

IN THE PRIVY COUNCIL

No. 15 of 1978

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O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN  
AT KUALA LUMPUR

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B E T W E E N:

TEH CHENG POH @ CHAR MEH Appellant

- and -

THE PUBLIC PROSECUTOR, MALAYSIA Respondent

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CASE FOR THE APPELLANT

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1. This is an appeal from a judgment and order made the 26th March 1977 of the Federal Court of Malaysia (Suffian, Lord President; Raja Azlan Shah F.J.; Wan Suleiman F.J.). The Appellant had been tried in the High Court Penang without a jury under the provisions of the Essential (Security Cases) (Amendment) Regulations, 1975, by Mr. Justice F.C. Arulanandom on two charges under the Internal Security Act, 1960 (Revised 1972) and convicted on both charges. The Appellant was sentenced to the mandatory death sentence.

p.84

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2. The two charges were :- unlawful possession of a firearm, to wit, a home made .38 revolver and unlawful possession of ammunition, to wit, five rounds of .38 special revolver bullets.

pp.1-2

3. The relevant statutory provisions are as follows :-

PROCLAMATION OF EMERGENCY

"PROCLAMATION OF EMERGENCY  
THE FEDERAL CONSTITUTION

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BY HIS MAJESTY THE YANG DI-PERTUAN AGUNG, BY  
THE GRACE OF ALLAH OF THE STATES AND TERRITORIES  
OF THE FEDERATION, SUPREME HEAD

TUANKU ISMAIL NASIRUDDIN SHAH,  
Yang di-Pertuan Agung

WHEREAS WE are satisfied that a grave Emergency  
exists whereby the security of the Federation is  
threatened;

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

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NOW, THEREFORE, WE, Tuanku Ismail Nasiruddin  
Shah ibni Al-Marhum Al-Sultan Zainal Abidin by the  
Grace of Allah of the States and territories of  
the Federation Yang di-Pertuan Agung in exercise of  
the powers aforesaid do hereby proclaim that a State  
of Emergency exists, and that this Proclamation shall  
extend throughout the Federation.

GIVEN at Our Istana Negara in Our Federal  
Capital of Kuala Lumpur, this Fifteenth day of May,  
1969.

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By His Majesty's Command,

TUNKU ABDUL RAHMAN PUTRA AL-HAJ  
Prime Minister"

EMERGENCY (ESSENTIAL POWERS) ORDINANCE  
No.1 of 1969

"An Ordinance promulgated by the Yang di-Pertuan  
Agung under Article 150 (2) of the Federal Constitution.

(15th May, 1969)

WHEREAS by reason of the existence of a grave emergency  
threatening the security of Malaysia, a Proclamation  
of Emergency has been issued by the Yang di-Pertuan  
Agung under Article 150 of the Constitution ;

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AND WHEREAS Parliament was dissolved on the  
Twentieth day of March, 1969, and elections to the  
new Dewan Ra'ayat have not been completed ;

AND WHEREAS the Yang di-Pertuan Agung is  
satisfied that immediate action is required for securing  
public safety, the defence of Malaysia, the maintenance  
of public order and of supplies and services essential  
to the life of the community;

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IT IS HEREBY ENACTED by the Duli Yang Maha Mulia

Seri Paduka Baginda Yang di-Pertuan Agung  
pursuant to Clause (2) of Article 150 of the  
Constitution as follows :

1. This Ordinance maybe cited as the Emergency  
(Essential Powers) Ordinance, 1969, and shall  
have application throughout Malaysia.

10 2. (1) Subject to the provisions of this  
section, the Yang di-Pertuan Agung may make any  
regulations whatsoever (in this Ordinance  
referred to as "Essential Regulations") which he  
considers desirable or expedient for securing  
the public safety, the defence of Malaysia, the  
maintenance of public order and of supplies and  
services essential to the life of the community.

20 (2) Without prejudice to the generality  
of the powers conferred by the preceding sub-  
section, Essential Regulations may, so far as  
appear to the Yang di-Pertuan Agung to be necessary  
or expedient for any of the purposes mentioned  
in that sub-section -

30 (a) make provisions for the apprehension,  
trial and punishment of persons offending  
against the regulations, and for the  
detention, exclusion and deportation of  
persons whose detention, exclusion or  
deportation appears to the Minister for  
Home Affairs to be expedient in the  
interests of the public safety or the  
defence of Malaysia notwithstanding that  
such persons are citizens;

(b) create offences and prescribe penalties  
(including the death penalty) which may  
be imposed for any offence against any  
written law (including regulations  
made under this Ordinance) ;

(c) provide for the trial by such courts  
as may be specified in such regulations,  
of persons guilty of any offence against  
the regulations ;

40 (d) make special provisions in respect of  
procedure (including the hearing of  
proceedings in camera) in civil or  
criminal cases and of the law regulating  
evidence, proof and civil and criminal  
liability ;

(e) make provisions for the control of  
aliens ;

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- (f) make provisions for directing and regulating the performance of services by any persons ;
  - (g) authorise -
    - (i) the taking of possession, control, forfeiture or disposition on behalf of the Government of Malaysia, of any property or undertaking ;
    - (ii) the acquisition, on behalf of the Government of Malaysia, of any property other than land ;
  - (h) authorise the entering and search of any premises ;
  - (i) prescribe fees or other payments ;
  - (j) provide for amending any written law, for suspending the operation of any written law and for applying any written law with or without modification;
  - (k) notwithstanding anything contained in the Constitution, provide for any specified grounds upon which any person may be deprived of his citizenship ;
  - (l) make provisions for the control of the harbours, ports and territorial waters of any State of Malaysia and of the movements of vessels ;
  - (m) make provisions for the transportation by land, or water, and the control of the transport and movement of persons, animals and things ;
  - (n) make provisions for trading, storage, exportation, importation, production, and manufacture ;
  - (o) make provisions for the supply and distribution of food, water, fuel, light and other necessities ;
  - (p) provide for any other matter in respect of which it is in the opinion of the Yang di-Pertuan Agung desirable in the public interest that regulations should be made.
- (3) Essential Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and by-laws for any of the purposes

for which such regulations are authorised by this Ordinance to be made, and may contain such incidental and supplementary provisions as appear to the Yang di-Pertuan Agung to be necessary or expedient for the purposes of the regulations.

(4) An Essential Regulation, and any order, rule, or by-law duly made in pursuance of such a regulation shall have effect notwithstanding anything inconsistent therewith contained in any written law, including the Constitution or the Constitution of any State, other than this Ordinance or in any instrument having by virtue of any written law other than this Ordinance.

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PROCLAMATION P.U.(A) 148/69

" PROCLAMATION

INTERNAL SECURITY ACT, 1960

BY HIS MAJESTY THE YANG DI-PERTUAN AGUNG, BY THE GRACE OF ALLAH OF THE STATES AND TERRITORIES OF MALAYSIA, SUPREME HEAD

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TUANKU ISMAIL NASIRUDDIN SHAH,  
Yang di-Pertuan Agung

WHEREAS in OUR opinion public security in the Federation is seriously threatened by reason of action taken by a substantial number of citizens to fear, organized violence against persons and property :

AND WHEREAS WE consider it to be necessary for the purpose of suppressing such organized violence to proclaim the areas in the Federation as security areas for the purpose of Part II of the Internal Security Act, 1960 :

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NOW THEREFORE, WE Tuanku Ismail Nasiruddin Shah ibni Al-marhum Al-Sultan Zainal Abidin by the Grace of Allah of the States and territories of the Federation Yang di-Pertuan Agung in exercise of the powers conferred on US by section 47 of the Internal Security Act, 1960, DO HEREBY PROCLAIM all areas in the Federation to be security areas for the purposes of Part II of the said Act.

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GIVEN AT OUR Istana Negara in Our Federal Capital at Kuala Lumpur, this Fifteenth day of

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May, 1969.

By His Majesty's Command,

TUNKU ABDUL TAHMAN PUTRA AL-HAJ,  
Prime Minister "

FEDERAL CONSTITUTION

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

Article 5(1) - No person shall be deprived of his life or personal liberty save in accordance with law. 10

(2) Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice. 20

(4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority :

Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an intergral part of this Article as from Merdeka Day. 30

(5) Clauses (3) and (4) do not apply to an enemy alien.

Article 8(1) - All persons are equal before the law and entitled to the equal protection of the law. 40

Article 9(1) No citizen shall be banished or excluded from the Federation.

(2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

10 (3) So long as under this Constitution any other State is in a special position as compared with the States of Malaya, Parliament may by law impose restrictions, as between that State and other States, on the rights conferred by Clause (2) in respect of movement and residence.

Article 10(1) Subject to Clauses (2), (3) and (4)

- (a) every citizen has the right to freedom of speech and expression ;
  - 20 (b) all citizens have the right to assemble peaceably and without arms ;
  - (c) all citizens have the right to form associations.
- (2) Parliament may by law impose -
- 30 (a) on the rights conferred by paragraph (a) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation, or incitement to any offence ;
  - (b) on the right conferred by paragraph (b) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof or public order ;
  - 40 (c) on the right conferred by paragraph (c) of Clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality.

(3) Restrictions on the right to form associations conferred by paragraph (c) of clause (1) may also be imposed by any law relating to labour or education.

(4) In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause 2(a), Parliament may pass law prohibiting the questioning of any matter right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law. 10

Article 145 (3) - The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial. 20

Article 149(1) - If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or

(b) to excite disaffection against the Yang di-Pertuan Agung or any Government in the Federation ; or 30

(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence ; or

(d) to procure the alteration, otherwise than by lawful means, of anything by law established ; or

(e) which is prejudicial to the security of the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9 or 10, or would apart from this Article be outside the legislative power of Parliament ; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill. 40



(2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

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

20 (2) If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agung 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.

30 (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 power of the Yang di-Pertuan Agung 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, not withstanding anything in this Constitution extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.

40 (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 laws 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 Agung 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. 10

INTERNAL SECURITY ACT

PREAMBLE AND LONG TITLE

"An Act to provide for the internal security of Malaysia, preventing detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia, and for matters incidental thereto. 20

(West Malaysia - 1st August, 1960;  
East Malaysia - 16th September, 1963)

WHEREAS action has been taken and further action is threatened by a substantial body of persons both inside and outside Malaysia -

- (1) to cause, and to cause a substantial number of citizens to fear, organised violence against persons and property;  
and
- (2) to procure the alteration, otherwise than by lawful means, of the lawful Government of Malaysia by law established; 30

AND WHEREAS the action taken and threatened is prejudicial to the security of Malaysia ;

AND WHEREAS Parliament considers it necessary to stop or prevent that action ;

NOW therefore PURSUANT to Article 149 of the Constitution BE IT ENACTED by the Duli Yang Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agung with the advice and consent of the Dewan Negara and Dewan Ra'ayat in Parliament assembled, and by the authority of the same, as follows:" 40

Article 47(1) If in the opinion of the Yang di-Pertuan Agung public security in any area

in Malaysia is seriously disturbed or threatened by reason of any action taken or threatened by any substantial body of persons, whether inside or outside Malaysia, to cause or to cause a substantial number of citizens to fear organised violence against persons or property, he may, if he considers it to be necessary for the purpose of suppressing such organised violence, proclaim that area as a security area for the purposes of this Part.

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(2) Every proclamation made under subsection (1) shall apply only to such area as is therein specified and shall remain in force until it is revoked by the Yang di-Pertuan Agung or is annulled by resolutions passed by both Houses of Parliament:

Provided that any such revocation or annulment shall be without prejudice to anything previously done by virtue of the proclamation.

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(3) A proclamation made under subsection (1) shall be published in such manner as the Minister thinks necessary for bringing it to the notice of all persons who in his opinion ought to have notice thereof and shall have effect as soon as such notice has been given, without publication in the Gazette.

Article 57 (1) - Any person who without lawful excuse, the onus of proving which shall be on that person, in any security area carries or has in his possession or under his control -

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(a) any fire-arm without lawful authority therefor; or

(b) any ammunition or explosive without lawful authority therefor,

shall be guilty of an offence and shall on conviction, be punished with death.

(2) A person shall be deemed to have lawful authority for the purposes of this section only if he -

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(a) is a police officer or a member of the security forces, or any person employed in the Prisons Department of Malaysia, and in every such case is carrying or is in possession of or has under his control that fire-arm, ammunition or explosive in or in connection with the performance of his duty ;

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(b) is a person duly licensed, or authorized without a licence, under any written law for the time being in force to carry possess or have under his control that fire-arm, ammunition or explosive ; or

(c) is a person exempted from this section by an Officer in Charge of a Police District, or is a member of any class of persons so exempted by the Inspector-General by notification in the Gazette :

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Provided that no person shall be deemed to have lawful authority for the purposes of this section or to be exempted from this section if he carries or has in his possession or under his control any such fire-arm, ammunition or explosive for the purpose of using the same in a manner prejudicial to public security or the maintenance of public order.

(3) A person shall be deemed to have lawful excuse for the purposes of this section only if he proves -

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(a) that he acquired the fire-arm, ammunition or explosive in a lawful manner and for a lawful purpose ; and

(b) that he has not at any time while carrying or having in his possession or under his control the fire-arm, ammunition or explosive, acted in a manner prejudicial to public security or the maintenance of public order.

(4) A person charged with an offence against this section shall not be granted bail.

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EXPLANATORY STATEMENT TO INTERNAL

SECURITY ACT, 1960

Paragraph 1 - As aforeshadowed in the Speech from the Throne delivered at the opening of the Second Session of the first Parliament of the Federation, it is intended to repeal the Emergency Regulations Ordinance, 1948, and all subsidiary legislation thereunder, with effect from July 31 next. Such a repeal would, however, have the effect of abolishing certain provisions of the existing law which, in view of the grave risks to internal security presented by the threat of subversion, must still be considered essential : and as long as the possibility of terrorism remains in border area of the Federation powers must continue to be available to combat organised violence against persons and property within those areas.

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10 Paragraph 2 - In consequence it has been considered necessary to prepare the above Bill, which has two objectives: first the combating of subversion throughout the Federation, a matter dealt with Part I of the Bill : and second, the elimination of organised violence in such limited areas of the Federation (in the Bill referred to as "security areas") as may be proclaimed under clause 47 of the Bill: a matter dealt with in Part II of the Bill.

FIREARMS (INCREASED PENALTIES) ACT, 1971

ACT 37

Section 8 - Any person who is in unlawful possession of a firearm shall be punished with imprisonment for a term which may extend to fourteen years and with whipping with not less than six strokes.

ARMS ACT, 1960

(F.M. No. 21 of 1960)

20 Section 9 - Any person who in contravention of the provisions of this Act -

(a) has in his possession, custody or control, or carries or uses any arm or ammunition without an arms licence or arms permit in that behalf or otherwise than as authorised by the licence or permit or, in the case of ammunition, in quantities in excess of those so authorised; or

30 (b) fails to comply with any condition or to observe any restriction subject to which an arms licence or arms permit is held by him,

shall be liable in respect of any such contravention to imprisonment for a term not exceeding seven years or to a fine not exceeding ten thousand dollars, or to both such imprisonment and fine.

40 The relevant written laws to which reference will be made at the hearing of the appeal herein are as follows :-

- (1) Essential (Security Cases)(Amendment) Regulations, 1975
- (2) Criminal Procedure Code
- (3) Evidence Act, 1950

4. Evidence for the prosecution was led as

follows:-

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(i) PW 1 Cpl. Sahad bin Ahmad testified on the 13th Day of January, 1976 at 12.30 p.m. he was the desk officer (emergency) at District Headquarters when he received a 999 call from a male Chinese to the effect that there was an armed robbery at 26, Lim Lean Teng Road, Penang.

(ii) Police Corporal Haji Mohamed bin Chu (PW 2) of the Mobile Patrol Unit said on 13th January 1976 at about 12.30 p.m. he was in a radio car at the junction of Kampong Pinang and Thean Teik Road. He received instructions to proceed to 26, Lim Lean Teng Road where there had been an armed robbery. The patrol car was driven by PC Ahmad bin Uda. On Arrival at the scene, he went in to see the owner who informed him that he had been shot and added that he could identify the person who had shot him. PW 2 thereupon together with two others went in search of the robber. The appellant was later apprehended and a home made pistol with five live bullets inside its chamber was found tucked in his waist.

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p 7

(iii) PW 3 the investigating officer confirmed at about 2.30 p.m. on that day PW 2 Cpl. Haji Mohamed bin Chu handed him the accused, the firearm and five rounds of ammunition. PW 3 testified there was no connection with subversion in the case.

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p 8

(iv) PW 4 the police armourer Zackhariah bin Mohd. Hassan gave evidence that the pistol and bullets were serviceable.

p. 9

(v) The appellant elected to make a statement from the dock. He stated on the 13th day of January 1976 he was returning from Georgetown by bus. After alighting from the bus as he was walking home a few police personal approached him. He further said he was assaulted by them and taken to the Patani Road Police Station whereat the same night he was asked to admit that the pistol and bullets belonged to him. He refused and was further assaulted but he refused to admit. The appellant stated the case against him was a frame-up.

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p 4

5. The learned trial Judge rejected the

submission on behalf of the appellant that the circumstances under which the appellant was being tried had led to infringement of the provisions of Article 8(1) of the Federal Constitution which guaranteed equal protection of the law to persons.

pp 16 - 19

10 It had been submitted on behalf of the appellant that there were three sets of laws in the country under which a person found in unlawful possession of firearms or ammunition could be charged namely, the Internal Security Act, 1960 (Revised 1972) Act 82, the Arms Act, 1960 (F.M. No. 21 of 1960) and the Firearms (Increased Penalties) Act, 1971, Act 37.

20 6. The learned trial Judge also rejected the submission on behalf of the appellant that the High Court had no jurisdiction to try the appellant under the provisions of the Essential (Security Cases) (Amendment) Regulations, 1975 (hereinafter referred to as 'the Regulations') as the Regulations were purportedly made under section 2 of the Emergency (Essential Powers) Ordinance No. 1 of 1969 which was null and void and of no effect.

p. 14

7. The learned trial Judge rejected the submission on behalf of the appellant that the Internal Security Act was intended for combating political subversion.

p 4

30 8. The learned trial Judge did not express any views on the submission on behalf of the appellant that security areas were intended to be limited areas in the Federation.

pp 22 - 23

40 9. The learned trial Judge also disagreed with the argument on behalf of the appellant that as the Internal Security Act was only intended for political subversion, the prosecution must show some element of political subversion before the appellant could be charged under the Internal Security Act. The learned trial Judge appeared to be of the view the discretion of the Attorney-General in launching a prosecution under any law he thought fit could not be questioned by the Courts and that anyone who was dissatisfied with the Attorney-General's exercise of discretion must seek his remedy elsewhere. The learned trial Judge however said "The Courts may be able to interfere if it is shown to the Courts that there has been an abuse of the powers vested in the Attorney-General. As far as this Court is concerned there has neither been an allegation nor evidence of abuse to that effect.

10. The learned trial Judge also held that

promulgation under P.U. (A) 148/69 was a valid proclamation by the Yang Dipertuan Agung of the whole of the Federation as a security area although that was done under Section 47 Part II of the Internal Security Act, 1960 and as that proclamation had not been revoked or annulled by Parliament the whole of the Federation remained a security area.

p 23 11. The learned trial Judge held on the evidence before him the charges against the appellant had been proved and convicted and sentenced the appellant to death. 10

p 59 12. Upon appeal to the Federal Court of Malaysia the appellant's appeal was heard together with three other appeals wherein the Appellants had also been charged under the Internal Security and tried under the provisions of the Regulations.

p 59 13. The first point taken on behalf of all the appellants was that the Regulations were void because the Emergency (Essential Powers) Ordinance No. 1 published as P.U. 149/69 under authority of which the Regulations were made, had itself lapsed and ceased to be law by effluxion of time and by force of changed circumstances. 20

pp 59-66 The Federal Court disagreed with this contention and concluded the 1969 Proclamation (P.U.(A) 145/69) and the Emergency (Essential Powers) Ordinance No. 1 of 1969 had not lapsed but were still in force. 30

14. It is respectfully submitted the Federal Court was wrong in coming to the conclusion aforesaid. The Federal Court of Malaysia should have, having regard to the circumstances, applied the principle that a statutory provision becomes obsolete if the state of things on which its existence depended had ceased to exist so that its object was no longer attainable.

pp 66-67 15. With regard to the validity of the Regulations, the Federal Court held even if there had been sub-delegation by the Yang Dipertuan Agung (which was not the case) the Regulations were not ultra vires the Emergency (Essential Powers) Ordinance No. 1 of 1969 as they came within the language of sections 2(1) and 2(2) of the Ordinance. 40

It is submitted respectfully the Federal Court was in error in not holding there was



10 sub-delegation of power to the Attorney-General to alter the mode of trial of persons accused under the Internal Security Act. The Federal Court should have held the Regulations were made under sections 2(3) and 2(4) of the Emergency (Essential Powers) Ordinance No. 1 of 1969 and those sections were invalid in so far as they purport to delegate power to legislate provisions inconsistent with the Constitution whereby Clause 2, of Article 150 of the Constitution does not empower the Yang Dipertuan Agung to provide for such delegation.

20 16. The Federal Court held there had been no infringement of the provisions of Article 8 (1) of the Constitution. The Court concluded the language of Article 145(3) of the Constitution was very wide as it included the word "discretion" and in view of the deliberate decision of our constitution-makers to write this provision into our constitution it could not be said it must be read subject to Article 8 but on the contrary article 8 must be read subject to article 145(3). The Federal Court also held if anyone had any complaint against the Attorney-General for exercising his discretion in any particular way he should direct it not to the Courts but elsewhere. The Federal Court also rejected the argument that there had been mala fides when the Attorney-General elected to charge the appellant under the Internal Security Act which was intended to deal with subversive elements when there was no evidence that the appellant was in any way connected with subversive elements. The Federal Court held the enacting words of sections 57 and 58 of the Internal Security Act were very clear. They say "any person" and not "any subversive person". The Federal Court also referred to the preamble to the Internal Security Act and the long title and held the Appellant was not excluded from the operation of the provisions of the Internal Security Act against him.

pp 68-73

pp 73-75

40 It is respectfully submitted Federal Court was wrong in not construing the Internal Security Act according to the intent and object of Legislature. The Federal Court was wrong in holding there was no infringement of the provisions of Article 8(1) of the Constitution. The Federal Court was further wrong in concluding Article 8 must be read

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subject to Article 145(3) of the Constitution. The Federal Court should have held having regard to the prosecution evidence itself that there was no connection with subversion in the case and that it was a straightforward case of armed robbery there had been arbitrary and capricious exercise of discretion by the Attorney-General to prosecute the appellant under the provisions of the Internal Security Act. The Attorney-General was accordingly guilty of mala fides.

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17. The following additional grounds of appeal which were not argued before the High Court or the Federal Court are raised on behalf of the appellant :-

(1) The Regulations were made at a time when both Houses of Parliament had sat after the Proclamation of Emergency on 15th May 1969 in contravention of Clause (2) of Article 150 of the Constitution which empowers the Yang Dipertuan Agung to promulgate ordinances only until both Houses of Parliament are sitting. The Regulations are accordingly ultra vires the powers of the Yang Dipertuan Agung.

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(2) The Regulations are inconsistent with certain provisions of the Constitution Clause (6) of Article 150 (which provides that no provision of any ordinance promulgated under that 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 the Federal Constitution or of the Constitution of the State of Sarawak) does not extend to the Regulations on the ground that the Regulations are not such an ordinance but merely subsidiary legislation made under such an ordinance.

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(3) Since the Regulations provide for procedure of trial of offences against the Internal Security Act which has been enacted pursuant to Article 149 of the Federal Constitution (under which Article any law made pursuant to it is valid even if inconsistent with Articles 5,9 or 10 of the Federal Constitution) the Regulations must conform with that Article in that they are inconsistent with the provisions of the Federal Constitution other than Articles 5,9 or 10.

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(4) It is submitted that the appellant was tried under the Emergency (Essential Powers) Ordinance No. 1 of 1969 which was not properly

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or validly promulgated under Article 150 (2) of the Constitution thereby rendering the Regulations under which ordinance the Regulations were made invalid which in turn rendered the appellant's conviction a nullity.

(5) The appellant contends further that the original Articles 149(2) and 150(3) of the Federal Constitution before they were amended read as follows :-

10                   Original article 149 (2)

"A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed cease to have effect on the expiration of a period of one year from the date on which it comes into operation, without prejudice to the power of Parliament to make a new law under this Article."

20                   This Article was amended by section 28(b) of the Constitution (Amendment) Act No. 10 of 1960 to read as follows :-

30                   "A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article."

The original Article 150(3) read as follows :-

"(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 be in force -

(a) a Proclamation at the expiration of a period of two months beginning with the date on which it was issued ;

40                   and

(b) an ordinance at the expiration of a period of fifteen days beginning with the date on which both Houses are first sitting, unless, before the expiration of that period, it has been approved by a resolution of each House of Parliament."

The original Article 150(3) was amended by section 29 of the Constitution (Amendment) Act

ecord

No. 10 of 1960 to read as follows :-

"(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 Dipertuan Agung to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2)."

10

The effect of the amendment to Article 149(2) was to make legislation passed under Article 149 which originally was to be reviewed yearly into a permanent feature of the law.

A Proclamation of Emergency under Article 150 which could exist originally under Article 150(3) for a limited period was by the amended Article 150(3) made to exist until resolutions are passed by both Houses annulling the same.

20

It is submitted for the appellant the two amendments made by sections 28(b) and 29 of the Constitution (Amendment) Act 10 of 1960 are ultra vires the Federal Constitution. The appellant contends further by reason of Article 4(1) of the Federal Constitution which reads as follows :-

30

"This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void." the said amendments being inconsistent with the Federal Constitution are void.

It is submitted for the appellant as such the Internal Security Act should have ceased to exist after a period of one year and the Proclamation of Emergency declared on the 15th day of May, 1969 together with all other ordinances passed thereunder have ceased to be in force under the original Article 150(3) of the Federal Constitution.

40

The words "any law" in Article 4 of the Federal Constitution includes law passed by a

a two-thirds majority to amend the Constitution under Article 159 of the Constitution.

Article 160(2) of the Federal Constitution defines "law" as follows :-

"Federal law" means -

- 10 (a) any existing law relating to a matter with respect to which Parliament has power to make laws, being a law contained in operation under Part XIII and  
(b) any Act of Parliament.

"Law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof and any custom or usage having the force of law in the Federation or any part thereof."

"Written law" includes this Constitution and the Constitution of any State."

20 It is submitted for the appellant the word "law" appearing in Article 4 embraces any amendment to the Constitution made by Federal law and therefore any amendment to the Constitution which is inconsistent with it is void.

It is submitted for the appellant in order to prevent any abuse of the amending power provided by Article 159 the Constitution-makers provided by Article 4 that any law passed after Merdeka Day which is inconsistent with the Constitution shall to the extent of the inconsistency be void.

30 It is submitted for the appellant if Article 4 is interpreted in any other way, in particular, if it is said that the word "law" therein does not include Constitutional amendment then the very safeguard provided in the Constitution in respect of rights could be easily destroyed. For example by process of Constitutional amendment and the accepted Constitutional monarchy could be destroyed or the State religion could be changed or the role of the Courts in the country could be interfered with. If the power of amendment were unlimited  
40 and the basic structure of the Constitution could be easily destroyed.

It is submitted for the appellant even if it is held that the word "law" in Article 4 does not include amendment to the Constitution it is contended following the Indian case of Kesavananda

Record

v State of Kerala (1973) AIR Supreme Court 1461  
no amendment to the Constitution is valid which  
destroys the basic foundation and structure of  
the Constitution.

It is submitted for the appellant the  
amendment made by sections 28(b) of Act No. 10  
of 1960 deleting the original Article 150(3)  
and substituting therefor the present Article  
150(3) is destruction of the basic structure  
of the Federal Constitution.

10

Taking first the amendment to Article  
149(2) it is to be noted that before the  
amendment any law passed under Article 149 was  
only valid for a period of one year but could  
be renewed. Under the amendment, however,  
the Internal Security Act was made a permanent  
feature to be repealed only if resolutions are  
passed by both Houses of Parliament.

The amendment to Article 149(2) by making the  
Internal Security Act a permanent feature of the  
law has deprived the members of Parliament to  
review the legislation every year and to bring  
to the notice of Parliament any existing abuses  
and also to check on the necessity of its  
existence.

20

As the Federal Constitution enshrines  
fundamental liberties in Articles 5,9 and 10 and  
Article 149 permits encroachments on these  
liberties such encroachments under Article  
149(2) as unamended envisaged only a temporary  
encroachment. Any permanent encroachment on the  
liberties of the subject is a step towards the  
destruction of the Constitution especially so  
where the Internal Security Act can be abused  
or used to muzzle all Constitutional opposition  
to the Government.

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Similarly by amendment to the original  
Article 150(3) the whole process is reversed;  
whereas under the previous Article 150(3) a  
Proclamation of Emergency and any ordinance  
promulgated thereunder was to cease to have  
effect after 2 months unless earlier approved  
by both Houses of Parliament, under the amended  
Article 150(3) the Proclamation remains in  
force unless annulled by resolutions passed by  
both Houses of Parliament. By reversing the  
process it is to be seen that an Emergency  
once promulgated can be continued if no

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resolutions are passed by both Houses forever.

By Article 150(5) after its amendment while a Proclamation of Emergency is in force Parliament may make laws on any matter notwithstanding anything in the Constitution.

10 With the amendments aforesaid it is quite easy to destroy the basic structure of the Constitution. An emergency could be easily proclaimed. Parliament need not convene and ordinances promulgated indefinitely. In the alternative Parliament could be convened while a Proclamation of Emergency is in force and laws passed inconsistent with the Constitution thereby destroying the very foundations and basic structure of the Constitution by a simple majority.

20 It is submitted for the appellant in view of Article 4 no amendment which is inconsistent with the provisions of the Constitution is valid. As such the amendment made to Article 149(2) by section 28(b) of the Constitution (Amendment) Act No. 10 of 1960 is void and therefore the Internal Security Act was valid for a period of one year and was not in existence at the time the appellant was charged. In view of Article 4 the amendment made to Article 150(3) is void and therefore the Proclamation of Emergency dated 15th May 1969 had lapsed after a period of 2 months.

30 It is submitted for the appellant if Article 4 does not apply to Constitutional amendments then it is contended that both the amendments to Articles 149(2) and 150(3) are still void as they destroy the basic structure and foundation of the Constitution.

40 It is also submitted for the appellant the appellant was tried under the Emergency (Essential Powers) Ordinance No. 1 of 1969 which was not properly or validly promulgated under Article 150(2) of the Constitution thereby rendering the appellant's conviction a nullity. This ground was argued only in the High Court. Mr. Justice Fred Arulanandom ruled the Ordinance had been validly promulgated on the authority of *N. Madhavan Nair v Government of Malaysia* (1975) 2 MLJ 286. The appellant respectfully submits the Federal Court was wrong in dismissing the appellant's appeal.

The Appellant submits that the judgment of the Federal Court and the High Court ought to be set aside and the conviction and sentence also set aside for the following, among other

R E A S O N S

1. BECAUSE the Appellant's trial in the High Court was a nullity as the Emergency (Essential Powers) Ordinance No. 1 of 1969 and the Regulations are void and invalid.
  
2. BECAUSE the Appellant should not have been charged under the Internal Security Act as there was no subversion disclosed. The Attorney-General exercised his discretion under Article 145(3) arbitrarily and capriciously thereby denying the Appellant equal protection of the law under Article 8 of the Constitution. 10
  
3. BECAUSE the two amendments made by sections 28 (b) and 29 of the Constitution Amendment Act of 1960 to the Constitution are ultra vires the Constitution and further by reason of the provisions of Article 4(1) of the Constitution the said amendments being inconsistent with the Constitution are void. The Internal Security Act should have ceased to exist after a period of one year and the Proclamation of Emergency declared on 15th May 1969 together with all other ordinances passed thereunder have ceased to be in force under the original Article 150(3) of the Constitution. 20  
Alternatively if Article 4 does not apply to Constitutional amendments both the amendments to Article 149(2) and 150(3) are still void as they destroy the basic structure and foundation of the Constitution. 30

KARPAL SINGH

Advocate & Solicitor  
Penang.



No: 15 of 1978

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE FEDERAL COURT OF MALAYSIA  
HOLDEN AT KUALA LUMPUR

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B E T W E E N :

TEH CHENG POH @ CHAR MEH Appellant

- and -

THE PUBLIC PROSECUTOR, MALAYSIA  
Respondent

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CASE FOR THE APPELLANT

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