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INTRODUCTION

In a written constitution, the judiciary has the onerous responsibility of acting as the guardian and protector of the constitution. The constitution is the supreme law of the land and, therefore, any law inconsistent with the constitution is void. This is the underlying theory of a written constitution as propounded by Marshal CJ in *Marbury* v *Madison*[1] in 1803 in the context of the Constitution of the United States

[1]Cranch 137; 2L Fd 60. See, MP Jain, *Role of the Judiciary in a Democracy* [1979] JMCL 239, 281.

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of America. This involves the significant function of interpreting the constitution. Thus the courts in a country with a written constitution are constantly called upon to interpret constitutional provisions. This judicial function raises several complex questions, for example, should the constitution be treated as any other statute passed by the legislature and interpreted as such, or, should the constitution, being the fundamental law of the land be given a somewhat different treatment and interpreted more liberally than an ordinary statute?

The courts may either adopt a positivist literal approach to constitutional interpretation or may adopt a liberal approach thereto. Literal approach envisages the application of the same canons of interpretation to a constitution as are usually applied to the interpretation of ordinary legislative enactments. On the other hand, by applying a liberal approach, the courts may give a creative and purposive interpretation to the constitution. There is a respectable body of judicial opinion favouring the liberal approach to the constitution. The Privy Council which has by and large adopted the literal interpretation of the constitution[2], has decried such an approach in some cases. In *Hinds* v *The Queen,*[3] the Privy Council said:

> To seek to apply to constitutional instruments the canons of construction applicable to ordinary legislation in the fields of substantive criminal or civil law would ... be misleading.

In the Malaysian context, the Privy Council adopted such an approach in *Teh Cheng Poh* v *The Public Prosecutor.*[4] It is a very well known fact that the United States Supreme Court has never adopted a literal approach to the constitution. It interprets the constitution as a 'constitution' and not as a 'statute'. The Indian Supreme Court has also gradually adopted a liberal stance in the matter of constitutional interpretation. One can now find such statements as the following in judicial opinions pertaining to the constitution:

> The attempt of the court should be to expand the reach and ambit of the fundamental rights rather than attenuate their meaning and content by a process of judicial construction.[5]

The main reason for the courts adopting a liberal attitude to constitutional interpretation is their feeling that the function of the courts is to control power and promote constitutionalism, democratic values and rule of law in the country.

There are not many opinions delivered by His Royal Highness Sultan

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[2]The high-water mark of such an approach can be seen in *Kariapper* v *Wijesinha* [1968] AC 717.

[3][1976] 1 All ER 356. Also see, *Liyanage* v *Regina,* [1966] 1 All ER 650.

[4][1979] 1 MLJ 50.

[5]Bhagwati J in *Maneka Gandhi* v *Union of India,* AIR (1978) SC 597, 622.

Azlan Shah on constitutional questions. From the opinions collected here, only a few general observations may be made as regards His Highness' approach to the Malaysian Constitution. The first thing which strikes a reader of these opinions is that His Royal Highness took a restrictive view of the judicial function in relation to the interpretation of the constitution. The second feature of these opinions is that, by and large, His Highness exhibited a positivistic judicial attitude towards the constitution. Thirdly, by and large, Sultan Azlan Shah adopted a restrictive attitude towards the civil or fundamental rights of the people.[6] To illustrate the above judicial attitudes, some of the Sultan's observations in *Loh Kooi Choon* v *Government of Malayisa*[7] (which is the most significant constitutional case decided by him) may be quoted here. In *Loh Kooi Choon,* Raja Azlan Shah FJ (as he then was), in order to refute the doctrine of inviolability of the basic structure of the constitution through the process of constitutional amendment, took recourse to the technique of statutory or literal interpretation of the constitution. His Lordship pointed out that the question at issue was "fraught with political controversy", and that the function discharged by the courts in guarding the constitution was very much criticised and frequently misunderstood. His Lordship argued that

> the question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and, therefore, not meet for judicial determination; ... our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution.[8]

Raja Azlan Shah FJ did recognise that "the Constitution is not a mere collection of pious platitudes", and that

> it is the supreme law of the land embodying three basic concepts: one of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation ... The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among, the executive, legislative and judicial branches of government, compendiously expressed in modern terms that we are a government of laws not of men.[9]

Nevertheless, His Lordship was not prepared to lend the services of the court to protect these "basic concepts" when they were threatened by "state power".

In one of His Highness' opinions, His Highness adopted and advocated a liberal judicial attitude towards the Constitution. This is what

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[6]*Hashim bin Saud* v *Yahaya bin Hashim,* [1977] 2 MLJ 116 FC; *Assa Singh* v *Menteri Besar, Johore* [1969] 2 MLJ 30 FC

[7][1977] 2 MLJ 187 FC.

[8]At page 188.

[9]*Supra.*

Raja Azlan Shah Ag LP (as he then was) said in *Dato Menteri Othman bin Baginda & Anor* v *Dato Ombi Syed Alwi bin Syed Idrus:*[10]

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — "with less rigidity and more generosity than other Acts". A constitution is *sui generis,* calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation.[11]

Raja Azlan Shah Ag LP then quoted Lord Wilberforce from *Minister of Home Affairs* v *Fisher*[12] case:

> A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.[13]

The mechanistic view of the judicial function was prevalent in England in the early twentieth century. But such a view has long since been thrown overboard as is apparent from the numerous pronouncements of such judges, among others, as Lord Denning, Lord Reid, Lord Diplock[14]. The law-creative function of the judges is very well recognised now. The American realist jurists greatly emphasize such a judicial role. A judge is not an automaton. He has his own scale of values and makes choices accordingly. Even if it be accepted that the courts do justice according to law, the question still remains: Who finds the law? The court or the legislature? Obviously, the answer is: courts find the law. If that is so, then the courts are exercising law-creative function. This should not be equated to 'legislative' function. Legislation is the function of the legislature but law-making is not the monopoly of the legislature. There are various sources of law, for example, custom. Even the administration makes law insofar as it interprets the law and applies it in individual cases. So, how can the courts deny their law-creative role? If one interpretation of law leads to unjust results, and another interpretation to just results, what prevents a court from

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[10][1981] 1 MLJ 29.

[11]At page 32.

[12][1979] 3 All ER 21.

[13]Raja Azlan Shah Ag LP also referred to *Attorney General of St Christopher, Nevis and Anguilla* v *Reynolds* [1979] 3 All ER 129, as an example of interpreting constitutions "with less rigidity and more generosity".

[14]See MP Jain, *supra,* note 1.

adopting the latter interpretation. If that is so in the area of private law, it is much more relevant and pertinent to the area of constitutional law. All said and done ultimately it is all a matter of judicial attitudes as to how the judges approach the task of constitutional interpretation.

DECISIONS AND COMMENTS

RIGHT TO COUNSEL

Hashim Bin Saud
v
Yahaya Bin Hashim & Anor

[1977] 2 MLJ 116 Federal Court, Alor Star

Coram: Gill CJ (Malaya), Ong Hock Sim and Raja Azlan Shah FJJ

Cases referred to:-
(1) *Miranda* v *Arizona* (1966) 86 S Ct 1602.
(2) *Massiah* v *United States* (1964) 377 US 201.
(3) *R* v *Connor* (1966) 56 DLR (2d) 12.
(4) *Ooi Ah Phua* v *Officer-in-Charge Criminal Investigation, Kedah/Perlis* [1975] 2 MLJ 198.
(5) *Moti Bai* v *The State* AIR (1954) Raj 241

RAJA AZLAN SHAH FJ: In this appeal which we dismissed the central issue was the time-honoured question of the constitutional right of an arrested person to counsel. When does such right begin?

The learned trial judge had this to say:

> It will be seen that the law regarding the constitutional right to consult counsel must be reconciled with actual practice with regard to police investigations under the Criminal Procedure Code. It seems to me that as the purpose of detention under section 117 CPC is for the purpose of completing investigations and as the constitutional right to consult counsel 'should not be exercised to the detriment of investigation', then for so long as an arrested person is detained under section 117 CPC he cannot exercise his right to consult counsel. I therefore hold that the right to consult counsel begins from the moment of arrest but the exercise of that right is postponed for so long as the arrested person is detained under section 117 CPC.
>
> In this case the request to consult counsel was made during the period the plaintiff was under detention under section 117 CPC. The plaintiff, therefore, could not exercise his right at the material time and consequently there could not be a denial of such right.

The facts are not in dispute. On August 8, 1972, the plaintiff ('the appellant') and two other persons were arrested on suspicion of being involved in the theft of an electric generator. The legality of the arrest was not challenged. They were interrogated by Inspector Yahaya ('the first respondent') on the same day. As he could not complete his

investigations, he brought the plaintiff and the two suspects before a magistrate the following morning and applied for and was granted an order of detention under section 117 CPC until August 19, 1972 — a period of ten days. On the same day a person claiming to be from the legal firm of Messrs Karpal Singh & Company but not a lawyer visited the said inspector at his house with a letter which reads:

> Inspector Yahaya,
> Pendang Police Station,
> Pendang,
> KEDAH.
>
> Dear Sir,
>
> Re: Hashim bin Saud
>
> We have been approached by Che Ramli bin Salleh, the father-in-law of the abovenamed to act for the abovenamed.
> We understand the abovenamed has been detained by you on 8th instant.
> We are instructed to apply to you for an opportunity to see the abovenamed for consultation as soon as possible.
> Kindly inform us by return the exact time when our Mr Karpal Singh could attend at the Police Station, Pendang, or elsewhere to interview the abovenamed.
> Needless to say, the abovenamed has a constitutional right to consult a legal practitioner after his arrest.
> We would be grateful if you would grant our request.
>
> Yours faithfully,

Inspector Yahaya then asked for Mr Karpal Singh's free dates or the dates on which he could see him. He was not able to give any date. Inspector Yahaya then wrote a note on the said letter.

> You can see your client on August 19, 1972.

At that time Inspector Yahaya said that August 19 would be the earliest date convenient for appellant to see his counsel as he thought that investigations would have been completed by then. As matters then stood to accede to counsel's request would hamper investigations. If investigations could be completed sooner, he said he would have allowed counsel to see the appellant.

The appellant was however released on August 14, clearly four days before the expiry of the magistrate's order.

The short issue before us was whether the refusal to allow the appellant to consult his counsel during the period of police detention in spite of the magistrate's order was a breach of his constitutional right and rendered the said order unlawful. In those circumstances it was argued that the appellant had a right of action for damages for false imprisonment against the officer responsible for it and his superiors, that is, the Government of Malaysia, the second respondent.

I think it would be interesting to see how the constitutional right of an arrested person to counsel is implemented in other common law countries.

In the United States an accused person shall have the assistance of counsel and if he asks for counsel police investigation must stop until

counsel is available and that he must be informed of his right. A very heavy burden would lie on the prosecution to show that the constitutional right to counsel has been waived if interrogation nevertheless proceeds in the absence of counsel: see *Miranda* v *Arizona.*[1]. The United States Supreme Court pointed out in *Massiah* v *United States*[2] that to hold otherwise would deny the accused an effective representation by counsel at the only stage when legal aid and advice would help him.

In Canada the right of the suspect to counsel conferred by the Canadian Bill of Rights is respected but it is of limited scope. It relates to the trial itself and not to any proceedings prior to it: see *R* v *Connor.*[3]

English law does not go so far in restricting the right to counsel. There, its importance in the particular context of police interrogation has been given explicit judicial recognition in the Judges' Rules that 'any person at any stage of an investigation ... even if he is in custody ... should be able to communicate and to consult privately with a solicitor'. This principle is subject to the proviso that no unreasonable delay or hindrance is caused to the process of investigation or the administration of justice. But the Judges' Rules lack all force of law so that it will not be unlawful on the part of the police to ignore them. In those circumstances the only course open to the arrested person is to complain to the police themselves under the Police Act 1964.

As in Canada we have a Bill of Rights. However the position in this country seems to be that the pretrial right of an arrested person to be allowed to consult a lawyer is merely one particular manifestation of the general right to be allowed to consult and be defended by a legal practitioner of his choice: Article 5(3) of the Constitution. Such right starts right from the day of his arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice: see *Ooi Ah Phua* v *Officer-in-Charge Criminal Investigation, Kedah/Perlis.*[4] The position seems to be the same in India: see *Moti Bai* v *The State.*[5] We therefore did not agree with the proposition of law propounded by the learned judge that the right to counsel could only be exercised after the completion of the period of police investigation under section 117 CPC. That is too narrow a proposition. In our view it is at the police station that the real trial begins and a court which limits the concept of fairness to the period when police investigation is completed recognises only the form of criminal justiciable process and ignores its substance.

The correct view is that as stated by this court in *Ooi Ah Phua's, supra,* case. In spite of the magistrate's order under section 117 CPC the right of the arrested person to counsel is not lost. Such order is essential only on the basis that it renders legal detention which otherwise would have been illegal in view of the provision of clause 4 of Article 5 of the Constitution which exhorts that an arrested person if not released shall be produced before a magistrate within twenty-four hours and shall not be further detained in custody without the magistrate's authority. The onus of proving to the satisfaction of the court that giving effect to the right to counsel would impede police investigation or the administr-

ation of justice falls on the police.

On the facts of this case we were satisfied that they had given good and sufficient reason why such right could only be exercised after the period of police investigation was completed under section 117 CPC. The fact that the appellant was released five days earlier showed the *bona fides* of the police, which means that the right to counsel could be exercised much earlier than that originally allowed.

We too often think of the administration of justice simply as it relates to the protection of the rights of an accused person, that is, to know the charge against him, to be represented by counsel, to be confronted by witnesses, to have an impartial trial. But justice does not mean only for the accused; it also means the interests of the State, and not enough is paid to the interests of the State. We have a shocking prevalence of crime, and of crimes of violence, infractions of the plainest requirements of civilised society about which there is no debate. Our capacity to protect life and property itself is in question. There is a manifest failure to secure, through an adequate administration of our criminal laws, an appropriate punishment of crimes, the deterrent effects which are in large part the object of these laws. This failure is due in part to the defects in a procedure which favours delay and obstruction to the cause of justice. The chief cause is probably a laxity of public sentiment, the most difficult thing to correct.

Order accordingly.

Karpal Singh for the Appellant.
Fong Seng Yee (Senior Federal Counsel) for the Respondents.

Note

In this case Raja Azlan Shah FJ reiterates the proposition propounded earlier by the Federal Court in *Ooi Ah Phua* as regards the interpretation of Article 5(3) of the Malaysian Constitution, *viz,* the right of an arrested person to consult a lawyer starts from the day of his arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice. The onus of proving to the satisfaction of the court that giving effect to the right of the accused to counsel would impede investigation or the administration of justice falls on the police. As Raja Azlan Shah FJ explains, the rule in Malaysia is narrower than the American rule as propounded in *Miranda* v *Arizona.*

SUCCESSION OF RULERS

Dato Menteri Othman bin Baginda & Anor
v
Dato Ombi Syed Alwi bin Syed Idrus

[1981] 1 MLJ 29 Federal Court, Kuala Lumpur
Coram: Suffian LP, Raja Azlan Shah CJ (Malaya) Ag LP, Salleh Abas FJ

See under Administrative Law at page 190 below.

Note

Article 71 of the Federal Constitution guarantees the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges. Raja Azlan Shah Ag LP gives a liberal interpretation to this provision so as to include therein the election of Undangs.

FEDERAL TERRITORY

Hen Chean Seng & Anor
v
Public Prosecutor

[1983] 1 MLJ 297 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah LP, George Seah FJ and Abdoolcader J

Case referred to:
(1) *Merdeka University Berhad* v *Government of Malaysia* [1981] 2 MLJ 356.

RAJA AZLAN SHAH LP (delivering the judgment of the Court): The High Court has in this case made a reference to this court under section 48(4) of the Courts of Judicature Act, 1964 on two constitutional questions:
(i) Whether the Federal Territory is an integral part of Malaysia.
(ii) Whether the High Court in Malaya sitting in the Federal Territory is lawfully constituted.

By Part 1 of and the Schedule to the Constitution (Amendment) (No 2) Act, 1973 (Act A206) which came into force on February 1, 1974 the Federal Territory was constitutionally excised from the territory of the State of Selangor (section 3) and constituted as a territory *per se* with jurisdiction in respect thereof vested in the Federation by section 4 which specifically provides that the Federation shall exercise sovereignty over the Federal Territory and all power and jurisdiction in or in respect of the Federal Territory shall be vested in the Federation. Article 1(2) of the Federal Constitution enumerates the States of the Federation and the exclusion of the Federal Territory from the State of Selangor is provided for in Article 1(4) of the Constitution which was added by Act A206. Article 2(a) of the Constitution provides that Parliament may by law admit other States to the Federation, and 'state' in Article 2(a) is defined in Article 159(6) of the Constitution to include any territory. Act A206 is indeed for the purposes of Article 2(a) of the Constitution such a law admitting to the Federation the Federal Territory by section 4 thereof which vests the Federation with sovereignty and all power and jurisdiction over, in and in respect of the Federal Territory which was established by Act A206 as Article 1(4) of the

Constitution specifically states.

Mr Karpal Singh for the applicants at whose behest this reference was made says at the outset that if the answer to the first question posed is in the affirmative it will not be necessary to deal with the second question. We should however add that in respect of the second question the answer is clearly provided for in the provisions of section 6(1) of Act A206 [as amended by the Constitution (Amendment) (No 2) Act, 1976-Act A335] which prescribes that any written law existing and in force in the Federal Territory shall continue to be in force therein until repealed, amended or replaced by laws passed by Parliament. The Courts of Judicature Act is such a written law existing and in force in the Federal Territory prior to February 1, 1974 and the local jurisdiction of the High Court in Malaya as defined in section 3 of that Act clearly applied to the Federal Territory when it was still within the State of Selangor previous to the operation of Act A206 and continues to so apply by virtue of the provisions of section 6(1) of Act A206. On the point taken in respect of Article 121(1)(a) of the Constitution as to the vesting of judicial power in the High Court in Malaya for the States of Malaya, Article 2(a) of the Constitution read in the light of the definition of 'State' in Article 159(6), Act A206 and the provisions of Article 1 of the Constitution, considered together and in that order, clearly manifest the position that the High Court in Malaya has jurisdiction in the Federal Territory, and in any event any contention to the contrary would seemingly divest the High Court in Malaya of any judicial power or jurisdiction throughout the States of Malaya as Article 121(1)(a) of the Constitution specifically prescribes that the High Court in Malaya shall have its principal registry in Kuala Lumpur, the status of which is in issue in the question referred to us.

We accordingly declare an emphatic 'aye' in answer to the two questions presented for determination by us and would only in conclusion express our concern that it has been thought at all necessary to raise the first question which would *ex facie* purport to posit the preposterous proposition that the Federal Territory is *res nullius* or no man's land, in which event we would be sitting, in the words of Abdoolcader J, in *Merdeka University Berhad* v *Government of Malaysia*[1], in the middle of nowhere!

Order accordingly.

Karpal Singh for the Appellant
Shaikh Daud Hj Mohd Ismail (Deputy Public Prosecutor) for the Respondent

Note

The point decided in this case is with respect to the status of the Federal Territory of Kuala Lumpur. Raja Azlan Shah LP declares that the Federal Territory is an integral part of Malaysia and that the Federation has sovereignty and all powers and jurisdiction over it.

APPEAL TO THE YANG DI PERTUAN AGONG

Phang Chin Hock
v
Public Prosecutor (No. 2)

[1980] 1 MLJ 213 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah Ag LP, Chang Min Tat and Ibrahim Manan FJJ

Cases referred to :
(1) *Colonial Sugar Refinery Company Ltd* v *Irving* [1905] AC 369.
(2) *Lee Chow Meng* v *Public Prosecutor* [1978] 2 MLJ 36.

RAJA AZLAN SHAH Ag LP: (delivering oral judgment of the Court): This is a motion by the appellant for leave to appeal to His Majesty the Yang di Pertuan Agong against a judgment of this court given on June 28, 1979.

The appellant was charged for an offence under section 57(1)(b) of the Internal Security Act No 82 (Revised 1972) for possession of six rounds of ammunition and was tried under the Essential (Security Cases) Regulations, 1975 before the High Court in Kuala Lumpur. He was convicted and sentenced to death on April 4, 1977. He lodged notice of appeal to this court on April 9, 1977. On January 1, 1978 the Courts of Judicature (Amendment) Act 1976 (Act A328) which has the effect of abolishing the right of appeal in criminal matters to the Yang di-Pertuan Agong came into force. On June 28, 1979 this court dismissed his appeal against conviction.

We hope we can be forgiven for disposing this case in a few words with the submission of counsel for the appellant. We do so because, quite frankly, we have been unable to understand it. The submission rests, we gather, on the argument that section 13 of the Act A328 is invalid because the Conference of Rulers has not given its consent under Article 38 Clause (4) of the Constitution: it being said that such right which we concede is a substantive right cannot be taken away from the Rulers without their express consent: see Article 159 Clause (5) of the Constitution of Malaysia . The said Article reads: 'No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers'. We can see no foundation for that argument.

The Conference of Rulers is a constitutional body established under Article 38 of the Constitution with certain executive, deliberative and consultative functions.

The executive functions are those of (a) electing and removing the Yang di Pertuan Agong and his Deputy, (b) in the matter of religion agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole and (c) consenting or withholding consent to any law such as a law which affects the privileges, position, honours or dignities under clause (4) or a law

which alters the boundaries of a state and making or giving advice on any appointment which requires the consent of the Conference e.g., the Public Services Commission, the Railway Service Commission and the Education Service Commission under Articles 139(4), 141(2) and 141A(2) respectively and on any designated appointment of a head or deputy head of a department under Article 144(3) and (5).

Insofar as these executive functions are concerned, the Rulers act in their discretion.

The consultative functions of the Conference in clause (5) is limited to administrative action under Article 153 i.e., to matters affecting the special position, in West Malaysia, of the Malays.

But in their deliberative functions, the Rulers may range over any field since clause (2) refers to questions of national policy and any other matter the Conference thinks fit. When they come to these functions, the practice has developed, they sit on the second day of the Conference and they are then attended by the Yang di Pertuan Agong who shall be accompanied by the Prime Minister. In their deliberations, the clause specifically provides that not only the Rulers and the Yang di Pertua Yang di Pertua Negeri but also the Yang di Pertuan Agong shall act in accordance with the advice of the respective Executive Councils and Cabinet respectively. Necessarily in these matters, the Rulers make no decisions.

A contention that a decision to abolish appeals to the Yang di-Pertuan Agong affects the privileges, position, honours or dignities of the Rulers must therefore be examined in the context of Article 38 and the Federal List. A federation implies basically the surrender of certain of the powers of hitherto absolutely sovereign constitutional members. Item 4 of the Ninth Schedule, which is the Federal List and in this part consists of legislative matters makes 'civil and criminal law and procedure and administration of justice' a federal matter. The decision to abolish appeals to the Yang di-Pertuan Agong comes within the matters which the Rulers may deliberate upon, subject to the condition that their deliberations are in accordance with the advice of their Executive Councils and in the company of the Yang di Pertua Yang di Pertua Negeri and the Yang di Pertuan Agong. But the Rulers take no decision in the matter. Article 131 specifically enables the Yang di Pertuan Agong to make arrangements with Her Majesty the Queen of England for the reference of appeals to him to the Privy Council 'in any case in which such an appeal is allowed by federal law'. He may decide, as he did in this case, on the advice of his Cabinet, to abolish any or all appeals to himself. In all his functions, the Yang di Pertuan Agong is not a Ruler within the meaning of a Ruler of a constitutional state of the Federation. When a Ruler becomes the Yang di Pertuan Agong, he cannot hold at the same time his position of a Ruler but he is required to appoint a Regent. At the Conference of Rulers, the Regent attends as a Ruler, but the Yang di Pertuan Agong is not entitled to attend as a Ruler and, for this reason, he does not attend on the first day when the Rulers exercise the functions set out which lie within their discretion. Law and procedure therefore are matters which cannot come within the

honours, etc. of the Rulers.

The case before us has been loaded with so much learning and marked by brilliance of exposition of all the constitutional points involved that we do stand in danger of not seeing the wood for the trees and if we get entangled in the branches of the trees we may miss reaching the destination: the correct conclusion or decision which is whether Act A328 affects pending appeals. The Privy Council case in *Colonial Sugar Refinery Company Ltd* v *Irving*[1] which is cited to us has held that if the amending Act affects substantive rights it will not apply to pending proceedings already commenced unless a clear intention to that effect is manifested. We have looked at subsection (4) of section 13 of Act A328. It reads:

> The amendments embodied in this section shall not apply to any appeal or application for appeal which is pending at the date of the coming into force of this section.

That subsection has been judicially interpreted in the Privy Council case in *Lee Chow Meng* v *Public Prosecutor*[2] as follows:

> The subsection makes it perfectly clear that the amendment in question, which deletes the right of appeal in criminal matters, applies to all cases except those in which an appeal or an application for appeal is pending at the date of coming into force, namely January 1, 1978.

We cannot possibly cavil at the decision of the Privy Council in *Lee Chow Meng, supra,* or wish to criticize it. It is apparent that Act A328 does not affect pending appeals and the singular point before us is, whether an appeal to the Privy Council is pending as on January 1, 1978. In our view pending appeal must undoubtedly mean an appeal properly brought within the meaning of the *Judicial Committee Rules,* 1957, in particular, rules 3 and 4. We are satisfied that as on that date no appeal was pending before the Privy Council. We would therefore dismiss the motion.

Motion dismissed.

GTS Sidhu for the Appellant
TS Sambanthamurthi (Deputy Public Prosecutor) for the Respondent.

Note

In this case, Raja Azlan Shah Ag LP has ruled that abolition of criminal appeals to the Yang di Pertuan Agong does not affect the privileges, position, honours or dignities of the Rulers and, accordingly, consent of the conference of Rulers under Article 38(u) is not necessary. The matter pertains to the "civil and criminal law and procedure and administration of justice" and as such it does not fall within the ambit of Article 38(u).

OFFICIAL SECRETS AND PARLIAMENTARY PRIVILEGE

Lim Kit Siang
v
Public Prosecutor

[1980] 1 MLJ 293 Federal Court, Kuala Lumpur

Coram: Suffian LP, Raja Azlan Shah CJ (Malaya), Lee Hun Hoe CJ (Borneo), Wan Suleiman and Chang Min Tat FJJ

See under Administration of Criminal Justice at page 19 above.

Note

The interesting constitutional law question in this case pertains to the duty of a member of Parliament, particularly, that of the leader of the Opposition, to disclose secret information. Raja Azlan Shah, CJ has held that parliamentary privileges may exempt a member of Parliament from the law of defamation so long as libellous words are uttered within the walls of Parliament, but "will not save a member from an action for damages if repeated outside the House". He has not decided the point whether any speech in Parliament revealing official secret would be caught by the Official Secrets Act. But a member of Parliament cannot claim the right to disclose or make available for disclosure official secret information outside the walls of the House to the public, whatever his motives might be.

FREEDOM OF MOVEMENT AND RESIDENCE

Assa Singh
v
Menteri Besar, Johore

[1969] 2 MLJ 30 Federal Court, Kuala Lumpur

Coram: Azmi LP, Ong Hock Thye CJ (Malaya), Suffian and Gill FJJ and Raja Azlan Shah J

Cases referred to :-
(1) *Surinder Singh Kanda* v *The Federation of Malaya* [1962] MLJ 169, PC.
(2) *Aminah* v *Superintendent of Prison* [1968] 1 MLJ 92.
(3) *Mungoni* v *Attorney-General of Northern Rhodesia* [1960] AC 336; [1960] 2 WLR 389.
(4) *Chia Khin Sze* v *Mentri Besar, State of Selangor* [1958] MLJ 105.
(5) *Local Government Board* v *Arlidge* [1915] AC 120.
(6) *Keshavan Madhava Menon* v *State of Bombay* [1951] SCR 228.
(7) *State of Bombay* v *Shivbalak* [1965] 1 SCR 211.

RAJA AZLAN SHAH J: My answer to the question referred to us is also in the negative. I should have contented myself with that simple statement, but out of deference to the arguments of both counsel and, I must add, to the fluctuations of my own mind as the arguments proceeded, I should like to give my reasons. For my part I wish only to consider three substantial points raised before us.

The question referred to us under section 48 of the Courts of Judicature Act, 1964, is whether:

> The provisions of the Restricted Residence Enactment authorising detention and/or deprivation of liberty of movement are contrary to the provisions of the Federal Constitution and void.

Paraphrasing the question, is a pre-Merdeka law unconstitutional because it does not provide all the safeguards contained in our Constitution which formulate specific individual rights? It is not, however, our purpose nor are we required to decide the question whether the order of arrest and detention against the petitioner violates the provisions of the Constitution. That is the province of the trial judge after applying the law as propounded by this court to the facts as found by him.

The Restricted Residence Enactment is impugned as violating Article 5(1), (3) and (4) and Article 9(2) of the Constitution. When these provisions are examined closely they will be found to contain valuable safeguards ensuring (a) the right to be informed of the grounds of arrest, (b) the right to consult and to be defended by a legal practitioner of the arrested person's choice, (c) the right to be produced before a magistrate within 24 hours, (d) freedom from detention beyond the said period except by order of a magistrate, and (e) the right to move freely throughout the Federation and to reside in any part thereof.

Dato' Marshall contends that it is impossible to modify the impugned Enactment, in particular section 2, so as to bring it into conformity with the Constitution because if we did that, we would be re-enacting the law, and that is not our business. Our attention is also drawn to the provisions of Article 162 and Article 163 (4) of the Constitution. He submits that in the light of these constitutional provisions the courts can apply laws in existence prior to Merdeka Day only insofar as they are not inconsistent with the provisions of the Constitution and the courts have the authority and indeed the duty to repeal provisions in these pre-Merdeka laws which cannot be adopted and amended to comply with the provisions of the Constitution. The Privy Council case of *Surinder Singh Kanda* v *The Federation of Malaya,*[1] and the decision of Wan Suleiman J in *Aminah* v *Superintendent of Prison, Pengkalan Chepa, Kelantan*[2] were also referred to us.

The learned Solicitor-General contends that the said Enactment being Federal law on Merdeka Day (Article 160) and being a law which Parliament has power to make [Article 9(2)], its validity cannot be challenged on the ground that it restricts freedom of movement (Article 4(2)). He submits that the absence of provisions comparable to Article 5 does not invalidate the Enactment because the constitutionality after

Merdeka Day of the Enactment is covered by Article 162(1) which enacts that it shall continue to be in force with such modifications and amendments by Parliament and in the absence of such modifications by any court or tribunal applying it will make under Article 162(6). *Aminah's* case, *supra,* was also relied in support of this contention.

We are not here to repeal or amend the impugned law; that is a legislative function. We are to consider whether the impugned law which admittedly is silent on the question of fundamental rights must be read subject to these rights. Article 162(1) which deals with existing laws does not reader them void *ab initio.* It expressly enacts that existing laws 'shall continue in force on or after Merdeka Day' with such modifications as may be necessary to bring it into conformity with fundamental rights. In other words, after Merdeka Day no existing laws can be allowed to stand in the way of the exercise of fundamental rights. Such inconsistent laws are not wiped off the statute book, for so to hold would be to give fundamental rights a retrospective effect which the law holds they have not: see *Keshavan Madhava Menon* v *State of Bombay*[6].

The true position, in my opinion, is that the impugned law which violates fundamental rights becomes eclipsed until it is modified to remove the shadow and to make it free from blemish or infirmity. If that were not so, then it is not understandable what 'existing law' can be said to be modified so as to bring it into conformity with the Constitution. The impugned law which violates constitutional conditions is not a nullity or void *ab initio* but remains unenforceable by reason of those conditions, but once the conditions are observed the law becomes effective and I perceive no adequate grounds for adjudging that a re-enactment of the impugned law is required before it can have effect. In the light of the above reasoning, I take the view that Wan Suleiman J quite rightly interpreted the provisions of Article 162(1) of the Constitution when dealing with the fundamental rights declared in Article 5(3): *Aminah* v *Superintendent of Prison, Pengkalan Chepa, Kelantan, supra.*

I will now deal with the provisions of Article 9 clause (2) of the Constitution.

It is urged that the impugned Enactment is controlled by the safeguards of Article 9 clause (2) in that inasmuch as it curtails the freedom of movement throughout the Federation and the freedom to reside in any part thereof it is *ultra vires* the Constitution. The view of the learned Solicitor-General, as earlier indicated, is that Parliament can restrict such freedom by virtue of Article 9 clause (2) read with clause (3) and as such its validity cannot be challenged [Article 4 clause (2)]. That is a correct line of reasoning. The concept of the right of freedom and residence throughout the Federation or any part thereof is entirely different from the concept of the right of personal liberty mentioned in Article 5 clause (1), and Article 9 clause (2) should not therefore be read as controlled by the provisions of Article 5. The rights protected by Article 9 clause (2) are not absolute rights. They may be subordinated to the larger social interests. As Holmes J used to say: 'In a

complicated society there are no absolutes'. Each of these rights is liable to be curtailed by laws made or to be made by Parliament to the extent mentioned in clause(2) read with clause (3), that is, in the interests of the security of the Federation, public order, public health, or the punishment of offenders, restricting freedom of movement or residence between a State and other States. If these rights are absolute rights then Parliament would be completely debarred from making any law taking away or abridging any of those rights. The net result is that the unlimited legislative power of Parliament given by Article 74 is cut down by the provisions of Article 9 clause (2) and clause (3) and all laws made by Parliament with respect to these rights must, in order to be valid, observe these limitations. Whether any law has in fact transgressed these limits is to be ascertained by the court.

The true view, in my opinion, is that Article 9 clause (2) does not refer to the freedom of movement or residence *simpliciter* but guarantees the right to move freely 'throughout the Federation' and the right to reside in any part thereof. Clause (2) read with clause (3) authorises the imposition of 'restrictions' on these rights in the interests of security, public order, public health or the punishment of offenders. Reading the provisions of Article 9 together, it is reasonably clear that it was designed primarily to emphasise the factual unity of the Federation and to secure the right of a free citizen to move from one place in the Federation to another and to reside in any part thereof, in short, the object of Article 9, not unlike Article 13(1) of the Declaration of Human Rights, is to remove all internal barriers in the country and to make it as a whole the dwelling place of all citizens. It has nothing to do with the freedom of the person as such. That is guaranteed to any person, citizen or non-citizen (except enemy alien) in the manner and to the extent formulated by Article 5.

For the above reasons there is no doubt that a law which restricts a person to reside in a particular district or *mukim* falls exclusively under Article 5 of the Constitution and that the constitutionality of such a law cannot be questioned with reference to Article 9(2).

The other main argument advanced by Dato' Marshall that the impugned Enactment is *ultra vires* is based on the maxim *delegatus non potest delegare* .

In my view, this is not such a case. In the pre-Merdeka days there is no doubt that the Resident was vested with administrative plenary powers to issue an order of restricted residence. But after Merdeka Day the law relating to restricted residence is centralised. It is now the Minister who is vested with plenary powers with regard to restricted residence.

The pith and substance of the matter is to what extent, if any, the Minister can delegate his functions under the Restricted Residence Enactment to the Mentri Besar? Let us examine whether there is some express authority in that behalf. Section 5 of the Delegation of Powers Ordinance, 1956, contains an express provision enabling a Minister to delegate his powers. It reads as follows:

5. Where by any written law a Minister is empowered to exercise any

> powers or perform any duties, he may, subject to the provisions of section 11 of this Ordinance, by notification in the *Gazette* delegate subject to such conditions and restrictions as may be prescribed in such notification the exercise of such powers or the performance of such duties to any person described by name or office.

The question then arises as to how far that enables him to delegate his powers to make an order of restricted residence. The authority to make such orders is given by section 2 which is in these terms:

> 2. (i) Whenever it shall appear to the Minister on such written information and after such enquiry as he may deem necessary that there are reasonable grounds for believing that any person should be required to reside in any particular district or *mukim* or should be prohibited from entering into any particular district or districts or *mukim* or *mukims* the Minister may issue an order in one of the Forms in the Schedule for the arrest and detention or, if he is already in prison for the detention of such person.
>
> (ii) The Minister thereafter after such further enquiry as he may deem necessary may make an order in the Form in the Schedule that from a date to be stated in such order, such person do reside in such district or *mukim* as may be specified in the order or do not enter into such district or districts or *mukim* or *mukims* as may be so specified.
>
> (iii) An order made under sub-section (ii) may be for the life of the person to whom it relates or for a term to be stated in the order, and may at any time be revoked, cancelled, or varied by the Minister.

There is no doubt that under section 2 the Minister cannot issue an order for the arrest and detention of any person unless it 'appears' to him that there are reasonable grounds for believing that any person should be required to reside in any particular district or *mukim*. That is a condition precedent to the exercise of the power. In a sense he is under a duty to be satisfied before making such orders. Can this duty by the Minister be delegated to someone else? Dato' Marshall says that it cannot. The authority of the Minister to delegate, he says, applies only to powers and not to duties. He finds support for his argument in the wording of LN 279 of 20th August, 1959 which defines the Minister's authority to delegate:

> In exercise of the powers conferred by section 5 of the Delegation of Powers Ordinance, 1956, the Minister of the Interior and Justice hereby delegates to the Mentri Besar or Chief Minister of a State the exercise of the powers conferred upon the Minister by sections 2, 2A and 5 of the Restricted Residence Enactment of the Federated Malay States as extended to apply throughout the Federation by the Restricted Residence (Extended Application) Ordinance, 1948:
>
> Provided that the Mentri Besar or Chief Minister shall not exercise any such power in respect of any person who is not ordinarily resident in the State or in respect of any place outside the State.

The effect of this Legal Notification, Dato' Marshall contends, was to authorise a Minister to delegate his powers conferred upon him by section 2 of the Enactment to make the order but it did not authorise him to delegate his duty to be satisfied. He was bound to perform his duty

himself and as the Minister had never fulfilled that duty the transfer of power to the Mentri Besar is *ultra vires* . I cannot agree with this line of reasoning. The power of the Minister to make the said order can only be exercised when he is 'satisfied' or when it 'appears' to him that there are reasonable grounds. The requirement that he is to be satisfied that there exists reasonable grounds is nevertheless also a condition or limitation on the exercise of the power, and when the Minister delegates the exercise of the power conferred upon him by section 2 of the said Enactment to the Mentri Besar he delegates to such person the fulfilment of all the conditions and limitations attaching to it even though they be also duties. Where a power is coupled with a duty, the power cannot be divorced from the duty. They are inseparable; whoever exercises the power, he it must be who has to perform the duty, which is a condition precedent for the exercise of the power.

We may usefully refer to two authorities. The first is the decision of the Privy Council in *Mungoni* v *Attorney-General of Northern Rhodesia.*[3] The Acting Governor of Northern Rhodesia, acting under his statutory powers, delegated his powers under regulation 16(1) of the Emergency Powers Regulations, 1956, of Northern Rhodesia to the Provincial Commissioner, Western Province. The detention order made by the latter was attacked as being invalid. Similar reasons were urged before the Privy Council which held that the power and the duty under regulation 16(1) are so interwoven that it was not possible to split the one from the other so as to put the duty on one person and the power on another person, the regulation contained not so much a duty but rather a power coupled with a duty, and he who exercised the power had to carry out the duty. The Privy Council therefore took the view that in delegating his functions under the said regulation the Acting Governor could delegate both the power and duty together to one and the same person — he could not delegate the power to another and keep the duty to himself.

The other case is *State of Bombay* v *Shivbalak.*[7] By section 5 of the Bombay Tenancy and Agricultural Law Act, 1948, the State Government is under an obligation to hold an enquiry as to whether a particular agricultural land in the State has remained uncultivated or fallow for the period prescribed by statute. If after such enquiry it appears to the State Government that the said land is uncultivated for the said period it may make a declaration that the management of such land be resumed by Government. Section 83 of the said Act in terms authorises delegation by the State Government to any of its officers of the specified status and the delegation can be in respect of all or any of the powers conferred on the State Government by the provisions of the Act. The Deputy Collector, acting under delegated authority, made an order directing that the land of the respondents should be resumed by Government for cultivation as the latter had statutorily failed to cultivate it. In answer to a similar argument which was raised before us the Indian Supreme Court took the view that the authority to delegate all or any of the powers which are expressly conferred on the State Government by section 83 would be rendered almost meaningless if the

duty to hold an enquiry as a condition precedent for the exercise of the said authority cannot be delegated. In the context, the power which can be delegated is inseparable from the enquiry which must precede the exercise of the power, and so, in order to make section 83 effective it is necessary to hold that the delegation of the power authorised by the said section must necessarily involve the delegation of the discharge of obligations or functions which are necessary for the exercise of the said power. On a fair and reasonable construction of section 83 it was held to authorise the delegation not only of the powers mentioned by it but also of duties and functions which are incidental to the exercise of the powers and are integrally connected with them. For similar reasons I hold in our case that the transfer of powers to the Mentri Besar is not *ultra vires.*

Question answered in the negative.

Dato' David Marshall for the Applicant.
Dato' Mohamed Salleh Abas (Solicitor-General) for the Respondent.

Notes

This case belongs to the era when each Judge of the Federal Court used to give a separate judgment of his own. Such a practice has now fallen into disuse. Raja Azlan Shah J gives his decision as the most-junior member of the Bench because he is as yet only a High Court Judge and not a Federal Court Judge.

The case raises two questions: (i) inter-relation of Articles 5 and 9 and (ii) constitutional validity of Restricted Residence Enactment *vis-a-vis* Articles 5 and 9. Along with the four other Judges, Raja Azlan Shah also upholds the validity of the Enactment. The enactment is held to fall under Article 5 and not Article 9(2) of the Constitution. He interprets Article 9 restrictively. According to him, Article 9 "has nothing to do with the freedom of the person as such".

AMENDMENT OF THE CONSTITUTION

Loh Kooi Choon
v
Government Of Malaysia

[1977] 2 MLJ 187 Federal Court, Kuala Lumpur
Coram: Ali, Raja Azlan Shah and Wan Suleiman FJJ

Cases referred to:-
(1) *Vacher & Sons Ltd* v *London Society of Compositors* [1913] AC 107, 118.
(2) *Henry* v *Geopresco International Ltd* [1975] 2 All ER 702, 718.
(3) *Assa Singh* v *Mentri Besar, Johore* [1969] 2 MLJ 30.

(4) *IC Golak Nath & Ors* v *State of Punjab & Ors* [1967] 2 SCR 762.
(5) *Sri Sankari Prasad Singh Deo* v *Union of India and State of Bihar* [1952] SCR 89.
(6) *Sajjan Singh* v *State of Rajasthan* [1965] 1 SCR 933.
(7) *Kasavananda Bharati* v *State of Kerala* [1973] SCR Supp 1.
(8) *Adegbenro* v *Akintola & Anor* [1963] 3 All ER 544, 551.
(9) *Hinds* v *The Queen* [1976] 2 WLR 366, 373.
(10) *In re Pulborough School Board, Bourke* v *Nutt* [1894] 1 QB 725, 737.
(11) *Barber* v *Pigden* [1937] 1 KB 664, 673.
(12) *Letang* v *Cooper* [1964] 2 All ER 929, 933.
(13) *Latikiro of Buganda* v *AG* [1960] 3 All ER 849, 851.
(14) *Black Clanson* v *Papierwerke* [1975] 1 All ER 810, 815.

RAJA AZLAN SHAH FJ: It is clear that the question at issue is fraught with political controversy. No doubt the appellant and other persons hold strong views one way or the other on the justice of the impugned Act. I should add that right now no feature of our system of government has caused so much discussion, received so much criticism, and been so frequently misunderstood, than the duties assigned to the courts and the functions which they discharge in guarding the Constitution. For that reason and also because it is rarely that this court is faced with a constitutional question of this kind it is desirable at the outset to make clear the functions of the courts.

The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord Macnaghten in *Vacher & Sons Ltd* v *London Society of Compositors*[1]:

> Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction' — *per* Roskill LJ in *Henry* v *Geopresco International Ltd.*[2] Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box.

The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 basic concepts: One of them is

that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 States shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the executive, legislature and judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.

Clause (4) of Article 5 of the Constitution prescribes that a person arrested must be taken before a magistrate within 24 hours so that an independent authority exercising judicial powers may without delay apply its mind to his case. This safeguard is to a large extent covered by the provisions of the Criminal Procedure Code but its incorporation in the Constitution is deemed essential for assuring the minorities that their rights would be constitutionally guaranteed and that they shall not entertain any apprehension of the alleged despotism and arbitrariness of the majority and legislative omnipotence. This safeguard equally applies to any person arrested under the Restricted Residence Enactment (Cap 39): see *Assa Singh* v *Mentri Besar, Johore*[3] 'but evidently difficulties have arisen in the practical application of the enactment and hence the need for the amendment': see [1976] 2 MLJ xcii.

The question is how safe are the provisions in clause (4) of Article 5 from change. This question arose in a case which the Supreme Court in India in *IC Golak Nath & Ors* v *State of Punjab & Ors*[4] considered *en bloc*. The same question had arisen twice before in India. On the first occasion in *Sri Sankari Prasad Singh Deo* v *Union of India and State of Bihar*[5] the Supreme Court considered the validity of the Constitution First Amendment Act in 1950. One of the arguments against the validity of the amendment was that the power of amendment granted by the constitution to Parliament did not extend to the abridgment or removal of any of the fundamental rights because such a law would be hit by Article 13 and void. This argument was not accepted. On the second occasion in *Sajjan Singh* v *State of Rajasthan*[6] the Seventeenth Amendment was challenged but this argument, though faintly argued, was not accepted by three judges who constituted the majority. In *Golak Nath, supra,* another challenge to the same amendment was made and succeeded. By a bare majority of 6:5 it was held that the powers of amendment did not extend to the taking away and abridging of the fundamental rights on the basis that there was no distinction between the constitution and ordinary law. An Indian writer (Tripathi, Amending the Constitution) has aptly summarised the *Golak Nath* constitutional crisis in reality. He said:

> It does not seem to be a rash hypothesis that if any one around there could successfully state the distinction between the constitution and ordinary law in clear juridical terms at least one judge would have deserted the company of the majority and the power of Parliament to amend the

> fundamental rights would not have remained eclipsed for six long years....

Six years later the Supreme Court in *Kasavananda Bharati* v *State of Kerala*[7] had no difficulty in overruling *Golak Nath* practically without any dissent.

Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied, and this wording 'can never be overridden by the extraneous principles of other Constitutions' — see *Adegbenro* v *Akintola & Anor.*[8] Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law.

Counsel for the appellant before us urged that any amendment affecting the fundamentality of the Constitution should be avoided at all costs. According to him that part of the Constitution must not be touched. In my view, a distinction must be made between those parts of the Constitution which the framers thought should not suffer change and those that can be changed.

Our Constitution prescribes four different methods for amendment of the different provisions of the Constitution:

(i) Some parts of the Constitution can be amended by a simple majority in both Houses of Parliament such as that required for the passing of any ordinary law. They are enumerated in clause (4) of Article 159, and are specifically excluded from the purview of Article 159;

(ii) The amending clause (5) of Article 159 which requires a two-thirds majority in both Houses of Parliament and the consent of the Conference of Rulers;

(iii) The amending clause (2) of Article 161E which is of special interest to East Malaysia and which requires a two-thirds majority in both Houses of Parliament and the consent of the Governor of the East Malaysian State in question;

(iv) The amending clause (3) of Article 159 which requires a majority of two-thirds in both Houses of Parliament.

(For a detailed study of the subject, reference may be made to Tun Suffian, *An Introduction to the Constitution of Malaysia,* 2nd edition, Chapter 21).

It is therefore plain that the framers of our Constitution prudently realised that future context of things and experience would need a change in the Constitution, and they, accordingly, armed Parliament with 'power of formal amendment'. They must be taken to have intended that, while the Constitution must be as solid and permanent as we can make it, there is no permanence in it. There should be a certain amount of flexibility so as to allow the country's growth. In any event, they must be taken to have intended that it can be adapted to changing conditions, and that the power of amendment is an essential means of adaptation. A Constitution has to work not only in the environment in

which it was drafted but also centuries later. 'The vanity and presumption of governing beyond the grave is the most ridiculous and insolent of all tyrannies. Man has no property in man; neither has any generation or property in the generations which are to follow.... It is the living and not the dead, that are to be accommodated": Thomas Paine, *Rights of Man* .

As fundamental rights are not the same as ordinary rights, they can only be suspended or abridged in the special manner provided for it in the Constitution. In my opinion, the purpose of enacting a written Constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure. Their Lordships of the Privy Council in *Hinds* v *The Queen*[9] took the view that constitutions based on the Westminster model, in particular the provisions dealing with fundamental rights, form part of the substantive law of the state and until amended by whatever special procedure is laid down in the constitution for this purpose, impose a fetter upon the exercise by the legislature of the plenitude of its legislative power. A passage from the speech of Lord Diplock who delivered the majority judgment is apposite (page 374):

> One final general observation: where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the Parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves. The purpose served by this machinery for 'entrenchment' is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision.

The framers of our Constitution have incorporated fundamental rights in Part II thereof and made them inviolable by ordinary legislation. Unless there is a clear intention to the contrary, it is difficult to visualise that they also intended to make those rights inviolable by constitutional amendment. Had it been intended to save those rights from the

operation of clause (3) of Article 159, it would have been perfectly easy to make that intention clear by adding a proviso to that effect. I am inclined to think that they must have had in mind what is of more frequent occurrence, that is, invasion of fundamental rights by the legislative and executive organs of the State by means of laws, rules and regulations made in exercise of legislative power and not the abridgment of such rights by amendment of the Constitution itself in exercise of the power of constitutional amendment. That power, though it has been entrusted to Parliament, has been so hedged about with restrictions that its exercise can only be made after 'mature consideration by Parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws'.

There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.

I concede that Parliament can alter the entrenched provisions of clause (4) of Article 5, to wit, removing the provision relating to production before the magistrate of any arrested person under the Restricted Residence Enactment as long as the process of constitutional amendment as laid down in clause (3) of Article 159 is complied with. When that is done it becomes an integral part of the Constitution, it is the supreme law, and accordingly it cannot be said to be at variance with itself. A passage from the Privy Council judgment in *Hinds* v *The Queen, supra,* is of some assistance (page 392):

> That the Parliament of Jamaica has power to create a court ... is not open to doubt, but if any of the provisions doing so conflict with the Constitution in its present form, then, it could only do so effectively if the Constitution was first amended so as to secure that there ceased to be any inconsistency between the provisions and the Constitution....

This reasoning, in my view, is based on the premise that the Constitution as the supreme law, unchangeable by ordinary means, is distinct from ordinary law and as such cannot be inconsistent with itself. It is the supreme law because it settles the norms of corporate behaviour and the principle of good government. This is so because the Federation of Malaya, and later, Malaysia, began with the acceptance of the Constitution by the nine Malay States and the former Settlements of Penang and Melaka, by the acceptance of it by Sabah and Sarawak that entered the Federation in 1963, as 'the supreme law of the Federation ....' (clause 1 of Article 4). It is thus the most vital working document which we created and possess. If it is urged that the Constitution is on the same level with ordinary law, then the Constitution is an absurd attempt on the part of the framers, to limit a power,in its own nature illimitable. In the context of clause (1) of Article 160 'law' must be taken to mean law made in exercise of ordinary legislative power and not made in exercise of the power of constitutional amendment under clause (3) of Article

159 with the result that clause (1) of Article 4 does not affect amendments made under clause (3) of Article 159.

In conclusion, I hold that clause (4) of Article 5 is nothing but a constitutional protection which can be taken away or abridged only in the manner in which the Constitution provides. There is a world of difference between legislative immunity and a constitutional guarantee. The Constitution, by its very nature, creates the distinction. A constitutional guarantee cannot be wiped out by a simple legislative process as opposed to constitutional amendment.

Can an amendment of a clause in the Constitution operate with retrospective effect? It was strenuosly contended for the appellant that a law which takes away vested right must be presumed to be intended not to operate retrospectively for the simple reason that subsequent change in the law would not prejudice such right. I accept this statement, for which authority is to be found in many cases. But my decision is based on the language of section 4 of the Constitution (Amendment) Act,1976 (Act A354) which reads:

> 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 integral part of this Article as from Merdeka Day.

In so far as an Act of Parliament is concerned, the rule of construction is that in order to determine whether it is retrospective in its operation, the language of the Act itself must be looked into bearing in mind that an Act is not to be construed retrospectively unless it is clear that such was the intention of Parliament. If such was the intention that the Act was to be given retrospective effect even in respect of substantive right or pending proceeding, the courts have no alternative but to give effect to the Act even though the consequences might appear harsh and unjust.

The principle that parties are to be governed by the law in force on the date when an action is instituted and any subsequent amendment or alteration cannot affect vested right or pending proceeding must always be read subject to the corollary that Parliament can always expressly provide that vested right or pending proceeding be affected by the amendment of the law.

If Parliament retrospectively affects vested right or pending proceeding, then it would be the duty of an appellate court to apply the law prevailing on the date of appeal before it. There is abundant authority for the proposition that an appellate court is entitled to take into consideration facts and events which have come into existence since the judgment under appeal was delivered: see *In re Pulborough School Board, Bourke* v *Hutt*[10] and *Barber* v *Pigden.*[11]

It cannot be gainsaid that Parliament is endowed with plenary powers of legislataion and that it is within the ambit of its competence to legislate with prospective or retrospective effect. Retrospective legistation is one of the incidents of plenary legislative powers and as such is not required to be spelt out in the Constitution. Subject to the constitutional limitation of Article 7 of the Constitution, to wit,protection

against retrospective criminal laws and repeated trials, Parliament would be within the ambit of its competence if it deems fit to legislate retrospectively. There is no such restriction of legislative power with regard to restrictive residence. In the absence of any constitutional provision against retrospective legislation with regard to restrictive residence it is not right to argue that Parliament should apply such a restriction. 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it' — *per* Frankfurter J.

The appeal is dismissed. No order as to costs.

Raja Abdul Aziz Addruse for the Appellant.
Lim Beng Choon (Senior Federal Counsel) for the Respondent.

Note

Raja Azlan Shah FJ considers in this case the all-important question whether any limit can be implied on the power to amend the constitution as contained in Article 159. He takes the view that no such limit can be read. This means that Parliament can make any amendment of the Constitution, howsoever drastic it may be, by following the procedure laid down in Article 159. In this case, the Federal Court has approved retrospective constitutional amendments. Raja Azlan Shah FJ has also rejected an argument based on the Indian cases on constitutional amending process that there should be an implied limitation in Malaysia on the amending power. In the process, the Federal Court has sanctioned an uncontrolled amending power and has refused to assert any control thereon.

EMERGENCY: SECURITY REGULATIONS

Johnson Tan Han Seng v Public Prosecutor
Soon Seng Sia Heng v Public Prosecutor
Teh Cheng Poh v Public Prosecutor

[1977] 2 MLJ 66 Federal Court, Kuala Lumpur

Coram: Suffian LP, Raja Azlan Shah and Wan Suleiman FJJ

Cases referred to :-

(1) *Willcock* v *Muckle* [1951] 2 KB 844.
(2) *In re Petition of Earl of Antrim and eleven other Irish Peers* [1966] 3 WLR 1141.
(3) *King* v *Governor of Wormwood Scrubs Prison* [1920] 2 KB 305.
(4) *Bhut Natha Mate* v *State of West Bengal* AIR [1974] SC 806.
(5) *King* v *Halliday* [1971] AC 260.
(6) *Stephen Kalong Ningkan* v *Government of Malaysia* [1968] 2 MLJ 238; [1970] AC 379.
(7) *Public Prosecutor* v *Khong Teng Khen & Anor* [1976] 2 MLJ 166.
(8) *Samivellu* v *Public Prosecutor* [1972] 1 MLJ 28.
(9) *Public Prosecutor* v *Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116.

(10) *Public Prosecutor* v *Oh Keng Seng* [1976] 2 MLJ 125.
(11) *Public Prosecutor* v *Su Liang Yu* [1976] 2 MLJ 128.
(12) *Long bin Samat* v *Public Prosecutor* [1974] 2 MLJ 152.
(13) *Smedlys Ltd* v *Breed* [1974] 2 All ER 21.
(14) *Re Tan Boon Liat* [1976] 2 MLJ 83.
(15) *Sulong bin Nain* v *Public Prosecutor* [1947] MLJ 139.
(16) *Ismail bin Haji Ibrahim* v *Public Prosecutor* [1949] MLJ 139.
(17) *Public Prosecutor* v *Muniandy* [1963] MLJ 147.
(18) *Lim Eng Koi* v *Public Prosecutor* [1948-49] MLJ Supp. 63.
(19) *Brown* v *Magistrates of Edinburgh* [1931] SLT 456, 458.
(20) *Liversidge* v *Anderson* [1942] AC 206 at pp 252, 253.
(21) *Mutual Film Corporation* v *Industrial Commission of Ohio* (1915) 236 US 230, 245.
(22) *R* v *Halkett* [1910] 1 KB 50.

RAJA AZLAN SHAH FJ: I have had the advantage of reading in draft the judgment of the Lord President. I agree with his reasoning and with his conclusion with regard to the merits of all the four appeals. However, having regard to the importance of this appeal and the arguments delivered, it is only right that I should express my own reasons regarding the law argued before us.

The forefront of the argument raised before us on behalf of all the accused is that the 1975 regulations are void because Ordinance No 1 of 1969 under which the regulations were made, and *a fortiori* the Proclamation of Emergency of 1969, the basis of the said Ordinance, have lapsed by effluxion of time. It is said that seven years have gone by since the 1969 Proclamation, that circumstances have since changed for the better and that we are now living in happier times, and therefore the Ordinance and consequently the Proclamation have outlived their purpose and must be considered repealed by effluxion of time. That is tantamount to saying that the Ordinance and the Proclamation can lose their force without express repeal.If that is the case, then it can be argued only on the premise that they have been repealed by implication. I am almost tempted to say that a little common sense is a valuable quality in the interpretation of an enactment. It cannot be gainsaid that a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with and repugnant to the provisions of an earlier enactment that the two can no longer stand together. It would be quite inapposite to now say that a 'change of circumstances' is a later enactment. I know only of Scotland that an Act of the Scottish Parliament may lose its force by effluxion of time. Even then, there must be contrary to practice which must be of some duration and general application. Lord Mackay has aptly described how a Scottish Act may be repealed when he said in *Brown* v *Magistrates of Edinburgh:*[19]

> I hold it clear in law that desuetude requires for its operation a very considerable period, not merely of neglect, but of contrary use of such a character as practically to infer such completely established habit of the community as to set up a counter law or establish a *quasi* repeal.

It will be fatuous enough for us to accept the suggestion that the Ordinance and *a fortiori* the Proclamation can lose their force by a

change of circumstances as outlined by counsel. Such trivial niceties are too palpable for construing the documents for it is essentially a question of construction.

Harun J in Criminal Appeal No 43 reached his conclusion on the basis of a general proposition which was enunciated by Lord Goddard CJ and Devlin J (as he then was) in *Willcock* v *Muckle*[1]. That case is no doubt 'illuminating' and it is only necessary to set out the facts to obtain its true perspective. Because of the imminence of an outbreak of war in Europe in 1939, a state of emergency was declared in the United Kingdom in that year. In pursuance of that emergency the National Registration Act, 1939, was passed, and section 12(4) provided that it was to continue in force 'until such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing this Act came to an end'. Thirty-two other Acts of Parliament which were passed at about the same time, and of which the Courts (Emergency Powers) Act, 1939, was one, contained the same or similar formula specifying their termination. On October 9, 1950, an Order in Council provided that the emergency that was the occasion for the passing of the Courts (Emergency Powers) Act, 1939, had ended. There was no similar Order in Council terminating the National Registration Act, 1939.

I now come to the facts. Section 6(4) of the National Registration Act, 1939 empowered a police constable in uniform to require a person to produce his national registration card. On December 7, 1950, the defendant, while driving his motor vehicle, was stopped by a police constable in uniform. The constable asked the defendant to produce to him his national registration card, and to make the story short the defendant refused to do so and he was charged under the section. The justices found him guilty but because of the conduct of the police officer in question, they granted him a conditional discharge. The defendant appealed and because of the great importance of the case seven judges had been specially constituted to determine it.

The question which the judges had to decide was whether the National Registration Act, 1939, was still in force. Counsel for the defendant argued that although the emergency had many sides in relation to the national life of the country, there was in fact only one emergency that was the occasion for the passing of the National Registration Act, 1939 and the other 32 Acts. And because the emergency that was the occasion for the passing of the Courts (Emergency Powers) Act, 1939 had ended by virtue of the Order in Council of October 9, 1950, and, as that emergency was the same emergency in the case of the National Registration Act, 1939, the latter Act was no longer in force. Lord Goddard CJ, expressing the opinion of four others judges, preferred the argument of the prosecution that:

> There can be different aspects of the same emergency and that if the Crown has considered that a particular aspect no longer exists, so that the emergency which occasioned that particular Act to be passed has ended, it does not follow that all the Acts concerning other aspects of the same emergency are terminated.

The learned Chief Justice said that on the true construction of the formula used in all the 'emergency' Acts, it was contemplated that to bring any one of those Acts to an end, there must be an Order in Council concerning that particular Act, and that could be done on different dates. He concluded that the National Registration Act, 1939 had not been terminated as there was no Order in Council terminating it.

In the course of the judgment the learned Chief Justice made two observations and the one that concerns us is in respect of law enforcement. After making an observation that he agreed with the justices that in view of the conduct of the police officer in question, the appellant was rightly given a conditional discharge, he went on to say that the police should not as a matter of routine use the power given to them under section 6(4) of the National Registration Act,1939, because in 1950 the purpose of that Act had lapsed. The merits of each case must be looked into, and he drew a distinction between the ordinary case of 'a woman who has left her car outside a shop longer than she should, or on some trivial occasion of that sort', and the case 'where there is a real reason for demanding sight of the registration card'. His main reason of exhorting the police to refrain from doing acts which he said was 'wholly unreasonable' was to maintain the 'good feeling that exists between the police and the public'. It was with that object in mind that the learned Chief Justice made the observation relied upon by Harun J Devlin J also made a similar observation which found favour with Harun J. In my judgment the general observations made by them must be taken with reference to the particular question before them, and I think their language itself, if rightly understood, show that they meant that. If their observations are limited to the particular facts of the case, they may be correct,but if they are meant to be of general application,I think they go too far. It would be going too far to say that both the learned judges laid it down as a proposition of law that an Act of Parliament can be repealed by the force of changed circumstances. I think that cannot be extracted from their judgment. I therefore reject the argument that *Willcock* v *Muckle, supra,* assists the accused. In fact that case is against him.

The reliance placed by Harun J on the passage enumerated by Lord Reid in the *Earl of Antrim's*[(2)] case is also misplaced. On closer examination that passage, read together with the next sentence, reveals the *ratio* of the case, i.e:

> A statutory provision is impliedly repealed if a *later enactment* brings to an end a state of things the continuance of which is essential for its operation.

The Irish Free State (Agreement)Act, 1922 created two political entities, the Irish Free State which became a Dominion within the Commonwealth (and in 1949, became a Republic) and Northern Ireland which remained part of the United Kingdom. As a result of the changes made by the Act of 1922, Ireland as a political entity ceased to be part of the United Kingdom. The question then was whether the right of Irish peers to sit and vote in the House of Lords continued after 1922. The House of

Lords answered it in the negative. Viscount Dilhorne (page 1152) saying that since Ireland as a political entity had ceased to be part of the United Kingdom it follows that the Irish peers could not sit and vote in the United Kingdom Parliament to represent a territory which had ceased to exist. 'For these reasons', said Viscount Dilhorne 'that part of the Union with Ireland Act (1800) which provided for the election of Irish peers to the House of Lords must be regarded as having become spent or obsolete or impliedly repealed in 1922'. That case therefore does not bear out the proposition that an enactment may be impliedly repealed by the force of changed circumstances. It is explicable on the basis that an enactment is impliedly repealed when the provisions of a later enactment are so inconsistent or repugnant to the provisions of the earlier enactment that the two cannot stand together. I would say it again that I do not find anything in that case which can be of assistance to the accused.

There is an inherent danger in reading a passage from a judgment as if it affords the *ratio decidendi* of a case. A judge before he arrives at his decision derives much help from a consideration of reported decisions but he will always remember that most of these reported decisions merely record what the ruling of another judge has been in another case and in the particular circumstances of that case and on the basis of its own particular facts.

A subsidiary argument raised is this. There had been two Yang di Pertuan Agongs who had succeeded the Yang di-Pertuan Agong who issued the Proclamation and that is a factor to be taken into account in determining that it has outlived its purpose. I think the reasoning is based on the belief current in the latter part of the fifteenth century when the Tudor and Stuart Proclamations were considered inferior to by-laws in respect of their permanence so that the Royal Proclamations were only in force during the life of the sovereign who issued them: see Vol IV, *Holdsworth History of English Law,* page 100. That belief can no longer hold good with the growth of the modern constitutional state.

I accept the view expressed by Abdoolcader J in *Re Tan Boon Liat*[14] that the Ordinance and *a fortiori* the Proclamation are 'still in force in law and in fact' . The important characteristics of the Proclamation and the Ordinance promulgated under clause 2 of Article 150 of the Constitution are their operative nature and the necessity of laying them before both Houses of Parliament which thus can exercise constant supervision and review. This type of emergency legislation remains in force unless sooner revoked by His Majesty or annulled by resolutions of both Houses of Parliament.

Incik Rajasingam in the course of an interesting and vigorous submission, and adopted by other counsel before us, impeached the 1975 regulations on another ground, i.e., sub-delegation of power to the Attorney-General to alter the mode of trial of persons accused under the Internal Security Act, 1960 (Revised — 1972). That he says is *ultra vires* Ordinance No 1 of 1969, basing his argument on the dissenting judgment of Ong FJ in *Public Prosecutor* v *Khong Teng Khen.*[7] I accept the view that the 1975 regulations are subsidiary legislation and the

question before the learned judge then, and now before us, is whether they are *ultra vires* Ordinance No 1 of 1969. The reasoning of the learned judge (page 174) seems to be that 'No limitation was imposed under the first 1975 regulations, though under the second, it was left to the Attorney-General's opinion whether the offence is one affecting the security of the Federation'. That, in his opinion, is sufficient to render those regulations *ultra vires* Ordinance No 1 of 1969. In other words it is said that that is a case of excessive delegation; His Majesty cannot and shall not sub-delegate to the Attorney-General the powers which are exclusively exercisable by him alone and amounting to an abdication of such powers *pro tanto*. With due respect to the learned judge, I think his opinion rests upon a mistaken view of the powers of His Majesty to issue ordinances having the force of law under Article 150(2) of the Constitution, and indeed of the nature and principles of legislation. His Majesty has powers expressly limited by Article 150(2) of the Constitution which created it, and he can, of course, do nothing beyond the limits which circumscribe those powers. But when acting within those limits, he has, and is intended to have, plenary powers of legislation, as large, and of the same nature, as those of Parliament itself. The courts must of necessity determine, when the question arises, whether the prescribed limits have been exceeded: and the only way in which it can properly do so is by looking at the terms of the instrument by which, affirmatively, the legislative powers are created, and by which, negatively, they are restricted. If what has been done is legislation, within the ambit of the affirmative words which gives the power, and if it does not violate any express condition or restriction by which that power is limited, it is not for this court, or for that matter any court, to inquire further, or to enlarge constructively those conditions and restrictions.

The 1975 regulations derive their force from Ordinance No 1 of 1969 by which the legislative power is given and not from the authority by whom the power is exercised. Within the limits prescribed by Article 150(2) His Majesty has promulgated Ordinance No 1 of 1969, which by its essential nature is an enabling instrument giving to himself power to make regulations widely envisaged in section 2, *inter alia,* power in paragraph (b) to 'create offences and prescribe penalties.....' The 1975 regulations, in particular regulation 2(2) of PU(A) 362/75, have been made under section 2 of the Ordinance and their subject-matter is clearly within the language of section 2 of the Ordinance.

Next the question arises whether the power conferred upon the Attorney-General under regulation 2(2) of PU(A) 362/75 is delegated to him, namely, sub-delegation of His Majesty's power to the Attorney-General to alter the mode of trial. The better view is that His Majesty is doing no more than delegate his legislative function to the Attorney-General. A duty is imposed on the Attorney-General to decide in each case by issuing a certificate whether it is a security case affecting the Federation. Here the Attorney-General has to form an opinion in the exercise of a legislative discretion. His discretion is apparently at large and what weight or influence each case is to have upon his mind is not made clear. The objection to regulation 2(2) is that it furnishes no

standard when a case is certified as one affecting the security of the Federation, whether it is one under the Arms Act, Act 21 of 1960, the Firearms (Increased Penalties) Act, Act 37 or the Internal Security Act, and hence leaves the matter to the Attorney-General's arbitrary judgment, whim and caprice. The discretion no doubt gives to the Attorney-General a wide charter which it might have been thought he is ill-equipped to exercise. However, the terms of regulation 2(2) 'in the opinion of the Attorney-General, affects the security of the Federation', like other general terms, acquire precision from the sense and experience of the Attorney-General, and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore the law properly relies. In this connection it is not inapposite to quote the following passage from the speech of Lord Macmillan in *Liversidge* v *Anderson:*[20]

> The statute has authorized (the power) to be conferred on ... one of the high officers of the State who, by reason of his position, is entitled to public confidence in his capacity and integrity, who is answerable to Parliament for his conduct in office and who has access to exclusive sources of information. In a question of interpreting the scope of a power it is obvious that a wide discretionary power may more readily be inferred to have been confided to one who has high authority and grave responsibility.

I think it is a fallacy to speak of the power thus conferred upon the Attorney-General as if, when it is exercised, the efficacy of the acts done under it would be due to any other legislative authority than that of His Majesty. The whole operation of regulation 2(2) is, directly and immediately, under and by virtue of His Majesty's legislative power under Ordinance No 1 of 1969. What the Attorney-General is required to decide, in my opinion, is in truth a function of His Majesty's legislative power. The true distinction therefore, is, between the power to make the law, i.e., altering the mode of trial, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion upon the Attorney-General as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; that would involve a delegation by His Majesty of his legislative power which is invalid as going too far and amounting to an abandonment of his function and duty. There is no valid objection to the second. His Majesty has not delegated to the Attorney-General any authority or disretion as to what the law shall be — which would not be allowed — but has merely conferred upon him an authority or discretion, to be exercised in the execution of the law, and under and in pursuance of it, which is permissible. His Majesty himself has passed upon the expediency of the law, and what it shall be. The Attorney-General is entrusted with no authority or discretion upon these questions.The answer which the decision of the Supreme Court of the United States supplies to this kind of question and which is of some assistance to us is formulated in the opinion of McKenna J in *Mutual Film Corporation* v *Industrial Commission of Ohio:*[21]

> While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution.

Whether it is wise or not to confer authority or discretion upon the Attorney-General to certify a security case under the 1975 regulations is not for us to say, but in doing so I cannot see that His Majesty has transcended his constitutional authority. In the circumstances indicated above the 1975 regulations are not *ultra vires* Ordinance No 1 of 1969 being neither a case of excessive delegation nor abdication of legislative authority.

Another attack upon the Attorney-General's alleged unlawful act is put in two ways. First it is said that preferring a charge against the accused under the Internal Security Act rather than under the Arms Act or the Firearms (Increased Penalties) Act demonstrates the discriminatory character of his discretion and contravenes the equal protection clause of Article 8 of the Constitution. In my opinion, the policy underlying regulation 2(2) of PU(A) 362/75 is to regulate the trial of persons charged with security offences to be 'dealt with and tried in accordance with the 1975 regulations'.The grant or refusal of the Attorney-General's certificate is thus to be governed by this policy and the discretion given to him is to be exercised in such a way as to give effect to this policy. The conferment of such a discretion cannot be called invalid and if there is an abuse of the power there is ample remedy elsewhere to sanction him. In view of the foregoing I consider that there is enough guidance to the Attorney-General in the use of his discretion under regulation 2(2) of PU(A) 362/75 and I therefore reject the contention that the said regulation is obnoxious to the equal protection clause of Article 8. I need only add that it cannot be disputed that the guidance which I have held can be derived from the regulations, and that it bears a reasonable and rational relationship to the object to be attained by them, and, in fact will fulfil the purpose which they seek to achieve, i.e., that all persons charged with security offences are dealt with and tried in accordance with the said regulations.

The second ground upon which the Attorney-General's alleged *ultra vires* act is called in question is the contention that under regulation 2(1) of PU(A) 362/75 only the Attorney-General can certify 'security offences', and if, as is alleged, it is certified by a Deputy Public Prosecutor then it amounts to a sub-delegation of power to the Deputy Public Prosecutor and is bad. A further submission is to the effect that here we must not confuse the sanction as required under section 80 of the Internal Security Act and the discretion vested in the Attorney-General by regulation 2(1). A sanction, it is urged, may be signed by a Deputy Public Prosecutor but the discretion conferred upon the

Attorney-General by regulation 2(1) cannot be sub-delegated to a Deputy Public Prosecutor. As against that submission Datuk Yusuf takes the point that it is essentially a question of construction. He says the operative words of section 80 of the Internal Security Act are 'with the consent of the Public Prosecutor'; the word 'personally' is not there, and therefore he concludes by virtue of the absence of the word 'personally' or the like effect, a Deputy Public Prosecutor may sanction prosecution under the Internal Security Act, and *a fortiori* certify that a particular case is a security offence under the regulations. He submits that a Deputy Public Prosecutor is vested with the power of the Public Prosecutor not by virtue of delegation of power, but vested in him by written law passed by Parliament [section 376(3) Criminal Procedure Code]. In my judgment, the maxim *delegatus non potest delegare* is essentially a rule of construction. In private law the maxim is well known and is taken to mean that a person who has delegated authority cannot without express power or statutory authority further delegate such authority: *Brooms's Legal Maxims,* 10th edition, 570; 1 *Halsbury's Laws of England,* 3rd edition, page 169. Professor de Smith puts it in this way:

> The maxim *delegatus non potest delegare* does not enunciate a rule that knows no exception; it is a rule of construction to the effect that 'a discretion conferred by statute is *prima facie* intended to be exercised by the authority on which the statute has conferred it and by no other authority, but this intention may be negatived by any contrary indications found in the language, scope or object of the statute'.

(Judicial Review of Administrative Action, 3rd edition, page 265).

He gives an illustration on page 269 of his book which I think is taken from the case of *R* v *Halkett:*[22]

> Where the exercise of a discretionary power is entrusted to a named officer — e.g., a chief officer of police, a medical officer of health, a town clerk or an inspector — another officer cannot exercise his powers in his stead unless express statutory provision has been made for the appointment of a deputy or unless in the circumstances the administrative convenience of allowing a deputy to act as an authorised agent very clearly outweights the desirability of maintaining the principle that the officer designated by statute should act personally.

In *R* v *Halkett, supra,* the question arose under the Sunday Observation Prosecution Act whether a police officer who is in temporary command during the absence of the cheif constable can effectively consent to proceedings instead of the chief constable, and the court held that he could not. This decision appears now to be qualified for boroughs by the Police (Consolidation) Regulations, SI No 1216 of 1948, regulation 3, which provides that the watch committee in a borough may appoint a deputy chief constable who shall, in the absence or incapacity of the chief constable or during any vacancy in that rank, have all the powers and duties of the chief constable not specifically excluded by resolution of the committee. It seems clear that a deputy appointed under this regulation could give a statutory consent; but the regulation applies

only in boroughs.

On principle therefore it must be held that when an enactment specifically designates a named officer, e.g., the Attorney-General, to sanction prosecution under section 80 of the Internal Security Act or to certify a security offence under regulation 2(1) of PU(A) 362/75, the said officer cannot delegate his power to another officer unless of course there is express statutory authority for the appointment of a deputy. In the present case there is express statutory authority given to a Deputy Public Prosecutor to exercise all or any of the rights and powers vested in the Public Prosecutor under the Criminal Procedure Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally [section 376(3) Criminal Procedure Code]. It does not appear to me that there is any distinction between the sanction enacted in section 80 of the Internal Security Act and the discretion envisaged in regulation 2(1). Both seem to be aimed at the same thing, i.e., empowering the Attorney-General to do a certain act in one way or another.

It is also argued that preferring a charge under section 57 of the Internal Security Act when the prosecution knew very well that the firearm could not be used is a sign of bad faith. In appeal No 43 the gun was defective in the sense that the firing pin was broken but the prosecution had failed to disclose that through the evidence of the armourer. In fact he was not called as a prosecution witness but was offered to the defence who then learnt from his report that the gun was defective. By that it is ably insisted that the prosecution had acted in bad faith. That argument displays dialectical ingenuity, but it has no bearing on the result of this appeal and I think it can be very shortly answered. The prosecution is not required to prove that the gun is in a serviceable condition. Regulation 21(6) of P U (A) 362/75 merely enacts that a firearm used in a security case is *deemed* to have been in a serviceable condition, thus shifting the onus upon the defence to show otherwise. In my opinion, that is only an evidentiary rule altering the burden of proof in the ordinary case of possession of a firearm, and requiring certain pre-appointed evidence to fit the special circumstances in the interest of justice, because the accused knows best the facts, and leaving the court with this provision to examine the facts and determine the matter.

Another ground of appeal concerns proof of security area. Harun J in appeal No 43 was of the opinion that the prosecution had not proved to his satisfaction that the accused committed the acts in a security area. The learned judge had since, in a supplementary judgment, realised and corrected his error. Proclamation PU(A) 148/69, a subsidiary legislation made under the authority of section 47 of the Internal Security Act, refers to all areas in the Federation to be security areas for the purposes of Part II of the said Act. In 1972 the Internal Security Act was revised and the sections under which the accused was charged were placed in Part III of the revised Act, but the word 'Part II' referred to in the said Proclamation was not revised. Hence Harun J held that proof that the acts were committed in a serucity area was not es-

tablished. In my opinion, the matter can easily be resolved by invoking section 12 of the Revision of Laws Act, 1968, Act 1 which enacts:

> 12. Subsidiary legislation made under any law and in force on the date on which that law as revised comes into force shall continue in force until otherwise provided; and references in any such subsidiary legislation to the law under which it was made, or to any part thereof, or to any other revised law shall be construed as references to the revised law or to that other law as revised.

I agree with the learned Lord President that *Samivellu* v *Public Prosecutor*[8] was wrongly decided. Proclamation PU(A) 148/69 is law which the court can take judicial notice. Judicial notice is the cognizance taken by the court itself of certain matters which are so notorious or clearly established that evidence of their existence is deemed unnecessary; see *Phipson on Evidence,* 11th Ed., page 10. 'With regard to the facts enumerated in section 57, if their existence comes into question, the parties who assert their existence or the contrary need not, in the first instance, produce any evidence in support of their assertions. They need only ask the judge to say whether these facts exist or not, and if the judge's own knowledge will not help him then he must look the matter up; further the judge can, if he thinks proper, call upon the parties to assist him. But in making his investigation the judge is emancipated from all the rules of evidence laid down for the investigation of facts in general. He may resort to any source of information which he finds handy, which he thinks helps him": see Woodroffe & Ameer Ali, *Law of Evidence,* 12th Ed, Vol 2, page 1143. Judicial notice can therefore be taken of PU(A) 148/69 issued by His Majesty in the exercise of legislative power. But judicial notice cannot be taken of a notification issued by any authority in the exercise of its executive functions.

Order accordingly.

R Rajasingam, Chew Kar Yee and Karpal Singh for the Appellants.
Datuk Mohamed Yusof bin Abdul Rashid (Deputy Public Prosecutor) for the Respondent

Note

The leading judgment in this case has been delivered by Suffian LP. Raja Azlan Shah FJ also delivers a separate concurring opinion. The first point which emerges from his opinion is that the Proclamation of Emergency 1969 has not lapsed by effluxion of time. Raja Azlan Shah FJ has not referred to the question as to how far Article 8 controls the discretion of the Attorney General. Suffian LP has said on this point that Article 8 does not control the discretion of the Attorney-General conferred on him by Article 145(3) but, on the contrary, Article 145(3) controls Article 8. Thus, according to Suffian LP, Article 145(3) is more fundamental than the fundamental liberties guaranteed by the Constitution. Raja Azlan Shah FJ has not said anything specifically on this point.

WHETHER MANDATORY DEATH SENTENCE UNDER INTERNAL SECURITY ACT 1960 IS CONSTITUTIONAL

Lau Kee Hoo
v
Public Prosecutor

[1984] 1 MLJ 110 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah LP, Abdul Hamid, Mohamed Azmi, Hashim Yeop A Sani and Abdoolcader FJJ

Cases referred to:
(1) *Public Prosecutor* v *Lau Kee Hoo* [1983] 1 MLJ 157.
(2) *Chong Soon Koy* v *Public Prosecutor* [1977] 2 MLJ 78.
(3) *Sum Kum Seng* v *Public Prosecutor* [1981] 1 MLJ 244.
(4) *Mithu* v *State of Punjab* AIR [1983] SC 473.
(5) *Maru Ram* v *Union of India* AIR [1980] SC 2147.

RAJA AZLAN SHAH FJ: (delivering the judgment of the Court): Mr Karpal Singh has put forward 2 grounds of appeal which we think were powerful arguments and attractively presented. We shall deal with each of the grounds very briefly.

There is a continuing debate as to the wisdom and effectiveness of capital punishment in particular under section 57(1) of the Internal Security Act 1960 but we think the authority to enact it, as a constitutional matter, has never been in doubt. Parliament has the plenary powers to enact it. The case of *Mithu* v *State of Punjab*(4) which was cited by Mr Karpal Singh must be kept in its context. What may be an appropriate course of reasoning in a case involving capital punishment in India is not to be literally or even analogically applied to a case under section 57(1) of the Internal Security Act 1960. The position in *Mithu* relates to a set of circumstances hinging on specific provisions of the Indian Criminal Procedure Code, and we find no reason to depart from the decision of this court in *Public Prosecutor* v *Lau Kee Hoo*(1) and the principles enunciated therein which we reaffirm. We would only observe that the Indian legislative provisions under consideration in *Mithu* have no paradigm here, and it is also significant that in condemning the mandatory death sentence in *Mithu,* the Supreme Court of India did not refer to or discuss its decision in *Maru Ram* v *Union of India*(5) which upheld a mandatory non-capital sentence and the rationale thereof.

With regard to the ground on section 27 of the Evidence Act, we would briefly say that in the particular circumstances of this case on the evidence given of what was said and what took place, we are satisfied that the appellant's knowledge that the detonators and home-made grenades were buried in his oil palm holding amounts to control of them.

We therefore dismiss the appeal.

Appeal dismissed.

Mohd Azman (Deputy Public Prosecutor) for the Prosecution.
Karpal Singh for the Accused.

WHETHER LIFE IMPRISONMENT FOR DURATION OF NATURAL LIFE IS CONSTITUTIONAL

Che Ani bin Itam
v
Public Prosecutor

[1984] 1 MLJ 113 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah LP, Hashim Yeop A Sani and Abdoolcader FJJ

Cases referred to;
(1) *Maneka Gandhi* v *Union of India* AIR (1978) SC 597.
(2) *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, 148.
(3) *Ong Ah Chuan* v *Public Prosecutor* [1981] 1 MLJ 64,71; [1981] AC 648, 670.
(4) *Hinds & Ors* v *The Queen* [1977] AC 195, 221.
(5) *Maru Ram* v *Union of India* AIR [1980] SC 2147.
(6) *Carmona* v *Ward* (1979) 99 S Ct 874; 59 L Ed 2d p 58.
(7) *Rummel* v *Estelle* (1980) 100 S Ct 1133; 63 L Ed 2d p 382.
(8) *Public Prosecutor* v *Lau Kee Hoo* [1983] 1 MLJ 157.

RAJA AZLAN SHAH LP (delivering the judgment of the Court): The appellant was convicted in the Sessions Court at Kangar for an offence under section 4 of the Firearms (Increased Penalties) Act, 1971 ('the 1971 Act') and sentenced to imprisonmment for life with six strokes of whipping. He appealed to the High Court, and right at the inception on an application by the appellant the learned Judge stayed the proceedings under the provisions of section 48(1) of the Courts of Judicature Act, 1964 and certified the following constitutional question for our determination:

> Whether or not the sentence of life imprisonment for the duration of natural life as provided under section 4 of the 1971 Act read with the section 2 definition of life imprisonment as amended by Act A256/1974 is unconstitutional and violates Article 5(1) and Article 8(1) of the Federal Constitution.

For ease of reference, Article 5(1) of the Federal Constitution provides that no person shall be deprived of his life or personal liberty save in accordance with law, and Article 8(1) prescribes that all persons are equal before the law and entitled to the equal protection of the law.

Mr Karpal Singh for the appellant in his argument that the sentence of imprisonment for life as defined in section 2(1) of the 1971 Act to mean imprisonment for the duration of the natural life of the person sentenced is a savage sentence relies heavily on the decision of the Supreme Court of India in *Maneka Gandhi* v *Union of India*[1] which held that a statute which merely prescribes some kind of procedure for depriving a person of his life or personal liberty cannot ever meet the requirements of Article 21 of the Indian Constitution, and that the procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary, with Bhagwati, J, observing that the concept of reasonableness must be projected in the procedure con-

templated by Article 21, having regard to the impact of Article 14 [the equivalent of our Article 8(1)] on that article.

We do not think the argument advanced by Mr Karpal Singh can be sustained. We would at the outset observe that a distinction was drawn in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*[2] (at page 148) between Article 21 of the Indian Constitution and Article 5(1) of our Constitution in that the former provides that 'no person shall be deprived of his life or personal liberty except according to procedure established by law' in contrast to the latter which makes no mention of the word 'procedure'. In any event notwithstanding the provisions of section 3 of the Criminal Justice Ordinance, 1953 which provide that a sentence of imprisonment for life shall be deemed for all purposes to be a sentence of imprisonment for twenty years and the amendments made to the Penal Code to substitute provisions for imprisonment for life with imprisonment for a term which may extend to twenty years, there are specific statutory exceptions however categorically providing for imprisonment for life to mean imprisonment for the duration of natural life in certain specified offences, such as, for example, section 130 A of the Penal Code in relation to offences against the State under Chapter VI of the Penal Code, and the Arms Act, 1960.

It is now firmly established that 'law' in the context of such constitutional provisions as Articles 5, 8 and 13 of the Constitution refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution [*Ong Ah Chuan* v *Public Prosecutor*[3] (at page 670)]. We can see nothing in the statutory provision sought to be impugned before us to infringe the proposition enunciated. There is nothing arbitrary, fanciful or oppressive in the legislatively defined sentence for the specific offence in question committed under the 1971 Act. Lord Diplock said in *Hinds & Ors* v *The Queen*[4] (at page 221):

> In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon the offenders found guilty to the defined offence ...

The Supreme Court of India in *Maru Ram* v *Union of India*[5] upheld the validity of an Act which required offenders awarded a life sentence for an offence for which death was a permissible penalty, and offenders whose death sentence was commuted to a term of life imprisonment, to undergo a minimum detention of fourteen years. In *Carmona* v *Ward*[6] the Supreme Court of the United States of America denied a writ of certiorari to challenge the constitutionality of a mandatory life sentence imposed under a New York law for the possession of an ounce of a substance containing cocaine. In *Rummel* v *Estelle*[7] the Supreme Court of America by a majority decision upheld a statute which authorised a mandatory sentence of life imprisonment on a third conviction of a felony less than a capital felony. The principle underlying these decisions apply equally in the case before us in relation to the mandatory nature of the maximum term of the sentence imposable by a

specific statutory definition for a specific offence. The legislature in doing so no doubt had in mind the object and purpose to be achieved by such a provision and it cannot accordingly be arbitrary in any sense of the word.

On the contention that the specified term for the duration of the natural life of the person sentenced violates the equality provisions in Article 8(1) of the Constitution, we would refer to the speech of Lord Diplock in *Ong Ah Chuan, ante,* (at page 674) where he says that the Singapore constitutional provision with regard to equality [which textually accords *totidem verbis* with our Article 8(1)] is not concerned with equal punitive treatment for equal moral blameworthiness but is concerned with equal punitive treatment for similar legal guilt. In matters relating to equal protection the basis of approach is the identification of legislative purpose and a reasonable classification is one that includes all persons who are similarly placed with respect to the purpose of the law. We would refer in elaboration and support to the decision of this court in *Public Prosecutor* v *Lau Kee Hoo*[8] and also to *Maru Ram* referred to earlier.

We accordingly, at the conclusion of argument before us, answered the question posed for our consideration in the negative. The sentence prescribed in the 1971 Act is constitutional and valid, and we might perhaps just add that the existence of executive powers of clemency could well militate against the rigours of the sentence sought to be impugned by consideration on a case to case basis.

Order accordingly.

Karpal Singh for the Appellant.
Mokhtar Abdullah (Deputy Public Prosecutor) for the Respondent.