurdity of

[5] See Professor S. Jayakumar "Emergency Powers in Malaysia" [1978] 1 M.L.J. ix and also in Suffian-Trindade-Lee *The Constitution of Malaysia: Its Development 1957-1977* at p. 329 especially pp. 335-336. *Cf.* R.H. Hickling "Prerogative in Malaysia" (1975) 17 Mal. L.R. 207.

[6] [1967] 1 M.L.J. 46.

[7] [1968] 1 M.L.J. 119.

[8] [1976] 2 M.L.J. 166.

[9] "Parliament would be sitting though a week-end recess is taken ... art. 150(2) should be construed to give it a meaning which is neither absurd nor impossible ..." *per* Ong Hock Sim F.J. (dissenting) *supra,* at p. 172.

such a literal interpretation was avoided by the Privy Council, which held that once Parliament has sat after the proclamation of emergency, the Yang di-Pertuan Agong's power to legislate by ordinance under Article 150(2) does not revive even during periods when Parliament is not actually sitting.

The determination of the first issue thus depended on whether Article 150(2) can be interpreted so as to allow the Yang di-Pertuan Agong to make Regulations under a Proclamation of Emergency once Parliament has sat.

In *P.P. v. Khong Teng Khen & Anor.*[10] the Federal Court interpreted this Article literally and concluded that as the Regulations were made not under Article 150(2) but under Section 2 of the *Emergency (Essential Powers) Ordinance 1969,* they were valid. This interpretation brings about a most curious legal situation: the Executive can no longer make emergency ordinances because Parliament has sat but it can continue to enact subsidiary legislation.[11] Their Lordships rejected the approach for "it would be tantamount to the Cabinet lifting itself up by its own bootstraps."[12] Instead they adopted a different approach by examining the scheme and spirit of clauses 2 and 3 of Article 150 read in conjunction. According to their Lordships one must look to the substance and not the label which is attached to the instrument. The desire to avoid too literal an interpretation of this article is best seen from the Board's assertion that even if the written laws which were made under the Proclamation before February 20 1971 were described as "Regulations" instead of "Ordinances", this would not *ipso facto* render them invalid. The Board therefore concluded that the power of the Yang di-Pertuan Agong to promulgate legislation could only be exercised (after a Proclamation of Emergency) *before* both Houses of Parliament had sat. Accordingly it was held that the Regulations, which were made after Parliament had sat, were *ultra vires* the Constitution and void.

Although their Lordships had already decided in this fashion that the Regulations were void they went even further with regard to the alternative argument that the Regulations would have been valid if the Yang di-Pertuan Agong had derived his authority to make the Regulations from the *Emergency (Essential Powers) Act 1964.* This argument depended on the continued existence of the Proclamation of Emergency of 1964 upon which the validity of the 1964 Act depended. The Board held that the 1969 Proclamation of Emergency had by necessary implication been intended as a revocation of the previous proclamation of 1964. Therefore, the 1964 Proclamation as well as the 1964 Act had lapsed.

The question therefore arises how widely one can read this statement. At its widest, it means (as one learned writer has suggested)[13] that a later proclamation of emergency would revoke an earlier

[10] [1976] 2 M.L.J. 166.
[11] As has been pointed out by Prof. S. Jayakumar on "Emergency Powers in Malaysia", *op. cit.,* at p. 342.
[12] [1979] 1 M.L.J. 50 *per* Lord Diplock at p. 53.
[13] Sheridan & Groves *The Constitution of Malaysia* (3rd ed., Malayan Law Journal 1979), p,370.

subsisting one. At its narrowest, it may be argued that the Board has confined itself to the facts before it and had it not been for the presence of Section 6 of the Emergency (Essential Powers) Ordinance 1969 ("the Ordinance"), which recognised the termination of the 1964 Emergency, the Board would have come to a different conclusion.

It is respectfully submitted that neither view should prevail. As regards the wider view, it is untenable for two reasons. First, the Board used the following words: "... threatening the security of the Federation *as a whole...*"[14] (emphasis added). This means that the 1966 Sarawak Emergency did not revoke the 1964 Emergency; it was only the 1969 Emergency which revoked the 1964 Emergency."[15] Second, even if this is wrong, it would seem strange that a later proclamation which covered only a part of the country can be treated as having impliedly revoked the earlier proclamation which covered the whole of the country. This is especially true if the threat to the security of the greater part of the country has not ended. With regard to the narrow view, it is too restrictive in its scope. It can be argued that the Board merely used section 6 of the Ordinance to buttress its conclusion.

The writer submits that the best view is that as long as there is no inconsistency between two proclamations of emergency, the latter would not operate as an implied revocation of the earlier. It will be noted that both the 1964 and the 1969 proclamations dealt with situations where the security of the whole Federation was threatened. It is also submitted that two emergencies can apply to the same place at the same time. The Yang di-Pertuan Agong may intend that two proclamations co-exist each serving a different purpose. An example of this is the Emergency Proclamation of Kelantan 1977 which co-existed with the 1969 Emergency. The intention of the Yang di-Pertuan Agong was to declare an emergency to curb the troubles arising from the state elections, but this cannot be taken to mean that the 1969 Emergency does not apply to Kelantan from 1977 onwards, still less that it does not apply to the Federation as a whole.

Further it is the writer's view that there is no inconsistency between *Teh Cheng Poh's* case and the Federal Court's decision in *Johnson Tan v.* P.P.[16] where it was held that it is for the Executive to decide whether a proclamation of emergency should or should not be ended. By the use of this device of implied revocation a court is not usurping the functions of the executive. It is merely giving effect to the intention of the Executive.

[14] *Supra.*, at p. 53.
[15] There were 4 proclamations:
(a) the 1964 proclamation applicable throughout the Federation;
(b) the 1966 proclamation applicable only to Sarawak;
(c) the 1969 proclamation applicable throughout the Federation;
(d) the 1977 proclamation applicable only to Kelantan;
Therefore, it follows that the 1966 and 1977 proclamations did *not* impliedly revoke the 1964 and 1969 proclamations respectively as the two former proclamations were territorially restricted in their operations.
[16] [1977] 2 M.L.J. 66.

2. *Whether the Security Area Proclamation was in force on January 13 1976.*

The Yang di-Pertuan Agong's power to proclaim a security area is derived from Section 47 of the I.S.A.[17] However, the appellant argued that the proclamation under the I.S.A. had lapsed through effluxion of time and change of circumstances.

This argument was rejected by the Board as it felt that the power of revocation is vested in the executive. However, it was said *obiter* that the aggrieved person could apply for a writ of mandamus if it could be shown that the proclamation was no longer necessary and the Yang di-Pertuan Agong had abused his discretion by failing to revoke it.[18] In these circumstances, since the Yang di-Pertuan Agong cannot be the object of a writ of mandamus and since he must act on the advice of the cabinet, the mandamus would issue to the cabinet which would then advise the Yang di-Pertuan Agong to revoke the proclamation.

Nevertheless, as this had not been done, the security area proclamation was held to be in force on January 13, 1976.

3. *The Legality under the Constitution of the decision of the Attorney-General to prosecute the appellant under the ISA*

The appellant argued that this decision had deprived him of his constitutional right of equal protection under Article 8(1). In *Johnson Tan* v. P.P.[19] it was held that Article 145(3) gave the Attorney-General full discretion to act and that Article 8 must be read subject to Article 145(3). The Board agreed with this decision and held that the appellant had been correctly charged, since under the common law system of administration of criminal justice a prosecuting authority has discretionary power to decide under which statute to proceed.

However, their Lordships went further and held that once the Attorney-General had decided to charge the appellant with unlawful possession of a firearm and ammunition, he had no option but to charge him under the ISA. It is respectfully submitted that here an inconsistency between *Teh Cheng Poh* v. P.P. and *Johnson Tan* v. P.P. appears. The Board seems to have been influenced by the fact that the ISA had been enacted to deal with special circumstances such as those in the appeal before it *(i.e.* unlawful possession of firearms and ammunition in a security area). Yet, this cannot be true when the Attorney-General has a discretion in the exercise of his functions under Article 145(3) as was held by their Lordships earlier in their judgment. Furthermore, their Lordships seem to have ignored section 80 of the ISA which provides that a prosecution for any offence under the Act punishable with imprisonment of seven years or more shall not be instituted except with the consent of the Public Prosecutor. In fact there have been a number of cases where the Public Prosecutor exercised his discretion in appropriate cases to bring charges under the Arms Act 1960 or the Firearms (Increased Penalties) Act 1971.[20]

[17] Passed pursuant to Article 149 of the Constitution of Malaysia.
[18] The appellant brought proceedings for an order to revoke the security area proclamation. However, he was unsuccessful. (New Straits Times, 16th January 1979).
[19] [1977] 2 M.L.J. 66.
[20] See Prof. A. Ibrahim: "Legislative Digest (Malaysia) [1979] 1 M.L.J. lxxxv.

In conclusion, it is submitted that their Lordships' discussion of the Attorney-General's discretion leaves much to be desired, for it must be noted that no mention was made of the doctrine of *reasonable classification,* a concept fundamental to Article 8(1). Nevertheless, it may be possible to read into the judgment an affirmation of *P.P.* v. *Su Liang Yu*[21] where the court held that an Attorney-General's discretion under Article 145(3) is not subjected to Article 8(1). The inconsistency between *Teh Cheng Poh's* case and *Johnson Tan's* case may be reconciled by treating the later part of the reasoning in *Teh Cheng Poh's* case as *obiter dicta,* for the Privy Council had already decided in the earlier part of its judgment that the Attorney-General has full discretion under Article 145(3) with regard to prosecutions.

*Part II*

*Emergency (Essential Powers) Act 1979*

This was enacted as a result of the decision in *Teh Cheng Poh* v. *P.P.* It seeks, *inter alia,* to re-enact the Ordinance of 1969 as an Act of Parliament and validate all the subsidiary legislation made under the 1969 Ordinance as well as acts done under the Ordinance or the subsidiary legislation.

A closer look will be taken at a few relevant provisions of this Act.

*Section 9*

The decision in *Teh Cheng Poh's* case that the 1975 Regulations were void meant that a great number of people who were tried under it were improperly tried. The section cures this "technical" defect by declaring such trials to be lawful.[22]

However, it is submitted that this has merely invalidated the result but not the reasoning in *Teh Cheng Poh's* case *vis-a-vis* Article 150(2). Moreover, by re-enacting the 1969 Ordinance as an Act of Parliament, Parliament has indirectly acknowledged the Board's interpretation of Article 150(2), that once Parliament sits, the only source from which the Yang di-Pertuan Agong could derive powers to make written laws would be an Act of Parliament delegating the powers to him.

*Section 6*

Their Lordships held that the 1969 Emergency had impliedly revoked the 1964 proclamation of emergency. This section provides for the continued operation of essential regulations made under the Emergency (Essential Powers) Act 1964. This shows that Parliament has acknowledged the termination of the 1964 proclamation of emergency.

[21] [1976] 2 M.L.J. 128.

[22] This word was used by the Hon. Minister of Law of Malaysia in his speech to Parliament in introducing the Emergency (Essential Powers) Bill 1979 as reported in [1979] 1 M.L.J. lxxiv, although it hardly seems appropriate.

*Section 12*

Although the Board made it possible for a person to apply for a writ of mandamus to have a security area proclamation revoked in order to escape a conviction under the ISA, this section has rendered such a recourse impossible. This section purports to prevent a challenge on any ground regarding the validity or the continued operation of any proclamation issued by the Yang di-Pertuan Agong in exercise of his powers under any ordinance promulgated or Act of Parliament enacted under Part XI of the Constitution. However, it remains to be seen whether the courts would treat this section as having the intended effect. If the continuance of a proclamation is *ultra vires,* presumably the courts would not regard themselves as precluded from issuing mandamus in an appropriate case. Thus, the *obiter dicta* of the Board *vis-a-vis* revocation of a security area proclamation have been nullified.

In conclusion, it can be seen that much of the effect of their Lordships' judgment in *Teh Cheng Poh's* case has been reduced by this Act.

*Part III*

*Consequences of the Decision for Malaysia and Singapore*

(i) This decision has acted as an effective brake on the Yang di-Pertuan Agong's powers to make written laws after Parliament sits.

(ii) The device of implied revocation introduced by Lord Diplock is a useful tool in ascertaining when an emergency ends. This is so even though this point is purely *obiter dicta,* for one cannot dismiss too readily a statement of no less an authority than the country's highest appellate tribunal.[23] The 1979 Act's acknowledgement of this point (as mentioned earlier) is perhaps further authority, albeit obliquely.

(iii) As their Lordships felt it unnecessary to decide whether or not an emergency might lapse by effluxion of time, the Federal Court's decision that it may not so lapse still stands. While the Minister of Law tried to justify the existence of the 1969 Emergency, the learned Chief Justice Tan Sri Ong Hock Thye opined that it had lapsed by a change in circumstances. But it would deem that a declaration by a court that an emergency has ended would *ipso facto* be an usurpation of power since the power to revoke is stated by Article 150(3) to lie with the Yang di-Pertuan Agong and the two Houses of Parliament.

(iv) Finally, it may be argued that if a writ of mandamus is available to secure the revocation of a proclamation of a security area, it should by analogy be available for the revocation of a proclamation of emergency. The failure of the executive to revoke a proclamation of emergency when it has clearly outlived its purpose would amount to an abuse of its discretion. In the final analysis, a balance should be struck between the need to protect the individual

[23] The Courts of Judicature (Amendment) Act 1976 (No. A 328) section 13 abolished (without prejudice to appeals or applications for appeal pending when it came into force) appeals to the Privy Council in constitutional and criminal matters. See also the (U.K.) Malaysia (Appeals to Privy Council) Order 1978 (S.I. 182/78); [1977] 2 M.L.J. lxxxix.

and collective interests of a country's citizens. Given the current judicial attitude, the chances of success in an application for a writ of mandamus to revoke a proclamation of emergency are indeed slim, especially when the Privy Council has refused to give any definite guidance on the matter.

A further question which arises is whether Singapore is still under a state of emergency.[24] Professor S. Jayakumar[25] is of the view that Singapore is technically still under a state of emergency. The writer respectfully agrees. The Singapore Parliament has neither revoked nor annulled the 1964 emergency, therefore the proclamation remains in force. This aspect of the decision in *Teh Cheng Poh* v. *P.P.* has therefore no application to Singapore.[26] However, the interpretation of Articles 150(2) and 154(3) as well as the I.S.A. would be binding on Singapore courts.[27]

*Part IV*

*Teh Cheng Poh* v. *P.P. (No. 2)*[28]

Following the Privy Council's decision that the Essential (Security Cases) Amendment Regulations 1975 were *ultra vires,* Teh Cheng Poh's conviction was set aside. The case was remitted to the Federal Court for further consideration whether or not to order a new trial.

This resulted in *Teh Cheng Poh* v. *P.P. (No. 2).* The appellant's arguments were based on alternative grounds:

either (a) the Federal Court should make no order at all, the trial having been a nullity,

or (b) it should not order a retrial.

Counsel for the appellant argued that the decision of the Privy Council that the Regulations were *ultra vires* was a decision within the meaning of Section 9(3) of the 1979 Act. This had the effect of rendering the decision "lawful and … valid." However, this sub-section also conflicted with sub-section (1) of the same section which seeks, *inter alia,* to validate with retrospective effect the regulations declared *ultra vires* by the Privy Council. In view of this inconsistency, counsel submitted that the ambiguity should be resolved in favour of the accused as it was a criminal matter.

The Federal Court rejected the appellant's arguments. As to the first, the short answer was that the 1979 Act had validated with retrospective effect the 1975 Regulations. Therefore, the trial was not a nullity. With respect to the alleged inconsistency, the Court

[24] Prof. S. Jayakumar *Constitutional Law* (Singapore Law Series, 1976 ed.) at p. 48.

[25] *Constitutional Law* (Singapore Law Series, 1976 edition) at p. 48

[26] The Emergency (Essential Powers) Ordinance 1969 and the 1975 Regulations are not applicable to Singapore.

[27] A decision of the Privy Council touching upon a statutory provision which is in *pari materia* with the equivalent Singapore provision is binding on our courts: *Khalid Panjang* v. *P.P. (No. 2)* [1964] M.L.J. 108. Note, however, that the decision must technically be *ratio decidendi.*

[28] [1979] 2 M.L.J. 238.

agreed that the Privy Council's decision was within the meaning of sub-section (3) of section 9. But, in their Lordships' view:

> "the effect of the sub-section as regards criminal proceedings is limited to validating convictions, sentences and acquittals and other orders in trials conducted in accordance with the regulations *before* the enactment of the Act, but, because of the explicit language of sub-section (1), does not extend to upholding the opinion of the Privy Council formed *before* the passage of the Act.... To hold otherwise would be to fly in the face of the clear language not only of subsection (1) of section 9, but also of the long title and the preamble."[29] (emphasis added)

Accordingly, the Federal Court ordered a new trial. However, Teh was retried on a capital charge and was convicted.[30]

Thus ended the final chapter of Teh Cheng Poh's long struggle for freedom. Till the very end, it remained a distant hope, far from reality.[31]

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[29] *Supra,* at p. 240.

[30] See [1980] 1 M.L.J. 251. Teh was charged and convicted under the Internal Security Act. He was also tried in accordance with the special procedure prescribed by the Essential (Security Cases) Regulations 1975 which had been validated by Act 216 of 1979, and executed. (See The Straits Times, Singapore, Friday, 11th April, 1980 at p. 14).

[31] The writer is indebted to Mr. Jimmy Yim and Mr. Andrew Phang, 4th year students, Faculty of Law, National University of Singapore, and Mr. A.J. Harding, Lecturer, Faculty of Law, National University of Singapore for their comments and assistance.

[1] Facts as derived from the Sunday Times report of September 2, 1979 and Straits Times report of August 14, 1980.

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