

Government's Powers During an Emergency

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Abstract

This write-up looks into the political situation that existed in Malaysia commencing with the 2018 General Election when Pakatan Harapan toppled the long-established Barisan Nasional and thereafter fall of Pakatan Harapan (PH) Government in 2020. Thereafter the Perikatan Nasional (PN) led by Tan Sri Muhyiddin Yassin took over the government. The PN Government was accused of being a back-door government. Immediately after PN took over the Government, the world, including Malaysia, faced the Covid-19 pandemic. At the same time, the PN Government, which included UMNO and PAS, had only a very small majority in Parliament. The issue of the Government invoking the Emergency powers under Article 150 of the Federal Constitution was extensively discussed amongst the politicians and writers. Article 150 became very relevant. A major part of this write-up (which is supported by legal authorities) involves the legality of the Government invoking Article 150 towards fighting the Covid-19 pandemic in Malaysia.

Keywords: Article 150, Federal Constitution, Emergency Powers, Covid-19, Election

Introduction

Our Federal Constitution was drafted by the Reid Commission and enacted immediately prior to our independence in 1957 for the then Federation of Malaya. In 1963 it was extended to the Federation of Malaysia with appropriate additions and modifications. Our Constitution is the supreme law of the Federation, and any law which is inconsistent with it shall, to the extent of the inconsistency, be void.¹ There are some exceptions to this rule of constitutional supremacy. One of them is

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1 Federal Constitution, art 4(1).

that during an emergency proclaimed by the Yang di-Pertuan Agong under Article 150(1) of the Federal Constitution, emergency laws may enact provisions that are inconsistent with most of the provisions of the Constitution.² This will be discussed later.

Normally all federal laws must be passed by both Houses of Parliament³ and assented to by the Yang di-Pertuan Agong⁴ before they become an Act of Parliament.⁵ However, an exception to Parliament's primary law-making power is the authority of the Yang di-Pertuan Agong to promulgate Emergency Ordinances during an emergency which have the same effect as an Act of Parliament.⁶

The pandemic, political instability and the economic crisis

As this article is being written,⁷ Malaysia, like other countries of the world, is facing the devastation wrought by Covid-19. Multiple health and economic challenges that confront the nation call for crisis powers. Another problem faced by the present Government is the instability of the government's very small, razor-edge majority in Parliament. The 'Sheraton move' and the resignation of the previous Prime Minister on 24 February 2020⁸ resulted in a 'hung', fractured parliament. Consequently, the big challenge that the current government faces is the continuous threat of not having sufficient support in Parliament to enable it to pass, among other things, Bills, including the Supply Bill.⁹ The reality of the razor-thin majority and the persistent danger of party hopping compounds the possibility of the fall of the government in power at any time. That may require a premature General Election with no guarantee that the electoral result will produce a strong and stable government capable of meeting the grave health and economic crisis engulfing the nation. Though party hopping is a phenomenon known

2 *ibid.* arts 150(5) and 150(6). For limits on emergency powers see Federal Constitution, art 150(6A).

3 For a provision to bypass the Dewan Negara, see Federal Constitution, art 68.

4 Federal Constitution, art 66.

5 For an exception to the consent of the Yang di-Pertuan Agong, see Federal Constitution, art 66(4A).

6 Federal Constitution, art 150(2B).

7 From December 2020 to 4 January 2021.

8 His letter of resignation was delivered to the Yang di-Pertuan Agong (the King) of Malaysia at 1pm at the Palace on Monday (Feb 24). See <<https://www.thestar.com.my/news/regional/2020/02/24/malaysias-dr-mahathir-quits-as-premier>>.

9 Federal Constitution, arts 96 to 104.

in the past to such states as Sabah and Kelantan,¹⁰ it has acquired special notoriety since February 2020 when the Pakatan Government of Tun Mahathir fell as a result of the breakup of his disparate coalition and ‘floor crossing’ by many MPs. Besides the fall of the federal government in February 2020, seven state governments have collapsed due to party or coalition-hopping between 2018-2020. These are: Sabah (twice), Perak (twice), Johor, Melaka and Kedah.¹¹

Before discussing the relevant provisions of the Federal Constitution dealing with crises, it may be good to understand the saga which led to the present chronic political instability during this period. In 2018, Pakatan Harapan (PH), led by Tun Dr Mahathir Mohamad, won a reasonably safe majority at the Federal Government in the 14th General Election. It managed to do so because several political parties who were, prior to GE14, in the opposition, agreed to form PH to contest against the incumbent Barisan Nasional government. PH succeeded in obtaining the majority in the Dewan Rakyat, and Tun Dr Mahathir Mohamad was invited by the then Yang di-Pertuan Agong to form the government. PH also captured eight State Governments but with very narrow margins. At the Federal level, PH was required to appoint its Cabinet within a limited period. Many of those appointed as Federal Ministers lacked the experience in running a government. Because the formation of PH had one principal object, and that is to precipitate the downfall of the then Prime Minister of Barisan Nasional and some other senior Ministers who were allegedly corrupt, the coalition parties within PH lacked political or ideological unity and were, in fact, foes on other issues.

Many individual PH leaders lost sight of nation-building and looking after their constituents, but instead were motivated to continually highlight the fault of the previous BN Government. The PH Government was not seen to be moving. It seems, or at least it is believed, that many older and senior civil servants were silent supporters of the BN. This situation was exacerbated by the fact that many members of the coalition parties within PH did not get along with each other. These members led by Tan Sri Muhyiddin bin Yasin decided to work with some MPs

10 See *Dewan Undangan Negeri Kelantan & Anor v Nordin Salleh & Anor* (2) [1992] 1 CLJ Rep 90.

11 Ida Lim, ‘How Pakatan lost half its States, after prematurely ceding federal power in the 2020 political crisis’ *The Malay Mail*, (Petaling Jaya, 20 May 2020) <<https://www.malaymail.com/news/malaysia/2020/05/20/how-pakatan-lost-half-its-states-after-prematurely-ceding-federal-power-in/1867814>>.

from Barisan Nasional, who were the opposition party to PH. Tan Sri Muhyiddin bin Yasin sought the Yang di-Pertuan Agong's blessing to form the new government, which he was allowed to do on 1 March 2020. Before the Government was taken over by PN, during the period of 24 February to 1 March, Tun Dr Mahathir was asked by the King to be the Interim Prime Minister.

Immediately after the overthrow of the PH government at the federal level, a few members from the Parti Warisan, Sabah, jumped to the Barisan Nasional in Sabah. As a result, Parti Warisan lost its majority status in the Dewan Undangan Negeri. Learning from what had happened at the Federal Government level, Datuk Seri Panglima Shafie Apdal advised the Governor to dissolve the Dewan Undangan Negeri, which advice was acceded to by the Governor. The Dewan Undangan Negeri of Sabah was dissolved on 30 July 2020. Under the Sabah Constitution, a State General Election had to be held for Sabah within 60 days of the dissolution.

A General Election meant that there were campaigns and physical contacts amongst the candidates and their supporters. Without going into too much detail, as a result of the State Election, Covid-19 in Sabah spiked to an unprecedented level.¹² West Malaysians who went to Sabah for the election also brought back the virus to West Malaysia, which caused the daily figures in West Malaysia to also increase to as high as four digits daily. The total daily figures for the nation started running in four figures for a few months since then.

Since the fall of the Mahathir government in February 2020, six State Governments in Johore, Malacca, Kedah, Sabah and Perak (twice) have crumbled. The most recent is on 3 December 2020 when the Menteri Besar of the State Government of Perak Datuk Seri Ahmad Faizal Azumu from the Parti Pribumi Bersatu Malaysia (BERSATU) lost the Assembly's vote of confidence.¹³ He had to resign and was replaced by a member of UMNO, Datuk Saarani Mohamad.¹⁴ The cause of this change of leadership seems to be the loss of faith in the Menteri Besar personally. However, the ruling coalition remains in power. Many see this as a temporary arrangement to avoid holding the State Election

12 According to media report the infection rate in Sabah post-election went up to over 400 cases daily.

13 See <<https://www.theedgemarkets.com/article/perak-mb-loses-confidence-vote>>.

14 See <<https://www.bharian.com.my/berita/nasional/2020/12/763557/saarani-angkat-sumpah-jawatan-mb-perak-ke-14>>.

in light of the Covid-19 crisis, which worsened following the Sabah election. The Government as well as the citizens, are apprehensive about holding any election until an effective vaccine is found and Malaysians vaccinated. The vaccines have been identified, but Malaysian are yet to be vaccinated. Even epidemiologists are warning that the vaccines are not the silver bullet. This is merely a brief of the political scenario as well as the situation of the Covid-19 pandemic in Malaysia as this article is being written.

The dilemma of holding Covid-era elections

A related issue is vacancies in Parliament and State Assemblies resulting from the deaths of members of the Dewan Rakyat or the Dewan Undangan Negeri. In the normal course of events in the past, there was never any hurdle in conducting a by-election following the death of a member of the Dewan Rakyat or State Assembly or the calling of a general election after the dissolution of the Federal Parliament. However, the unfortunate experience of the Sabah election campaign and the election itself resulted in a sudden rise in Covid-19 cases in Sabah, with the virus spreading to Semenanjung Malaysia. The large majority of the citizens of Malaysia and the current federal and state governments are against the holding of any elections at the federal or state levels because, as had happened in Sabah, the electoral exercise would entail large gatherings of people, close contacts between voters and contestants and a great deal of inter and intrastate travel.

However, there is a legal dilemma: the law prescribes mandatory electoral contests within prescribed time frames. The Federal and the State Constitutions require a by-election or general election to be held within 60 days of the dissolution of an Assembly or the arising of a vacancy in Parliament or an Assembly.¹⁵ This requirement cannot be avoided since it is a mandatory provision of the respective Federal and State Constitutions, which are supreme laws that cannot be ignored under normal circumstances. The only way to avoid holding an election in this current pandemic is for the King, acting on the advice, to proclaim Malaysia or part thereof under a state of emergency under Article 150 of the Federal Constitution.¹⁶ Indeed, this has been done recently.

¹⁵ Federal Constitution, arts 54(1) and 55(4).

¹⁶ *ibid.* art 150.

Supply Bills 2021

The Government put before the Dewan Rakyat the Supply Bills 2021; to the relief of the vast majority of the population, the Supply Bills were passed in Parliament notwithstanding the perceived objection by some politicians and political parties. Dato' Seri Anwar Ibrahim, the current Leader of Opposition, failed in his promise to prevent the passing of the Supply Bills. The Government won at the second reading on policy by a voice vote as well as at the Committee stages for all the Bills and the third reading. It is worth noting that the joint statement issued by Tun Dr Mahathir and Tengku Razaleigh,¹⁷ urging MPs to vote their consciences (apparently persuading them to vote against the Supply Bills), had little impact on the majority of MPs' decision to support the Bills.

The Supply Bills, when enacted into an Act, will provide for the budget of the nation. Had the Supply Bills not being passed, the Government would have faced difficulty in running the country. It would also have been an indication that the Government has lost the support of the majority in the Dewan Rakyat. This would require the House to be dissolved and a fresh election called. With the Covid-19 pandemic racing through the country and the world, as well as the experience of Sabah, calling for an election at this time will toll the death knell. It is common knowledge that the pandemic had resulted in a threat to the health of the population, closures of businesses, loss of jobs and closure of schools. Compensation given by the Government during the total lockdown in March-April 2020 is phenomenal. The loss to the Government in terms of national revenues is estimated to be RM2 billion per day. If this had continued, the only option would be for an emergency to be declared for the whole of Malaysia on the grounds that there is a threat to the economic life of Malaysia.

The last straw

As the politicians squabble over several issues, including the capability of the PN Government, threats of withdrawal of support for the PN Government and the question of who the next Prime Minister should be, the daily Covid-19 cases as well as death resulting from contracting the virus continue to cause more damage. The daily figures increase at a stupendous rate of from 3-digit daily of new cases to over 4,000 daily new cases. The projection by the Ministry of Health was that the daily

17 See <<https://www.bernama.com/en/general/news.php?id=1912179>>.

new cases and deaths would continue to increase at a steep rate if no serious action was taken to stop or drastically slow down the increase.¹⁸ Three UMNO MPs who, as part of UMNO was supporting the PN Government announced their withdrawal of support. These are Tengku Razaleigh Hamzah (MP for Gua Musang),¹⁹ Datuk Ahmad Jazlan Yaakub (MP for Machang),²⁰ and Dato' Seri Mohamed Nazri Aziz (MP for Padang Rengas).²¹ Dato' Seri Anwar Ibrahim continued to claim that he has majority support in the Dewan Rakyat, although no figures or names of those purportedly supporting him were disclosed. Tengku Razaleigh was also named as a possible candidate for the Prime Minister's post. These actions by the politicians (even before the announcement by Dato' Seri Mohamed Nazri withdrawing his support) made the political situation more unstable. These two situations call for extraordinary and grave actions to be taken by the PN Government. The last straw broke the camel's back.

As was expected by many, on Monday 11 January 2021, the Prime Minister announced a stricter movement control order.²² Many areas where cases were extremely high were put in another lockdown, although not as strict as the first lockdown at the beginning of the pandemic. Other areas which are not too serious were imposed a less restrictive lockdown. As this article is being written, more areas were continued to be placed under higher restrictions.²³

The following day, another major surprise was declared by the Prime Minister (preceded by an announcement from the Istana Negara). An Emergency under Article 150 was proclaimed by the Yang Di-Pertuan Agong acting on the advice of the Prime Minister.²⁴ The Emergency was to take effect immediately until 1 August 2021, which date may be

18 See <<https://www.theedgemarkets.com/article/malaysia-could-hit-5000-daily-cases-months-end-if-no-action-was-taken-%E2%80%94-moh>>.

19 See <<https://www.astroawani.com/berita-politik/ku-li-sahkan-tidak-akan-mengundi-belanjawan-2021-273128>>.

20 See <<https://www.nst.com.my/news/politics/2021/01/655970/ahmad-jazlan-withdraws-support-pn>>.

21 See <<https://www.nst.com.my/news/politics/2021/01/656675/nazri-aziz-withdraws-support-muhyiddins-government>>.

22 See <<https://www.nst.com.my/news/nation/2021/01/656447/mco-20-five-states-three-fts>>.

23 See <<https://www.malaymail.com/news/malaysia/2021/01/15/kelantan-sibu-placed-under-mco-after-surge-in-covid-19-cases/1940812>>.

24 See <<https://www.nst.com.my/news/nation/2021/01/656604/updated-state-emergency-not-military-coup-or-curfew-pm-clarifies>>.

shortened or extended depending on the condition of the pandemic. In his announcement, the Prime Minister cited the worsening of the Covid-19 pandemic as the impetus for an emergency declaration. He assured that it would last for only so long as is necessary, and if the people so want, an election could be held at any time thereafter. One of the effects that was immediately seen was that no election would be held during this Emergency. Sarawak, whose government is due to end in June 2021, will also have to postpone the election. As expected, Opposition parties and their leaders strongly criticised the declaration of Emergency as a way for Tan Sri Muhyiddin Yasin to hold on to office.²⁵ Further, they accused the Prime Minister of intending to abuse his power during the Emergency by invoking provisions to the detriment of the nation but to his benefit. Only time will tell how he will utilise his powers during the Emergency.

Nature and scope of emergency powers

The rest of this article seeks to discuss the powers of the Yang di-Pertuan Agong vis-à-vis the legislative powers of Parliament during an emergency.

Nature of the power

Article 150 provides as follows:

- (1) If the Yang di-Pertuan Agong is *satisfied* that a grave emergency exists whereby the *security, or the economic life, or public order* in the Federation or *any part thereof* is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.²⁶

As to the meaning of threat to 'security, or the economic life, or public order' perhaps certain examples of previous activities and incidences accepted by the Courts may be useful in understanding them. Threats by communist terrorist to exploit a situation existing in any area have been accepted as a threat to security. For this purpose, the Government can rely on intelligence report by its agents.²⁷ In *The Zamora*, Lord Parker C.J

25 See <<https://www.malaymail.com/news/malaysia/2021/01/12/opposition-labels-pms-emergency-announcement-a-political-move-that-endanger/1939650>>.

26 Federal Constitution, art 150(1) (emphasis added).

27 *Stephen Kalong Ningkan v Government of Malaysia* [1968] 2 MLJ 238 PC.

expressed the view: 'Those who are responsible for the national security must be the sole judge of what the national security requires'.²⁸ As late as 1977 in *R v Secretary of State for Home Affairs, Ex-parte Hosenball* Lord Denning said: 'It is a case in which national security is involved: and our history shows that, when the state itself is endangered, our cherished freedoms will have to take second place'.²⁹ More recently, however, the European Commission seemed reluctant to accept the statement of the government as to the existence of an emergency. Also, in *Council of Civil Service Unions v Minister for the Civil Service*, Lord Scarman said:

once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the Crown could in the circumstances reasonably have held.³⁰

The government acting on the advice of its experts in the civil service and agencies normally would be accepted as final by the courts, without having to disclose the details.

In respect of the threat to economic life, some examples can include natural disasters, e.g. exceptionally bad floods, drought or other calamities that cause or threaten damage to agriculture, e.g. large-scale crop failures, damage to the industry. Our current Covid-19 pandemic can, if not properly controlled, be seen as a threat to the economic life of Malaysia or any part thereof. Therefore, the Yang di-Pertuan Agong is correct in declaring an emergency for those areas where by-elections need to be held due to vacancies occurring. No one can honestly dispute that the Covid-19 pandemic is a threat to life and the economy after what we have seen had happened in Sabah post-election. The damage caused to the national economy by the closing of the economic activities resulting from the pandemic has been crippling for the nation's coffers.³¹

The last situation in which an emergency can be declared is the existence or threat of breach of public order. A good example is what happened

28 *The Zamora* [1916] 2 AC 77, 107.

29 *R v Secretary of State for Home Affairs, Ex-parte Hosenball* [1977] 1 WLR 766, 778.

30 (1984) 3 AER 935; These views are consistent with the conclusion expressed in C.V. Das, 'Emergency Powers and Parliamentary Government in Malaysia: Constitutionalism in a new Democracy' (PhD thesis, University of Brunel 1994).

31 *ibid.*

in the 13 May 1969 tragedy, where there were riots and destruction of properties and loss of lives. No one would even think of challenging the proclamation of emergency made following the occurrence of the incident. What was challenged was the continuation of the declaration although the nation had returned to normalcy. Hence the decision in *Teh Cheng Poh*.

Duration of an emergency

Article 150(1) empowers the Yang di-Pertuan Agong to declare an emergency if he is satisfied that any of the conditions mentioned in Article 150 exist. The emergency can last until the King makes a proclamation revoking the emergency³² or until Parliament annuls the Proclamation.³³

Does the King act on advice?

There is a scholarly dispute about whether the King's emergency powers are entirely discretionary or are exercised on the PM's advice. Some writers and politicians argue that the discretion to declare an emergency rests totally with the Yang di-Pertuan Agong because the words 'If the Yang di-Pertuan Agong is satisfied', if interpreted literally, clearly confer a personal discretion on the Monarch. This was also the view taken by the then Federal Court (prior to the inclusion of Article 40(1A)) in the case of *Stephen Kalong Ningkan (No.2) (1968)*³⁴.

However, this cannot be so because Article 40(1)³⁵ imposes a duty upon the Yang di-Pertuan Agong to act on the advice of the Cabinet or a Minister acting under the authority of the Cabinet save where the

32 Federal Constitution, art 150(3). See also *Teh Cheng Poh v PP* [1979] 1 MLJ 50, per Lord Diplock:

'The power to revoke, however, like the power to issue a proclamation of emergency, vests in the Yang di-Pertuan Agong, and the Constitution does not require it to be exercised by any formal instrument. In their Lordships' view, a proclamation of a new emergency declared to be threatening the security of the Federation as a whole must by necessary implication be intended to operate as a revocation of a previous Proclamation, if one is still in force.'

33 Federal Constitution, art 150(3).

34 In my opinion the Yang di-Pertuan Agong is the sole Judge and once His Majesty is satisfied that a state of emergency exists it is not for the Court to inquire as to whether or not he should have been 'satisfied'. *Stephen Kalong Ningkan v Government of Malaysia* [1967] 1 LNS 167.

35 Federal Constitution, art 40(1).

Constitution provides otherwise. The royal duty to act on advice is further fortified by the introduction of Article 40 (1A)³⁶. It is submitted that the King's exercise of emergency powers is subject to Article 40(1) and 40(1A) for the following reasons:

1. First, Article 40(1) and 40(1A) apply across the board to all royal functions under the Constitution and laws 'except as otherwise provided'.
2. Second, Article 40(2) provides four exceptions to Article 40(1), where the King may act on his own. The four discretionary areas are: (i) the appointment of a Prime Minister; (ii) the withholding of consent to a request for the dissolution of Parliament; (iii) the requisitioning of a meeting of the Rulers concerned solely with the privileges, position honours and dignities of the Rulers of Malaysia; and (iv) 'any other case mentioned in this Constitution'.³⁷ Emergency powers are nowhere mentioned in Article 40(2)'s list of discretionary powers. The interpretation of the discretion exercisable under Article 40(2)(a) and its equivalent provisions in the State Constitutions have been in many cases scrutinised by the Courts.³⁸
3. Third, though Article 40(2) states that the King may act in his discretion 'in any other case mentioned in this Constitution', what is meant is 'any other case (*explicitly*) mentioned in this Constitution' as with items (a) to (c) in Article 40(2), the right to ask for any information from the government (Article 40(1)), delaying legislation for 30 days under Article 66(4A), and some constitutional appointments as under Articles 139(4) and 141A(2).

36 Inserted by Act A885 with effect from 24 June 1994. Article 40(1A) states: 'In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice'.

37 Federal Constitution, art 40(2).

38 For example: *Dato' Dr Zambry Abd Kadir v Dato' Seri Ir Hj Mohammad Nizar Jamaluddin; Attorney General of Malaysia (Intervener)* [2009] 5 CLJ 265; *Tun Datu Haji Mustapha Bin Datu Harun v Tun Datuk Haji Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan* (No 2) [1986] 1 LNS 136; *Tan Sri Musa Hj Aman v Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Anor And Another Application* [2020] 9 CLJ 44.

4. Fourth, the Privy Council, in the case of *Teh Cheng Poh*,³⁹ has put the matter beyond all doubt that in the exercise of emergency powers, the King acts on advice. Lord Diplock stated that:

when one finds in the Constitution itself or in Federal law powers conferred upon the Yang di-Pertuan Agong that are expressed to be exercisable if he is of opinion or is satisfied that a particular state of affair exists or that particular action is necessary, the reference to his opinion or satisfaction is, in reality, a reference to the collective opinion or satisfaction of the members of the Cabinet, or the opinion or satisfaction of a particular Minister to whom the Cabinet have delegated their authority to give advice upon the matter in question.

In sum, the power to proclaim an emergency and frame Emergency Ordinances is a constitutional power exercisable on advice and not in accordance with the personal discretion of the Yang Di-Pertuan Agong. However, in acting on the advice of the Cabinet to declare an emergency, the Yang di-Pertuan Agong is not forbidden to consult any person, including his brother Rulers. The King is not required to act mechanically or as a rubber stamp. He may 'advise, caution and warn'. He may delay the decision and ask the PM to reconsider. The PM may pay heed to the royal advice as it appears the PM did recently. It is reported that late in October 2020, the PM advised the declaration of a national emergency to enable the Government to combat the many crises the nation is facing. The King advised caution. Consequently, the Cabinet and the Prime Minister reconsidered their advice to the Yang di-Pertuan Agong. Ultimately, no national emergency was declared.⁴⁰ Nevertheless, what if the PM had insisted on the Yang Di-Pertuan

39 In *Teh Cheng Poh v Public Prosecutor* [1978] 1 LNS 202, Lord Diplock stated: 'Although this, like other powers under the Constitution, is conferred nominally upon the Yang di Pertuan Agong by virtue of his office as the Supreme Head of the Federation and is expressed to be exercisable if he is satisfied of a particular matter, his functions are those of a constitutional monarch and except on certain matters that do not concern the instant appeal, he does not exercise any of his functions under the Constitution on his own initiative but is required by Article 40(1) to act in accordance with the advice of the Cabinet'.

40 Media Statement by Istana Negara (25 October 2020) <http://pengurusan.istananegara.gov.my/index.php?option=com_content&view=article&id=421:kenyataan-media-istana-negara-kdymm-spb-yang-di-pertuan-berkenan-menerima-menghadap-yab-perdana-menteri-di-istana-abdul-aziz-kuantan-pahang-25-okt-2020&catid=95&Itemid=634>.

Agong acting on his advice? It is submitted that due to Article 40(1) and 40(1A), the Yang di-Pertuan Agong has no alternative but to ultimately accept the advice. Any decision of the Yang di-Pertuan Agong to go against the advice of his Prime Minister to declare an emergency, would be an unusual and unprecedented act contrary to the traditions of a constitutional monarchy, based on the Westminster system of government. The assertion of personal satisfaction by the Head of a State in the matter of an emergency may place future governments in a difficult position in exercising their duty and responsibility in governing a nation.⁴¹ This concern has in fact been referred to by some writers.⁴² 'A constitutional monarch, with a ceremonial figurehead role, may provide continuity and stability, provide a unifying non-partisan representative of the state, and reinforce democratic legitimacy with other sources of authority, including traditional and in some cases religious authority'.⁴³ This statement correctly describes the Malaysian constitutional monarchy as we experience today, including the monarch being the Head of the religion of Islam.

To the layperson, the words 'advice' in Article 40(1) and 'satisfied' in Article 150(1) are given the normal, literal meaning used in daily conversation, but legally these words have to be given a legal interpretation that is harmonious with the rest of the Constitution. Those who are inclined to give a literal or popular definition must be reminded that they are treading on thin ice. As was reminded by a writer,⁴⁴ the danger of giving such interpretations to those words is to forget that the King is to act on the advice of his Government. In this respect, it is also not the conventional practice in the Westminster government system for the Palace to issue statements relating to the day to day running of the Government. Such statements should only be issued by the Government. To the relief of many, the King ultimately paid heed to the PM's advice. The

41 See also Constitutional Monarchy by Tun Abdul Hamid Mohamad <http://library.kehakiman.gov.my/digital/Speech/2014/174._CONSTITUTIONAL_MONARCHY.pdf>.

42 *ibid.*

43 E. Bulmer, *Constitutional Monarchs in Parliamentary Democracies* (Stockholm, International IDEA, 2014).

44 'Suka atau tidak, saya percaya pendekatan YDPA itu akan menjadi precedent dan amalan di masa hadapan dan penghakiman Privy Council itu, lama kelamaan, akan dilupai begitu sahaja'. See <<https://www.tunabdulhamid.my/index.php/speech-papers-lectures/item/1009-sambungan-kepada-%E2%80%9Cproklamasi-darurat-wajibkah-ydpa-mengikut-nasihat-pm?%E2%80%9D>>.

King agreed to declare an emergency in the parliamentary constituency of Batu Sapi⁴⁵ in Sabah as well as two other constituencies, i.e. the federal constituency of Gerik in Perak and the Sabah State constituency of Bugaya. These vacancies were a result of the passing away of their respective representatives.

Non-justiciability

Is there any possibility of judicial review of the King's exercise of emergency powers? Although the Yang di-Pertuan Agong's decision to declare an emergency has to be made pursuant to the advice of his Prime Minister and/or Cabinet, once that decision is made, such exercise of power by the Yang di-Pertuan Agong under Article 150(1) and (2B) shall be final and shall not be challenged or called into question in any court. This is provided for in Article 150(8), which was inserted on 15 May 1981. It seems to close all doors to challenging the satisfaction of the Yang di-Pertuan Agong to declare an emergency or promulgate an Ordinance. To this observation, several qualifications must be made:

First, the satisfaction of the Yang di-Pertuan Agong must be by way of the advice of the Prime Minister and/or the Cabinet. If the King acts on his own and declares an emergency on his own initiative, suspends or dissolves Parliament, promulgates Emergency Ordinances and assumes emergency powers for himself, the courts may not sit idly by and may declare that the words 'If the Yang di-Pertuan Agong is satisfied' mean that 'if the Yang di-Pertuan Agong, acting on advice, is satisfied...'

Second, if the King rejects the PM's advice to proclaim an emergency, but the PM insists that his advice is binding under Article 40(1) and 40(1A), courts will have the difficult task of deciding whether a Declaration can be issued that the King is bound by the advice of his Government or to declare that the issue is non-justiciable.

Third, it must be observed that the provision in Article 150(8) on the non-reviewability of the King's emergency powers does not transfer emergency powers from the government of the day to the Monarch. The real effect of Article 150(8) is that it seeks to immunise the government of

45 Media Statement by Istana Negara (18 November 2020) <http://pengurusan.istananegara.gov.my/index.php?option=com_content&view=article&id=423:kenyataan-media-istana-negara-sesi-menghadap-yab-perdana-menteri-18-november-2020&catid=95&Itemid=634>.

the day from judicial review. The non-reviewability of the King's powers under Article 150 does not convert His Majesty's non-discretionary power into a discretionary one. It basically means that the *government's advice* under Article 150 is non-reviewable by the courts.

Fourth, the issue of non-reviewability by the courts is itself open to debate. Recent decisions from the Federal Court like *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak* indicate that the judicial power of the courts cannot be taken away from the courts even by an ouster clause or a constitutional amendment.⁴⁶ On issues of constitutionality, the superior courts cannot be easily ousted.⁴⁷ For example, Article 150(6A) bars the violation of six civil rights⁴⁸ even during an emergency. If an Act of Parliament or an Ordinance by the King were to violate these limits, then it is arguable that judicial review will lie, notwithstanding Article 150(8). One can rely on the Anisminic principle⁴⁹ that the term 'determination' means a valid determination. An unconstitutional or ultra vires determination is a nullity, and no ouster clause can save it. An illustration of this comes from *Teh Cheng Poh*, where it was decided by the Privy Council that the Yang di-Pertuan Agong's discretion in declaring any area as a security area pursuant to the Internal Security Act made under Article 149 is exercised on advice. Although the powers of the ISA under Article 149 are different from the provision of Article 150, the principle derived from that decision is that the Cabinet's decision in advising the Yang di-Pertuan Agong to declare any area as a security area is open to challenge in the court. Since the King is required in all executive functions to act in accordance with the advice of the Cabinet, mandamus could, in their Lordships' view, be sought against the members of the Cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the Proclamation. The exclusionary provision in Article 150(8) is yet to be tested in our superior courts. As has been seen in a few landmark cases, the courts are jealously protective of their constitutional jurisdiction and do not readily allow the legislature to take it away. The tussle between

46 *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; and the UK Supreme Court in *R (Miller) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5.

47 *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 3 MLJ 561 FC; *Alma Nudo Atenza v PP* [2019] 3 AMR 101 FC.

48 The six topics are: Islamic law, custom of the Malays, native law and custom in Sabah and Sarawak, religion, citizenship and language.

49 *Anisminic v FCC* [1969] 2 AC 147.

the legislature and the courts has been going on for a long time. On questions of constitutionality, the court's jurisdiction cannot be ousted. See *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak*;⁵⁰ *Semenyih Jaya*,⁵¹ and *Alma Nudo*.⁵²

Fifth, there is the possibility of a judicial challenge on the ground of mala fide or *fraudem legis* as in the case of *Stephen Kalong Ningkan v Government of Malaysia*⁵³. On the issue of an exercise of power that is mala fide, courts impose high standards of proof, and the burden lies on the accuser, but courts do not turn away a complainant entirely. See the recent UK Supreme Court cases of *R (Miller) v Secretary of State for Exiting the European Union*⁵⁴ and *R (Miller) v The Prime Minister and Cherry v Advocate General*.⁵⁵

Whether *Miller* will be followed in Malaysia is an open question. In Malaysia, as said earlier, any challenge to the 'absolute discretion' of the

50 *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145: 'The significance of the exclusive vesting of judicial power in the Judiciary, and the vital role of judicial review in the basic structure of the constitution, is twofold. First, judicial power cannot be removed from the civil courts. The jurisdiction of the High Courts cannot be truncated or infringed. Therefore, even if an administrative decision is declared to be final by a governing statute, an aggrieved party is not barred from resorting to the supervisory jurisdiction of the court. The existence of a finality clause merely bars an appeal to be filed by an aggrieved party'.

51 *Semenyih Jaya Sdn Bhd* [2017] 3 MLJ 561.

52 [2019] 3 AMR 101 FC.

53 *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119.

54 *R (Miller) v Secretary of State for Exiting the European Union (Rev 3)* [2017] UKSC 5: '121. Where, as in this case, implementation of a referendum result requires a change in the law of the land, and statute has not provided for that change, the change in the law must be made in the only way in which the UK constitution permits, namely through Parliamentary legislation. What form such legislation should take is entirely a matter for Parliament. But, in the light of a point made in oral argument, it is right to add that the fact that Parliament may decide to content itself with a very brief statute is nothing to the point. There is no equivalence between the constitutional importance of a statute, or any other document, and its length or complexity. A notice under article 50(2) could no doubt be very short indeed, but that would not undermine its momentous significance. The essential point is that, if, as we consider, what would otherwise be a prerogative act would result in a change in domestic law, the act can only lawfully be carried out with the sanction of primary legislation enacted by the Queen in Parliament'.

55 [2019] UKSC 41.

Government is intended to be removed by Article 150(8).⁵⁶ In matters of national security, while the Government moves towards eliminating any questioning of its discretion, the Courts, on the other hand, are going in the opposite direction to do the contrary. However, it may be consoling to our legislators to know that perceptibly, our courts do not seem to be as judicially active as in the United Kingdom. Also, most Malaysian cases striking down provisions in ordinary legislation are based on the fact that ordinary legislation collides with Article 121, which confers judicial powers on the courts. As discussed above, the Courts have shown reluctance in conferring upon Parliament the right to pass legislation that restricts the powers of the Judiciary.⁵⁷ However, Article 150(8) is not ordinary legislation but a provision within the Federal Constitution, and it expressly states ‘Notwithstanding anything in this Constitution’. Whether the exclusion of the courts to question the matters provided in Article 150(8) can be upheld has to be left to the lawyers to challenge and for the Courts to decide. There is a possibility that the Courts will not allow misuse or abuse by the executive of that exclusionary clause.

Emergency Ordinances

A law promulgated by the Yang di-Pertuan Agong during an emergency is referred to as an Emergency Ordinance, and such an Ordinance has the full effect of an Act of Parliament. Such a law can override any provision of the Constitution except on matters of Islamic law, the custom of Malays, native customary laws of Sabah and Sarawak, matters relating to religions, citizenship and language.

Duration of emergency laws

Laws made during an emergency do not have a sunset clause, but they lapse on the expiration of six months, beginning with the date when an emergency proclamation ceases to be in force (Article 150(7)).

Multiple proclamations

A later proclamation does not override an earlier proclamation. Multiple proclamations may coexist and overlap with each other. This

⁵⁶ See Tan Sri Zainun Ali’s judgments in *Indira Gandhi* [2018] 3 CLJ 145 and *Semenyih Jaya Sdn Bhd* [2017] 3 MLJ 561.

⁵⁷ *Semenyih Jaya Sdn Bhd* (n 51).

Article 150(2A) was inserted following the Privy Council decision in *Teh Cheng Poh*, which held that no two proclamations could overlap each other, and a later proclamation overrides a former one. With the addition of Article 150(2A), *Teh Cheng Poh* is no more good law on this point.

Parallel law-making powers

During an emergency, the executive acquires primary law-making powers coterminous with those of Parliament. The only limitations are, first, that the power of the Yang Di-Pertuan Agong to promulgate an Ordinance during an emergency can be exercised only if the two Houses are not sitting concurrently. If the two Houses are sitting concurrently, which they rarely do, then such a law must be enacted by Parliament. Second, the word 'sitting' is restrictively defined as 'only if members of each House are respectively assembled and carrying out the business of the House'. This clause is still waiting to be interpreted by the Courts.⁵⁸ How narrow or wide it is going to be will be left to be seen. Third, an Ordinance promulgated by the Yang di-Pertuan Agong must be laid before the Dewan Rakyat as well as the Dewan Negara and shall cease to have effect if such a law is annulled by both Houses (Article 150(3)).

Federal-state relations

It should also be noted that the powers of the Federal Parliament and the Government during an emergency extend to the legislative authority of the States as well: Article 150(2C), 150(4), 150(5).

Proclamations

Malaysia has experienced several emergencies since the declaration of independence in 1957. These are:

1. The 1964 nationwide emergency (Confrontation).
2. The 1966 Sarawak emergency.
3. The 1969 nationwide emergency (Racial Riot).
4. The 1977 Kelantan emergency.
5. The 2020 Batu Sapi, Sabah constituency emergency.

⁵⁸ Article 150(9) of Federal Constitution inserted on 15 May 1981.

6. The 2020 Gerik (Perak) and Bugaya (Sabah) constituency emergency.

Of the six emergencies declared in Malaysia, the 1969 Emergency was the one that was most acceptable by the people. It was declared as a result of racial and political rioting. The rioting was brought about by two opposing political parties, each made up of Malaysians of basically two different races, i.e. the Chinese and the Malays. The party consisting of the Chinese went around celebrating the success of their party in the General Election held a few days earlier, making provocative statements against members of the opposing party. This created anger amongst the Malays in the other party that led to the rioting. The riots continued for a couple of days, during which time many were killed and properties were burnt down. This was when the then Prime Minister Tunku Abdul Rahman decided to advise the then Yang di-Pertuan Agong to declare a national emergency. Since Parliament had not been summoned since its last dissolution before the General Election, there was no Parliament in session. This enabled the caretaker government to administer the country. Towards this end, the National Operations Council (NOC) or Majlis Gerakan Negara (MAGERAN) was formed. A few necessary Ordinances were promulgated by the Yang di-Pertuan Agong.

Two years later (20 February 1971), Parliament was summoned to sit.⁵⁹ In the meantime, many political parties were invited to form a coalition called the National Front or Barisan Nasional. The Democratic Action Party (DAP) was not part of Barisan Nasional. The parties that comprised the Barisan Nasional were United Malay National Organisation (UMNO), Malaysian Chinese Association (MCA), Malaysian Indian Congress (MIC), People's Progressive Party (PPP), Gerakan and later Pan-Malaysian Islamic Party (PAS). The coalition was constituted formally on 1 January 1973 and registered as a political party on 1 June 1974.⁶⁰

Conclusion

Malaysia's Federal Constitution was drafted based on the Westminster system of government and materially similar to the other constitutions of the Commonwealth countries. The power to declare an emergency is found in all these constitutions. Unlike the Parliament of the United

59 DR Deb 20 February 1971, Bil. 1.

60 J. Liow and M. Leifer, *Dictionary of the Modern Politics of Southeast Asia* (4th edn, Oxon, Routledge, 2015) 102.

Kingdom, which derives its legislative powers from the notion of the supremacy of Parliament, the governments of countries like Malaysia derive their legislative, executive and judicial powers from their written Constitution. It must be recognised that any country can face an emergency at any time, no matter how peaceful the country expects to be. It is when the country suddenly faces a situation where the normal legislative and executive powers are insufficient to solve the emergency situation or the threat thereof that it requires special, wider and practically unlimited powers to tackle such a situation. This was foreseen by our forefathers, who provided for provisions like Article 150. However, it is expected that these special powers are not to be used unless the country faces an exceptional situation and unless there are no alternative means of overcoming the situation. From experience, the Governments of Malaysia since independence, it is happily noted that emergency powers under Article 150 have generally been used sparingly and only in situations that really require it.

Immediately after the Declaration of Emergency was announced, dissenting voices were heard, whether with political or genuine concerns. Even if the court makes a decision on the validity or otherwise of the declaration, the discussions and protests, one way or the other, will continue until the Covid-19 is totally eradicated from Malaysia. It is hoped that the Emergency declared on 11 January 2021 would only last for so long as is necessary.

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