CHAPTER IV

LAWS AGAINST SUBVERSION IN MALAYSIA

POST-MERDEKA LAWS

I. Emergency Legislation

Despite the state of emergency that existed from 1948 to 1960, Malaysia (Malaya then) achieved her independence from the British colonialist government on 31st August 1957.[1] The abortive attempt by the communist to overthrow the government through armed rebellion did not hinder the development of the constitutional process of the country. The state of emergency was proclaimed at an end on 13th July 1960.[2]

With the termination of Emergency the government was still faced with the threat from the terrorists who retreated into the jungles situated near the Thai-Malayan border. In order to eliminate another uprising of the Communist insurgents, steps were taken by the government to legislate laws controlling or preventing subversion. As a result of this, provisions were included in the Constitution, enshrining new laws as a substitution for the emergency laws that were to come to an end after the emergency.

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[1] The Federation of Malaya Independence Act 1957. Under this Act a new Constitution was drafted by the Reid Commission which was set up for the purpose of recommending the provisions of the new Constitution.

[2] Government Gazette 1921/1948.

To show the importance of these provisions which were aimed at eliminating the remnants of the Communist terrorists as well as preventing the emergence of a new uprising, the Reid Commission recommended new provisions giving wide and arbitrary power to the government to enact laws against subversion even though it infringes the fundamental rights of an individual. In the words of the Commission it recommended:-[3]

> "... Neither the existence of fundamental rights nor the division of powers between the Federal and the State ought to be permitted to imperil the safety of the State or the preservation of a democratic way of life. The Federation must have adequate power in the last resort to protect these essential national interests. But in our opinion infringement of fundamental rights or of State rights is only justified to such an extent as may be necessary to meet any particular danger which threatens the nation ..... The history and continued existence of the present emergency show that organised attempts to subvert constitutional government by violence or other unlawful means may have to be met at an

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[3] The Federation of Malaya Constitutional Commission, Government Printers 1957, pp. 74-5.

> early stage by the use of emergency powers if they are to be prevented from developing into serious and immediate threats to the safety of the State .... Emergencies, such as war, or internal disturbance, which constitute an immediate threat to the security or economic life of the country or any part of it may have to be dealt with more promptly. There should be a proclamation of emergency ...."

Thus this recommendation which was accepted gave birth to the article relating to the power of the government to declare a state of emergency. This was the origin of article 150 of the Federal Constitution of Malaysia. Under the article[4] the Yang di-Pertuan Agong, being the ruler of the State, may issue a Proclamation of Emergency if he is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part of it is threatened. This power conferred on the Yang di-Pertuan Agong in proclaiming a state of emergency is very wide. It is not confined to any particular reason of emergency or types of emergency. So long as the security or economic life of the Federation is threatened, he may issue the proclamation.

The issue whether the Proclamation of Emergency can be

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[4] article 150 (1)

questioned by a court of law was discussed in the celebrated case of Stephen Kalong Ningkan v Government of Malaysia.[5] The Federal Court decided that the validity of the Declaration of Emergency cannot be questioned or challenged by the court. The decision was affirmed by the Privy Council. However, although a Proclamation of Emergency cannot be questioned in Court, Emergency Legislation can be questioned in Parliament, where the government must give reasons for the legislation and answers to the challenge.[6]

A Proclamation of Emergency may be made notwithstanding whether a Parliament is sitting[7] or not. If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate Ordinances having the force of law if satisfied that immediate action is required.[8]

The most important clause within the scope of this study is Clause (5) which provides that while a Proclamation of Emergency is in force Parliament may, notwithstanding anything in the

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[5] [1968] 2 MLJ 238

[6] Salleh Abbas, Prinsip Perlembagaan dan Pemerentahan di Malaysia, Dewan Bahasa dan Pustaka, 1968 p 363

[7] Lord President, Tun Suffian in the most recent case of Khong Then Kheng and another v P.P. (Federal Court decision) defined 'sitting' as "actually sitting down and deliberating on matters." New Sunday Times August 15, 1976. p.1

[8] Federal Constitution, article 150 clause 2.

Constitution make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the Emergency.[9] And no providion of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of the Constitution.[10] Therefore, the effect of this article is that Parliament can make any law even though it is inconsistent with the provisions of the Constitution, during a Proclamation of Emergency.

Nevertheless, the Proclamation of Emergency is considered as a temporary means of suspending Parliamentary democracy[11] in order to overcome the emergency with effectiveness. At the expiration

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9 Ibid. clause 5 and 6 are both subject to clause 6 (A) which provides that clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim Law or customs of the Malays, or with respect to any matter of native law or custom in a Borneo State nor shall clause (6) validate any provision inconsistent with the provisions of the Constitution, relating to any such matter or relating to religion, citizenship or language.

10 Article 150 clause (6).

11 Wan Sulaiman J. said that "It was common to all democratic constitutions that in times of grave national emergency, normal constitutional prinsiples must take second place to the overriding need to deal with the emergency."
See also the dissenting judgement of H.S. Ong J. Ibid.
New Sunday Times August 15, 1976 p. 3.
(Khong Then Kheng and another v. P.P.).

of a period of six months beginning with the date on which a Proclamation of Emergency ceases to be in force, any ordinance promulgated in pursuance of the proclamation and, to the extent that it could not have been validly made but for article 150, any law made while the Proclamation was in force, shall cease to have effect, except as things done or omitted to be done before the expiration of that period.[12]

This sweeping power given by the Constitution is prone to abuse by the authorities but historically speaking, the government could be credited for it has never yet made the fullest use of its arbitrary strength in the three emergencies that were declared in Malaysia. Throughout the emergencies few really drastic measures were taken although local election were suspended in 1965.[13]

The first emergency was put into play on 13 July 1948 due to the Communist rebellion. It was to be followed later by another emergency after the first emergency came to an end on 31st July 1960.[14] The second emergency was proclaimed on 3rd September 1964[15] due to the aggressive policy of Confrontation by the Indonesian Government. Emergency powers were once again invoked in Sarawak in September

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[12] Article 150 (7)

[13] R.S. Milne, Government and Politics in Malaysia, University of British Columbia Publication, Houghton Mifflin Co. 1967 at p.42

[14] P.U. 185 (1960)

[15] P.U. 271 (1964)

1966 to justify the passing of a constitutional amendment which led to a change of government.[16] Finally it became operative once again due to the inter-racial rioting beginning on 13th May 1969. A state of emergency[17] was proclaimed two days after the outbreak of violence although mainly restricted to certain areas in the federal capital.

The emergency from 1948-1960 was proclaimed by the High Commissioner of the Federation of Malaya under section 3 of the Emergency Regulation Ordinance 1948.[18] With the Proclamation of Emergency, the High Commissioner enacted emergency regulations[19] which were necessary for the prevention of the Communist subversion.[20] The regulations were improved from 1948 and reached its effectiveness in 1953. However, with the end of the first Emergency, the Emergency Regulation Ordinance 1948 was temporarily kept alive by article 163 of the Federation of Malaya Constitution 1948 which was repea ed by the Federal Constitution of Malaysia. Part of these regulations were preserved in the Internal Security Act.[21]

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[16] see Stephen Kalong Ningkan v government of Malaysia [1968] 2 MLJ 238.

[17] P.U. (A) 145/1969.

[18] Ordinance No. 10 (1948) This Ordinance was repealed by P.U. 185 (1960).

[19] Emergency Regulations 1948-1950. Government Printer (1950).

[20] The regulations were discussed in Chapter III.

[21] The Act will be dealt with in detail in the next Chapter.

In so far as the second emergency was concerned, the threat of subversion from the Indonesian Confrontation, was initially prevented by the Internal Security Act whereby the whole shore and territorial waters of Malaysia were declared as 'security area'.[22] The government's security forces were able to patrol the Malaysian territorial waters with ease under the declaration. The Indonesian Confrontation threat was not serious at the outset but situations turned to be serious when Indonesia sent her soldiers into the Malaysian territory and soil.

When Indonesian soldiers infiltrated and landed in Pontian and Labis in Johore and also in Malacca and Negri Sembilan, the three States were declared as security areas.[23] Unfortunately both declarations were inadequate because the Indonesian armies received assistance, from subversive elements living in Malaysia, in their infiltration. Finally a proclamation of emergency was inevitable, and under article 150 of the Federal Constitution, the Yang di-Pertuan Agong declared a state of emergency on 3 September 1964. By 7 September 1964 the whole of Malaysia was declared as security area.[24] On the 18 September 1964, Parliament was convened to discuss the Proclamation of Emergency and on the same

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[22] P.U. 243/1964 - 13 August 1964.

[23] P.U. 245/64 - 17 August 1964.

[24] P.U. 273/64 - 7 September 1964

date the Emergency (Essential Power) Act 1964 was passed.[25]

This Act gives the power to the Yang di-Pertuan Agong to make regulations which he considers desirable or expedient for securing the public safety, the defence of the Federation, the maintenance of public order and of supplies and services essential to the life of the community.[26] As compared to the regulations made in the 1948 Emergency, only a few regulations were made[27] due to the fact that measures could be taken under the Internal Security Act 1960.

Under the Emergency (Essential Powers) Act 1964, regulations were made among them the Emergency (Criminal Trials) Regulations 1964.[28] This regulation dispensed with the strict compliance of procedural evidence in an emergency procedure case where there is no preliminary inquiry needed.[29] The suspension of elections was suspended during the

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[25] Act No. 30 (1964)

[26] Emergency (Essential Powers) Act 1964 Sect 2(1).

[27] See LN 286/64, 420/64, 421/64, 45/65, 75/65, 84/65, 121-123/65, 168/65, 215/65, 230/65, 231/65, 251/65, 355/65, 443/65, 451/65, 33/66, 35/66, 187/66, P.U.245/66, 243/68 and 297/68.

[28] LN 286/64

[29] Ibid regulation 5 (1)

continuance of the proclamation of Emergency[30] under the Emergency (suspension of Local Government Elections) Regulations 1965.[31] There are other regulations made which were of little importance in preventing the Indonesian subversion. Eventually with the change of government in Indonesia, the policy of confrontation was dropped, thus the emergency came to an end in July, 1966. Following the declaration, the government launched an appeal to those subversive elements who had taken up arms persuading them to surrender.[32]

The last proclamation of emergency was made when inter-racial rioting broke out on 13 May 1969. The Yang Di Pertuan Agong again invoked article 150 under which he promulgated the Emergency (Essential Powers) ordinance 1969.[33] The proclamation of emergency at that time was made not because of any subversion but due to the outbreak of racial violence. In order to cope with the swifty-moving events during the emergency and the great likelihood of communist exploiting the grave situation,[34] a second ordinance was promulgated two days after the

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[30] Ibid., regulation 2(1).

[31] LN 75/65.

[32] Straits Times August 9, 1965.

[33] Ordinance 1, P.U. (A) 146/1969.

[34] National Operation Council, The May 13, 1969, Government Printers p. 77.

promulgation of the first ordinance. By virtue of the Emergency (Essential Powers) ordinance No.2, 1969,[35] the executive authority, of the Federation was delegated to a Director of Operations[36] who was given wide powers similar to that of a dictator. It is appropriate to mention that the Director of operation did not use his arbitrary powers more than necessary. It is to be noted that there were amendments made to the Constitution of Malaysia after the incident but, however, it is not within the scope of this study, thus it needs no further mention.

It can be seen that under the proclamation of emergency, the executive authority of the Federation can make any laws notwithstanding that it encroaches the fundamental liberties provided in Part II of the Constitution or anything in the Constitution.[37] So the question arise whether this provision conferring wide arbitrary powers to the government during emergencies is justiciable.

It can be argued that this temporary measure is necessary where the security or economic life of the Federation is threatened. Parliamentary democracy in the country would have been destroyed were it not for these emergency powers. Moreover, the State has a duty

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[35] P.U. (A) 149/1969.

[36] The late Tun Abd. Razak was the Director of the National Operation Council. He was the Deputy Prime Minister then.

[37] except subject to clause 6(A) of article 150.

to protect its citizens in times of grave emergency. Though the powers conferred during emergencies are liable to abuses by the authority, it can later be questioned in Parliament. It is up to the people to judge whether the authority has justifiably used their powers during the emergency and whether in times of national danger such measures as the suspension of democracy can be accepted in the interests of security.

II Special Powers Against Subversion.

Part XI of the Constitution contains the permanent provisions under which the federal authorities may legislate in certain circumstances in a manner which would otherwise be unconstitutional. These provisions were unimportant during the two remaining years of the first emergency because article 163 (which was repealed) continued the Emergency Regulations Ordinance, 1948. The Ordinance was continued until 31 July 1960, and while it was in force, gave the federal government all the powers that it required, as can be seen in Chapter III. However, when the first emergency was declared at an end, the government deemed it necessary that the Constitution be amended to give permanent powers to legislate for emergencies and against subversion. These powers were inadequate then. To comprehend for future subversion the Constitution was accordingly amended.

By virtue of the original article 149 (1), " If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause, or to cause a substantial number of citizens to fear,

organised violence against persons or property, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of article 5[38], 9[39] or 10[40], or would apart from this article be outside the legislative power of Parliament; and article 79[41] shall not apply to a Bill for such an Act or any amendment to such a Bill. (2) A law containing such a recital as is mentioned in clause (1) shall, if not sooner repealed, cease to have effect on the expiration of a period of one year from the date on which it comes into operation, without prejudice to the power of Parliament to make a new law under this article."

This article (149) was amended by the Constitution (Amendment) Act, 1960.[42] By virtue of section 28, article 149 was amended by repealing clause (1) and substituting a new clause which states:

> "If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation: - (a) to cause, or to cause a

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[38] Liberty of a person.

[39] Prohibition of banishment and freedom of movement

[40] Freedom of speech, assembly and association.

[41] Exercise of concurrent legislative powers.

[42] No. 10.

substantial number of citizens to fear, organised violence against persons or property; or (b) to excite dissaffection against the Yang Di Pertuan Agong or any government in the Federation; or (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or (e) which is prejudicial to the security of the Federation; any provision of that law designed to stop or prevent that action is valid....."

The remaining words were retained. So the amendment added new clauses to the article to widen the scope of power in legislating against subversion.

The original clause (2) of article 149 was also substituted with a new provision which provides that the law made under the article shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this article. The effect of this clause is that the law passed shall cease to have effect after resolutions

are passed whereas under the original clause the law passed would automatically cease to have effect after one year.

The danger to political dissent in the special powers against subversion is greater than in the emergency powers provisions of article 150 for a variety of reasons. The laws against subversion extend to fewer people, they many seem less harmful to a larger proportion of the population. They may be employed less dramatically and publicly than in the procedure of a declaration of emergency and can be abused by the authority who usually claimed that they are doing something which is highly necessary to preserve the security of the nation. There is no guarantee found in the Constitution that the powers would not be abused. A statement was made by the Prime Minister, Tun Abdul Razak, in 1975 that "the people will just have to put their faith in the Government."[43]

Regarding the encroachment on the individual freedoms most that is fearful in article 149 lies in the combination of breadth and vagueness of the descriptive language and the removal of the consideration of the fairness of its application by an independent judiciary[44] Parliament need only follow the simple permissive formula of the article, and any repressive legislation, whatever the basis for it infact, may be

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[43] The New Straits Times, October 11, 1975.

[44] See Karam Singh v. Government of Malaysia, op. cit.

enacted, and this legislation will be quite beyond the reach of any court.

III. Internal Security Act 1960

We have seen in the last sub-chapter how the authority may legislate against subversion. This sub-chapter will deal with the Internal Security Act 1960 which is considered as the principal legislation against subversive activities. This chapter traced the origin of the Act and the introduction of preventive detention, which is permissible under the Act.

Under the powers conferred by article 149 of the Federal Constitution, the Internal Security Act 1960[45] came into existence after Parliament had had a long and thorough debate and the opposition had been given a fair hearing.[46] The Act became operative on 1st August, 1960 to West Malaysia and on 16th September 1963 to East Malaysia. The most important feature of this Act is the introduction of administrative detention without trial or preventive detention if it is necessary for the preservation of security of Malaysia or maintenance of essential services in Malaysia.

To justify the introduction of preventive detention,

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[45] Act 18, 1960.

[46] per Deputy Prime Minister, Tun Abdul Razak. Straits Times June 23, 1960.

it is appropriate to quote the speech of the Deputy Prime Minister (Tun Abdul Razak) in moving the second Reading of the Constitution (Amendment) Bill 1960, at the Dewan Rakyat[47] In his words,

> "Every country which lies under the direct threat of Communism and wishes to remain free has to face the established fact established in the writings of the Communists themselves - that one of the policies of Communism is to undermine democratic government by every subtle weapon of subversion that can be continued without an open breach of the law. Country after country has found that one weapon is essential in defence against such an attack, the detention of agents to prevent them proceeding with their plans. The situation in this country demands that the government assumes this weapon of defence and we would be failing utterly if we allowed ourselves to be deterred from doing so."

The policy of the Communists in using subtle weapons of subversion, also resulted in the expansion of article 149.[48] The government came to a conclusion that a serious threat could

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47 National Archives, Speeches of Tun Abdul Razak, 1975.

48 Malaysia, Federal Constitution.

develop to public safety without actual threat or organised violence and therefore the wording has been expanded to include attempts to stir up communal hostility and to upset the established order by unlawful means.

It is felt necessary to discuss the various aspects of preventive detention here. Preventive detention can be defined as detention without trial in circumstances where evidence possessed by the detaining authority is not sufficient to secure conviction but may still be sufficient to justify his detention as preventive measure against the commission of acts prejudicial to the national interest. There is no need for the authority to have legal proof in justifying the detention. The question whether there is reasonable cause to detain a person is a matter of opinion and policy, a decision which could only be taken by the executive.[49]

There are various reasons put forward in justifying the concept of preventive detention. By preventive detention it is possible to try subversive elements according to procedures as distinct from criminal procedures because this would compel the authority to disclose the identity or information of the detaining officer. As such it will result in jeopardising the intelligence network of the country. Furthermore other aspects of the secret agent or special branch might

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[49] Karam Singh v. Menteri Hal Ehwal Dalam Negeri op. cit.

be disclosed and this is against national interest.

Another reason given by the authority is that ordinary courts of law are not trained to evaluate the significance of informations on security. Normal criminal procedure makes it difficult for the authorities to secure a conviction for hardcore criminals. Potential witnesses are usually apprehensive of giving evidence in court for fear of reprisal from the accused. Preventive detention is an act by the executive to prevent a person from doing harm to the state.[50]

The object of preventive detention is to prevent the person from doing something, that is, acting in a manner prejudicial to the security of Malaysia[51] while the object of punitive detention is to punish a person for what he has done. While punitive detention comes after the illegal act is actually committed, preventive detention intercepts the person before he does the act and prevents him from doing it. The illegal act referred to here is not necessarily a criminal offence but, could include a political offence.

The necessity for having preventive detention provisions in the Federal Constitution was stressed in 1960 by the Deputy

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[50] P.P. v. Musa (1970) I MLJ 101.

[51] Internal Security Act 1960, Sect. 8.

Prime Minister who was also the Minister of Defence. In justifying the importance and the urgent need for those provisions he said,[52]

> "..... The object of having this provision of Preventive Detention is to prevent anti-social and subversive elements from imperilling the welfare and security of our country, particularly of a young nation like ours. We have had 12 years of the Emergency and although this Emergency is about to come to an end we know only too well how dangerous it is to allow such a situation to arise again. It is therefore the incumbent duty of the Government of the day to see that the Communists and their Agents are prevented from carrying out their object and their plan....."

Accordingly provisions were made permitting preventive detention. However, since the excessive power conferred on the executive could be abused, there are some safeguards provided in article 151 of the Federal Constitution. However, there is

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52 Speech by the DPM on the Constitution (Amendment) Bill at Dewan Negara 10 May 1960. Extracted from speeches of Tun Haji Abdul Razak Hussein. Published by National Archives with the co-operation of Prime Minister Department 1975 p. 85.

no public appeal against such detention.

Article 151 (1)(a) provides for the detaining authority to state the nature of the detention. He shall as soon as may be, inform the detainee of the grounds for his detention and the allegations of fact on which the order of detention is based, and the detainee shall have an opportunity of making representation against the order as soon as may be. However, the allegations of fact may be refused if the authority invokes clause (3) of the Article which states that the article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest. The clause gives the discretion to any authority not to disclose facts.[53]

Article 151 (1)(b) provides that if the person detained is a citizen, he may not be detained longer than 3 months, unless a three-man advisory board has considered any representations he has made and has made recommendations on them to the Head of State, that is, the Yang Di Pertuan Agong. The Advisory Board shall be constituted of persons mentioned in Clause (2) of Article 151. The safeguards which preventive detention is subjected to, in a way fall short of judicial procedure but since the chairman of the advisory board must be a judge of the

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53 Karam Singh v. Kementerian Hal Ehwal Dalam Negeri op. cit.

Federal Court or High Court or qualified to be one it can be said that there is some semblance of judicial review.

The origin of the Internal Security Act 1960 can be traced from the Speech of the Deputy Prime Minister in moving the Internal Security Bill on the second reading at Dewan Rakyat on 21st June, 1960.[54] The Act was to replace the Emergency Regulation Ordinance 1948 which ceased to function after Independence. Tun Razak said,

> "..... because the Emergency is to be declared at an end, the government does not intend to relax its vigilance against the evil enemy who still remains as a threat on our border and who is now attempting by subversion to succeed where he had failed by force of arms. It is for this reason that this Bill is before the House. It has two main aims: firstly, to counter subversion throughout the country and secondly, to enable the necessary measures to be taken on the border area to counter terrorism."

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54 Speeches of Tun Haji Abdul Razak op. cit. p. 119.

Also in the same speech the Deputy Prime Minister assured the political opposition of the country that the Internal Security Act would not be used arbitrarily against them. Referring to the preventive detention power under the Act, he said,[55]

> "..... A person is detained for what it is considered he may reasonably be expected to try to do but not what he proved beyond reasonable doubt to have done. He is detained because he represents a risk to the security of the country and not because he is a member of a lawful political party. The government has no desire whatsoever to hinder healthy democratic opposition in any way. This is a democratic country and the government intends to maintain it as such. It is the enemies who will be detained ....."

Nevertheless, with the assurance from the government that the powers would not be used arbitrarily, it has set a considerable influence on the tone and temper of the Houses of Parliament and on the relationship between government and opposition.[56]

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[55] Ibid., at p. 122.

[56] R.S. Milne, op. cit. p. 123.

The limitation imposed on the opposition is that they must not resort to unconstitutional means or work in conjunction with Communist Front Organisation. On occasions, the government has given warnings in Parliament about the restrictions imposed on opposition activities by the Act.[57] The existence of the Internal Security Act and the recollection of the arrests made under it have put the opposition members in a dilemma. No matter how healthy his political apathy is, it is very difficult to interpret his activities, since only the executive have the subjective satisfaction of deciding whether his act would fall under the ambit of subversion.

According to a very reliable source,[58] when asked about the likelihood of the detaining authority abusing his arbitrary power in securing an arrest he said, there is "little room for any flaws." The authority receives information from informers which in turn will be evaluated by the Special Branch. These

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[57] Straits Times, March 13, 1963.

[58] An interview with the Minister of Information, Datuk Amar Haji Taib Mahmud, sometime in April 1976. He is also a member of the National Security Council (Due to personal reasons he declined to impart certain information on arrest and detention).

informations given were usually gathered for many years.[59] The suspect will be put under close surveillance, when the authority is satisfied that he represents a security risk to the nation, only then will he be arrested. Even so the information given by informers are checked with the information kept by the authorities. If the information given tallies with that of the authority he proceeds with the arrest and detention.

In justifying the necessity of the laws which are similar to those under Emergency rule, the source said that, "although the Constitution states that the country is under a democractic rule, it is however, not an absolute democracy. The country is still under a state of emergency."[60] According to the source "the law of Malaysia is not law at peace.[61] Our law is a compromise between civil law and martial law. Looking at the present

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[59] The same was said by the new Prime Minister, Datuk Hussein Onn in his speech when he opened the UMNO General Assembly reported in Malay Mail Friday July 2, 1976. The government took action against certain influential people whose activities have threatened national security after investigations and research over a number of years.

[60] He was refferring to the sudden outburst of acts of terrorism and violence in 1975.

[61] This statement can be justified when Dr. Mahathir Mohammed (Deputy Prime Minister) in his opening address at the UMNO Youth and Wanita General Assemblies, stressed and warned that the country is at war with the Communist terrorists, and he called for an all out effort to gain a quick victory. New Straits Times July 2, 1976.

circumstances the law should be made to serve the society not vice versa."

Based upon the prevailing circumstances of the threat of subversion to the national security it is a necessity to have tough, though not repressive laws, in order to preserve the rule of law as provided by the Constitutional Convention of Rukunnegara. It is up to the people of the country to judge the necessity of having these laws; failure on the part of the government would result in the voter's sanction in the next general elections. Be that as it may, the government is faced with a dilemma of encroaching the fundamental rights of a citizen and the desire to preserve their power. By right the government may adopt whatever means it deems necessary to over come the threat of subversion, even to the extent of taking draconian measures, but the citizens of the country will have the final say.

IV Other legislation in general

There are other principal as well as subsidiary legislation preventing or controlling subversive activities in Malaysia. Although some of the legislation were enacted not for the sole purpose of fighting subversion, there are certain provisions in the legislation which are indirectly aimed at curbing subversive activities. There are a few subsidiary legislation enacted with the primary purpose of fighting subversion. However, it is not intended in this study to discuss the laws exhaustively. Only

the relevent provisions of the legislation will be treated.

The Public Order (Preservation) Ordinance, 1958[62] empowers the Minister charged with the responsibility for internal security to proclaim a state of danger in any area of the Federation if he is of the opinion that public order in that area is seriously disturbed or threatened.[63] The proclamation shall apply only to that area and remains in force for one month or until revoked by the Minister[64] and is renewable from month to month.[65] In the proclaimed area the government has special powers to maintain and restore public order. Under the Ordinance the government has very wide powers. The police may close or regulate the use of roads, waterways, etc.[66] They may also disperse or prohibit meetings and processions[67] and order a curfew.[68]
The police may stop and search any person or vehicle without warrant with a view to ascertain whether the person or vehicle is carrying any offensive weapon, subversive document, corrosive

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62 (No. 46 of 1958).

63 Section 3 (1).

64 Section (2).

65 Section (3).

66 Section 4.

67 Section 5.

68 Section 7.

substance or explosive substance[69] and may also without warrant, arrest and detain any person suspected of the commission of an offence against the Ordinance.[70] The Ordinance creates a number of offences relating to Public Order. The effect of this legislation is the delegation of authority to the police and security forces for the maintenance of law and order in that particular area even if it jeopardise human lives and property. It is felt that there is no such need for this legilation because the powers conferred under it are also available under the Internal Security Act.

Subversion may be effected through incitement and instigation from subversive elements, undesirable elements or anti-national elements. Any seditious act, speech, words or publication is governed by the Sedition Act, 1948.[71] The Act provides for the punishment of sedition, that is, a person if convicted can be imprisoned for a term not exceeding 5 years or $5,000 fine. After the May 13th tragedy, the government amended the Sedition Act by Emergency Ordinance, 1970 (45), until then the government were ridiculed by criticism that it is seeking to protect itself and keep itself in power.

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[69] Section 15 (1).

[70] Section 17 (1).

[71] Act 15 (Revised 1969).

However, the Court has decided that there is a line of distinction drawn between the right to freedom of speech and sedition as contained in the Act.[72] If the words uttered or written was "intended to be a criticism of government policy or administration with a view to obtain its change or reform it is not sedition, but if the Court comes to the conclusion that the speech used naturally, clearly and indubitably has the tendency of stirring up hatred, contempt or dissaffection against the government, then it is sedition.[73] It may seem that the breadth of the definition of sedition is very wide indeed. The free-flow of political opposition has been seriously handicapped by this Act.[74] In relation to the freedom of press in the country, it is also subjected to the Act, under which the Court has power to suspend the circulation of newspaper containing seditious matter or prohibits the circulation of seditious publications.[75]

In the preceding chapters[76] we have seen how the Communist infiltrated higher learning institutions in their search for new leaders from the intellectual groups. The government is always

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[72] Section 3 (1) defined 'seditious tendency.'

[73] per. Raja Azlan Shah J. in P.P v. Ooi Kee Saik & others [1971] 2 MLJ 108.

[74] Soo Pan Yew Tang -vs- P.P. [1975] 2 MLJ 231.

[75] Sections 9 and 10.

[76] Especially the University of Malaya Chinese Language Society.

keeping tabs on the developments of the students in these institutions. The Universities and University Colleges Act, 1971[77] was enacted, inter alia, for the maintenance and administration of Universities and University Colleges. In 1974 there were mass demonstrations held by students of institutions of higher learning over the alleged incompetency to eradicate social injustices. There was ample evidence showing that subversive elements were using the students in furtherance of the Communist 'revolutionary' objective, claimed the government.[78] It was also claimed that the student unrest was provoked by the CPM which eventually degenerated into illegal street demonstrations and resulted in physical conflict with the police.

The government took new measures, for fear that the student population might be manipulated by subversive elements. Thus, the Universities and University Colleges Act 1971 was amended by the Universities and University Colleges (Amendment) Act 1975.[79] Under the Act, student activities are tremendously restricted. By virtue of the amendments, the government prohibits a student or a students' organisation, body or group of students associating

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[77] Act 30.

[78] See Activities within the University of Malaya Chinese Language Society, Kementerian Hal Ehwal Dalam Negeri.

[79] Act A295.

with societies, political parties, trade unions or any other organisation except as provided under the constitution of the University or approved by the Vice-Chancellor.[80] The effect of this section is the prohibition of political activities among the students. But the government did not stop there; it went on to prohibit a student or students' organisation from expressing or doing anything which may be construed as expressing support, sympathy or opposition to any political party or trade union or any unlawful organisation.[81] Any person who violates this, would be liable to a fine of $1,000 or imprisonment for six month or both. The collection of money is also banned under the Act. Any student convicted for a criminal offence shall cease to be a student of the University.[82] There can be little doubt that these prohibitions were imposed to control or prevent students from being subverted by undesirable elements.

Apart from these Acts as mentioned above, there are other subsidiary legislation which are aimed at providing for security cases. The most important of these is the Essential (Security Cases) Regulations, 1975.[83] These regulation have

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80 Section 15 (1) and (2).

81 Section 15 (3) and (4).

82 Section 15 D (2).

83 P.U. (A) 320.

become the target of criticism from the Bar Council of Malaya and opposition members. The regulations were made after the sudden outburst of terrorism in urban areas. The Essential (Security Cases) Regulation was validly promulgated under the Emergency (Essential Powers) Ordinance, 1969. (No. I). The Regulations were amended by the Essential (Security Cases) (Amendment) Regulations 1975 and were challenged for its validity on the ground that they "were unconstitutional and invalid" but the Court decided that the Regulations were validly promulgated.[84]

The most alarming provision of the Regulations is contained in Rule 2 (1) where all offences under the Internal Security Act 1960 and all offences under the Fire-arms (Increased Penalties) Act 1971 are defined as security offences. Pursuant to Rule 2 (2) the Public Prosecutor may personally give a certificate to try any other offence in accordance with the provisions of these regulations. The Regulations provided for the practice and procedure which would be followed for security cases. The Regulations have a retrospective effect although not against Article 7[85] of the Federal Constitution. A person can be tried in accordance with the regulations notwithstanding that

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84 See New Straits Times 13 March 1976 and July 2, 1976.

85 Protection against retrospective criminal laws and repeated trials.

the offence was committed before the coming into force of these Regulations. The powers conferred on the Public Prosecutor are very wide and arbitrary. The likelihood of abuse can be summed up by the words of a member of the Bar Council.[86]

> "..... This is the deadliest weapon[87] to be given into the hands of the Deputy Public Prosecutor. After all the Deputy is the servant of the government and the Cabinet controls the government. The Attorney-General himself being a member of the Cabinet, what guarantee has the man in the street that this power will not be abused. An over eager prosecutor with such wide powers will only be too tempted to invoke these Regulations when he finds that there is insufficient evidence to prosecute under the ordinary law. Hence, with the power in the statute the criminal law has now become uncertain. An offence which is not a security offence today can become such an offence the next day ....."

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[86] P. Cumaraswamy - A paper presented in the 3rd. Malaysian Law Conference in Kuala Lumpur, 13-15 October 1975.

[87] He was referring to Rule 2 (2).

Under the Regulations there is no requirement to adhere to the strict compliance of established features of the law of evidence. All the essential features of a fair trial have been abolished. The prosecution does not have to prove a prima facie case when the case against the accused is closed. This is provided for in rule 15 which says that when the case for the prosecution is closed, the court shall call on the accused to enter on his defence. The effect of this section is that a person tried under these regulations is guilty unless proven innocent. Once the prosecution has put its case the judge has no option but to call the defence eventhough there is no sufficient evidence to prove a prima facie case. It is left to the accused to prove that he is innocent. This is against the universal principle of law, in that a person is innocent unless proven guilty. Upon deciding the guilt or innocence of the accused, the judge shall decide, having regard to the justice of the case but without regard for the technicalities of the rules of evidence or procedure.[88] This makes the burden of the Public Prosecutor to convict the person much easier.

The prosecution may apply for the examination of witnesses under special circumstances. Regulation 21 (i) allows the tendering

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Regulation 19.

of evidence against the accused in his absence and in the absence of his counsel. It does away with the principle of natural justice. It is possible for the witness, when testifying in the presence of the accused, to conceal his identity by whatever means.[89] even to the extent of covering his face with a hood. Hear say and secondary evidence shall be admissible and be given due weight and consideration as provided under Regulation 23 (3). On the whole, the provision of Regulation 23 makes it impossible for the credibility of any of the prosecution witness to be impeached.

There are no safeguards given in the statute but a person convicted of a security offence has a right of appeal where the court convicting him had imposed excessive penalty. Finally the convicted person may appeal to the Yang Di Pertuan Agong who has the exclusive power of pardon under Section 32 (1). However, in practice the Yang Di Pertuan Agong acts on the advice of the Prime Minister.[90] Therefore, the Prime Minister has a say in deciding whether a person should be pardoned.

Following the promulgation of this law, criticism

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89 Regulation 21 (3).

90 Article 40 of the Federal Constitution.

was thrown at the government, alleging that it is manifestly unfair and unjust and that there is every likelihood that the innocent will suffer unjustly, without a fair trial. It will be regarded as oppressive laws, which do not win the confidence and loyalty of the people. This criticism was mirrored by an opposition Member of Parliament,[91] when he reminded the government that "repressive and arbitrary legislation amounts to an admission of defeat, and will play directly into the hands of The Communists." There is no need for this law since the existing law, especially the Internal Security Act 1960, is more than sufficient to deal with any situation. It would be a morale booster to the enemy, who is gaining more confidence due to the government panicking.

Apart from these laws, the government has strengthened its measures against the intensified terrorism by underground forces by making it compulsory for all able bodied man to serve as vigilantes, and the Peoples' Volunteer Corps (RELA) under the Rukun Tetangga scheme. To show that the Communist threat is being taken seriously[92] the government promulgated the Essential

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[91] per Dr. Tan Chee Khoon - Time. February 9, 1976 at P. 8.

[92] Malaysian Business 8 May 1976.

Community Self-Reliance) Regulations 1975.[93] The primary objective is aimed at mobilising a public force against crime and guerilla terrorism. The Prime Minister Datuk Hussein Onn had reminded Parliament that no one can be an 'observer' of the nation's crisis and the threat of subversion,[94] hence the scheme was launched to secure total commitment by everyone.

The Essential (Community Self-Reliance) Regulations, 1975, was promulgated under the authority of the Emergency (Essential Powers) Ordinance (No. 1) of 1970. The validity of these regulations was challenged in court,[95] but the High Court held that promulgation is a matter of fact which can be proved by evidence and that on the evidence the Yang Di Pertuan Agong has promulgated the Emergency (Essential Powers) Ordinance (No. 1) 1970 and that therefore regulations made under its authority are valid.

The Rukun Tetangga scheme was first launched on September 11, 1975. Notwithstanding the fact that it is very much like a security organisation, besides providing security to residents it has become a social organisation.[96] According to regulation 6

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[93] U.P. (A) 279 - Came into force in W. Malaysia on 12.9. 1975
U.P. (B) 370/75.

[94] loc. cit.

[95] N. Madhavan Nair v. Government of Malaysia [1975] 2 MLJ 286.

[96] The Star, Monday May 31, 1976.

of the Essential (Community Self-Reliance) Regulations 1975 all residents living in a Rukun Tetangga sector and aged above 15 must register themselves. The purpose of this provision is to identify residents and non-residents or aliens found in that area and thus facilitate the vagilantes' task of preventing crime and terrorism in that area. Under the scheme all male adults are required to do round the clock patrols. However, the success of the scheme cannot be gauged at this juncture, since it is still in its infancy.

The latest government measure of controlling subversive activities was taken by amending the Internal Security Regulations, 1960. The amendment provides for the registration of workers in certain industries. The amendment was approved on 29 June 1976, by the National Security Council, whereby all workers in the construction, building and timber logging industries would have to be registered. The registration would include the names addresses, national registration card members and other personal details. Accoording to a spokesman of the National Security Council the workers were essential as these industries were vulnerable to the infiltration of subversive and anti-national elements.[97] This was evident with the frequent hoisting of Communist flags in buildings under

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[97] Wednesday June 30, 1976 New Straits Times.

construction and the placing of bombs and booby traps by these elements. With the registration, the government would be able to keep tab on the workers and prevent them from being exploited by anti national elements.

Thus it can be seen from above that there are numerous existing laws to cope with the threat of subversion in Malaysia. However, it is to be noted, that some of the laws are not in fact necessary since it has already been provided for and covered by the Internal Security Act, 1960.