

**EMERGENCY POWERS AND PARLIAMENTARY GOVERNMENT IN MALAYSIA:
CONSTITUTIONALISM IN A NEW DEMOCRACY**

A Thesis submitted for the degree of Doctor of Philosophy

by

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ABSTRACT

This thesis is a situational study of the use and exercise of emergency powers in Malaysia, undertaken from the perspective of the principles underlying the Malaysian Constitution. The primary focus and perspective are Malaysian, and I use comparative materials where I consider they may help to illuminate that perspective and the way in which emergency powers have been used.

A unique situation has been created whereby the Malaysian Government has the option of taking measures under one or other of two legal regimes. The thesis, therefore, examines the development of this parallel government system. It includes discussion of the considerations that animated writing reserve powers into the Malaysian Constitution and the near institutionalisation of the state of emergency in Malaysia, using this historical background to focus on the role of the judiciary in crisis situations, the incorporation of certain traditional elements of Malay society into the Constitution, and the existence of racial 'bargaining' in developing the Constitution.

The thesis then examines the distinct legal order created by a state of emergency, within the context of the reality of the Malaysian polity. Hence, there is an examination of the four actual instances when an emergency was proclaimed in the country.

An examination is also undertaken of the various amendments made to Article 150 over the years which has reduced much of the safeguards originally built into the provision. This examination suggests that Article 150 in its present form, is debilitating of parliamentary government largely because of the dual system of law-making created by a state of emergency.

The thesis therefore provides an insight into the working of a major constitutional democracy seeking to reconcile the need to maintain emergency powers and realise the objective of a parliamentary system envisaged by its Federal Constitution.

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P R E F A C E

This proposes to be a study of constitutionalism in a newly emergent democracy. Malaysia attained independence in 1957 and after 30 years retains many of the vestiges of a Westminster-style democracy. In this respect it compares well with many of the other countries in the south and south east Asian region that began as democracies, after discarding the colonial yoke, but are now under some form of totalitarian government or other.

The Malaysian experience is in many ways an unique one. It is a nation that has struggled to maintain the features of democracy in spite of several challenges to the fabric of its society. The multi-racial, multi-religious and multi-cultural composition of its peoples has probably presented the greatest challenge to the retention of a viable democracy in Malaysia.

A prominent feature of constitutional life during this period has been the frequent invocation and use by the Government of its emergency powers under the Constitution. The resort to a state of emergency has been proffered by the Executive as the reason for the survival of democracy in the country. Thus, the Proclamation of Emergency made on 15 May 1969 continues unabated to this day, and the country is for all legal purposes still under a state of emergency. This unique state of affairs bears living proof of C.K. Allen's prescient observation in his "Law And Orders" that emergency government once taken root is a tough plant to uproot.

The resort to crisis powers and the continuous state of the Emergency nevertheless presents a profound challenge to constitutionalism in the

country. The ability of the Executive Government to invoke and perpetuate a state of emergency without any independent check raises obvious questions as to whether the original objective behind the creation of this power has now been discarded. Moreover, and probably more importantly, the legal regime created by a state of emergency enhances executive power and provides for executive law-making under the rubric of emergency legislation. This has resulted in two parallel legal regimes subsisting in Malaysia; one, the parliamentary system with a Cabinet which is answerable to an elected Parliament, and the other, the emergency regime where the Government may at its option invoke its emergency powers and undertake action without reference to Parliament. The significance of this emergency power may not be fully appreciated unless one realises also that emergency laws, whether enacted by Parliament or as Executive legislation, overrides the Constitution and may not be invalidated on account of being inconsistent with the Constitution. The eclipse of the doctrine of constitutional supremacy, which is a cornerstone of the Malaysian Constitution, in the face of emergency laws, graphically illustrates the import of a continuous state of emergency in the country.

An attempt is made in this study to examine these questions in some detail and review their impact on the state of constitutional democracy in Malaysia. The study is made, as it must, in the historical context of Malay society and early constitutional systems in Malaya.

I have considered at the outset the jurisprudential underpinning to the exercise of crisis powers, and sought to analyse first its treatment by the common law. The present day exercise of emergency powers, including its use in Malaysia, should be compared with the original jurisprudential basis for the existence of this power. Part I of the study deals with this and examines how

the power of the royal prerogative to handle a crisis was translated into the written constitutions of many of the countries of the new Commonwealth, including Malaysia. There is also an analysis of the problems posed by constitutional breakdowns in the new democracies. Often this has called for emergency action under circumstances which are *de hors* the written constitution resulting in a state of martial law. An interesting feature of this development, as will be seen in the study, is the legitimating process by which legal recognition of some form or the other is given to the new constitutional order and the role played by the courts in this regard.

Part II deals with the historical evolution of the emergency power in Malaysia. An understanding of how and why emergency powers are exercised by the Government would not be possible without comprehending the unique milieu in which the Malaysian Constitution was founded. The incorporation of certain traditional features of Malay hierarchical rule into the Westminster framework and the principal features of the Constitution, namely, Parliamentary government, the role of the Yang di-Pertuan Agong (the King) and the doctrine of constitutional supremacy are discussed to provide an understanding of the impact and change to government that is brought about by the declaration of an emergency.

The four instances when an emergency was declared in Malaysia are discussed in Part III. In two instances, it was declared to cover territorially a particular State only, and in two other instances it was proclaimed to cover the whole of Malaysia. A judicial observation was made once that nearly every consideration arising from the Constitution may be considered to be political (see Dixon J. in *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31, 82). That observation probably sees its greatest truth in the invocation and exercise of crisis powers, especially

when it is utilised not to deal with a natural calamity, but to ostensibly avert a threat to the public order or security of the nation. An examination of the actual instances when the Government invoked its emergency power, and the reasons for the same, is indispensable for an inquiry into whether the provision is a safety valve or an escape channel for political expediency. Any discussion of the scope, efficacy or adequacy of the emergency power or suggestions for future safeguards would otherwise take place only in a vacuum.

Part IV attempts a detailed legal analysis of the nature and scope of the emergency power. The discussion begins with an examination of the features of Article 150 dealing with the circumstances when the emergency power may be invoked, and the important question of the duration and tenure of a state of emergency. In this context, there is also an analysis of the judicial role in emergency situations, namely, as to whether the proclamation and continuance of a state of emergency is justiciable before the courts.

Emergency government is characterised by the plenitude of emergency measures and legislation that is brought forth to deal with the so-called crisis. Malaysia is no exception. The 21 months of rule under a Director of Operations, and the National Operations Council, after the Emergency was declared on 15 May 1969, is discussed in some detail as providing the best example of an emergency-type government established in the country. The review ends with a consideration of the present weaknesses and inadequacies in Article 150, and the need for the provision of future safeguards to ensure that Article 150 does not become a route for the dilution of constitutionalism in the country.

In doing this study I have attempted solicitously to identify and locate events, examples and case-precedents from third world countries. The yardsticks of the developed democracies would not be a suitable measure of the

causes and effect of crisis government, which is today largely (albeit, not exclusively) a third world phenomenon. This is significant in evaluating generally the attitude of the courts to the threat to constitutional safeguards and liberties that accompany the declaration of an emergency. The analysis is in some ways a comparative study of judicial attitudes of the third world courts towards a common problem. Precedents are drawn and discussed from the stronger democracies of India and the Caribbean Island nations, and from the African countries of Nigeria and Uganda where crisis government is endemic, as also from the new Pacific Island nations where democracy is still at the experimental stage. This comparative evaluation hopefully presents a better understanding of the growth of democratic values and principles in Malaysia itself.

Constitutionalism is a hope and a challenge to the Malaysian democratic polity. The pivotal question is whether the nation could do away with the crutch of emergency powers and a continued state of emergency. It is hoped that this study could contribute in some small measure towards a better understanding of the use and exercise of this awesome power and of its strengths and weaknesses.

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INDIA

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INTERNATIONAL

International Covenant on Civil and Political Rights, Art. 4

TRINIDAD & TOBAGO

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ABBREVIATIONS

Periodicals and Journals

AJIL	American Journal of International Law
Camb. L.J.	Cambridge Law Journal
CLB	Commonwealth Law Bulletin
CLJ	Current Law Journal
ICLQ	International & Comparative Law Quarterly
ILJ	Industrial Law Journal
INSAF	Journal of the Malaysian Bar Council
J. of Indian Law Institute	Journal of Indian Law Institute
JMCL	Journal of Malaysian and Comparative Law
McGill L.J.	McGill Law Journal
MLJ	Malayan Law Journal
Mal. L.R.	Malaya Law Review
Melb. U.L.R.	Melbourne University Law Review
NLJ	New Law Journal
PL	Public Law
Sing. L.R.	Singapore Law Review

Law Reports

AER	All England Law Reports
AC	Appeal Cases
AIR	All India Reports
CLR	Commonwealth Law Reports
CLJ	Current Law Journal
Co. Rep.	Company Reports
DLR	Dominion Law Reports
EA	East Africa
F.M.S.L.R.	Federated Malay States Law Reports
HL	House of Lords
IR	Irish Reports
KY	Kyshe Reports
LRC (Const)	Law Reports of the Commonwealth
MLJ	Malayan Law Journal
N.L.R.	Nigerian Law Reports
NI	Northern Ireland
N.Z.L.R.	New Zealand Law Reports
PC	Privy Council
PLD	Pakistan Legal Decisions
Qd. R.	Queensland Reports
SA	South Africa
SC	Supreme Court
SCC	Supreme Court Cases
SCR	Supreme Court Reports
S.S.L.R.	Straits Settlements Law Reports
St. Tr.	State Trials
WIR	West Indies Reports

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PART I

THE DOCTRINE OF EMERGENCY POWERS

CHAPTER 1

EMERGENCY SITUATIONS AND THE NECESSITY DOCTRINE

Introduction

Emergency governments have existed from the earliest of times. Crisis government was recognised in early Rome to cope with an invasion or conspiracy.¹ The Roman city-state made provision in its constitution to suspend the elaborate structure of government and nominate a single person, usually a general, to take control of affairs during a crisis.² Of equal interest is the observation that once in power the dictators seldom gave up office.³ They perpetuated emergency rule and made it a way of life.

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1. R.M. MacIver, The Web Of Government (Revised Edition 1965. The Free Press. Macmillan Publishing Co. Inc. New York) p. 170.
 2. Ibid. The need for crisis government was underscored by Machiavelli who reportedly said "...those republics which in time of danger cannot resort to a dictatorship will generally be ruined when grave emergencies occur": quoted in Anthony Matthews, Freedom, State Security & The Rule Of Law. (Juta & Co. Johannesburg, 1986) at p. 192.
 3. MacIver, Ibid. As the learned author records: "Only Cincinnatus returned to his plow". The contemporary historian Barbara W. Tuchman gives another noteworthy example, of the 6th century B.C. ruler of Athens, Solon, who called to save the state from economic ruin and social unrest, introduced a series of reforms, and after exacting an oath from the Athenian Council to maintain his reforms for ten years, sailed away to voluntary exile for that period to avoid endless petitions for modifications to the reforms: see The March Of Folly: From Troy To Vietnam (Abacus Books, London, 1985) at pp.18-19. For an account of modern-day dictators refusing to give up office and holding power with apparent support of their people through the medium of populism, see Barry Rubin, Modern Dictators: Third World Coup-Makers, Strongmen And Populist Tyrants (Meridian, New York, 1987.)

The problem is by no means the disease of a bye-gone era. The International Commission of Jurists reported in a recent study that the exercise of emergency powers by national governments has become a problem of global importance.⁴ Equally disturbing is the tendency to make states of emergency perpetual. The Report also noted that in recent times a considerable part of humanity has been living under a state of emergency and that too accompanied often by grave violations of human rights.⁵ The conclusion is inescapable that in many countries the resort to crisis government is a constitutional pretense to exercise unchecked and uncanalised power. The problem is particularly acute in the third world countries where the potential for instability and civil disorder is greatest. In these countries the basic question always is whether adequate safeguards can be built into the system to prevent misuse of authority and the excuse of a facile resort to emergency rule.

It may be noted that a state of emergency is as much a legal problem as it is a political and social one. It raises grave questions regarding the status of constitutionalism in the country concerned.⁶ A state of emergency could arise as a result of a constitutional upheaval like a revolution or a

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4. States of Emergency: Their Impact On Human Rights. (A Study Prepared By The International Commission Of Jurists, Geneva, March 1983) at p. 413.
 5. Ibid. See Introduction by Niall MacDermot, Secretary-General of the International Commission of Jurists (ICJ), and also at p. 413.
 6. Constitutionalism has been defined by Professor S.A. De Smith as "the principle that the exercise of political power shall be bounded by rules; rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content": S.A. De Smith, Constitutionalism In The Commonwealth Today, (1962) 4 Malaya Law Review 205.

coup d'etat. In that event, the emergency arises *de hors* the terms of the governing constitutional instrument and raises questions immediately as to the continued validity of the existing constitution and the legitimacy of the revolutionary government which has supplanted it.⁷ Even in cases where emergency powers are constitutionalised,⁸ its invocation and exercise could raise difficult legal questions. For example, the proclamation of an emergency may be challenged as being *in fraudem legis*⁹ or that the emergency legislation are *ultra vires* the Constitution.¹⁰ These cases demonstrate that emergency situations present a myriad of legal problems, often of a complex nature, as will be seen in the discussion that follows.

Emergency Situations

Emergencies may arise under a number of circumstances. They are not necessarily political because natural catastrophies could produce emergency conditions as well. In *Bhagat Singh v. King Emperor*, Lord Dunedin attempted a definition in understandably broad terms when he called an emergency "a state

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7. For example, a succession of army take-overs in Pakistan since independence in 1949 has led to its courts evolving an impressive jurisprudence on the law pertaining to revolutions and constitutional breakdowns generally: see cases like *State v. Dosso* PLD 1958 SC 533; *Asma Jilani v. Government of Punjab* PLD 1972 SC 139.
 8. The term "constitutionlizing emergency powers" is defined as the prescription by law of the range of authority available to the executive and the relationships between the executive, the legislative and the courts in time of emergency: See Cornelius P. Cotter. Constitutionalizing Emergency Powers, The British Experience (1953) Stanford L. Review 382.
 9. For eg. *Stephen Kalong Ningkan v. Government of Malaysia* [1970] AC 379; [1968] 2 MLJ 238, dealing with the bona fide of the Government of Malaysia's advise to the King that grounds existed for declaring a state of emergency in the East Malaysian State of Sarawak.
 10. *Teh Cheng Poh v. Public Prosecutor* [1980] AC 458; [1979] 1 MLJ 50; a Malaysian case where the Privy Council struck down emergency legislation made by the King after Parliament had convened.

of matters calling for drastic action".¹¹ The purpose of emergency powers is obvious. It is to forestall any threat to the stability of the nation. It is commonly believed that there are six main types of emergencies, namely, war, economic recession, natural disaster, secession, insurrection and subversion.¹² Except for an emergency created by war, the other instances are generally classified as internal emergencies, and in respect of them, one talks of the exercise of peacetime emergency powers.

However it is war-time emergency measures that have done much to shape and influence the present day approach to emergency powers.¹³ War presents the clearest example of the type of threat to the safety of the nation that causes every other consideration to be subordinated. Thus the war effort by a nation and its people draws many casualties, chief of which is freedom and liberty.¹⁴ The obligation of a government to safeguard the integrity of the nation is often irreconcilable with certain freedoms exercisable by its citizens. This conflict has produced a plethora of court decisions from several jurisdictions born out of war time cases. The cases show a remarkable consistency in approach. With rare exceptions, the courts have voted in favour of the executive's war power.

11. AIR 1931 PC 111 at pp.111-112.

12. See Michael P. O'Boyle, Emergency Situation And The Protection Of Human Rights; A Model Derogation Provision For A Northern Ireland Bill Of Rights (1977) Vol. 28 N.I.L.Q. 160 at p. 161, and Herbert Marx, The Emergency Power And Civil Liberties In Canada (1970) Vol. 16 McGill L.J. 39 at p. 42.

13. David Bonner, Emergency Powers In Peacetime, London (Sweet & Maxwell), 1985 at p.2.

14. See for example, per Lord Macmillan in the well-known English case of Liversidge v. Anderson [1941] 3 AER 338 at 366: "(I)n a time of emergency, when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a

A good starting point is the juridical stand that the executive is the best judge of the requirements of the nation's safety. In an oft quoted passage of his judgment in The Zamora,¹⁵ Lord Parker C.J. said:

"Those who are responsible for the national security must be the sole judges of what the national security requires".¹⁶

In an Australian case,¹⁷ decided at about the same time, the court declared that it must be left to the wisdom of the Parliament and the Executive as to the appropriate war measures to implement because "they alone have the information, the knowledge and the experience and also, by the constitution, the authority to judge the situation and lead the nation to the desired end".¹⁸ Likewise in the United States, in *Hirabayashi v. United States*,¹⁹ concerning the internment of Japanese - Americans as a war-time preventive measure, the Supreme Court said "...it is enough that circumstances

contd...

14. meaning which, because of its drastic invasion of the liberty of the subject, the courts would be slow to attribute to a peacetime measure". From across the Atlantic we have the dictum of Holmes J. in *Moyers v. Peabody* 212 U.S. 78 [1909] at p.85: "When it comes to a decision by the Head of State upon a matter involving its life, the ordinary rights of the individual must yield to what he deems the necessities of the moment. Public danger warrant the substitution of executive powers for the judicial process". For a comprehensive discussion of the balance struck between national security and civil liberties in the United States, see (1972) 85 Harvard Law Review on The National Security Interest And Civil Liberties at p.1130 et. seq.
15. [1916] 2 AC 77.
16. Ibid at p. 107. See also *Bhagat Singh v. King Emperor* [1931] 58 IA 169. The continued acceptance of this principle is seen by its adoption by the Malaysian Supreme Court recently in a preventive detention case, *Minister of Home Affairs v. Karpal Singh* [1988] 3 MLJ 29 at p.31.
17. *Farey v. Burvett* [1916] 21 CLR 433.
18. Ibid at p. 455-56 per Isaacs J.
19. 320 U.S. 87 [1943].

within the knowledge of those charged with the responsibility for maintaining the national defence afforded a rational basis for the decision which they made".

The rationale for the war-power was given by Williams J. in the Australian case of *Adelaide Company of Jehovah Witnesses Inc. v. The Commonwealth*²⁰ in simple terms:

"Because war promotes abnormal conditions, abnormal means are required to cope with them".²¹

In a later case²² he elaborated on this theme:

"The paramount consideration is that the Commonwealth is undergoing the dangers of a world war and that when a nation is in peril, applying the maxim *salus populi suprema lex*, the courts may concede to the Parliament and the Executive which it controls a wide latitude to determine what legislation is required to protect the safety of the realm".²³

A strong jurisprudence has thus developed that when the nation's safety is in peril a rigid adherence to constitutional rules and liberty becomes inappropriate. One of the American founding fathers, Thomas Jefferson, gave the early thinking on this matter:

"To lose our country by a scrupulous adherence to the written law, would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us, thus absurdly sacrificing the end to the means".²⁴

20. [1943] 67 CLR 116.

21. Ibid at p. 161.

22. *The Victorian Chamber of Manufacturers v. The Commonwealth* [1943] 67 CLR 347.

23. Ibid at p.400.

24. From his "Writings" (Washington Ed.) pp.542-45: quoted in *Ajay Dixit v. State of U.P.* AIR 1985 SC 13 at p.20. See also the statement attributed to President Lincoln in a letter to Hodges, April 4, 1864: "Was it possible to lose the nation and yet preserve the Constitution?": quoted in foot-note (4) p.1 of Cotter's, Constitutionalizing Emergency Powers, supra, note 8.

However, in *Youngstown Sheet & Tube Co. v. Sawyer*,²⁵ the United States Supreme Court rejected the notion that the President as Commander-in-Chief had implied unlimited power to take whatever measures necessary for the war effort, including the seizure of a steel mill by executive order. This case was decided in the wake of the Korean War and is considered a constitutional landmark affirming the supremacy of the rule of law under the American Constitution. Delivering the opinion of the court Mr. Justice Black said:

"The contention is that presidential power should be implied from the aggregate of his powers under the Constitution..... Even though "theatre of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander-in-Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labour disputes from stopping production. This is a job for the nation's lawmakers, not for its military authorities... ..In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker..... The Constitution is neither silent nor equivocal about who shall make laws which the President shall execute".²⁶

In a separate concurring opinion Mr. Justice Douglas remarked: "while emergency does not create power, emergency may furnish the occasion for the exercise of power".²⁷ In like vein, dealing with emergency legislation as opposed to emergency powers, Viscount Simon remarked in the Privy Council case of *Attorney General Ontario v. Canada Temperance Federation*:²⁸

25. 343 U.S. 579 [1951]. For a first person account of the case, see William H. Harbough, Lawyer's Lawyer: The Life of John W. Davis (New York, O.U.P. 1973) pp. 462 et.seq., and William H. Rehnquist, The Supreme Court, How It Was, How It Is (New York, William Morrow 1987) p. 41 et.seq.

26. Ibid at p. 586.

27. Ibid at p. 704. See also *Home Building & Loan Assn v. Blaisdell*, 290 U.S. 398, 425 [1934], a case decided during the depression in the United States.

28. [1946] AC 193 at p.206.

"True it is that an emergency may be the occasion which calls for the legislation, but it is the nature of the legislation itself, and not the existence of emergency, that must determine whether it is valid or not".

These cases demonstrate a preparedness by the courts in spite of the grave emergency created by a war to ensure that war-time measures are kept within constitutional limits.

Nevertheless, the basic premise remains that the courts will not review the choice of measures taken by the executive on behalf of the war effort. The courts have invariably deferred to the executive's discretion in these matters. The rationale is simple that it is futile to talk of individual or group rights when the very existence of society or a way of life is threatened. It formed the basis for the decision of the High Court of Australia in the case of *The Adelaide Society of Jehovah Witnesses Inc. v. The Commonwealth*.²⁹ The case concerned a challenge to a proscriptive order made by the Government against a religious group called the Jehovah Witnesses. This group renounced the bearing of arms and campaigned against conscription during the war. The group argued that its religious freedom was violated. In repelling the challenge, Latham CJ said:

".....the protection of any form of liberty as a social right within a society necessarily involves the continued existence of that society as a society. Otherwise the protection of liberty would be meaningless and ineffective".³⁰

Likewise, in the wartime case of *Jones v. Opelika*, the United States Supreme Court observed that fundamental freedoms "are not absolute to be exercised independently of other cherished privileges protected by the same organic

29. Supra, note 20.

30. Ibid at p. 131.

instrument..... without which the constitutional guarantee of civil liberties would be a mockery".³¹

One juristic method has been to read the written constitution flexibly so as to give the Executive a wide latitude in prosecuting the war. This is evident in Isaacs J.'s judgment in *Farey v. Burvett*:³²

"The Constitution, so I view it, is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled".

In one case the court went as far as to say it would even countenance executive dictatorship. In *Yasny et al v. Lapointe*,³³ a Canadian court was considering a challenge to a ministerial order prohibiting the publication of a newspaper in the Russian language as subverting the war effort. In dismissing the challenge the court said:

"In times of peace the civil rights of the people, the liberty of the subject, the rights of free speech, and the freedom of the press, are entrusted to the courts. In wartime this may be changed. Parliament may take from the courts their judicial discretion and substitute for it the autocracy of bureaucrats".³⁴

The thinking was encapsulated graphically by Scrutton L.J. in his judgment in *Ronnfeldt v. Phillips*³⁵ decided during the First World War:

"It had been said that a war could not be conducted on the principles of the Sermon on the Mount. It might also be said that a war would not be carried on according to the principles of Magna Carta".

However, the notion that the fighting of a war becomes a licence for government lawlessness must quickly be dispelled. This is seen from the

31. 316 U.S. 584 [1942] at p. 593.

32. *Supra*, n. 16 at p. 451.

33. [1940] 3 DLR 204.

34. *Ibid* at p. 205.

35. [1918] 35 TLR 46 at p.47.

eventual fate that befell the majority opinions in the celebrated case of *Liversidge v. Anderson*³⁶ and the reinstatement of Lord Atkin's dissent as expressing the correct law.³⁷ The approach of the majority was embodied in these words of Lord MacMillan:

"....in a time of emergency, when the life of the whole nation is at stake, it may well be that a regulation for the defence of the realm may quite properly have a meaning which, because of its drastic invasion of the liberty of the subject, the courts will be slow to attribute to a peacetime measure."³⁸

In contrast, Lord Atkin spoke these words which were to enjoy vindication in posterity:

"In England amidst the clash of arms the laws are not silent. They may be changed but they speak the same language in war as in peace".³⁹

It is perhaps unfortunate that the war-power rationale has been extended to every emergency faced by a nation regardless of the source of the threat. This is because war-time cases are decided when the judges are under a subconscious pressure not to stultify the war effort by their decisions. It is doubtful therefore if these cases could stand as general precedents for all times. Lord Diplock implicitly recognised that war-hysteria had made the

36. [1941] 3 AER 338. For an interesting account of behind-the-scene happenings before judgment was delivered by the House of Lords in the case, and Lord Maugham's public outcry after reading Lord Atkin's dissent, see RFV Heuston: *Liversidge v. Anderson in Retrospect* (1970) 86 LQR66, and Geoffrey Lewis, Lord Atkin (Butterworths) 1983 pp. 132 et. seq.

37. In *Ridge v. Baldwin* [1964] AC 40 at p. 65 Lord Reid referred to *Liversidge* as a "very peculiar decision". The denouement came in *IRC v. Rossminster* [1980] AC 953: "For my part I think the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently, and at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right", per Lord Diplock at p. 1101D.

38. *Supra*, note 14 at p. 366C.

39. *Ibid* at p. 361C.

majority in *Liversidge v. Anderson* "excusably" go wrong.⁴⁰ In the United States, early after the Second World War, Mr. Justice Jackson of the Supreme Court warned that war-time decisions were unsuitable for general application:

"No one will question that this (war) power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervour that makes moderation unpopular. And, worst of all, it is interpreted by the Judges under the influence of the same passions and pressures".⁴¹

Nevertheless, these principles have been applied without modification to justify peacetime emergency measures. There are various methods by which governments deal with peacetime emergency situations. They range from the French "état de siège" which is a constitutionally recognised form of emergency government, to military administrations in the form of martial law.⁴² The common denominator running through the various forms of emergency government is the reposing of near totalitarian power in the hands of the Executive. With this comes the attendant danger of abuse and misuse of the newly acquired power. In the result, in many countries there is resort to emergency rule to prop up an unpopular government or for no reason other than for the government to have unchecked power.⁴³ In third world countries, where

40. See supra, note 36.

41. *Woods v. Miller Company* 333 U.S. 138 [1947] at p. 146. See also Turner J. in the New Zealand case of *Reade v. Smith* [1959] NZLR 996 at 1000: "Cases dealing with war regulations promulgated in times of great national danger must, in my opinion, be carefully examined before being used too hastily as a touchstone for the validity of regulations made under more normal conditions".

42. See Marx, op.cit., p.42; Michael P. O'Boyle, op.cit., p. 162.

43. See generally the Report of the International Commission of Jurists, supra, note 4.

the rule of law is not firmly entrenched, the continuance of emergency government long after the danger has abated is not uncommon. A written constitution is never regarded as an impediment to achieve the ulterior political objective behind a state of emergency. A keen writer on African constitutional development observed generally on this phenomena:

"In the Third World, constitutions are seen not as the protectors of human rights but as instruments for legitimising the exercise of arbitrary power. The kind of constitutional law that most people understand in the Third World is the law that allows the government to impose unreasonable laws, to arrest and detain persons whose guilt is often highly suspect, to impose restrictions on the freedom of movement, association and speech, and to do whatever the whims of political leaders dictate. Ultimately, constitutional law in the Third World is the obstacle that revolutionaries and military 'coup d'etat find to be an easy target and the removal of which introduces even more stringent measures. It may be argued therefore that in the Third World, constitutional law has no more validity or sanctity than what is often accorded to notions of democracy, the rule of law and constitutionalism".⁴⁴

Whether the cause for a state of emergency is real or specious, the juridical basis for its proclamation at common or general law is invariably grounded in the doctrine of state necessity as will be seen in the ensuing discussion.

It is reported that during the American Civil War, Lincoln broke laws, violated the Constitution, usurped arbitrary powers, and trampled individual liberties. His justification was necessity.⁴⁵ His explanation was:

"My oath to preserve the Constitution imposed on me the duty of preserving by every indispensable means that government..... By general law, life and limb must be protected, yet often a limb must be amputated to save a life, but a life is never wisely given to save a limb. I felt

44. George W. Kanyeihamba, Constitutional Obligation In Developing Countries, in Essays On Third World Perspectives In Jurisprudence, Ed. Marasinghe & Conklin (Malayan Law Journal) 1984, 29 at pp. 36-37.

45. See Richard Nixon, Leaders (Warner Books Inc. New York 1982) at p. 326.

that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the Constitution through the preservation of the nation".⁴⁶

Necessity is essentially a political concept used to justify extra-constitutional conduct and clothe it with some legal basis. It bears out Chitty's statement that "necessity knows no law"⁴⁷ and Bracton's maxim that "necessity makes lawful that which is unlawful".⁴⁸

The principle of necessity is now a recognised part of constitutional jurisprudence and has come a long way since its first rejection by Lord Camden C.J. in *Entick v. Carrington* [1765] 19 St Tr 1030 at 1073 in the famous line: "(W)ith respect to the argument of State Necessity... the common law does not understand that kind of reasoning". The Latin maxims, *salus populi est suprema lex* (the safety of the people is the supreme law) and *salus reipublicae est suprema lex* (safety of the State is the supreme law), lie at the heart of the doctrine of necessity. Broom explains the maxims as based "on the implied agreement of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances be placed in jeopardy or even sacrificed for the public good".⁴⁹

46. Ibid.

47. Chitty, author of the classic book "Prerogatives of the Crown" (1820): quoted in the Pakistan case of In Re Special Reference PLD 1955 SC 435 at p. 485.

48. "*Quvad alias non est lisitum necessitas lisitum pacit*": quoted in S.A. De Smith "Constitutional Lawyers In Revolutionary Situations" (1968) 7 W. Ontario L.R. 93 at p.97.

49. Broom's Legal Maxims 9th Edn. 1924, at p.1.

Defending The Realm And The Royal Prerogative

Early English constitutional law recognised the concept of "*suprema potestas*", that is, that the defence of the realm is entrusted to the Crown embodied in the person of His Majesty. It was explained by Avory J. in In Re A Petition Of Right:⁵⁰

".....(T)he authorities appear to establish that by the Constitution the defence of the realm is entrusted to the Crown, that the law has entrusted the person of His Majesty with the care of this defence, that in this business of defence the "*suprema potestas*" is inherent in His Majesty as part of his Crown and kingly dignity, that in times of war or invasion the maxim "*salus populi suprema lex*" must prevail, and that in these times of war not only His Majesty but likewise every man that hath power in his hands, may take the goods of any within the realm, pull down their houses or burn their corn to cut off victuals from the enemy, and do all other things that conduce to the safety to the kingdom without respect had to any man's property".⁵¹

The royal prerogative, as it is known, is accepted as part of the common law of England.⁵² Dicey has defined it as "the residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown".⁵³ The prerogative was judicially considered in some early cases. Almost all of them concerned the taking of private property without compensation by the Crown in the defence of the realm.⁵⁴ In this, the *De*

50. [1915] 3 K.B. 649.

51. At pp. 651-652. See also Lord Dunedin in *Attorney General v. De Keyser's Royal Hotel* [1920] AC 508 at p. 524: "...the King, as *suprema potestas* endowed with the right and duty of protecting the Realm, is for the purpose of the defence of the realm in times of danger entitled to take any man's property....".

52. Per Lord Cozen-Hardy M.R. in In Re A Petition of Right (Court of Appeal), supra, note 50 at p. 659.

53. See RFV Heuston, Essays In Constitutional Law 2nd Edn. (Stevens) 1964 p. 58. See also B.S. Mardesinis, The Royal Prerogative Re-Visited (1973) Camb. L.J. 287.

54. R v. Hampden [1637] 3 Howell's State Trials, 825 (the Ship Money case); The King's Prerogative in Saltpetre (1607) 12 Co. Rep. 12.

Keyser case⁵⁵ in the House of Lords is the most significant of its kind this century. It was there held that the royal prerogative could not be invoked to justify seizure of private property in the face of a statute providing for taking with compensation. In his speech, Lord Moulton discussed the royal prerogative from its early times:

".....one must consider the nature and extent of the so called Royal Prerogative in the matter of taking or occupying land for the better defence of the realm. I have no doubt that in early days, when the war was carried on in a simpler fashion and on a smaller scale than in the case in modern times, the Crown, to whom the defence of the realm was entrusted, had wide prerogative power as to taking or using the lands of its subjects for the defence of the realm when the necessity arose. But such necessity would be in general an actual and immediate necessity arising in the face of the enemy and in circumstances where the rule *salus populi suprema lex* was clearly applicable".⁵⁶

The next important case is *Burmah Oil Company v. Lord Advocate*,⁵⁷ where the modern day operation of the prerogative was considered. The case arose out of a claim for damages by an oil company in Burma. The oil company had several oil installations which were destroyed by British forces during the last war. In his speech Lord Reid remarked "(T)here is difficulty in relating the prerogative to modern conditions"⁵⁸ and referred to it as "a relic of a past

55. See note 51, supra.

56. At p. 552. See also Darling J in *In Re Arbitration Between Shipton, Anderson & Co.* [1915] 3 KB 676 at p. 684, dealing with the seizure of wheat by the Government for the war effort: "We are in a state of war; that is notorious. The subject matter of this contract has been seized by the State acting for the general good. *Salus populi suprema lex* is a good defence, and the enforcement of the essential law gives no right of action to whomsoever maybe injured by it".

57. [1964] 2 All ER 348.

58. Op. cit. at p. 354. The claim succeeded only because the court found that the destruction of the oil installations was part of a long-term deliberate strategy and therefore did not fall within the recognised exception of battle damage. The principle that damage to civilian property as a necessity of battle and therefore not compensable is of long standing. It was epitomised by Field J. in a decision of the United

past age".⁵⁹ Both Lord Reid and Lord Pearce were of opinion that the prerogative was available only for a case not covered by statute.⁶⁰ A recent decision of the English Court of Appeal applied the royal prerogative as an alternative plea to defend a circular from the Home Office on supply of police equipment to the constabulary. In *R v. Secretary of State Ex parte Northumbria Police Authority*,⁶¹ the Court said that if the Police Act touching on the subject was not applicable, the Home Office was entitled to rely on the prerogative power to keep peace and for this purpose supply equipment to deal with actual or apprehended public disorder. The decision affirms the current view that the prerogative power may exist parallel to a statutory power but may not be exercised if to do so would be incompatible with the statute.

contd...

58. States Supreme Court arising from the American civil war, *United States v. Pacific Railroad Co.* [1887] 120 U.S. 227 at pp. 233-34: "The destruction or injury of private property in battle, or in the bombardment of cities and towns, and in many other ways in the war, had to be borne by the sufferers alone as one of its consequences. Whatever would embarrass or impede the advance of the enemy, as the breaking up of roads, or the burning of bridges, or would cripple and defeat him, as destroying his means of subsistence, were lawfully ordered by the commanding general. Indeed, it was his imperative duty to direct their destruction. The necessities of the war called for and justified this. The safety of the state in such cases overrides all considerations of private loss. *Salus populi is then, in truth, suprema lex*".
59. *Ibid.* See also *BBC v. Jones* [1965] Ch.32: "It is 350 years and a civil war too late for the Queen's Courts to broaden the prerogative" (at p. 79 per Diplock L.J.).
60. At pp. 354C and p. 384I respectively. See reiteration of these principles in *Laker Airways v. Department of Trade* [1977] 2 AER 182 at 193: "Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the courts just as any other discretionary power which is vested in the executive".
61. [1988] 1 All. E.R. 556.

Written Constitutions And The Implied Power To Act In Defence
Of The Realm

Where there is a written constitution, and in the absence of express provisions in it to deal with a threat to the security of the state, the cases show that a power will be implied authorising the Executive to take all necessary measures to safeguard the state.⁶² As Isaacs J. declared in the Australian case of *Farey v. Burvett*:⁶³ "The Constitution, as I see it, is not so impotent a document as to fail at the very moment when the whole existence of the nation it is designed to serve is imperilled".⁶⁴

In *Fort Frances Pulp & Power Company Ltd. v. Manitoba Free Press Company Ltd.*,⁶⁵ the Privy Council had to consider whether the Dominion Government of Canada had inherent power to limit the supply of newsprint paper for the whole of Canada. The question arose in the context of an argument that this subject was outside the legislative competence of the Dominion Parliament, being reserved for the provincial legislatures. Viscount Haldane for the Board premised his decision on the implied power in the constitution to deal with a "sudden danger to social order arising from the outbreak of a great war".⁶⁶ He said:

"This principle of a power so implied has received effect also in countries with a written and apparently rigid constitutions such as the

62. The continental legal philosopher Grotius called it an "implied mandate" from the lawful sovereign to take measures to keep law and order in the territory whether controlled by the lawful government or an usurper (*De Jure Belli Et Pacis*): see Privy Council in *Madzimbamuto v. Lardner-Burke* [1968] 3 All ER 561 at pp. 577, 579, 581.

63. [1916] 21 CLR 433.

64. *Ibid* at p. 451.

65. [1923] AC 695.

66. *Ibid* at p. 703.

United States, where the strictly federal character of the national basic agreement has retained the residuary powers not expressly conferred on the Federal Government for the component states..... In a sufficiently great emergency such as that arising out of war, there is implied the power to deal adequately with that emergency for the safety of the Dominion as a whole".⁶⁷

Lord Haldane's reference to the United States experience must apropos be the American doctrine of police power. This doctrine is said to be an inherent attribute of the American Constitution exercisable without any express grant. The inherent police power was a concept devised by the United States Supreme Court to overcome the statement of fundamental rights in absolute terms in the American Constitution and to enable the government to make regulations for the health, peace, morals and good order of the people.⁶⁸

However, the police power doctrine has not been adopted in countries with written constitutions which provide expressly for qualification of the exercise of fundamental rights in the interest of the state. Thus in India, the Indian courts have avoided importing the concept of police power "because what has been achieved in the U.S.A. under that concept was exercisable by the State in India under the constitution itself".⁶⁹ In *Dwarkadas v. The Sholapur Spinning & Weaving Company Ltd.*,⁷⁰ the Indian Supreme Court expressly rejected the argument that the take-over of a textile mill could be justified under inherent "police power" in the absence of express legislative authorisation. Bose J. said:

67. Ibid at pp. 704-705.

68. *Chicago, Burlington & Quincy Ry v. Illinois* 200 U.S. 561; *Meyer v. Nebraska* 262 U.S. 390.

69. See M.P. Jain, Indian Constitutional Law (4th Edn. 1987) N.M. Tripathi Ltd. Bombay, pp. 685-686.

70. AIR 1954 SC 119.

"With the utmost respect I deprecate, as I have done in previous cases, the use of doubtful words like "police power", "social control", "eminent domain" and the like. I say doubtful, not because they are devoid of meaning but because they have different shades of meaning in different countries, and because they represent powers which spring from widely differing sources. In my opinion, it is wrong to assume that these powers are inherent in the State in India and then to see how far the Constitution regulates and fits in with them. We have to interpret the plain provisions of the Constitution and it is for jurists and students of law, not for judges, to see whether our Constitution also provides for these powers and it is for them to determine whether the shape which they take in India resemble any of the varying forms which they assume in other countries".⁷¹

Likewise in Malaysia, which has a constitution modeled on India, it has been argued that "the doctrine of inherent police power as interpreted by the American courts, has no force or validity and no place in the framework of (Malaysia's) constitutional process".⁷² The reasoning was that where the Constitution itself defines the limitation that may be imposed on the exercise of fundamental rights this virtually constitutes "a constitutional modification of the doctrine of police power".⁷³

It is apparent that the difficulty lies not in determining the source of the exercise of peacetime emergency powers by governments but in ascertaining the scope and extent of these powers. Can the government rely on its inherent or residual power to call out the military to quell civil unrest or an insurrection? Does this power extend to handing over the reins of government to the military or to exercise martial law powers over the people? If these measures are taken, what is the status of the personal and property rights of the individual?

71. Ibid at p. 137.

72. Mr. Justice E. Abdoolcader, Constitutional Process And The Doctrine Of Police Power (1977) 2 MLJ xxxi.

73. Ibid.

Civil Unrest, Martial Law And The Necessity Doctrine

The law of civil necessity is an aspect of the State Necessity doctrine. It is grounded on the basic principle that it is as much important to preserve the sovereignty of the state from external threat by war or invasion as it is to act to quell internal disorder, rebellion, insurrection or any like activity leading to a constitutional disruption.

An early case dealing with this question was *Proceedings Against George Stratton & Ors.*⁷⁴ The defendant and his followers were tried in England for the misdemeanour of arresting and imprisoning the Governor of the Settlement of Madras which belonged then to the East India Company. The defence was that the defendant had acted out of necessity to preserve the constitution because the Governor was repeatedly flouting it. In his address to the jury Lord Mansfield dealt with the elements of the law of civil necessity:

"It must be very imminent, it must be very extreme, and in all they do, they must appear clearly to do it with a view of preserving the society and themselves, with a view of preserving the whole..... If the governor does twenty illegal acts, that will not be a justification of it; it must tend to the dissolution of society and the intervention must tend to the preservation of it.

But the only question for you to consider is this whether there was that necessity for the preservation of the society and the inhabitants of the place as authorises private men to take possession of the government; and to take possession of the government to be sure it was necessary to do it immediately.

If you can find that there was that imminent necessity for the preservation of the whole, you will acquit the defendants".

The defence failed and the accused were convicted.

In *Philips v. Eyre*,⁷⁵ the English Court had to consider whether the Governor of the Colony of Jamaica was open to actions for assault and false

74. [1779] 21 State Trials 1046.

75. [1870] L.R.Q.B. 1.

imprisonment for steps taken to quell rebellion and insurrection in the province. Willes J. dealt at length on the powers of the civil authority to quell a rebellion:

"This perilous duty, shared by the governor with all the Queen's subjects, whether civil or military, is in an especial degree incumbent upon him as being entrusted with the powers of government for preserving the lives and property of the people and the authority of the Crown; and if such duty exist as to tumultuous assemblies of a dangerous character, the duty and responsibility in case of open rebellion are heightened by the consideration that the existence of law itself is threatened by force of arms and a state of war against the Crown established for the time. To act under such circumstances within the precise limits of the law of ordinary peace is a difficult and may be an impossible task, and to hesitate or temporize may entail disastrous consequences. Whether the proper, as distinguished from the legal, course has been pursued by the governor in so great a crisis, it is not within the province of a court of law to pronounce..... It is manifest, however, that there may be occasions in which the necessity of the case demands prompt and speedy action for the maintenance of law and order at whatever risk, and where the governor may be compelled, unless he shrinks from the discharge of paramount duty, to exercise de facto powers which the legislature would assuredly have confided to him if the emergency could have been foreseen, trusting that whatever he has honestly done for the safety of the state will be ratified by an Act of indemnity and oblivion. There may not be time to appeal to the legislature for special powers. The governor may have, upon his own responsibility, acting upon the best advise and information he can procure at the moment, to arm loyal subjects, to seize or secure arms, to intercept munitions of war, to cut off communication between the disaffected, to detain suspected persons, and even to meet armed force by armed force in the open field. If he hesitates, the opportunity may be lost of checking the first outbreak of insurrection, whilst by vigorous action the consequences of allowing the insurgents to take the field in force may be averted. In resorting to strong measures he may have saved life and property out of all proportion to the mistakes he may honestly commit under information which turns out to have been erroneous or treacherous".⁷⁶

In that case the Governor had acted after a proclamation of martial law. However, a proclamation is not a prerequisite for a state of martial law to exist. In *Tilonko v. Attorney General of Natal*,⁷⁷ Lord Halsbury called it "an entire delusion" that martial law exists by reason of the proclamation.

76. Ibid at pp. 16-17.

77. [1907] AC 93.

He declared: "The right to administer force against force in actual war does not depend upon the proclamation of martial law at all".⁷⁸ In the Irish case of *The King (Ronayne & Mulcahy) v. Strickland & Anor*,⁷⁹ the court held that when a state of facts exists which justifies the imposition of martial law, the forces of the Crown, without any proclamation, may be employed in executing it.

The question that follows is whether the proclamation of a state of affairs justifying martial law is conclusive against judicial review? The cases that have dealt with this problem generally arose in the context of whether civilians arrested in areas under martial law could be subjected to military tribunals instead of the regular civil courts. In *Ex Parte Milligan*,⁸⁰ and again in *Duncan v. Kahanamoku*,⁸¹ the United States Supreme Court ruled that, notwithstanding martial law, the military trials of accused persons ordinarily triable in the regular courts whilst those courts were open was in violation of the Constitution. *Duncan* was decided a few years after martial law was proclaimed in Hawaii following the Japanese attack on Pearl Harbour. The Supreme Court said that the power to declare martial law does not include the power to supplant civilian laws by military orders and to supplant

78. Ibid at p. 94. See also W.S. Holdsworth in "Martial Law Historically Considered" (1902) 18 LQR 117 at p. 129: "The law..... acts on the same principles in judging the conduct of those who have acted under a proclamation of martial law, and in judging the conduct of those who have used force to suppress a riot. The proclamation in no way adds to the powers inherent in the government of using force to suppress disorder".

79. [1921] 2 IR 333.

80. 18 L. ed. 281, 303.

81. 327 U.S. 304 [1945].

courts by military tribunals, where conditions are not such as to prevent the enforcement of the laws by the courts. But in *Ex Parte Marais*,⁸² the Privy Council held on a similar question, that the fact that civil courts were functioning in a district in which martial law has been proclaimed is not conclusive that war is not raging. The petitioner in that case complained that he was denied access to the civil courts.

Ex Parte Marais depicts the general attitude of the courts under common law systems not to review the judgment of the government that circumstances exist necessitating the imposition of martial law. But judicial reticence in this regard cannot be considered as universal or unqualified. In *The King (Garde & Ors) v. Strickland*,⁸³ the Irish Court said that it has the power when its jurisdiction is invoked to decide whether a state of war exists which justifies the application of martial law. The point was said to be destitute of authority and Molony C.J. expressed his wish to state this proposition in "the clearest possible language".⁸⁴ In the later case of *R. (O'Brien) v. Military Governor N.D.U. Internment Camp*,⁸⁵ Molony C.J. rejected the argument that the civil courts of Dublin had no jurisdiction to issue a writ of habeas corpus because of a state of war. He said:

"I am satisfied that it has not been proved that a state of war or armed rebellion at present exists in the city of Dublin. There is, no doubt, a certain amount of disorder, and the presence of the military may be sometimes required for the purpose of assisting the police in the maintenance of order or the protection of buildings. Parliament is, however, sitting without interruption, every court is functioning, writs are duly served and executed, and while it may sometimes be necessary

82. [1902] AC 109.

83. [1921] 2 IR 317.

84. Ibid at p. 329.

85. [1924] 1 IR 32.

that the civil administration should be aided by military force, it by no means follows that in every case where military aid is necessary, a state of war or armed rebellion can be said to exist".⁸⁶

In *Sterling v. Constantin*,⁸⁷ the United States Supreme Court had to consider whether it could go behind the Governor's declaration that an insurrection exists and that certain measures are needed to suppress it. In repelling the argument that the Governor's decision was conclusive, Chief Justice Hughes declared: "If this extreme position could be deemed to be well taken, it is manifest that the fiat of a State Governor, and not the Constitution of the United States, would be the supreme law of the land..... There is no such avenue of escape from the paramount authority of the Federal Constitution".⁸⁸ It is submitted that the American decision has rightly fastened on the principle that it is inimical to the notion of supremacy of the Constitution if the Executive should have a conclusive say in these matters.

The term "martial law" is often understood to mean the abrogation of constitutional government and its replacement by military rule. The Duke of Wellington is reported to have said that "martial law is neither more nor less than the will of the General who commands the army. In fact martial law means no law at all".⁸⁹ No less an authority than Maitland appears to confirm this: ".....it is an improvised justice administered by soldiers".⁹⁰ In *Duncan v. Kahanamoka*,⁹¹ Chief Justice Stone gave a comprehensive constitutional

86. Ibid at p. 42.

87. 287 U.S. 378 [1932].

88. Ibid at pp. 397-98.

89. See Holdsworth, *op.cit.*, at p. 132.

90. See Heuston, *Essays*, *op.cit.*, at p. 151.

91. *Supra*, note 81. See generally also 8 Halsbury's Laws 4th Edn. p. 625 et.seq.

definition of the term: ".....martial law is the exercise of the power which resides in the executive branch of the government to preserve orders and insure the public safety, in times of emergency, when other branches of the government are unable to function, or their functioning would itself threaten the public safety. It is a law of necessity to be prescribed and administered by the executive power. Its object, the preservation of the public safety and good order, defines its scope, which will vary with the circumstances and necessities of the case. The exercise of the powers may not extend beyond what is required by the exigency which calls it forth".⁹² In *Asma Jilani v. Government of Punjab*,⁹³ the Supreme Court of Pakistan said martial law is of three types: (1) law regulating the rule of conduct of the armed forces; (2) law imposed on an alien territory under occupation by an armed force, and (3) law which relates to a situation where the civil power is unable to maintain law and order and the military power is used to recreate conditions of peace in which the civil power is able to reassert its authority.⁹⁴ It is with the last of the three situations enumerated that we are presently concerned.

Martial law is often taken to be synonymous with military rule. In *Asma Jilani's* case, the Pakistan Supreme Court suggested that a distinction must be made between martial law as a machinery for the enforcement of internal order and martial law as a system of military rule of a conquered or alien territory. It was said that martial law of the first category is normally brought about by proclamation issued under the authority of the civil government. The civil government is displaced only where a situation has

92. Ibid at p. 336.

93. PLD 1972 SC 139.

94. Ibid at pp. 152-53.

arisen in which it has become impossible for the civil courts and other civil authorities to function.⁹⁵

A distinction may also be made between martial law and emergencies proclaimed under a written constitution or under statutory powers as in the United Kingdom. It is said that the two are very different concepts.⁹⁶ The basis of martial law is actual rebellion or insurrection whereas emergencies under most written constitution can be proclaimed in anticipation of a breakdown of law and order. The fundamental difference lies in the absence of formalities that brings about a state of martial law. A similar distinction is made between martial law and the French concept of the "état de siège" (state of seige) which like the emergency in the written constitutions of common law countries is a constitutionally recognised method of dealing with crises situations.⁹⁷

It is the fact of a constitutional breakdown and not the cause of it that brings about martial law. Lord Pearce observed in *Madzimbamuto's* case: "Questions of martial law do not depend upon the merits of an invasion. When a state of rebellion or invasion exists, the law must do its best to cope with resulting problems that beset it".⁹⁸ However, once a state of martial law exists the maxim *inter arma silent leges* (in the midst of arms the law is silent) prevails. Lord Halsbury said in *Ex Parte Marais*:⁹⁹ "The civil courts

95. Ibid at p. 187.

96. See M.P. Jain, *op.cit.*, at p. 719.

97. See Friedrich & Sutherland, Defense Of The Constitutional Order, in Boyle & Friedrich, Studies In Federalism (Little Brown and Company. Boston; Toronto. 1954) at pp. 678-79.

98. *Supra*, at p. 5871.

99. *Supra*, note 82 at p. 115.

will not call in question the propriety of the action of military authorities". In *R. (Childers) v. Adjutant General of the Provisional Forces*,¹⁰⁰ the Irish Court elaborated on this principle:

"For the purpose of suppressing this rebellion and restoring order, the Provisional Government has been obliged to employ its army. Force must be met by force, and violence by violence; and once an army is set in motion - once a state of war has been established - the rough and ready methods of warfare must be adopted, and take the place of the precise and orderly methods of civil government. The ordinary law is silenced by the sound of the pistol-shot and the bomb. *Inter arma silent leges* is a maxim two thousand years old, and has come down to us from the Romans. *Suprema lex, salus populi* must be the guiding principle when the civil law has failed. Force then becomes the only remedy, and those to whom the task is committed must be the sole judges how it should be exercised".¹⁰¹

It does not mean, however, that the proclamation of martial law *ipso facto* terminates the civil and fundamental rights of the people affected. The correct position is that it does not automatically suspend civil rights: *Wilson & Co. v. Freeman* [1959] 178 179F. Supp. 520 at pp. 531-33. In *Asma Jilani's* case, the Pakistan Supreme Court held that martial law by itself did not involve the abrogation of the civil law or the Constitution.¹⁰² The case considered whether the handing over of the reins of government to the Military Commander by the President of Pakistan through a letter exhorting him to restore civil order was constitutional. The Military Commander, General Yahya Khan, had subsequently abrogated the Constitution and proclaimed martial law throughout the country. Hamoodur Rahman C.J. ruled that the declaration of martial law was unconstitutional and invalid:

100. [1922] 1 IR 5.

101. Ibid at p. 14, per O'Connor M.R.

102. Supra, note 93 at p. 190.

"There was nothing in this letter to show that he (the President of Pakistan) was appointing General Agha Muhammad Yahya Khan as his successor-in-office or was giving him authority to abrogate the Constitution which he himself had given to the country in 1962. Both these documents merely called upon the Commander-in-Chief of the army to discharge his legal and constitutional responsibility not only to defend the country against external aggression but also to save it from internal disorder and chaos. He did not even proclaim martial law. Nevertheless the Commander-in-Chief on his own proclaimed martial law..... It is difficult however, to appreciate under what authority a Military Commander could proclaim Martial Law. Even in 1958 the Martial Law was proclaimed by the President. In my view, the Military Commander had no power also to abrogate the Constitution, although the learned Attorney-General has contended that the Proclamation of Martial Law by its own intrinsic force gave him the right to do".¹⁰³

In third world countries, when the military is invited to intervene to restore law and order the situation is often fraught with danger for the civilian government. In many cases soldiers when brought out could not be returned to their barracks. Many civilian governments have learnt it is not in the disposition of a military commander to hold free elections or return power to a democratically elected civilian government. Thus the *Asma Jilani* possibility always looms omnipresent when control of government is handed over to the military.

But when a civilian government remains in control and deploys military forces to quell civil unrest and disorder it is decidedly not a state of martial law. It has long been recognised at common law that the disposition and armament of the armed forces is entirely at the discretion of the Crown.¹⁰⁴ For example, the use of the military in industrial disputes is not uncommon. It is recorded that since 1945, the armed forces intervened in at least 23 disputes in Great Britain.¹⁰⁵ A corollary theory at common law that

103. Ibid at pp. 183-185.

104. See *Chandler v. DPP* [1964] AC 763 per Lord Reid.

105. See Christopher J Whelan, Military Intervention in Industrial Disputes (1979) 8 Industrial Law Journal 222; See also, Geoffrey Marshall, Constitution Conventions (Oxford 1984) p. 154 et. seq. See further,

soldiers could act on their own to restore order where they apprehend a breach of the peace can now be regarded as an anachronism of the past.¹⁰⁶ This theory called the "soldiers are citizens" doctrine was based on an extension of the right inherent in citizens to effect the private citizen's arrest at common law. Today, with the acceptance of the constitutional principle of military subordination to a civilian government that theory has fallen into desuetude. Thus, the constitutional principle is settled that the military may not intervene in civil disturbances of their own volition. However, once the military is deployed to quell an insurrection or rebellion, the actual measures it takes to complete its job is not justiciable before the Courts: *The King (Garde) v. Strickland*.¹⁰⁷ The maxim *inter arma silent leges* will apply: *R. (Childers) v. Adjutant General Of The Provisional Forces*.¹⁰⁸ But in *Ex Parte Marais*,¹⁰⁹ Lord Halsbury appeared not to foreclose judicial satisfaction of the question whether civil unrest justified military action:

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105. Gillian S. Morris, The Police And Industrial Emergencies (1980) 9 Industrial Law Journal 1, on the use of the police force to perform the work of striking workers in certain essential services. Dr. Morris is critical of this practice stating that "it involves a fundamental shift in their role in disputes: officially one of neutrality" (p.7).

106. Steven C. Greer, Military Intervention in Civil Disturbances: The Legal Basis Reconsidered (1983) Public Law 573.

107. *Supra*, note 83.

108. *Supra*, note 100. For a discussion of the right of soldiers to use firearms when on duty to maintain peace in circumstances of civil unrest, see *Attorney General For Northern Ireland's Reference* (1977) AC 105. In this case, a soldier had shot dead an unarmed man seen running away from the scene of military operations. The approach of the court was to treat the question as essentially a question of fact for the jury as to whether the use of force was reasonable.

109. *Supra*, note 82.

"It may often be a question whether a mere riot, or disturbance neither so serious nor so extensive as really to amount to a war at all, has not been treated with an excessive severity, and whether the intervention of the military force was necessary but once let the fact of actual war be established, and there is an universal consensus of opinion that the civil Courts have no jurisdiction to call in question the propriety of the action of military authorities".¹¹⁰

The approach the courts may take to determine the question whether civil unrest was of a degree necessitating military intervention can be seen in *Childer's* case. This case was decided by the Dublin Court shortly after the establishment of a Provisional Government in Ireland. O'Connor M.R.'s approach was to take cognizance of the fact that a group opposed to the establishment of a Provisional Government had raised an insurrection. He observed: "This party has raised an army called the Irish Republican Army, and by means of it they are seeking to overthrow the existing Government, and replace it by an Irish Republic. The result has been the reduction of the country to a state of chaos".¹¹¹ In Court, the Provisional Government had tendered an affidavit to prove the state of unrest in the country. But O'Connor M.R. was prepared to take judicial notice of that fact:

"But if there was no affidavit at all, I would be bound to take judicial notice of the fact that for months this country has been enduring a state of war. I am sitting here in this temporary makeshift for a Court of Justice. Why? Because one of the noblest buildings in this country, which was erected for the accommodation of the King's Courts and was the home of justice for more than a hundred years, is now a mass of crumbling ruins, the work of revolutionaries, who proclaim themselves the soldiers of an Irish Republic. I know also that the Public Record Office (a building that might well have been spared even by the most extreme of irreconcilables) has been reduced to ashes, with its treasures, which can never be replaced. I know also that railways have been torn up, railway stations destroyed, the noblest mansions burned

110. Ibid at p.115.

111. Supra, note 100 at p.14.

down, roadways made impassable, bridges blown up, and life and property attacked in almost every county in Southern Ireland. If this is not a state of war, I would like to know what is".¹¹²

The learned judge accordingly held that the civil authority was justified in taking all measures within its powers to re-establish law and order.¹¹³

Where the civilian government is firmly in authority, the legal basis for military intervention in civil disturbances does not present much difficulty. The position is however different where the civil disturbance is in reality a revolution which succeeds in overthrowing the government and the existing constitutional order. The problem that then confront the courts is of a different kind. The "rebels" form the de facto government and in them is "vested" the right to exercise emergency powers. If the judges decide to continue in office they may have the unenviable task of adjudicating on the legality of governmental actions under circumstances where their own position under the existing constitutional situation is dubious and the legitimacy of the government itself suspect. In that event, do the usual principles justifying emergency action apply? Can the actions of a revolutionary government be legitimated? We may next examine these questions.

112. Ibid at p.13.

113. Per O'Connor M.R.: "This is the condition of affairs which confronts me when I come to deal with this case, and I have first to ask myself is this state of things to be allowed to continue, and on whom devolves the duty of re-establishing peace and order, and saving the country from utter destruction? Plainly this duty falls upon the Government - whatever that Government may be - whether it be merely provisional or finally constituted. Whatever character it bears the salvation of the country depends upon it": *ibid*.

CHAPTER IICONSTITUTIONAL BREAKDOWNS AND
THE LEGITIMATING PROCESSIntroduction

In *Madzimbamuto v. Lardner Burke*,¹ Lord Reid acknowledged the reality of constitutional breakdowns. He observed that "it is a historical fact" that in many countries there are governments that derive their origins from revolutions or coup d'etat and that "the law must take account of that fact".²

Indeed the courts of many third world countries have had to grapple with the problem of revolutionary governments since obtaining freedom from colonial rule.

Constitutional Upheavals And Recognition Of The New Order

A constitutional breakdown can take place in a number of ways. It is not the cause of the disruption that has engaged the attention of jurists but its effect. The overthrow of the existing legal order has been largely due to revolutions and coup d'etat. What constitutes or amounts to a revolution has not been easy to define. It has been described as "a sharp sudden change in the social location of power, expressing itself in the radical transformation of the process of government..... such transformation could not normally occur without violence, but if they did, they would still, though bloodless, be

1. [1968] 3 All ER 561.

2. Ibid at p. 574 A-B.

revolution".³ In the case of *The State v. Dosso*,⁴ the Pakistan Supreme Court defined a revolution by saying that it was an abrupt political change not in the contemplation of the constitution: "(I)ts legal effect is not only the destruction of the existing constitution but also the validity of the new national legal order".⁵ The Court went on to say that while a revolution is generally associated with public tumult, mutiny, violence and bloodshed, from "a juristic point of view" the method by which and the persons by whom a revolution is brought about is wholly immaterial.⁶

On the other hand, a coup d'etat is a leadership change outside the existing legal order and may not result in the displacement or replacement of the existing constitutional system.

The point of note is that a constitutional breakdown creates a legal vacuum. The courts of many third world countries have evolved legal principles which are designed to legitimise the de facto political situation. The simple approach has been for the courts to recognise reality and to accept the new legal order. As Beadle C.J. observed in *R. v. Ndhlovu*,⁷ when dealing with the legal status of the illegal Smith regime in Rhodesia after it had unilaterally declared independence (U.D.I.) from Britain:

3. Eugene Kamenka, The Concept Of A Political Revolution: quoted in F. Reyntjens & L. Wolf Phillips, Revolution In The Legal Systems Of Third World States in Essays On Third World Perspectives In Jurisprudence (Ed. Marasinghe & Conklin, MLJ Publication, 1984), at p. 106.

4. PLD 1958 SC 533.

5. Ibid at pp. 537-8. The definition was adopted by the High Court of Uganda in *Exparte Matovu* [1966] E.A. 514.

6. Ibid.

7. [1968] 4 S.A.L.R. 515.

"I considered I sat as a de facto court exercising jurisdiction because the de facto government was prepared to allow me to sit and to allow their officials to enforce my orders".⁸

Generally, the courts have resorted to two basic doctrines to legitimise the new Order. They are: (1) the doctrine of state necessity, or (2) the Kelsen doctrine of revolutionary legality.⁹

According to Lord Pearce in his able dissent in *Madzimbamuto's* case, "the principle of necessity or implied mandate is for the preservation of the citizen, for keeping law and order, *rebus sic stantibus*, regardless of whose fault it is that the crisis has been created or persists".¹⁰ The implied mandate theory was evolved by Grotius in his classic work De Jure Belli Et Pacis. It was explained by Lord Denning in the case of *In Re James (An Insolvent)* in the following terms:¹¹

"When a lawful sovereign is ousted for the time being by an usurper, the lawful sovereign still remains under a duty to do all he can to preserve law and order within the territory: and, as he can no longer do it himself, he is held to give an implied mandate to his subjects to do what is necessary for the maintenance of law and order rather than expose them to all the disorders of anarchy".¹²

The early jurisprudence on the subject and the need to give recognition in some matters to the acts of the de facto government can be traced to the American Civil War cases that came before the U.S. Supreme Court: *Texas v. White* [1868] 7 Wallace 733; *Horn v. Lockhart* [1873] 17 Wallace 580; *Baldy v. Hunter* [1897] 171 U.S. 388. The principles deduced from these cases were summarised in *Baldy's* case as follows:

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8. Ibid at p. 526.
9. See Leslie Wolf Phillips "Constitutional Legitimacy: A Study Of The Doctrine Of Necessity" (Third World Foundation Monograph) p. 3.
10. Supra, note 1, at p. 584G.
11. [1977] 2 WLR 1; 1977 1 AER 364.
12. Ibid at p.11E.

".....the preservation of order, the maintenance of police regulations, the prosecution of crimes, the protection of property, the enforcement of contracts, the celebration of marriages, the settlement of estates, the transfer and descent of property, and similar or kindred subjects, were, during the war under the control of the local governments constituting the so-called Confederate States; that what occurred or was done in respect of such matters under the authority of the laws of these local de facto governments should not be disregarded or held to be invalid merely because those governments were organised in hostility to the Union established by the National Constitution; this, because the existence of war between the United States and the Confederate States did not relieve those who were within the insurrectionary lines from the necessity of civil obedience, nor destroy the bonds of society, nor do away with civil government or the regular administration of the laws..... and transactions in the ordinary course of civil society..... although they may have indirectly or remotely promoted the ends of the de facto or unlawful government..... were without blame except when proved to have been entered into with actual intent to further invasion or insurrection".¹³

The distinction made in these cases between laws and acts done for the maintenance of peace and good order and that undertaken to further the rebellion was accepted by Lord Pearce in *Madzimbamuto's* case, and Lord Denning in *Re James*. In the latter case, the Court of Appeal had to consider whether an English court would recognize and enforce a bankruptcy order made by the High Court of Rhodesia under the illegal Smith regime. The argument against it was since the High Court of Rhodesia was an illegal court, the bankruptcy order was the instrument of an illegal regime. Lord Denning relied on the American cases and said:

"I would ask this question: if the judges and officers of the (Rhodesian) courts had not carried on with their normal tasks, what was to happen to the criminal law? Were murderers to go free? Were thieves to go unpunished? And, I would add, what was to happen to the civil law? Were debtors absolved from payment? Were contracts no longer binding? Or wrongdoers not to be compelled to make compensation? If law and order were to be maintained, it was imperative that the judges should continue in office and that the courts should continue to function. That was, I am sure, the intendment of the lawful sovereign, the Queen of England, as well as of the unlawful regime itself".¹⁴

13. At pp. 400-401.

14. *Supra*, note 11, at p. 10. Lord Denning disagreed with *Adams v. Adams*

Lord Denning concluded that the courts of Southern Rhodesia were lawfully exercising jurisdiction over matters coming before them under an implied mandate and their orders were valid so long as they did not apply the laws passed by the illegal regime.¹⁵

The law of necessity has been considered at length by the Pakistan Supreme Court in several cases. Since independence, Pakistan has alternated between military dictatorship and civilian government. This has led to several interesting cases in its superior courts giving rise to an impressive jurisprudence on the law relating to constitutional failures, and the rehabilitative doctrines of Kelsen, Grotius and the necessity theory. The first important case in this series was *Re Special Reference by H.E. The Governor General* ("the Special Reference" case).¹⁶ The case arose out of a constitutional vacuum created in Pakistan after the Governor General dissolved the constituent assembly that was set up to draft a new constitution. This act was challenged in court in another case,¹⁷ where the court pronounced that legislation passed by the Assembly would nevertheless be invalid for non-compliance with certain essential formal requirements. The Governor-General then purported to pass a Proclamation giving retrospective validity to all

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14. [1970] 3 AER 572. In that case the English Probate Court refused to recognise a divorce decree pronounced by a Judge of the Rhodesian High Court appointed by the illegal Smith regime. According to Lord Denning, the validity of an order cannot depend upon which judge presides.
15. Ibid at p. 11G-H. See also application of the necessity doctrine by Lord Denning in *Sabally v. Attorney General* [1964] 3 AER 377. In that case, the doctrine was invoked to uphold the Validation Order in Council that sought retrospectively to validate the irregular elections held in the then colony of Gambia.
16. PLD 1955 FC 435.
17. *Federation of Pakistan v. Tamizuddin Khan* PLD 1955 FC251.

legislation, and for this purpose assumed temporary legislative power pending the convening and completion of the work of a new constituent assembly. The issue was whether the actions of the Governor General could be saved by the common law doctrine of necessity. Muhammed Munir C.J. held that having regard "to the disaster that stared the Governor General in the face he must be held to have acted in order to avert an impending disaster and to prevent the State and Society from dissolution".¹⁸

In October 1958, a peaceful coup took place in Pakistan. President Mirza dissolved the legislative assembly, abrogated the Constitution and took power for himself. His ostensible reasons were "the ruthless struggle for power, the corruption, the shameful exploitation of Islam for political ends..... (the need) to rectify this by a peaceful revolution..... (and) to devise a Constitution more suitable to the genius of the Muslim people".¹⁹ The validity of his actions were challenged in the significant case of the *The State v. Dosso*.²⁰ The case concerned the lawfulness of the detention of the appellant Dosso. This in turn depended upon whether the Order promulgated by President Mirza for the continuation of laws was a valid instrument. The Pakistan Supreme Court upheld the validity of the Order. It recognised the efficacy of the political change brought about by the coup. It clothed the takeover with legal form by relying on the "grundnorm" theory of Hans Kelsen. Muhammed Munir C.J. wrote:

18. Ibid at p. 486. For another instance of laws being validated retrospectively by application of the necessity doctrine, see Canadian Supreme Court in *Re Manitoba Language Rights* (1985) 1 SCR 721. See discussion of this case in P.W. Hogg, Necessity In Constitutional Crisis (1989) Vol. 15. Monash University Law Review 253.

19. Leslie Wolf-Phillips, *supra*, note 9 at pp.11-12.

20. *Supra*, note 4.

"For the purposes of the doctrine a change is, in law, a revolution if it annuls the Constitution and the annulment is effective..... if the revolution is victorious in the sense that the persons assuming power under the change can successfully require the inhabitants of the country to conform to the new regime, then the revolution itself becomes a law-creating fact because thereafter its own legality is judged not by reference to the annulled Constitution but by reference to its own success. On the same principle the validity of the laws to be made thereafter is judged by reference to the new and not the annulled Constitution. Thus the essential condition to determine whether a Constitution has been annulled is the efficacy of the change..... Hans Kelsen, a renowned modern jurist, says ".....it is never the constitution merely but always the entire legal order that is changed by a revolution". This shows that all norms of the old order have been deprived of their validity by revolution and not according to the principle of legitimacy..... Every jurist will presume that the old order - to which no political reality any longer corresponds - has ceased to be valid, and that all norms, which are valid within the new order, receive their validity exclusively from the new constitution..... the norms of the old order can no longer be recognised as valid legal norms".²¹

Kelsen's theory proceeded on the basis that law is a system of coercive rules or norms that can be traced back to a point of origin, which is the basic norm, the historically first constitution.²² As a logical progression, Kelsen's theory recognised that successful revolutions brought about an effective change in the basic norm:

"It is just the phenomenon of revolution which clearly shows the significance of the basic norm. Suppose that a group of individuals attempt to seize power by force, in order to remove the legitimate government in a hitherto monarchic State, and to introduce a republican form of government. If they succeed, if the old order ceases, and the new order begins to be efficacious, because the individuals whose behaviour the new order regulates actually behave by and large, in conformity with the new order, then this order is considered as a valid order. It is now according to this new order that the actual behaviours of individuals is interpreted as legal or illegal. But this means that a new basic norm is presupposed. It is no longer the norm according to which the old monarchial constitution is valid, but a norm according to

21. Ibid at p. 537.

22. J.W. Harris, Legal Philosophies (Butterworths, 1980) p.59 et. seq.

which the new republican constitution is valid, a norm endowing the revolutionary government with legal authority. If the revolutionaries fail, if the order they have tried to establish remains inefficacious, then, on the other hand, their undertaking is interpreted, not as a legal a law-creating act, as the establishment of a constitution, but as an illegal act, as the crime of treason, and this according to the old monarchic constitution and its specific basic norm".²³

Kelsen's thesis that the new order becomes itself a basic law-creating fact has given comfort to judges caught in revolutionary situations. Faced with the daunting task of having to decide on the validity of a revolutionary government in de facto control, and the practical absurdity of ruling otherwise, a facile resort to Kelsen seemed the answer. It happened in *Exparte Matovu*²⁴ decided by the Uganda High court. In February 1966, Dr. Milton Obote, the Prime Minister of Uganda, took full control of the Government and sacked the President. He abrogated the 1962 Constitution of the State and through his majority in Parliament had a new Constitution adopted. One of the persons detained in the wake of the takeover was Michael Matovu, an Ugandan Chieftain. Matovu challenged his detention on the ground that it was in violation of the 1962 Constitution. The issue before the Ugandan High Court was whether Obote's actions in abrogating the 1962 Constitution were valid. The Chief Justice, Sir U. Udoma, found the answer in Kelsen:

"On the theory of law and state propounded by the positivist school of jurisprudence represented by the famous Professor Kelsen, it is beyond question, and we hold, that the series of events..... could only appropriately be described in law as a revolution..... Although the product of a revolution, the Constitution is nonetheless valid in law because in international law revolutions and coups d'etat are the recognised methods of changing governments and constitutions in sovereign states..... Applying the Kelsenian principles, which incidentally form the basis of the judgment of the Supreme Court of Pakistan in the Dosso Case, our deliberate and considered view is that

23. Ibid at pp. 71-72, quoting from Kelsen's General Theory of Law and State (1945).

24. [1966] E.A. 514.

the 1966 Constitution is a legally valid constitution and the Supreme Law of Uganda; and that the 1962 Constitution having been abolished as a result of a victorious revolution in law does no longer exist nor does it now form part of the laws of Uganda, it having been deprived of its de facto and de jure validity. The 1966 Constitution, we hold, is a new legal order and has been effective since 14 April 1966, when it first came into force".²⁵

Kelsen's theory was acknowledged, but without express approval, by Lord Reid in *Madzimbamuto's* case. Dealing with the *Dosso* and *Matovu* judgments, recognising revolutionary governments, he said:

"Their Lordships would not accept all the reasonings in these judgments but they see no reason to disagree with the results".²⁶

Lord Reid's judgment led Quenet J.P. of the High Court of Rhodesia to proclaim in *R v. Ndhlovu*, that it was now "beyond doubt that a regime, illegitimate at birth, can become lawful, that is a lawful regime may follow upon a revolution or coup d'etat".²⁷ Kelsen's theory nevertheless has an unacceptable face to it. It endorses unconstitutional behaviour and legalises the actions of usurpers and mutineers. Before long it was rejected in some jurisdictions. The Supreme Court of Nigeria faced the issue in *Lakanmi v. Attorney General*

25. Ibid at p. 539.

26. [1968] 3 ALL E.R. 561 at p. 574H. The Privy Council said the question of whether the illegal regime in Rhodesia had become a fact did not arise because Her Majesty's Government, as the sovereign authority, was taking steps to regain control.

27. [1968] 4 S.A.L.R. 515 at p. 540A. This was a decision of the Rhodesian Court of Appeal soon after the *Madzimbamuto* decision in the Privy Council. Although the Rhodesian Court itself in *Madzimbamuto's* case had denied the authority of the Privy Council, it purported in this case to argue that the Board's decision was wrong on the law and the facts: see Beadle C.J. at p. 523 et seq. See also Dr. L. Marasinghe, The Legality Of National Liberation Movements (1978) 2 MLJ VIII at p. XII for a similar opinion. The learned author is of the view that "Kelsen's theory should have indicated to the Board that the political revolution arising out of the U.D.I. had acquired a de jure status according to the principle of efficacy". (p.XII).

(*Western State*)²⁸ The case arose out of a rebellion in the armed forces resulting in the killing of two of the four state premiers. Although the rebellion was foiled, the Federal Ministers met at an emergency session and handed over power to the Army Commander. The latter set up a Federal Military Government but did not immediately abrogate the Constitution. The Supreme Court held that the military coup was not a true revolution presumably because the existing constitution was allowed to continue albeit at the total sufferance of the military.²⁹

In Pakistan itself, *Dosso* was overruled by the Supreme Court in *Asma Jilani v. State of Punjab*.³⁰ The case dealt with the validity of the handing over of the reins of government by President Ayub Khan to the Army Commander, General Yahya Khan. The latter abrogated the Constitution and declared martial law throughout the country. The Court ruled that his action was unconstitutional. Kelsen's thesis as applied in *Dosso* was said to have been wrongly understood. Hamoodur Rahman C.J. wrote that Kelsen was merely making "a jurist's proposition" and not laying down any legal norm for the use of judges and lawyers. He said:

"It was by no means his (Kelsen's) purpose to lay down any rule of law to the effect that every person who was successful in grabbing power could claim to have become also a law-creating agency..... It is not the

28. Supreme Court Suit No. 58 of 1969, judgment dated April 24, 1970. Discussed in T. Akinoda Aguda, The Judiciary in a Developing Country, in Essays, op. cit. p. 137 et.seq., at p. 145, and by Leslie Wolf-Phillips, op. cit. at p. 43 et.seq.

29. For a criticism of the judgment, see Akinoda Aguda, *ibid*, at p. 146.

30. PLD 1972 SC 139. For a discussion of the Fijian Coup of May 1987 and the actions of Colonel Rabuka in abrogating the country's constitution, see Yash Ghai and Jill Cottrell, Heads Of State In The Pacific: A Legal And Constitutional Analysis (University of South Pacific, Suva, 1988) pp. 206 et.seq.

success of the revolution, therefore, that gives it legal validity but the effectiveness it acquires by habitual submission to it from the citizens".³¹

It was pointed out that a few days after the decision in *Dosso*, President Mirza was himself replaced by Field Marshall Ayub Khan; it belied the argument that the Mirza Government had become efficacious. The Court concluded that Kelsen's theory was misinterpreted and wrongly applied on the facts in *Dosso's* case.³²

The Court instead preferred the doctrine of necessity. It disputed the view that it was a doctrine to validate the illegal actions taken by the usurpers. It called the doctrine a principle of condonation and not legitimization. The Chief Justice explained his case for the necessity doctrine in this way:

"In my humble opinion, this doctrine can be invoked in aid only after the Court has come to the conclusion that the acts of the usurpers were illegal and illegitimate. It is only then that the question arises as to how many of his acts, legislative or otherwise, should be condoned or maintained, notwithstanding their illegality in the wider public interest. I would call this a principle of condonation and not legitimization. Applying this test I would condone (1) all transactions which are past and closed, for, no useful purpose can be served by reopening them, (2) all acts and legislative measure which are in accordance with, or could have been made under, the abrogated Constitution or the previous legal order, (3) all acts which tend to advance or promote the good of the people, (4) all acts required to be done for the ordinary orderly running of the State. I would not, however, condone any act intended to entrench the usurper more firmly in his power or to directly help him to run the country contrary to its legitimate objectives. I would not also condone anything which seriously

31. Ibid at p. 180.

32. Ibid at p. 183. For a close analysis of the *Dosso* and *Jilani* decisions, see TKK Iyer, Constitutional Law in Pakistan: Kelsen In The Courts (1973) 21 Am J of Comp L 759, and Leslie Wolf-Phillips, op. cit. p. 17 et.seq.; Muhammad Munir C.J. who gave the leading judgment in *Dosso* has rebutted the criticism of his judgment made by the *Jilani* court: see his autobiography, Highways & Bye-Ways Of Life (Law Publishing Company, Lahore 1978) pp. 217, 254.

impairs the rights of the citizens except in so far as they may be designed to advance the social welfare and national solidarity".³³

The necessity doctrine remains the preferred theory in Pakistan. In *Begum Nursrat Bhutto v. The Chief Of Army Staff*,³⁴ the Supreme Court rejected an attempt to resurrect the Kelsenian theory. The army take-over by General Zia-ul-Haq from Prime Minister Bhutto, a popularly elected leader was correctly termed an extra-constitutional measure. However, the Court held that it was a constitutional deviation dictated by necessity which would be tolerated for a short period only. This was in apparent reference to the pledge by General Zia, as Chief Martial Law Administrator, that free elections would be held shortly to return the country to democratic government.³⁵ In the later case of *Zulfikar Ali Bhutto v. The State*³⁶, the doctrine was widened. It was held as "a logical corollary" that the new Zia regime must be permitted in the public interest not only to run the administration but also to work towards the achievement of the objective on the basis of which its intervention has been validated.

Apart from Pakistan, the necessity doctrine has been adopted in cases in Cyprus and Africa.³⁷ It's most recent application was in the Court of Appeal

33. Ibid at p.207. The condonation theory was expressly rejected by Haynes P. of the Grenada Court of Appeal in *Mitchell & Ors. v. DPP* [1986] LRC (Const) 35, stating: "Necessity, when it applies, should legitimise or not legitimise; it is difficult to conceive of a judicial jurisdiction to pardon an illegality. To pardon should be the prerogative of the executive" (p.89).
34. PLD 1977 SC 657.
35. General Zia died, whilst in office in a plane crash in mid-1988, never redeeming this pledge.
36. PLD 1978 SC 40.
37. *Mustafa Ibrahim v. Attorney General* [1964] Cyprus L.R. 195; *Republic v. Nicolaos Sampson* [1977] 2 Cyprus L.R.; *Lakanmi v. Attorney General (Western Region)*, supra, note 28.

of Grenada in the Carribeans. In *Mitchell & Ors. v. Director of Public Prosecutions*,³⁸ the Grenada Court had to consider its own validity following a succession of military revolutions. The instability in the country led to an invasion of the island by the forces of the United States. The Governor General then assumed the legislative authority to reinstate the court system promulgated by the popular movement that took power in the first of the military coups. The Governor's actions were sought to be justified on the basis of necessity to restore law and order in the chaos that prevailed soon after the invasion. The choice by the Governor of the courts of the first military revolution was sought to be justified on the basis of its acceptance for the 4 1/2 years that the military government remained in office. Kelsen's theory was expressly repudiated by the Court as not applicable to "Caribbean jurisprudence" and the doctrine of necessity was adopted as the constitutional source for the validation of the laws promulgated by the Governor General.

It is submitted that the Pakistan Supreme Court in the trilogy of cases beginning with *Asma Jilani* had rightly given preference to the necessity doctrine over Kelsen's thesis. It reflects a more discerning approach to the illegal state of affairs produced by the unconstitutional behaviour of a military dictator. It enables the court to recognise only those acts necessary for the maintenance of law and order and discard actions taken in promotion of the rebellion. Lastly, it enables the judges to remain true to their oath.

38. (1986) LRC (Const) 35. The judgment of Haynes P. is noteworthy for the comprehensive coverage of the prevailing theories in this field and of the leading Commonwealth authorities touching on the subject. An appeal to the Privy Council was dismissed (per Lord Diplock) on jurisdictional grounds: see pp. 122-125.

Judicial Anxieties

In many of these cases the Courts acted according to the reality of the political situation confronting them. Professor De Smith described the Pakistan decisions as "fundamentally political judgments dressed in legal garb".³⁹

In defence of the judges it may be said that when they are asked to decide on the validity of a revolutionary government, they are placed in an intolerable position. On the one hand their oath of allegiance to the constitution under which they were appointed necessitates that they refuse sanction of unconstitutional behaviour. On the other hand, it is a political reality that the de facto government would ignore any judgment that pronounces against its validity. In that event, the Court decision is rendered an absurdity and the judges left with no alternative but to resign. These extra-record considerations must surely weigh heavily in the minds of the judges who make these decisions. For example, the Chief Justice who heard the *Special Reference* case in Pakistan spoke candidly some years after the case of his anxiety: "The mental anguish caused was beyond description..... If the court had found against the Governor General there would be chaos..... who could enforce a decision adverse to the Governor General. At moments like these public law is not to be found in the books; it lies elsewhere.....".⁴⁰ *Asma Jilani's* case, which has been heralded as a bold decision by the Pakistan Supreme Court, was decided after the impugned regime of Yahya Khan had fallen.

39. S.A. De Smith, Constitutional Lawyers In Revolutionary Situations (1968) 7 West Ontario L. Review 93 at p. 94.

40. Ibid at p. 98. See generally F.S. Nariman, The Judiciary Under Martial Law Regimes (1984) 14 CIJL Bulletin 41; see also ICJ Report on Pakistan - The Independence Of The Judiciary And The Bar After Martial Law (1987) Nos. 19 & 20 CIJL Bulletin p. 66.

It is left to surmise whether the decision would have been the same if the timing was different. Likewise, *Matovu* in Uganda, *Ndhlovu* in Rhodesia, and *Lankanmi* in Nigeria were all decisions that sanctioned the actions of the government of the day. The result-oriented approach was evident. For example, in *Ndhlovu*, Beadle C.J. saw it as the duty of judges in revolutionary situations not to resign their office but to remain in their stations for the sake of law and order: "The choice which faces a judge in Rhodesia today may be an agonising one, but the choice itself is straightforward enough. It is simply this: Is it better to remain and carry on with the peaceful task of protecting the fabric of society and maintaining law and order or is it better to adhere to the old 1961 Constitution and go on with it..... To argue that to depart along with the old 1961 Constitution is to uphold "the rule of law" is pure casuistry. It is not possible to adhere to a constitution that does not exist.....".⁴¹ He said that by remaining at his station the judge was neither siding nor abetting the revolution; he was simply overtaken by events.⁴²

A state of emergency may arise without there being anything as dramatic as a revolution or a coup d'etat. It nevertheless creates a situation akin to a constitutional disruption and the government of the day is unlikely to take kindly to a court pronouncing against its actions. The courts are seen as roadblocks or a hindrance to the government's efforts to return the country to normality. In an empirical study of third world courts, a writer concluded:

41. *Supra*, note 27, at p. 534D - F. Beadle C.J.'s affiliation with the Smith regime was seen by his involvement in the negotiations with the British over U.D.I.: see Claire Palley, The Rhodesian Judiciary And U.D.I. [1967] 30 MLR 263 at p. 267. If so, it was sufficient reason for Beadle C.J. to have recused himself in *Ndhlovu's* case.

42. *Ibid* at p. 533F.

"The courts which had been established to be the last bastion in defence of the freedom of the individual and against oppression by or injustices of public authorities have been reluctant to confront the executive. When opportunities arose for them to pass judgment on executive acts, they with a few notable exceptions, exhibited timidity".⁴³

Another writer was of similar opinion, concluding that as a result of passive judicial response to declarations of emergency, liberty itself was placed in jeopardy in these countries.⁴⁴ Matters of human rights violations and fundamental freedoms which are subjects that should preoccupy the judiciary are often treated as political questions. There is a noticeable tendency not to adopt an activist approach as regards these complaints and avoid hurting the sensitivity of the government. A survey of the judiciary's role in defending human rights in the Pacific Island nations concluded: "The human rights provisions of constitutions have two major roles, to protect individuals from governments and other individuals..... The tendency of the decisions in the cases considered is to support the actions of governments against individuals, and to limit the value of constitutions as instruments of social change".⁴⁵

Where adverse decisions are given it is not unknown for the government to defy and ignore the court order. It happened in Papua New Guinea when the Minister of Justice was imprisoned for contempt of court. The Minister

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43. George W. Kanyeihamba, Constitutional Obligation in Developing Countries p. 29 in Essays, supra, note 3 at p. 64. The attitude of third world courts is not exceptional. In his comprehensive survey of the courts of the United States, Britain, Canada, Australia, New Zealand, South Africa and India, Professor George J. Alexander concludes that their role in the protection of human rights in times of crisis as disappointing and lacklustre: The Illusory Protection of Human Rights By National Courts During Periods Of Emergency, (1984) 5 Human Rights Law Journal, 1.
44. William E. Conklin, The Role of Third World Courts, in Essays, supra, note 3, at p. 77.
45. N.K.F. O'Neill, Human Rights In The Hands Of Judges: The Experience In The Pacific Island Nations (1983) Vol. 2 No. 2 LAWASIA 194 at p. 216.

concerned was accused of scandalizing the court by public statements after the court stopped a deportation order made by the government.⁴⁶ The Prime Minister took over the Ministry of Justice and released the Minister from gaol. This led to the resignation of the Chief Justice and two other judges.⁴⁷ These and other like actions indicate a noticeable lack of respect for the rule of law in some of the newly emergent nations. Sometimes the way out is not to defy the Court order but to circumvent it. The case of *Ibingira & Ors v. Uganda*⁴⁸ illustrates this. The applicants were five cabinet members of the Obote Government who were arrested and detained without any charges being preferred against them. The Court at first instance had little difficulty in releasing them. The Court of Appeal affirmed the decision. At that time there was only one region of Uganda that was under an emergency where preventive detention laws applied. Upon their release the 5 applicants were flown to that region, set free, and then preventively detained. On the second round, the Court of Appeal realising that a direct confrontation would develop with the Government if their release was again ordered, confirmed their detentions. This became evident from certain extra-judicial comments that the President of the Court was to make later: "I ask you to imagine what might happen if the courts of a newly emergent nation, in which the rule of law is not a settled way of life either on the part of the executive or of the people, were by their judicial decisions to enter the political arena".⁴⁹

46. *Public Prosecutor v. Nahau Rooney* (1979) PNGLR 448. The Minister made a broadcast statement in respect of the decision rendered by the Chief Justice that she had no confidence in the Chief Justice and other judges who are "only interested in administering foreign laws": see pp. 476-77.

47. See O'Neill, *supra*, note 45, at p. 202.

48. [1966] E.A. 306.

49. See an account of the case in George W. Kanyeihamba and John W. Katende,

The accusation that the courts are entering the political arena lies at the heart of the confrontation between the two limbs of government. It is an old complaint. It was evident early in the life of the American Constitution. For example, the French magistrate Alexis de Tocqueville, on a visit to America in the 1840's, remarked: "Scarcely any political question arises that is not resolved sooner or later into a judicial question".⁵⁰ This phenomenon is bound to happen in any country seeking to establish by its constitution a limited government defining the authority of the executive and the rights of citizens. In a conflict between the two interests it is the function of the courts to resolve the dispute. The intensity of this conflict is exacerbated when the country is under a state of emergency or facing a constitutional upheaval. The ICJ Report⁵¹ identified this as a problem confronting many third world countries today. The undesirable features that accompany a state of emergency and the ability of the courts to respond to complaints of wanton interference with life and liberty continues to be a challenge to freedom and democracy in the third world.

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49 The Supranational Adjudicatory Bodies And The Municipal Governments, Legislatures and Courts: A Confrontation: The East African Experience (1972) Public Law 107 at pp. 111-112.

50. See Archibald Cox, The Role Of The Supreme Court In American Government (Clarendon Press Oxford 1976) p. 1.

51. States Of Emergency: Their Impact On Human Rights (International Commission of Jurists, Geneva, March 1983).

PART II

EMERGENCY POWERS UNDER THE MALAYSIAN CONSTITUTION

CHAPTER IIIHISTORICAL BACKGROUND TO THE MALAYAN CONSTITUTION
AND THE FORMATION OF MALAYSIAIntroduction

Since independence, Malaysia has been under a continuous state of emergency except for the short period between July, 1960 and September, 1964. This hiatus marked the end of the twelve year period of emergency proclaimed by the British colonial Government springing from Communist insurgent activity,¹ and the beginning of a two year period of emergency arising from Indonesia's policy of Confrontation towards the newly formed Malaysian federation.² The emergency provisions of the Malaysian Constitution are therefore amongst its most overworked parts.

The doctrine of state or civil necessity as discussed in Chapters I and II provide the jurisprudential underpinning to the emergency provisions in the Malaysian Constitution. Article 150 which deals with emergency powers has been

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1. See K.G. Tregonning, A History of Modern Malaya (Eastern University Press, 1964) p. 290 et seq; Khong Kim Hoong, Merdeka: British Rule And The Struggle For Independence In Malaya, 1945-57 (INSAN Publication, 1984) p. 130 et seq.
 2. See Richard Allen, Malaysia: Prospect And Retrospect, The Impact And Aftermath Of Colonial Rule (OUP, 1968) p. 157 et seq.

classified as importing into the Malaysian Constitution the English constitutional doctrine of necessity. In *Government of Malaysia v. Mahan Singh*,³ Lee Hun Hoe CJ (Borneo) referred to the leading English cases⁴ on the subject and observed:

"Article 150 gives His Majesty wide powers, so wide that he could in the interest of the nation during an emergency act as he thought fit. This is a most important aspect of the matter. The interest of the nation comes first. This is the law of civil or state necessity which forms part of the common law and which every written constitution of all civilised states takes for granted. The reason underlying the law of necessity was aptly put by Cromwell that "if nothing should be done but what is according to law, the throat of the nation might be cut while we send for someone to make law".⁵

It may be observed that the Constitution was itself "conceived against a backdrop of a state of emergency".⁶ This was the emergency proclaimed in 1948 by the British to combat the communist insurgency in Malaya.

The Constitution of the Federation of Malaya was based on the vintage Westminster model. It has, however, certain distinctive Malayan characteristics, chief of which is the incorporation into the parliamentary system of a constitutional role for the hereditary Malay Rulers called the Sultans. Through their Council, called the Conference of Rulers, the Sultans are to elect one from amongst them to be the Yang di-Pertuan Agong or the King for a period of 5 years. The role played by the Yang di-Pertuan Agong in the

3. [1975] 2 MLJ 155; the decision was reversed by the Privy Council (see [1978] 2 MLJ 133) for reasons other than the constitutional grounds on which the instant observation is made, see at p. 134H-I.
4. Eg. *The Saltpetre case* [1602] 12 Co. Rep. 12, *R v. Hampden* 3 St. Tr. 825, *Arbitration of Shipton Anderson & Co.* [1915] 3 KB 676.
5. *Ibid* at p. 165F-G.
6. See H.P. Lee, Emergency Powers In Malaysia in the Constitution of Malaysia: Further Perspectives And Developments (Eds. F.A. Trinidade And H.P. Lee) O.U.P. 1986, at p. 135.

constitutional scheme of things, in particular, in the proclamation of a state of emergency and in the exercise of his law-making powers under a state of emergency is crucial in understanding the balance between emergency rule and parliamentary government in Malaysia.

However, it is important first to have an appreciation of the historical background to the Malaysian Constitution and the political and social milieu in which it was evolved.

The Malay Peninsula at the commencement of the nineteenth century was an aggregate of independent states and not a single political entity.⁷ The dominant population, the Malays functioned under a political structure at the apex of which was the hereditary ruler called the Sultan or Yang di-Pertuan.⁸ At that time, these states with hereditary rulers enjoyed the status of independent sovereign states in international law.⁹

The pre-eminence of the Malay Rulers in early Malay society and their interaction with the British after colonisation did much to shape the political history of the Malays, and in turn the Malay Peninsula.¹⁰ For example, it was the subordinate status accorded to the Malay Rulers that doomed the British proposal for the formation for the first time in the Malay

7. Professor Khoo Kay Kim, Nineteenth Century Malay Peninsula in Glimpses of Malaysian History Ed. Zainal Abidin Wahid (Dewan Bahasa & Pustaka Publication; 1970) at p. 51.

8. Ibid.

9. See *Duff v. Govt. of Kelantan* [1924] AC 797.

10. For a critical study of the unique political-cum-sociological relationship between the Malay Rulers and their subjects, see Dr. Chandra Muzaffar, "Protector: An Analysis Of The Concept And Practice Of Loyalty Within Malay Society" (An ALIRAN Publication, Kuala Lumpur, 1979). For an examination of the same subject from the Malay cultural

Peninsula of a united constitutional entity called the Malayan Union.¹¹ This event in 1946 is significant because it led also to the creation for the first time in Malaya of nationalistic political activity among the Malays.¹² When post-war Malay political efforts culminated in Independence and the establishment of parliamentary democracy under a written constitution, it was the "traditional elements",¹³ principally the unique position of the Malay Rulers, that gave the Malayan Constitution its distinctive characteristic and set it apart, in form, from the other countries in the Pacific region that also adopted the vintage Westminster model.¹⁴

Early Legal History And British Rule

It has been observed that recorded legal history of any significance in Malaysia began with the British acquisition of the island of Penang in 1776

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10. standpoint, see Shaharuddin Maaruf, Concept Of A Hero In Malay Society (Eastern University Press, 1984). An enlightening personal account is given by Sir Frank Swettenham (the first British Resident General in Malaya) in the form of a series of short sketches (written in 1895) called Malay Sketches (1984 Reprint) Graham Brash (Pte) Ltd S'pore.
11. See generally Zainal Abidin Wahid, The Malayan Union: It's Introduction in Glimpses, supra, note 7, at p. 99 et seq; Khong Kim Hoong in Merdeka, supra, note 1, at p. 77 et seq; Dr. Chandra Muzaffar in Protector, supra, note 3, at p. 53 et seq.
12. See Professor Khoo Kay Kim, The Malay Peninsula: A Political Survey, 1900-1941 in Glimpses, supra n. 11, at p. 81. See also Zainal Abidin Wahid: The Japanese Occupation And Nationalism In Glimpses, supra, at p. 93 et seq.
13. For an account of the same, see Tun Salleh Abas, Traditional Elements Of The Malaysian Constitution in Constitution, Law & Judiciary (Selected Articles & Speeches) (Malaysian Law Publishers, K.L. 1984) at p. 37 et seq.
14. For an account of the latter, see C.J. Lynch, The Westminster Model In The Pacific in The Parliamentarian (Journal of the Parliaments of the Commonwealth) at p. 138 et seq.

and the passage of the Charters of Justice in 1807, 1826 and 1855.¹⁵

British presence in Malaya began as a trade presence in the late eighteenth century through the East India Company. It was concentrated in the trade ports of Singapore, Malacca and Penang. After the East India Company was abolished, these ports were formed into the Straits Settlements under the British Colonial Office. The British adopted a studious policy of non-intervention in the affairs of the Malay States. However this did not prevent the British maintaining strong commercial interests in the mainland Malay States especially in the rich tin and rubber resources of these states.¹⁶

The British commercial presence on the mainland led inevitably to a reassessment of the policy of non-intervention. Initially there was a divergence of views. Whilst the Colonial Office was insistent on maintaining non-intervention, the British officials on site were in favour of abandoning the policy. The latter held a disdain for the governing abilities of the native chiefs. For example, in October 1860 the Governor of the Straits Settlement, Colonel Cavanagh wrote to the India Office¹⁷ complaining that British commercial interests in the Malay hinterland was in jeopardy because of the inability of the Malay rulers to govern and suggested that it was an abdication of "one of the responsibilities attached to (our) high position as

15. See Professor Ahmad Ibrahim, Towards A History Of Law In Malaysia And Singapore (Stamford College Press, Singapore, 1970) at p. 1.

16. For an account of British relationship with the Malay States prior to formal British intervention, see L.A. Mills, British Malaya 1824-67 (OUP, 1966) (first published in 1925).

17. The British ruled the Straits Settlement from their Headquarters in Calcutta. For a lucid account, see Tun Mohd. Suffian, Malaysia And India - Shared Experiences In The Law (A.I.R. Publications, Nagpur, India, 1980) at p. 12 et seq.

the dominant power in this quarter".¹⁸ The attitude of the British Government, based in India, towards this question may be seen in one of the official letters that was sent from Calcutta to Penang:

"It is doubtful how far the British Government is justified in interfering to defend even the life and property of the innumerable Asiatic subjects of Her Majesty who for their own private advantage choose to take up their residence in foreign states under an uncivilised or weak administration.....¹⁹ If British subjects choose to live and trade in an uncivilised country like Perak (one of the Malay States), they must submit to the local customs and practices".²⁰

In the end, British commercial interests prevailed and the policy of non-intervention was abandoned. There was an overall reassessment of the British policy of non-intervention in the affairs of the Malay States in the 1870's.²¹ The formal abandonment of the policy came with the epochal Pangkor Treaty of January 20, 1874 which the British signed with the Sultan of Perak. By this Treaty the Sultan was "to provide a suitable residence for a British officer to be called a Resident..... whose advice must be asked and acted upon in all questions other than those touching upon Malay religion and custom".²²

18. Recorded in C.M. Turnbull, The Origins Of British Control In The Malay States Before Colonial Rule in Malaysian And Indonesian Studies Ed. John Bastin (Oxford, 1964) at p. 166.

19. Letter dated March 12, 1866. Ibid at p. 182.

20. Letter dated February 15, 1866, Ibid.

21. It will not be entirely correct to say that it was commercial interests alone that led the British to reassess their policy of non-intervention. The late nineteenth century saw an aggressive expansion of European powers in East and South East Asia - the French in Indo-China and the Dutch in the East Indies. The British being ever mindful of the markets in Europe for raw materials to fuel the industrial revolution obviously did not want the fertile Malay States to fall prey to the designs of the Dutch, French or Germans: see Chan Hon-Chan, The Development Of British Malaya 1896-1909 (OUP. 1964, K.L.) at p. 2.

22. For an account of the Treaty and its terms, see Khong Kim Hoong in Merdeka, supra, note 1, at p. 2.

The Pangkor Treaty marked the beginning of British expansion into the Malay States.²³ By the end of the decade the Residence system was in operation in the States of Selangor, Negeri Sembilan, Pahang and Johore.

By the Residence system the British effectively ruled these States and exercised varying degrees of influence in the neighbouring States. It was observed of the system that "in theory, the British Resident was supposed to advise the Sultans; in practice, however, he ruled, getting the Ruler's advice on matters of religion and Malay customs".²⁴

British intervention also brought about the first recognizable form of an administrative government in the Malay Peninsula. In 1895, the British formalised the Residence system by setting up a federation of the states under the Residency called the Federated Malay States (F.M.S.). It provided for a centralised form of government with the States retaining their legislative councils. The post of a Resident-General was created. However, centralization brought about certain difficulties. Again, it was in the form of remonstrations from the Malay Rulers, who had been reduced to "matters of local importance and execution of the directions of the Federal Government".²⁵ The powers of

23. For a detail account of British expansion, see C. Northcote Parkinson, British Intervention In Malaya (University of Malaya Press, K.L., 1964) which is regarded as the leading work on the subject. An interesting personal account of the Pangkor Treaty is given in Isabella L. Bird's The Golden Chersonese: Travels In Malaya In 1879 (John Murray, London 1883 Republished by OUP 1985) at pp. 269-270. Miss Bird, a Victorian lady, was an intrepid traveller of fame in those days. She suggests that the Treaty and British intervention may initially have been just an administrative decision: "The London press began to ask how it was that Colonial Officers were suffered to make conquests and increase Imperial responsibilities without the sanction of Parliament" (at p. 270).
24. Khong Kim Hoong, op. cit. at p. 3.
25. Tun Salleh Abas, "Federation In Malaysia - Changes In The First Twenty Years" in Constitution, Law & Judiciary, op. cit. at p. 15.

the Resident-General were cut-down, and in 1930 an active decentralisation policy under a new High Commissioner named Sir Cecil Clements was undertaken.²⁶

British rule in the Malay States was by this time complete. They ruled directly in the F.M.S. and indirectly in the "Unfederated Malay States" of Kelantan, Trengganu, Kedah and Perlis. In respect of the latter States, the ever present threat of Siamese suzerainty caused the Malay rulers there to claim British protection in return for control of their foreign affairs and the exercise of considerable influence in their governments.²⁷

The British introduced for the first time a discernible legal system in the Malay Peninsula. By the Charter of Justice of 1807, a Court of Judicature was established in the Straits Settlements that was to have the powers and jurisdiction of the Superior Courts in England. For example, an early case decided in Penang laid down that the Charter introduced English law in the Straits Settlements.²⁸ The juristic approach of the early Colonial judges was a pragmatic one meant to ensure that due regard was given to local customs and practices. For example, in Malacca and Singapore, where there was some form of pre-existing basis law in reliance of which the inhabitants had conducted their affairs, whether Dutch, Portugese or Malay, the approach was to accord

26. For an account of the Decentralisation programme and the system of British administration generally during this period, see Jagjit Singh Sidhu, The Administrative Development of Malaya, 1896-1941 in Glimpses, supra, note 7, at pp. 75-76.

27. See Tun Salleh Abas, op. cit., at p.15.

28. *Kamoo v. Basset* [1808] 1 KY. 1. The decision was endorsed in the case of *Reg v. Williams* [1858] 3 KY. 16. The point was later affirmed by the Privy Council in the case of *Ong Cheng Neo v. Yeap Cheah Neo* [1872] 1 KY. 326, 343-44.

some form of recognition to this. This was illustrated in the case of *Sharp v. Mitchell*,²⁹ when Sir Benson Maxwell C.J. said:

"The Portugese while they held Malacca and after them the Dutch, left the Malay custom or *lex non scripta* in force. That it was in force when this Settlement was ceded to the Crown appears to be beyond dispute and that the cession left the law unaltered is equally plain on general principles: *Campbell v. Hall* Cowp. 204, 209. It was held by Sir John Claridge in 1829 to be then in full force; and although it was decided by Sir B. Malkin in 1834 in conformity with what had been held in India, that the law of England had been introduced into the Settlement by the Charter which created the Supreme Court it seems to me clear that the law so introduced will no more supersede the custom in question than it supersedes local custom in England".

The reliance on the old case of *Campbell v. Hall* is noteworthy because it was in that case that Lord Mansfield laid the proposition that the laws of a conquered country continue in force until they are altered by the conqueror.

In appreciation of the fact that the inhabitants of the Straits Settlements were Malays, Chinese and Indians with diverse customs and religions, the British judicial policy under the Charters was also to give due recognition to their personal law. In a famous case called the *Six Widows* case,³⁰ concerning the Chinese custom of polygamous unions, Braddell J. declared in the Court of Appeal of the Straits Settlements:

".....the law of England would necessarily require to be administered with such modifications as to make them suitable to the religions and customs of the inhabitants who were intended to be benefited by them. They are dictated from a regard of that constant policy of our rulers to administer our laws in our Colonies with a tender solicitude for the religious beliefs and established customs of the races living under the protection of our Flag, and to regard them as a charge to our Courts to exercise its jurisdiction with all due regard to the several religions, manners and customs of the inhabitants.....".³¹

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29. (1890) Leic. 466 at p. 469. Taken from the discussion by Professor Ahmad Ibrahim, Towards A History of Law, supra, note 15, at p. 10.
30. In the Estate of Choo Eng Choon, deceased [1908] S.S.L.R. 120.
31. Ibid at p. 218. See also generally, Sir Roland Braddel, "The Law of The Straits Settlements: A Commentary" (O.U.P. Reprint 1982, Singapore) First Published by Kelly & Walsh Ltd., 1915. For an account of the legal

It may also be noted that the British policy of governing the Straits Settlements from Calcutta led to the importing of several Indian statutes some of which are in operation to this day.³² The significant statutes in this respect are the Evidence Code, the Criminal Procedure Code and the great Indian Penal Code.³³

But the extent to which English principles of constitutional law applied in the F.M.S. was less clear. It would appear from the decision of the F.M.S. Court of Appeal in the case of *Yap Hon Chin v. G.L. Jones Parry & Anor*,³⁴ that, unlike the Straits Settlements, the F.M.S. was not constitutionally on the same footing as a Colony. The question arose in the context of an argument that the Banishment Enactment 1900, in force in the F.M.S., was ultra vires because it was made to apply extra-territorially and that it was not competent for a colonial legislature, without the sanction of the British Parliament or King, to make laws with extra-territorial application. In rejecting the contention, Law C.J.C. said:

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31. history of the Colony and the application of English legal principles with the necessary modifications to suit local conditions: see Chapter II p. 73 et seq. In R.H. Hickling's, The Influence of the Chinese upon Legislative History In Malaysia and Singapore (1978) 20 Mal. L.R. 265 an account is given of the history of the governing of the Chinese community by the British and how the rule by Chinese custom, administered by Chinese, was gradually replaced into a system of rule by English law taking account of Chinese custom. See also R.H. Hickling, Malaysian Law (Professional Law Book Publishers, K.L. 1987) at p. 113 et seq.
32. See an account of this in Tun Mohd. Suffian, Shared Experiences, op.cit. at pp. 18-21; see also Professor Ahmad Ibrahim, Legislation In the Malay States (1977) 2 MLJ Supp. lxiii at p. lxv.
33. Drafted by the English historian Thomas Macaulay when he served as Indian Administrator (1834-38), it was the "fruit of three years" unstinted labour: see Arthur Bryant, Macaulay (1979 Reprint, Weidenfeld & Nicholson, London) at p. 36. This remarkable document, drafted when Macaulay was not yet thirty years of age, has found acceptance in far places as Queensland (Australia) New Zealand and many parts of British Africa.
34. [1911] 2 F.M.S.L.R. 70.

".....Matters here are not in the same footing as in a Colony. I think the Supreme legislative authority in the State (of Selangor) is vested in the Sultan, except perhaps the Sultan may have himself limited his own powers by treaty, or by grant of legislative authority to some Council or other body, and I think that, except in so far as he may have limited his authority as above referred to the Sultan must have the same power of legislation as Parliament has in the United Kingdom".³⁵

It was explained by Ebdon J.C. in the same case that the 1895 Treaty between the British and the Rulers of the Malay States did not in any way diminish the Sultans' authority to govern:

"By this Treaty the said Rulers agreed to accept a Resident-General as agent and representative of the British Government under the Governor of the Straits Settlements and to follow his advice in matters of administration not touching the Muhammadan religion. It was, however, provided that nothing in the Treaty should curtail the power or authority of the said Rulers in their respective states or alter the relations then existing between the said States and the British Empire..... the Federated Malay States are undoubtedly in a high degree under British influence in respect of their legislation as of other matters; but I know of nothing to imply that their Rulers have ever made any surrender of the legislative power.....³⁶ I do not think it can be said that the limitations (on the legislative competence of Colonial legislatures) apply to the Legislature of a Protected State save on terms of Treaty or some form of expressed consent".³⁷

In reality, this reasoning was a fiction that served both sides well. The Sultans retained their status at the apex of Malay Society and along with it the facade of power and authority, but the British were actually in control.³⁸ This, however, does not detract from the fact that from the constitutional and theoretical standpoint the judgment in Yap Hon Chin's case had correctly stated the position.

35. Ibid at p. 73.

36. At p. 82.

37. At p. 82.

38. See Dr. Chandra Muzaffar in Protector, supra, note 3, at p. 50: "The British were in fact the Rulers, the Sultans were mere puppets, it was "a convenient cloak for British colonialism". Professor Ahmad Ibrahim says: "whatever the practical result, the agreement (setting up the Federal Council in 1909) was to reduce the Sultans in status": See Legislation In The Malay States, op.cit. at p. lxvi.

The internal constitutional position in the F.M.S. was said to be alike that in the United Kingdom. The existence of a State Constitution did not affect the concept of legislative supremacy in the person of the Sultan in Council. In *Anchom Bte Lampong v. Public Prosecutor*,³⁹ it was sought to argue that certain Muhammadan laws in Johore were ultra vires the State Constitution. In repelling the argument, Poyser C.J. observed:

"The Constitution of Johore..... is in the nature of an Enactment which can at anytime be amended or varied, and therefore has the force of law. In view of its terms I have no hesitation in coming to the conclusion that this court has no power to pronounce on the validity or invalidity of any Enactment passed by the Council of State and assented to by the Sultan, any more than the English courts could pronounce an Act of Parliament to be invalid. To hold otherwise would be to ignore the sovereignty of the Sultan and the legislature and to treat Enactments of the Johore legislature as the English courts treat by-laws.....".⁴⁰

In *The Pahang Consolidated Company Ltd. v. The State Of Pahang*,⁴¹ the Privy Council had to consider the constitutional position of the Malay Rulers in the F.M.S. and the effect of laws enacted by the Federal Council on behalf of the Rulers. The Federal Council, created in 1927, was the Central Legislature of the F.M.S.. The Rulers themselves did not sit in the Federal Council but were represented by their respective British Residents. The laws passed were declared to be enacted by the Rulers. The question that arose in the case was whether an Enactment passed by the Federal Council could override the terms of a mining lease given to a corporation by the British Resident on behalf of the Sultan of Pahang. The Privy Council, and the F.M.S. Court of Appeal before it, held that the Enactment had an overriding effect. Lord

39. [1940] M.L.J. Rep. 18.

40. Ibid at p. 22H-I.

41. [1933] M.L.J. 247 P.C.

Tomlin, who delivered the advice of the Board, observed that the Sultan was "an absolute ruler in whom resides all legislative and executive power subject only to the limitations which he has imposed upon himself".⁴² The Board held that the creation of the Federal Council was such a limitation in that the laws passed by the legislature would prevail over laws passed by the State Council. However it was also observed that the laws of the Federal Council would have to be signed by each of the Malay Rulers, and that nothing in the setting up of this legislature was to curtail the power or authority of the Rulers in their respective states.

Thus the position that obtained in the Malay Peninsula up to the coming of the Second World War was that the Malay States, in private and public international law, were very much in the nature of sovereign states. Internally it was a mixture of absolute monarchism and constitutional government. The choice of which prevailed in any given case was not that of the Sultan but of the British Resident upon whose advice he was bound to act.⁴³

This was the position until the advent of the Japanese Occupation during the Second World War.

42. Ibid. See also Stevens J. in *Pillai v. State of Kedah* [1927] 6 FMSLR 160. In *Wong Ah Fook v. State of Johore* [1937] M.L.J. 121 the executive act of the Sultan of Johore was successfully challenged on the ground that the Sultan had himself in 1908 declared that he was subject to the law. The correctness of this decision of a single judge is however doubtful in the light of the full bench decision in the *Anchom* case, supra. See criticism of the decision in Mohd Arif Yusof, Post-war Political Changes: Constitutional Developments Towards Independence And Changing Conceptions Towards Judicial Review In Malaysia (1982) Vol. 9 JMCL 19 at p. 26 (Foot-note 24).

43. For an account of how the British influenced or inveigled the Sultans in decision-making, see Dr. Chandra Muzaffar in Protector, supra, note 3, at p. 52 et seq.

Post-War Constitutional Reforms

British rule separated the early Malay Kingdoms from the present period.⁴⁴ The Japanese conquest of the Malay Peninsula and Singapore in 1942 destroyed British rule.⁴⁵ The British were never again to regain their pre-eminence in the Malay Peninsula. The attainment of independence in India and the successful overthrow of the Dutch yoke in neighbouring Indonesia had its impact on the nascent nationalist movement in Malaya.

Thus when the British returned to Malaya they faced a changed situation. There was for the first time political awareness amongst the various races in the country.⁴⁶ This was soon to burgeon when the British introduced the ill-fated Malayan Union plan in 1946.

44. Ibid at p. 50.

45. "Within 70 days in 1942, the Japanese brought to an end British colonisation that had begun with the colonisation of Penang in 1786": see Khong Kim Hoong in Merdeka, op. cit. at p. 24. Churchill had obviously underestimated the Japanese offensive in the Far East. When told by his advisers of the threat to Singapore, Churchill had reportedly brushed it aside with these words: "The little yellow men will never dare to challenge the might of the British Empire": see AJP Taylor, The Warlords (Penguin, 1984 Reprint) at p. 89. The Japanese ruled Malaya for 3 1/2 years. For an account of the Japanese legal administration in occupied Malaya, see S.K. Das, Japanese Occupation And Ex-Post Facto Legislation In Malaya (MLJ Publication, March, 1960. Reproduced from (1958) and (1959) Malayan Law Journal) and Sim Ewe Eong, An Account Of The Japanese Occupation Of The Settlement Of Penang, Straits Settlement (1941-45) With Special Reference To Administration In The Judicial Department (1981) 2 MLJ clxix. The Japanese Occupation of Malaya was attended with violence and cruelty to the local populace, especially the Chinese. For a personal account of Japanese atrocities, see Sybil Kathigasu, No Dram Of Mercy (OUP 1983; First Published 1954). In the Preface to the 1983 Edition Cheah Boon Kheng records the observation made to him by Gen. Fujiwara in Tokyo in 1976: "Japan lost a golden opportunity to show Asians that as an Asian power, she was a kind liberator who would treat them better than the European powers". Gen. Fujiwara was the head of the Japanese military agency during the war.

46. See Zainal Abidin Wahid, The Japanese Occupation And Nationalism in Glimpses, op.cit. at p. 93. For a detailed political study see Rolf, The Origins Of Malay Nationalism.

The immediate British plan was to deal with the breakdown of authority following the Japanese surrender. Thus, they formed the British Military Administration (BMA) which had as its main objective the reimposition of British rule in Malaya.⁴⁷ The methods of the BMA were authoritarian. It was in reality a military government.⁴⁸

The Malayan Union

In October 1945 the British proposed the formation of a unitary state in Malaya called the Malayan Union. The proposal has been described variously as the product of enlightened British officials with a commitment towards decolonization or otherwise as a British attempt to create the basic political infrastructure leading towards eventual self-rule.⁴⁹ It will be a mistake, however, to consider that the motive was entirely altruistic. The British methodology in implementing the scheme was to bear this out. From the British standpoint, a centralized administration without the bother of the pre-war consultative advisory scheme was advantageous for political and economic reasons.⁵⁰

47. Khong Kim Hoong in Merdeka, op. cit. at p. 37.

48. Ibid at p. 38. The military administration lasted from September 1945 to April 1946: see Mohd Arif Yusof, in Post-War Constitutional Changes, op.cit. at p. 20.

49. See Khong Kim Hoong, Ibid at p. 73, quoting Nordin Sopiee, From Malayan Union To Singapore Separation, (University of Malaya Press, 1974) at p. 16.

50. See Dr. Chandra Muzaffar in Protector, op. cit. at p. 54: "Many reasons have been advanced for the new policy. It has been said that the desire to create a militarily more defensible state, given the British debacle in the face of the Japanese invasion of 1941, the disillusionment with the Malays many of whose leaders had sided with the Japanese during

But the Malayan Union scheme proved abortive. Its implementation, in both substantive and procedural terms, was unacceptable to the now-politically conscious Malays, and in particular the Rulers.⁵¹ In substance, the Malayan Union was an attempt to change the constitutional status of the Malay States from protectorates to colonies; except in matters of the Malay religion and customs the Rulers would be required to surrender their jurisdictions to the British Government thus enabling the Foreign Jurisdiction Act of 1890 to have effect in Malaya.⁵² Laws passed by the legislature would no longer require their assent either individually or collectively but that of the British Governor.

Lastly, the method by which the British procured the assent of the Rulers to the Proposal was considered an affront to the dignity of the Rulers and, in turn, the Malays. The assent of the Rulers was needed because the Sultans had constitutionally never ceded their jurisdiction to the British.

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50. the war, the desire to reward the Chinese some of whom had fought the Japanese and the desire to prepare the country for eventual self-government, were among the major reasons for the formation of the Malayan Union. While all this may have influenced British policy-makers, it is doubtful if any of the factors cited could have been the major motivation".
51. See Tun Salleh Abas, "Federalism In Malaysia" in The Constitution, Law & The Judiciary, op.cit. at p. 15-16: "The Malays opposed the Union; its basis rejected their special position as sons of the soil. The liberal franchise laws would disturb the Malay-Chinese balance. They did not wish to be overwhelmed by a race which had little, if any, real loyalty and commitment to the country. Centralisation would also deprive the Malay Rulers of their power". For a detailed account of the opposition to the Malayan Union proposal, see Khong Kim Hoong, Merdeka, op.cit. at pp. 73 et seq.
52. See Zainal Abidin Wahid, The Malayan Union: Its Introduction in Glimpses, op.cit. at p. 101.

The task was given to Sir Harold MacMichael who was flown in from Britain solely for this purpose. Within two months he had obtained the consent of all the Rulers in circumstances that Richard Winstedt, a local historian of British descent, called "sharp practice".⁵³ The Sultans had continued in office during Japanese occupation, and, indeed six of the ten, had ascended to their thrones during that time. It was obvious that MacMichael had threatened dethronement of the recalcitrants.⁵⁴

The public outcry against the Union proposal was astonishing. It led to the formation of the first ever Malay movement towards nationalism. A Malay political party called the United Malay Nationalist Organisation (UMNO) was formed in May 1946 on the palace grounds of the Johore Sultan with the avowed aim of opposing the proposal.⁵⁵

The British relented.⁵⁶ As a result, it was decided at a meeting of the Rulers and the Malayan Union Governor that a committee be formed to resolve the crisis. The Committee comprised, inter alia, representatives of the Rulers and of UMNO.⁵⁷ The report of this Committee, which was accepted by the British, led to the formation of the Federation in Malaya.

53. Ibid at p. 103.

54. J. Allen in his study The Malayan Union (Yale University: South East Asia Studies Monograph Series, New Haven 1967) quotes the Sultan of Kedah: "I was presented with a verbal ultimatum with a time limit, and in the event of my refusing to sign the new agreement..... a successor who would sign would be appointed Sultan": Quoted in Khong Kim Hoong, Merdeka, op. cit. at p. 81. MacMichael was also described by Allen as not having given due respect to the Rulers. He was "brusque, discourteous and overwhelming, showing irritation at the slightest delay". Ibid.

55. See Tunku Abdul Rahman Putra, Political Awakening (Pelanduk Publications, K.L. 1986) at p. 4.

56. "The Malayan Union remained as an object lesson in the folly of establishing a constitutional structure without prior local consultation": Mohd Arif Yusof, Post-War Constitutional Changes, op.cit. at p. 23.

57. Tunku Abdul Rahman Putra, Political Awakening, op.cit. at p. 4.

The Federation of Malaya, 1948

The first proposal for a Federation had come from the Rulers. It was made on 20th March, 1946 on the eve of the establishment of the Malayan Union. However, it was never considered seriously by the British who thought that it came too late in the day.⁵⁸ When the British decided to dismantle the Malayan Union, the Rulers revived the proposal for a Federation through a working committee set up to recommend a new constitutional arrangement for Malaya.

The Working Committee was given terms of reference to make proposals for the establishment of a strong central government which would nevertheless ensure that the individuality of each of the Malay States is maintained; a common form of citizenship for all those who regard Malaya as their only homeland; lastly, the proposals were to be directed towards the achievement of ultimate self government.⁵⁹ Interestingly, the Working Committee was expressly required to propose a scheme "which would be acceptable to Malay opinion".⁶⁰ The terms of reference showed that the British Government had taken note of the sensitivity of the Malay Rulers and leaders with regard to the authority of the Sultans and the special position of the Malays.⁶¹

58. See Khong Kim Hoong, Merdeka, op. cit. at p. 98.

59. Khong Kim Hoong. Ibid.

60. See Constitutional Proposals for Malaya: Report of the Working Committee, Kuala Lumpur 1947: quoted in Mohd Arif Yusof, Post-War Constitutional Changes, op.cit. at p. 27 (Foot-note no. 14).

61. See Khong Kim Hoong op. cit. at p. 98. In his book The Malay Dilemma (Federal Publication 1981 Ed) Dr. Mahathir bin Mohamed, Prime Minister of Malaysia since 1981, acknowledged that "all changes leading up to independence was done in full consultation and agreement not only with the Malay Rulers but also with the Malay people represented by U.M.N.O." (at p. 130).

The Committee's proposals were embodied in a Draft Agreement which was given conditional approval by the British Government.⁶² The Draft Agreement provided for the continuance of a British government in Malaya. A High Commissioner was to replace the Governor and was to retain all powers except those touching on Malay customs and the Muslim religion. These matters were to be returned to the Sultans.

The Federation Agreement was signed by all the Rulers and on February 1, 1948 the Federation of Malaya came into being.⁶³

The Federation Agreement of 1948 brought into existence for the first time a federal government consisting of the nine Malay States and the two settlements of Malacca and Penang.⁶⁴ There was a clear definition of the ambit of the legislative authority of the Federal legislature. Such residual legislative power that existed, together with the power to legislate on matters of the Muslim religion and custom of the Malays was left to the State legislatures.⁶⁵ However, the Malay Rulers were not constitutional rulers. They

62. The Secretary of State for the Colonies announced in London that "no final decision would be made until all interested parties had full and free opportunity of expressing their views": see Khong Kim Hoong op. cit. at pp. 100-101.

63. The Federation Plan was opposed by some quarters eg. the Communist who saw it as a consolidation of British colonialism, radical Malay groups and some non-Malay groups: see Khong Kim Hoong op.cit. at pp. 101-121, and also Tunku Abdul Rahman, Political Awakening, op.cit. at p.9 et seq. The Federation also saw numerous dissensions from amongst its member states for a number of localised reasons and there were threats also of secession: see Tun Salleh Abas, Federation in Malaya op.cit. at pp. 16-18.

64. Tun Mohd Suffian, An Introduction To The Constitution Of Malaysia, 2nd Edn. (Government Printers 1976) at p. 10.

65. See Federation of Malaya Agreement 1948 in Malayan Constitutional Documents Vol I, 2nd Edn. (Government Printer 1962) at p. 7.

presided over an Executive Council appointed in each State and technically had power to overrule the advice of the Executive Council.⁶⁶

The Federation Agreement did not introduce a constitutional monarchy or a parliamentary government in Malaya. Its significance was in being "an important milestone", and providing "a structure in the advance towards self-government with a constitutional form of government".⁶⁷

The Reid Commission

In 1956, the British Government in consultation with the Malay Rulers appointed a Constitutional Commission under the chairmanship of Lord Reid⁶⁸ to deliberate and propose a Constitution for independent Malaya. By its terms of reference the Reid Commission was enjoined, inter alia, "to make recommendations for a federal form of government for the whole country as a single self-governing unit within the Commonwealth based on parliamentary democracy with a bicameral legislature".⁶⁹

66. See paragraph 177 of the Report of the Federation of Malaya Constitutional Commission 1957 (The Reid Commission Report) (Government Printer 1957) at p. 77 and generally Paragraphs 22-25 on the workings of the legislature and government of the Federation.

67. Mohd Arif Yusof, Post-War Political Changes, op. cit. p. 24.

68. The members of the Commission were: The Rt. Hon. Lord Reid, a Lord of Appeal in Ordinary, Sir Ivor Jennings Q.C., Master of Trinity Hall, Cambridge, both nominated by the United Kingdom Government; Sir William McKell Q.C., a former Governor General of Australia nominated by the Australian Government; Mr B Malik, a former Chief Justice of the Allahabad High Court, nominated by the Government of India; and Mr. Justice Abdul Hamid of the West Pakistan High Court, nominated by the Government of Pakistan.

69. See the Reid Commission Report op. cit. at p.2.

The Reid Commission presented its recommendations in the form of a draft Constitution for the Federation.⁷⁰ In making the Recommendations the Commission declared expressly that it had two objectives in mind; that "first there must be the fullest opportunity for the growth of a united free and democratic nation, and secondly that there must be every facility for the development of the resources of the country and the maintenance and improvement of the standards of living of the people".⁷¹

A Working Party was appointed in the Federation to make a detailed examination of the Report and to submit recommendations. In the meantime, the Report was studied by London. A conference in London in May 1957 between the representatives of the Federation Government and of the Malay Rulers and the British Government resulted in agreement on all points of principle and a revised Draft Constitution for an independent Malaya was adopted.⁷²

70. The Commission had 113 sittings in all in the Federation, of which 31 sittings were to hear representations from interested persons or bodies: see the Reid Report *op. cit.* at paras. 8-12. The Commission received 131 written memoranda. The most significant were those from the Rulers and the Alliance Party, the principal political party at that time: see Zainal Abidin Wahid Merdeka in Glimpses *op. cit.* at p. 150. The Recommendation and the Draft Constitution were later drafted by the Commission in Rome in December 1956: see para. 13 of the Reid Report.
71. See paragraph 14 of the Reid Commission Report. For reliance on the objectives of the Reid Commission in interpreting the Constitution: see Supreme Court in *Theresa Lim Chin-Chin & ors v. Inspector General of Police* [1988] 1 SCR 141; Federal Court in *Dato Menteri Othman v. Dato Ombi* [1981] 1 MLJ 29 at p. 37B-D.
72. For an account of the stages towards independence, see generally, Tunku Abdul Rahman, Political Awakening *op. cit.* and Challenging Times (Pelanduk Publications 1986 K.L.).

Independence

Thereafter events moved swiftly towards the proclamation of independent Malaya. The constitutional machinery devised to bring the new Constitution into force consisted of:-

- (a) the Federation of Malaya Agreement, 1957;
- (b) in the United Kingdom, the Federation of Malaya Independence Act, 1957, together with Orders in Council made thereunder;
- (c) in the Federation, the Federal Constitution Ordinance, 1957, and (in each of the former Malay States) State Enactments approving, and giving the force of law to the Federal Constitution.⁷³

On 31st July, 1957 the British Parliament passed the Federation of Malaya Independence Act, 1957⁷⁴ to make provisions for the establishment of the Federation of Malaya as an independent sovereign country.

On 5th August, 1957 the Federation of Malaya Agreement, 1957⁷⁵ was duly entered into between the Representative of Her Britannic Majesty and their Highnesses the Rulers for the establishment of the Federation of Malaya as an independent country. A Constitution for the proposed Federation of Malaya was annexed as the First Schedule to the Agreement.

On 27th August, 1957, the Federal Legislature of the Federation Malay States passed the Federal Constitution Ordinance, 1957⁷⁶ to approve the Federation of Malaya Agreement, 1957. By an Order in Council of Her Britannic

73. See R.H. Hickling in Preface to Malayan Constitutional Documents Vol. 1 (2nd Edn.) (Government Press 1962) at p. xiii.

74. Ibid at pp. 1-8.

75. Ibid at pp. 9-12.

76. Ibid at pp. 13-14.

Majesty, termed the Federation of Malaya Independence Order in Council, 1957 (Statutory Instrument No. 1533)⁷⁷ laid before the British Parliament on 29th August, 1957 the Federal Constitution was declared to have the force of law within the Straits Settlement's colonies of Penang and Malacca with effect from 31st August, 1957. Thus, after more than a century, direct British rule ended in these colonies on 31st August, 1957.

Independence was proclaimed on 31st August, 1957 where at a ceremony in Kuala Lumpur, the Duke of Gloucester, acting on behalf of Her Majesty, the Queen, formally handed over to the Prime Minister the constitutional documents signifying the independence of the Federation of Malaya. At the ceremony there was also read by the new Prime Minister a document called the "Proclamation of Independence".⁷⁸ This remarkable document⁷⁹ encapsulated in its contents the essence of the type of government established by the new Constitution. It declared that by the Constitution "provision is made to safeguard the rights and prerogatives of their Highness, the Rulers, and the

77. Ibid at pp. 15-16.

78. Ibid at pp. 17-18.

79. It's draftsman Professor R.H. Hickling has called it "a neglected document": see R.H. Hickling, "The Historical Background To The Malaysian Constitution" in Reflections On The Malaysian Constitution (ALIRAN Publication, Penang. 1987) at p. 26. There is also an account of how the document came to be drafted. According to Hickling: "On the eve of independence I was working as the legal draftsman in the Attorney General's Chambers here in Kuala Lumpur - in the old Secretariat, now the Supreme Court. I was summoned by the Attorney himself, Tom Brodie, an excellent, thorough, honest law officer. (Why do I say "honest" - are not all lawyers honest? Well, of course they're not!) He was not exactly enchanted. "The Tunku" (Tunku Abdul Rahman, the first Prime Minister) he said, "would like a draft Proclamation of Independence". Well, I thought, why not? Independence does not come every day. What to do? The American Declaration of Independence, "We the People", something like that? It was a sober thought..... In the event there came in the end, completed by the Tunku's master touch - the Proclamation of Independence..... To me, there is something splendid about it. It must not be forgotten: one of the happiest inspirations of the Tunku". Ibid.

fundamental rights and liberties of the people and to provide for the peaceful and orderly advancement of the Persekutuan Tanah Melayu as a constitutional monarchy based on Parliamentary democracy".⁸⁰

Malaysia

In 1963, came the formation of Malaysia with the enlargement of the Federation of Malaya by the admission of the neighbouring British Colonies of Sabah, Sarawak and Singapore into the Federation through the Malaysia Act, 1963.⁸¹ This was enabled by Article 2 of the Malayan Constitution which provided inter alia that "Parliament may by law admit other states to the Federation".⁸²

80. Malayan Constitutional Document, Vol. 1, op. cit. at p. 18.

81. Act No. 26 of 1963 w.e.f. 16 September 1963 (Halbury's Statutes of England Vol. 4, 3rd Edn. at pp. 374-79). The Malaysia Act amended the Constitution by: (a) amending Article 1(1) which provides that "the Federation shall be known by the name of Persekutuan Tanah Melayu (in English the Federation of Malaya) by substituting for it that "the Federation shall be known in Malay and in English by the name "Malaysia"; (b) amending Article 1(2) by adding the states of Sabah, Sarawak and Singapore to the states originally enumerated. By the Constitution Amendment Act No. 14 of 1962, Article 159(4) was amended by providing that only a simple majority was needed for the passing of an amendment made for the admission of a new State to the Federation. In criticism of this, Professor H.E. Groves has argued that the amendment makes "it possible for a simple majority in the House of Representatives to vary at any time as a purely unilateral action any agreement which any state now joining the Federation may make with the Government of the Federation of Malaya as to its admission and association: see H.E. Groves "Constitution (Amendment) Act, 1962, (1962) Vol. 4 Mal. L.R. 329.

82. Article 2 was evidently modeled on Article 3 of the Indian Constitution, which reads: "Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit". The Malaysian Article 3 is likewise based on the Indian Article 3 dealing with the right of Parliament to alter the boundaries of a State with the consent of the State Legislature. Interesting case-law from India suggests that these provisions do not entitle Parliament to cede territory to a

The formation of the enlarged Federation was challenged in Court by the Government of the State of Kelantan: see *The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al Haj.*⁸³ The case was decided dramatically on the eve of the proclamation of the new Federation. The challenge was made on several legal grounds:

- 1) that the Malaysia Act would abolish the Federation of Malaya thereby violating the Federation of Malaya Agreement, 1957;
- 2) that the proposed changes needed the consent of each of the constituent States, including Kelantan, and this had not been obtained;
- 3) that the Ruler of Kelantan should have been a party to the Malaysia Agreement;
- 4) that constitutional convention called for consultation with Rulers of individual States as to substantial changes to be made to the Constitution;
- 5) that the Federal Parliament had no power to legislate for Kelantan in respect of any matter regarding which that State had its own legislation.⁸⁴

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82. foreign country: see Advisory Opinion of the Supreme Court in *In Reference On Berubari* AIR 1960 SC 845. However, the settlement of a boundary dispute with another country involving adjustment of territory will not offend the principle: see *Maganbhai v. Union of India* AIR 1969 SC 783.

83. [1963] 29 MLJ 355.

84. *Ibid* at p. 357E-H. Of the several grounds of legal challenge, the "failure to consult" argument was politically the real complaint. As one opposition Member of Parliament declared during the debate on the proposed Malaysia Act: "This Bill really mutilates our Constitution and

Accordingly, the petitioners claimed that the Malaysia Agreement and the subsequent Malaysia Act were null and void. The questions were undoubtedly of great significance. However, Thomson C.J., whilst claiming a right to deal with the arguments on their merits, rolled up the several issues into a single question: "whether Parliament or the Executive Government has trespassed in any way the limits placed on their powers by the Constitution".⁸⁵ In the result, the Court held that Parliament had correctly followed the amending process⁸⁶ and the changes were therefore valid:

"In doing these things I cannot see that Parliament went in any way beyond its powers or that it did anything so fundamentally revolutionary as to require fulfilment of a condition which the Constitution itself does not prescribe, that is to say a condition to the effect that the State of Kelantan or any other State should be consulted. It is true in

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84. kills the Federation of Malaya..... The Federation Government should not only have discussed the matter here but it should also have consulted the States" (Malayan Parliamentary Debates Vol. V No. 11, 17 August, 1963 Cols. 1155-1156): see generally Shafruddin Hashim, The Constitution And The Federal Idea In Peninsula Malaysia (1984) Vol. 11 JMCL 139, for a discussion of the opposition to the Malaysia plan from some Members of Parliament, p. 161 et seq.
85. Ibid at pp. 358I-359A. Thomson C.J.'s approach has been criticised as a judicial anti-climax i.e. to "generalise as one issue what was clearly five different bases for challenging the constitutionality of the Agreement and the Act": see S. Jayakumar, Admission of New States, (1964) 6 Mal.L.R. 121 at p. 135.
86. An amendment to the Constitution for purposes of admitting a new State is an exception to the general rule that amendments must have a 2/3 majority in Parliament: see Art. 159(4)(bb). In respect of limitations on the amending power of the Federal Parliament in relation to certain subjects affecting the States of Sabah and Sarawak requiring the concurrence of the Yang di-Pertua Negeri (Governor) of these States, see Art. 161E(2): see generally, Datuk Nicholas Fung: "The Constitutional Position of Sabah", in The Constitution of Malaysia: Further Perspectives And Developments (Essays In Honour Of Tun Mohd. Suffian) Ed. F.A. Trinidade & H.P. Lee (Oxford, Singapore 1986) at p. 92 et seq 3, and; Datuk Hj. Mohd Jemuri bin Serjan: "The Constitutional Position of Sarawak" in Further Perspectives Ed. Trinidade & H.P. Lee, op.cit., at p. 114 et seq.

a sense that the new Federation is something different from the old one. It will contain more States. It will have a different name. But if that state of affairs be brought about by means contained in the Constitution itself and which were contained in it at the time of the 1957 Agreement, of which it is an integral part, I cannot see how it can possibly be made out that there has been any breach of any foundation pact among the original parties. In bringing about these changes Parliament has done no more than exercise the powers which were given to it in 1957 by the constituent States including the State of Kelantan."⁸⁷ (emphasis added).

Thus, two days later on 16 September 1963, Malaysia was established.⁸⁸

The new nation is conceptually a confederation. It brought the new units of Sabah, Sarawak and Singapore into association with the former Federation of

87. At p. 359B-D. Thomson C.J.'s qualification that there might be some Act of Parliament "so fundamentally revolutionary" that although done in conformity with the Constitution may nevertheless be invalid unless fulfilling some condition such as State consultation not prescribed in the Constitution, has been consistently criticised by several writers: see Sheridan & Groves, The Constitution of Malaysia, 4th Edn. (Malaya Law Journal Publication, 1987) at p. 3; L.A. Sheridan, Constitutional Problems Of Malaysia (1964) 13 ICLQ 1349 at pp. 1352-53; S. Jayakumar, Admission of New States, op. cit. at p. 187; H.P. Lee, The Process of Constitutional Change in the Constitution of Malaysia: It's Development 1957-1977 Ed. Tun Suffian et al., (OUP, Kuala Lumpur, 1978) p. 373 at pp. 375-76. The present writer is, however, of the opinion that these criticisms do not take into account the fact that the Malaysian Constitution is in constitutional terms the product of a treaty arrangement between the Malay Rulers and the British Sovereign contained in the Federation of Malaya Agreement 1957, and therefore the requirement for consultation can reasonably be implied as arising therefrom. A reasonable argument can be mounted that the Federation Constitution, whilst otherwise exhaustive, has nevertheless to be read conjointly with the other constitutional documents that brought about Independence. Furthermore, Thomson CJ's view may now be justifiable under "the basic features" doctrine (ie. that there is an implied restraint on the amending power of Parliament such that it cannot amend the Constitution so as to destroy its basic features) laid down by the Indian Supreme Court in a landmark decision: *Keshavanandha Bharati v. State of Kerala* AIR 1973 SC 146. A fuller discussion of the impact of this case on Malaysian constitutional law is made later in this study: see Chapter XII.

88. For an account of the political and diplomatic steps leading to the formation of Malaysia including the protests by the neighbouring countries of Indonesia and the Philippines, and the appointment by the United Nations of a fact-finding commission (called the Cobbold

Malaya; thus the units were, prior to the separation by Singapore, really not fourteen States but rather four units, Malaya, Singapore, Sabah and Sarawak, of which the first consists of eleven parts.⁸⁹ The judgment in the *Kelantan* case did not deal with the conceptual character of the new nation although it was acknowledged by the Chief Justice that "in a sense the new Federation is something different from the old one; it will contain more States; it will have a different name".⁹⁰ These reasons would suggest that the change brought about by the admission of the new States did not change the character or structure of government under the old Constitution. It was rightly observed by another writer⁹¹ that the Federation of Malaya continued as "Malaysia" and that the Malaysia Act merely amends the Constitution of the Federation of Malaya and does not create a new Constitution.

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88. Commission after its chairman Lord Cobbold, the former Chairman of the Bank of England) to ascertain the wishes of the people and the local leadership of Sabah and Sarawak to the Malaysia plan, see Richard Allen, Malaysia: Prospect And Retrospect (The Impact And Aftermath of Colonial Rule) Oxford University Press, London 1968 at p. 144 et seq. For a detailed account of the Indonesian and Filipino claims, see Malaysia-Indonesia Conflict, Ed. A.G. Mezerik (International Review Service) Vol. XI No. 86 (New York, 1965).
89. See H.E. Groves, The Constitution of Malaysia: The Malaysia Act (1963) 5 Mal.L.R. 245.
90. At p. 359C.
91. Professor Ahmad Ibrahim, Professor Groves' Constitution of Malaysia (A Book Review) (1964) 2 MLJ xcvi. Indeed the Official Statement of the Government on the formation of Malaysia was emphatic ".....in no sense is it a new State that has come into being but the old State has continued in an enlarged form and with a new name": see Official Statement of Government of Malaysia on Transition of Malaya Into Malaysia (reproduced in A.G. Mezerik, Malaysia-Indonesia Conflict, op.cit. at pp. 95-96).

The Singapore Separation

On 9 August 1965, Singapore separated from Malaysia and became an independent sovereign nation.⁹² Separation was achieved by the constitutional mechanism of the Malaysian Parliament passing the Constitution of Malaysia (Singapore Amendment) Act, 1965.⁹³ By section 3, Singapore ceased to be a part of Malaysia and became an independent, sovereign state. It gave statutory force to the Independence of Singapore Agreement 1965 made between the Government of Malaysia and the Government of Singapore. Article IV of the Agreement provided for the enactment by the Malaysian Parliament of an Act which was set out as an annexure to the Agreement. By section 6 of the said Amendment Act, the sovereignty and authority of the Yang di-Pertuan Agong of Malaysia ceased and became vested in the Yang di-Pertuan Negara, the Head of State of Singapore.⁹⁴ By the Constitution (Amendment) Act, 1966 the necessary

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92. Irreconcilable differences between the leaders in Singapore and Kuala Lumpur and a difference in outlook on vital questions like racial unity and Malay rights made a parting of ways inevitable: see Richard Allen, Malaysia: Prospect and Retrospect, op. cit. at pp. 206-208; R.S. Milne & Diane Mauzy, Politics And Government in Malaysia (Federal Publications, Singapore, 1973) p. 67 et seq. For an interesting analysis of Singapore's sojourn in Malaysia and the expulsion crisis, see James Minchin, No Man Is An Island (A Study of Singapore's Lee Kuan Yew) Allen & Unwin, Sydney 1986 pp. 125-161. A less critical version is given in Alex Josey: Lee Kuan Yew: The Struggle For Singapore (Angus & Robertson) 1980 Ed. pp. 186-189.
93. Act No. 53 of 1965. For an account of Singapore's legal status whilst in Malaysia and the autonomy it enjoyed on matters of local government, legislative power, and education, see Ahmad Ibrahim, The Position Of Singapore In Malaysia (1964) 2 MLJ cxi. The future legislative history of Singapore is outside the scope of this study, but for an account of the transition and acquisition of legislative power by the Singapore Parliament, see A.J. Harding, Parliament And The Grundnorm In Singapore (1983) 25 Mal.L.R. 351.
94. This provision gave rise to the interesting case of *Sng Hung Meng v. Public Utilities Board* [1966] 2 MLJ 25, decided by the then Federal Court in Singapore, where the Court had to consider Singapore's

changes to the text of the Malaysian Constitution was made as a result of Singapore's departure.

Whilst the precipitate decision of the Malaysian Executive to expel Singapore has been politically questioned on the Malaysian side,⁹⁵ the constitutional basis of the excision remains unexplored. It is submitted that in the absence of a provision in the Constitution authorizing Parliament to secede any territory as opposed to a power to admit new States (Art. 2(a)), the jurisdiction can only rest on the argument that in public international law it is an essential attribute of sovereignty that a sovereign state can in case of necessity cede a part of its territory in favour of a foreign state, and that this can be done in the exercise of its treaty making power: see *In Re The Berubari Reference By the President of India*.⁹⁶

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94. constitutional status after separation. The question arose in a very ordinary way. A writ was issued out in Singapore by the plaintiff for a debt in November 1965, after the Separation, with the endorsement "in the name and on behalf of His Majesty the Yang di-Pertuan Agong". It was an obvious mistake but the Court invoked section 6 to hold that the writ was a nullity because it was issued out "in the name of a sovereign of a foreign country".
95. See Allen, op.cit. at p. 208.
96. AIR 1960 SC 845. The case is an Advisory Opinion of the Indian Supreme Court on a reference from the President of India. The Court had to consider, in the context of their Article 1 (which is similarly worded to our Article 2), whether it was lawful for the Indian Government to cede part of the Berubari territory to Pakistan by way of treaty in exchange for the acquisition of new territory.

CHAPTER IVPARLIAMENTARY GOVERNMENT AND KEY FEATURES
OF THE MALAYSIAN CONSTITUTIONIntroduction

In moving the second reading of The Federal Constitution Bill on August 15, 1957 Tunku Abdul Rahman, subsequently the first Prime Minister of the Federation, declared:

"It must be remembered that the freedom to which we aspire is the freedom to govern ourselves under a system in which parliamentary institutions shall be exclusively representative of the people's will".¹

The 1957 Constitution purported to establish in Malaya a parliamentary democracy based on the Westminster model. A bi-cameral legislature, a constitutional monarchy and the establishment of three distinct organs of State - Parliament, an Executive and the Judiciary - were the obvious characteristics of the vintage model that was adopted. However, of equal importance were the dissimilarities. This gave the Malayan Constitution a distinctive character. Professor Hickling rightly observed: "The ideas of Westminster and the experience of India have mingled with those of Malaya to produce a unique form of government".² The independence constitution of 1957 was also described as evolutionary in character having grown out of the early federal arrangement in 1895 and its progeny the Federation Agreement of 1948.

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1. Malayan Constitutional Documents (Second Edition) Vol. 1 at p. iv.
 2. R.H. Hickling, The Historical Background To The Malaysian Constitution in Reflections On The Malaysian Constitution (ALIRAN PUBLICATION, 1987) at p. 29.

Hickling sees in this development "an increasing assertion of the Malay origins of the Constitution" embodied, in particular, in the offices of the Yang di-Pertuan Agong and the Rulers.³ However, not to be diminished are the other features that reflects the underlying compact between the races that produced the independence Constitution.

The Reid Commission was evidently mindful of the multi-racial and multi-religious character of the population. The Commission therefore proposed a fundamental rights chapter in the Constitution providing for freedom of religion,⁴ liberty and equality of the person,⁵ and rights to education regardless of race or religion.⁶ The Reid proposal on the race question was undoubtedly influenced by the Memorandum of the Alliance Party which was the principal political party in the country. It was itself a coalition of political parties representing the three major races in the country. Thus the Constitution has been described as "very much a product of ethnic bargaining and accommodation",⁷ underscoring the significance of a bill of rights in

3. Ibid.

4. Article II.

5. Articles 5 and 8.

6. Article 12. For a discussion of the fundamental liberty clauses of the Malaysian Constitution, see: Koh Eng-Tian, Fundamental Rights Under The Malayan Constitution (1958) Me Judice, 5; R.H. Hickling, Some Aspects Of Fundamental Liberties Under The Constitution Of The Federation Of Malaya (1963) MLJ xliv; Fundamental Liberties: Are They Real Or Illusory? Editorial INSAF (1976) Vol. 9.

7. Tan Chee Beng, Ethnic Dimension In The Constitution, INSAF Vol. XX No. 3 September, 1987 at p. 31. The purpose and function of a Bill of Rights is best described in this passage from the judgment of Justice Jackson of the United States Supreme Court in *West Virginia State Board of Education v. Barnette* 319 U.S. 624 [1943]: "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and

respect of ethnic and religious minority rights. Indeed in a government publication the Constitution is described as "a binding agreement solemnly entered into by all the races".⁸ In brief the accommodation between the races is seen in the provision of liberal citizenship rights for the non-Malays in return for the recognition of special privileges for the Malays.⁹

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7. officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections".
8. Towards National Harmony (Government Printers, Kuala Lumpur 1971).
9. The "special privilege" clause of the Constitution is Article 153. Clause (2) reads: "Notwithstanding anything in this Constitution, but subject to the provisions of Article 40 and of this Article, the Yang di-Pertuan Agong shall exercise his functions under this Constitution and federal law in such manner as may be necessary to safeguard the special position of the Malays and natives of any of the States of Sabah and Sarawak and to ensure the reservation for Malays and natives of any of the States of Sabah and Sarawak of such proportion as he may deem reasonable of positions in the public service (other than the public service of a State) and of scholarships, exhibitions and other similar educational or training privileges or special facilities given or accorded by the Federal Government and, when any permit or licence for the operation of any trade or business is required by federal law, then, subject to the provisions of that law and this Article, of such permits and licences". The accommodation had much to do with the wisdom, personality and character of the country's first Prime Minister Tunku Abdul Rahman. R.H. Hickling has written of the Tunku that "his personality did much to inform and influence the pattern of the new Constitution": An Overview of Constitutional Changes In Malaysia: 1957-1977 (The Constitution of Malaysia. It's Development 1957-1977 Ed. Tun Suffian, H.P. Lee, FA Trinidad). The Tunku's role in the early days in bringing about a united nation is remembered as his greatest accomplishment: See citation on being conferred the Outstanding Malaysian Award by ALIRAN on 15th August, 1987:

"Only an extraordinary leader could have brought together the Malays and other communities in the '50s in a common quest for a common goal - Merdeka. To understand the magnitude of this task, one has to be aware of the fears and apprehensions, the doubts and suspicions that existed between and among the various communities. For the Malays, granting citizenship on such liberal terms to recently-domiciled Chinese and Indians, was a traumatic

The balance of ethnic interests is seen in the recognition given to certain traditional features of Malay society and its incorporation structurally into the Constitution. Apart from this the Constitution entrenched the special position of the Malay language as the National Language and "a special privileges" clause for Malays.¹⁰ These features, inter alia, have been called "the traditional elements" of the Constitution.¹¹ The term has been used in relation to features of Malay society and culture that "have been in practice long before the British colonial administration itself and have passed through several successive constitutional and political developments".¹² These indigenous features have been identified as:-

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9. experience. It had relegated them from a nation to a community among communities. Among the non-Malays, on the other hand, there was pervasive fear that their economic, political and cultural interests and aspirations would be at the total mercy of a Malay political elite. As a result of these fears and anxieties there was quite a bit of communal hysteria in those days. It took the warm, assuring hand of the Tunku to assuage the doubts and apprehensions on both sides, to calm down Malays and non-Malays so that they would compromise and accommodate each other's position": ALIRAN Monthly Vol. 7 (August 1987) at p.2.

10. The Constitution itself is silent on the question of Malay hegemony or dominance in government. At the political level, however, it is considered axiomatic. It has been argued that Malay dominance was "an agreed compact between the races as a condition for non-Malay rights after independence: See speech by Datuk Abdullah Ahmad, a member of the ruling U.M.N.O. (United Malay Nationalist Organisation) party at the Institute of International Affairs, Singapore: "The political system of Malay dominance was born out of a sacrosanct social contract which preceded national independence. There have been moves to question, to set aside, and to violate this contract that have threatened the stability of the system. The May 1969 riots arose out of the challenge to the system agreed upon, out of the non-fulfilment of the contract" (The Sunday Star, August 31, 1986 p. 11). The social contract argument has been criticised as an "invented theory" and that Malay dominance only came about as a political reality: see rebuttal by Dr. Mavis Puthuchery, The Star, Saturday, September 6, 1986.

11. See Tun Salleh Abas, Traditional Elements Of The Malaysian Constitution in Constitution, Law and Judiciary (Malaysian Law Publishers, Kuala Lumpur 1986) at p. 37 et seq.

12. Ibid.

- (1) The Sultanate or Rulership
- (2) Islamic Religion
- (3) Malay Language
- (4) Malay Privileges.¹³

In the result, as one writer observed:

"The Federation Constitution of 1957 was a superb example of the intricacies involved in balancing competing interests in a complex society. To start with, the Constitution attempted to balance the interests of the constituent states of the Federation with those of the centre. The position of hereditary Sultans was adjusted to the demands of a democratic polity which vested sovereignty with the people. Given the fears of the indigenous Malay community, its status and symbols had to be protected. Given the apprehensions of the non-indigenous Chinese and Indians, on the other hand, their legitimate aspirations had also to be considered. At the same time, since the establishment of a Parliamentary Democracy was the objective, various fundamental freedoms had to be incorporated into the Constitution. However, since an emergency was in force - the consequence of a communist insurgency - the state also chose to arm itself with vast powers which gave priority to security over liberty".¹⁴

PARLIAMENTARY GOVERNMENT

The Reid Commission was directed by its terms of reference to make recommendations for a federal form of government based on parliamentary democracy and a bi-cameral legislature.¹⁵ The mandate was evidently to use the Westminster model and adapt it to suit local requirements. The Commission had several previous models to work on.¹⁶ The final proposal showed that the form

13. Ibid.

14. See Dr. Chandra Muzaffar, Constitution And Society: an Overview in Reflections, op. cit., note 2, at p. 289.

15. See the Report of the Federation of Malaya Constitutional Commission 1957 at p. 22, para. 57.

16. Eg. the Constitutions of India, Australia, the British North America Act of Canada, and Ceylon.

and structure of government was largely modeled on the Indian Constitution. As Suffian F.J. (as he then was) acknowledged in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister for Home Affairs)*¹⁷: ".....to a great extent the Indian Constitution was the model for our Constitution".¹⁸

There are nevertheless significant differences between the two which should not escape notice. For one, Professor Hickling observes that the Constitution was essentially evolutionary in character:

"There is no proud preamble, declaratory of the will of the people; no constituent assembly hammered it out with the strange paradox to be found in the Indian Constitution nor did any popular referendum set a popular seal upon its single but lengthy text".¹⁹

In *Phang Chin Hock v. Public Prosecutor*²⁰ the Federal Court termed the Constitution as an Anglo-Malayan venture.²¹ The issue that arose in that case was whether the principle enunciated by the Indian Supreme Court in the landmark decision of *Kesavanandha Bharati v. State of Kerala* AIR 1973 SC 1461, of an implied limitation on the amending power of Parliament should be adopted in Malaysia. In declining to follow the Indian doctrine, the court relied on the so-called differences between the two Constitutions. The principal difference was said to be the presence in the Indian Constitution of an

17. [1969] 2 MLJ 129 F.C.

18. The alternatives suggested were the Ceylonese and Canadian models: see Shafruddin Hashim, The Constitution And The Federal Idea In Peninsular Malaysia (1984) 11 JMCL 139, 140 (Foot-note (2)).

19. R.H. Hickling in Overview, op. cit. at pp. 2-3.

20. [1980] 1 MLJ 70 FC.

21. At p. 73. See also Raja Azlan Shah Ag LP in *Dato Menteri Othman v. Dato Ombi Syed Alwi* [1981] 1 MLJ 29 at 32 F.G.: "The Federal Constitution was enacted as a result of negotiations and discussions between the British Government, the Malay Rulers and the Alliance Party relating to the terms on which independence should be granted".

express declaration of state and social policy in its Preamble and in Part IV called the Directive Principles of State Policy. In his classic treatise on the Indian Constitution, Dr. Basu observes that the Directive Principles were inserted by the makers of the Indian Constitution to meet the aspirations of their peoples and that the Directive Principles, albeit non-justiciable, were incorporated in the Indian Constitution to "serve as a moral restraint upon future governments and prevent the policy from being torn away from the ideas which inspired the makers of the organic law".²² Further, the Indian Supreme Court uses the Directive Principles as authorised aids to interpret the constitution.²³ Having in mind these distinctions, Suffian LP concluded:

".....it is understandable that Indian jurists should infer from the Preamble and Directive Principles ideas and philosophies animating the Indian Constitution and controlling its interpretation so much so that there are limits on the power of the Indian Parliament to amend their constitution. In Malaya, on the other hand, the constitution was the fruit of Anglo-Malayan efforts and our Parliament had no hand in its drafting..... When the British finally surrendered legal and political control, Malaya had a ready-made constitution and there was no occasion for Malaysians to get together to draw up a constitution. Our constitution has no preamble and no directive principles of state policy..... Our constitution was not drawn up by a constituent assembly and was not "given by the people"."²⁴

The similarity with the Indian Constitution lies in the federal system and the distribution of legislative powers between a federal legislature and state legislatures. Both Constitutions attempt to demarcate legislative power

22. Basu's Commentary On The Constitution Of India 6th Ed. Vol. A (1973) (Sarkar & Anor Ltd, Calcutta) at pp. 21-22. He also observes: "The sanction behind the Directives is, of course, political and not judicial" (1981 Ed. Vol E at p. 4).

23. See eg. *In Re Kerala Education Bill* AIR 1955 SC 1958: *Magan Lal v. Municipal Corporation Bombay* [1974] 2 SCC 402.

24. Op.cit. at p. 73E-I.

according to subjects with respect to which the centre or state legislatures can enact laws.²⁵ In Malaysia, the distribution of legislative power is closely tied up with the scheme of the Federation.

In proposing a federation for the Malay Peninsular, the Reid Commission recommended "a strong central government with a measure of autonomy for the States".²⁶ There was established a duality of government with a clear demarcation of legislative and executive powers between the Centre and the States. The Constitution provided for separate executive and legislative branches at both the Federal and State levels.

The Federal Parliament is bi-cameral in character composed of an upper house of appointed senators and a lower house that is entirely elected. Like its English model, the executive government is formed from the Lower House, called the Dewan Rakyat. The Yang di-Pertuan Agong appoints as Prime Minister a member of the Dewan Rakyat who in his judgment is likely to command the confidence of the majority of the members of the House (Article 43). The Prime Minister presides over a Cabinet that is chosen from members of the Dewan Rakyat.²⁷ Since the Yang di-Pertuan Agong is a constitutional monarch he is bound to act on the advice of the Cabinet save in some matters.²⁸ The upshot

25. For a comprehensive analysis of the position in India see H.M. Seervai, Constitutional Law of India 3rd Edn. Vol. II Ch. XXII (Legislative Power of the Union and the State) p. 1892 et. seq.

26. The Reid Report, op. cit. para. 17, p.77.

27. The Constitution however also provides for appointment of members of the Senate (the Upper House, called the Dewan Negara) to the Cabinet.

28. There were 3 matters in which the King may ostensibly act on his own. They are: (1) appointment of the Prime Minister (2) withholding consent to dissolution of Parliament, and (3) requisitioning a meeting of the Conference of Rulers. He will no doubt be governed by constitutional conventions in the exercise of his discretion in these matters: see generally, Tun Mohd Suffian, Parliamentary System v. Presidential System - The Malaysian Experience [1979] 2 MLJ liii.

of the whole scheme was the creation of a Cabinet style government based on the Westminster model. It was the obvious intention of the framers of the Constitution that the executive government should be answerable to and controlled by Parliament.

At the state level, the same model was adopted except that an unicameral legislature was set up. Each of the states retained their own constitution.²⁹ The system of accountability to an elected legislature by the executive government is similar to that at the federal level.

The significant feature of the federal system under the Reid proposals was the clear demarcation of legislative power between the federal and state parliaments. The Ninth Schedule to the Federal Constitution carries the demarcation in three separate lists called the Federal List, the State List and the Concurrent List. An examination of the subjects contained in these Lists indicates a strong central bias eg. defence, police, internal security, foreign affairs, fiscal policy, all come under the Centre.³⁰ The main subjects allotted to the States are land administration and matters of the Islamic religion. By Article 4 of the Federal Constitution the vires of a statute may be challenged on the basis that the Federal Parliament had trespassed onto a State matter. The decision of the Supreme Court in *Mamat bin Daud v. Government of Malaysia*,³¹ is a case in point. The question there was whether a

29. However by Article 4 of the Federal Constitution, the Federal Constitution is declared to override the state constitutions in the event of conflict. The point will be discussed more fully later in this study.

30. For a discussion of the distribution of legislative powers between the Federal Parliament and the State Legislatures, see Ahmad Ibrahim, *Malaysia As A Federation* (1974) JMCL 1; Shad Salim Faruqi, *The Legal Basis For Federal State Relationship In Malaysia* (1981) INSAF Vol. XIV No. 3 at p. 14 et seq.; Shafruddin Hashim, *The Constitution And The Federal Idea In Peninsula Malaya* (1984) 11 JMCL 139.

31. [1988] 1 SCR 153; [1988] 1 MLJ 119 SC.

provision in the Penal Code creating the offence of causing religious disunity was in pith and substance a measure directed at the Islamic religion or was it a provision dealing with the subject of public order. If it was the former, the statute would be invalid as falling outside the legislative competence of the Federal Parliament whereas a public order measure would pre-eminently be within its sphere. In deciding this question, the Supreme Court adopted the doctrine of colourable legislation from India. That doctrine was outlined by the Indian Supreme Court in *KCG Narayan Deo v. State of Orisa* AIR 1953 SC 395, 379 in the following terms:

"It may be made clear at the outset that the doctrine of colourable legislation does not involve any question of "bona fides" or "mala fides" on the part of the legislature. The whole doctrine resolves itself into the question of competency of a particular legislature to enact a particular law. If the Constitution of a State distributes the legislative powers amongst different bodies, which have to act within their respective spheres marked out by specific legislative entries, of it there are limitations on the legislative authority in the shape of fundamental rights, questions do arise as to whether the legislature in a particular case has or has not, in respect to the subject matter of the statute or in the method of enacting it, transgressed the limits of its constitutional powers. Such transgression may be patent, manifest or direct, but it may also be disguised, covert and indirect and it is to this latter class of cases that the expression "colourable legislation" has been applied in certain judicial pronouncements. The idea conveyed by the expression is that although apparently a legislature in passing a statute purported to act within the limits of its powers, yet in substance and in reality it transgressed these powers, the transgression being veiled by what appears on proper examination to be a mere pretence or disguise".

Applying the doctrine, the Supreme Court in *Mamat's* case struck down the provision holding that it was in pith and substance not a legislation on "public order" but a law on the subject of religion with respect to which only the States have power to legislate.³² The case illustrates that the courts

32. For a general discussion on limits to legislative power under the Constitution, see S. Jayakumar, Constitutional Limitations On Legislative Power In Malaysia (1967) 9 Mal. L.R. 96.

would be prepared to solicitously uphold the federation system in Malaysia and enforce the constitutional provisions relating to distribution of legislative powers between the Federal and State Legislatures. The only overriding instance when the question of legislative competence becomes irrelevant is when a state of emergency is in force and a legislative measure is expressly declared to be an emergency measure. This position will be discussed later in this study when the impact of a proclamation of emergency is considered.

A significant point about the parliamentary system in Malaysia is the establishment of Cabinet Government. It is outside the scope of this work to inquire whether the parliamentary system has in substance provided for a representative government in Malaysia.³³ Likewise, it is not intended to discuss whether Parliament has fulfilled its role of controlling the executive government. However, a note may be made of the fact that Malaysia experiences what is often regarded as a principal drawback of the parliamentary system everywhere, namely, that the ruling party with an overwhelming majority in Parliament can control Parliament through the executive government rather than vice versa.³⁴ In Malaysia, the same party has been in power since independence with an overwhelming four-fifths of the seats in the Dewan Rakyat (Lower House) most of the time. The commanding majority of the ruling party has resulted in what some quarters have described as the decline of Parliament

33. For example it has been argued that the Constitution by providing for representation to the Dewan Rakyat by reference to single member constituencies provides no guarantee that minority or conflicting or opposing interests will be represented in Parliament: see Raja Aziz Addruse, Does Our Constitution Provide For Opposing And Varied Interest In Parliament? (1976) 1 MLJ lxxviii. See also the Commentaries on this article by Senator Kamarul Ariffin (1976) 1 MLJ lxxxiii and Lim Kean Chye (1976) 1 MLJ lxxxii.

34. Lord Hailsham has called this an "elective dictatorship": see his Dilemma Of Democracy (Collins, London 1978) at p. 125.

under the weight of Executive dominance.³⁵ Thus, there has evolved for all real purposes the concept of parliamentary sovereignty in Malaysia rather than constitutional supremacy as envisaged by the Constitution. The ruling party with its overwhelming voting power can push any measure through Parliament including amendments to the Constitution.

35. See Dr. Chandra Muzaffar, The Decline Of Parliament ALIRAN Monthly April/May 1985 Vol. V No. 4 at p. 2: "Executive dominance is mainly responsible for diminishing parliamentary power. Parliament is completely subservient to the whims and fancies of the Executive... A related factor has further reinforced executive power. This is the rise of Malay capitalism in the last fifteen years or so. Malay capitalism is dependent upon the State; just as the State is committed to Malay capitalism which is to be expected in a system like ours. A strong, secure, executive which brooks no challenge from any quarter is what the government and Malay capitalists want so that the latter can accumulate wealth without hinderance. If parliamentary debate is going to slow down the growth of this class of capitalists, then it has to be set aside. If, on the other hand, the UMNO (the dominant component in the ruling party) Assembly serves as a useful vehicle for strengthening the interest of this class, then it is inevitable that it will emerge as the nation's prominent forum. This explains in part why the Annual UMNO General Assembly is far more important than any parliamentary session. For that is where real power resides!" See also, Dr. Chandra Muzaffar, Democracy - Last Rites?, ALIRAN Monthly, Vol. V. No. 8 (1985) at p.7. The belief that over the years Parliament has become a mere rubber-stamp of the executive government is also a view expressed in his book The Malay Dilemma (Federal Publications 1981 Edn) by the present Prime Minister Dr. Mahathir Mohamed, whilst a backbencher in Parliament: "In the main, Parliamentary sittings were regarded as a pleasant formality which afforded members opportunities to be heard and quoted, but which would have absolutely no effect on the course of the Government. The general feeling was that whether or not the Parliament sat, the Government would carry on. The sittings were a concession to a superfluous democratic practice. Its main value lay in the opportunity to flaunt Government strength. Of and on, this strength was used to change the Constitution. The manner, the frequency and the trivial reasons for altering the constitution reduced this supreme law of the nation to a useless scrap of paper". (at p. 11)

For further discussion of the role of Parliament, see:

- 1) Tommy Thomas, Parliamentary Democracy (1985) INSAF Vol. xviii. No. 3 p. 34 et. seq.
- 2) Shad S. Faruqi, Parliamentary Government In Malaysia: Some Reflections (1985) INSAF Vol. xviii No. 1 p. 19 et. seq.

Does the Constitution provide any restraint on the exercise of majority power in Parliament? In *Phang Chin Hock v. Public Prosecutor* [1980] 1 MLJ 70 the Malaysian court declined to follow the jurisprudence evolved by the Indian Supreme Court in *Kesavanandha Bharati v. State of Kerala* AIR 1973 SC 1461 that parliament has no power to amend the constitution so as to alter its basic features. Thus a constitutional obstacle to a legislative measure of the party in government is easily overcome by amending the Constitution itself. It raises serious doubts as to the viability of the doctrine of constitutional supremacy under the Malaysian Constitution. We shall now examine this doctrine.

CONSTITUTIONAL SUPREMACY

Article 4 declares that "this Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void". Article 4 is fundamental to the meaning and effect of the Constitution. Professor Hickling rightly observed that to "misunderstand Article 4 is to misunderstand the whole document (ie. the Constitution)".³⁶ It purports to establish the

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35. 3) Tan Chee Khoon, The Role Of Parliament (Reflections On The Malaysian Constitution - ALIRAN PUBLN. 1987) p. 114.
- 4) Lim Kit Siang, Role Of Parliament in Reflections, op. cit. p. 122.
- 5) Nik Abdul Rashid, The Malaysian Parliament in Suffian, Lee and Trindade, The Constitution Of Malaysia Its Development: 1957-1977 (OUP, 1978) at p. 136 et. seq.

36. R.H. Hickling, Overview, op. cit. at p. 5.

doctrine of constitutional supremacy in Malaysia in place of the theory of parliamentary supremacy which prevails, for example, in countries like the United Kingdom. The purpose behind Article 4 is obviously to establish the Constitution as the basis or foundation for the Rule of Law to prevail in the country on the principles enunciated in the Constitution. It posited for all laws passed by Parliament or the State Legislature to conform to the provisions of the Constitution at pain of being otherwise invalidated. Its significance as a cornerstone principle of the Constitution was duly noted by the Federal Court in *Loh Koi Choon v. Government of Malaysia*,³⁷ when it was observed, per Raja Azlan Shah FJ (as he then was):

"The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying 3 basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach. The second is the distribution of sovereign power between the States and the Federation, that the 13 states shall exercise sovereign power in local matters and the nation in matters affecting the country at large. The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial Branches of government, compendiously expressed in modern terms that we are a government of laws, not of men".³⁸

The significance of Article 4 as establishing the principle of constitutional supremacy, in preference to legislative supremacy, is seen by considering the position before the coming into force of the Federal Constitution. In *Anchom bte Lampong v. Public Prosecutor*,³⁹ decided in 1939, the then Court of Appeal was confronted with the issue whether the state

37. [1977] 2 MLJ 187.

38. See reiteration of this principle by the learned Judge upon his appointment as Sultan of Perak in (1984) JMCL Vol. II, Supremacy Of Law In Malaysia, at p. 1 et. seq.

39. [1940] MLJ Rep. 18.

legislature of Johore was precluded by the Constitution of Johore, 1895, from revising or amending the Mohammedan law applicable to the State. Poyser CJ said:

"The Constitution of Johore..... is in the nature of an Enactment which can at anytime be amended or varied, and therefore has the force of law. In view of its terms I have no hesitation in coming to the conclusion that this court has no power to pronounce on the validity or invalidity of any Enactment passed by the Council of State and assented to by the Sultan, any more than the English courts could pronounce an Act of Parliament to be invalid. To hold otherwise would be to ignore the sovereignty of the Sultan and the legislature and to treat Enactments of the Johore legislature as the English Courts treat by-laws...".⁴⁰

The position changed with Independence and the coming into force of the Federal Constitution in 1957. This is demonstrated in a series of cases.⁴¹ We do not propose to discuss them for our present purposes.⁴² It suffices to quote what Suffian LP said in *Ah Thian v. Government of Malaysia*:⁴³

40. At p. 22H-I.

41. *Stephen Kalong Ningkan v. Tun Abang Hj. Openg* (No. 2) [1967] 1 MLJ 46; *Assa Singh v. Menteri Besar, Johore* [1969] 2 MLJ 30; *Gerald Fernandez v. Attorney General, Malaysia* [1970] 1 MLJ 262. In *The City Council Of Georgetown v. Government Of The State Of Penang* [1967] 1 MLJ 169, the Federal Court applied Article 75 of the Constitution to invalidate a state law which was inconsistent with Federal law. See generally, S. Jayakumar, Constitutional Law Cases From Malaysia & Singapore. (Second Ed. (MLJ 1976) pp. 2-16.

42. For example, the view point in *Chia Khin Sze v. Menteri Besar Selangor* [1958] 24 MLJ 105 that the doctrine of constitutional supremacy does not apply to pre-merdeka laws was laid to rest by the Privy Council in *S.S. Kanda v. Government of Malaysia* [1962] 28 MLJ 169. The error in *Chia Khin Sze's* case was duly noted in *Aminah v. Supt. of Prisons Kelantan* [1968] 1 MLJ 92 and *Assa Singh v. Menteri Besar Johore* [1969] 2 MLJ 30. See also Loke Kit Choy Constitutional, Supremacy In Malaysia In The Light Of Two Recent Decisions (1969) Vol. 11 Mal. L.R. 260, where the above cases are discussed. The article concludes: "With the case of *Assa Singh* the corpse of limited constitutional supremacy is finally buried" (at p.263). NB: "Limited constitutional supremacy refers to the theory advanced in *Chia Khin Sze's* case, supra.

43. [1976] 2 MLJ 112.

"The doctrine of supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please. Under our Constitution written law may be invalid on one of these grounds:

- (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter with respect to which the State legislature has no power to make law, article 74; or
- (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see Article 4(1); or
- (3) in the case of State written law, because it is inconsistent with Federal law, article 75".⁴⁴

An important aspect of the supremacy question is the amendability of the Constitutional itself. Can a law declared to be supreme and thereby binding on Parliament be itself amended by Parliament? This poser calls for a consideration of Article 4 in the context of Article 159,⁴⁵ which confers amending power on Parliament to amend the Constitution. In *Phang Chin Hock v. Public Prosecutor*,⁴⁶ the Federal Court said that "the rule of harmonious

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44. At p. 113A-D. The suggestion by Pike CJ in *Stephen Kalong Ningkan v. Tun Abang Hj. Openg* [1967] 1 MLJ 46 that the constitutional validity of a statute can only be challenged under Article 4(3), namely, on the ground that the Federal Parliament had trespassed on a matter reserved for the State legislature, can now be considered overruled.

45. Article 159 reads: "(1) Subject to the following provisions of this Article and to Article 161E the provisions of this Constitution may be amended by federal law. (2) A Bill for making any amendment to the Constitution (other than an amendment excepted from the provisions of this clause) and a bill for making any amendment to a law passed under Clause (4) of Article 10, shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House".

46. [1980] 1 MLJ 70.

construction" in construing Article 4(1) and Article 159 enables them to hold that Acts of Parliament made in accordance with the conditions set out by Article 159 are valid "even if inconsistent with the Constitution" (See Article 4(1)).⁴⁷ Earlier in *Loh Kooi Choon v. Public Prosecutor*,⁴⁸ the Federal Court rejected the argument that the Constitution as the supreme law cannot be inconsistent with itself. The decision was predicated on the argument that the term "law" as defined in Article 160 (dealing with definitions) "must be taken to mean law made in the exercise of ordinary legislative power" and quite different from "law" made as a constitutional amendment under Article 159 with the result that "constitutional amendments" are not "affected" by Article 4(1).⁴⁹ In *Phang Chin Hock's* case, Suffian LP arrived at the same result albeit in a different way. He did not discuss the meaning of "law" in Article 160. He held that a harmonious reading of Article 4 and Article 159 leads to the conclusion that the term "law" in Article 4(1) refers only to ordinary law as opposed to constitutional amendments; thus only "ordinary law" needs to conform to the Constitution.⁵⁰

In the result, these two decisions have firmly established the rule that the supremacy clause in Article 4(1) does not fetter the power of Parliament to make constitutional amendments of any type as it deems fit. The effect is as Raja Azlan Shah F.J. (as he was then) said in *Loh Kooi Choon's* case:

47. At p. 72H-I.

48. [1977] 2 MLJ 187.

49. At p. 190G-H.

50. Op.cit. at p. 72.

"When that is done it becomes an integral part of the Constitution, it is the supreme law, and cannot be said to be at variance with itself".⁵¹

It does not lie within the scope of this study to examine the question as to whether an unlimited amending power in Parliament is inimical to the concept of supremacy of the Constitution. It suffices for the present to observe that an unchecked and unbridled power to amend the Constitution establishes de facto supremacy in Parliament and negatives for all practical purposes the declaration contained in Article 4(1) of supremacy of the Constitution.

THE POSITION OF THE YANG DI-PERTUAN AGONG

Under the Constitution, the position of the Yang di-Pertuan Agong is not merely ceremonial. Indeed at first blush, some of the provisions of the Constitution vesting powers in His Majesty would seem to place him as a ruler with an unfettered prerogative rather than as a constitutional monarch.⁵² A Malaysian Monarch had once described the role of the King in rather wide terms extending beyond constitutional functions:

"A King is a King, whether he is an absolute or constitutional monarch. The only difference between the two is that whereas one has unlimited powers, the other's powers are defined by the constitution. But it is a mistake to think that the role of a King, like a President is confined to what is laid by the Constitution. His role far exceeds those constitutional provisions".⁵³

51. Op.cit. at p. 188.

52. For a discussion of the royal prerogative in Malaysia, see R.H. Hickling, The Prerogative In Malaysia (1975) 17 Mal. L.R. 207.

53. Raja Tun Azlan Shah, The Role of Constitutional Rulers: A Malaysian Perspective For The Laity (1982) Vol. 9 JMCL 1 at p. 17. Also published in Trindade & Lee, The Constitution Of Malaysia: Further Perspectives

Let us consider some of the provisions of the Constitution enumerating the functions of the Yang di-Pertuan Agong. Article 32(1) declares the Yang di-Pertuan Agong as the "Supreme Head of the Federation" and Article 39 declares that the executive authority of the Federation shall be vested in him. Article 40(1) enjoins the Yang di-Pertuan Agong when exercising his power under the Constitution or under Federal law to act on the advice of the Cabinet. However, Article 40(2) says he may act in his discretion with respect to, appointment of a Prime Minister; withholding consent to dissolution of Parliament; requisition of a meeting of the Conference of Rulers when concerning solely with the privilege and honour of the Rulers. In matters where the security or the economic life or public order of the Federation or any part thereof is threatened, Article 150(1) empowers the Yang di-Pertuan Agong to issue a Proclamation of Emergency if he "is satisfied" that a grave emergency exists. Under Article 153 the Yang di-Pertuan Agong is vested with the responsibility of safeguarding the special position of the Malays and the natives of the Borneo States (ie. Sabah and Sarawak) and is for that purpose empowered to make reservation of positions in the public service or reservation of scholarship and other educational privileges and give general directions to the relevant authority charged with the issue of trade and business licences to ensure the reservation of such proportion of such permits or licences; in undertaking all the responsibilities aforementioned the Yang di-Pertuan Agong is authorised to act "as he may deem reasonable".

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53. And Development (Oxford) under the title "The Role Of Constitutional Rulers In Malaysia" at p. 76 et. seq. Raja Azlan Shah, a member of the Perak royal family was then Lord president of the Federal Court of Malaysia. On 3rd February 1984 he was installed as the Sultan of Perak. On 18th September 1989 he was installed as the 9th Yang di-Pertuan Agong of Malaysia. See Special Commemorative Issue of the Supreme Court Journal: (1989) 2 SCJ p. 1 et. seq.

It has been observed that the office of the Yang di-Pertuan Agong is governed by the political, social and economic realities of Malaysia.⁵⁴ In recommending the creation of the office of Yang di-Pertuan Agong, the Constitution Commission stated that "he will be a symbol of the unity of the country".⁵⁵ Certainly the features of the monarchical institution in Malaysia is unique. It is the only monarchy anywhere providing for the election of the King. The King holds office on rotation with his brother Rulers. The body that elects the King is the Majlis Raja-Raja or Conference of Rulers. This body established under Article 38 of the Constitution is composed of the Malay Rulers of the nine states and the Governors of Penang, Malacca, Sabah and Sarawak.

The Governors however take no part in the election of the Agong or on questions relating to the privileges, position, honours or dignities of the Rulers. The Conference of Rulers is undoubtedly a body *sui generis*. It is said to have no legislative, executive or financial power but "is the most prestigious body in the country".⁵⁶

By Article 38(2) the Conference of Rulers exercises the functions of:-

- (a) electing, in accordance with the provisions of the Third Schedule, the Yang di-Pertuan Agong and Timbalan Yang di-Pertuan Agong (Deputy King);

54. R.H. Hickling, *op.cit.* at p. 216.

55. The Reid Report, *op.cit.* at p. 22 para. 58(i). The Yang di-Pertuan Agong is "a visible symbol of unity in a remarkably diverse nation": H.E. Groves, The Constitution Of Malaysia (Malaysia Publications Ltd., Singapore, 1964) at p. 42.

56. Tun Mohd Suffian, Parliamentary System Versus Presidential System: The Malaysian Experience (1979) 2 MLJ lii at p. lvi. It has also been described as a constitutional body "with certain executive, deliberative and consultative functions" per Raja Azlan Shah Ag. LP in *Phang Chin Hock v. Public Prosecutor (No.2)* (1980) 1 MLJ 213.

- (b) agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole;
- (c) consenting or withholding consent to any law and making or giving advice on any appointment which under this Constitution requires the consent of the Conference or is to be made by or after consultation with the Conference,

By Article 38(6) it has the following discretionary functions:-

- (a) the election or removal from office of the Yang di-Pertuan Agong or the election of the Timbalan Yang di-Pertuan Agong;
- (b) the advising on any appointment;
- (c) the giving or withholding of consent to any law altering the boundaries of a State or affecting the privileges, position, honours or dignities of the Rulers; or
- (d) the agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole.

The powers of election and removal of the Yang di-Pertuan Agong and the Timbalan Yang di-Pertuan Agong emphasise that the King and Deputy King are accountable to the Conference of Rulers whilst in office.⁵⁷ The powers of the

57. For an account of the election procedure of the Yang di-Pertuan Agong, see F.A. Trindade & S. Jayakumar, The Supreme Head of the Federation (1964) Vol. 6 Mal. L.R. 280 at pp. 282-84; F.A. Trindade, The Constitutional Position of the Yang di-Pertuan Agong in Suffian, Trindade & Lee, The Constitution of Malaysia: Its Developments 1957-1977, op. cit. p. 101 et. seq. at pp.103-105. The election would seem to strictly follow the electoral list according to the Third Schedule of the Constitution and is by secret ballot although it is known that the list has been departed from: see Tunku Abdul Rahman, View points (Pelandok Press, K.L. 1978) at pp. 72-73. For further readings on the election of the Agong, see Professor Dato Dr. Visu Sinnadurai, The Yang di-Pertuan Agong: The Appointment Process Under the Federal Constitution (1989) 2 SCJ 65. The removal of the Yang di-Pertuan Agong or the Timbalan is of course a serious matter and has never happened. Professor Trindade has made the observation in relation to the removal power over

Conference of Rulers increased after the May 1969 Emergency resulting from the outbreak of racial riots in Kuala Lumpur. In the result, it has been said pointedly of the powers of the body: "It stands outside Parliament, yet can veto certain bills and has legislative powers of its own in relation to certain religious observances in the States of Malaya,..... and it can discuss anything".⁵⁸ By two amendments to the Constitution made in March 1971,⁵⁹ after parliamentary rule was restored in the aftermath of the 1969 race riots, Article 159 was amended to provide by clause (5) that the consent of the Conference of Rulers is required for any law that seeks to change Article 38 (Conference of Rulers), Article 70 (Precedence of Rulers) and Article 71 (the right of a Ruler to hold and exercise the constitutional right and privileges of Ruler of the State). Apart from these provisions relating to the position and status of the Royalty, by Article 159(5) consent of the Conference is also needed for any changes to: (a) Part III of the Constitution dealing with citizenship (b) Article 10(4) providing for the passing of any law in the interest of public order from prohibiting the questioning of the so-called sensitive issues like citizenship, national language, the special privileges clause, and the position of the Royalty, (c) Article 152 establishing the Malay language as the national language, and (d) Article 153 relating to

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57. the Yang di-Pertuan Agong: "He cannot be removed by the Cabinet or even by the Malaysian Parliament itself. In this respect his position is stronger than that of the President of India who can be impeached by both Houses of the Indian Parliament but not as strong as the English Monarch who cannot, it seems, be removed at all": F.A. Trindade, The Constitutional Position of the Yang di-Pertuan Agong op. cit. at p. 106.
58. L.A. Sheridan & H.E. Groves, The Constitution of Malaysia (MLJ Publication, 1987) 4th Edn. p. 131.
59. The Constitution Amendment Act 1971 (Act A 30) of 10 March 1971 and the Constitution Amendment Act (No. 2) 1971 (Act A 31) of 24 March 1971.

special privileges for the indigenous people of Malaysia. It will be noted that these matters are essentially those matters which was said to be the underlying compact between the races in producing a balance in the original or independence Constitution. The objective of giving this role to the Rulers would seem to be the maintenance of "a cordial inter-ethnic relationship" in the country.⁶⁰ However, the more plausible reason would seem to be the need to placate Malay sensitivities and assure them of the safeguarding of their rights and privileges. Thus the resort to the time-honoured practice of placing these matters in the hands of the Malay Rulers. The assurance that no constitutional change could be made on these subjects without the consent of the Conference of Rulers make "the Malays feel safe, because it is to the Rulers that they entrust the role of protecting their rights as the Rulers must necessarily be Malays and are above politics".⁶¹ The objective behind giving this quasi-legislative role to the Rulers is obvious - to ensure that these matters precious and sensitive to the Malays should not be subject to the vicissitudes of politics and be left solely in the hands of politicians. From the constitutional standpoint, the position is clear that if the consent of the Conference is not obtained to any such bill, it has no legal effect and would not become law. It is unthinkable that the Yang di-Pertuan Agong would

60. See Azmi Abdul Khalid, Role of the Monarch: Influences Upon The Development Of Parliamentary Government, in Reflections op. cit. p. 44 et. seq. at p. 45.

61. See Raja Tun Azlan Shah, The Role of Constitutional Rulers op. cit. p. 16. He further observes: "It is true that the Conference of rulers acts on advice in this matter. But one will not expect that the consent of the Rulers could be obtained easily in these matters. Any government trying to force these issues on the Rulers would be courting trouble as the Malay masses would definitely back the Rulers when it comes to the question of preserving their special privileges" (at pp. 16-17).

give assent to a bill that has been refused consent by the Rulers. If by some fortuitous such a bill receives the Royal assent its validity is very doubtful.⁶²

In the writer's view the position is clear that the Conference of Rulers is not a mere consultative body. In the constitutional sense and in the context of Article 159(5) it is part of the amending legislative process of Parliament. In the political sense, the Malay Rulers through the Conference and individually, play a significant role in the public affairs of the country.⁶³ The traditional position of the Rulers of being at the apex of Malay society and the power or capacity of the Conference to discuss any subject affirms this position.

62. See *The Bribery Commission v. Ranasinghe* [1965] AC 172; [1964] 2 All ER 785 PC, where the Privy Council struck down a purported amendment to the Constitution of Ceylon which had received the Royal assent but did not comply with the special procedure prescribed by the Constitution that the amending Bill should carry a Speaker's certificate that the Bill was passed with the requisite majority, per Lord Pearce: "Where the certificate is not apparent there is lacking an essential part of the process necessary for amendment" (p.791A). See also *AG for New South Wales v. Trethowan Hong Kong* [1932] AC 526 PC; *Rediffusion (Hong Kong) Ltd v. AG of Hong Kong* [1970] AC 1136 PC; Australian High Court in *Cormack v. Core* [1974] 131 CLR 432.

63. Ironically Tunku Abdul Rahman Putra Al-Haj, the first Prime Minister of Malaysia, has lamented that he had not given more power to the Sultans when the original Constitution was framed. He made this observation in the context of the dismissal of the Lord President of the Supreme Court in August 1988 by the Yang di-Pertuan Agong Sultan Mahmood Iskandar of Johore who he said "was asked to do it by the (Prime Minister)". He observed: "Neither the King nor the other Sultans had any constitutional power to check an elected leader's ambitions if they felt he was going against the people's wishes": see Rodney Tasker, *Second Thoughts in Far Eastern Economic Review* 26 January 1989 at p. 24. It is debatable whether the Tunku is right in his thinking that the Rulers should be empowered to interfere in the political decision - making of the Executive no matter how justified it may seem in a given case. Such a role could hardly be compatible with the status of the Rulers as constitutional monarchs.

However, the Yang di-Pertuan Agong is not *primus inter pares* vis-a-vis his brother Rulers nor does he hold any exalted position over them. He exercises no right or power over them. His significance lies in the functions ascribed to him under the Constitution. In the exercise of them he enjoys certain protection and immunities peculiar to his post.

The question of immunity enjoyed by the Yang di-Pertuan Agong and the Malay Rulers may be examined at two levels. At the first level, is the ambit of the Court's power of justiciability on questions relating to the position and privileges of the Rulers. At the next level, is the pure question of jurisdiction over actions done by the Yang di-Pertuan Agong or the Rulers in their personal or official capacities. On the first question, the relevant constitutional provisions are Articles 71(1) and 181. Article 71(1) reads:

"The Federation shall guarantee the right of a Ruler of a State to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State; but any dispute as to the title to the succession as Ruler of any State shall be determined solely by such authorities and in such manner as may be provided by the Constitution of that State".

And Article 181 reads:

"(1) Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers and the prerogatives, powers and jurisdiction of the Ruling Chiefs of Negeri Sembilan within their respective territories as hitherto had and enjoyed shall remain unaffected.

(2) No proceedings whatsoever shall be brought in any court against the Ruler of a State in his personal capacity."

In *Dato Menteri Othman bin Baginda & Anor v. Dato Ombi Syed Alwi*,⁶⁴ the provisions of Article 71 was described as "a graphic illustration" of the "strength of our constitutional law to guarantee and protect matters of succession of a Ruler".⁶⁵ The issue in that case was whether the court had

64. [1981] 1 MLJ 29 FC.

65. Per Raja Azlan Shah AG LP. Ibid. p. 32 (R) G.

jurisdiction to entertain a writ challenging the election of one of the Ruling Chiefs (called "the Undang") of the State of Negeri Sembilan. The Federal Court by a majority held that the question was not justiciable. Raja Azlan Shah AG. L.P. gave the answer in emphatic terms:

"This court, being the highest court in the land in constitutional matters should take the occasion to reaffirm expressly, unequivocally and unanimously the constitutional position of the Ruler in matters of succession including the election of the Undang and to hold that it is non-justiciable".⁶⁶

The question of justiciability of royal succession arose again in *Daeng Baha Ismail v. Tunku Mahmood Iskandar*.⁶⁷ The question was whether the court had jurisdiction to hear and determine a question as to the legality or otherwise of the election of a Ruler as the Yang di-Pertuan Agong. The Supreme Court held that the decision of the Conference of Rulers, which elects the Yang di-Pertuan Agong, was not open to judicial scrutiny. It said that whether a particular Ruler was eligible for election or not is a matter solely for the Conference of Rulers to decide.⁶⁸

66. Ibid p. 33A-B. Suffian L.P., as did Abdul Hamid F.J. (as he then was) at first instance, held that the question of lawful succession of Rulers was justiciable. Abdul Hamid F.J. was of the view that it would be the function of the court to invoke the relevant adat (traditional Malay mores and customs) to determine the question (of lawful appointment) before the court (p.30F). Suffian LP held that clearer provisions would be needed in the provisions of the Federal or State Constitutions to oust the jurisdiction of the court to adjudicate on the election.

67. Reported only in note-form in (1987) 1 MLJ vi.

68. In the absence of a full judgment, it is not possible to say whether the *Dato Menteri Othman* case, supra, was adopted *in totem verbis*. The High Court, at first instance, had apparently held that the immunity under Article 32(1) applied (see (1987) 1 MLJ vi). The basis of the High Court's decision is questionable because the protection under Article 32(1) could apply only if the Yang di-Pertuan Agong was rightfully appointed. A sounder basis for the decision would be as given in the *Dato Menteri Othman* case viz that by Article 71(1) "the right to succeed..... shall be determined solely by such authorities and in such

In the writer's view the scope of immunity was too widely drawn in both the *Dato Menteri Othman* case and in *Daeng Baha Ismail*. In both cases the courts had failed to make the distinction between choice and eligibility, and appear to have confused the two. Whilst the former is essentially a non-justiciable question the latter is undoubtedly a legal one. Thus for example, there is set out in the Third Schedule to the Constitution the essential matters dealing with eligibility and procedure for election of the Yang di-Pertuan Agong. If the Third Schedule is ignored or if the appointment of the Ruler or the election of the Agong is not made by the proper body under the State or Federal Constitutions it cannot be said that the succession is lawful; nor can a patently unconstitutional appointment be cured by endorsement or approval by any appropriate body. To hold otherwise would be to say that the Rulers may collectively dispense with constitutional provisions. In this respect, the first instance judgment and the minority opinion on appeal in the *Dato Menteri Othman* case are to be preferred to the majority judgments as striking the right balance between immunity and justiciability.

Article 181(2) reiterates the common law doctrine of sovereign immunity from legal suit.⁶⁹ In *Dato Menteri Othman*, the Federal Court held that the immunity given by Article 181(2) does not apply where the title of the Ruler

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68. manner as may be provided by the Constitution of that State". In the instant case, the contention was that the Ruler concerned was not eligible for election as the Yang di-Pertuan Agong because he had not rightfully succeeded to the throne in his State. The ratio in the *Dato Menteri Othman* case would therefore apply appropriately.

69. This right existed even before Independence as illustrated in the case of *Mighell v. Sultan of Johore* [1894] 1 QB 149. It was a breach of promise to marry suit. The charge was that the then Sultan of Johore had come into England incognito under the assumed name of Albert Baker and had promised to marry the plaintiff. The action failed upon the plea of

is itself in dispute.⁷⁰ However, where it properly applied, the provision has been given a wide application. In *Mobil Oil Malaysia Sdn. Bhd. v. Official Administrator Malaysia*,⁷¹ Article 181(2) was held to absolve the estate of the deceased Sultan of Perak from liability under a commercial contract. The plaintiff there claimed against the estate of the late Sultan for the price of diesel oil supplied to a mining company of which the late Sultan was the sole proprietor. It was held that Article 181(2) applied to preclude legal action against the estate. In *Karpal Singh v. Sultan of Selangor*,⁷² Article 181(2) was applied to bar legal action against a Ruler in respect of his statement as to the manner in which he proposes to exercise his powers of pardon. The plaintiff had applied for a declaration that the public statement by the Sultan of Selangor as reported in the newspapers that he would not pardon anyone who has been sentenced to the mandatory death sentence for drug trafficking in Selangor was in violation of the pardon-power given under the Constitution. Abdul Hamid C.J. (Malaya) rejected the argument that Article 181(2) did not apply because the Sultan had made the statement in his official capacity. He held that the statement was made by the Sultan in his personal

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69. sovereign immunity and certification by the British Foreign Office that Her Majesty's Government recognised the Sultan of Johore as an independent sovereign monarch. As to the waiver of this immunity by voluntary submission to jurisdiction, see *Tengku Abu Bakar v. Sultan of Johore* [1949] 15 MLJ 187; on appeal, [1952] AC 318 PC.
70. All the judgments given in the case were agreed on this point. Whilst the holding on this issue is undoubtedly correct it should be noted that insofar as the majority judgments were concerned it was inconsistent with their major premise that a Ruler's ascension to the throne was non-justiciable.
71. [1988] 1 MLJ 518.
72. [1988] 1 MLJ 64.

capacity because it was not done in the course or progress of a Pardons' Board Meeting. He also held, in the alternative, "in line with the spirit and intention of the Constitution", that proceedings brought against a Ruler purportedly in his official capacity will attract Article 181(2) if it is in effect and substance an action against the Ruler personally. The decision has considerably broadened the application of Article 181(2) and obliterated for all practical purposes the dichotomy between "personal capacity" and "official capacity".⁷³

The seemingly wide application of Article 181(2)⁷⁴ should be seen in contradistinction to the circumscribed approach taken by the courts in respect of the protection given by Article 32(1). The obvious difference between the two immunity provisions lie in that the latter applies only to the Yang di-Pertuan Agong.

73. In the *Mobil Oil* case, supra, the distinction was recognised. The learned judge compared the protection afforded by Article 181(2) and Article 32(1) which does not carry the words "in his personal capacity" (see p. 520E-I), and concluded that Article 181(2) was strictly confined to acts done by the Ruler in his personal capacity. This view is preferred to that in the *Karpal Singh* case. If it were otherwise governmental actions undertaken by the Ruler as a constitutional monarch would attract the shield of Article 181(2) and operate as a bar to suits against the Government on the basis of the "in substance" test. The decision is also not defensible on the first ground stated. A Ruler cannot be said to be acting in his personal capacity when he speaks of his constitutional functions regardless of the time and place of the statement. A Ruler does not lose his official capacity by time or place. A Ruler may be said to act in his personal capacity where he transacts on a private basis for personal considerations. As Lord Denman CJ observed in *Munden v. Duke of Brunswick* 10 QB 656 "sovereign princes may contract obligations in their private capacity on considerations purely personal". Both *Mobil Oil* and *Karpal Singh* are decisions of the High Court. Because of the apparent divergence of opinion on the ambit of Article 181(2) it will be left to the Supreme Court on a future date to settle the point.

74. At a Seminar held in August 1987, "To Review 30 years of the Constitution", two distinguished Malaysian Constitutionalists expressed disquiet over "misbehaviour" by some members of royalty. Tun Suffian

The question naturally is whether the acts of the Yang di-Pertuan Agong done pursuant to powers conferred by the Constitution are immune from challenge or judicial review. Article 32(1) declares that the Agong "shall not be liable to any proceedings whatsoever in any court". A number of court decisions *in tandem* has resolved the question to say that the acts of the Yang di-Pertuan Agong are not immunized from legal challenge. The scope of the protection conferred by Article 32(1) was first considered in *Stephen Kalong Ningkan v. Tun Abang Hj. Openg & Anor (No. 2)*,⁷⁵ where the plaintiff challenged his dismissal as Chief Minister of the State of Sarawak on the grounds, *inter alia*, that the Proclamation of Emergency in the State by the Yang di-Pertuan Agong, pursuant to which a meeting of the Council Negeri (State legislature) was convened to vote him out of office, was null and void

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74. observed: "The name of the monarch in Malaysia is sometime besmirched by crimes committed by minor princelings..... Though enjoying legal immunity each of them should scrupulously honour the spirit as well as the letter of the Constitution: Role of the Monarchy in Reflections op. cit. at p. 40, 42; Reproduced in INSAF Sept. 1987 Vol. xx No. 3 at p. 20 et. seq. Tun Suffian may be mistaken if he is saying that legal immunity extends also to royal personages other than the Ruler of the State. Article 181(2) read with Article 160 (Interpretation provision defining, *inter alia*, the term "Ruler") makes it clear that immunity does not go all the way down the Royal line. For example, see *Public Prosecutor v. Tunku Mahmood Iskandar* [1973] 2 MLJ 128 and *Public Prosecutor v. Tunku Mahmood Iskandar* [1977] 2 MLJ 123. At the same seminar Tunku Abdul Rahman Putra Al-Haj, the first Prime Minister of Malaysia suggested the creation of a special court composed of Rulers to try offences by royalty: "What I am concerned about is the position of the Yang di-Pertuan Agong and the Rulers who are above the law, which means they are free to commit crime without being subject to prosecution under the law..... Firstly I feel that no person should be exempted from the law but a special court might be provided to deal with offences committed by those above the law. This court should be made up of their brother rulers whose decision shall hold good. This is done in order to protect the fundamental rights of all citizens of this country": Reflections, op.cit. p. 20. For an expression of support to the Tunku's call, see ALIRAN Vol. 7/8 Sept. 1987 p. 24.

75. [1967] 1 MLJ 46.

as being made *in fraudem legis*. Responding to the argument that Article 32(1) precluded any acts of the Yang di-Pertuan Agong from being questioned in court, Pike CJ (Borneo) said:

"Article 32(1) only protects the Yang di-Pertuan Agong personally from proceedings in a court but cannot be construed to protect the Federal Government from action in the courts in respect of its acts committed in the name of the Yang di-Pertuan Agong, and when the Yang di-Pertuan Agong acts on the advice of the Cabinet his act must be deemed to be the act of the Federal Government".⁷⁶

In related proceedings, *Stephen Kalong Ningkan v. Government of Malaysia*⁷⁷ commenced in the Federal Court by the same plaintiff invoking its original jurisdiction, Ong Hock Thye FJ (as he then was), in a strong dissent on the question of justiciability of a proclamation of emergency by the Yang di-Pertuan Agong, said:

"His Majesty is not an autocratic ruler since Article 40(1) of the Federal Constitution provides that "in the exercise of his functions under this Constitution or federal law, the Yang di-Pertuan Agong shall act in accordance with the advise of the Cabinet". In this petition therefore when it was alleged by the petitioner "that the said proclamation was *in fraudem legis* in that it was made, not to deal with a grave emergency whereby the security or economic life of Sarawak was threatened, but for the purpose of removing the petitioner from his lawful position as Chief Minister of Sarawak", there never was even the ghost of a suggestion that His Majesty had descended into the arena of Malaysian politics by taking sides against Sarawak's legitimate Chief

76. Ibid at p. 47. Professor Trindade disagrees with this view. Comparing Article 32(1) to Article 181(2) where the words "in his personal capacity" are expressly mentioned he suggests that "the immunity intended to be conferred by Article 32(1) is wider than that suggested by Pike CJ": see FA Trindade, The Constitutional Position of the Yang di-Pertuan Agong in Suffian, Lee & Trindade, The Constitution of Malaysia, op. cit. at pp. 107-8. However, the result of a wider reading of Article 32(1) would be to immunize from legal action acts which are really that of the executive government but carried out in the name of the Yang di-Pertuan Agong, a thing which is inimical to the whole concept of a constitutional monarch. The true position is that in such cases it is not even necessary to implead the sovereign in the suit: see *Carlic v. The Queen & Minister of Manpower & Immigration* [1968] 65 DLR 633.

77. [1968] 1 MLJ 119.

Minister. With the greatest respect, it is unthinkable that His Majesty, as a constitutional ruler, would take on a role in politics different from that of the Queen of England..... It was repeatedly and publicly stated, in the plainest of terms, that it was on Cabinet advice that the Yang di-Pertuan Agong proclaimed the Emergency..... With all respect, therefore, I will not join in what I consider a repudiation of the Rule of Law, for I do not imagine, for a moment, that the Cabinet has ever claimed to be above the Law and the Constitution".⁷⁸

In *Teh Cheng Poh v. Public Prosecutor*,⁷⁹ the Privy Council considered the validity of emergency legislation promulgated by the Yang di-Pertuan Agong once Parliament had sat. In the course of his judgment Lord Diplock observed:

"Article 32(1) of the Constitution makes the Yang di-Pertuan Agong immune from any proceedings whatsoever in any court. So mandamus to require him to revoke the Proclamation would not lie against him; but since he 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".⁸⁰

In the light of these decisions, the position is unambiguous that the Yang di-Pertuan Agong is a constitutional monarch bound to act as such at all times even when the country is under emergency rule. His functions and powers under the Constitution, save those expressly reserved to be exercised in his individual discretion under Article 40(2),⁸¹ are deemed, for purposes of judicial review, to be the decision and act of the Cabinet or the relevant Minister of Government. It is undoubted also that these decisions and acts are

78. At p. 125 B-G.

79. [1979] 1 MLJ 49; 1979 2 WLR 623.

80. At p. 55 F-G; See also Abdoolcader J. in *Balakrishnan v. Ketua Pengarah Perkhidmatan Awam* [1981] 2 MLJ 259, 263 E-F and *Merdeka University Bhd. v. Government of Malaysia* [1981] 2 MLJ 356, 358 B-C.

81. The appointment of a Prime Minister; withholding of consent to a request for dissolution of Parliament; requisition of a meeting of the Conference of Rulers for certain purposes.

amenable to the traditional prerogative writs issuable by the courts in the form of certiorari, mandamus, prohibition and the like to rectify a legal wrong.

The discussion, for our immediate purposes, can conclude by considering the case of *Re Tan Boon Liat @ Allen et al*,⁸² where the Federal Court held that a finality clause in a federal law pursuant to which His Majesty acted was not sufficient to give immunity to his act if it was wrong in law. In that case the Yang di-Pertuan Agong had confirmed certain detention orders in the absence of any recommendation from the Advisory Board, a safeguard prescribed by the Constitution (Article 151(1)(6)). In rejecting the submission that the court was precluded from judicial review by section 6(2) of the Emergency (Public Order and Prevention of Crime Ordinance) 1969 which declared the decision of the Yang di-Pertuan Agong as "final and shall not be called in question in any court", Suffian L.P. said:

"I am of opinion however that that section applies only to real decisions, not ultra vires decisions, of His Majesty (see *Anisminic Ltd. v. Foreign Compensation Commission* [1969] 2 AC 147) and here clearly His Majesty's decision was ultra vires, and therefore the court is free to order release of the Appellants".⁸³

In the writer's view this approach is undoubtedly correct. The decisions on Article 32 have placed the constitutional role of the Yang di-Pertuan Agong in its correct perspective and enhanced constitutional government by promoting executive accountability.

82. [1977] 2 MLJ 108.

83. At p. 109 I.

CHAPTER VTHE EMERGENCY PROVISIONS: THE ORIGINAL THEORY AND TRANSFORMATIONIntroduction

The provision in the independence Constitution of 1957 of a power to declare a state of emergency was very much a product of its times. It was gestated in the wake of the British struggle against a communist insurgency in pre-independence Malaya. The Reid Constitutional Commission was considerably influenced by this fact. In its recommendations for a Constitution for independent Malaya it observed:

"We must first take note of the existing emergency. We hope that it may have come to an end before the new Constitution comes into force but we must make our recommendation on the footing, that it is then still in existence".¹

The "existing emergency" referred to was the state of emergency proclaimed by the British Colonial Government throughout Malaya in June 1948.

The Communist Emergency 1948-1960

The proclamation of a state of emergency on 12th June, 1948 was brought about by the declared policy of the Malayan Communist Party (CPM) to resort to armed struggle to gain power in British Malaya. During the Japanese occupation the Communists had co-operated with the British forces and other local anti-Japanese units to fight the Japanese. The organisations were grouped under the umbrella of a fighting force called the Malayan Peoples' Anti-Japanese Army (MPAJA).² Several factors have been ascribed for the switch in policy of the

1. The Reid Report, at p. 75 para. 173.

2. For judicial cognizance of the role of the MPAJA during the war, see *In Re Loh Kai Fat* (1946) 12 MLJ 91, a decision of the Military Court established by the British Military Administration which re-occupied Malaya.

Malayan Communists from one of co-operation within the existing political framework to that of an armed struggle to unseat the British. For one, the Communists were emboldened by the British loss of invincibility resulting from their defeat at the hands of the Japanese in Malaya. The other reason was the result of changes in policy in the World Communist movement itself. The policy change emanating from Moscow was to discard moderate policies and pursue a more determined struggle to gain power in places where the communist movement was significant. This line was conveyed at a meeting of eastern communist organs at the Asian Youth Congress in Calcutta in March 1948 where Moscow's instructions for national communist movements to adopt a policy of armed uprising in the name of national liberations was adopted.³ It should be noted, however, that the communists in Malaya were more under the influence of Peking than Moscow.⁴

In any event, in June 1948 the CPM gave up its peaceful struggle for power through the labour unions and launched a wave of terror in Malaya. Three European planters were killed and violence occurred at rubber estates and tin

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3. See Gene Z. Hanrahan, The Communist Struggle In Malaya (University of Malaya Press) 1971 (First published in 1954) at p. 104 et. seq. See also Zainal Abidin Wahid, The Emergency: Its Consequences in Glimpses of Malaysian History (Dewan Bahasa Publication, 1970) at p. 113.
 4. Reliance is placed on a major document issued by the CPM in December 1948 called "Strategic Problems Of The Malayan Revolutionary War" which bore striking resemblance to Mao Tse Tung's "Strategic Problems Of China's Revolutionary War" written in 1936. The copious reference to Mao's works in the CPM document and the call to imitate the revolutionary struggle of the Chinese people would seem to bear out this theory: see Khong Kim Hoong, Merdeka: British Rule And The Struggle For Independence In Malaya, 1945-1957 (INSAN Publications) K.L. 1984 at p. 138 et. seq. Peking's impact is understandable because 95% of the guerillas in Malaya were Chinese by ethnic descent: see Victor Purcell in Introduction to Hanrahan, op. cit. at p. 14.

mines perpetrated by communists or their sympathisers in the labour force. The communist military strategy was best outlined in an extract taken from a directive issued at that time by the CPM:

"The objective of our army lies in preserving itself and in eliminating the enemy, and also in endeavouring to obtain every opportunity and every possibility to expand itself. Therefore, we must refrain from being impetuous and adventurous. We will strike only when we feel confident, we will not strike when we do not feel so. We want to strike hard to score victory in every encounter and to ensure that the enemy is eliminated and his arms seized. Thus we will train our forces, expand them and raise their quality until ultimately the position of superiority and strength of the enemy and our position of inferiority and weakness is reversed. For this reason our army is adopting the policy of a protracted war. Armed strength in a colonial revolution must gradually attain development during a long-term war. We are not afraid of a protracted war; on the contrary, subjectively we seek the strategy of a protracted war".⁵

The decision to declare a state of emergency throughout Malaya was largely due to the pressure applied by British planters. The planters protested that they could not maintain normal work because of lawlessness in the labour force and the rapid deterioration of law and order.⁶ Quite apart from this, British military intelligence was itself aware of the potential danger posed by any active collaboration between communist guerillas operating from the jungles and about 650,000 Chinese squatters settled along the jungle fringes.⁷

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5. Hanrahan, op.cit. at pp.110-111. On 6th October, 1951, shortly after the issue of the communist directive, the British High Commissioner in Malaya, Sir Henry Gurney, was ambushed and killed by guerillas whilst motoring up the mountain road to Frasers Hill: see Victor Purcell, op.cit. at p. 12.
 6. See Khong Kim Hoong, op.cit. at p. 150 quoting a report in the Straits Times of 4th June, 1948.
 7. This was about a fifth of the entire Chinese population in Malaya at that time: see R.S. Milne & Diane K. Mauzy, Politics And Government In Malaysia (Federal Publications, 1978, Singapore) at p. 33. The evacuation and resettlement of Chinese squatters into 550 settlements throughout the country, called "new villages", was probably the most successful programme launched by the British military authorities to

Thus on 12th June, 1948, a state of emergency was proclaimed throughout Malaya. For our purposes, we shall focus on the features of emergency rule during this period to examine the influence it exerted on the Reid Commission proposals.

The emergency was initially proclaimed under the British Military Administration (Essential Regulations) Proclamation.⁸ By this time there was already in force the Federation of Malaya Agreement, 1948 by which laws were to be passed by an appointed legislative council, save laws in the interest of public order and good government which could be enacted by the High Commissioner himself.⁹ However, the authority of the British Military Administration (the BMA) to make laws by proclamation was not revoked. It was nevertheless felt by the British that it was not desirable that the vast coercive powers exercisable under the proclamation should be by way only of a

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7. defeat the Communists. The programme was called the "Briggs Plan" after Lieutenant General Sir Harold Briggs who conceived and implemented the plan. The resettlement was carried out as a military operation over a number of years and effectively cut off communication between the Communists and the civilian population, and more importantly, their supplies. Each new village became a separate civic unit with schools and other community programmes, and was later to be the foundation of legitimate Chinese participation in the mainstream of political life in independent Malaya. For an excellent account of the "new villages" programme, see R. Dhu Renick, The Malayan Emergency: Causes And Effect, Journal of Southeast Asian History. Vol. 6, No. 2, Sept. 1965, at p. 9 et. seq.
8. "British Military Administration" was the name by which the re-occupying British military forces ruled Malaya until the establishment of the Federation of Malaya in 1948. At the time of the initial Proclamation of emergency, the transition from the military administration to the civilian administration under the new Federation was not complete and therefore for a while two legal regimes existed side by side.
9. See sections 51 and 52 of the Federation of Malaya Agreement 1948 (G.N. No. 6 of 5th Feb. 1948, No. 1 Vol. 1).

military edict.¹⁰ There was undoubtedly another reason. This was the British experience with the Sultans and the emerging Malay nationalists over the aborted Malayan Union plan in 1946 and the commitment through the Federation plan in 1948 to take Malaya progressively towards self-government.¹¹ Thus on 7th July, 1948, the legislative Council of the Federation passed the Emergency Regulations Ordinance, 1948. On 13th July, 1948, acting under the provisions of section 3 of the Ordinance, the High Commissioner re-declared that a state of emergency existed. On 31st July, 1948, the Legislative Council adopted by resolution the Proclamation made by the High Commissioner.

Emergency rule by the British was largely through emergency laws. On 15th July, 1948, the High Commissioner in exercise of powers given under section 4 of the Emergency Regulations Ordinance, 1948 made the Emergency Regulations, 1948. By this provision, the High Commissioner was empowered to make emergency law without recourse to the Legislative Council. Throughout the period of the emergency this power was exercised by successive High Commissioners to make not only numbered Emergency Regulations eg. the Emergency Regulations 1951 (Federation of Malaya No. 10 of 1948) but also titled Emergency Regulations eg. Emergency (Detained Persons) Regulations, 1948 (C.N. 2032/48). As one writer observed:

"The scope and intensity of the Emergency Regulations effected a complete coercive embrace of the population".¹²

10. See Dhu Renick, *op.cit.* at p. 19.

11. The aborted Malayan Union plan and its impact on the rise of Malay nationalism is discussed in Chapter III.

12. R. Dhu Renick, *op. cit.* at p. 19. The Emergency Regulations 1948 created a number of offences relating to security eg. Regulation 6A, the offence of harbouring a person likely to act in a manner prejudicial to public safety (see *Lee Tong Lai v. PP* [1949] 15 MLJ 66); Regulation 6A(1), the offence of consorting with terrorists (see *Soo Sing & Ors v. PP* [1951]

The Emergency Regulation 1948, the principal emergency legislation, was itself broad in its sweep. Its long title read: "An Ordinance to confer on the High Commissioner power to make regulations on occasions of emergency or public danger". By section 3(i), the High Commissioner was empowered to declare by proclamation a state of emergency "whenever it appears to him that an occasion of emergency or public danger has arisen, or that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life". The 1948 Ordinance was modeled on its precursor, the Emergency Regulations Enactment, 1930 which was an enactment of the Federated Malay States.¹³ Section 3(i) of the 1948 Ordinance was a reproduction of section 2(i) of the 1930 Enactment.

A distinctive feature of British emergency rule, which had overtones of a regime of martial law, was the meticulous care with which the British administrators armed themselves with legal authority to undertake a range of emergency measures. Thus even harsh actions like detention without trial or the punishing of an entire village for rendering assistance to the Communists were legalised and given the requisite legislative basis.¹⁴ There may have

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12. 17 MLJ 143; *PP v. Tan Thoy* [1951] 17 MLJ 186). The Emergency Regulations Ordinance 1948 and the Regulations made under it were kept alive after independence by Article 163 of the independence Constitution on a year to year basis. They were repealed with effect from July 31, 1960 by a Proclamation dated July 29, 1960 pursuant to Legal Notification 185 of 1960: see Malayan Constitutional Documents Vol. I 2nd Edn. p. 128.

13. The 1930 Enactment itself replaced the Public Emergency Enactment 1917.

14. Detention without trial was authorised under the Emergency Regulations, 1951. The Chief Secretary could order the detention without trial of any person for a period not exceeding two years. The "collective punishment"

been several reasons for the British to place so much emphasis on this approach. A principal, if not dominant, reason must undoubtedly have been the British realisation, early in the communist struggle, that the battle was to be won not in the battlefields but in the hearts and minds of the Malayan

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14. provision was the notorious Regulation 17DA. It authorised the collective punishment of the inhabitants of an area if suspected of having aided, abetted, consorted or failed to give information about a person who intended or had or was about to act in a manner prejudicial to the public safety or security. The power included the right to order closing of shops in the area or the establishment of a curfew. D. Dhu Renick, supra, at p. 27 et. seq. records the harsh manner in which the High Commissioner, Sir Gerald Templer, meted out collective punishment to the residents of the small foot-hill town of Tanjong Malim in Perak: "On March 28, 1952 General Sir Gerald Templer went personally to Tanjong Malim to pronounce the sentence - a strict 22 hour curfew, shops to be open only two hours per day, no person was allowed to leave the town, all schools were to be closed, and the rice ration was reduced to less than half the ordinary amount for men and women. The reason that this sentence was imposed on a town of 20,000 persons was that General Templer believed that the inhabitants of the town had failed to give information about persons suspected of participating in acts detrimental to public order and safety. There is some doubt as to whether or not proper procedures were followed in the punishment of Tanjong Malim. Emergency Regulation 17DA requires that an inquiry into the facts and circumstances be made and that a written report containing a certificate that all procedural requirements for the inquiry have been met. These procedural requirements include giving the inhabitants of the area an adequate opportunity to understand the subject of the inquiry and to make statements concerning the alleged charge. There is no indication that this procedure was followed in the case of Tanjong Malim. It is interesting to note that to get the sentence remitted the town of Tanjong Malim had to make a public demonstration of its good faith and its conviction to cooperate fully with the government. Each adult citizen of Tanjong Malim was required to fill out a form in which he was supposed to give all the pertinent information he possessed about individuals connected with the insurrection. These forms were collected by a pseudo-secret balloting technique and delivered to General Templer, at his headquarters by a delegation from Tanjong Malim. Full advantage was taken of the situation for its propaganda value. Photographs and news releases reflected the change in behavior of the citizens of Tanjong Malim. They were now cooperating fully with the government and were once again considered valuable citizens. No indication has ever been given of the contents of the forms submitted by the citizenry or whether such information was of any value in the prosecution of the Emergency".

people.¹⁵ The British policy, behind the various emergency regulations, was described as "an example of seeking to find a compromise between civilian and military needs during an insurrection, by the successful application of a "carrot" and "stick" philosophy of law and order".¹⁶ The "carrot" method was to reward individuals who had assisted the Government by the conferment of awards, and in respect of pro-government townships and districts by the removal of restrictive Emergency Regulations and the provision of social welfare services to these places. This policy was also to accentuate the difference in methodology between British rule, and later their Malayan successors, and the Communists. It succeeded in portraying the Communists as bandits and insurgents who were unfit to govern. In this British policy succeeded and the Communist armed struggle failed. By 31 July 1960 the first Government of independent Malaya was able to officially end the Emergency.¹⁷

15. See postscript by Sir Robert Thompson to Hanrahan's book, *supra*, p. 136 et. seq. at p. 143. Sir Robert Thompson was an acknowledged authority on guerilla warfare in S.E. Asia. The British strategy was to categorise the Communists as insurgents and bandits opposing the rule of law, and that the British were invoking the rule of law against them as a counter-insurgency measure. Thus the British, and later their Malayan successors, made sure "every action had a legal basis and enforcement of the law applied equally to friend and foe; European and Asian": see Zakaria Hj. Ahmad in Governments and Rebellions in Southeast Asia (Ed. Chandran Jeshurun) ISEAS Publ'n. S'pore 1985 at p. 163.

16. D. Dhu Renick, *op. cit.* p. 33.

17. Within a year of their "armed struggle" policy, the Communists were isolated and forced to retreat to the jungles. By 1955, when the first local elections in Kuala Lumpur were held, a large part of Malaya was already declared a "white area" or safe area: see Thompson, *ibid.* The emphasis placed by the Government of Independent Malaya on socio-economic development and economic prosperity was an effective counter measure against any appeal the Communists may have especially with the local Chinese population. The policy was epitomised in the words of the first Prime Minister, Tunku Abdul Rahman: "As I have said more than once

The Reid Recommendations

The British style of operating an emergency left a lasting impression on the Reid Commission. The Commission observed in its Report: "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 early stage by the use of emergency powers if they are to be prevented from developing into serious and immediate threats to the security of the State".¹⁸ The recommendations to retain the power to declare a state of emergency was modeled on the Emergency Regulations Ordinance 1948. Like the function exercised by the Legislative Council under the Federation Agreement 1948, in respect of the first emergency, the recommendation by the Commission was also for parliamentary review of the proclamation of emergency.

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17. before, it is the policy of our country to provide our people with food instead of bullets, clothing instead of uniforms and homes instead of barracks": see Chandran Jeshurun, Government Responses to Armed Insurgency in Malaysia, 1957-82 in Governments And Rebellions in Southeast Asia, op. cit., at p. 134 et. seq.
18. The Communists continued to operate in the jungles in small bands largely confined to the northern parts along the Malayan-Thai border. After the failure of the Baling peace talks on December 28, 1955 between the then Chief Minister Tunku Abdul Rahman and the Malayan Communist leader Chin Peng, the communist leaders returned to the jungles. They remained a clandestine organisation. (For a personalised account of the Baling talks, see Tunku Abdul Rahman, Political Awakening (Pelanduk Publications, 1986) at p. 63 et. seq.). It was almost 34 years to the date when Chin Peng and other communist leaders appeared in public again. On December 3, 1989 Chin Peng and other noted leaders of the CPM appeared in the Thai border town of Haadyai to sign a peace accord with the Malaysian and Thai Governments and officially give up their armed struggle. Little is known yet of how this dramatic and historical deal was brokered. The New Straits Times, December 3, 1989 observed: "The formal cessation of the armed conflict between the Governments of Malaysia and Thailand and the Communist Party of Malaya brings to an end 41 years of bloody hostility..." (at p. 10). See also C.C. Too, The Communist Party Of Malaya And Its Attempt To Capture Power (New Straits Times Serial, published December 3, 1989 to December 6, 1989).

The Reid Commission by Clause 138 of the draft Constitution provided for the Federal Government to have the power to declare a state of emergency throughout the Federation or parts of it under certain circumstances. It also provided for a scheme of government under emergency rule. The provision to override fundamental rights, and the division of powers between the Federal and State Government, was intended to apply only to the extent necessary and for the duration of the emergency. The Commission observed:

"Neither the existence of fundamental rights nor the division of powers between the Federation and the States 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. We therefore recommend that the Constitution should authorise the use of emergency powers by the Federation but that the occasions on which, and so far as possible the extent to which, such powers can be used should be limited and defined".¹⁹

The emergency provisions as recommended were incorporated with some modifications into the independence Constitution of 1957. It was obvious from the scheme introduced that Emergency rule was never intended to be a permanent feature of government. However, the several amendments to the Emergency provisions over the last 30 years has transformed the original purpose behind it to something other than transitory. Thus, today emergency rule stands as an accepted feature of government in Malaysia.

We will now examine these amendments and discuss how they were brought about.

The Original Theory

The Reid Commission in the draft Constitution for independent Malaya created a special section to deal with subversion and emergencies. This was

19. The Reid Report. Para. 175 pp. 75-76.

Part XI under the caption "Special Powers to deal with Subversion, the Power to Proclaim a State of Emergency, and the Power of Preventive Detention". The provision against subversion was Clause 137 which read as follows:

"(1) Subject to the provisions of this Article, 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 any substantial number of citizens to fear, organized violence against persons or property, any provision of such Act designed to stop such action or meet such threat shall be lawful notwithstanding that it is repugnant to any of the provisions of Articles 5, 9, 10, 68 or 73.

(2) Any Act of Parliament to which clause (1) applies shall cease to operate on the expiration of a period of one year from the date of the enactment thereof, without prejudice to the power of Parliament to renew such Act in accordance with the provisions of this Article".²⁰

The recommendation on Emergency Powers was Clause 138:

"(1) If the Federal Government is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, whether by war or external aggression or internal disturbance, the Yang di-Pertuan Besar may issue a Proclamation of Emergency, in this Article referred to as a Proclamation.

(2) When a Proclamation is issued in accordance with the provisions of Clause (1), if Parliament is not sitting it shall be the duty of the Yang di-Pertuan Besar to summon Parliament as soon as may be practicable.

(3) A Proclamation shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to operate at the expiration of a period of two months from the date of its issue unless, before the expiration of that period, it has been approved by resolutions in both Houses of Parliament.

(4) While a Proclamation is in operation, notwithstanding anything in this Constitution -

(a) the executive authority of the Federation shall extend to any of the matters within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof;

(b) the legislative authority of Parliament shall extend to -

20. See draft Constitution of the Federation of Malaya, Appendix II to the Reid Report, op. cit.

- (i) any matter within the exclusive legislative authority of a State;
 - (ii) the extension of the maximum duration of Parliament or of a State Legislature, the suspension of any election required by or under this Constitution or the Constitution of any State, and the making of any provision consequential upon or incidental thereto; and
- (c) if and so long as either House of Parliament is not sitting and the Federal Government is satisfied that existing circumstances require immediate action, the Yang di-Pertuan Besar shall have power to promulgate ordinances having the force of law.
- (5) Any provision of an Act of Parliament enacted while a Proclamation is in force shall be valid notwithstanding that it is repugnant to any provision of Part II.
- (6) Any provision of an Act of Parliament which would, but for the provisions of this Article, be invalid shall cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as to things done or omitted to be done before the expiration of the said period.
- (7) An ordinance promulgated under this Article shall have the same force and effect as an Act of Parliament, but every such ordinance -
- (a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of fifteen days from the reassembly of both Houses unless before the expiration of that period it is approved by resolution in both Houses, and
 - (b) may be withdrawn at any time by the Yang di-Pertuan Besar.
- (8) Where a Proclamation relates to a part only of the Federation, the expression "State" in this Article means a State wholly or partially within that part.²¹

Clauses 137 and 138 were adopted with minor modifications as Articles 149 and 150 of the Constitution of the Federation of Malaya. For the present, we shall focus on Article 150 only. It read originally as follows:

"(1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, whether by war or external aggression or internal disturbance, he may issue a Proclamation of Emergency.

21. Ibid.

(2) 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.

(3) A proclamation of Emergency and any ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to be in force -

- (a) a Proclamation at the expiration of a period of two months beginning with the date on which it was issued; and
- (b) an ordinance at the expiration of a period of fifteen days beginning with the date on which both Houses are first sitting,

unless, before the expiration of that period, it has been approved by a resolution of each House of Parliament.

(4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.

(5) While a Proclamation of Emergency is in force Parliament may, notwithstanding anything in this Constitution, make laws with respect to any matter enumerated in the State List (other than any matter of Muslim law or the custom of the Malays), extend the duration of Parliament or of a State Legislature, suspend any election, and make any provision consequential upon or incidental to any provision made in pursuance to this clause.

(6) No provision of any law or ordinance made or promulgated in pursuance of this Article shall be invalid on the ground of any inconsistency with the provisions of Part II, and Article 79 shall not apply to any Bill for such a law or any amendment to such a Bill.

(7) At the expiration 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 this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period".

However, Article 150 has been transformed by a number of amendments made over the years. We shall now examine these amendments.

The Amendments To Article 150 And The Amending Power of Parliament

Since 1957, Article 150 has been amended six times. It ranks amongst the most amended provisions of the Federal Constitution. The end product is a radical transformation of the original format. The single thread that ran through all the amendments was the enhancement of the executive power to declare and perpetuate a state of emergency. In this regard one writer observed:

"The emergency powers of the Federal Government at independence were wide but various amendments, including those in contemplation of Malaysia have made them extraordinarily extensive and have induced within them the capacity to destroy the entire constitutional order".²²

These amendments were made on separate occasions. Each occasion was actuated by different considerations but all were united in the objective of strengthening the exercise and deployment of the emergency power. The facile exercise of the amendment power by Parliament to transform Article 150 into an engine "with the capacity to destroy the entire constitutional order" raises serious questions as to Parliament's authority to amend the Constitution without restriction or limitation. Can Parliament create an amending power that enables the Constitution itself to be by-passed or scuttled? If that is possible what are its implications on the Constitution being the basic law or supreme law of the land? An understanding of the amending power of Parliament is therefore material for an appreciation of the context in which emergency powers operate within the Malaysian constitutional framework and of constitutionalism itself in the country.

22. Yash Ghai, The Politics of the Constitution: Another Look at the Ningkan Litigation (1986) 7 Sing. LR 147 at pp. 160-61.

A written constitution is classified as "controlled" or "uncontrolled"²³ according to the ease with which its provisions can be amended. Lord Birkenhead L.C. used this classification in his seminal decision in *McCawley v. The King*.²⁴ It was an appeal to the Privy Council from Queensland (Australia) as to whether it was competent for their legislature to enact a law inconsistent with the constitution without declaring it to be an amending legislation. Lord Birkenhead's observation repays full consideration:

"The first point which requires consideration depends upon the distinction between constitutions the term of which may be modified or repealed with no other formality than is necessary in the case of other legislation, and constitutions which can only be altered with some speciality, and in some cases by a specially convened assembly..... Many different terms have been employed in the text-books to distinguish these two contrasted forms of constitution. Their special qualities may perhaps be exhibited as clearly by calling the one a controlled and the other an uncontrolled constitution as by any other nomenclature. Nor is a constitution debarred from being reckoned as an uncontrolled constitution because it is not, like the British constitution, constituted by historic development, but finds its genesis in an originating document which may contain some conditions which cannot be altered except by the power which gave it birth. It is of the greatest importance to notice that where the constitution is uncontrolled the consequences of its freedom admit of no qualification whatever. The doctrine is carried to every proper consequence with logical and inexorable precision".

The Board held that in the absence of a special procedure to amend the Queensland Constitution it was "uncontrolled" and that every legislation that conflicted with the constitution was pro tanto an alteration of it. The

23. Dicey uses the terms "rigid" and "flexible": see A.V. Dicey, An Introduction To The Study Of The Law Of The Constitution (10th Edn) Macmillan press London (1982 Rpt) at p. 127: A "flexible" constitution is one under which every law of every description can legally be changed with the same ease and in the same manner by one and the same body. A "rigid" constitution is one under which certain laws generally known as constitutional or fundamental laws cannot be changed in the same way as ordinary laws".

24. [1920] A.C. 691.

doctrine of an implied amendment of the constitution was rejected by the Board in *The Bribery Commissioners v. Ranasinghe*.²⁵ The case was concerned with whether the creation of a special tribunal by legislation in Ceylon to try bribery offences, apparently in conflict with a provision of the Ceylonese Constitution, was nevertheless a valid law having the effect of amending the Constitution. Lord Pearce for the Board held that the *McCawley* conclusion was inapplicable to the Ceylonese Constitution:

"It is possible now to state summarily what is the essential difference between the *McCawley* case and this case. There the legislature, having full power to make laws by a majority, except on one subject that was not in question, passed a law which conflicted with one of the existing terms of its Constitution Act. It was held that this was valid legislation, since it must be treated as pro tanto an alteration of the constitution, which was neither fundamental in the sense of being beyond change nor so constructed as to require any special legislative process to pass on the topic dealt with. In the present case, on the other hand, the legislature has purported to pass a law which, being in conflict with a s.55 of the Order in Council, must be treated, if it is to be valid, as an implied alteration of the constitutional provisions about the appointment of judicial officers. Since such alterations, even if express, can only be made by laws which comply with the special legislative procedure laid down in s. 29(4), the Ceylon legislature has not got the general power to legislate so as to amend its Constitution by ordinary majority resolutions, such as the Queensland legislature was found to have under s.2 of its Constitution Act, but is rather in the position, for effecting such amendments, that that legislature was held to be in by virtue of its s.9, namely compelled to operate a special procedure in order to achieve the desired result".²⁶

In a later Ceylon appeal, *Kariapper v. Wijesinha*,²⁷ the Privy Council held that the *McCawley* principle of implied amendments would apply, even in circumstances of a controlled constitution, if the prescribed procedure for alteration of the constitution, was followed. Section 29(4) of the Ceylon (Constitution) Order in Council, 1946 provided:

25. [1964] 2 All ER 785.

26. At p. 792 D-H.

27. [1967] 3 All ER 485.

"In the exercise of its powers under this section, Parliament may amend or repeal any of the provisions of this order, or of any other order of Her Majesty in Council in its application to the island: Provided that no bill for the amendment or repeal of any of the provisions of this order shall be presented for the Royal Assent unless it has endorsed on it a certificate under the hand of the Speaker that the number of votes cast in favour thereof in the House of Representatives amounted to not less than two-thirds of the whole number of the member of the House (including those not present)."

This was the provision that earlier led the Privy Council in *Ranasinghe's* case to conclude that the Ceylon Constitution, unlike the Queensland Constitution in *McCawley's* case, was a controlled constitution. The question here was whether a bill which would otherwise be an effective amendment of the Constitution, having the requisite number of votes to alter it, would nevertheless be ineffective as an amending bill because it was not described as an amendment and did not carry the Speakers Certificate. In holding that the bill effectively amended the constitution, the Privy Council said:

"The bill which became the Act was a bill for the amendment... of the constitution simply because its terms were inconsistent with that section. It is the operation that the bill will have on becoming law which gives it its constitutional character not any particular label which may be given to it".²⁸

The Privy Council rejected the argument that the implied amendment theory would result in the constitution being amended without any deliberation or system and without regard to its effect on the whole instrument. The short answer given was that "consideration of this sort, powerful as they ought to be with the draftsman, cannot in a court of law weigh against the considerations which have brought the Board to its conclusions that a bill, which on its passage into law would amend the constitution, is a bill for its amendment."²⁹

28. At p. 495F.

29. At pp. 495-496.

The implied amendment theory could not, however, operate in a written constitution that describes the constitution as the supreme law and declares any law inconsistent with it to be invalid to the extent thereof. Article 4(1) of the Malaysian Constitution carries this declaration. Thus the theory should not *ex facie* apply in Malaysia.³⁰ In *Ah Thian v. Government of Malaysia*,³¹ the Federal Court declared:

"The doctrine of supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the constitution, and they cannot make any law they please. Under our constitution written law may be invalid on one of these grounds:

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30. Article 159 which deals with the amending process does not on the face of it provide that any bill seeking to amend the constitution should be expressed as one. Thus the view has been taken in respect of the like provision in the Singapore Constitution that the implied amendment theory as stated in *Kariapper's* case would apply: see S. Jayakumar, *The Constitution (Amendment) Act, 1979* (1979) 21 Mal. L.R. 111 @ 112-113. The present writer does agree not with this view. A provision like Article 4(1) of the Malaysian Constitution that expressly declares any law inconsistent with it to be invalid should suffice to ensure that the theory of amendments by implication is not applicable. This view is borne out by the practice by which constitutional amendments are made in Malaysia. In the constitutional history of Malaysia, every amendment of the Constitution has been expressed as an amendment bill particularising the provision and manner of amendment. The one instance when an Amendment Act was not intitled as such was the Malaysia Act (No. 26 of 1963) when Malaysia was formed by the admission of new states to the existing Federation of Malaya. However, the recital to the Act clearly mentioned that the Act was also to amend the Constitution and it was passed by both Houses of Parliament with the requisite majority to operate as an amending Act: see *The Government of Kelantan v. The Government of the Federation of Malaya & Tunku Abdul Rahman* [1963] MLJ 355. An instance in the Constitution where it is expressly provided that a Bill has to be certified as an amending Bill is Article 79(1) dealing with any changes to the matters enumerated in the Concurrent List on which Parliament has the power to make laws or those matters in the State List (for both see Ninth Schedule) on which the Federation may exercise executive authority.
31. [1976] 2 MLJ 112. The Federal Court in this case was dealing with a challenge to the Firearms (Increased Penalties) (Amendment) Act, 1974 as being *ultra vires* the Federal Constitution. The decision was confined purely to the procedure for such challenge.

- (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter with respect to which the State legislature has not power to make law, article 74; or
- (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see Article 4(1); or
- (3) in the case of State written law, because it is inconsistent with Federal law, Article 75."³²

The principle in theory and its effect in practice are however two different things. In practice, the true position is that the Malaysian Constitution may be subjected to amendment directly and indirectly. Direct amendments are brought about under Article 159 of the Federal Constitution. Indirect amendments result from the passage of emergency laws under Article 150, which by virtue of Article 150(6), are valid even if inconsistent with the Constitution. For the present we are concerned only with direct amendments.

In this regard, it should first be noted that the Malaysian Constitution was intended to be a controlled constitution. The Reid Commission observed: "It is important that the method of amending the Constitution should be neither so difficult as to produce frustration nor so easy as to weaken seriously the safeguards which the Constitution provides".³³ The format adopted appeared to meet this balance, except that the safeguard of a special amendment procedure is of little significance if the party in power controls more than two-thirds of the seats in Parliament.³⁴ Thus if an ordinary law meets with a constitutional impediment the way around is to make two laws. One

32. Ibid.

33. The Reid Commission Report, op.cit. at p. 31 Para. 80.

34. Since independence, the ruling Alliance Party has always held power in Malaysia with more than a two-third majority in Parliament. The Alliance Party is now known as the Barisan Nasional or "the National Front".

law to amend the Constitution and another law to achieve the desired objective.³⁵ Nevertheless, in certain specified instances, Parliament does not possess an uncontrolled power to amend the Constitution. Article 159, in its present form,³⁶ reads as follows:

- "(1) Subject to the following provisions of this Article and to Article 161E the provisions of this Constitution may be amended by federal law.
- (2) (Repealed).
- (3) A Bill for making any amendment to the constitution (other than an amendment excepted from the provisions of this Clause) and a Bill for making any amendment to a law passed under Clause (4) of Article 10 shall not be passed in either House of Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of members of that House.
- (4) The following amendments are excepted from the provisions of Clause (3), that is to say:
 - (a) any amendment to Part III of the Second or to the Sixth or Seventh Schedule;
 - (b) any amendment incidental to or consequential on the exercise of any power to make law conferred on Parliament by any provision of this Constitution other than Articles 74 and 76;
 - (bb) Subject to Article 161E any amendment made for or in connection with the admission of any State to the Federation or its association with the States thereof, or any modification made as to the application of this Constitution to a State previously so admitted or associated;
 - (c) any amendment consequential on an amendment made under paragraph (a).

35. See observation by Tun Salleh Abas, Amendment of the Malaysian Constitution (1977) 2 MLJ xxxiv at p. xlvi.

36. This provision has itself been amended six times: see Tun Salleh, *ibid*, footnote (12). The significant change was that effected by the Constitution (Amendment) Act 1971 which enhanced the role of the Conference of Rulers in the amendment process.

- (5) A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, Article 38, 63(4), 70, 71(1), 72(4), 152 or 153 or to this Clause shall not be passed without the consent of the Conference of Rulers.
- (6) In this Article "amendment" includes addition and repeal; and in this Article and in Article 2(a) "State" includes any territory."

In *Loh Kooi Choon v. Government of Malaysia*,³⁷ Article 159 was read as prescribing four different methods of amending different parts of the Constitution:

- "(1) Some parts of the Constitution can be amended by a simple majority in both Houses of Parliament such as that required for the passing of any ordinary law. They are enumerated in Clause (4) of Article 159, and are specifically excluded from the purview of Article 159;
- (2) The amending Clause (5) of Article 159 which requires a two-thirds majority in both Houses of Parliament and the consent of the Conference of Rulers;
- (3) The amending Clause (2) of Article 161E which is of special interest to East Malaysia and which requires a two-thirds majority in both Houses of Parliament and the consent of the Governor of the East Malaysian State in question;
- (4) The amending Clause (3) of Article 159 which requires a majority of two-thirds in both Houses of Parliament."³⁸

It would follow that apart from the provisions excepted under Clause (4) of Article 159, the amendment of any other provision of the Constitution would need the support of not less than two-third of the total number of members of both Houses of Parliament on the Second and Third Readings. This provision would qualify the Malaysian Constitution as a controlled or rigid constitution according to the *McCawley* and *Ranasinghe* decisions aforementioned. It has led the court in *Loh Kooi Choon's* case to classify those provisions requiring a special procedure for amendment as entrenched provisions. Raja Azlan Shah F.J. (as he then was) said:

37. [1977] 2 MLJ 187.

38. At p. 189D-F.

"In my opinion the purpose of enacting a written constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure."³⁹

This seems to follow the reasoning of Lord Diplock in the Privy Council case of *Hinds v. The Queen*.⁴⁰ The case was a challenge to the validity of the Gun Court Act 1974 in Jamaica establishing a special court of record, called "the Gun Court", to try all firearm offences. Like the Malaysian Constitution, the Constitution of Jamaica was declared as supreme and carried a provision for the amendment of some of its parts by specified majorities only. Lord Diplock observed:

"One final general observation: where, as in the instant case, a constitution on the Westminster model represents the final step in the attainment of full independence by the peoples of a former colony or protectorate, the constitution provides machinery whereby any of its provisions, whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers, may be altered by those peoples through their elected representatives in the parliament acting by specified majorities, which is generally all that is required, though exceptionally as respects some provisions the alteration may be subject also to confirmation by a direct vote of the majority of the peoples themselves.

The purpose served by this machinery for "entrenchment" is to ensure that those provisions which were regarded as important safeguards by the political parties in Jamaica, minority and majority alike, who took part in the negotiations which led up to the constitution, should not be altered without mature consideration by the parliament and the consent of a larger proportion of its members than the bare majority required for ordinary laws. So in deciding whether any provisions of a law passed by the Parliament of Jamaica as an ordinary law are inconsistent with the Constitution of Jamaica, neither the courts of Jamaica nor their Lordships' Board are concerned with the propriety or expediency of the law impugned. They are concerned solely with whether those provisions, however reasonable and expedient, are of such a character that they

39. Op.cit. p. 189A-B.

40. [1976] 1 AER 353 PC.

conflict with an entrenched provision of the Constitution and so can be validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision."⁴¹

The appellation "entrenched provisions" or "entrenchment" is however illusory and affords no real safeguard against an easy amendment of the Constitution, including the so-called "entrenched provisions", where the party in power commands the requisite majority in the legislature.⁴² The Malaysian courts, following a line of Privy Council cases from *McCawley* to *Ranasinghe*, have held that the Constitution can be validly amended so long as the requisite procedure is followed. The Privy Council approach was appositely given in *Ranasinghe's* case by Lord Pearce:

".....(A) legislature has no power to ignore the conditions of law-making that are imposed by the instrument which itself regulates its power to make law.....such a constitution can indeed be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with: and the alteration or change may include the change or abolition of those very provisions.

41. At p. 361d-g. Lord Diplock repeated this observation more recently in respect of the Constitution of Trinidad & Tobago which carry similar provisions: see *McLeod v. Attorney General of Trinidad & Tobago* [1984] 1 AER 694 PC at 697a-b.
42. The possibility of abuse of power by a parliamentary majority has led Lord Hailsham to use the term "elective dictatorship". He advocated, at least when out-of-office, for the entrenchment in Britain of certain liberties in a written or controlled constitution: see his Dilemma of Democracy (Collins, London: 1978) chapters "Elective Dictatorship" (p. 125 et seq). Constitutions, Written And Unwritten (p. 133 et seq). For a similar view, see Lord Scarman, English Law - The New Dimension (Hamlyn Lectures) Stevens (London 1974). The phrase "tyranny of the majority" is itself attributable to Alexis de Tocqueville in his classic treatise "Democracy in America" (First Published in 1835; Reprinted in Mentor Books (USA) 1956 Print Ed. Richard Heffner). He quotes Jefferson, one of the founders of the American republic as saying: "The executive power in our government is not the only, perhaps not even the principal, object of my solicitude. The tyranny of the legislature is really the danger most feared, and will continue to be so for many years to come. The tyranny of the executive power will come in its turn, but at a more distant period": at p. 122. In a Westminster style constitution, unlike the American model, the executive more likely than not controls the legislature, and so the fear expressed by Jefferson is immediate with respect to these Constitutions.

The proposition which is not acceptable is that a legislature, once established, has some inherent power, derived from the mere fact of its establishment, to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process."⁴³

In *Phang Chin Hock v. Public Prosecutor*,⁴⁴ the amending power of Parliament was fully tested in Malaysia. The question, inter alia, was whether Parliament could make an amendment that was itself inconsistent with the Constitution. The Federal Court rejected this as a limiting factor stating that if it were so then no change whatsoever could be made to the Constitution.⁴⁵ The Court drew a distinction between ordinary legislation which under Article 4(1) would be invalid if they offend the Constitution and legislation intended to amend the Constitution. In respect of the latter, Suffian LP, following *Ranasinghe's* case, said:

"(I)t is enough for us merely to say that Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed by the Constitution itself."⁴⁶

In an earlier case, *Loh Kooi Choon v. Government of Malaysia*⁴⁷ the Federal Court dismissed a like argument when considering whether Article 5(4) dealing with the rights of arrested persons could be amended. Raja Azlan Shah FJ (as he then was) concluded:

"I concede that Parliament can alter the entrenched provisions of Clause (4) of Article 5..... so long as the process of constitutional amendment as laid down in Clause (3) of Article 159 is complied with. When that is

43. See *The Bribery Commissioners v. Ranasinghe*, op. cit. at p. 792D-F.

44. [1980] 1 MLJ 70 FC.

45. At p. 72F.

46. At p. 74C.

47. [1977] 2 MLJ 187.

done it becomes an integral part of the Constitution, it is the supreme law, and accordingly cannot be said to be at variance with itself."⁴⁸

These two decisions,⁴⁹ being the principal cases dealing with the amending power under the Malaysian Constitution, suggest quite explicitly that the courts do not recognise any conceptual limitation or restriction on the amending power of Parliament. This differs from the doctrinal approach of the Indian Supreme Court on the same question.⁵⁰ In the sixties and seventies, the Indian Supreme Court, in a remarkable display of judicial innovation, declined to recognise the unbridled power of Parliament to alter the constitution even if it complies with the requisite amendment procedure. The first was the decision in *I.C. Golak Nath & Ors v. State of Punjab*⁵¹ in 1967 where the Indian Supreme Court ruled that Parliament implicitly lacked the power to amend the fundamental liberty provisions of the Indian Constitution. In 1973 came the landmark decision in *Kesavananda Bharati v. State of Kerala*⁵² when *Golak Nath* was overruled, and the Supreme Court adopted the broader principle

48. Ibid at p. 190C.

49. They are both decisions of the Federal Court delivered before the Supreme Court came into being as the final court of appeal on January 1st, 1985. There is, however, no reason to believe that the Supreme Court will not, when confronted with a like question, decide in the same vein.

50. Tun Salleh observes: "In interpreting Article 159, the Malaysian judiciary deserves to be congratulated for its pragmatic approach. It has rejected the conceptual approach pregnant with theories and ideologies which beset the judicial interpretation of the Indian Constitution": see Tun Salleh Abas, Amendment of the Malaysian Constitution, op. cit., note 37, p. xliii. Tun Salleh's conclusion is challengeable as not ascribing sufficient value to the objective behind these doctrines, which is to prevent the Constitution from being emasculated by a passing majority in Parliament.

51. AIR 1967 SC 1643; see also comment by K. Subba Rao "Freedom in Free India" [1968] 55 AIR 22.

52. AIR 1973 SC 1461. There have been numerous articles written in law journals, mostly from India, on this epochal decision. For a comprehensive account in a journal from outside India, see David Gwynn Morgan, The Indian "Essential Features" Case [1981] 30 ICLQ 307.

that the amending power of Parliament did not extend to altering the basic features of the Indian Constitution. Sikri CJ in that case, identified the basic features (although by no means exhaustive) of the Indian Constitution as: (1) supremacy of the constitution (2) republican and democratic forms of government (3) secular character of the constitution (4) separation of powers between legislature, executive and judiciary (5) federal character of the constitution.⁵³ The Malaysian courts have so far declined to adopt the Indian doctrine.⁵⁴ The Malaysian courts⁵⁵ have instead opted to follow the pre-Golak Nath cases like *Shankari Prasad Deo v. Union of India* [1951]⁵⁶ and *Sajjan Singh v. State of Rajasthan*⁵⁷ [1965] which do not recognise any restraint on the amending power of Parliament.

In the result, the position obtaining in Malaysia presently is that in the absence of express restrictions found in the Constitution itself there is no implied restraint on Parliament's power to amend. The supremacy provision (Article 4(1)) of the Constitution cannot be a restraining factor. An argument in this regard was rightly dismissed in *Phang Chin Hock's* case. On a like provision in the Constitution of Trinidad & Tobago, Lord Diplock observed (*Attorney General of Trinidad & Tobago v. Mcleod*):⁵⁸

53. The rule laid down in this case still prevails in India: see *Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299; *Waman Rao v. Union of India* AIR 1981 SC 271.

54. See *Phang Chin Hock v. Public Prosecutor*, supra. A fuller discussion of "the basic features" doctrine and its relevance in the Malaysian context is discussed in Chapter XII.

55. Ibid.

56. AIR 1951 SC 458.

57. AIR 1965 SC 845.

58. [1984] 1 AER 694 PC.

"Although supreme the constitution is not immutable..... constitutions on the Westminster model..... provide for their future alteration by the people acting through their representatives in the parliament of the state. In constitutions on the Westminster model, this is the institution in which the plenitude of the state's legislative power is vested."⁵⁹

In the writer's view the requirement for a specified majority for amendment of the Constitution is not a safeguard against an expedient use of the power by the government of the day. It is therefore illusory to refer to the provisions covered by this procedure as entrenched provisions.⁶⁰

The only true entrenchment occurs in respect of the provisions covered by Article 159(5) requiring the consent of the Conference of Rulers,⁶¹ as a condition precedent to any amendment of those provisions. Clause (5) of Article 159 reads:

59. At p. 697a-b.

60. In its 30 year history the Malaysian Constitution has been amended 31 times including and up to the 1988 Amendments (Amendment Act A 704 of 1988). The amendments up to 31 December 1987 are listed at p. 217 of the Federal Constitution Reprint No. 1 of 1988 (Government Printers, 1988). The frequent lament of parliamentarians, especially those from the opposition bench, is that insufficient time is given to consider and debate the amendments: see Dr. Tan Chee Khoo, Bills: Give Sufficient Time (1983) 2 CLJ 51; see also INSAF Vol. XVI No. 3 August 1983 p. 14 under the heading: Contemporary Law Making In Malaysia. The most apposite comment in this regard was made by the Prime Minister Dr. Mahathir Mohamed himself when serving as a backbencher in Parliament: "Laws were hurriedly passed without prior consultation with the representatives who had to "sell" these laws to the people..... The manner, the frequency and the trivial reasons for altering the Constitution reduced this supreme law of the nation to a useless scrap of paper": see his The Malay Dilemma (Federal Publications) 1981 Edn. at p. 11.

61. The unique position and status of the Conference of Rulers established under Article 38 of the Constitution is discussed in Chapter IV. The Conference of Rulers has judicially been recognised as a constitutional body "with certain executive, deliberative and consultative functions": see *Phang Chin Hock v. Public Prosecutor* (No. 2) [1980] 1 MLJ 213 FC.

"A law making an amendment to Clause (4) of Article 10, any law passed thereunder, the provisions of Part III, Article 38, 63(4), 70, 71(1), 72(4), 152 or 153 to this clause, shall not be passed without the consent of the Conference of Rulers."

This clause was created by the Constitution (Amendment) Act, 1971.⁶² It may be noted, however, that the role of the Conference of Rulers in the amendment process had existed from the beginning. Clause (5) of Article 159 of the independence Constitution read as follows:

"A law making an amendment to Article 38, 70, 71(1) or 153 shall not be passed without the consent of the Conference of Rulers."⁶³

It covered provisions dealing largely with the position, privileges and honours of the Malay Rulers. Article 38 is concerned with the functions and powers of the Conference of Rulers; Article 70 deals with the order of precedence of Rulers and Governors; Article 71(1) contains the guarantee of a Ruler to succeed, hold, enjoy and exercise the constitutional rights and privileges of a Ruler of a state; and lastly, Article 153, the only provision in the series not connected with the position and privileges of the Rulers, deals with the special rights and privileges of the Malays and the natives of the Borneo states and the legitimate interests of the other communities. By the Amendment Act 1971 the power and role of the Conference of Rulers in the amendment process was enhanced by the addition of other provisions to the list requiring approval of the Rulers before any amendment in respect of them could

62. Act A 30 of 1971.

63. See Malayan Constitutional Documents Vol. One, 2nd Edn (Government Printers) p. 122.

be validly passed. The significant addition was Article 10(4)⁶⁴ and any laws passed under that provision. These inclusions were also explanatory of the background to the Amendment Act 1971. The amendments were brought about as a result of the racial riots on May 13, 1969 in several parts of Peninsula Malaysia.⁶⁵ A state of emergency was declared throughout the country on May 15, 1969. As events went Parliament was not convened until 20 February 1971. Meanwhile, in order to curb inflammatory speech and conduct by racial extremists, the amendments were introduced aimed at restricting freedom of speech. The amendment Act added to Article 10 dealing with the right of free speech, Clause (4) which read:

"In imposing restrictions in the interest of the security of the Federation or any part thereof or public order under Clause (2)(a), Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181 otherwise than in relation to the implementation thereof as may be specified in such law".⁶⁶

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64. Articles 63(4) and 72(4) are consequential to the inclusion of Article 10(4) because they deal with the removal of parliamentary privilege in respect of a seditious speech in Parliament and the State Legislature respectively.
65. See HP Lee, The Amendment Process Under The Malaysian Constitution (1974), 1 JMCL 185 at p. 196. See also Professor Ahmad Ibrahim, Parliamentary Debates On The Constitution Amendment Bill 1971 (1972) MLJ pp. ix-xv. The 1969 race riots and the Proclamation of Emergency in consequence thereof is discussed in Chapter VI. For a comprehensive account of Sino-Malay Relations and the May 13 riots, see Leon Comber, 13 May 1969: A Historical Survey Of Sino-Malay Relations (Heinemann Asia) 1986 Rpt.
66. The amendment made to the Sedition Act 1948 by Emergency Ordinance No. 45 of 1970 promulgated by the Yang di-Pertuan Agong was however never made into a law under Clause (4) of Article 10. The effect of the amendment was to widen the definition of "seditious tendency" under the Sedition Act 1948 and "making..... taboo any topic of public discussion calling in question" any of the "sensitive matters" identified in the Act: see Ong C.J. in *Melan bin Abdullah v. Public Prosecutor* [1971] 2 MLJ 280 at p. 282.

It authorised Parliament to pass a law validly curbing speech in respect of four "sensitive" matters namely, the special position of the Malays and of the natives of the Borneo States, citizenship rights of the non-Malays, the status of the National Language and languages of the other communities and the position of the Rulers.⁶⁷ The true entrenchment of the provisions covered by this clause is assured by the fact that an amendment to Clause (5) of Article 159 has itself to receive the consent of the Rulers.⁶⁸ As observed by one of their Majesties in respect of the confiding of these sensitive matters in the hands of the Rulers:

"It is true that the Conference of Rulers acts on advice in this matter. But one will not expect that the consent of the Rulers could be obtained easily in these matters".⁶⁹

In summary, on the present state of authorities, the Malaysian Parliament is not subject to any restrictions as to its amending power other than those expressly contained in Article 159 itself. Thus an amendment of Article 150 would be valid, no matter how radical, so long as the prescribed procedure is followed.

67. Parliament has yet to pass a law under Article 10(4), although as noted above, the Sedition Act 1948, a pre-independence statute, has been amended to proscribe discussion of these sensitive matters. The Act, of course, has a wider coverage than these matters. It is of a disturbingly wide application and speaks of "seditious tendency" as being speech calculated to create ill-will and hostilities between the races or disaffection between the Rulers and their subjects etc. In the seventies and eighties the Act was invoked on several occasions to prosecute individuals: see *PP v. Ooi Kee Saik* [1971] 2 MLJ 108; *PP v. Fan Yew Teng* [1975] 1 MLJ 176, [1975] 2 MLJ 235; *Oh Keng Seng v. PP* [1980] 2 MLJ 244; *PP v. Mark Koding* [1983] 1 MLJ 111. The most recent prosecution under the Act, and the only one to date resulting in the acquittal of the defendant, was *PP v. Param Kumaraswamy* [1986] 1 MLJ 518.
68. See observation by HP Lee, The Amendment Process Under The Malaysian Constitution, op.cit. at 199: "Herein lies the justification for describing the Constitution (Amendment) Act, 1971 as an attempt at entrenchment".
69. DYMM Sultan Azlan Shah, The Role Of Constitutional Rulers: A Malaysian Perspective For The Laity (1982) 9 JMCL 1 at p. 16.

In the result between 1960 and 1985, Article 150 has been amended six times without let or hindrance. Some of them like the amendments made in 1966 to deal with the so-called Sarawak crisis were purely to overcome perceived constitutional obstacles to a pre-determined course of action, whilst others were minor involving a mere change of words like the 1976 amendment. But other amendments were portentous and far reaching striking at the very heart of constitutionalism in the country.

We may now examine each of the amendments to determine the extent to which there has been deviation from the original scheme of emergency rule envisaged under Article 150:

- (1) Amendment to Article 150(3) by the Constitution (Amendment) Act No. 10 of 1960 dated 31 May 1960

Article 150(3) deals with the life and duration of a proclamation of emergency. Article 150(3) originally read as follows:

"A Proclamation of Emergency and any ordinance promulgated under Clause (2) shall be laid before both Houses of Parliament and if not sooner revoked, shall cease to be in force -

- (a) A Proclamation at the expiration of a period of two months beginning with the date on which it was issued; and
- (b) An Ordinance at the expiration of a period of fifteen days beginning with the date on which both Houses are first sitting,

unless, before the expiration of that period, it has been approved by a resolution of both Houses of Parliament".

This clause was substituted by section 29 of the Constitution (Amendment) Act, 1960, in force from May 31, 1960, with a new clause⁷⁰ which reads as follows:

70. Article 150(3) in its present form is identical to the amendments made in 1960 except that "clause (2) in the body of Article 150(3) now reads as "clause (2B)" because of the amendments made to Article 150(1) and (2) by Act A514 of 1981.

"A Proclamation of Emergency and any ordinance promulgated under clause (2) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under clause (1) or promulgate any ordinance under clause (2)."

The Explanatory Statement that accompanied the Bill in Parliament merely stated:

"It is considered that the Article should be amended in order to permit a Proclamation or ordinance to continue in force until revoked by His Majesty or annulled by resolution of both Houses of Parliament."⁷¹

The impact of the change was, however, not quite so simple. It dealt with two essential features of a state of emergency, namely, duration of the emergency and parliamentary control over the Proclamation, and of emergency laws. It essentially reversed the process of ending or extending an emergency.⁷² Whereas previously there was a positive burden on the Executive to convene Parliament to debate the Proclamation within two months, in which event emergency laws would lapse within fifteen days of the commencement of the sitting⁷³ unless approved by resolution of both Houses, there was now no time limit for the seeking of Parliamentary approval.⁷⁴ Thus if an emergency is proclaimed when both Houses of Parliament are not sitting, the state of

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71. See Federal Government Gazette dated 31 March 1960 (Explanatory Statement Para. 15).
72. INSAF Editorial Vol. xii (No. 1) June 1979; see also GTS Sidhu, Emergency Powers Under Article 150 Of The Constitution, INSAF Vol. xxi (No. 1) June 1990 at p. 79.
73. The comment in the Explanatory Statement (Para. 151, supra,) that it is fifteen days "from the date of tabling" would appear to be an erroneous statement.
74. A further amendment to Article 150 with regard to parliamentary control was the removal through Act A514 of 1981 of clause (2) dealing with the requirement to convene Parliament "as soon as may be practicable".

emergency can continue indefinitely until the Executive sees it fit to convene Parliament. This happened in 1969 after race-riots broke out on 13 May 1969 following the general elections. An emergency was proclaimed throughout the Federation on 15 May 1969. Parliament had by then been dissolved for the purposes of the general elections.⁷⁵ It was not convened until 20 February 1971. During the period, the emergency continued and the country was governed for all practical purposes by a Director of Operations without parliamentary sanction.

Thus the amendment by removing the constitutional imperative of laying the Proclamation before Parliament for debate and approval within a specified time has theoretically made it possible for a Government to continue a state of emergency indefinitely. In the writer's opinion the amendment is a radical departure from the letter, spirit and intent of the original Article 150 proposed by the Reid Commission.

(2) Amendment of Article 150(1), (5) and (6) And the Addition of New Clause (6A) by Act No. 26 of 1963 dated 16 September 1963

The dominant purpose of Act No. 26 of 1963, or the Malaysia Act 1963, was to amend the Constitution to provide for the establishment of Malaysia by the admission of new states, namely Sabah, Sarawak and Singapore. In making the necessary modifications for this purpose, Parliament had apparently made a comprehensive review of the Constitution and also made changes to parts which were, strictly speaking, unconnected with the creation of the new Federation.

75. See observation by Lee Hun Hoe CJ (Borneo) in *Government of Malaysia v. Mahan Singh* [1975] 2 MLJ 155 FC at 164A: "The emergency in 1969 is different from the previous emergencies in that when the Proclamation was made, Parliament had already been dissolved and elections to Dewan Ra'ayat had yet to be completed. As it was not possible to summon Parliament, the Proclamation could not be laid before Parliament."

The emergency provisions fell in this category. By section 39 of the Malaysia Act 1963, clauses (5) and (6) of Article 150 were substituted with new clauses (5), (6) and (6A). The Explanatory Statement that accompanied the Bill in Parliament⁷⁶ made no mention of the amendments to Article 150 implying thereby that the amendments were inconsequential. A closer scrutiny would reveal that this was far from being the true position.

We may deal separately with each of the three clauses amended in this session:

(a) Article 150(1)

This clause read originally as follows:

"If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or any part thereof is threatened, whether by war or external aggression or internal disturbance he may issue a Proclamation of Emergency."

The amendment removed the words "whether by war or external aggression or internal disturbance" so that the clause now reads:

"If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or any part is threatened he may issue a Proclamation of Emergency."

The removal of the words widened the circumstances in which an emergency could be declared. There was no longer a need to relate the threat to the security or economic life of the country to "war, external aggression or internal disturbance." Any event threatening the security or economy of the country could now notionally justify the proclamation of a state of emergency.⁷⁷

76. Government Gazette dated 13 August 1963.

77. See, for example, GTS Sidhu, Emergency Powers under Article 150 of the Constitution, op. cit. p. 80, who suggests that even a strike by workers could be a justifying ground.

(b) Article 150(5):

The amendment to this clause enlarged the law-making power of Parliament during an emergency. Parliament was no longer circumscribed by the subjects on which it could make laws nor could the coming into force of these laws be impeded by the requirement under the Constitution to obtain any consent or concurrence or the assent of the Yang di-Pertuan Agong to any bill. Under the original clause (5), emergency laws also possessed an overriding quality but of a limited scale. The original clause read:

"While a Proclamation of Emergency is in force Parliament may, notwithstanding anything in this Constitution, make laws with respect to any matter enumerated in the State List (other than any matter of Muslim law or the custom of the Malays), extend the duration of Parliament or of a state legislature suspend any election and make any provision consequential upon or incidental to any provision made in pursuance to this clause."

The effect of this clause was to permit Parliament's law-making power during an emergency to cover subjects listed in the State List (see Ninth Schedule to the Constitution) being matters on which only the state legislature ordinarily had the jurisdiction to make laws. Parliament was also expressly empowered to make an emergency law extending its duration and that of a state legislature and to suspend any election. Except in respect of these enumerated subjects, Parliament was otherwise obliged to abide by the Constitution in the exercise of its law-making function. This limitation was removed by the amendments. Clause (5) was amended to read as follows:

"Subject to clause (6A),⁷⁸ while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this Constitution or of any written law which requires

78. Clause (6A) was also introduced by the 1963 Amendments.

any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent."

The effect of the change was to remove all the stops. The enumeration previously of the matters in respect of which Parliament could pass overriding emergency laws was removed and in its place was conferred the *carte blanche* authority "to make laws with respect to any matter". This effectively obliterated the division of legislative powers between the Federal and State legislatures and concentrated all legislative power in the Central Executive for the period of the emergency. Thus, under a state of emergency the concept of a Federation with distribution of legislative powers between the Centre and the States becomes virtually non-existent, constitutionally speaking, and if it is seen to exist, it is entirely at the let and the sufferance of the Centre.

The passing of an emergency law on a subject reserved for the State legislature under the State List is entirely at the discretion of Parliament. The phrase "if it appears to Parliament that the law is required by reason of the emergency" does not admit of any judicial debate on the question whether Parliament had acted informedly or wisely in enacting an emergency legislation. This would echo the judicial position as stated by Lord Guest in the Privy Council in *Akar v. Attorney General of Sierra Leone*:⁷⁹ "Emergency laws cannot be challenged on grounds that it was not reasonably justifiable for the situation."⁸⁰

The free hand of Parliament to legislate on any matter as an emergency measure is facilitated by the removal of all the procedural checks. Thus

79. [1969] 3 All ER 384.

80. At p. 395.

Article 79(1) requiring certification of any Bill changing the enumerated subjects, inter alia, in the Concurrent List is rendered inapplicable as also the minimum period specified in Article 79(2) of notice before the Bill could be moved. Next, the dispensation of the requirement for any consent or concurrence is designed to remove compliance with Article 159(5) and enable a by-passing of the Conference of Rulers. The matters contained in Article 159(5) like Article 10(4) dealing with abridgement of criticism and free discussion in respect of certain "sensitive matters" or the position and privileges of the Rulers would ordinarily require the consent of the Conference of Rulers before any changes could be made to them. An emergency law under clause (5) now does not need the consent of the Rulers even if it affects the matters covered by Article 159(5).

Lastly, even the assent of the Yang di-Pertuan Agong is dispensed with so that an emergency Bill may come into force without the imprimatur of the Sovereign Head. The requirement for assent is contained in Article 66⁸¹ of the Constitution and provides that a Bill upon being passed by both Houses of Parliament shall be presented to the Yang di-Pertuan Agong for his assent and shall become law on being assented to. We see a departure from this norm in respect of emergency legislation. Significantly it symbolises complete executive control and dominance in matters relating to the administration of the state of emergency. Thus the Yang di-Pertuan Agong, who in any event is duty bound under Article 40(1) to act on the advice of the Cabinet as a

81. This Article was amended in January 1984 (Constitution Amendment Act A584) with effect from 20 January 1984. The need for the assent of the Yang di-Pertuan Agong was one of the subjects that sparked off the controversy in late 1983 between the executive Government and the Rulers. The constitutional crisis of 1983 is discussed in the following pages.

constitutional monarch,⁸² ceases to play any role in an emergency once he issues the Proclamation, and once Parliament is convened.

(c) Article 150(6) and New Article 150(6A)

The amended clause (6) and the new clause (6A) are inter-related. Clause (6A) was introduced to impose restrictions on the width of the amended clause (6). In its original form, clause (6) read as follows:

"No provision of any law or ordinance made or promulgated in pursuance of this Article shall be invalid on the ground of any inconsistency with the provisions of Part II and Article 79 shall not apply to any Bill for such law or any amendment to such a Bill."

Part II of the Federal Constitution deals with fundamental liberties. Prior to the amendment, emergency legislation could only override the fundamental liberties provisions and not the other provisions of the Constitution. This was in keeping with the observation of the Reid Commission that "the existence of fundamental rights..... ought (not) to be permitted to imperil the safety of the state".⁸³ However, the amendment removed this restriction. The new clause (6) reads as follows:

"Subject to clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on ground of inconsistency with any provision of this Constitution."

82. See Lord Diplock in *Teh Cheng Poh v. PP* [1969] 1 MLJ 49 PC at p. 55F-G; see also Ong F.J. in *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 1 MLJ 119 at p. 125B-G: "His Majesty is not an autocratic ruler since Article 40(1) of the Federal Constitution provides that "in the exercise of his functions under this Constitution or Federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet."

83. The Reid Report Para. 175 pp. 75-76. The Report also cautioned "that the infringement of fundamental rights..... is only justified to such an extent as may be necessary to meet any particular danger which threatens the nation."

The effect of the amendment is to give a general overriding quality to emergency legislation. Article 4(1) which declares the Constitution as the supreme law is itself overridden so that an emergency legislation today prevails over the Constitution. In the writer's view no other provision of the Constitution strikes so deadly a blow to the fabric of constitutionalism in the country as does this clause.⁸⁴ The superogatory quality of emergency legislation by virtue of clause (6) is limited only by the new clause 6(A).⁸⁵

This clause reads:

"Clause (5) shall not extend the powers of Parliament with respect to any matter of Muslim law or the custom 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 this Constitution relating to any such matter or relating to religion, citizenship or language."

The effect of clause (6A) is to preserve and keep inviolate certain subjects which are put beyond the reach of emergency legislation. These subjects reflect the compromise or bargain at the time of Independence between the multi-ethnic and multi-religious communities of Malaysia. They are the same subjects that have consistently been given special treatment in the Constitution. For example, under Article 10(4) Parliament may pass a law prohibiting the questioning of any matter, inter alia, pertaining to citizenship or the national language. In like vein, these subjects are also

84. Clause (6) and its effect on constitutionalism in the country is discussed in Chapter XI later.

85. Another limiting factor is explicit in clause (6) itself, namely, that the Act of Parliament must declare that the law is required by reason of the emergency. This is a condition of law-making and unless the law conforms to the same it will not have the special quality of emergency legislation as discussed: see *Bribery Commissioners v. Ranasinghe* [1964] 2 AER 785, 782 PC.

insulated from amendment under Article 159(5) without the prior approval of the Conference of Rulers. A noticeable omission from the list of subjects in Clause (6A) is the position, privilege and status of the Rulers themselves. There is no discernible reason for this omission. Thus as Article 150 stands today it is technically possible for emergency legislation to be passed by Parliament, affecting the rights and privileges of the Rulers which would be valid under Clause (6) because it is not protected by Clause (6A). Moreover, in view of Clause (5) it will be possible for such legislation to be brought into force without the assent of the Yang di-Pertuan Agong.

(3) Temporary Amendment to Article 150(5) and (6) made by the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966, No. 68 of 1966 effective 20 September, 1966

The Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966 was passed on 20 September 1966 purely to deal with the so-called constitutional crisis in Sarawak in respect of which the Yang di-Pertuan Agong had proclaimed an emergency in the State on 14 September 1966. The constitutional crisis was brought about by the dismissal of the Chief Minister of the State by the Governor on the perceived ground that he no longer commanded the confidence of a majority of the members of the state legislature, called the Council Negri. The dismissal was struck down by the High Court, Borneo on the ground that the Governor had no power of dismissal under the State Constitution and that the Chief Minister could only be removed if he suffers a vote of no-confidence in the Council Negri.⁸⁶ Thwarted in its efforts to remove the recalcitrant Chief Minister, the Federal Government invoked its emergency powers under Article 150 to achieve its objective. The

86. *Stephen Kalong Ningkan v. Tun Abang Openg* (No. 1) [1966] 2 MLJ 187 per Harley Ag. CJ.

Emergency (Federal Constitution and Constitution of Sarawak) Act 1966 was passed with only this object in mind. A perceived restriction in Article 150(5) and (6) was removed temporarily so that Federal law overriding the State Constitution could be passed to permit the Governor to convene a session of the Council Negri to pass a vote of no-confidence on the Chief Minister. The Explanatory Statement that accompanied the Bill in Parliament dealt with this objective quite explicitly:

"In a recent judgment of the High Court in Borneo it was held that the question whether the Chief Minister commands the confidence of a majority of the members of the Council Negri cannot be resolved otherwise than by a vote in the Council itself. It was further held, in the same judgment, that the State Constitution confers no power on the Governor to dismiss, or by any means to enforce the resignation of, a Chief Minister, even when it has been demonstrated that he has lost the confidence of a majority. This is a serious lacuna in the State Constitution, and one which enables a Chief Minister whose majority has become a minority to flout the democratic convention that the leader of the Government party in the House should resign when he no longer commands the confidence of a majority of the members. The occurrence of such an event, resulting in the breakdown of stable Government and thereby giving rise to the spreading of rumours and alarm throughout the territory, is in the opinion of the Yang di-Pertuan Agong, as expressed in the Proclamation of Emergency, a threat to the security of Sarawak.

Clause 3 of the Bill is designed to remove any doubt as to whether the power of Parliament to make laws pursuant to a Proclamation of Emergency extends to making laws inconsistent with the provisions of a State Constitution, as it expressly does in relation to the Federal Constitution - Article 150(5) and (6). The proposed amendment of the Constitution is intended to be a temporary one, which will cease to have effect six months after the Proclamation of Emergency ceases to be in force."⁸⁷

Clause 3 was enacted as Section 3 of the 1966 Act. It read as follows:

"(1) In Article 150 of the Constitution -

- (a) in Clause (5), after the word "Constitution" where it first occurs, there shall be inserted the words "or in the Constitution of the State of Sarawak"; and

87. See Bill dated 19 September 1966.

(b) in Clause (6), after the word "Constitution" at the end thereof, there shall be added the words "or of the Constitution of the State of Sarawak"

(2) The amendments made by subsection (1) of this section shall cease to have effect six months after the date on which the Proclamation of Emergency issued by the Yang di-Pertuan Agong on the fourteenth day of September 1966 ceases to be in force."

The remarkable feature of this amendment was its temporary duration. As it turned out, it has been the only temporary amendment to the Federal Constitution in the constitutional history of the country.

However, the necessity for the amendments was doubtful. Its purpose was to overcome the provision in the Sarawak Constitution that did not authorise the Governor of the State to convene a sitting of the Council Negri to take a vote of confidence on the Chief Minister. Clause (5) of Article 150 as it stood even before the temporary amendment enabled Parliament to encroach onto the legislative sphere of the State legislatures. Thus by Federal emergency law, Parliament could have empowered the Governor to convene a sitting of the Council Negri, as it did by this Act, without having to amend Clause (5). Moreover, by Article 75 it is declared that state law which is inconsistent with federal law shall to the extent of the inconsistency be void. In the writer's view the constitutional supremacy accorded to emergency legislation by Clause (5) and the effect of Article 75 should have been sufficient to place the Act beyond challenge. In addition, there was Clause (4) which read:

"While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof."

One would have thought that Clause (4) was wide enough to empower the Federal Government to instruct the clerk of the Council Negri or its Speaker, by executive order, to convene a sitting to determine the question whether the Chief Minister enjoyed the confidence of a majority of its members.

It is likely that the resort to the extreme measure of invoking emergency powers under Article 150, and the making of the 1966 temporary amendments, was probably undertaken *ex abundanti cautela* to ensure that the Federal Government achieved its objective in Sarawak.

- (4) Amendment of Article 150(1) and (2) and the Addition of New Clauses (2A), (2B), (2C); (8) and (9) By The Constitution (Amendment) Act A514 of 1981 effective 14 May 1981
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The amendments in 1981 probably effected the most significant change to Article 150. At one end of the spectrum it enlarged the power to proclaim a state of emergency. At the other, it purported to immunise the act of proclamation from legal challenge and judicial review. The amendments were occasioned by the landmark decision of the Privy Council in *Teh Cheng Poh v. Public Prosecutor*,⁸⁸ where in the course of striking down emergency legislation made by the Yang di-Pertuan Agong after Parliament had sat, Lord Diplock made several observations about the status and continuity of a regime of emergency in Malaysia. For example, about the continuity, he observed:

"Apart from annulment by resolutions of both Houses of Parliament it (the Proclamation) can be brought to an end only by revocation by the Yang di-Pertuan Agong. If he fails to act the court has no power itself to revoke the proclamation in his stead. This, however, does not leave the court powerless to grant to the citizen a remedy in cases in which it can be established that a future to exercise his power of revocation would be an abuse of his discretion..... (M)andamus could, in their Lordship's view, be sought against the members of the Cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the Proclamation."⁸⁹

88. [1979] 1 MLJ 50 PC; [1980] AC 458.

89. At p. 55E-G.

On overlapping proclamations of emergency, which was the case when the 1969 Emergency was proclaimed to overlap the still existing 1964 Emergency, he said:

"In their Lordship's 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".⁹⁰

The 1981 amendments purported to negative these observations. We will take a closer look at the changes:

(a) Article 150(1) and (2)

Clause (1) was amended by adding the word "public order" as follows:

"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".

The addition of the words "public order" was to widen the existing grounds upon which an emergency could be declared. It is difficult to envisage what it is intended to cover because of the all-embracing character of the term "whereby the security..... of the Federation or any apart thereof is threatened" already found in Article 150(1). It has been suggested that the amendment was a response to a problem extant then, namely, the protest in many quarters in the country to the amendment to the Societies Act.⁹¹ The likely

90. At p. 53H.

91. See GTS Sidhu, op. cit. at p.81. The amendments to the Societies Act 1966 was far reaching. It was perceived as an infringement of the right to freedom of association. Societies were classified as political and non-political societies. It drew widespread criticism from public interest groups including the Bar Council. A protest march by lawyers to Parliament led to the participants being charged for partaking in an unlawful assembly: see *PP v. Cheah Beng Poh & 42 others* [1984] 2 MLJ 225; *Siva Segera v. Public Prosecutor* [1984] 2 MLJ 212 FC.

reason is found in the Government's response to a number of urban terrorists attacks that rocked Kuala Lumpur in 1974 and 1975 resulting in the enactment of several legislative counter measures like the Essential (Security Cases) Regulations 1975.⁹² Moreover there was an increased number of cases of unlawful possession of firearms in the late seventies which made the Government to conclude that the potential for internal disturbance was not over.

The insertion of the "public order" ground is ironical since "internal disturbance" was removed as a head for declaring an emergency by the 1963 amendments. Apart from the change of circumstances presented by the urban unrest problems in the nineteen-seventies, the term "public order" in its generic sense is wider than "internal disturbance" and possibly explains its insertion. The meaning of the term was considered in *Re Tan Boon Liat*⁹³ in the context of a preventive detention law⁹⁴ that authorised the Minister for Home Affairs to make a detention order "if he is satisfied it is necessary to do so to prevent any person acting in any manner prejudicial to public order". Abdoolcader J. said: "Danger to human life and safety and disturbance of public tranquility must necessarily fall within the purview of the expression"..... it is used in a generic sense and is not necessarily antithetical to disorder and is wide enough to include consideration of public

92. See Chandran Jeshurun, Government Responses to Armed Insurgency in Malaysia, 1957-82 (ISIS Publication Singapore: Government And Rebellions In South East Asia) p. 134 et. seq. and at p. 143. See also observation by Wan Suleiman FJ in *PP v. Khong Teng Khen* [1976] 2 MLJ 166 at p. 176 of "Circumstances now prevailing in this country..... which takes various forms including widespread illegal possession and use of firearms".

93. [1976] 2 MLJ 83.

94. Emergency (Public Order and Prevention of Crime) Ordinance, 1969.

safety in its signification".⁹⁵ This definition of "public order" is likely to be accepted also in the context of Article 150(1). Article 150(2) was a new insertion. It reads:

"A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied there is imminent danger of the occurrence of such event".

Even more significant than the insertion of the above provision was the deletion of the existing Article 150(2). That clause read as follows:

"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".

This constitutional provision was pivotal in the *Teh Cheng Poh* case in invalidating emergency legislation made after Parliament had sat in February 1971. Its deletion is directly attributable to that decision. The purpose was to remove a ground for invalidating emergency law-making by the Yang di-Pertuan Agong during an emergency after Parliament had sat. The necessity for this deletion is questionable in the light of the enactment by Parliament soon after the decision of the Emergency (Essential Powers) Act 1979 in January 1979 to overcome the consequences of the Privy Council ruling.

Additionally, we see here the move towards a further reduction of the role of Parliament in an emergency. The removal of the existing Clause (2) removes the duty cast upon the Government to convene Parliament "as soon as may be practicable". Although this phrase is open-ended and imposes no time-limit for the convening of Parliament to debate the emergency, it had a

95. At p. 86D-F. A more detailed discussion of the "public order" head for proclaiming an emergency is found in Chapter VIII.

salutary effect. It carried an important principle that the norm was for Parliament to govern and that executive-rule through an emergency was the exception.

The new Clause (2) empowers the proclamation of an emergency even before the actual occurrence of the event which is said to constitute a threat to the security or the economic life of the Federation or to public order if there is an imminent danger of that occurrence. It considerably broadens the circumstances in which an emergency may be declared. It is no longer necessary for the Government to justify the proclamation by identifying any particular event, incident or occurrence as the cause of the emergency. It is now possible for the Government to act on intelligence reports alone and declare an emergency as a preventive measure. The obvious purpose of the amendment is to enlarge the power of the Government in declaring an emergency. Ironically, the position previously did not also require that the Government prove any disorder or disturbance to justify an emergency. This was manifested in the Privy Council's decision in the *Ningkan* case⁹⁶ when it ruled, in repelling an argument that the State of Sarawak where the emergency was declared had shown none of the symptoms of a grave emergency, that an emergency is capable of covering a very wide range of situations and occurrences and that the Government could act on information and apprehensions not known to those who challenge its validity.⁹⁷

(b) New Clauses (2A), (2B), (2C) and Clause (9)

The new clauses are as follows and may be considered together:

"(2A) The power conferred on the Yang di-Pertuan Agong by this Article shall include the power to issue different Proclamations on different grounds or in different

96. *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 2 MLJ 288 PC.

97. At pp. 241-242.

circumstances, whether or not there is a Proclamation or Proclamations already issued by the Yang di-Pertuan Agong under Clause (1) and such Proclamation or Proclamations are in operation.

- (2B) If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.
- (2C) An ordinance promulgated under Clause (2B) shall have the same force and effect as an Act of Parliament, and shall continue in full force and effect as if it is an Act of Parliament until it is revoked or annulled under Clause (3) or until it lapses under Clause (7); and the power of the Yang di-Pertuan Agong to promulgate ordinances under Clause (2B) may be exercised in relation to any matter with respect to which Parliament has power to make laws, regardless of the legislative or other procedures required to be followed, or the proportion of the total votes required to be had, in either House of Parliament.
- (9) For the purpose of this Article the Houses of Parliament shall be regarded as sitting only if the members of each House are respectively assembled together and carrying out the business of the House".

These clauses were again inserted to overcome the observations made by the Privy Council in the *Teh Cheng Poh* case. Clause (2A) enables the Government to declare overlapping proclamations of emergency. It is a direct response to Lord Diplock's comment that a new declaration of emergency that overlaps an existing emergency impliedly revokes the latter.⁹⁸ Previously in the *Ningkan* case, the Privy Council had observed that the continued existence of an emergency did not preclude the invocation again of the powers under Article 150.⁹⁹ However, the distinction between the *Teh Cheng Poh* situation and the *Ningkan* situation was that in the case of the former the emergencies

98. See *Teh Cheng Poh*, op. cit. at p. 53H.

99. See *Ningkan*, op. cit. at p. 242E.

were truly overlapping because they were nation-wide emergencies whereas in the case of the latter, the emergency was only state-wide, being confined to the State of Sarawak.

Clauses (2B) and (2C) deal with the law-making power of the Yang di-Pertuan Agong during an emergency. Clause (2B) deals with when the Yang di-Pertuan Agong can make emergency laws, whereas Clause (2C) deals with the character of these laws. Clause (2B) was evidently enacted with the purpose of reinstating the majority opinion of the Federal Court in *Public Prosecutor v. Khong Teng Khen*¹⁰⁰ which was overruled by the Privy Council in *Teh Cheng Poh*. The majority in *Khong Teng Khen's* case gave a literal meaning to the phrase "when Parliament is sitting" under the former Article 150(2) to mean when Parliament is actually sitting and deliberating.¹⁰¹ Clause (2B) read together with Clause (9) now makes it clear that the executive power to make emergency legislation through the Yang di-Pertuan Agong is retained throughout an emergency so long as both Houses of Parliament are not assembled together and deliberating. As the Federal Court itself observed in *Khong Teng Khen's* case, the two Houses do not sit at the same time.¹⁰²

Clause (2C) ensures that the width of the law making power of the Yang di-Pertuan Agong is co-extensive with that of Parliament and suffers no legislative or procedural limitations in its exercise. The necessity for Clause (2C) may be questioned in the light of Clause (6) which already confers a super-overriding quality to emergency legislation.

100. [1976] 2 MLJ 166.

101. See the convincing dissent of Ong Hock Sim F.J. who spoke of the absurdity of that interpretation: "(If) so the Yang di-Pertuan Agong's law-making function would revive over the week-end or when Parliament is in recess": at p. 172.

102. At p. 172F.

(c) New Clause (8)

The introduction of Clause (8) made one of the most radical changes to Article 150. Clause 8 reads as follows:

"(8) Notwithstanding anything in this Constitution -

- (a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and
- (b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of -
 - (i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);
 - (ii) the continued operation of such Proclamation;
 - (iii) any ordinance promulgated under Clause (2B); or
 - (iv) the continuation in force of any such ordinance.

The Explanatory Statement that accompanied the Bill in Parliament gives the reason for the introduction of Clause (8) as follows:

"The new Clause (8) seeks to provide that the satisfaction of the Yang di-Pertuan Agong under Clause (1) and Clause (2B) is final and conclusive and cannot be challenged or called in question in any court or on any ground. This Clause also provides that no court shall have jurisdiction in relation to the validity of a Proclamation issued under Clause (1) or any declaration made in such Proclamation, or the continued operation of such Proclamation, or in relation to any ordinance promulgated under Clause (2B) or the continuation in force of any such ordinance.¹⁰³

The objective behind Clause (8) is obvious; it is to oust judicial review in respect of: (a) the declaration of a state of emergency, and its continuance, and (b) the promulgation of any emergency ordinance and its continuance. Whether Clause (8) achieves its objective may be considered in the context of the discussion later of the justiciability of a proclamation of emergency.

103. See Bill dated 19th April 1981.

(5) The Constitution (Amendment) Act A 566 of 1983 And the Constitution (Amendment) Act A 584 of 1984 Considered Together

The 1983 amendments and the 1984 amendments to Article 150 may conveniently be discussed together. They dealt with the same subject and were in actuality a single occasion. The amendments made in December 1983 were reversed in January 1984 in the wake of an unprecedented crisis that seemed to pit the Rulers against the Federal Government. This confrontation which threatened to paralyse the process of Government¹⁰⁴ was the direct result of the effect of the 1983 amendments, which is to diminish the role of the Yang di-Pertuan Agong in certain constitutional respects. The crisis highlighted the great importance attached by the Government to the presence and easy availability of the emergency powers under the Constitution. The amendments and the crisis that followed repay close scrutiny.

The 1983 amendments purported to make a number of changes to the Constitution.¹⁰⁵ However, the most important were those pertaining to the curtailment of the functions of the Yang di-Pertuan Agong and the State Rulers. In this regard the proposed change to Article 150 must be examined in the context of the amendment to Article 66. The Constitution (Amendment) Bill purported to amend Article 66, dealing with the assent of the Yang di-Pertuan

104. See H.F. Rawlings, The Malaysian Constitutional Crisis of 1983 (1986) 35 ICLQ 237.

105. There were 22 in all. Some of the changes were to increase the number of Parliamentary and State seats, and provision to establish a Supreme Court in place of the Federal Court upon termination of appeals to the Privy Council. See generally, RH Hickling: Malaysia - Constitution (Amendment) Act 1983 And Constitution (Amendment) Act 1984 (1984) JMCL 213.

Agong to bills passed by Parliament before they become law, by providing for its dispensation if the Yang di-Pertuan Agong does not give his assent within fifteen days of it being presented to him.¹⁰⁶

Article 150 was changed by substituting the "satisfaction of the Yang di-Pertuan Agong" to declare an emergency for that of the Prime Minister. The amended Article 150(1) read as follows:

"If the Prime Minister is satisfied that a grave emergency exists where by the security, or the economic life, or public order in the Federation or any part thereof is threatened, he shall advise the Yang di-Pertuan Agong accordingly and the Yang di-Pertuan Agong shall then issue a Proclamation of Emergency making therein a declaration to that effect."

The other parts of Article 150 were likewise amended to reflect the change that it was the satisfaction of the Prime Minister that was operative and that the Yang di-Pertuan Agong acted merely on advice.

The objective behind the amendments to Articles 66 and 150 was to remove all ambiguity with regard to the purely constitutional role that the Yang di-Pertuan Agong plays in these matters. There can be little doubt that in assenting to a bill passed by Parliament, His Majesty acts as a constitutional monarch and cannot refuse to give his assent based on his private conception of the Bill.¹⁰⁷ Likewise on the question whether the Agong could act on his

106. Article 66(5) was amended to read as follows:

"A Bill shall become law on being assented to by the Yang di-Pertuan Agong. If for any reason whatsoever the Bill is not assented to within fifteen days of the Bill being presented to the Yang di-Pertuan Agong, he shall be deemed to have assented to the Bill and the Bill shall accordingly become law."

A parallel change was made to Paragraph 11 of the Eighth Schedule to effect a similar dispensation in respect of the Ruler's assent to state legislation.

107. This has been the consistent view of all leading writers on the subject. Professor Trindade in his article "The Constitutional Position Of The Yang-di-Pertuan Agong (see The Constitution of Malaysia - Its Development:"

own in proclaiming a state of emergency under Article 150, all possible doubts should have been dispelled by the Privy Council's observation in *Teh Cheng Poh's* case:

"(The Agong's) functions are those of a Constitutional monarch..... 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. So when one finds in the Constitution itself or in a 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 affairs exists or that a 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.....".¹⁰⁸

In the light of the obvious position that obtained prior to 1983 on these matters, the question asked is what prompted the Federal Government to act as it did? It might be as one writer observed that it "constituted the Federal Government's attempt at a pre-emptive strike to mitigate the effects of the election of an autocratic or unpredictable Agong".¹⁰⁹ This was in reference to the unique monarchical system in Malaysia where one of the Malay Rulers is elected on rotation once in five years to fill the post of Yang di-Pertuan Agong or Supreme Head of the Federation.¹¹⁰ It so happened that 1984

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107. 1955-79 Ed. Suffian, Lee Trindade at p. 101 et. seq.) concludes on this question that: "Nevertheless it does not seem possible for the Yang di-Pertuan Agong to withhold assent to a Bill passed by both Houses of Parliament". Likewise, a royal monarch has himself observed with regard to the royal assent: "In Malaysia, the role of the Rulers is specifically provided for in the Constitutions and the Rulers have no power to refuse: See Raja Tun Azlan Shah (as he then was) in The Role of the Constitutional Rulers: A Malaysian Perspective For The Laity" (1982) JMCL 1.

108. *Teh Cheng Poh v. Public Prosecutor* [1979] 2 MLJ 50 at p. 52.

109. H.F. Rawlings, op. cit. at p. 248.

110. The principal features of this system are discussed in Chapter IV.

was election year. The two eligible candidates were the Rulers of Perak and Johore.¹¹¹ The fears of the Federal Government in regard to the accession of either of these Rulers was encapsulated by Rawlings in his article:

"The immediate cause of the crisis was the Federal Government's response to the prospect of an election of a new Agong to take office in 1984. In order to understand this response, it is necessary to explain that the Conference of Rulers, when selecting a new Agong is in fact constrained in its choice by a series of rules set down by the Third Schedule to the Constitution. The effect of these rules for the 1984 election was that only two candidates, the Rulers of Perak and Johore, were immediately eligible, since all other states with hereditary Rulers had previously supplied a Ruler to serve as Agong. As the senior of the two, the Ruler of Perak was entitled to first refusal of the position.

The problem for the Federal Government was simply that it did not wish either of the eligible Rulers to serve as Agong. Both Rulers, had come into conflict with their Chief Ministers and, as already mentioned in each case the Chief Minister had ultimately been compelled to resign. More recently, both Rulers had occasioned considerable confusion in their capacities as Heads of Islam by announcing that the Muslims fasting month of Ramadan would begin earlier in their states than in all other states - an indication of possible unwillingness to follow Federal Government or state Executive Council advice. Further, it was reported that at least one of the candidate Rulers had spoken openly of an intention, on assuming the office of Agong, to declare a Proclamation of Emergency under Article 150 of the Constitution and seek to exercise some governmental powers himself. Finally, it should be said that the Ruler of Johor, at least, had a reputation as a somewhat colourful character, and his high-spirited exuberance had, prior to his accession to the throne of Johore, twice led to criminal convictions for offences involving personal injury to others.

Furthermore, in at least one state (Pahang) the Ruler had refused to assent to state legislation as a tactic to bring pressure on his Chief Minister.¹¹²

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111. The Ruler of Perak then was Sultan Idris Shah who died shortly before the election and was succeeded to the throne by Sultan Azlan Shah. The Ruler of Johore was Sultan Mahmood Iskandar who was eventually elected the eighth Yang di-Pertuan Agong.
112. H.F. Rawlings, *op. cit.* at p. 246. A remarkable feature of the constitutional crisis was the near-silence in the local media of the controversy. Only foreign news journals commented on the crisis and provided the essential details. It was perceived that the news clamp was on the directions of the Government. In November 1983, the ALIRAN Quarterly observed: "When the amendments to Articles 66 and 150 were passed by Parliament in early August there was hardly any news in the

The crisis broke out when the Yang di-Pertuan Agong refused to assent to the Constitution (Amendment) Bill passed by Parliament in August 1983. A local columnist wrote:

"The King had earlier on been briefed by the Prime Minister about the amendments and he had agreed to them. But apparently he did not quite understand the full import of the amendment to the Eighth Schedule or he had not been briefed on them. When his brother Rulers realised the full impact of the amendment to Schedule Eight they were up in arms. Led by the Sultans of Perak and Johore, they resolved that the King should not

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112. local media. The regional magazines carried some information. A couple of opposition monthlies also discussed the issue..... Even now with banner headline in the newspapers and demonstrations in different parts of the country, the pros and cons of the amendments have not been explored in any depth. Once again, we have put on display one of our "national traits": we talk but do not think" (see ALIRAN Quarterly Nov. 1983, The Constitutional Crisis And Democracy p.1). It was evident that even during the parliamentary debate on the amendments in August 1983, Government backbenchers noticeably avoided discussing the changes to Articles 66 and 150. The Opposition Leader wrote: "We seem to be staging a Wayang Kulit, where we see the shadows but not the substance, as nobody seems to be brave enough to deal with the real substance of the amendments. The Bill before the House is one of the most important amendments to be made to the Constitution, as for the first time since Merdeka, amendments are proposed which would have grave consequences to the system of government in Malaysia. Everybody is aware of the great import of this amendment, but everyone is steering clear of the subject. In the Parliament canteen or outside this Chamber, when MPs discuss the 1983 Constitutional Amendment Bill, they do not talk about the proposed increase of parliamentary seats, nor do they discuss the proposed amendment to Article 48 to specify the circumstances whereby an MP convicted of criminal offence would lose his seat. What they all discuss is the purpose, reason and consequences of the proposed amendments to Article 66 and Article 150 of the Constitution! Similarly, outside Parliament, when the present batch of constitutional amendments are discussed by those who are knowledgeable, by the political leaders inside or outside the Barisan Nasional, by the press, they all focus their attention on the proposed amendments to Articles 66 and 150. But in these two days of debate, all the Barisan MPs avoided these two Articles, and even those UMNO MPs who had always been the first to jump up and speak and are in the habit of breathing "fire and brimstone" are this time uncommonly and extraordinarily quiet and subdued": see Lim Kit Siang, The "Wayang Kulit" Debate (1983) ALIRAN QUARTERLY Vol. 3 No. 3 p. 9. (Writers Note: "wayang kulit" is the Malay term for "shadow play").

give the Royal Assent to the Bill. Then at the Conference of Rulers in Kota Kinabalu in October, the Rulers voted 8-0 against the acceptance of the amendments".¹¹³

However, the disagreement of the Rulers was not confined merely to the changes to the Eighth Schedule. They also saw in the amendments to Articles 66 and 150 an infringement of Article 38(4), which read:

"No law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers."

It was no doubt a complex question as to whether the dispensation of the need for the Royal Assent under the Eighth Schedule and Article 66, or removing "the satisfaction of the Yang di-Pertuan Agong" under Article 150 constituted an affront to "the privileges position, honours or dignities of the Rulers."¹¹⁴ For our purposes, in respect of Article 150, the relevant question was the import of substituting the satisfaction of the Yang di-Pertuan Agong for that of the Prime Minister. Since the Yang di-Pertuan Agong was bound by Article 40(1) to act on the advice of the Cabinet, the reference to the Prime Minister instead of the Cabinet in the Amendment Bill was

113. Dr. Tan Chee Khoon in his weekly column "Without Fear or Favour", The STAR, 4 Jan 1984. See also Michael Ong, Malaysia In 1983 (Southeast Asian Affairs 1984 - ISEAS, Singapore) pp. 202-03.

114. For an excellent discussion of this question, see HP Lee, The Malaysian Constitutional Crisis: Kings, Rulers And Royal Assent INSAF Sept. 1985 Vol. XVIII 7 at pp. 13-16. Mr. Lee reproduces as an appendix to the article the opinion of the Attorney General (see also (1983) 2 CLJ 229) to the effect that: (1) the amendments to Article 66 does not require the consent of the Conference of Rulers because it is not mentioned in Article 159(5), (2) signifying assent to a bill passed by Parliament has no relevance to "the privileges, position, honours and dignities" of the Yang di-Pertuan Agong, and (3) the Yang di-Pertuan Agong cannot refuse to assent to any bill passed by Parliament. Mr. Lee takes the view that probably only the changes to the Eighth Schedule would infringe Article 38(4). For a discussion of Article 38(4) and the role of the Conference of Rulers, see *Phang Chin Hock v. Public Prosecutor* (No. 2) [1980] 1 MLJ 213, which considered whether the consent of the Rulers was needed for the abolition of appeals to the Privy Council.

significant. Theoretically it enabled the Prime Minister to act on his own without consulting the Cabinet. It is unclear whether the Rulers had this upper-most in their minds or whether they saw the curtailment of their royal functions of assent under the Eighth Schedule and Article 66 as the more serious infraction. They nevertheless refused to permit the Yang di-Pertuan Agong to assent to the Constitution (Amendment) Bill 1983.

In the result an impasse developed because the Bill passed by Parliament in August 1983 could not be brought into force. A solution was reached finally in the form of a compromise.¹¹⁵ An agreement was struck¹¹⁶ between the Rulers and the Government whereby the Timbalan Yang di-Pertuan Agong as Acting King¹¹⁷ would give assent to the Amendment Bill in its existing form. The ostensible reason was to enable the electoral law changes to be immediately brought into force. In return the Government undertook to move a new Bill in Parliament to give effect to the terms of the compromise on Article 150 and Article 66.

The compromise was contained in the Constitution (Amendment) Bill 1984¹¹⁸ which came into force as Act A584 on 19 January 1984. Very briefly, on Article 150 it deleted the amendments made in 1983 and reinstated the

115. According to Rawlings the first suggestion came from the former Prime Minister, Tunku Abdul Rahman, to the effect that the Rulers give an assurance that they will not withhold assent to any legislation: see Rawlings, *op. cit.* at pp. 250-251.

116. According to HP Lee there was a written agreement containing the compromise and also an "oral undertaking" that the Rulers would give royal assent to state legislation within the fifteen day period: see HP Lee, *op. cit.* at p. 16.

117. The Yang di-Pertuan Agong was at the material time indisposed.

118. Reproduced in (1984) 1 CLJ 7.

provisions before they were amended.¹¹⁹ The end result was the highlighting of the consciousness of the Rulers and some sections of the public to the significance of the "advice power" under Article 150(1). It affirmed the constitutional position that the Yang di-Pertuan Agong acts on cabinet advice and not of the Prime Minister alone in proclaiming a state of emergency.¹²⁰

In conclusion, it should be mentioned that the Government's concession on Article 150 was a quid-pro-quo for the significant change to Article 66. The new Article 66 provides for the dispensation of the Royal Assent once Parliament has re-debated the Yang di-Pertuan Agong's initial refusal to give assent.¹²¹ The significance of this change is undoubtedly far-reaching. In

119. HP Lee writes that in procuring a withdrawal of the amendments on Article 150 "the Rulers have rendered a signal service (possibly, unwittingly) to the nation": see op.cit. p. 22. See also (1983) INSAF Vol. 16 p. 3 "Hurried Legislation" where the Rulers are commended for their "vigilance and opposition" to the constitutional changes.

120. This question is discussed in detail in chapter VII.

121. The changes to Article 66 are as follows:

(a) by adding the words "except as otherwise provided in this Article", after the word "and" in Clause (1);

(b) by substituting for Clause (4) the following Clauses (4), (4A) and (4B):

"(4) The Yang di-Pertuan Agong shall within thirty days after a Bill is presented to him -

(a) assent to the Bill by causing the Public Seal to be affixed thereto; or

(b) if it is not a money Bill, return the Bill to the House in which it originated with a statement of the reasons for his objection to the Bill, or to any provision thereof.

(4A) If the Yang di-Pertuan Agong returns a Bill to the House in which it originated in accordance with Clause (4)(b), the House shall as soon as possible proceed to reconsider the Bill. If after such reconsideration the Bill is passed by the votes of not less

short, whilst the Government may have succeeded in precisely defining the royal function in the exercise of the assent power the Yang di-Pertuan Agong's "right" of "first refusal" is now constitutionally recognised, something he did not possess previously.¹²² The end result was that: (1) Article 150 emerged unscathed, but (2) there was a radical change to Article 66 on the exercise of the assent power.¹²³

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121. than two-thirds of the total number of members of that House in the case of a Bill for making any amendment to the Constitution other than an amendment excepted pursuant to Article 159, and by a simple majority in the case of any other Bill, with or without amendment, it shall be sent together with the objections to the other House, by which it shall likewise be reconsidered, and if similarly approved by members of that House, the Bill shall again be presented to the Yang di-Pertuan Agong for assent and the Yang di-Pertuan Agong shall give his assent thereto within thirty days after the Bill is presented to him.

(4B) If a Bill is not assented to by the Yang di-Pertuan Agong within the time specified in Clause (4)(a) or (4A) hereof, it shall become law at the expiration of the time as specified in Clause (4)(a) or (4A), as the case may be, in the like manner as if he had assented to it.

(c) by substituting for Clause (5) the following Clause (5):

"(5) A Bill shall become law on being assented to by the Yang di-Pertuan Agong or as provided in Clause (4B), but no law shall come into force until it has been published, without prejudice, however, to the power of Parliament to postpone the operation of any law or to make laws with retrospective effect"; and

(d) by repealing Clause (5A).

122. See note 107, supra.

123. Rawlings' conclusion that Malaysian constitutionalism and democracy emerges enhanced from the 1983 crisis is a likely overstatement not borne out by a close study of the implications of the changes see Rawlings op. cit. at p. 250. For a critical article debunking the Government's claim to "a people's victory", see Chandra Muzaffar, Constitutional Crisis: The Aftermath (1984) ALIRAN Quarterly p. 3. For a contrary view, see A.J. Stockwell, Princes And Politicians: The Constitutional Crisis In Malaysia, 1983-84 (Constitutional Heads And Political Crises, Ed. D.A Low, Cambridge Commonwealth Series, Macmillan Press, 1988, London) 182 at 186-7.

Conclusion

It is indisputable that the many changes to Article 150 between 1960 and 1984 has radically altered the concept and principle of emergency rule in Malaysia. The amendments have progressively denuded Article 150 of its original inbuilt safeguards. The 1963 and 1981 amendments were by far the most radical of the six sets of amendments during this period. At one end, we see the diminution of the role of Parliament in determining the continuance of an emergency. At other end, we see limits to judicial review of matters pertaining to an emergency. This has effectively cleared the way for the Executive, if it chooses, to rule perpetually under conditions of an emergency.¹²⁴

In third world countries, the judicial function in curbing executive excesses especially under times of emergency has had a dubious track record.¹²⁵ The courts have never been found to be a bulwark in the defence of the liberty of the subject or to safeguard the existing constitutional system.¹²⁶ Thus it is arguable that it is the decline of the role of

124. The Bar Council Editorial in its publication, INSAF, for June 1979 read as follows: "On looking at Article 150 as it now stands it may be a great temptation to someone in the future in order to retain himself in power to cause an Emergency to be declared on some vague ground that the economic life of the Federation is threatened and thereafter by the promulgation of Ordinances or Acts passed by a simple majority legislature to keep the Constitution suspended or destroy its basic structure or even not to introduce any motion for resolutions to be passed to annul such Proclamation": see The Constitutional Road To Dictatorship (INSAF June 1979 Vol. XII, 1.

125. See William Conklin, The Role of Third World Courts During Alleged Emergencies in Essays on Third World Perspective In Jurisprudence (Ed. Marasinghe & Conklin) MLJ Publication 1984 at p. 69 et. seq.

126. As Mr. Justice Krishna Iyer of the Indian Supreme Court observed of judges in general: "The fundamental fallacy is that judges are a hallowed species. Justice is too important to be left to the judges": see The Judiciary: Crisis of Credibility, India Today, July 15, 1990 at p. 41.

Parliament which is truly lamentable. The very first amendment in 1960 stripped Parliament of determining, within two months of its proclamation, whether an emergency should continue and further to decide whether emergency legislation should stand. By the 1981 amendments the need to summon Parliament "as soon as may be practicable" to debate the declaration of an emergency under the then Article 150(2) was deleted. As one writer observed:

"For a democratically-constituted Parliament, the right to proclaim, oversee and terminate an Emergency is vital to its very existence. It is during an Emergency that Parliament is compelled to surrender temporarily its normal law-making function to the Executive. This makes it all the more imperative for it to retain control over all aspects of an Emergency so that what is temporarily conceded does not become a permanent feature of the political system as a result of manipulation by an authoritarian Executive."¹²⁷

It is apparent that the diminishing of the role of Parliament was deliberate. It was done with a view of enhancing and strengthening Executive control over an emergency. After the 1983 amendments it was observed:

".....changes to Article 150 indicate that the role of the legislature has gradually been replaced by Cabinet authority and, ultimately now, the satisfaction, authority and responsibility of only the Prime Minister."¹²⁸

At a more serious and conceptual level, the diminution of the role of Parliament and the Judiciary in matters pertaining to an Emergency is destructive of separation of powers which is the cornerstone of a Westminster-style democracy. The end result after two decades of systematic amendments to

127. See Dr. Chandra Muzaffar, The Decline of Parliament (1985) ALIRAN Quarterly Vol. V at p. 2.

128. See Azmi Khalid, Emergency Powers And Constitutional Changes (1983) ALIRAN Quarterly Vol. 3 at p. 7.

Article 150 is the complete dominance of the Executive on all questions relating to the declaration of an emergency, its continuance, its extent, the making of emergency laws - their scope and width, and the cessation of the state of emergency. The only safeguard against abuse and excess would appear to be the good faith and sense of those in power. As one writer correctly observed during the 1983 constitutional crisis:

".....the integrity of institutions cannot be protected through the goodness of individuals alone. This is why the truly just laws are always concerned with entire processes, not particular persons".¹²⁹

Thus the position that obtains today is that the whole edifice of the constitutional system may be scuttled through the medium of emergency powers exercised under Article 150.

129. See Dr. Chandra Muzaffar, The Constitutional Crisis And Democracy, op. cit. at p.2. One is reminded of the famous line from the speech of Herbert Morrison during the debate in the British Parliament on the Defence Regulations quoted by Prof. Allen in his book Law And Orders 3rd ed. at pp. 364-65: "I am not going to use the argument usually put forward as a matter of courtesy that we do not believe the present Minister would be wicked but that his successors might be. I think that any minister is capable of being wicked when he has a body of regulations like this to administer".

PART IIITHE FOUR EMERGENCIES IN MALAYSIACHAPTER VITHE FOUR EMERGENCIES, 1957 TO 1977:
THE INTERPLAY OF LAW AND POLITICS
IN A NEW DEMOCRACYIntroduction

Since independence, Malaysia has been under a continuous state of emergency except for a short period of three years between 1960 and 1964. For most of the time the country has concurrently been under more than one state of emergency. It has been a case of successive proclamations, each overlapping the other.¹

Given the frequent use of emergency powers in the short constitutional history of the country, the question is whether the use of Article 150 has been in accordance with its constitutional objectives or not? An examination of the instances when Article 150 was invoked is therefore imperative.

The Four Emergencies

Since the ending of the Communist Emergency in July 1960,² Malaysia has experienced four occasions when Article 150 was invoked to declare a state of emergency. On two occasions namely in 1964 and 1969, the proclamation of

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1. The various proclamations are discussed below.
 2. For a full discussion of the background and circumstances behind the Communist Emergency 1948-1960, see the preceding chapter.

emergency was on a nation-wide basis. On the other two occasions, an emergency was declared only in respect of a particular state ie. Sarawak in 1966 and Kelantan in 1977.

We shall now consider the circumstances in which an emergency was declared on each of these occasions:

The 1964 Emergency

On 3 September 1964 the Yang di-Pertuan Agong proclaimed a state of emergency throughout the Federation. The reason given was that "the security of the Federation was threatened".³ The emergency was a direct result of neighbouring Indonesia's declared policy of confrontation against Malaysia. The Malaysian state was formed on 16 September 1963⁴ against strong protests from Indonesia. The diplomatic offensive initially launched by Indonesia,⁵ which categorised the British sponsored Federation as a neo-colonialist creation, soon developed into an armed conflict.⁶

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3. See Proclamation published in the Federal Gazette Vol. VIII No. 21, 3 September 1964 L.N. 271. It is reproduced in Appendix B hereto.
 4. The legal processes involving the enlargement of the Federation of Malaya and the Borneo States of Sarawak and Sabah, and the island of Singapore into the Federation of Malaysia was discussed in Chapter III.
 5. For an account of Indonesia's diplomatic offensive, see Malaysia - Indonesia Conflict Ed. A.G. Mezarik (International Review Service, New York 1965).
 6. The term "confrontation" was a euphemism. There was no doubt that the two nations were in a state of armed conflict. The Federal Court sitting in Singapore held that Indonesia's "confrontation" was an "armed conflict" within the meaning of that expression in the Geneva Convention on Prisoners of War, 1949: see *Stanislaus Krofan v. Public Prosecutor* [1967] 1 MLJ 133, a case concerning an Indonesian saboteur who was apprehended on landing by sea in Singapore armed with explosives. The Privy Council in *Public Prosecutor v. Ooi Kee Koi* [1968] 1 MLJ 14; [1968] 1 AER 419, an appeal by Indonesian saboteurs sentenced to death by the Singapore courts, also took judicial notice of the existence of "a state of armed conflict" between Malaysia and Indonesia (p. 423).

It was evident throughout 1964 that there was a steady build-up of events portending an armed assault on Malaysia. A central organisation for sabotage and guerilla training was established in the Riau Archipelago south of Singapore, whilst other training bases were set up on the islands off the Sumatra coast which provided easy access to the peninsula across the straits.⁷ On August 17, 1964 there was a sea-borne landing of about 180 Indonesian troops at Pontian in south-west Johor to establish a guerilla training base.⁸

However, what immediately led to the declaration of an emergency was the air-borne invasion of Malaysian territory on the night of September 1-2, 1964 by parachutists from Indonesia. The particulars of the landings can be gathered from the facts given at the trial in the Malaysian courts of these invaders.⁹ There were ten such cases which came on appeal, and they all involved Malaysian-Chinese who had been members of Indonesian raiding parties.¹⁰ The facts as presented in court may be relied upon as they were

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7. See Richard Allen, Malaysia: Prospect & Retrospect - The Impact And Aftermath Of Colonial Rule (OUP, London 1968) at pp. 187-88.
 8. Ibid.
 9. They were to the last man detained by Malaysian authorities almost a day or two after landing. The facts as given in court disclosed an invasion which was ill-planned and amateurish. The cases involving the Indonesian invaders are all published in (1966) 1 MLJ from pp. 100-252.
 10. The Indonesian parachutists were treated as prisoners of war. See discussion generally in S. Jayakumar, Judicial Decisions On Prisoners Of War Questions Arising From Indonesia's Confrontation Against Malaysia (1968) 10 Mal. L.R. 339. In *Public Prosecutor v. Ooi Kee Koi And Associated Appeals* [1968] 1 AER 419, the Privy Council ruled that the Geneva Convention on Prisoners of War was limited in application to the armed forces of opposing countries and not to own citizens who formed part of the invading armed forces. This was the position earlier taken by the Federal Court in *Lee Hoo Boon v. Public Prosecutor* [1966] 2 MLJ 16. Thus Malaysians who were captured with the Indonesian invaders were denied the protection of the Geneva Conventions and charged under the domestic laws, to wit, the Internal Security Act, 1960. The Privy Council in *Ooi Kee Koi*, supra held by a majority that the Malaysian Internal Security Act cannot, as a matter of construction, apply to the

largely undisputed. For example, in *Ng Seng Huat v. Public Prosecutor*,¹¹ the facts disclosed that the landing party comprised 41 Indonesians and 7 Malaysians. In *Law Kiat Leong v. Public Prosecutor*,¹² the invading force comprised 34 Indonesians and 14 Malaysians. In several of these cases the defence was that the accused did not know they were being sent on an invasion mission to Malaysia. A typical case was *Tan Hwa Lam v. Public Prosecutor*¹³ where this defence was summarily rejected. Thomson LP said:

"Then there was an argument that seemed to be the effect that when the appellant embarked on the expedition of 1st September he was under the impression that it was a training exercise, that he could not have known till after the aircraft left Medan and the money was distributed that a landing in Malaysia was contemplated and that at that stage he could do nothing to avoid being brought into the airspace forming part of a security area. Accordingly he could not be guilty of any offence.

Even if that argument possesses any plausibility when considered in an almost intellectually impossible isolation it completely disregards the evidence in the case as a whole and the surrounding circumstances of which we all have knowledge and of which we must take judicial notice. The appellant had voluntarily left his own country, against which he admitted a grudge, to go to Indonesia for military training; it was the openly avowed policy of the Republic of Indonesia to crush Malaysia, a policy which was being ruthlessly carried into effect by invasions of Malaysian soil by sea and air; and on both sides of the Straits of Malacca "Konfrontasi" was a household word. The actual expedition in which the appellant was voluntarily engaged was a military one and its members were fully armed; the leader was an Indonesian officer; the members were either Indonesian soldiers or Malaysians who had gone to

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10. Indonesian soldiers. For a criticism of the majority opinion, see S. Jayakumar, *supra*, at p. 343 et. seq. Further in *Stanislaus Krofan v. Public Prosecutor* [1967] 1 MLJ 133, the Singapore Court ruled that Indonesian saboteurs who came in civilian clothing were not entitled to be treated as prisoners of war under the Geneva Conventions. This position was subsequently affirmed on appeal by the Privy Council in *Osman & Anor v. Public Prosecutor* [1968] 2 MLJ 137, a related case on similar facts.
11. [1966] 1 MLJ 210.
12. [1966] 1 MLJ 215.
13. [1966] 1 MLJ 147.

Indonesia. It was a training exercise with what end was the training being undertaken if not to attack Malaysia? And was not that an activity in which the appellant was consorting with the other occupants of the aircraft which was prejudicial to the public security of this country? If they were not about to do something actively prejudicial that night they were training themselves to do it some other night. And how could it be said that even if the appellant did not intend to use his arms and ammunition that very night but some other night that in itself made his possession lawful?"¹⁴

In that case Thomson LP also outlined the type of invasion that took place on the night of 1-2 September 1964:

"During the night of 1st/2nd September, 1964, an Indonesian aircraft carrying 48 armed men under the command of Lieutenant Sutikno of the Indonesian Air Force left Medan in Indonesia and flew to Malaysia. Some of the men in the aircraft were members of the Indonesian armed forces, others were Malaysians who were not members of the Indonesian forces. The object of the expedition was sabotage to disrupt the economy of Malaysia.

Shortly after 2 a.m. on the morning of 2nd September the aircraft was over Malaysian territory in the neighbourhood of a land settlement area known as Kampong Tenang, near Labis in the State of Johore and some 40 miles east of the coast, which is within a proclaimed Security Area thus described in the Schedule to the Proclamation of 17th August, 1964 (Legal Notification No: 245 of 1964):-

"The area comprising the territories of the States of Johore, Malacca and Negeri Sembilan".

When the aircraft was over Kampong Tenang the party of armed men left it by means of parachutes carrying their arms and ammunition with them and in due course they came to earth. Later the same morning, the present appellant, who is Malaysian, was arrested. He was thought to have been one of the armed men who had left the aircraft by parachute and he was prosecuted on three charges under the Internal Security Act, 1960".¹⁵

Apart from air-borne landings there were also sea-landings by armed personnel from Indonesia. *Lee Fook Lum v. Public Prosecutor*¹⁶ was such a case. The accused who was armed and in possession of hand-grenades had landed near

14. At p. 149-150.

15. At p. 147.

16. [1966] 1 MLJ 100.

the town of Pontian in the south of the Peninsula on 17-18 August 1964 after having undergone some months of military training in Indonesia. He was quickly apprehended by villagers and was subsequently charged in court.

Against this background, the Malaysian Government acted swiftly and declared a nationwide emergency on 3 September, 1964 and braced itself for more armed assaults from Indonesia. As events went, Indonesia's policy of confrontation subsided by 1965 after internal dissensions and disturbances in the country itself. The justification for declaring a state of emergency throughout the Federation on security grounds on 3 September 1964 was generally accepted. However, as events went, the 1964 Emergency was never officially revoked. It is nevertheless considered today to have lapsed by effluxion of time.

The 1966 Sarawak Emergency

The Sarawak Emergency of 1966 was the first of the emergencies limited in a geographical sense to a particular state.¹⁷ It was also the first that raised serious doubts as to whether the emergency power was exercised for bona fide purposes.¹⁸ It also provided the first opportunity for the development of a local jurisprudence on whether the proclamation of an emergency is justiciable.¹⁹ It was by this case that the position got established that our

17. The other occasion was to take place in 1977 in Kelantan.

18. A scathing attack in this regard is found in Yash Ghai, The Politics of the Constitution: Another Look At The Ningkan Litigation (1986) 7 Sing. L.R. 147.

19. This would be the Ningkan cases arising from the dismissal of the Chief Minister of Sarawak, Stephen Kalong Ningkan from office on 17 June 1966. A series of legal actions commenced over both the dismissal and the

courts would adopt a conservative approach and defer to the Executive in these matters.²⁰

The emergency declared by the Federal Government in Sarawak on 14 September 1966²¹ had its origins in certain political squabbles in the State and not on the basis of any external threat of aggression, like in 1964. The events leading to the emergency were inextricably tied up with the political moves at the Federal level to oust the incumbent Chief Minister of the State.

The State of Sarawak, which is separated from Peninsula Malaya by the South China Sea, had its own native peoples who possessed cultural traits peculiar to themselves. Like its sister Borneo state of Sabah, there were always fierce local loyalties which invariably created tension between the Centre and the State. The incumbent Chief Minister of Sarawak under British rule was a native Iban by the name of Dato Stephen Kalong Ningkan. After the absorption of Sarawak into the Malaysian union on 16 August 1963, his political party called the Sarawak National Party (SNAP) joined the Alliance Party, which was the ruling party at the federal level, and he thereby continued in office as the Chief Minister of Sarawak. He was soon found by the Centre to be intractable because of his independent ways. It would appear that the Federal Government was annoyed with his continued dependence on British

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19. subsequent political action taken by the Federal Government by way of an emergency to procure his removal. These cases may be found in [1966] 2 MLJ 187; [1967] 1 MLJ 46; [1968] 1 MLJ 109; [1968] 2 MLJ 238 PC.
20. For example, Barakbah LP in *Ningkan v. Government of Malaysia* [1968] 1 MLJ 119, in dealing with justiciability of the proclamation of emergency in Sarawak went on the basis that it was incumbent on the Court to assume that the Government was acting in the best interests of the nation (p. 122E).
21. Proclamation is published as P.U. 339A Jil. 10 Bil. 20 Federal Government Gazette of 14 September 1966. The Proclamation is reproduced in Appendix B hereto.

expatriate officers and the fact that they often found themselves dealing with expatriates in Sarawak and not Malaysian officials.²² A vivid account of the crisis is given by a Kuala Lumpur based lawyer and political emissary, named Syed Kechik, reportedly sent by the Federal Government to procure the removal of Ningkan.²³ Amongst the cloak and dagger actions taken was the transporting of 21 of the 42 members of the local legislature, called the Council Negri, to Kuala Lumpur from where on 14 June 1966 a letter was addressed by all of them to the Governor of Sarawak expressing a lack of confidence in Ningkan. Predictably Ningkan ignored the letter with, inter alia, the comment that 21 was not a majority of 42. On June 17, 1966 the Governor informed Ningkan that he had ceased to be the Chief Minister and purported to appoint another in his place. On the same day the removal and replacement were published in the State Government Gazette.

Ningkan promptly commenced legal proceedings challenging his removal as being ultra vires the State Constitution and conventions. Harley Ag. C.J. delivered his judgment on 7 September 1966 declaring that Ningkan's removal from office was ultra vires the Constitution and reinstated him to his post.²⁴ Harley C.J. concluded with the observation that a political solution by calling for an election would be the best way to avoid multiple legal proceedings.²⁵ Whether influenced by this or not, the Federal Government

22. See Bruce Ross-Larson, The Politics of Federalism: Syed Kechik in East Malaysia (Singapore 1976) at pp. 36-37. An added reason was the Federal Government's annoyance with Ningkan for his outward sympathy for Singapore following the latter's expulsion from Malaysia on 9 August 1965.

23. Ibid.

24. *Stephen Kalong Ningkan v. Tun Abang Hj Openg* [1966] 2 MLJ 187. For a perceptive analysis of the judgment, see S.M. Thio, Dismissal of Chief Ministers (1966) 8 Mal. L.R. 283.

25. At p. 195E.

decided not to appeal against the decision. Meanwhile, according to Ross-Larson, on the day of the judgment, Syed Kechik contacted Kuala Lumpur to say that Ningkan had to be brought down at whatever cost - financial or constitutional.²⁶ A constitutional stalemate had come into being because Ningkan's opponents were unable to force a vote in the Council Negri since the State Constitution vested the power to convene a sitting of that body in the Chief Minister and his Cabinet only. It was obvious that something had to give - a solution had to be found to fill the "gap" in the State Constitution. The only way in which a State Constitution could be altered other than by its own provisions was by federal decree under a state of emergency.²⁷ The Governor had to be empowered to convene a sitting of the Council Negri to test Ningkan's confidence because it was a fact that Ningkan had by then lost the support of a majority of his party's legislators. He was for all intents and purposes a recalcitrant Chief Minister. Although there was in existence a political impasse, no doubt annoying to the Federal Government, there was nothing untoward in the form of overt incidents or disorder in the State to justify the proclamation of an emergency. On this, the Privy Council was later to comment that the word "emergency" in Article 150(1) was not confined to the unlawful use or threat of force in any of its manifestations and that there need not be an actual or threatened outbreak of violence.²⁸

The stage was then set for declaring a state of emergency in Sarawak for the obvious purpose of removing Ningkan. Ross-Larson writes that in August 1966, press releases were made emphasizing the gravity of the security

26. Op. cit. at p. 46.

27. See Article 150(5).

28. Lord MacDermot in *Ningkan v. Government of Malaysia* [1970] AC 39 at p. 390C-E.

situation in the State. Groups opposed to Ningkan distributed leaflets denouncing the death of democracy. Demonstrations by anti-Ningkan groups were organised, and although such assemblies were illegal, Ross-Larson observes that "the police had been informed of the benign intent and asked to stay out of it".²⁹ These organised activities had their desired effect because the Ibans, Ningkan's own clansmen, also started grouping in response and it was reported that many had come by bus-loads from the interior, resplendent in their ceremonial war-gear which included spears, swords and shot-guns to stand by Ningkan. On the political front, the cause for concern for the Federal Government was Ningkan's growing strength: the court victory had given the impetus to Ningkan and there was every possibility that the Chinese-based Sarawak United People's party (SUPP) would form an electoral understanding with him. The impasse was in Ningkan's favour and the Federal authorities had to act.

On 14 September 1966 a state of emergency was declared in Sarawak.³⁰ The Proclamation merely declared that "a grave Emergency exists whereby the security of a part of the Federation, to wit the State of Sarawak, is threatened".³¹ A more candid reason was given in the Explanatory Statement to the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966. The Act was passed by the Federal Parliament under Article 150(5) to empower the Governor to convene a sitting of the Council Negri to decide on a vote of confidence on Ningkan.³² The Government statement carried the following passages:

29. Supra, at p. 51. NB: The police force came under the authority of the Federal Government.

30. The Proclamation is reproduced in Appendix B.

31. Ibid.

32. Section 4.

"1. A constitutional crisis has occurred in Sarawak which the Yang di-Pertuan Agong is satisfied constitutes a grave emergency whereby the security of Sarawak is threatened.

2. There is already in force a proclamation of emergency issued on September 3, 1964, in respect of the whole Federation, the occasion for which is a matter of public knowledge.

3. The Yang di-Pertuan Agong, in exercise of his powers under Article 150 of the Constitution, has on September 14, 1966, issued a further proclamation in respect of Sarawak only, in order to deal with the present crisis as a distinct emergency additional to the emergency already proclaimed. In a recent judgment of the High Court in Borneo it was held that the question whether the Chief Minister commands the confidence of a majority of the members of the Council Negri cannot be resolved otherwise than by a vote in the Council itself. It was further held, in the same judgment, that the State Constitution confers no power on the Governor to dismiss, or by any means to enforce the resignation of, a Chief Minister, even when it has been demonstrated that he has lost the confidence of a majority. This is a serious lacuna in the State Constitution, and one which enables a Chief Minister whose majority has become a minority to flout the democratic convention that the leader of the Government party in the House should resign when he no longer commands the confidence of a majority of the members. The occurrence of such an event, resulting in the breakdown of stable Government and thereby giving rise to the spreading of rumours and alarm throughout the territory, is in the opinion of the Yang di-Pertuan Agong, as expressed in the proclamation of emergency, a threat to the security of Sarawak".³³

It was obvious that the dominant objective of the emergency was to secure the amendment of the State Constitution to enable a sitting of the Council Negri to vote on Ningkan. In the event, the vote was called on 23 September 1966 and Ningkan was defeated and removed from office.³⁴ The political objective behind

33. Government Gazette (Bill dated 19 September 1966).

34. Ningkan and his supporters boycotted the sitting maintaining that the convening of the Council Negri by the emergency amendment was unlawful. He later unsuccessfully challenged the vires of the proclamation: see *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 1 MLJ 119; on appeal to the Privy Council [1968] 2 MLJ 238; [1970] AC 379. Stephen Kalong Ningkan never regained the Chief Ministership. Under a state of emergency there was no obligation for the authorities to call for elections. Elections were finally held in May 1969 together with the general elections in the country. The elections were temporarily suspended with the outbreak of communal violence in the Peninsula on 13 May 1969, and finally concluded in June 1970. The election results were

the emergency was thus achieved. As one writer observed, the Sarawak emergency was "the clearest example of the manipulation of the Constitution" by creating conditions "which would justify the proclamation of an emergency".³⁵ The Sarawak Emergency, although never officially revoked, is considered for all legal purposes to have lapsed.

The 1969 Emergency

If the circumstances surrounding the 1966 emergency in Sarawak were impugnable, the events leading to the proclamation of a nationwide emergency on 15 May 1969 in Malaysia were generally indisputable.³⁶ The circumstances leading to the declaration of the emergency have been the subject of judicial

contd...

34. inconclusive, but still making it possible for Ningkan to form a government if he could find a coalition partner. But political manoeuvre and negotiations prompted by the Federal Government made that impossible. In the event, the incumbents favoured by the Federal Government formed the Government and Ningkan eventually faded out of politics: see R.S. Milne & K.J. Ratnam, Malaysia - New States in a New Nation: Political Development of Sarawak and Sabah in Malaysia (Frank Cass & Co.; London; 1974) at pp. 236-240. See also Milne & Ratnam, The Sarawak Elections of 1970: An Analysis of the Vote, Journal of South East Asian Studies Vol. III 1972, p. 111 et. seq. It is also reported that the SUPP (the Chinese based party), which was placed in a pivotal position of being able to give a majority to either the Ningkan faction or the incumbents to form the state government, was warned by the Federal authorities that if they affiliated with Ningkan, the emergency would not be ended and direct rule will continue: see Margaret Roff, The Politics of Belonging: Political Change in Sabah and Sarawak (OUP; 1974) at pp. 144-45 quoted in Yash Ghai, *supra* 18, at p. 168.

35. Yash Ghai; *Ibid* at p. 161.

36. This is not to say that there is no dispute as to how the communal riots started. The Government side and the Opposition have each accused the other of not having exercised control over their supporters resulting in the outbreak of racial riots.

comment. In *N. Mahadevan Nair v. Government of Malaysia*,³⁷ Chang Min Tat J. (as he then was) observed:

"The state of emergency which arose from the grave disturbances from May 13 onwards which the applicant says he is prepared to accept as a fact must mean that even in his estimation, the future of the country was balanced precariously on a razor's edge, that it was touch and go whether law and order would be restored and that extraordinary measures were required".³⁸

In *Teh Cheng Poh v. Public Prosecutor*,³⁹ Arulnandom J. said:

"In fact anybody who knew of the terror and turbulence, the violence and the bloodshed, the total threat to law and order in the country that erupted on 13 May 1969 would not have the temerity to argue that..... public security was (not) seriously threatened".⁴⁰

The 1969 race riots leading to the emergency had its origins in the political make-up of the country. The official reasons for the communal violence were cryptically given in the introduction to the Report of the National Operations Council⁴¹ released on 9 October 1969 as follows:

"The eruption of violence on May 13 was the result of an inter-play of forces that comprise the country's recent history. These include a generation gap and differences in interpretation of the constitutional structure by the different races in the country, and consequently the growing political encroachment of the immigrant races against certain important provisions of the Constitution which relate to the Malay language and the position of the Malays, principally Articles 152 and 153; the incitement, intemperate statements and provocative behaviour of

37. [1975] 2 MLJ 286.

38. At p. 291C.

39. [1978] 1 MLJ 30. This was the first instance decision. The case went on appeal finally to the Privy Council (see [1979] 1 MLJ 50) where a landmark decision was delivered that invalidated all emergency regulations made by the executive after Parliament was reconvened in February 1971. The case is fully discussed in Chapters IX and X.

40. At p. 32G-H.

41. This was a special body set up under Emergency Ordinance No. 2 of 1969, soon after the declaration of emergency, to assist the Director of Operations in administering the emergency. Its composition and functions are discussed later in this study.

certain racist party members and supporters during the recent General Elections; the part played by the Malayan Communist Party (MCP) and secret societies in inciting racial feelings and suspicion; and the anxious, and later desperate, mood of the Malays with a background of Sino-Malay distrust, and recently, just after the General Elections, as a result of racial insults and threats to their future survival and well-being in their own country".⁴²

As one writer explained: "Malaysia from the beginning was a plural society, but there was no sign of integration among the various races living in it. In its place, as far as the Malays and Chinese were concerned, there was a rather precarious agreement or understanding between UMNO⁴³ and MCA⁴⁴ top leaders that Malay special rights should not be questioned and the political predominance of the Malays should not be challenged provided that the Chinese were allowed to pursue unimpeded their traditional commercial and industrial activities".⁴⁵ All this collapsed in the campaign leading to the general elections held on 10 May 1969. It was undoubtedly one of the most racist of election campaigns, as communal frustration of both Malays and non-Malays were brought to a pitch by candidates and parties openly courting for communal votes.⁴⁶ The non-Malay frustration was largely centred on the government

42. The May 13 Tragedy: A Report Of The National Operations Council, 9 October 1969 at p. IX (hereinafter referred to as "the Official Report").
43. Acronym for the United Malay Nationalists Organisation, the dominant political party in the country and the dominant partner of the coalition that has governed the country since independence.
44. Acronym for the Malaysian Chinese Association, the Chinese partner of the ruling coalition.
45. Leon Comber, 13 May 1969: A Historical Survey of Sino-Malay Relations (Heinemann Asia, 1988) at p. 53.
46. See Official Report op. cit. at p. 21. See also Dr. Syed Hussein Alatas in The Rukunegara And The Return To Democracy In Malaysia, (1971) Vol. 2 No. 4, Pacific Community (Tokyo) 800 at 801-02: "Whatever the explanation offered for the May 13 riot, the fact remains that (politicians) caused the tragic incident..... communal sentiment of the destructive type had been whipped up by unscrupulous politicians".

policy of special privileges for the Malays in education and public sector employment whereas the Malays were unhappy with their economic position⁴⁷ and perceived government slowness in implementing the Malay language as the national language of the country.⁴⁸

However, for our immediate purpose, what brought about the emergency were the riots and the violence that followed. As one politician from the government bench commented: "It is not relevant, really, when you consider it, whether Mr. X threw the first stone, whether Party X organised the first rally, whether so many Malays or so many Chinese or so many Indians were killed in such a tragedy as the 13th of May".⁴⁹ The riots began on 13 May, two days after the election results and a day after several victory parades were held in Kuala Lumpur by opposition parties. The results stunned the ruling Alliance party whose leaders had grossly underestimated the degree of non-Malay frustration with the Government. Although the Alliance party had won the elections, it was its worst performance yet, suffering major defeats in non-Malay dominated constituencies. The MCA won only 13 of the 33 seats it contested, and the state of Penang was lost to the opposition for the first time. The greatest uncertainty was in Selangor, which housed the nation's capital, where the Alliance party had not won enough seats outright to form

47. In 1969, the Malays had only 1% share of the share capital of resident limited companies whereas the Chinese had 22.8%, and the largest share was held by foreign-controlled companies: Leon Comber, *ibid*, p. 57.

48. *Ibid* pp. 62-65. The causes for the May 13 riots have been written about extensively eg. R.S. Milne & Dianne K. Mauzy, Politics And Government In Malaysia (Federal Publications, Singapore: 1977), John Slimming, Malaysia: Death Of A Democracy (London, 1969); Karl Von Vorys, Democracy Without Consensus: Communalism And Political Stability In Malaysia (Princeton, 1975); Goh Cheng Teik, The May 13 Incident And Democracy In Malaysia (OUP, Kuala Lumpur, 1971).

49. Dato Musa Hitam during the Parliamentary debate on the Constitution Amendment Bill 1971, quoted in Milne & Mauzy, *op. cit.* at p. 78.

the State Government.⁵⁰ The uncertainty coupled with the victory parades held by the opposition on May 11 and 12 in Kuala Lumpur were provocative to the supporters of the ruling party which had actually won the elections.⁵¹ UMNO supporters then decided to hold a counter-demonstration on 13 May and obtained a police permit for this purpose. The procession was to assemble at the Menteri Besar's house on the evening of May 13.⁵² Then Prime Minister Tunku Abdul Rahman was to write later: "I was personally worried that the procession which UMNO was about to hold might lead to trouble. It was not easy to stop it at this stage as the Opposition had already held processions, and permission had already been obtained for UMNO to have theirs. I could only pray to God that nothing serious would happen".⁵³ Thus the situation was explosive that evening and tensions were high. It only needed an incident to spark-off hostility between the supporters of the various political parties who, unfortunately, were grouped along racial lines. The incident occurred in Setapak, a suburb of Kuala Lumpur, in the evening of May 13 at about 6.30 p.m. involving a clash between Chinese youths and Malay youths on their way to attend the gathering.⁵⁴ The riots quickly spread to several parts of Kuala

50. Leon Comber, *op. cit.* pp. 67-69. As events went, the Parti Gerakan Malaysia (Gerakan) an opposition party decided not to form an alliance with the other successful opposition party called the Democratic Action Party (DAP) to form the State Government, thus paving the way for the Alliance party led by the Menteri Besar (Chief Minister) in the State, Dato Harun Idris, to re-form the Government.

51. Official Report, *op. cit.* pp. 29-36.

52. The Official Report reproduces police statements recorded from aides to the Menteri Besar who spent May 12 actively rounding up participants for the procession from the Malay kampongs (villages) around Kuala Lumpur: see pp. 38-43.

53. Tunku Abdul Rahman, May 13: Before & After (Utusan Melayu Press, September 1969) p. 86.

54. Official Report, *op. cit.* p.44.

Lumpur. "Malays and Chinese indulged in an orgy of killing, looting and burning".⁵⁵ By 8 p.m. a curfew was declared by the police throughout Kuala Lumpur. Shooting and rioting continued the next day, May 14, and with the possibility of trouble spreading to other parts of the country the Government decided to declare a state of emergency.

The emergency was declared on 15 May 1969 and it was made to extend throughout the Federation.⁵⁶ The Tunku explained: "(I)t was necessary for me to advise His Majesty to proclaim a State of Emergency throughout the country as there was no other way of dealing effectively with the current situation".⁵⁷ He went on television on the night of May 16 and said:

"A State of Emergency has now been declared because circumstances demand that we must act, and act quickly as otherwise, the situation might well deteriorate and become uncontrollable, and we will be faced with a State of Emergency as was faced by the British in 1948..... The only course open to us is to declare a State of Emergency and to take all such measures as are possible to prevent the situation from worsening The terrorist Communist have worked out their plan to take over power.⁵⁸ They have managed to persuade voters by threat, by

55. Leon Comber, op. cit. p. 70. According to official figures, between 13 May and 31 July, 196 persons lost their lives, 6000 persons rendered homeless, 753 buildings destroyed by fire and at least 211 vehicles damaged (p. 71). It has, however, been said that the Government figures on the deaths may be underestimated: see Milne & Mauzy, op. cit. p. 79.
56. The Proclamation is reproduced in Appendix B.
57. Tunku Abdul Rahman, op. cit. p. 98.
58. In this view the Tunku would appear to stand alone. Both in the Official Report and elsewhere the communist theory is rejected: see Official Report, op. cit. at p. 27: "It would not be correct to say that the Communist Party of Malaya had started the May 13 disturbances in order to seize power immediately". The view is also not shared by the then Minister of Home Affairs, Tun Dr. Ismail (brought into Government soon after the riots) who said: "Everybody thought the Communists were responsible for the disturbances. Later we found that they were as much surprised as we were": Leon Comber, op. cit. p. 73. The Tunku was however right to the extent that leftist elements were involved in the demonstrations that preceded the riots, often carrying red flags or pictures of Mao Tse-Tung in processions: see photographs given on pp. 59-61 of the Tunku's book, op. cit.

intimidation and by persuasion to overthrow the Alliance through the process of democracy, but fortunately for us we were returned in sufficient majority".⁵⁹.

The 1969 Emergency is unique for a number of reasons, mostly for the special administrative apparatus that was set up to administer the Emergency. By the Emergency (Essential Power) Ordinance No. 1 of 1969 made by the Yang di-Pertuan Agong on 15 May 1969, the power to govern by emergency regulations was conferred upon the Government. By another law made the next day, called the Emergency (Essential Powers) Ordinance No.2 of 1969, there was appointed a special officer called the Director of Operations,⁶⁰ who was to be assisted by a newly created special body, called the National Operations Council,⁶¹ to administer the State of Emergency. Section 2(1) of the said Ordinance declared that the executive authority of the Federation was to be delegated by the Yang di-Pertuan Agong to the Director of Operations⁶² who was nevertheless to act in accordance with the advice of the Prime Minister.⁶³ These newly created appointments and bodies were a special feature of the 1969 emergency.⁶⁴ Another unique feature of the emergency was the "absence" of Parliament.⁶⁵ Parliament could not be convened because the riots had broken

59. Tunku Abdul Rahman, op.cit. pp. 105-106.

60. Section 2(1).

61. Section 3.

62. The person appointed as Director of Operations was the then Deputy Prime Minister, Tun Abdul Razak.

63. Section 2(2).

64. They are discussed more fully later in Chapter XI.

65. In *Government of Malaysia v. Mahan Singh* [1975] 2 MLJ 155, Lee Hun Hoe CJ (Borneo) explained: "The emergency in 1969 is different from the previous emergencies in that when the Proclamation was made, Parliament had already been dissolved, and elections to the Dewan Rakyat had yet to be completed" (p. 164).

out before the elections to the Federal and State legislatures had been completed in the East Malaysian States. By section 7 of Emergency Ordinance No.1, these elections were suspended indefinitely after the Emergency was declared. The elections in these States were held in February 1971 after a hiatus of almost 2 years.

The 1969 racial strife and the emergency that followed was a watershed in the country's political life. It brought about radical transformation in the Government's political and economic policies which took a more strident approach towards strengthening Malay political hegemony and the upliftment of their economic position.⁶⁶ The Proclamation of Emergency continues unrevoked to date and is the basis presently for the continued application of emergency laws alongside the ordinary legislation passed by Parliament.

THE 1977 KELANTAN EMERGENCY

The 1977 emergency declared in the state of Kelantan, like the Sarawak emergency of 1966, was confined to a particular state and was likewise brought about by political squabbles in the State. However, the approach and administration of the emergency by the Federal Government in Kelantan was vastly different from that in Sarawak.

The problem from beginning to end was a struggle for control of the State Government of Kelantan between UMNO and the Parti Islam Malaysia (PAS). The latter were the incumbents in Kelantan whereas the former governed at the Federal level. A break-up of the coalition at the federal level between the two parties led to an open struggle in Kelantan where UMNO made no secret of

66. For a concise account see Milne & Mauzy, op. cit. p. 83 et. seq. and p. 321 et. seq.

its ambition to wrest control of the state from PAS.⁶⁷ It would appear that UMNO had secretly won over the support of the Menteri Besar (Chief Minister) himself, who was the principal PAS official in the State Government. This led to a crisis within PAS. Although the Menteri Besar, Dato Mohd. Nasir, and seven other PAS Central Committee members of like-mind, did not cross-over to UMNO, it was evident that he had lost the confidence of the majority of the PAS members in the State legislature. The Menteri Besar was given an ultimatum by his party to resign or face a no-confidence motion in the State assembly where PAS held 22 of the 36 seats. He refused to resign contending that the disaffection with him had nothing to do with his supposed affiliation with UMNO but over his withdrawal of the concession of 350,000 acres of concession land to a controversial company called the Timbermine Company.⁶⁸ The connection between the concession and the UMNO/PAS struggle for control of the State had always seemed tenuous. Nevertheless, as events went, Dato Mohd Nasir was expelled from the party in late September. At the session of the Kelantan State Assembly on 15 October 1977 a vote of no confidence was passed on him. Clause XVI(6) of the Kelantan State Constitution provided that "If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then unless at his request His

67. See Raja Tun Azlan Shah, The Role Of Constitutional Rulers (1982) JMCL 1 at p. 10.

68. See Lim Kit Siang, Time Bombs In Malaysia (Kuala Lumpur, 1978) p. 248. Tun Suffian described the disenchantment in these words: "The Chief Minister, Dato Mohd Nasir, was a PAS man, but he was honest and strict and gradually fell out with his fellow party members in the state Executive Council": see Tun Suffian, Malaysia, and India - Shared Experiences In The Law (AIR Publication, Nagpore, India, 1988) at p. 80. Tun Suffian obviously did not intend to suggest by these words that PAS officials were not honest but the suggestion does appear that Nasir's strictness had something to do with the falling-out.

Highness dissolves the legislative assembly, he shall tender the resignation of the State Executive Council". It was evident from a plain reading of this provision that the State Government had to resign unless the Ruler on the advice of the Menteri Besar dissolved the Assembly. In this case the Menteri Besar did not resign but instead tendered advice, as he was entitled to do, to the Regent⁶⁹ to dissolve the Assembly. However the Regent did not make any decision on the request.⁷⁰ It was then incumbent on the Menteri Besar, by the above provision, to tender the resignation of his Government in which event the Ruler will be obliged to dissolve the Assembly or call upon some other person who in his opinion is likely to command the confidence of the majority in the Assembly to form a new Government. It was unlikely that the Regent would allow the State to function without a government. But the impasse was allowed to continue until 8th November 1977 when an emergency was declared in Kelantan. During this intervening period, the Federal Government actively pursued several political options. According to one source the Federal Government gave an ultimatum to PAS that it would impose an NOC-type⁷¹ rule in

69. At the material time the Sultan of Kelantan was the Yang di-Pertuan Agong and his son was the Regent in Kelantan.

70. Raja Tun Azlan Shah (as he then was) suggests that "the Federal Government had some influence over the State Ruler in the exercise of his discretion with regard to the dissolution of the State Assembly": op. cit. p. 10. However, Tun Suffian suggests that because of the Menteri Besar's refusal to resign there was considerable political confusion in the State and "because of the uncertainty, the Regent held his hand as..... he was entitled to": op.cit. p. 81.

71. NOC stands for National Operations Council, the administering body set-up under Emergency Ordinance No. 2 of 1969 to administer the Emergency declared on 15 May 1969. It would have been legally possible for the Federal Government to institute an NOC-type government in Kelantan by special parliamentary or emergency legislation for this purpose under the rubric of the 1969 emergency which was still in force.

Kelantan and gave it until November 7 to respond.⁷² Obviously PAS stood its ground because on 8th November 1977 a state of emergency was declared throughout the state of Kelantan. The Proclamation⁷³ declared that a grave emergency existed whereby the security or the economic life of a part of the Federation, to wit, the State of Kelantan was threatened". There were no outward manifestations of any disorder or riots in the week or so preceding the proclamation. There was a demonstration in support of the Menteri Besar on 19 September, a few days after the vote in the State Assembly but the police had acted swiftly by imposing a curfew in the state capital of Kota Bahru and the town of Kubang Krian. Notwithstanding the curfew, public rallies and demonstration were allowed to take place but only to express support for the Menteri Besar.⁷⁴ For example, an hour-long orderly rally was held on 24 September in the town "padang" (field) attended by about 60,000 people to demonstrate support for the Menteri Besar. It was evident that the situation was well under control, and in the absence of intelligence reports to the contrary, there was nothing outward to show there was a breakdown of law and order in the State in the days leading to the declaration of the emergency.⁷⁵

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72. Lim Kit Siang, op. cit. p. 249. But it is not mentioned what the ultimatum was. However, it would not be difficult to surmise that it must relate to PAS allowing Dato Nasir to continue in office until fresh state elections were held. As events went, because of the Emergency, Dato Nasir continued in office and contested the elections as Menteri Besar.
73. P.U.(A) 358 Gazette 8 November 1977. The Proclamation is reproduced in Appendix B.
74. Speech by Opposition Leader in Parliament, 8 November 1977 over the Emergency in Kelantan: Lim Kit Siang, op.cit. p. 249. An instance was quoted of where the Chief Police Officer of Kelantan had welcomed the Menteri Besar to a rally in his support, which was being held without police permit (pp. 248-49).
75. Tun Suffian's characterization that there was "turmoil in the State" is not supported by the contemporary accounts of the law and order situation in Kelantan: see Tun Suffian, op.cit. p. 81.

The unique feature of the Kelantan emergency was the NOC-style government that was imposed as an emergency measure in the State. The Emergency Powers (Kelantan) Act 1977⁷⁶ suspended the State Government including the office of Menteri Besar and vested all executed powers in the office of a Director of Government appointed under the Act.⁷⁷ All legislative powers of the State Assembly were also removed and vested in the State Ruler.⁷⁸ The Act and its provisions were declared to prevail over the State Constitution.⁷⁹ The sum effect of the Act was to suspend the State Constitution and bring the State under Federal control in the person of the Prime Minister. The Director for Kelantan was subject to specific and general directions from the Prime Minister⁸⁰ who may at anytime suspend or dismiss him from office.⁸¹ The Prime Minister was also empowered to make rules for the implementation of the Act.

Thus, by the exercise of emergency powers under Article 150 and the passing of the said Act by the Federal Government, PAS lost control of Kelantan State. The State was for all practical purposes now run by UMNO from the Federal level. The Menteri Besar consolidated his position during the emergency by the formation of a new political party called BERJASA comprised of PAS dissidents. The emergency was revoked in about 3 months by the repeal

76. Act 192 of 1977.

77. Sections 3, 4 and 5.

78. Section 10.

79. Section 15.

80. Section 7.

81. Section 3(2).

of the Emergency Powers (Kelantan) Act 1977 on 11 February 1978.⁸² State elections were held on 11 March 1978. UMNO and BERJASA swept into office and ended 18 years of PAS rule in Kelantan. The Menteri Besar was made a Federal Cabinet Minister and UMNO took the post of Menteri Besar.

The Kelantan problem was from beginning to end a political crisis which on all accounts had not degenerated into a state of civil disorder. There was justifiable scepticism as to whether, as in Sarawak, a state of emergency had to be declared to resolve the crisis.

82. The Emergency Powers (Repeal of the Emergency Powers (Kelantan) Act 1977) Order 1978 P.U.(A) 46 Government Gazette dated 12 February 1978.

CHAPTER VII

THE FOUR EMERGENCIES: A CONSPECTUS

Introduction: The Key-Role Of The Prime Minister

The declaration of four emergencies within a short period of 13 years (1964 to 1977) naturally raises the question whether the emergency powers under Article 150 are not being too easily invoked. In *Teh Cheng Poh v. Public Prosecutor*,¹ Lord Diplock affirmed the position that in all matters where the satisfaction of the Yang di-Pertuan Agong is called for (as in the case of Article 150(1)) it is in reality the exercise of power by the Cabinet.² It is acknowledged that the power to impose an emergency under Article 150 is a Cabinet decision by the Government of the day.³ In reality, it is principally the decision of the Prime Minister. In this regard, it is possible for the Prime Minister to act alone and not necessarily with the prior concurrence of his Cabinet. This seemingly happened in the case of the 1969 emergency. The decision to declare a state of emergency in May 1969 was taken by the then Prime Minister Tunku Abdul Rahman personally.⁴ The riots had broken out even before the Tunku could constitute his new Cabinet. Thus, on the night of the outbreak of the riots, May 13, he declared over

1. [1979] 1 MLJ 50.

2. At p.52 D-E.

3. His Majesty as a constitutional monarch does not refuse to act in these matters when so advised by the Cabinet: see discussion of the Yang di-Pertuan's role in Chapter IV.

4. See account given in his book of the May 13 riots, *Tunku Abdul Rahman, May 13 Before & After*, (Utusan Melayu Press, 1969) at p.90 et. seq.

television: "I have no choice now but to declare a State of Emergency in Kuala Lumpur and, if necessary, to declare a State of Emergency throughout Malaysia".⁵ When the Tunku made this statement it was evident that he had not consulted his caretaker cabinet.⁶ This was borne out by the Tunku's account of the events of the next day, May 14:

"I arranged for a special meeting of the senior Ministers of the old Cabinet..... I was presiding over an ad-hoc Cabinet of "emergency". I informed my colleagues of my intentions, the decisions I had arrived at overnight. First of all, I said it was necessary for me to advise His Majesty to proclaim a State of Emergency throughout the country..... That afternoon I summoned the Solicitor-General to my house and drafted with him the various legal notifications to declare a State of Emergency in the country..... and that evening I called on His Majesty at the Istana to obtain his Royal signature on all the Proclamations".⁷

But it would appear that he had at least the concurrence of the then Deputy Prime Minister, Tun Abdul Razak. In an affidavit submitted to court in the case of *N. Mahadevan Nair v. Government of Malaysia*,⁸ some years later, Tun Razak deposed of his role in obtaining the signatures of the Yang di-Pertuan Agong to Emergency Ordinance No. 1 of 1969 on May 15: "...I personally presented the said Ordinance to His Majesty the Yang di-Pertuan Agong at Istana Negara for his consideration and approval".⁹

5. Ibid.

6. Several cabinet members had lost in the elections especially from the MCA. On the afternoon of May 13, a delegation from MCA met with the Tunku to say they would not serve in the Cabinet because they seemed to have lost the confidence of the Chinese community: Tunku Abdul Rahman, op. cit. pp.85-86.

7. Tunku Abdul Rahman, op. cit. pp. 98-99.

8. [1975] 2 MLJ 286.

9. See his Affidavit tendered in court and reproduced in the law report at p. 288.

In the case of Kelantan, the then Prime Minister Dato Hussein Onn had left the task of finding a solution to the crisis to his deputy, Dr. Mahathir Mohamed. Thus the ultimatum of a threat of imposing an NOC-style government in Kelantan, unless PAS capitulated, was called the "Mahathir formula".¹⁰ It was the rejection of this formula in discussions with the Prime Minister on 7 November that led to the declaration of an emergency the next day.¹¹

These instances show the key-role played by the Prime Minister in the declaration of an emergency. The constitutional requirement under Article 40(1) that the Yang di-Pertuan Agong should act on the advice of the Cabinet is in reality the advice of the Prime Minister. Even if the cabinet-consultation had come later, it is very likely that he would receive ex post facto approval for his actions.¹² If the Prime Minister had worked in tandem with key cabinet personnel like the Deputy Prime Minister, as happened in 1969 and 1977, Cabinet approval is a mere formality.

The experience of India in 1975 shows that it is entirely possible for the Prime Minister to procure the declaration of an emergency without prior consultation with the Cabinet. The 1975 emergency was the first time that an

10. See parliamentary speech by the Opposition Leader on 8 November 1977 on the Kelantan emergency: Lim Kit Siang, Time Bombs In Malaysia (K.L., 1978) p. 249.

11. Ibid.

12. This fact throws a shadow of irony over the constitutional crisis in 1983 where one of the provisions for amendment was Article 150(1). The proposed change was to substitute "the satisfaction" of the Yang di-Pertuan Agong in Article 150(1) for that of the Prime Minister. Given the fact that the Yang di-Pertuan Agong does not act on his own, the proposed change was a constitutional redundancy. However, as previously discussed, the proposed change was motivated by fear that a new incumbent to the throne might give a literal reading to the provision rather than any fear of the diminution of the role of the Prime Minister or Cabinet in the declaration of an emergency: see discussion in Chapter V on this question.

emergency was declared in India for merely internal disturbances.¹³ It came on 25 June 1975 exactly two weeks after the then Prime Minister Mrs. Indira Gandhi suffered an adverse ruling in the Allahabad High Court on an election petition. The court had declared that her election to Parliament was invalid because of a number of election offences committed during her campaign. In consequence, she was disqualified from contesting the elections for a period of six years. The court verdict created an unprecedented political crisis in the country. It cast grave doubts as to whether Mrs. Gandhi could continue in office as Prime Minister. The limited stay given by the Supreme Court did not alleviate her position. The stay order was to the effect that whilst she could remain as Prime Minister and participate in the proceedings of the Lok Sabha (the Lower House) she was precluded from voting in the House.¹⁴ The Supreme Court's decision was delivered on 24 June 1975 and the embarrassing restraint it imposed led to a major call for her resignation including by all the leading newspapers.¹⁵ Mrs. Gandhi reacted the next day. Acting solely on her own, she advised the President to declare a state of emergency under Article 352 of the Indian Constitution on the ground that the country was

13. The previous emergencies in India like in 1962, 1966 and 1971 were as a result of external aggression, namely the Indo-Chinese border war in 1962 and the Indo-Pakistani Conflict in 1966 and 1971.
14. For a detailed discussion of the case and the events leading to the Indian emergency, see P. Bhushan, The Case That Shook India (Vikas Publishers, New Delhi, 1978); Kuldip Nayar, The Judgment (Vikas Publishers, New Delhi, 1977). Mrs. Gandhi's appeal was heard in the Supreme Court during the emergency. The appeal focused on the amendments made ex post facto to the Constitution and the election laws to exonerate offences of the type that disqualified Mrs. Gandhi: see *Indira Nehru Gandhi v. Raj Narain* AIR 1975 SC 2299. The amendments to the Constitution were struck-down by a majority in the Court but the appeal was allowed on the grounds that the amendments to the election laws were validly made.
15. P. Bhushan, *Ibid* pp. 126-127.

threatened by internal disturbance.¹⁶ The Cabinet was only informed of this the next day.¹⁷ Such was the control she exerted over her colleagues that they went along, and together presided over the darkest days of Indian democracy.¹⁸ Soon after her massive election defeat in January 1977, the new Government moved the 44th amendment which amended the Constitution to expressly provide that "the President shall not issue a Proclamation unless the decision of the Union Cabinet (that is to say the Council consisting of the Prime Minister and other Ministers of Cabinet rank) that such a proclamation may be issued has been communicated to him in writing".¹⁹

16. This finding was made by the Shah Commission that was set up in 1977 to investigate the excesses during the Emergency: see H.M. Seervai, Constitutional Law Of India Vol. 1, 3rd Ed. at p. 981 (Tripathi, Bombay, 1983); see also Seervai, The Emergency, Future Safeguards And The Habeas Corpus Case (Tripathi, Bombay, 1978) at p. vii. On the morning of 26 June 1971, after the emergency was declared, hundreds of people throughout India, mostly political opponents of Indira Gandhi were arrested under a preventive detention law called the Maintenance of Internal Security Act 1971. Mrs. Gandhi's control over the country by emergency laws became complete with a Presidential decree suspending the writ of habeas corpus. The Indian Supreme Court docily upheld the Presidential decree in a decision reminiscent of the American Dred Scott and French Dreyfus decisions: see *ADM Jabalpur v. Shivkant Shukla* AIR 1976 SC 1207.
17. A leading Cabinet member acknowledged: "We were told of the proclamation the next day. What could we do?": quoted in Seervai, Constitution Law, Ibid, para. 8 at p. 980.
18. The emergency saw many abuses and misuse of power by officials, causing Justice Shah, who headed a fact-finding Commission, to conclude: "Man's inhumanity to man seems to know no limits at all - of the officials it is still worse": Seervai, Future Safeguards, op. cit. p. 95. The levels to which the Judges became detached from the realities around them was seen in this remark of Chandrachud J. in the Habeas Corpus case (Shivkant Shukla, supra) when it was submitted to him that India has descended to the levels of Hitlerite Germany: ".....I have a diamond-bright, diamond-hard hope that such things will never come to pass in Free India (at p. 1349)".
19. See Basu's Commentary On The Constitution Of India 6th Edn. Vol. N (Sarkar & Sons, Calcutta, 1988) at p. 189. The amendment was called the Constitution (44th Amendment) Act 1977.

The abuse of the emergency power in India in the circumstances aforementioned was patently obvious. A noted constitutional writer commented: "On the facts found by the Shah Commission, it is clear that Mrs. Gandhi advised the proclamation of an emergency to secure her own position as Prime Minister, and in order to forestall a public demand that after the Supreme Court had refused an absolute stay that she should step down as Prime Minister till the Supreme Court decided her appeal..... Mrs. Gandhi had procured the promulgation of the Emergency secretly and therefore dishonestly in order to confront the Cabinet with an accomplished fact".²⁰

Article 150: Is the Power Politicised?

In Malaysia, it is the Sarawak and Kelantan emergencies that have been most criticised as being politically motivated.²¹ The other emergencies have generally been accepted as warranted by the extraordinary dangers then confronting the country namely the threat of external aggression in 1964 and the spectre of large-scale internal disorder in 1969.

The Sarawak Emergency was specifically challenged in court as having been made *in fraudem legis*.²² In the Privy Council, the argument against the emergency was pointedly advanced by Sir Dingle Foot QC for Ningkan in the

20. H.M. Seervai, Constitutional Law Of India Vol. I (Tripathi, Bombay; 1983) p. 981.

21. RH Hickling in his Constitutional Changes In Malaysia 1957-1977 observes: "Article 150 can be, and I think has been on two occasions used for political ends": see Suffian, Lee & Trindade, The Constitution of Malaysia: Its Development 1957-77 (OUP, 1978) at p. 7. Although Professor Hickling has not identified the two occasions it is reasonable to assume that he was referring to the Sarawak and Kelantan emergencies

22. *Stephen Kalong Ningkan v. Government of Malaysia* [1970] AC 379.

following terms: "Seven days after the judgment of the acting Chief Justice²³ holding that the Governor had no power to dismiss the appellant from his office as Chief Minister, on September 14, 1966, a State of Emergency was declared. There was in reality no emergency. The emergency powers were invoked merely to remove the Chief Minister, and it was therefore not a valid proclamation of emergency..... The purpose of Article 150 of the Constitution of Malaysia was to deal with an emergency such as a revolution, violence etc. but it was not designed to be used simply to alter the constitutional arrangements in Sarawak".²⁴

One sees some parallels between the Sarawak emergency and the 1975 emergency in India. Like in India, an unpopular court decision brought matters to a head culminating in an emergency. In Sarawak, the political tension was said to be exaggerated and the public demonstrations and unrest contrived. In India, Seervai wrote: "... the facts alleged by Mrs. Gandhi in support of the Emergency are not borne out by official records: there was nothing alarming on the economic front: periodical reports as to law and order showed that the situation was in complete control all over the country; the Home Ministry received no reports from the State Governments indicating any deterioration in the law and order situation in the period immediately preceding the proclamation of Emergency".²⁵ There was a similar allegation in Sarawak that the demonstrations were stage-managed and the situation contrived

23. This is in reference to the decision of Harley Ag CJ in *Stephen Kalong Ningkan v. Tun Abang Hj Openg* [1966] 2 MLJ 187 delivered on 7 September 1966 holding that the dismissal of Ningkan as Chief Minister was invalid.

24. See arguments of counsel reproduced in (1970) AC at pp. 393-394.

25. Seervai, *op. cit.* p. 980.

to justify the proclamation of an emergency. After the High Court ruled in Ningkan's favour, the Federal Government had the choice of either appealing the decision or taking political action to resolve the crisis. They decided on the latter because the delay was assisting Ningkan in the wake of the euphoria over his court victory. It was obvious that the demonstrations against Ningkan were pre-planned and had the tacit approval of the Federal authorities. According to one account: "A demonstration was organised..... hundreds assembled to proclaim their support for Tawi Sli²⁶ and the Sarawak Alliance Government. Although such assemblies were strictly illegal under the emergency regulations,²⁷ the police had been informed of the benign intent and asked to stay out of it. As frosting to all this, some Berjasa supporters engaged in a list of vandalisms later that evening, breaking the windows of a few establishments in Kuching to reflect anti-British and anti-Ningkan sentiment. And reports on the tense security situation had been circulating for some days. The tension was real; the manifestations of it, contrived. But the Federal Government had the justification it needed for fresh and radical action".²⁸

On the basis of the surrounding facts, one would have thought there was enough material on which the Emergency could have been assailed as having been made malafide. The attitude of the Privy Council on the question was one of scrupulous avoidance. Approaching it largely as a question of onus of proof, the Privy Council was reluctant to question the judgment of the responsible

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26. The Dayak leader who replaced Ningkan after his initial removal. Tawi Sli headed the Sarawak Alliance Party.
27. These are emergency regulations made under the 1964 emergency which was then still in force.
28. Bruce Ross-Larson, op. cit. p. 51-52.

government and concluded that the complainant had failed to prove his case.²⁹ On the absence of any outward manifestation of a breakdown of law and order, they relied on Lord Dunedin's statement that "a state of emergency is something that does not permit of any exact definition"³⁰ and said that the Government would have acted on information and apprehensions which are not known and cannot always be known to those who seek to impugn the emergency.³¹

Like in Sarawak, there was in Kelantan no visible deterioration of law and order before the emergency was declared. The irony lies in that unlike in Sarawak, the exertions of the Federal authorities in Kelantan were to retain the Chief Minister in office and not to remove him. It was evident that the period between the passing of the no-confidence motion on the Menteri Besar on 15 October 1977 and the declaration of an emergency on 8 November 1977 was actively used by the Federal Government to work-out a political solution to the crisis. The emergency was only declared after the PAS officials failed to come to an agreement in a meeting with the Prime Minister on the eve of the declaration. This drew a scathing criticism from the Leader of the Opposition in Parliament who characterised it as "blackmail in political negotiations". In his words: "If a grave emergency exists, then a Proclamation of Emergency should have been made a long time ago, and not dependent on acceptance or rejection of the Mahathir formula³²..... emergency situations justifying the Proclamation of Emergency waits for no person!"³³ It was evident that the law

29. [1970] AC 379 at p. 391.

30. *Bhagat Singh v. King Emperor* [1931] 58 IA 169.

31. [1970] AC 379 at p. 390.

32. As previously mentioned, this was the formula apparently proposed by the then Deputy Prime Minister Dr. Mahathir Mohamed.

33. Lim Kit Siang, *op. cit.* p. 250.

and order situation was not such that it could not be adequately handled by the police themselves. The objective was, like in Sarawak in 1966, to obtain a political result. The target was the constitutional machinery in the state. In Sarawak, it was the so-called "gap" in the State Constitution that created an impasse where a recalcitrant Chief Minister could continue in office by refusing to convene a sitting of the state legislature. But there was no such constitutional lacuna in the Kelantan Constitution. Indeed the Constitution expressly provided the solution for this eventuality.³⁴ In Sarawak, the overriding power given by the Emergency was merely used to amend the state constitution and supply the omission. In Kelantan, the Emergency was used to suspend the operation of the State Constitution and completely take over the administration of the State. In both cases the desired political objective was attained. Ningkan was removed in Sarawak and Nasir was retained in Kelantan; in both the ruling party at the Centre was the victor.

Tun Suffian termed the Kelantan crisis as "a breakdown of Government".³⁵ In the absence of a breakdown in law and order, the reference by Tun Suffian must be to the constitutional impasse created by the refusal of the Menteri Besar to resign and the non-action of the Regent in dissolving the State Assembly. It was not unlike the situation that prevailed in Sarawak although under different circumstances. Can a constitutional impasse be equated with a breakdown of government justifying the imposition of any emergency? A parallel may be drawn with the use and application of Article 356 of the

34. Clause XVI(6) of the Kelantan State Constitution.

35. Tun Suffian, *op. cit.* pp. 80-81.

Indian Constitution.³⁶ This is one of the emergency provisions of their Constitution specifically dealing with a situation where a "government of the state cannot be carried on in accordance with the provisions of the Constitution". In that event, the President of India, either on report from the Governor of the State or otherwise, may by proclamation impose what is commonly called "President's Rule" in the State. By the Proclamation he would assume for himself the governing of the State. The enormity of this power may be seen in that it is not only a sitting State legislature that may be dissolved but also one that has yet to be summoned after the completion of

36. Article 356 of the Indian Constitution in its relevant parts reads:

(1) If the President on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the government of the State cannot be carried on in accordance with the provisions of this Constitution, the President may by Proclamation:

- (a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor..... or any body or authority in the State other than the Legislature of the State;
- (b) declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament;
- (c) make such incidental and consequential provisions as appeared to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State;

(2) Every Proclamation under this article shall be laid before each House of Parliament and shall, except where is a Proclamation revoking a previous Proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament;

(3) Notwithstanding anything in this Constitution, the satisfaction of the President mentioned in Clause (1) shall be final and conclusive and shall not be questioned in any court on any ground.

elections.³⁷ The experience of India with Article 356 has however not been a happy one. As a noted constitutional lawyer observed: "The power under Article 356 had been grossly abused and President's rule imposed on the States more than seventy times."³⁸ All States except Maharashtra and Sikkim, had been given at one time or another doses of this pretentious curative. Several cases where President's rule has been imposed by the Centre in a partisan spirit for party ends have already passed into history."³⁹ In a fuller study of the subject, one of India's leading constitutionalists analysed that over the years President's rule had been imposed for broadly three reasons: (a) breakdown in law and order and administration, (b) stringent financial exigencies, and (c) political problems.⁴⁰ His conclusion was also that the declaration of President's rule in a State has been "motivated by political considerations".⁴¹

The problem in India stems from the wide interpretation given by the courts to the phrase "cannot be carried on in accordance with the provisions of the Constitution" and the chapter-heading "failure of constitutional machinery in a state". A reference to these decisions would be useful for our understanding of what is considered to be a breakdown in government. For

37. See *K.K. Aboo v. Union of India* AIR 1965 Kerala 229.

38. Presumably since Indian independence in 1947. For a complete list of the instances when Article 356 was invoked, see Basu's Commentary On The Constitution Of India 6th Edn. Vol. 0, 1989 pp. 19-27.

39. N.A. Palkhivala, We, The People: India - The Largest Democracy (Strand Book Stall, New Delhi 1984) at p. 252 (Chapter headed: "Centre-State Relations" p. 247 et. seq.).

40. Dr. Rajeev Dhavan, President's Rule In The States (Indian Law Institute, New Delhi, 1979 Ed. N.M. Tripathi, Bombay, Publishers) at pp. 110-122.

41. *Ibid* at p. 126.

example, in *Re A. Sreeramulu*,⁴² Chinappa Reddy J, went on the basis that Article 356 does not enumerate the situations when President's rule can be imposed and observes:

"The petitioner seems to labour under the impression that if a party has an undisputed majority in the Legislature to enable its leader to form a Ministry, it can never be said that a situation has arisen where the Government of the State cannot be carried on in accordance with the provisions of the Constitution. That is not correct. There may be many diverse and varied considerations. An outbreak of unprecedented violence which the Government is unable to curb may be a consideration. A great natural calamity like a severe earthquake or a flood creating a situation which the Government of a State is unable to meet may be a consideration. A large epidemic leading to mass deaths and exodus may be another. In all these cases there may be such a failure of the Government of the State as to amount to an abdication of its Governmental power. Any other cause which may paralyse the Government of a State may be a consideration. The Government of a State may enter into alliances with Foreign Governments and that may be a consideration".⁴³

However, the reality is that Article 356 has been invoked more often than not to resolve political crisis within the state. In *K.K. Aboo's case*,⁴⁴ the intervention in Kerala in 1965 was because of the uncertain election results which did not bring out any clear winner; however, the Communist Party which had the largest number of seats, ahead of the Congress party that ruled at the Centre, could have formed a coalition government. In *Rao Birinder Singh's case*,⁴⁵ the intervention in Haryana State was as a result of mass defections from the Congress Party that was ruling the State. In the result, the government went to the Opposition which sought to keep itself in office by political bribery by the appointment of a large number of the legislators as Ministers.

42. AIR 1974 AP 106.

43. Ibid at p. 110.

44. Supra n. 120.

45. AIR 1968 Punjab Haryana 441.

The leading case on the subject is *State of Rajasthan v. Union of India*,⁴⁶ commonly called "the Dissolution case". The case itself proves the acute politicization of the power. After the complete defeat of the Congress Party under Indira Gandhi in the 1977 national elections, there was considerable doubt whether the Congress State Governments in nine States continued to enjoy the mandate of the people to govern. The Centre which was now governed by the Janata Party, but still in the opposition in the nine states, issued a directive to the State Governments concerned to dissolve themselves well before expiry of their term of office and hold fresh elections, confident that the Congress Party would be routed in the polls as they were in the national elections. When it was imminent that President's rule was likely to be imposed as a result of the defiance of the direction, the States concerned applied to the Supreme Court to determine the legal propriety of invoking Article 356 in the circumstances. Bhagwati and Gupta JJ acknowledged that merely because the ruling party in a State suffers defeat in the national elections is not a reason to say that the Government of the State cannot be carried on in accordance with the Constitution.⁴⁷ However, they held that the circumstances then prevailing were unique:

"The defeat of the ruling party in a State at the Lok Sabha elections cannot by itself, without anything more, support the inference that the Government of the State cannot be carried on in accordance with the provisions of the Constitution. To dissolve the Legislative Assembly solely on such ground would be an indirect exercise of the right of recall of all the members by the President without there being any provision in the Constitution for recall even by the electorate. But where there has been a total rout of candidates belonging to the ruling party which has not been able to secure a single seat, it is symptomatic of complete alienation between the Government and the people. It is axiomatic that no Government can function efficiently and effectively in

46. AIR 1977 SC 1361.

47. Ibid at p. 1416.

accordance with the Constitution in a democratic setup unless it enjoys the goodwill and support of the people. Where there is a wall of estrangement which divides the Government from the people, and there is resentment and antipathy in the hearts of the people against the Government, it is not at all unlikely that it may lead to instability and even the administration may be paralysed. The consent of the people is the basis of democratic form of Government and when that is withdrawn so entirely and unequivocally as to leave no room for doubt about the intensity of public feeling against the ruling party, the moral authority of the Government would be seriously undermined and a situation may arise where the people may cease to give respect and obedience to governmental authority and even conflict and confrontation may develop between the Government and the people leading to collapse of administration. These are all consequences which cannot be said to be unlikely to arise from such an unusual state of affairs and they may make it impossible for the Government of the State to be carried on in accordance with the provisions of the Constitution. Whether the situation is fraught with such consequences or not is entirely a matter of political judgment for the executive branch of Government. But it cannot be said that such consequences can never ensue and that the ground that on account of total and massive defeat of the ruling party in the Lok Sabha elections, the Legislative Assembly of the State has ceased to reflect the will of the people and there is complete alienation between the Legislative Assembly and the people is wholly extraneous or irrelevant to the purpose of Article 356 Clause (1). This ground is clearly a relevant ground having reasonable nexus with the matter in regard to which the President is required to be satisfied before taking action under Article 356, Clause (1)".⁴⁸

In the result the Supreme Court of India concluded that the imposition of President's rule to procure a dissolution in order to hold elections in the belief, justifiably held, that the Government of the States concerned had lost the mandate to govern was not an improper exercise of the power under Article 356.

The Indian experience illustrates that the question whether a constitutional crisis has caused a breakdown in government or caused a failure

48. Ibid. Professor Upendra Baxi, a noted Indian constitutionalist, has written of this judgment: "The Dissolution Case, it should be clear is a political judgment and it should frankly be recognised as such. I do not see any objection in Justices of the Supreme Court taking account of hard political facts and discharging what they, in their conscience, feel to be their constitutional responsibilities in their role as the top adjudicators of the nation. I put it to the critics that they would not have done otherwise if they were in the judgment seat" (The Indian Supreme Court And Politics, Lucknow 1980. Eastern Book Co.) at p. 133.

of the constitutional machinery is very much a matter of political judgment. The legal considerations are purely peripheral, useful for justificatory purposes but not otherwise constituting an impediment. In the ultimate, the decision invariably was based on political considerations.

The Sarawak and Kelantan crises were essentially political crises albeit with constitutional overtones. They were brought about by recalcitrant chief ministers who refused to resign inspite of having lost the mandate to govern. The corresponding failures of the heads of state to dissolve the assembly and pave the way for elections created the so-called constitutional impasse. It must be noted also that the situation in each State was created by the political action of the opposition party in the assembly to procure a change of government. Could deliberate political action of this nature be the basis for an emergency or should it not be resolved within the framework of the existing constitution machinery, namely dissolution and elections?

Australia has experienced a similar crisis brought about by moves to oust the political party in power. Like the Kelantan crisis, the Australian crisis was the result of a deadlock which could have been resolved by either a resignation of the government or a dissolution of the elected assembly. The brief facts were as follows. By November 1975 it was obvious that the Whitlam Labour Government was unable to get the supply vote in the Upper House (the Senate) where it was effectively blocked. By an unprecedented move, the Governor General, Sir John Kerr, stepped in and broke the deadlock by dismissing the Whitlam Government and commissioning the then leader of the opposition, Sir Malcolm Frazer, to form a caretaker government. Fraser's appointment was on condition that he undertook to advise the dissolution of

both Houses and pave the way for a general election.⁴⁹ According to the Governor-General he had acted to break the deadlock and to prevent the Whitlam Government from governing in breach of conventions. In his words:

".....Mr. Whitlam and his colleagues should, I thought, be dismissed because they insisted, contrary to the customary procedures of constitutional government, on governing without parliamentary supply, failing to resign or advise an election. These were the two sides of a single coin".⁵⁰

There was considerable scepticism then as to whether the Governor-General was correct in his understanding of parliamentary conventions.⁵¹ Lord Hailsham for one was of the opinion that Sir John Kerr had acted correctly in dismissing

49. The Governor-General's decision led to a crisis of epical proportions in Australia. A number of books have been written on the event, the chief of which are those by the protagonists themselves, namely Sir John Kerr, Matters For Judgment (The MacMillan Company of Australia, 1978); Gough Whitlam, The Truth Of The Matter (Penguin Books of Australia, 2nd Edn., 1983). There are also available a number of legal treatise on the constitutional aspects of the crisis, see especially Geoffrey Sawer, Federation Under Strain (Melbourne University Press, 1977); Labour And The Constitution, Ed. Gareth Evans (Heinemann, Australia, 1977). An impressive monograph dealing fully with the legal questions is LJM Cooray's Australian Constitutional Convulsions of 1975 - The Reserve Powers Of The Governor General And Implications For The Future (1979) 21 Mal. L.R. 303 and (1980) 22 Mal. L.R. 107.

50. Matters For Judgment, op. cit. at p. 336.

51. The Governor-General had evidently sought and obtained the written advice of the Chief Justice of Australia, Sir Garfield Barwick, as to his proposed course of action, before dismissing the Whitlam Government. The letter is published in his autobiography, Matters For Judgment, op. cit. pp. 342-343. The Chief Justice advised: "If, being unable to secure supply, he (Whitlam) refuses to take either course, your Excellency has constitutional authority to withdraw his commission as Prime Minister". Barwick was severely criticised within and without the profession for this advice and the propriety of his rendering it while a serving Chief Justice: see David Marr, Barwick (George Allen & Unwin, Sydney, 1980) at pp. 284-285. It would be fair to note that Barwick CJ was not alone in the opinion he held. A distinguished trio of Melbourne legal personages, namely, Aickin QC, Gleeson QC and Professor P.H. Lane also opined that the Governor-General would be justified in dismissing a government that was unable to get supply: see 49 Australian Law Journal p. 650; see also Keith Aickin, Biography in Graham Fricke, Judges Of The High Court (Hutchinson, Australia, 1986) at pp. 204-205.

Whitlam.⁵² But the principal Australian constitutional writers of the day questioned the propriety of the decision.⁵³ In their view:

"In the events which happened it is possible to argue that by his intervention the Governor-General, far from giving effect to the intention of the Constitution, positively frustrated its express provisions..... the proposition that a supply deadlock should be resolved by the resignation of the Prime Minister..... rests entirely on an unwritten convention which, so far as the present writers can discover, was invented for the purpose in hand in 1975. There is no precedent for it".⁵⁴

52. See his Foreword to Matters For Judgment, op.cit. p. xiv. See also his Dilemma Of Democracy (Collins, London, 1978) chapter headed "The Power Of Dissolution" at p. 190 et. seq.
53. They are listed in Gough Whitlam's, The Truth Of The Matter, op.cit. pp.124-125.
54. Professors Colin Howard & Cheryl Saunders quoted in Whitlam, ibid. Lord Hailsham and other proponents of the Governor-General's reserve powers argue that British constitutional convention would dictate that the Prime Minister advise that Parliament be dissolved. They quote the precedent set by Prime Minister Asquith in 1909 when his budget was blocked by the unelected House of Lords: see Lord Hailsham, ibid. But the appropriateness of the British experience is questionable because of the Federal structure of the Australian Parliament and the elected status of its Senate, in addition to representation on it being on a state basis, all of which is said to dilute representative democracy in so far as the Senate is concerned: see Michael Coper, Encounters With The Australian Constitution (CCH Publication, 1987) pp. 252-256. The opponents of the Governor-General's decision have argued powerfully that the dismissal of a Government that still commands confidence in the lower house on account of a blocked vote in the Upper House is inimical to parliamentary democracy. ".....If the proposition that the Senate should have the power to block supply is really a claim simply that the opposition should have the power to force an election, it is anomalous that the exercise of the power should be confined to the occasions on which there happens to be a supply Bill to be blocked; logic demands that the power be available whenever the opposition judges that an occasion has arisen that warrants its use": see Encounters, op.cit. p. 257. In clear political terms, Sir Richard Eggleston has debunked the convention claimed by the Governor-General: "There is surely something paradoxical in a situation in which a party leader can, by putting his opponent's supply bill in cold storage, secure that opponent's dismissal, and immediately thereafter, by promising to pass the supply bill, qualify for appointment as Prime Minister": quoted in LMS Cooray, op.cit. at p. 113. For the proponents of the Governor-General's reserve powers, the arguments of Dr. Eugene Forsey, a Canadian constitutional expert would seem to be the best: "The danger of royal absolutism is

More importantly, for our purposes, is the strong suggestion that the Governor General had acted out of political considerations. In Whitlam's own assessment:

".....the crisis of 1975 was essentially not only a constitutional crisis but also a political crisis; that the action of the Governor-General can be understood only in political terms, not in constitutional terms at all; and that his action represented not only a gross perversion of the Constitution and its conventions but a gross misreading of the political realities. The Governor-General had no right whatsoever to make a political assessment, even if it had been correct. There was a political crisis entirely capable of a political solution. Although the constitutional anomalies would remain, the political resolution was imminent".⁵⁵

The principal complaint of the oppositionists was that the Governor-General had not given enough time to the Labour Government to find a political solution but had sullied his office by descending into the arena and behaving

contd...

54. past; but the danger of Cabinet absolutism, even of prime ministerial absolutism, is present and growing. Against that danger the reserve power of the Crown, and especially the power to force or refuse dissolution, is in some instances the only constitutional safeguard..... if a Prime Minister tries to turn parliamentary responsible government into unparliamentary irresponsible government then only the Crown can stop him": quoted in George Winterton, Parliament, The Executive And The Governor-General (Melbourne University Press, 1983) at p. 153. For a discussion of British political conventions governing dissolution of Parliament, see Geoffrey Marshall, Constitutional Conventions: The Rules and Forms of Political Accountability (Clarendon Press, Oxford, 1984) p. 35 et. seq.; Ivor Jennings, Cabinet Government 3rd Edn. (Cambridge University Press, 1980) p. 412 et. seq; and, J.A.G. Griffith & M. Ryle, Parliament: Functions, Practice And Procedure (Sweet & Maxwell, London, 1989) p. 42-43. In Malaysia, the withholding of consent to a dissolution of Parliament is one of the matters in which the Yang di-Pertuan Agong has a personal discretion: see Article 40(2).

55. The Truth Of The Matter, op. cit. p. ix-x. There is also a strong view that Sir John had acted prematurely since supply was not to run out till end November 1975: see Encounters, op.cit. p. 268-269. In this regard, the advice given by Chief Justice Barwick has also been castigated as "fundamentally political" because it was designed to provide support publicly for Kerr's plan of action and it failed to discuss alternative courses of action: see Barwick, op.cit. pp. 275-276.

partisanly. In the conclusion of one Australian constitutional writer: "The Senate was manipulated in a partisan way by the opposition coalition to restrict, harass and finally bring down the Whitlam government with Governor-General Kerr's assistance".⁵⁶

A constitutional crisis is implicitly a political crisis. In the prescient observation of Sir Owen Dixon of the Australian High Court: "The constitution is a political instrument. It deals with government and governmental powers.... it is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described....".⁵⁷

However, what constitutionalism aspires for is that political expediency should not be allowed to override constitutionally provided remedies or that constitutional powers should not be exercised solely to attain political objectives. In his illuminating book on the subject, Professor Nwabueze described constitutionalism as the limiting of the arbitrariness of political power, in essence a limitation on government.⁵⁸ He identifies the dilemma of constitutionalism as the frequent use made of the doctrine of state necessity in recent years in the emergent states.⁵⁹ He concludes that there is a

56. Brian Galligan, Politics Of The High Court: A Study Of The Judicial Branch Of Government In Australia (University of Queensland Press, St. Lucia, Queensland, 1987) at p. 224. It is proper to note that views in Australia varied widely as to the propriety of the Governor-General's actions depending on one's biases, predilections and sympathies: see Encounters, op.cit. p. 244.

57. *Melbourne Corporation v. Commonwealth* [1947] 74 CLR 31 at p. 82.

58. B.O. Nwabueze, Constitutionalism In The Emergent States (C. Hurst & Co., London, 1973) at p. 1.

59. *Ibid* p. xi.

tendency in the new democracies to use the concession of emergency powers in the constitution not only by using them for purposes for which they are not intended but also by using them to suspend constitutional government altogether.⁶⁰ He draws the entirely justified parallel between the Nigerian constitutional crisis in 1962 and the Sarawak crisis in 1966 in Malaysia. Nigeria like Malaysia had a federal system of government.⁶¹ The declaration of an emergency in Western Nigeria in 1962 bore an uncanny resemblance to the Sarawak situation. It was also brought about by political squabbles within the ruling party. Acting on representations in writing by a majority of the legislators in the House of Assembly, the Regional Governor dismissed the Premier, Chief Akintola from office and appointed Chief Adegbenro in his place. Chief Akintola refused to accept his dismissal and physically held on to his office-room as also did his ministers who were supportive of him. He commenced legal action to have his dismissal declared unlawful. In yet another similarity with the Sarawak case, the Nigerian Supreme Court held his dismissal to be unconstitutional and reinstated him. The decision was however reversed by the Privy Council which held that the crucial wording in the Nigerian Constitution that read "unless it appears to him (the Governor) that the Premier no longer commands the support of a majority of the members of the House of Assembly" entitled the Governor to act on material other than a vote

60. Ibid p. 174.

61. The 1966 military coup in Nigeria overthrew the federal based constitution and introduced rule by decree: see Nwabueze, op. cit. p. 196 et. seq. The Military take-over was initially at the provincial level but the Army's influence and threat was so pervasive that the civilian government at the Centre voluntarily handed over power to the military: see Nwabueze, op.cit. at p. 203.

of confidence in the House.⁶² The immediate cause of the emergency, however, was not the vicissitudes of the litigation, but the disruption of the sitting of the Assembly by Akintola's supporters who, although a minority, succeeded in aborting the Assembly by their uproar. Thus the Assembly was precluded from expressing its support for Akintola's successor. In a technical sense, therefore, there was an impasse.

The remedy employed in both Nigeria and Sarawak was to declare an emergency. The choice of action was questionable and the lack of an adherence to the principles of constitutionalism in both was obvious. A blind eye was turned to the remedy given within the respective Constitutions themselves. In Sarawak, Article 7 of the State Constitution had provided that if the Chief Minister loses the confidence of the members of the Council Negri "then, unless at his request the Governor dissolves the Council Negri, the Chief Minister shall tender the resignation of the members of the Supreme Council". Ningkan rightfully held that there was no obligation on his part to resign in the absence of a vote against him in the Assembly. He instead offered to advise dissolution of the Assembly, something that he was constitutionally entitled to exercise as an option, in the circumstances. Harley Ag. C.J. commented on this as "a political solution" which may be "the only way" to avoid multiple legal complications.⁶³ It is trite that in a parliamentary democracy, dissolution and elections are unobjectionable as remedies. Thus in the Australian constitutional crisis of 1975, the Governor General purported

62. *Adegbenro v. Akintola* [1963] 3 AER 544; [1963] AC 614. This phrase which is absent in the Sarawak Constitution was pivotal in the Malaysian Court not following the Privy Council and ruling that Ningkan's dismissal was bad: see *Stephen Kalong Ningkan v. Tun Abang Hj Openg* [1966] 2 MLJ 187. For a close analysis of the two cases, see SM Thio, Dismissal of Chief Ministers (1966) 8 Mal. L.R. 283.

63. *Stephen Kalong Ningkan*, op.cit. at p. 195E.

to act on an established convention in dismissing the Whitlam Government because of the latter's refusal to recommend dissolution and pave the way for a general election after failing on the budget in the Senate. In Kelantan, likewise, the way was cleared for the holding of elections after the Menteri Besar, quite constitutionally, recommended dissolution to the Regent. The latter, however, withheld proroguing the assembly in circumstances where it has been suggested that he was under some form of advisement from the Federal Government not to act.⁶⁴ A provision in the State Constitution, similar to the one in Sarawak, clearly provided for state elections as the way out of the constitutional impasse. The necessity to declare an emergency to break the impasse in both states was therefore questionable. Referring to the Sarawak situation, one constitutional writer described it as "a manipulation of the rules for the dismissal of the Chief Minister and the dissolution of the legislature".⁶⁵ The Kelantan emergency was slammed by the Opposition Leader as a blatant abuse of emergency powers in "a conflict between political parties and personalities".⁶⁶ Over in Nigeria, referring to the West Nigerian emergency, Professor Nwabueze described it as "ill-motivated and made for a purpose other than that envisaged by the Constitution",⁶⁷ in obvious reference to the moves to oust Chief Akintola from the premiership.

But the fact that there was available some other constitutional means of resolving the crisis does not by itself render the proclamation of emergency bad. The attitude of the court is to leave the choice of the remedy to the

64. See Raja Tun Azlan Shah (as he was then) in The Role Of Constitutional Rulers (1982) JMCL 1 at p. 10.

65. Yash Ghai, The Politics Of The Constitution: Another Look At The Ningkan Litigation (1986) 7 Sing. L.R. 147 at p. 171.

66. Lim Kit Siang, Time Bombs In Malaysia (Kuala Lumpur, 1978) at p. 250.

67. Nwabueze, op. cit. p. 176.

executive government. That, at least, appears to be the position taken by Privy Council in the *Ningkan* case: "(I)t is not for their lordships to criticise or comment upon the wisdom or expediency of the steps taken by the Government of Malaysia in dealing with the Constitutional situation which had occurred in Sarawak, or to inquire whether that situation could itself have been avoided by a different approach".⁶⁸ This hands-off approach of the Privy Council may be castigated as a clear instance of judicial abdication in the face of the obvious manipulation of the constitution to achieve a political objective.⁶⁹ Where the constitution itself has provided the solution for the crisis, as was the case in both Sarawak and Kelantan, it would have been thought that the failure to resort to these remedies would prima facie stand as reason to doubt the bona fides of the emergency especially in the absence of civil disorder or commotion. But the judicial self-restraint shown by the Privy Council is emblematic of the approach taken by third world courts generally in matters relating to national security ie. it is a matter for the judgment of the executive.⁷⁰ The *Ningkan* case is as strong a case as one could make out to impugn an emergency. The political objectives behind the action were obvious. There was also, as the Privy Council acknowledged, the

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68. Per Lord MacDermot in *Ningkan v. Government of Malaysia* [1970] AC 379 at p. 391 C.D.
69. For criticism of the judicial method employed in the House of Lords and the Privy Council in deciding only so much as is necessary to decide the case, see I.S. Dickinson, The Continuing Reluctance Of The Judiciary (1990) 140 NLJ 1071: ".....There would appear to be a strong argument in favour of bodies such as the House of Lords and the Judicial Committee of the Privy Council dealing in their judgments with the entire case laid before them..... in the interests of the development of the law or of legal certainty....." (p. 1072).
70. In Malaysia, a recent reiteration of this stand is found in *Minister of Home Affairs v. Karpal Singh* [1988] 3 MLJ 295 SC endorsing what Lord Parker CJ said as long ago as in 1916: "Those who are responsible for the national security must be the sole judge of what the national security requires": *The Zamora* (1916) 2 AC 77 at p. 107.

absence of "the usual signs and symptoms of a grave emergency" - no disturbances, riots or strikes, no extra troops or police had been placed on duty; no curfew or other restrictions on movement had been found necessary; and the hostile activities of Indonesia had already ended"⁷¹ - but the Privy Council was not convinced. Further, the reliance by the Board on fanciful possibilities of a threat to security is wholly inexplicable. On this, they said security questions were essentially matters for the judgment of the responsible ministers based on their knowledge and experience. They added that although the Indonesian Confrontation was over "it was open to the Federal Government, and indeed its duty, to consider the possible consequences of a period of unstable government in a State that, not so long before, had been facing the tensions of Confrontation and the subversive activities associated with it".⁷² The reasoning is altogether astonishing. If the perceived threat to Sarawak was the remnants of the Indonesian Confrontation, there was already the 1964 Emergency declared for that very purpose which was still in force. Moreover, the principal legislation made under the 1964 Emergency, the Emergency (Essential Powers) Act, 1964, gave a plentitude of emergency powers to the Cabinet to combat the security threat posed by Indonesia's aggression. Indeed the Government Explanatory Statement to the Bill amending Sarawak's Constitution pursuant to the (ie. Sarawak) emergency, which was reproduced in the judgment,⁷³ made specific mention of the continuance of the 1964 emergency and termed the new emergency "as a distinct emergency additional to the emergency already proclaimed". It was also

71. Ibid p. 389.

72. Ibid p. 391D-F.

73. Ibid pp. 390-391.

specifically described as being made "in order to deal with the present (ie. Sarawak) crisis". In the writer's opinion, it defies logic to justify the Sarawak emergency on the basis of the Indonesian Confrontation when the 1964 emergency specifically proclaimed to combat it was still in force.

The Privy Council judgment in *Ningkan's* case remains a classic example of judicial abstinence. The judgment would have rested on surer grounds if it had limited itself to "the constitutional breakdown argument".⁷⁴ The argument that there was a need for a stable government and the possibility of disorder and instability based on intelligence reports furnished to the executive government is usually unassailable before the courts.

Likewise in Nigeria, when the emergency was declared in the western region in circumstances similar to that in Sarawak, there was no civil disorder or commotion. Professor Geoffrey Sawer from Australia wrote a personal account of his own observation of the situation in Western Nigeria at the material time. Of the official reason given by the Centre for the emergency, that the legislature was paralysed and that the disturbances in the assembly could be communicated to the people outside leading to a breakdown in law and order, he wrote:

"The present writer happened to be in Ibadan (capital of Western Nigeria) during the week commencing with the declaration of emergency and is in a position to cast considerable doubt on the fears expressed by the Centre. Ibadan was certainly in a state of profound peace....".⁷⁵

74. Ibid p. 391D.

75. Geoffrey Sawer, Emergency Powers In Nigerian And Malaysian Federalism (1964) 6 Mal. L.R. 83 at p. 90. The Police acknowledged that there was no outbreak of civil disorder but that "unless firm Police action was taken widespread disorder will probably take place": Evidence given by the Deputy Inspector General of Police, see *Williams v. Majekodunmi* (No. 3) [1962] 1 All N.L.R. 418, 427-28.

It will take much to impugn the recitation of facts (usually of a threat to security) declared in a proclamation, as was done by the Australian High Court in the *Communist Party* case,⁷⁶ when it rejected the statement in the Preamble to the Communist Party Dissolution Act, 1950 that the Communist Party of Australia was a threat to the security of the country. In holding that this legislative determination was beyond the power of the Australian Parliament to pass as a defence measure, the Court observed that "it could not allow the opinion of Parliament to be the decisive factor, that is to determine the matter finally and conclusively, without deserting its own duty under the Constitution".⁷⁷

However, the Australian case stands on its own against the general current of authorities pointing the opposite direction. In matters relating to security, whether from an internal or external source, the courts are unlikely to second-guess the perception of the government of the day that a threat to law and order was imminent. In *Re A Sreeramulu*,⁷⁸ strikes by government servants leading to an agitation for a separate state by a regional community was held sufficient for the President of India to invoke his emergency powers and sack the elected state government and impose President's Rule. In *Rao Birinder Singh's* case,⁷⁹ the absence of civil unrest was not held to be an inhibiting factor in decreeing President's rule because of the large number of cabinet appointees made by the incumbent government to seduce away possible defectors.

76. *Australian Communist Party v. Commonwealth* [1951] 83 CLR 1.

77. Per McTiernan J. at p. 207.

78. AIR 1974 AP 106.

79. AIR 1968 P&H 441.

In the end, the decision to invoke and exercise emergency powers is evidently and intrinsically a political decision. The role and function of constitutional law is peripheral to this decision. In third world countries, the politicisation of the emergency powers in the constitution is all pervasive. A generally reticent judiciary that proceeds on the basis that the government is bound to act in the best interests of the nation⁸⁰ compounds the problem. The pathway is thus cleared for political expediency to govern, and constitutionalism to take a backseat.

80. See Barakbah LP in *Ningkan v. Government of Malaysia* [1968] 1 MLJ 119 at p. 122E.

PART IVTHE USE OF EMERGENCY POWERS AND EMERGENCY RULECHAPTER VIIITHE DECLARATION OF AN EMERGENCY: SUBSTANTIVE
AND FORMALISTIC REQUIREMENTSIntroduction

Article 150(1) and (2) in their present form¹ read 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".
- (2) "A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event".

On a first reading of the article the following features are noticeable:

- (1) the Yang di-Pertuan Agong proclaims the emergency;
- (2) he must be satisfied that a grave emergency exists;
- (3) the grave emergency relates to the security or the economic life or public order in the Federation or any part thereof;
- (4) he could act before the actual occurrence of the event if he is satisfied of the imminent danger of their occurrence; and
- (5) he issues a Proclamation of Emergency by declaring the existence of a grave emergency on all or any of the grounds stated.

1. The amendments to Article 150(1) have been dealt with in Chapter V.

Thus unlike the Australian Constitution which is silent on the exercise of emergency powers,² the Malaysian Constitution purports to define and limit the power to declare a state of emergency. The words in Article 150(1) and (2) are said to be "words of limitation"³ or "qualifying words"⁴ which must be satisfied before it can be said there was a valid exercise of the power to proclaim an emergency. The study therefore focusses on these qualifying words and the question of justiciability of a proclamation of emergency. In this respect we need to examine two sets of words in the Articles. The first is "if the Yang di-Pertuan Agong is satisfied", and the second, the words "a grave emergency exists whereby the security or economic life or public order..... is threatened". Because the "satisfaction" question is tied up with the justiciability question, and would entail consideration of matters like the political question doctrine and the effect of the ouster provisions in Article 150(8), it is proposed to deal first with what constitutes "a grave emergency".

A "Grave Emergency"

It may be noted at the outset that the term "emergency" itself is not defined in the Constitution. For one seeking a definition the invariable reference would be to the words of Lord Dunedin in *Bhagat Singh v. King Emperor*,⁵ where he said: "A state of emergency is something that does not

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2. See generally H.P. Lee, Emergency Powers (The Law Book Co., Australia, 1984) at pp.4 et.seq. In Australia, emergency situations are dealt with at State level by the enactment of state legislation.
 3. Per H.T. Ong F.J. in *Ningkan v. Government of Malaysia* [1968] 1 MLJ 119 at p. 126E.
 4. Per Azmi CJ in *Ningkan*, Ibid at p.124 D-E.
 5. [1931] 58 IA 169.

permit of any exact definition: It connotes a state of matters calling for drastic action".⁶ This bland definition was applied some forty years later by the Privy Council in the *Ningkan* case⁷ when construing the word "emergency" in Article 150(1). In repelling the argument that there was no actual or threatened outbreak of violence or breach of the peace in Sarawak, the Privy Council said "the natural meaning of the word itself is capable of covering a very wide range of situations and occurrences including such diverse events as wars, famines, earthquakes, floods, epidemics and the collapse of civil government".⁸ Lord MacDermot, who delivered the opinion, was of the view that the word "emergency" as used in Article 150(1) cannot be confined to the unlawful use or threat of force.⁹ It was however acknowledged that the "emergency" must be grave and must threaten the security or economic life of the Federation or any part of it. The word "grave" imports an element of degree. It follows that it is not every threat that constitutes an emergency but a "grave" threat. This refers to magnitude and how imminent, serious or

6. At p.172.

7. *Stephen Kalong Ningkan v. Government of Malaysia* [1970] AC 379.

8. At p.390 D-E.

9. *Ibid.* See, contra, Jeffrey Tan Eng Heong, Emergencies And The Sleeping Judicial Giant (1984) Vol. V Sing. L.R.145 at p.147: "A review of the 4 instances when an emergency has been proclaimed in Malaysia, indicates the necessity of aggression or violence to be present before a proclamation is made - admittedly, those situations called for drastic measures of which only Article 150 could satisfy". This opinion is clearly at variance with the Privy Council judgment. Moreover, the comment that the four instances of emergency in Malaysia were accompanied by acts of aggression or violence is not supportable by the facts: see discussion in Chapter VI of the four emergencies. There was no outward manifestation of any civil disorder or violence in the Sarawak and Kelantan emergencies. The point at least was conceded before the Privy Council in the *Ningkan* case, ante, insofar as the Sarawak emergency was concerned.

widespread is the threat to security, economic life or public order. It should therefore exclude from its signification a mere occurrence of public disorder or the outbreak of violence in localised parts of the country which could be handled by police action. However, the question of degree or magnitude, like the event said to give rise to the emergency, is a matter for the Cabinet and the courts are unlikely to review the sufficiency of the factors upon which the Proclamation was made, particularly, on the question of magnitude alone.

In this connection, the Privy Council was right when it refused to equate an emergency with the unlawful use or threat of force. Article 149¹⁰ deals specifically with Parliament's power to deal with the threat of organised violence by any or any substantial body of persons.

10. The Privy Council observed that Article 150 was wider in terms than Article 149: Ibid. at p.390 C. Article 149(1) reads as follows:

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

- (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
- (b) to excite disaffection against the Yang di-Pertuan 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 maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
- (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

It is also significant that Article 150(1) defines an emergency by reference to effect. Therein lies its width. Thus any event if it has the effect of threatening the security or economic life of the Federation or any part of it could amount to an emergency no matter what its character. The thrust of the provision is similar to the provisions of the United Kingdom Emergency Powers Act, 1920. Section 1(1) of the Act reads:

"If at any time it appears to Her Majesty that there have occurred or are about to occur, events of such a nature as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life, Her Majesty may, by proclamation (hereinafter referred to as a proclamation of emergency), declare that a state of emergency exists".¹¹

The provision does not define the "events" amounting to an emergency but makes the classification according to its effect, or whether they cause the type of interferences enumerated. Thus it has been said that the power to issue a proclamation under the said section is limited in three important respects. First, the "events" which occasion the emergency must interfere with the "supply and distribution of food, water, fuel or light or with the means of locomotion". The second and third limitations arise from the necessity for the "events" in question depriving the community or any substantial portion of the community of the essentials of life.¹² In the result, the twelve

contd...

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

11. Halsbury's Statutes 4th Edn. Vol.48 p.759, as amended by the Emergency Powers Act, 1964.

12. See Gillian S. Morris, Strikes In Essential Services (Mansell Publishing Ltd., London, 1986) at p.52.

occasions when the Act had been invoked have all been industrial disputes, involving strikes or other forms of industrial action taken by trade unions.¹³

We may also refer to the jurisprudence developed by the European Court of Human Rights (ECHR) in relation to the definition of an emergency. It has risen in the context of the derogation provision of the European Convention of Human Rights, Article 15(1), which reads:

"In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law".¹⁴

The term "other public emergency threatening the life of the nation" has been considered in a number of cases. In *Lawless v. Ireland*,¹⁵ a case involving preventive detention in Ireland, the Court defined "public emergency" as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed".¹⁶ The Court held that the Irish state was justified in declaring a public emergency on the basis of the activities of the illegal Irish Republican Army, and in particular as a result of a bomb incident on the Northern Ireland border in July 1957.¹⁷ The *Lawless*

13. Ibid. pp.50-51. See also Gillian S. Morris, The Emergency Powers Act, 1920 (1979) PL 317 at p.318. For a discussion of the use of the ordinary criminal law to deal with obstructive industrial action without resort to the Emergency Powers Act, 1920, see Peter Wallington, Policing the Miner's Strike (1985) 14 ILJ 145.

14. Basic Documents on Human Rights Ed. Ian Brownlie (Clarendon Press, Oxford) at p.247.

15. [1961] 1 E.H.R.R. 15

16. Op. cit. at para.28.

17. For a criticism of the decision, see P.D. Higgins, "*The Lawless Case*" (1962) Camb.L.J.234.

definition was followed by the Commission in the *First Greek Case*.¹⁸ The case arose from the coup by the Colonels in Greece in 1967. The Commission declined to permit derogation on the basis that the facts did not establish a public emergency. The Greek Government sought to justify the emergency under the twin heads of a communist takeover and public disorder. The first was dismissed by the Commission as evidentially unsubstantiated, and the second as not being existent to a point beyond police control.¹⁹ In the later case of *Ireland v. The United Kingdom*,²⁰ involving a point similar to *Lawless*, the Commission proceeded on the basis that "a public emergency" was not disputed.

It noted:

"The degree of violence, with bombing, shooting and rioting, was on a scale far beyond what could be called minor civil disorder and it is clear that the violence used was in many instances planned in advance by factions of the community organised and acting on paramilitary lines. To a great extent the violence was directed against the security forces, which were severely hampered in their function to keep or restore the public peace".²¹

These decisions of the European bodies show emphasis on two factors: first, the degree of disruption caused by civil disorder must be such that it threatens the very existence of the nation; secondly, if there is large scale

18. [1969] 12 Y.B.E.C.H.R.

19. See pp.73-76, paras.158-65 for the findings of the Commission.

20. [1976] 19 Y.B.E.C.H.R.512.

21. At pp.584-86. See also David Bonner, *Ireland v. United Kingdom* [1978] 27 ICLQ 897 and Michael O'Boyle, Torture And Emergency Powers Under the European Convention of Human Rights: *Ireland v. The United Kingdom* [1977] 71 AJIL 674, for a perceptive analysis of the decision of both the Commission and the Court. For a criticism of the Court's decision not to review the British Government's policy and the choice of means in combating terrorism in Ireland, see Colin Warbrick, The European Convention of Human Rights And the Prevention of Terrorism (1983) 32 ICLQ 82 at pp.115-116.

violence or organised terrorism there is every likelihood of a court or tribunal accepting the existence of an emergency. Thus the existence of organised terrorism in *Lawless and Ireland* passed muster under Article 15(1) but not the mere occurrence of civil disorder and riots, though widespread, in the *First Greek* case. It was held in the latter case that what was needed was police remedial action and not an emergency.

The Threat to Security

The threat to security was given as a reason in the declaration of all the four emergencies.²² In the *Ningkan* case in the Privy Council it was established that the threat to security need not be attended by the presence of violence or the threat of violence or public disorder. The Privy Council accepted that the responsible Government may found its apprehension upon intelligence reports and that would be a sufficient basis for declaring an emergency. At the Federal Court, H.T. Ong FJ. dealt squarely with the "security" question in terms that suggest that it falls beyond the pale of judicial review. His opinion is significant because he had dissented from the majority on the question of justiciability. Moreover, on the purpose of the emergency, he unequivocally held that it had as its primary objective the removal of Ningkan as Chief Minister:

"My view, rightly or wrongly, is that this primary objective is not necessarily incompatible with a genuine concern - whether on adequate grounds or not is not for me to say - felt by the Cabinet as regards the security situation in the State....."

22. See Appendix B for the reproduction all four Proclamations of Emergency. See also Chapter VI for the discussion of the circumstances surrounding the four declarations of emergency.

Sarawak naturally cannot be compared with more advanced countries.... in which political squabbles pose no problems imperiling national security. It may very well be true that political instability in Sarawak could possibly have serious repercussions on the security of the State, although some may quite honestly consider it improbable or far fetched.... I am unable to say that the Cabinet advice to His Majesty was not prompted by bona fide considerations of security".²³

Moreover, there was express reference to an affidavit of the Home Affairs Minister who deposed without more to the Communist threat of exploiting the situation in Sarawak. It demonstrated a judicial reluctance to review the responsible Government's appraisal of the security situation.²⁴ The Communist threat was a mere assertion. It could not have carried much force because in the Privy Council the security threat was perceived to come from another source, silicet, the remnants of Indonesia's Confrontation towards Malaysia in 1964-65.²⁵ In the *First Greek Case*, the European Commission refused to act on the mere assertion by the respondent Government of a Communist threat to takeover the government as justifying the Colonel's coup or the emergency that followed the coup. The Commission observed that the two pieces of evidence produced by the Greek Government were slender and that no Communist takeover

23. [1968] 1 MLJ 119 at p.128 G-H.

24. The Affidavit read: "I would be guilty, and I will be failing in my duty if, for example, I were to wait for three months, and during those three months the Communists got the upper hand through political means, because we know that one of the objectives of the Communists is to erode the fabric of the Government, to go into the political parties, and we have a great deal of evidence there on this Communist threat to Sarawak": *Ningkan*, *ibid*, lines A-B.

25. (1970) AC 379 at p.391: "(A)lthough the Indonesian Confrontation had then ceased, it was open to the Federal Government, and indeed its duty, to consider the possible consequences of a period of unstable government in a State that, not so long before, had been facing the tensions of Confrontation and the subversive activities associated with it". For a criticism of this hypothesis by the Privy Council, see discussion in Chapter VII under heading "The Four Emergencies: A Conspectus".

of the government by force could be anticipated. An arms caches that was found was described as negligible and the Communists "plan of action" did not involve an imminent overthrow of lawful government.²⁶

The Commission's decision may be considered as being ahead of its times as regards the treatment of the security question. Its robustness may be explained by its supra-national character. In contrast, the deference shown by the national courts to the Executive on matters of security is of long vintage. In *The Zamora* [1916] Lord Parker C.J. set the rule: "Those who are responsible for the national security must be the sole judge of what the national security requires".²⁷ As recent as 1977 the view seemed to prevail in England, reading Lord Denning in *Hosenball*:

"But this is no ordinary case. It is a case in which national security is involved: and our history shows that, when the state itself is endangered, our cherished freedom will have to take second place".²⁸

But the rapid development of judicial review in the United Kingdom over the past two decades²⁹ would seem to suggest a loosening of the "immunity" given to national security questions. In *Council of Civil Service Unions v. Minister for the Civil Service*,³⁰ the House of Lords held that where the government seeks to rely on reasons of national security in judicial

26. Supra, no.23 at pp.72-76, paras.154-165.

27. [1916] 2 AC 77 at p.107.

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

29. Described by Lord Diplock as the greatest achievement of the English courts in his judicial lifetime: see *IRC v. Federation of Self-Employed And Small Businesses Ltd* [1981] 2 AER 93 at p.106 g-h.

30. [1984] 3 AER 935.

proceedings, a mere assertion to that effect would not suffice and that the Courts would require evidence that the decision or action was in fact taken for reasons of national security. Lord Scarman wrote as follows:

"My Lords, I conclude, therefore, that where a question as to the interest of national security arises in judicial proceedings the court has to act on evidence. In some cases a judge or jury is required by law to be satisfied that the interest is proved to exist; in others, the interest is a factor to be considered in the review of the exercise of an executive discretionary power. 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. There is no abdication of the judicial function, but there is a commonsense limitation recognised by the judges as to what is justiciable; and the limitation is entirely consistent with the general development of the modern case law of judicial review".³¹

The application of the decision in *Ruddock*³² signals the present attitude of English judges on the plea of national security. It leans towards a closer judicial evaluation of the question. It was a case involving telephone tapping on grounds of national security. In rejecting the argument that the Secretary of State by long policy maintains his silence before the courts on what are the matters of national security involved, Taylor J. said:

"Counsel for the Secretary of State does not challenge here the jurisdiction of the court to decide the issues raised. He bases his submission on a plea to the court's discretion. In effect, the plea amounts to this: the Secretary of State invariably maintains silence in the interests of national security on issues such as are raised here. The court in its discretion should do likewise, and since making findings to decide the case may break that silence, the court should, in Lord Scarman's phrase, abdicate its judicial function. I cannot agree with that, either as a general proposition or in this particular case. I do not accept that the court should never inquire into a complaint against a minister if he says his policy is to maintain silence in the

31. At p.948 b-d.

32. *R v. Secretary of State for the Home Dept. Ex parte Ruddock* [1987] 2 AER 518.

interests of national security. To take an extreme and one hopes unlikely example, suppose an application were put before the court alleging a warrant was improperly issued by a Secretary of State against a political opponent, and suppose the application to be supported by the production of a note in the minister's own hand acknowledging the criteria did not apply but giving instructions that the phone be tapped nevertheless to see if anything discreditable could be learnt. It could not be sensibly argued that the department's invariable policy of silence should require the court meekly to follow suit and decline to decide such a case. At the other extreme, I recognise there could occur a case where the issue raised was so sensitive and the revelations necessarily following its decision so damaging to national security that the court might have to take special measures (for example sitting in camera or prohibiting the mention of names). Conceivably (although I would reserve the point) in an extreme case the court might have to decline to try the issues. But in all such cases, cogent evidence of potential damage to national security flowing from the trial of the issues would have to be adduced, whether in open court or in camera, to justify any modification of the court's normal procedure. Totally to oust the court's supervisory jurisdiction in a field where *ex hypothesi* the citizen can have no right to be consulted is a draconian and dangerous step indeed. Evidence to justify the court's declining to decide a case (if such a course is ever justified) would need to be very strong and specific".³³

A change is also visible in the attitude of the Australian High Court to the question. In a case involving the powers of surveillance of the Australian Security Intelligence Organisation (ASIO), the court held that questions whether intelligence is relevant to security and whether a communication of intelligence is for purposes relevant to security may be determined by the court.³⁴ The complaint was that the inquiries made by the ASIO of the plaintiff organisation was not related to security. "Security" was defined under the relevant statute³⁵ as the protection of the country from espionage, sabotage, subversion, terrorism, whether within or without.³⁶ In rejecting a

33. At pp. 526-527.

34. *The Church of Scientology v. Woodward* [1983-84] 154 CLR 25.

35. The Australian Security Intelligence Organisation Act, 1979.

36. Section 4.

demurrer that the complaint was not justiciable, Mason J. (as he then was) said:

"It is one thing to say that security intelligence is not readily susceptible of judicial evaluation and assessment. It is another thing to say that the courts cannot determine whether intelligence is "relevant to security" and is "for purposes relevant to security". Courts constantly determine issues of relevancy³⁷ Intelligence is relevant to security if it can reasonably be considered to have a real connexion with that topic, judged in the light of what is known to ASIO at the relevant time. This is a test which the courts are quite capable of applying".³⁸

The position in Malaysia is ambivalent. The progressive decisions in this field from England and Australia may not take root yet despite the *Berthelsen* decision.³⁹ It was a case involving the expulsion of a foreign journalist by the Home Affairs Ministry by revoking his professional visit pass on the ground that his presence was prejudicial to the security of the country. Leave to commence judicial review was refused at first instance. The High Court reasoned that because it involved a matter of national security it would be futile to give leave as the court should not go behind the decision of the executive. On appeal, the Supreme Court gave leave and proceeded to quash the expulsion order as a violation of the rules of natural justice. The Court ruled that the appellant had a legitimate expectation that his employment pass would not be cancelled without an opportunity first to make

37. Op.Cit.p.59-60.

38. Ibid.p.61. See also the Australian case of *A and Ors v. Hayden* [1985] LRC (Const) 365, regarding disclosure of the names of officers of the ASIO in court proceedings. Gibbs CJ said: "When the executive seeks a special privilege or immunity on grounds of national security, the court will not defer without question to the judgment of the executive as to what the national security requires" (p. 367).

39. *John Peter Berthelsen v. Director General of Immigration* [1986] 2 CLJ 409; [1987] 1 MLJ 134.

representations. The Supreme Court adopted the "evidential approach" taken by the House of Lords in the *Council of Civil Service Union's* case. But unlike in that case, Abdoolcader SCJ saw no threat to national security involved in "consultations":

"The position is wholly different in the matter of the instant appeal: we are unable to envisage what dire consequences of catastrophic magnitude would or possibly have ensued if the appellant had been accorded a right to make representations..... We would add that in any event adequate evidence from responsible and authoritative sources would be necessary on the security aspect and no reliance can be placed in that regard on a mere ipse dixit of the first respondent (Director General of Immigration) to that effect in the notice of cancellation.....".⁴⁰

The *Berthelsen* decision was a controversial one. It is cited as one of the cases that led to the confrontation between the judiciary and the executive in 1988.⁴¹ The judicial upheaval that followed saw the dismissal of three Supreme Court judges. The Supreme Court that was composed after this crisis is evidently cast in a more conservative mould. Its view on security questions was given in a preventive detention case, *Minister of Home Affairs v. Karpal Singh*,⁴² where it fully endorsed Lord Parker CJ's opinion in *The Zamora*, ante,

40. At p.418 para.15.

41. See Andrew Harding, The Malaysian Judiciary Crisis Of 1988 (1989) Commonwealth Judicial Journal Vol.8 No.1 at p.3. See also M/s. Frank, Markowitz, McKay & Roth, The Decline In the Rule of Law In Singapore And Malaysia (A Report of the Committee on International Human Rights of the Association of the Bar of the City of New York) at p.12: "Beginning in 1988, Prime Minister Mahathir, who had earlier praised the independence, competence and integrity of the judiciary in Malaysia, became highly critical of it. His shift in attitude followed the Supreme Court's decision in *J.P. Berthelsen v. Director General of Immigration*". A like opinion is expressed in H.P. Lee, "A Fragile Bastion under Siege - The 1988 Convulsion In the Malaysian Judiciary (1990) Vol.XXI No. 3 INSAF 18 at p.20: "Dissatisfaction with the judiciary started to simmer rapidly when the Prime Minister was clearly stung by the decision of the Supreme Court in *J.P. Berthelsen v. Director General of Immigration & Ors*". (See same article in [1990] 17 Melbourne U.L.R. 386).

42. [1988] 3 MLJ 295. This was one of the controversial cases pending appeal during the crisis: see Frank et al, op.cit. pp.15-16.

given in the wake of the First World War, that matters of national security are best left to the judgment of the Executive. This view would seem to reinstate the pre-*Berthelsen* position in Malaysia that the *ipse dixit* of the Executive would be sufficient to render security matters non-justiciable. On current judicial attitudes, the decisions in *Ningkan* and *Karpal Singh* appear to foreclose any challenge to an emergency as not being warranted on security grounds.

The Threat To Economic Life

Only in the Kelantan emergency was "threat to economic life" given as a ground for declaring an emergency.⁴³ Thus unlike the "security" ground, there has been no opportunity for our courts to judicially analyse what would constitute a threat to the economic life of the Federation. As a result, it would be a matter of speculation whether the courts would give that question the same blanket of immunity as they have done to the "security" ground.⁴⁴

However, given the circumstances behind the Kelantan crisis, it is difficult to comprehend how the events there could have amounted to a threat to the economic life of the State.⁴⁵ It was principally a struggle between two political parties for control of the State Government. By all accounts, there was no disruption of civil life or interruption of supplies justifying the conclusion that the economic life of the State was imperilled. In all

43. See Appendix B where the Proclamation is reproduced.

44. Tun Suffian records that a number of cases filed challenging the Kelantan emergency never reached the courts: see his lectures delivered in India under the title, Malaysia-India: Shared Experiences In the Law (AIR Publication, Nagpur, India, 1980) at p.83.

45. See discussion on the Kelantan emergency in Chapter VI.

probability, barring the printers devil, the draftsman of the Proclamation had merely reproduced the provisions of Article 150(1) *impissima verba* in drafting the Proclamation or had deliberately supplied an additional ground to better defend the Emergency should it be challenged.

The question for present purposes is what would amount to a threat to economic life justifying a proclamation? The width of the provision leaves little room for reading limitations or restrictions into its application. It can apply in times of natural disasters like floods or drought or other calamities that cause damage to industry or agriculture like widespread crop failures. It can be invoked if the country's principal foreign exchange earners like rubber, palm oil or tin face collapse in the overseas market.⁴⁶ In India, there is a specific provision that authorises declaring a financial emergency: see Article 360(1), which reads:

"If the President is satisfied that situation has arisen whereby the financial stability or credit of India or any part of the territory thereof is threatened he may by a Proclamation make a declaration to that effect".

During the period of such an emergency the Central Government is authorised to give directions to any State to observe "such canons of financial propriety" as specified in the directions. It is also not unknown in developing countries for a national economic recovery to be undertaken as an emergency action. For example, Nigeria declared a 15 month National Economic Emergency under a 1985 Decree that enabled the President to issue orders and make regulations to revamp the Nigerian economy. The overriding powers given to the President enabled him to give directions to the public and private sector of the economy, to procure the aid of the Armed Forces Ruling Council and to make

46. For example, Ecuador declared an emergency in 1981-82 because of the decline in the price of its oil causing an economic crisis: see Chowdhury, *infra*, p.19.

regulations for the development or stabilisation or for the correction of distortions in the economy.⁴⁷ In November 1987, the President of Sierra Leone proclaimed a state of "public economic emergency" in the country. The Proclamation declared that "it appeared to the President that a situation of economic crisis exists in the country which if allowed to continue may lead to a state of public emergency". The Proclamation was inherently vague and ambiguous. It was challenged in legal proceedings on the basis that the constitutional provision under which the President acted was silent on an "economic" emergency. But the argument was rejected by the Sierra Leone Supreme Court which reasoned that the provision which spoke of "a situation" leading to a public emergency was a matter for the sole determination of the President and he was therefore within his power to declare an emergency for reasons of the economy.⁴⁸

A continuous state of underdevelopment as an emergency situation is essentially a third world phenomenon. The International Law Association (ILA) has done focus study on the subject.⁴⁹ The studies revealed the indivisibility of economic and social rights, and civil and political rights.⁵⁰ They also

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47. See Nigeria, National Economic Powers Decree, 1985 (1987) Vol.1 CLB 18.
48. See the case of *The State v. Adel Osman & Ors.* [1988] LRC (Const.) 212. In the United States, during the period of economic recovery from the depression, the Governor of Texas purported to declare martial law in the State to control oil production. On a challenge as to the validity of his action, the Supreme Court held that he had exceeded his authority: *Sterling v. Constantin* 287 U.S. 378 [1932].
49. See Subrota Roy Chowdhury, Rule of Law in a State of Emergency: The Paris Minimum Standards of Human Rights Norms in A State of Emergency (Printer Publishers, London (1988)) pp.17 et.seq.
50. Four important reports are available from the four biennial conferences on the establishment of a New International Economic Order: Belgrade (1980), Montreal (1982), Paris (1984) and Seoul (1986): Chowdhury. Ibid. p.18-19.

highlighted the relationship between depressed economic conditions and lawlessness. The Inter-American Commission on Human Rights noted that violence and unrest in the rural areas of Guatemala were closely connected with the situation of extreme poverty existent there. The concern of international bodies has been with the derogation of human rights in the name of emergency measures taken to combat economic depression. For example, the economically motivated state of emergency in Ecuador as a result of the declining price of its oil saw emergency restrictions on the unrelated areas of the rights of assembly and expression. The ILA has stated that given the time involved in the realization of economic, social and cultural rights, it deprecates economic underdevelopment as per se justifying the declaration of a state of emergency.⁵¹

The most likely threat to the economic life of Malaysia may come from interferences with supplies and services essential to the life of the community. The implicit recognition of this is given in the principal emergency statute enacted under Article 150, namely, the Emergency (Essential Powers) Act, 1979.⁵² By section 2(1), the Yang di-Pertuan Agong is empowered to make emergency regulations having the force of law which "he considers desirable or expedient" for securing, inter alia, the "supplies and services essential to the life of the community". In addition thereto, his specific rule-making powers cover the making of provisions for: (a) trading, storage, exportation, importation, production and manufacture, and (b) supply and distribution of food, water, fuel, light and other necessities.⁵³ It is

51. Chowdhury. Ibid pp.18-19.

52. Its precursor was the Emergency (Essential Powers) Ordinance No. 1 of 1969 which in turn was modeled on the Emergency (Essential Powers) Act, 1964.

53. Section 2(2), clauses (m) and (n).

axiomatic that a crisis in any of these areas, if of sufficient magnitude to be considered grave, could be considered a threat to economic life. The causative effects are infinite, but in terms of those created by human agency, the most likely source is obstructive industrial action. The British experience in the use of emergency powers under their Emergency Powers Act, 1920 is instructive. The definition of an emergency under that statute covers events that interfere with the supply and distribution of food, water, fuel etc, or deprive the community or any substantial portion of it with the essentials of life. The phrase "essentials of life" is not defined but the British Government used it specifically on three occasions to justify proclaiming an emergency on the ground that the economy was damaged.⁵⁴ This was done in respect of the 1948 and 1949 dock strikes and the 1966 seamen strike.

Likewise, any form of industrial action in Malaysia that causes interference with supplies and service to the public, if sufficiently grave, could be considered "economic sabotage" and grounds for an emergency.⁵⁵ The Industrial Relations Act, 1967 lists out a wide range of services both in the

54. See Gillian Morris, Strikes In Essential Services, op.cit. note 12 at p.52. The learned author, however, takes the view that the interpretation given by the Government was not justified as being "inordinately wide": *ibid.* In Cornelius P. Cotter's, Constitutionalizing Emergency Powers: The British Experience (1953) *Stanford Law Review* 382, it is observed that proclamations of emergency under the Emergency Powers Act were issued on five occasions, all involving worker's strikes: (1) the 1921 coal strike, (2) the London tramways strike, 1924, (3) the General Strike, 1926 (4) the 1948 Dock strike, and (5) the 1949 Dock strike (pp. 398-402).

55. The mordant observation by GTS Sidhu in his, Emergency Powers under Article 150 (1990) *INSAF Vol.XXI No. 1* at p.80 that even a strike by workers would justify proclaiming an emergency may have more than a ring of truth to it. The New Zealand case of *Hewlett v. Fielder* [1951] *NZLR* 755 provides an example of resort to emergency powers to deal with a nation-wide dock strike.

public and private sectors that are considered essential services.⁵⁶ Theoretically, it is possible that a major interruption of these services may provide grounds for an emergency as threatening the economic life of the country. The likelihood of services and supplies being interrupted by strike-action, however, is remote. The Industrial Relations Act, 1967 is tightly drafted against widespread strike action by trade unions. There are several control mechanisms against wild-cat strikes and, additionally, the continuance of a strike action becomes illegal once the dispute is referred to the Industrial Court or, with regard to a public sector dispute, where the Yang di-Pertuan Agong has referred or refused to refer the dispute to the court or to a special panel created by the Minister of Human Resources.⁵⁷

In the past, when there were disputes in essential services, the Government had not resorted to its emergency powers. The closest instance occurred in February 1979 when there was a dispute in the national airlines over a collective agreement. A widespread work-to-rule involving technical staff and cabin crew crippled flight schedules and caused the Government to close the airlines for two days. The Government invoked its powers under the Internal Security Act (ISA) to preventively detain eighteen persons, namely union officials, without resort to the provisions of the Industrial Relations Act to deal with the situation.⁵⁸ This was the first time that the ISA was

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56. See the Schedule to the Industrial Relations Act, 1967. The essential services listed are banking, electricity, fire, port, airport, postal, radio and telecommunications etc.
57. See the present writer's, The Control And Regulation of Strikes And Lock-outs in Malaysia (1991) 2 CLJ iii.
58. The Internal Security Act, 1960 is a law passed under Article 149 of the Federal Constitution which enables the making of special law to deal with subversion or organised violence or the threat of it from any body of persons.

used to deal with purely an industrial dispute. It resulted in considerable pressure being applied by the International Transport Workers Federation for the release of the detainees. It's Asian representative located in Malaysia, was one of those detained. There was for some time a boycott of the handling of Malaysian Airline planes by affiliated workers in London and Australian airports. The detained union officials were shortly released except for two who were kept in detention for a period of about 76 days.⁵⁹

The airline strike experience illustrates that inspite of the provisions of the Industrial Relation Act, the Government could resort to its emergency powers to deal with a crippling labour strike that threatens supplies or the economic life of the community.

The Threat to Public Order

"Public Order" as a ground for an emergency is of recent origin. It was first introduced in the 1981 amendments to Article 150 and now constitutes the third basis, in addition to "security" and "economic life", upon which an emergency can be proclaimed.⁶⁰ It is of wider import than the previous head of "internal disturbance" which was deleted from Article 150 by the 1963 amendments.

The absence of a definition of the term "public order" in the Constitution leaves it open for a wide application. Unlike in Britain where the offences constituting a threat to public order are contained in a single

59. Interview with P. Kuppusamy, one of the two detainees. Mr. Kuppusamy was an ex-airline staff who at the material time was acting as an adviser to the airlines union: see also New Straits Times, 22 February 1979. He is presently a legal practitioner in Kuala Lumpur.

60. See the discussion in Chapter V on the Constitution (Amendment) Act A514 of 1981.

statute, the Public Order Act 1986,⁶¹ in Malaysia they are found variously in a number of statutes eg. the Penal Code, the Police Act 1967 and the Minor Offences Ordinance 1950. The offences therein are a codification of the traditional common law offences relating to public order, like breaches of the peace, disorderly conduct, unlawful assembly or procession. However, in the constitutional sense a threat to security would have a wider context. This emerges from the considerable Indian jurisprudence on the subject. It has been said by the Indian Supreme Court that offences against public order may be divided into two categories: (a) major offences affecting the security of the State, and (b) minor offences involving breaches of purely local significance: see *Romesh Thappar v. State of Madras*,⁶² and *Brij Bhushan v. State of Delhi*.⁶³ In *Romesh Thappar's* case, public order was defined as an expression of wide connotation. It was said to signify the state of tranquility prevailing among members of a political society as a result of the internal regulations enforced by the Government which they have instituted.⁶⁴ In the later case of *Superintendent Central Prison v. Ram Manohar Lohia*,⁶⁵ the Indian Supreme Court described "public order" as synonymous with public safety and tranquility, and the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war affecting the security of the State. It has also been observed that, "public

61. However, see criticism of the statute in David Bonner and Richard Stone, The Public Order Act, 1986: Steps In the Wrong Direction? (1989) PL 202.

62. AIR 1950 SC 124.

63. AIR 1950 SC 129.

64. At p.127.

65. AIR 1961 SC 633 at 637.

order" is not just "law and order"; it has a wider connotation than "law and order". In *Ram Manohar Lohia v. State of Bihar*,⁶⁶ the Supreme Court neatly described the difference as not a mere disturbance of law and order. It observed that the contravention of law always affects law and order but before it can be said to affect public order it must affect the community or the public at large. Likewise the expression "in the interest of public order" has been described as distinguishable from the expression "for the maintenance of law and order". "Law and order" is of local significance and refers invariably to disorder of comparatively lesser gravity. The expression "in the interest of public order" was thus read to include acts which are not only acts which disturb the security of the State but also acts which disturb public tranquility or are breaches of the peace: see *Madhu Limaye v. S.D.M. Monghyr*.⁶⁷ In *Ram Bali v. State of W. Bengal*,⁶⁸ the Indian Supreme Court ruled that "public order" is an elastic concept which is also wider than the "security of the State".

The Indian approach has considerably influenced the Malaysian courts in their appraisal of the term "public order". However, because of its recent origins in Article 150, none of the cases deal with the term in the context of our present discussion. The *Romesh Thappar* definition was followed by the Malaysian Court in *Re Tan Boon Liat*⁶⁹ dealing with preventive detention under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. The Ordinance provides for detention without trial where a person is said to act

66. AIR 1966 SC 740 at 758.

67. AIR 1971 SC 2486 at 2495.

68. AIR 1975 SC 623.

69. [1976] 2 MLJ 83.

in a manner prejudicial to public order. Abdoolcader J. (as he then was) said that the term was not necessarily antithetical to disorder but that danger to human life and safety and the disturbance to public tranquility must necessarily fall within the purview of the expression.⁷⁰ The court adopted what was said in *Romesh Thappar* on public safety as ordinarily meaning the security of the public and their freedom from danger.⁷¹ Although *Re Tan Boon Liat* is a preventive detention case, there is every likelihood that the treatment given in that case to the term "public order" will be adopted by a Malaysian court in any future case that discusses the term in the context of Article 150.

The inclusion of "public order" in Article 150, inspite of the presence of the all embracing term "threat to security" would suggest strongly that "public-order" was intended to have a wider signification than "security". The description given in the Indian case of *Ram Bali* with regard to these two terms provides support for this hypothesis. In the result, a purely local disturbance in a part of the country, which ordinarily would not amount to a threat to the security of the whole nation, could nevertheless be a ground for declaring an emergency. Thus, if "public order" had been present as a ground in Article 150 during the Sarawak Emergency, the occurrence of the several demonstrations in the capital would have provided sufficient cause for declaring an emergency, without resort to the "security" ground.⁷²

70. At p.86 D-F.

71. For "public safety" as a ground for declaring an emergency, see the West Indian case of *Christopher Maximea v. Attorney General* [1974] 21 W.I.R. 548.

72. In the discussions above it was pointed out that there was a certain degree of confusion as to the source of the so-called "threat to security". In the Federal Court, H.T. Ong F.J. saw it as emanating from the Communists but the Privy Council spoke of the danger emerging from the remnants of Indonesia's Confrontation that had only recently ended.

The introduction of "public order" as a ground for an emergency has considerably broadened the scope of Article 150. Given the disinclination of the Courts to review the satisfaction of the Executive as to the sufficiency of the facts upon which public order is said to be threatened, the declaration of an emergency on "public order" grounds is virtually placed beyond the pale of challenge.

The "Imminent Danger" Power under Article 150(2)

The amendment of Article 150(2) in 1981⁷³ has left no room for doubt that it was the intention of Parliament to enlarge the powers of the Executive to declare an emergency and perpetuate it without early Parliamentary sanction.⁷⁴

The new Article 150(2) enables a proclamation of emergency to be issued even before the actual occurrence of the event which is said to threaten "security", "economic life" or "public order", if there is "an imminent danger" of its occurrence. "Imminent danger" is therefore the touchstone for determination of whether an emergency under Article 150(2) is justified.

The obvious purpose behind the new clause (2) is to enable an emergency to be declared as a preventive measure.⁷⁵ It is no longer necessary for the

73. See the discussion in Chapter V.

74. The deleted Article 150(2) required the Executive to summon Parliament "as soon as it is practicable" if an emergency was proclaimed when Parliament was not sitting.

75. Preventive action in cases of imminent hostilities is not unknown. As Dixon J. said in the *Australian Communist Party* case [1950] 83 CLR 1 at 199: "It would, I think, be an error to draw a definite line between a period after the commencement of actual hostilities and the period before they commence. It is inappropriate to the altered character of war and the changes that appear to have taken place in the manner of commencing war. Imminence of war will enlarge the application of the fixed concept of defence".

Government to rely upon the occurrence of some event or the outbreak of some incident, which may be said to constitute a threat to security, economic life or public order. It would be sufficient if the Government had intelligence reports upon which it based its belief that there was a threat to the nation. The reliance on intelligence reports was explicitly recognised by the Privy Council in *Ningkan's* case.⁷⁶ However, that decision was delivered before the present set of amendments. It would follow that the objective behind the amendment was merely to make the position explicit; but more importantly, it is to declare as a constitutional imperative that emergency powers may be invoked not responsively but preventively.

The ability to rely on intelligence reports to declare an emergency, without reliance on any outward manifestations of threat or disorder, makes a legal challenge to the vires of an emergency nigh impossible. In an emergency declared under clause (2), the intelligence reports upon which the Government acted would be of central importance. The crucial question from an evidential standpoint is, would they be admissible in a court of law? In *Ningkan* itself, the Privy Council seemed to suggest that it was not obligatory for the Government acting on informations and apprehensions to make them known to the person challenging the proclamation.⁷⁷ *Ningkan*, however, should not be taken as having said the last word on the subject. The transcript of Counsel's arguments in the Privy Council does not show that the point was argued with any focus.⁷⁸ The observation of the Privy Council on this subject may

76. *Ningkan v. Government of Malaysia* [1970] AC 379 at p.390: "... (The) steps taken by the responsible Government may be founded on informations and apprehensions which are not known to, and cannot always be made known to, those who seek to impugn what has been done".

77. *Ibid.*

78. See Counsels' arguments reproduced in [1970] AC 379 at pp.383-386.

therefore be taken as obiter dicta. The admissibility of intelligence reports, which undoubtedly would form part of the cabinet papers upon which the satisfaction of the Cabinet was based to declare an emergency, raises the vexed question of crown privilege⁷⁹ and security-question immunity from scrutiny.

In a practical sense, the two considerations merge where the intelligence reports sought production are security related. There has been an impressive development in many jurisdictions towards disclosure and scrutiny over the last two decades. In England, the break-through was in *Conway v. Rimmer*⁸⁰ where the circumscribed-protectionist approach in *Duncan v. Cummel-Laird Co. Ltd*⁸¹ was discarded. The recent decisions of the House of Lords in *Burmah Oil Co Ltd v. Bank of England*⁸² and *Air Canada v. Secretary of State for Trade*⁸³ have expanded on the change made in *Conway v. Rimmer*. In the *Air Canada* case, production was sought of the ministerial documents upon which the policy was formulated to increase the landing charges at London airport. The current judicial thinking on the claim of privilege was given by Lord Scarman as follows:

"Faced with a properly formulated certificate claiming public interest immunity, the court must first examine the grounds put forward. If it is a "class" objection and the documents (as in *Conway v. Rimmer*) are routine in character, the court may inspect so as to ascertain the

79. Crown privilege is a rather imprecise description of the immunity sought by the Government against the production of certain class of documents in court as being injurious to the public interest: see criticism of the term "crown privilege" levied by Lord Reid in *Rogers v. Secretary of State* [1972] 2 AER 1057 at p.1060 c-e.

80. [1968] 1 AER 874 HL; [1968] AC 910.

81. [1942] 1 AER 587 HL; [1942] AC 624.

82. [1979] 3 AER 700.

83. [1983] 1 AER 910.

strength of the public interest in immunity and the needs of justice before deciding whether to order production. If it is a "contents" claim, eg. a specific national security matter, the court will ordinarily accept the judgment of the minister. But if it is a class claim in which the objection on the face of the certificate is a strong one, as in this case where the documents are minutes and memoranda passing at a high level between ministers and their advisers and concerned with the formulation of policy, the court will pay great regard to the minister's view (or that of the senior official who has signed the certificate). It will not inspect unless there is a likelihood that the documents will be necessary for disposing fairly of the case or saving costs. Certainly, if, like Bingham J in this case, the court should think that the documents might be "determinative" of the issues in the action to which they relate, the court should inspect, for in such a case there may be grave doubt which way the balance of public interest falls (see *Burmah Oil Co Ltd v. Bank of England* [1979] 3 All ER 700 at 725-726, 734 [1980] AC 1090 at 1134-1135, 1145). But, unless the court is satisfied on the material presented to it that the documents are likely to be necessary for fairly disposing of the case, it will not inspect for the simple reason that unless the likelihood exists there is nothing to set against the public interest in immunity from production".⁸⁴

The position taken in England is similar to the liberal approach developed in Australia since the epochal decision of the High Court in *Sankey v. Whitlam*⁸⁵ which was relied upon by Lord Wilberforce and Lord Scarman in deciding the *Burmah Oil Co Ltd* case in the House of Lords. It was an exceptional case where criminal information was laid against the then Prime Minister Mr. Whitlam and his colleagues of criminal conspiracy in seeking certain foreign loans. The case on conspiracy was based on the production of certain government documents. Lord Scarman found the following passage in Gibbs Ag CJ's judgment helpful:

"For these reasons I consider that although there is a class of documents whose members are entitled to protection from disclosure irrespective of their contents, the protection is not absolute, and it does not endure for ever. The fundamental and governing principle is that documents in the class may be withheld from production only when

84. At p. 924 c-g.

85. [1978] 142 CLR 1.

this is necessary in the public interest. In a particular case the court must balance the general desirability that documents of that kind should not be disclosed against the need to produce them in the interests of justice. The court will of course examine the question with especial care, giving full weight to the reasons for preserving the secrecy of documents of this class, but it will not treat all such documents as entitled to the same measure of protection - extent of protection required will depend to some extent on the general subject matter with which the documents are concerned. If a strong case has been made out for the production of the documents, and the court concludes that their disclosure would not really be detrimental to the public interest, an order for production will be made. In view of the danger to which the indiscriminate disclosure of documents of this class might give rise, it is desirable that the government concerned, Commonwealth or State, should have an opportunity to intervene and be heard before any order for disclosure is made. Moreover no such order should be enforced until the government concerned has had an opportunity to appeal against it, or test its correctness by some other process, if it wishes to do so (cf. *Conway v. Rimmer*)".⁸⁶

The High Court ruled that except for the Loan Council documents, the other government papers were subject to production.

The positive development towards disclosure in England, Australia and elsewhere⁸⁷ has led to the hope that the reservation expressed in *Ningkan's* case about disclosure of intelligence reports may now be overridden.⁸⁸ However a number of factors militate against this desirable conclusion. In the first place, the cases have themselves recognised that security-related cabinet papers would in all probability still be protected against disclosure. In the *Air Canada* case, both Lord Scarman and Lord Fraser seemed prepared to give protection against disclosure more easily to this class of documents. Lord Scarman said: "If it is a "contents" claim eg. a specific national security matter, the court will ordinarily accept the judgment of the

86. At p.43.

87. Eg. in the USA, the Supreme Court decision in *Nixon et al v. United States* 418 U.S.683 [1975].

88. See H.P Lee, Emergency Powers (Law Book Co Australia, 1984) at p.284.

minister".⁸⁹ In his judgment Lord Fraser spoke of the immunity given generally to Cabinet papers: "...while Cabinet documents do not have complete immunity, they are entitled to a high degree of protection against disclosure".⁹⁰ Secondly, the position in Malaysia, as in India,⁹¹ is statutorily governed by the Evidence Act 1950. The following are the relevant provisions:

"Section 123: No one shall be permitted to produce any unpublished official records relating to affairs of State, or to give any evidence derived therefrom, except with the permission of the officer at the head of the department concerned, who shall give or withhold permission as he thinks fit, subject, however, to the control of a Minister in the case of a department of the Government of Malaysia, and of the Chief Minister in the case of a department of a State Government.

Section 163: When a party calls for a document which he has given the other party notice to produce, and the document is produced and inspected by the party calling for its production, he is bound to give it as evidence if the party producing it requires him to do so and if it is relevant".

Indian decisions dealing with the identical provisions above have tended to concentrate on the right of the court to inspect the document. But otherwise there is the reiteration that the foundation of the law is the same as in England. The judgment in the leading case on the subject, *State of Uttar Pradesh v. Raj Narain*,⁹² however, seems to suggest that Indian courts would be prepared to exclude production on a mere class-basis and not content basis. The court said: "It is not that the contents contain material which it would be damaging to the national interest to divulge but rather that the document would be of a class which demanded protection. To illustrate the class of

89. Op.cit at p.924 d-e.

90. Ibid at p.915 c-d.

91. The Evidence Act of Malaysia is in pari materia with the Indian Evidence Act, 1878. Indian decisions on the subject are therefore of high persuasive value in the Malaysian courts.

92. AIR 1975 SC 865.

documents would embrace Cabinet papers, Foreign Office dispatches, papers regarding the security of the State and high level inter-departmental minutes".⁹³ For our purpose it is significant to note that the Indian approach has been adopted by the Malaysian Court in *Sapuran Kaur v. B.A. Rao*,⁹⁴ a case involving production of the report of a committee of inquiry into a hospital death. The court acknowledged the new developments in the other jurisdictions and seemed prepared to follow them. But in reconciling the competing claims of the public and private interest, Raja Azlan Shah FJ (as he then was) fell back on the class-basis exclusion posited by the Indian courts: "Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents, or departmental policy documents, private interest must give way".⁹⁵

93. Ibid. This view may be contrasted with Lord Fraser's opinion in the *Air Canada* case, supra, that even Cabinet documents would not be protected from disclosure if the case is about the misconduct of a Cabinet minister: op.cit.p.915C. It is a matter of surmise whether the subsequent Supreme Court decision in *SP Gupta v. Union of India* AIR 1982 SC 149 (popularly called "the Judges case" because it involved the non-consensual transfer of High Court judges) liberalised the position in spite of the strong emphasis placed by Bhawati J. on the open government concept. The impugned document there was not security-related unlike the document in the *Raj Narain* case, supra which was a book listing out the security precautions to be taken when the Prime Minister is on tour.

94. [1978] 2 MLJ 146.

95. Ibid. The Malaysian decision may have defined the position too narrowly in comparison to the developments elsewhere if it is understood to say that Cabinet papers as a class are excludable from production. The correct position, it is submitted, with regard to the developments on the subject, and under a provision similar to the Malaysian Evidence Act is from the unlikely jurisdiction of Tonga in the decision of their Supreme Court in *Pohiva v. Prime Minister of Tonga* [1988] LRC (Const) 949. It was a case where a public servant was suing the government for wrongful termination of his services, a decision which was taken by the Cabinet. In that connection he sought production of the Cabinet papers

There is no room for undue optimism that the burgeoning trends elsewhere in the Commonwealth towards open government⁹⁶ and limiting the claims of privilege would impel the Malaysian courts towards directing disclosure of the intelligence reports upon which the Government acted under Article 150(2). It is axiomatic that without the intelligence reports no court of law will be able to determine if there was "imminent danger" posed by the possible occurrence of the events.

"Imminent danger" is part of the emergency jurisprudence evolved under the European Convention of Human Rights. It was a determinant factor in both the *Lawless* case⁹⁷ and the *First Greek* case.⁹⁸ In *Lawless*, the Irish

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95. on his dismissal. Martin C.J. ruled in favour of production after referring to the new developments elsewhere in the Commonwealth. The court also considered that in Tonga, the Cabinet makes decisions on matters which in other countries may be delegated to minor government officials:

"Such a wide variety of functions cannot all attract the same degree of immunity. I put the test in relation to Cabinet papers in this way: What is the possible prejudice to the executive if they are disclosed? What damage would it do to the machinery of government? The answer in the circumstances of this case must be: none at all. What is sought are the documents considered by the Cabinet and decisions of the Cabinet. That decision is at the very heart of this action. It relates solely to the Plaintiff as an individual. I cannot at this stage see that it would involve any important policy considerations, but if I am wrong about that it will appear inspection by the court and such documents may be excluded". (p. 956b-d).

96. A reversal of trends in Malaysia is discernible in the passing of the Official Secrets (Amendment) Act 1986 which further enlarged the category of documents protected by the Official Secrets Act 1972: For a scathing criticism of the amendments see, (1986) INSAF Vol.XIX No.4 (Editorial), and Bar Council of Malaysia Memorandum reproduced in INSAF, supra., pp.12 et.seq.

97. See note 20, supra.

98. See note 18, supra.

Government had declared the emergency on 5 July 1957 the day after violent incidents took place in Northern Ireland. Moreover, evidence was given that the majority of the 100 IRA prisoners in detention were to be released shortly. Thus the Commission, as did the Court, held that the threat of violence and disturbance was imminent. In contrast, in the *First Greek* case, the emergency declared by the Colonels on 21 April 1967 after seizing power was held to be unjustified on an evaluation of the evidence tendered by the respondent government. A judicial appraisal was possible in both cases because of the evidence made available to the tribunal.

It should be noted however that the "imminent danger" contemplated under Article 150 is for preventive purposes whereas the inquiry before the European bodies was related largely to post-incident emergencies. Thus the European tribunals were enquiring into whether the incidents relied upon by the respondent governments "threatened the life of the nation" under Article 15(1) of the European Convention. Notwithstanding this distinction, the exacting approach taken by the European court should serve as a positive guideline to any national court engaging in a like inquiry. The cannon of construction propounded by Lord Maugham in *Liversidge v. Anderson*⁹⁹ that emergency legislation enacted to ensure the public safety should be interpreted to promote rather than defeat its efficacy should, in the writers opinion, be given the death knell, together with the fate suffered by the case itself in the subsequent rights-based jurisprudence that developed in English administrative law.¹⁰⁰ Thus "imminent danger" should be read restrictively as

99. [1941] 3 AER 338.

100. In the subsequent cases of *IRC v. Rossminster* [1980] AC 953 (Lord Diplock) and *Exparte Khawaja* [1984] AC 74 (Lord Scarman), the House of Lords accepted that the majority in *Liversidge v. Anderson* were wrong and that Lord Atkin's dissent in *Liversidge* reflected the correct law.

as demanding a convincing degree of proof, rather than expansively, if only because of the complete change in legal character to constitutional government that is brought about by a proclamation of emergency.

The Satisfaction Of The Yang di-Pertuan Agong

Under Article 150(1) a proclamation of emergency is made if the Yang di-Pertuan Agong "is satisfied" that a grave emergency exists. Two questions arise in relation to this:

- (a) Does the Yang di-Pertuan Agong have a personal discretion in the matter?; and
- (b) Is the satisfaction justiciable?¹⁰¹

The constitutional requirements of declaring an emergency may conveniently be discussed under the above headings.

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100. The Malaysian adherence to the majority judgment in *Liversidge's* case (see *Theresa Lim Chin Chin v. Inspector General of Police* [1988] 1 MLJ 293; [1988] LRC (Const) 477) suggests merely a judicial preference, without profering any convincing reason why the express rejection of the majority judgment by the House of Lords is not being recognised. In contrast, the Singapore Court of Appeal recognised the inconsistency that will follow by this posture and discarded the subjective test propounded by *Liversidge*: see *Ch'ng Suan Tze v. Minister of Home Affairs* [1989] 1 MLJ 89. The decision was subsequently overruled by legislative amendments in Singapore that reinstated the subjective criteria. Similar amendments were made in Malaysia.

101. The justiciability question is discussed in Chapter IX.

(a) Does the Yang di-Pertuan Agong Have a Personal Discretion?

The suggestion that the Yang di-Pertuan Agong may exercise a personal discretion in declaring an emergency was first espoused in writing by Professor Hickling.¹⁰² He relied on certain passages in the majority judgments of the *Ningkan* case in the Federal Court.¹⁰³ The reliance was on the remarks of Barakbah LP and Azmi CJ that the Yang di-Pertuan Agong is "the sole judge" of whether the security or economic life of the country was threatened. The Lord President had said:

"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 be satisfied".¹⁰⁴

In his judgment Azmi CJ said:

"In my view therefore notwithstanding the qualifying words the Yang di-Pertuan Agong in the exercise of his power under Clause (1) of Article 150 must be regarded as the sole judge of that. He alone could decide whether a state emergency whereby the security or economic life of the Federation was threatened, did exist".¹⁰⁵

Professor Hickling therefore concluded that this authoritative dicta strongly supports the belief that a personal discretion rests in His Majesty, requiring as a condition precedent his subjective satisfaction that events justifying a state of emergency exist.¹⁰⁶

102. R.H. Hickling. The Prerogative In Malaysia (1975) 17 Mal.L.R. 207 at 222-223.

103. *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 1 MLJ 119 per Barakbah LP and Azmi CJ.

104. At p.122D.

105. At p.124 D-E.

106. Hickling says: "Such great powers have no doubt been entrusted to the Yang di-Pertuan Agong with the certain feeling that they will be reasonably exercised" (p.221). He makes the further intriguing

The viewpoint gained further currency from the contents of an Affidavit submitted to the High Court by the former Prime Minister Tun Abdul Razak in 1975 in connection with the case of *N. Madhevan Nair v. Government of Malaysia*.¹⁰⁷ In his Affidavit the Prime Minister had deposed:

"I refer to para.12 of the affidavit of N. Madhevan Nair and state that owing to the grave emergency threatening the security of the country during the May 13 incident, I personally presented the said Ordinance to His Majesty the Yang di-Pertuan Agong at Istana Negara for his consideration and approval. Having considered the said Ordinance and after being satisfied that immediate action was required for securing public safety, the defence of Malaysia, the maintenance of public order and of supplies and services essential to the life of the community, His Majesty the Yang di-Pertuan Agong approved the promulgation of the said Ordinance accordingly".¹⁰⁸ (emphasis added)

The words emphasised lent credence to the belief that it was the Government's own stand that the Yang di-Pertuan Agong has a personal discretion in the matter.¹⁰⁹ The argument was that His Majesty could, if not personally

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106. observation: "A shrewd Head of State can read and interpret a Constitution as well as, and sometimes better than his legal advisers; and in the end the brutal facts of political reality will prevail". The desirability of some sort of check to executive authoritarianism has found currency in Australia and Canada, the suggestion being that it be vested in reserve vice-regal powers. Dr Eugene Forsey of Canada has written: "The danger of royal absolutism is past; but the danger of Cabinet absolutism, even of prime ministerial absolutism, is present and growing. Against that danger the reserve power of the Crown, and especially the power to force or refuse dissolution, is in some instances the only constitutional safeguard... if a Prime Minister tries to turn parliamentary responsible government into unparliamentary irresponsible government, then only the Crown can stop him": see George Winterton, Parliament, The Executive And The Governor-General (Melbourne University Press, 1983) at p.153.
107. [1975] 2 MLJ 286. The case was a challenge to the validity of the Emergency (Essential Powers) Ord. No.1 of 1969 made by the Yang di-Pertuan Agong after Proclaiming a nation-wide state of emergency on 15th May, 1969.
108. At p.288 I.
109. See Lim Kit Siang, "The Wayang Kulit" Debate (1983) ALIRAN Quarterly Vol.3 No.3, 9 at 12.

satisfied that events call for an emergency, refuse to issue a Proclamation notwithstanding the advice tendered by the Cabinet. It is obvious that the Government must itself have nursed some doubts on the question because of the subsequent attempts made to amend the provision and substitute "the satisfaction" of the Yang di-Pertuan Agong for that of the Prime Minister.¹¹⁰ Thus the proposed amendment, which was eventually aborted, read: "If the Prime Minister is satisfied.....". It was evident that the Government was acting to remove all ambiguity that the Yang di-Pertuan Agong could not act on his own in proclaiming a state of emergency.

Unlike the position in India,¹¹¹ where a realistic debate prevails over the powers of the President in declaring an emergency, a closer scrutiny of the question in Malaysia admits of no doubt. In the writer's opinion the majority in *Ningkan* and *Hickling* were decidedly wrong in the view they propounded. The *Hickling* view and its reliance on the majority judgments for

110. The Constitution (Amendment) Act A566 of 1983. The amendments and the unprecedented constitutional crisis it created are discussed in Chapter V.

111. The Indian provision (Article 352(1)) reads: "If the President is satisfied that a grave emergency exists where the security of India or any part of it is threatened.... he may, by Proclamation, make a declaration to that effect....". The subjective form in which the provision is worded has engendered disparate opinions from the Indian Courts as to whether the President has a personal discretion in the matter or could act on his own. For example, in *P. Venkateshamma v. The State of Andhra Pradesh* AIR 1976 AP 1, the view was expressed that "A proclamation to the effect that a grave emergency exists may be made by the President upon his own satisfaction" (p.9) (emphasis added). Further in the significant Supreme Court case of *State of Rajasthan v. Union of India* AIR 1977 SC 1361, dealing with another emergency provision which is similarly worded requiring the satisfaction of the President (Article 356), the court spoke of the satisfaction of the President as a condition precedent to the exercise of the power (para.144 p.1416). The contrary view has been that the President of India as a constitutional head is like the British sovereign, bound to

foundation was effectively rebutted by another academic.¹¹² Professor Jayakumar argues that by reason of Article 40 and case-law, including the *Ningkan* judgments relied upon by Hickling, the Agong does not have a personal discretion in the matter. In his analysis of the majority opinions, the phrase "sole judge" was used in relation to the question whether the Agong's actions under Article 150 were reviewable.¹¹³ His reliance on other case law, before

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111. act on the advice of a council of ministers. Thus in *Ram Jawaya v. State of Punjab* AIR 1955 SC 549 at 556, the Supreme Court declared: "The President has thus been made a formal or constitutional head of the Executive and the real executive powers are vested in the Minister or the Cabinet". See also the more recent case of *Samsher Singh v. Punjab* AIR 1974 SC 2192, where the Supreme Court ruled that the President's "satisfaction" is in reality the satisfaction of his Council of Ministers. The disputation of this view arises from the fact that the Presidency of India is an elective post and not an appointment: see discussion generally in K.V. Kuriakose, The President of India: Status And Position (1987) Vol.XIV Indian Bar Review 237. The position in India currently would seem to have been settled by the Constitution (44th) Amendment Act, 1978 which by a new clause (3) requires that the President should not act in proclaiming an emergency unless the decision of the Cabinet that such a proclamation be issued has been communicated to him in writing. Thus Basu's Commentary reads: "This satisfaction, however, is not a personal satisfaction of the President but that of his Council of Ministers..... This has not only been affirmed but, buttressed by the new provision in clause (3)": see Basu's Commentary On The Constitution of India Vol.IV Sixth Edn. p.197.

112. Professor S. Jayakumar, Emergency Powers In Malaysia: Can the Yang Di-Pertuan Agong Act In His Personal Discretion And Capacity? (1976) 18 Mal. L.R. 149; see also his "Legal Aspects of Emergency Powers In Malaysia" (1970) Law Times 27 at 28.

113. At p.154. It may be noted, as was done by Ong FJ. (p.125 E-F) that it was the Government's case itself that it was on Cabinet advice that the Yang Di-Pertuan Agong proclaimed the Emergency. In Ong FJ's words "This fact was never denied and no attempt was ever made by the Cabinet to disclaim responsibility" (Ibid). It would be reasonable to assume therefore that no argument was advanced by Counsel for the Government that the Agong had acted on his personal satisfaction. The remarks by the majority could not therefore relate to the proposition contended for by Professor Hickling that the Yang Di-Pertuan Agong has a personal discretion on being satisfied whether to declare an emergency.

and since the *Ningkan* decision in the Federal Court, is however, more compelling. For example, in the *Ningkan* litigation at the earlier stage,¹¹⁴ Pike CJ repelled the argument that an action could not be brought challenging the proclamation under Article 150 because the Yang di-Pertuan Agong is immune from suit. In his judgment he said, inter alia, that the Agong is bound to act on the advice of the Cabinet and that his powers under the provision cannot be analogous to the prerogative powers exercisable by the British sovereign.¹¹⁵ In the later case of *N. Mahdevan Nair v. Government of Malaysia*,¹¹⁶ Chang Min Tat J. (as he then was) was emphatic that emergency rule does not displace the Yang Di-Pertuan Agong as a constitutional monarch bound to act at all times on the advice of the Cabinet.

The most convincing argument, however, comes from Article 40(1). The provision reads:

"In the exercise of his functions under this Constitution or federal law the Yang Di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet".

Jayakumar argues correctly that as a matter of interpretation, unless it is specified elsewhere in the Constitution that he may act on his own, His Majesty is bound to act on all other matters on the advice of the Cabinet.¹¹⁷ In this regard, reference may be made to Article 40(2) that enumerates three matters in which the Agong has a personal discretion: the appointment of the

114. *Ningkan v. Tun Abang Hj Openg (No.2)* [1967] 1 MLJ 46. The case was concerned with the Defendant's application to strike out the pleadings on the ground of the Agong's immunity from action under Article 32(1).

115. At p.47F.

116. [1975] 2 MLJ 286 at 289.

117. Op.cit. p.150. See also Abdoolcader J. in *Merdeka University Bhd v. Government of Malaysia* [1981] 2 MLJ 356; on appeal [1982] 2 MLJ 243.

Prime Minister, the dissolution of Parliament, and the convening of a meeting of the Conference of Rulers. The omission of the emergency power under the listing provides a compelling argument that the constitutional scheme did not intend that the Yang Di-Pertuan Agong should have a personal discretion in the matter. Nevertheless, since the Hickling-Jayakumar debate, there has come the decision of the Privy Council in *Teh Cheng Poh v. Public Prosecutor*.¹¹⁸ Lord Diplock said in relation to the power of His Majesty to make laws under Article 150(2), but, which undoubtedly is of wider application, the following:

"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. So when one finds in the Constitution itself or in a 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".¹¹⁹

Although a debate had previously ranged on the subject, there can be no doubt now that the Privy Council opinion settles the point firmly that the Yang di-Pertuan Agong does not have a personal discretion under Article 150(1) but has at all times to act on Cabinet advice.¹²⁰

118. [1979] 1 MLJ 50; [1980] AC 458.

119. At p.52 B-E.

120. The writer shares the opinion expressed by Professor H.P. Lee that the Privy Council decision settles the question once and for all: see H.P. Lee, Emergency Powers In Malaysia, in *The Constitution of Malaysia: Further Perspectives And Developments* Ed. Suffian, Trindade & H.P. Lee (OUP, 1986) at p.142.

The Act of Proclamation: Formalities And Significance

Clause (1) of Article 150 requires the Yang di-Pertuan Agong, if satisfied that a grave emergency exists, to "issue a Proclamation of Emergency making therein a declaration to that effect". Ex facie the provision does not require that the Proclamation be issued in any particular form or specify a requirement for its publication. It may be contrasted with the emergency provisions of some Commonwealth countries where the stipulation is made that the Proclamation shall be by way of publication in the gazette. Such a requirement has ensured that a state of emergency is not brought about by a mere broadcast on radio or television. For example, Section 2(1) of the Emergency Powers Ordinance, 1971 of Trinidad And Tobago provides that the Governor-General "may by Proclamation in the Royal Gazette declare a State of Emergency". In *Kelshall v. Pitt et al*,¹²¹ the High Court of that country had to consider whether the radio broadcast by the Prime Minister on the night of October 19, 1971 that a state of emergency had been declared was sufficient. This question had direct bearing on the validity of a preventive detention order made that same evening. Under the relevant law the detention could only be lawful if it was made in the course of a public emergency. As events went the Proclamation was published in the Gazette the next day, October 20, and released to the public only on October 22. The High Court had little hesitation in concluding that the Proclamation came into force only when the publication in the Gazette was made and consequently the detention order was invalid.¹²²

121. [1971] 19 W.I.R. 136.

122. Malone C.J. was of the view that the essential requirement was the making of the Proclamation public and that publication in the Gazette

Another instance of an oral announcement of a state of emergency was in 1988 in the African state of Lesotho. On 25 February 1988, the Minister of Defence and Internal Security of Lesotho broadcast over radio a state of emergency on account of the increased incidences of crimes, house-breaking, theft of motor vehicles and stock-theft. The necessary publication of the proclamation in the Government Gazette was not effected until 5 April 1988. Section 3(1) of the Emergency Powers Act 1982 provided that "the Prime Minister may, by Proclamation in the Gazette, declare that a state of emergency exists". The issue whether certain detentions made after the broadcast but before the publication in the Gazette were valid came up for consideration in the case of *The Law Society of Lesotho v. Minister of Defence & Internal Security*.¹²³ Under the statute concerned, a detention without trial could not be effected otherwise than under a state of emergency. The High Court of Lesotho held, in reliance on the provision quoted, that a declaration of emergency could only be made by proclamation in the Gazette and not otherwise. Cullinan C.J. ruled that the police actions taken under the authority of the verbal declaration of a state of emergency was unlawful and that the Emergency took effect only when published in the Gazette and not before.

The result in these cases were predictable because of the express requirement for a publication in the Gazette. In so far as Article 150(1) of

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122. was the normal way. However "if that was impossible, the alternative is to plaster it on buildings etc". Section 4(1) of the Ordinance in consideration there provided: "If at any time it is impossible or impracticable to publish in the Royal Gazette any proclamation it shall be lawful to publish the same by notices thereof affixed to public buildings or distributed amongst the public or by oral public announcements" (at p.150 H-I).

123. [1988] LRC (Const) 226.

the Malaysian Constitution is concerned, the question is whether a verbal declaration of a state of emergency would suffice? The question is relevant to determine the validity of emergency action taken during the interlude between the oral announcement of an emergency through the public media and its official publication in the Gazette. An instance of this happened during the sudden outbreak of racial hostilities in Kuala Lumpur on May 13, 1969. The riots had occurred soon after the announcement of the results of the general elections, leading to the declaration of a state of emergency on May 15, 1969. However, on the night of May 13 itself, the caretaker Prime Minister Tunku Abdul Rahman had gone on radio and television to announce to the nation:

"Trouble has broken out in Kuala Lumpur and Security Forces have taken control of the situation and many places considered a security risk. I have no choice now but to declare a State of Emergency in Kuala Lumpur, and if necessary, to declare a State of Emergency throughout Malaysia".¹²⁴ (emphasis added).

However, the official announcement of a Proclamation of Emergency by the Yang di-Pertuan Agong was only on May 15, 1969. The Proclamation was published on the same day in the Government Gazette.¹²⁵ What then was the status of the Tunku's announcement? It is evident that the Tunku could not have intended his announcement on the night of May 13 to operate as a declaration of emergency.¹²⁶ Quite apart from the obvious fact that a Proclamation of

124. See Tunku Abdul Rahman, May 13: Before And After (Utusan Melayu Press Ltd., Kuala Lumpur, October 1969) at p.90.

125. P.U.(A) 145/69. See Appendix B for a reproduction of the Proclamation of Emergency.

126. There was undoubtedly a great degree of uncertainty during the two days or so after the outbreak of racial riots. There is every possibility that what the Tunku had intended to announce was that Kuala Lumpur had been placed under curfew and was in the control of security forces. Elsewhere in his book he writes that on the afternoon of May 14, he summoned the Solicitor General to his home to draft the various legal notifications to declare a State of Emergency throughout the country:

Emergency could only be made by the Yang di-Pertuan Agong, a conjoint reading of Clause (1) and Clause (3) of Article 150 makes it clear that a Proclamation of Emergency has to be formally issued in document form and published. The words of significance in this regard in Clause (1) are "issue a Proclamation" and "making therein a declaration". Further, the requirement under Clause (3) for the proclamation to be laid before both Houses of Parliament affirms the view that the Proclamation must be in document form.¹²⁷ It is obvious also that the Malaysian Government takes the view that the Proclamation must be in document form and published. All the Proclamations in respect of the four emergencies have been in document form and published in the Gazette.¹²⁸ The Proclamations have all taken effect from the date of publication in the Gazette and, save for the circumstances surrounding the 1969 Emergency as discussed, there has been no hiatus between the announcement of an emergency and its formal publication in the Gazette.

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126. Ibid p.99. The confusion of those days is borne out by the fact the original copy of the principal emergency law promulgated by the Yang di-Pertuan Agong on May 15, called the Emergency (Essential Powers) Ordinance No. 1 of 1969, was lost and never recovered: see *Mahadevan Nair v. Government of Malaysia* [1975] 2 MLJ 286 at 289 B-C, where the Court accepted as "not unreasonable" the reason proffered by the Government for the loss of the document that "May 15 was a day of great confusion". See also affidavit of the then Attorney General, Tan Sri Abdul Kadir Shamsuddin, reproduced in the judgment of the Penang High Court in *Teh Cheng Poh v. Public Prosecutor* [1978] 1 MLJ 30, who deposed that it had been misplaced (p.33A-B).

127. The Proclamation of Emergency is a legal instrument and by the Interpretation And General Clauses Ordinance, 1948 which also governs the interpretation of the Constitution (see Article 160(1) read with the Eleventh Schedule) the Proclamation must be published in the Gazette: see definition of "subsidiary legislation" in Section 2(88) of the Ordinance which includes a "proclamation". By Section 22(1) all subsidiary legislation takes effect only upon publication in the Gazette.

128. See Appendix B.

A further question is whether there is a requirement under Clause (1) for the Yang di-Pertuan Agong's satisfaction to be stated in the Proclamation or for a specification in the Proclamation of the nature of the emergency. Clause (1) carries the phrase that the Yang di-Pertuan Agong make a "declaration to that effect". This provision corresponds closely with the Indian provision, Article 352(1), which carries those words:

"If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or armed rebellion, he may, by Proclamation make a declaration to that effect.....". (emphasis added).

The Indian Supreme Court considered the words "to that effect" in the case of *P.L. Lakhanpal v. Union of India*¹²⁹ as to whether it imposed a requirement that the President's satisfaction should be recited in the Proclamation and, further, whether there should be a prescription of the type of aggression faced by the country. Sarkar C.J. said:

"The Article requires only a declaration of emergency threatening the security of India by one of the causes mentioned. The words "to that effect" can have no other meaning. The power to make the declaration can no doubt be exercised only when the President is satisfied about the emergency, but we do not see that the Article requires the condition precedent for the exercise of the power, that is, the President's satisfaction, to be stated in the declaration. The declaration shows that the President must have satisfied himself about the existence of the emergency for in these matters the rule that official acts are presumed to have been properly performed applies..... Then it was said that the Proclamation should have stated the direction from which the external aggression which it mentioned was apprehended. We find nothing in the Article to require the Proclamation to state this".¹³⁰

Should a question of like nature arise in Malaysia in the future, it is likely that the Indian decision dealing with a similar provision would be followed.

129. AIR 1967 SC 243.

130. At p.245 (para.3).

Be that as it may, the format adopted in the four Proclamations of Emergency in Malaysia contain as a common feature a statement of the "satisfaction" of the Yang di-Pertuan Agong.¹³¹

The due authentication of the instrument of Proclamation by the Yang di-Pertuan Agong by the impressing of the public seal may be proved by production of the original or by evidence aliunde. The High Court in *N. Mahadevan Nair v. Government of Malaysia*¹³² was concerned not with the authentication of the Proclamation of Emergency on May 15, 1969 but of the Emergency (Essential Powers) Ordinance No. 1 of 1969 promulgated on the same day. The Court ruled unequivocally that in the absence of the original copy the matter was open for judicial inquiry, and that evidence aliunde by way of affidavit evidence may be admitted to prove the fact of due authentication. The principles laid down in that case would undoubtedly apply to any challenge in the future to the want of due authentication of a Proclamation of Emergency.

Clause (3) requires that the Proclamation of Emergency be laid before both Houses of Parliament. The question in this regard is whether the requirement is mandatory or directory. The point was considered by the Federal Court in *Lim Woon Chong & anor v. Public Prosecutor*.¹³³ The Court found as a matter of fact that the Proclamation of Emergency of 15 May 1969 was laid before the Senate (the Upper House) contrary to the contention of the Appellants there. The Government's argument, nevertheless, was that the requirement was merely directory. The correctness of this view is doubtful.

131. See Appendix B.

132. [1975] 2 MLJ 286.

133. [1979] 2 MLJ 264.

The opinion expressed by Harun J. (as he then was) in *Inspector General of Police v. Lee Kim Hoong*¹³⁴ that the requirement under Clause (3) is mandatory would seem to be the better and more supportable view having regard to the rationale and purpose behind the requirement of laying the Proclamation before Parliament. The learned Judge stated that the object of Clause (3) "is for the Yang di-Pertuan Agong to give an account, as it were, of all things done by him during their (Parliament's) absence".¹³⁵ The reason proffered, however, does not sufficiently state the value and importance of Clause (3).

The provision reads:

"A Proclamation of Emergency and any ordinance promulgated under Clause (2B) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance.....".

The Reid Commission Report, and the whole scheme of the Constitution, makes it abundantly clear that parliamentary rule is the norm and emergency rule the exception. As Lee Hun Hoe C.J. had remarked in *Mahan Singh v. Government of Malaysia*,¹³⁶ an "emergency is temporary in nature". That being the case, and for the obvious reason that it is inimical to constitutional government that emergency rule should be perpetuated indefinitely, it is submitted that the laying before parliament is imperative to enable the elected representatives of the people to express their opinion as to whether the Emergency was

134. [1979] 2 MLJ 291.

135. At p.292C-D. The decision was reversed on appeal (Ibid) but on the factual ground that the concession by the Government in the High Court that the Emergency (Essential Powers) Ordinance No. 1 of 1969 was not laid before Parliament was erroneous. Additional evidence was admitted on appeal to prove the laying of the Ordinance before Parliament.

136. [1975] 2 MLJ at 165B.

justified and whether it should be continued. The only logical conclusion therefrom is that the requirement is mandatory.¹³⁷

In both *Lim Woon Chong* and *Lee Kim Hoong* the courts accepted proof of the laying before Parliament by reliance on parliamentary papers (eg. the Votes and Proceedings List) and an affidavit of the Clerk of Parliament. In the later case, Suffian LP recommended gazetting the laying of the Proclamation before Parliament to avoid any doubts that Clause (3) has been complied with.¹³⁸ It is implicit in this recommendation that Suffian LP was also of the view, like Harun J. before him, that the requirement of laying before Parliament is mandatory.

137. The principal test to determine whether a legislative requirement is directory or mandatory is the object and purpose behind the prescription. In the field of public law the requirement for a public authority to follow the statutory requirements where individual rights or the public interest is likely to be affected could rarely be directory. Lord Hailsham remarked in *London & Clydeside Estates Ltd v. Aberdeen District Council* [1979] 3 AER 876 at 881b: "I am content to assert a general principle to the effect that where Parliament prescribes that an authority with compulsory powers should inform the subject of his right to question those powers, prima facie, the requirement must be treated as mandatory". See also more recently, *Re T (a minor)* [1986] 1 AER 817. However, see the recent decision of the High Court in Ipoh in *Public Prosecutor v. Lee Ah Ha* [1989] 1 MLJ 120, that the requirement under Section 47(4) of the Internal Security Act 1960 of laying before Parliament of the proclamation of a security area by the Yang di-Pertuan Agong is directory and not mandatory. See also the South African case of *Metal & Allied Workers Union v. State President* [1986] 4 SA 358, where the Appeal Court at Durban held that non-compliance with the requirement of the principal legislation that emergency regulations must be laid before Parliament within 14 days after promulgation did not render them "automatically invalid".

138. At p.293F. In the Indian case of *Baburao v. Union of India* AIR 1988 SC 440, the Supreme Court ruled that it was not legally required that the resolutions of both houses of Parliament approving the Proclamation of Emergency be published in the Government Gazette, and that its appearance in the published Parliamentary Debates was sufficient.

CHAPTER IXTHE JUSTICIABILITY OF A PROCLAMATION OF EMERGENCYIntroduction: The Early Privy Council Cases

The justiciability question under Article 150(1), particularly in the view taken by the Malaysian courts in the *Ningkan* case and its affirmation subsequently by the Privy Council, has been influenced by some early Privy Council decisions on the subject. These cases originating from colonial India and Africa had reached the Privy Council as the apex court in a colonial legal system. They were decided at a time when Britain was actively combating indigenous forces opposing colonisation. It is hard to say to what extent the essential characteristic of these cases as political cases, providing in substance an affront to British colonial rule, influenced the judgment of the Board.¹ The principal cases in this respect were *Bhagat Singh v. King*

1. The Privy Council has, in some of the cases decided during the colonial period, expressed, quite unjudiciously, its rather poor opinion of the ability of the colonial peoples to manage themselves. An example is *McLeod v. St. Aubyn* [1899] AC 549, where the Privy Council felt it was entirely justified that the obsolete offence of scandalizing the courts should remain extant in the West Indian Colony of St. Vincent because "it must be considered that in small colonies, consisting principally of coloured populations, the enforcement (of) contempt of court for attacks on the Court may be absolutely necessary to preserve in such community the dignity of and respect for the Court" (Lord Morris at 561). Next, the people of the African colony of Sierra Leone were described in the headnotes of the Appeal Cases report of a case involving professional misconduct of a solicitor from that Colony in the following terms (although the term itself is not found in Lord Warrington's judgment): "In a country which is only partially civilized it is necessary to induce the inhabitants to resort to the courts for the settlement of their disputes rather than to personal violence": *WEA Macauley v. Judges of the Supreme Court of Sierra Leone* [1928] AC 344. Nothing that is said here, however, off-sets the immense contribution made by the Privy Council to the development of a coherent system of justice in the former colonies or the immense prestige it has always enjoyed with the peoples there. Decisions like that of Lord Atkin in the Nigerian case of *Eleko v. Government of Nigeria* [1931] AC 662, a habeas corpus case, that no

*Emperor*² and *King Emperor v. Benoari Lal Sharma*.³ Both cases dealt with emergencies declared by the British-India Colonial Government under a provision of the Government of India Act (section 72) that authorised the Governor General to promulgate ordinances in cases of emergency for the peace and good government of British India. In *Bhagat Singh* the accused were tried for waging war against the British Sovereign and in *Benoari Lal Sharma* the charge was one of rioting. In both, the accused persons disputed their conviction by special courts set up by emergency ordinances promulgated by the Governor General under section 72. We may now consider the impact these cases had on the *Ningkan* decision both by the Malaysian Federal Court and later the Privy Council.

The Ningkan Case

The obvious differences, and the milieu in which these cases were decided, were not taken into account by the majority in the Federal Court in *Ningkan's* case. Both Barakbah LP and Azmi CJ made an uncritical adoption of

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1. interference by the executive with the liberty of the subject is, according to British jurisprudence, permissible unless legally justified, struck a strong blow for the development of a human rights jurisprudence in the colonial courts.
2. [1931] L.R. Vol. LVIII IA 169.
3. [1945] AC 13. There is also the little known decision of the Privy Council in *Chittambaram v. Emperor* from Burma reported only in the Indian reports, AIR 1947 PC 85, where it was held, (Lord Wright speaking) that in the absence of any suggestion that the Governor acted other than in good faith in declaring an emergency, the declaration cannot be challenged. Another Privy Council decision was *Tilonko v. Attorney General Natal* [1907] AC 93, which arose from the Colony of Natal, Africa. The argument of the appellant that his trial and conviction by the military court was unjustified because the civil courts were functioning and there was no proclamation of martial law was brushed aside by Lord Halsbury LC who declined to look into the question.

the Privy Council cases including the term "sole judge" used in the report of *Bhagat Singh's* case.⁴ The judgments in the *Ningkan* case would seem to be the only expressed opinion locally on the subject, together with a later case,⁵ since the Privy Council subsequently left open the question.⁶ The reasoning of the majority is given in what the Lord President said:

"In an act of the nature of a Proclamation of Emergency, issued in accordance with the Constitution, in my opinion, it is incumbent on the Court to assume that the Government is acting in the best interests of the State and to permit no evidence to be adduced otherwise. In short, the circumstances which bring about a Proclamation of Emergency are non justiciable..... 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".⁷

It was only Ong J (as he then was) who took the position that the Privy Council cases do not support the stand of the Lord President and the Chief Justice. He saw it first as an abdication of the judicial function to refuse to decide on the bona fide of the Proclamation. He then expressed the view that section 72 of the Government of India Act under which the two Privy Council cases were decided was quite different in context and terms from Article 150:

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4. The term is found only in the headnotes of the Law Reports and not in the body of Lord Dunedin's judgment.
 5. *Public Prosecutor v. Ooi Kee Saik* [1971] 2 MLJ 108. It was a sedition case. In the context of the amendment made to the Sedition Act, 1949 by Emergency Ordinance No. 45 of 1970 passed after the Proclamation of an Emergency on 15 May 1969, Raja Azlan Shah J. (as he then was) remarked in obiter "Counsel has not challenged the validity of the proclamation. Indeed the proclamation is not justiciable" (see *Bhagat Singh v. King Emperor* and *King Emperor v. Benoari Lal Sharma*)" (p. 113 F-G).
 6. Lord MacDermott for the Board expressly declared that they were leaving open the justiciability question [1970] AC 379 at 392 A-B.
 7. Op. cit. at p.122

"Again with respect, I do not consider the ratio decidendi in those cases applicable herein because section 72 of Schedule IX of the Government of India Act, 1935, is manifestly not in pari materia with article 150 of the Federal Constitution, nor is the constitutional position of the Malaysian Cabinet comparable or similar to that of the Governor-General of India. Hence it is quite erroneous to argue by analogy from the Government of India Act to our Constitution as if those authorities were unquestionably conclusive. The plain fact is that the Governor-General of India, in the words of Viscount Simon L.C. in *King-Emperor v. Benoari Lal Sharma & Ors.* (at p.21) was not required by section 72 "to state that there is an Emergency, or what the Emergency is, either in the text of the ordinance or at all, and assuming that he acts bona fide and in accordance with his statutory powers, it cannot rest with the courts to challenge his view that an Emergency exists." On the other hand, the inbuilt safeguards against indiscriminate or frivolous recourse to emergency legislation contained in article 150 specifically provide that the emergency must be one "whereby the security or economic life of the Federation or of any part thereof is threatened." If those words of limitation are not meaningless verbiage, they must be taken to mean exactly what they say, no more and no less, for article 150 does not confer on the Cabinet an untrammelled discretion to cause an emergency to be declared at their mere whim and fancy. According to the view of my learned brethren, however, it would seem that the Cabinet have carte blanche to do as they please - a strange role for the judiciary who are commonly supposed to be bulwarks of individual liberty and the Rule of Law and guardians of the Constitution".⁸

In his convincing dissent Ong J. touched upon, but did not develop, the qualification laid by Lord Simon himself in *Benoari Lal Sharma's* case viz. that the Governor must act bona fide and in accordance with his statutory powers.⁹ Pike C.J. in an earlier round of the *Ningkan* case read the two Privy Council cases as not shutting out judicial review altogether. In his view "if the declaration appears ex facie to have been made in the manner required by the statute and the bona fides of the making of the declaration is not

8. Op. Cit at p.126 B-G. For a supporting view, see Visu Sinnadurai, Proclamation of Emergency - Reviewable? (1968) Vol.10 Mal. L.R. 130. Professor Sinnadurai also makes the valid distinction that the Governor-General of India exercises a prerogative power, unlike the Yang di-Pertuan Agong who is obliged to act on the advice of the Cabinet (p.132).

9. Op.cit at p.21.

impugned, it is not open to the Court to enquire into it".¹⁰ It was a tiny opening in the blanket of immunity thrown around a Proclamation by *Benori Lal Sharma's* case. Barakbah LP failed to recognise it, but Azmi CJ reasoned it away in the following terms:

"At first sight it could be suggested particularly from the first part of the above passage in *Benoari Lal Sharma's* case the Court could still go into the question of the bona fide of the Governor General, but in my view it is clear that the question whether an emergency existed at the time when an ordinance was made and promulgated was still a matter on which the Governor-General was the sole judge and that, therefore, no Court may inquire into it".¹¹

With respect, the reasoning of Azmi CJ failed to meet the argument. It was never disputed that the Governor-General or the Yang di-Pertuan Agong, as the case may be, should be the rightful judge of whether an emergency existed. The question is whether he had acted bona fide or ultra vires. This is not to say that the Court could inquire into the sufficiency of the reasons upon which he acted. But if the proclamation was wholly capricious or fanciful or was declared for an unauthorised purpose, it stands to reason that its bona fide is impugnable.¹² The Privy Council has consistently kept this corridor open.

10. [1967] 1 MLJ 46, 47-48.

11. Op. cit p. 124A-B. For a criticism of the basis of Azmi CJ's distinguishing of *Benoari Lal Sharma's* case, supra, see S. Jayakumar, Emergency Powers In Malaysia, Development of the Law 1957-77 (1978) 1 MLJ ix at xiv.

12. An example would be the proclamation of martial law in the Phillipines by President Marcos in 1972 upon the dubious assertion that there was a plot to assassinate his Defence Minister. No one other than the President seemed to have had knowledge of it. As Chief Justice Teehankee described it: "(A) tragic development in Phillipine political history occurred in 1972, when Mr. Marcos, on the seventh year of his presidency and no longer eligible constitutionally to run for a third term as President, declared martial law after faking a supposed ambush of his defence minister (in which nobody suffered even a scratch). Avowedly to "save the Republic" he invoked the commander-in-chief clause of the Constitution and took absolute command of the nation": Rt. Hon. Claudio Teehankee, The Return of Constitutional Democracy in the Philippines

In the later case of *Chittambaram*¹³ from Burma, the Board held that the Proclamation of Emergency was not challengeable in the absence of any suggestion that the Governor had acted other than in good faith. In *Ross-Clunis v. Papadopoulos & Ors*,¹⁴ the Privy Council had to consider the import of the words "satisfy himself" in an emergency legislation in Cyprus that authorised the Commissioner to impose sanctions in the form of penalties upon the people of any area whose inhabitants he believes were responsible for the commission of certain offences. In holding that the test was a subjective one, Lord Morton nevertheless made this observation:

"[Their Lordships] think that if it could be shown that there were no grounds on which the [Commissioner] could be so satisfied, a Court might infer either that he did not honestly form that view or that, in forming it, he could not have applied his mind to the relevant facts".¹⁵

There is no record of any of these cases having been cited to the Board in the arguments in *Ningkan's* case. The argument, nevertheless, had significantly focused on the justiciability question.¹⁶ The Government's case before the Board was that the validity of the proclamation was not justiciable, and that an investigation by the Court, including on the question of bona fides, would be to render the question as to whether an emergency

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12. 1988 Tun Abdul Razak Memorial Lecture (1988) 2 MLJ xxxviii at xlii. For a contrary view, see Justice Enrique Fernando of the Philippines Supreme Court who delivered the Inaugural Tun Abdul Razak Memorial Lecture in Kuala Lumpur on the subject, Governmental Powers And Human Rights In Times Of Emergency: A Brief Survey Of The Malaysian And Philippine Constitutions, reproduced in (1978) 1 MLJ cxviii at p. cxxvi et seq. Justice Fernando was a serving judge under President Marcos.

13. supra n. 3.

14. [1958] 2 AER 23 PC.

15. At p. 33 A-B.

16. See Counsel's arguments reproduced in [1970] AC 379, 383-386.

exists to be determined by the judgment of the Court and not the judgment of His Majesty. The riposte for the appellant Ningkan was that the authority to declare an emergency was exercised for an improper reason, namely to dismiss the appellant from office, and that rendered the proclamation invalid. In the face of this pointed joinder of issues on the justiciability question, one would have thought that the Privy Council would have made a determinative ruling on the question. Instead, the Privy Council declined to rule on the justiciability issue, which was the principal argument before it, and instead decided the whole case on the assumption that the issue is in law justiciable.¹⁷ It held in the circumstances of the case that the appellant had failed to prove his claim on the allegation of malafides. On the justiciability issue, Lord MacDermott said:

"The issue of justiciability raised by the Government of Malaysia led to a difference of opinion in the Federal Court, the Lord President of Malaysia and the Chief Justice of Malaya holding that the validity of the proclamation was not justiciable and Ong J. holding that it was. Whether a proclamation under statutory powers by the Supreme Head of the Federation can be challenged before the Courts on some or any grounds is a constitutional question of far-reaching importance which, on the present state of the authorities, remains unsettled and debatable. Having regard to the conclusion already reached, however, their Lordships do not need to decide that question in this appeal. They do not, therefore propose to do so, being of opinion that the question is one which would be better determined in proceedings which made that course necessary".¹⁸

The *Ningkan* case was a lost opportunity. The Privy Council failed to resolve the unsettled state of authorities on the subject. Thus it will be useful to look at some of these cases telling on the subject including the significant decision of the Privy Council in *Teh Cheng Poh v. Public Prosecutor*¹⁹ to decide the question.

17. Ibid p. 389H.

18. Ibid pp. 391-392.

19. [1979] 2 MLJ 50; [1980] AC 458

A Survey Of Judicial Views

The majority in the Federal Court in *Ningkan's* case were not alone in the view they took that His Majesty was the sole judge of a proclamation and that a Proclamation was conclusive and non-justiciable. The juristic thinking behind this school of thought stems from the belief held early in English constitutional law that acts of the royal prerogative in times of emergency were not justiciable. Lord Upjohn had occasion to deal with it in *Burmah Oil Co Ltd v. Lord Advocate*:²⁰

"It is clear that the Crown alone must be the judge of the precise emergency and exact point of time when it is necessary to exercise the prerogative in order to defend the country against apprehended invasion..... As a matter of common sense when the Crown is satisfied that an emergency exists its prerogative power to requisition goods and to take possession of land for the benefit of the country arises....".

This approach has been adopted by several Commonwealth courts without, however, making the distinction that the emergencies that came before them were under statutory powers. The case of *Dean v. Attorney General of Queensland*²¹ is in point. Under the Transport Act, 1938 of the State of Queensland in Australia the Governor in Council was authorised where it appears to him that the peace, welfare, order, good government or the public safety of the State was imperilled, to declare by Proclamation that a state of emergency exists. In anticipation of civil disorder because of the tour of Queensland by the South African Rugby Union football team, the Governor declared a state of emergency to cover the football grounds and related places for the duration of the tour. The Proclamation was challenged on a number of

20. [1964] 2 AER 348. At p. 397 A-C. For a discussion of the scope of justiciability under the statutory power to declare a state of emergency in Britain under the Emergency Powers Act, 1920, see Gillian Morris The Emergency Powers Act, 1920 (1979) PL 317, 318-321.

21. [1971] QD.R 391.

grounds, inter alia, that the Act did not authorise the declaration of an emergency for the reasons given by the Governor. The Supreme Court at Brisbane rejected the argument holding that "it is not for the Court to question the validity of any opinion formed by His Excellency in Council. The Court is concerned with the question of legality not with fact".²² In spite of the apparent ambiguity in this pronouncement, the principle laid down would seem clear enough that if the statutory formalities are met, the Court will not review the opinion formed by the Governor.

Another case in this series is *Hewlett v. Fielder*²³ decided in New Zealand. The Public Safety Conservation Act, 1932 of New Zealand authorised the Governor General to declare a state of emergency "if at anytime it appears to him" that action is taken or contemplated by any person or body of persons whereby the public safety or public order is likely to be imperilled. On February 21, 1951 the Governor-General proclaimed a state of emergency throughout New Zealand following the refusal of the waterside workers of the country to work overtime. Pursuant to the declaration, the Waterfront Strike Emergency Regulations, 1951 was made. The instant case arose out of a challenge to those Regulations on ground, inter alia, that a strike situation did not authorise the issue of a proclamation. The Auckland Court rejected the argument holding that the Governor General had "an absolute discretion", saying:

22. At pp. 404-405. Professor HP Lee in his analysis of emergency powers in Australia believes that *Dean's* case could be construed as not precluding judicial review on ground other than the determination of whether an emergency in fact exists. He observes elsewhere, however, that at the material time there was prevalent in the Australian Courts a trend to protect vice-regal proclamations and other acts by a vice-regal immunity doctrine: HP Lee, *Emergency Powers* (The Law Book company Ltd. Sydney, 1984) at pp.256, 268-69. The vice-regal immunity doctrine was rejected by the Australian High Court in the later case of *The Queen v. Toohy; Exparte Northern Land Council* [1980-81] 151 CLR 170.

23. [1951] NZLR 755.

"The question whether the proclamation was necessary or reasonable is one that is not open..... for, by the use of the words..... "If at anytime it appears to the Governor General", an absolute discretion is given, which cannot be challenged except on the ground last dealt with - ie. that the subject matter of the Proclamation is outside the ambit of the power".²⁴

The opening given by the Court that there could be challenge on the ground of vires does not detract from the holding that on a proper subject matter the view formed by the Governor-General that a state of emergency was required is not justiciable.

A more restrictive approach was taken by the Supreme Court of Sierra Leone in *The State v. Adel Osman*.²⁵ The declaration by the President of Sierra Leone of a public economic emergency under a provision that authorises him to declare an emergency whenever "a situation exists that could lead to a state of public emergency" was challenged on the ground that it was not an authorised subject matter. The Supreme Court ruled that in the absence of a definition of "a situation" it lies "in the sole power and discretion of the President to determine a situation, which at any given time in his estimation deserves a declaration by Proclamation of a state of public emergency".²⁶ A similar view was taken in the Nigerian case of *FRA William v. Majekodunmi* (No.2) per Ademola C.J.F.:

"That a state of public emergency exists in Nigeria is a matter apparently within the bounds of Parliament, and not one for this Court to decide. Once that state of emergency is declared, it would seem that

24. At p.760 (lines 30-40). In a later case, decided under the Education Act, 1914 that authorised the Governor-General to make regulations in furtherance of the objectives of the Act if "in the opinion of the Governor-General" the regulations are necessary, the Auckland Court held that the words do not give the Governor-General a complete and unexaminable discretion: *Reade v. Smith* [1959] NZLR 996. The report, however, does not show that its earlier decision in *Hewlett's* case was cited to the Court.

25. [1988] LRC (Const) 212.

26. At p.220.

according to the Constitution, it is the duty of the Government to look after the peace and security of the State, and it will require a very strong case against it for the Court to act".²⁷

In this connection reference may also be made to the dicta of Dumbutshena C.J. in the Zimbabwe case of *Patriotic Front - ZAPU v. Minister of Justice*:

".....(The) President may by proclamation declare a state of emergency affecting any part of Zimbabwe on the whole country. This is a question of national security. Judges are not qualified to take decisions that concern the security of the State. The Executive is better placed to form an opinion or judgments on matters concerning the security of the State".²⁸

These decisions are of interest as originating from courts of developing countries where tensions, overt or covert, often exist between the Executive and the Judiciary. They may be contrasted with the more robust approach taken by the courts in two other African jurisdictions. First is the Ugandan High Court in *Namwandu v. Attorney General*.²⁹ The case did not involve a direct challenge to the proclamation of an emergency. A state of emergency then extant was relied upon by the Government to defend a claim against it in damages following an incident where some soldiers of the Ugandan army had killed civilians. One of the defences raised was a claim of immunity from suit under a constitutional provision that precluded a court from granting any remedy or relief in respect of "anything done or omitted to be done during and consequent upon the state of public emergency declared on 22 May 1966". In a judgment, which surely must rank as one of the most unique amongst judicial

27. [1962] 1 All N.L.R. 328, 336.

28. [1986] LRC (Const) 672, 683 c-d. The case dealt largely with the customary prerogative of the President, and held that it was not beyond judicial review. See discussion of this decision, together with other "prerogative" cases, in Clive Walker, Review Of The Prerogative: The Remaining Issues (1987) PL 62.

29. [1972] EA 108.

decisions anywhere concerning emergencies, the Kampala Court ruled that the defence was not available because, in spite of the proclamation, there was no real emergency. Saldanha J. said:

"A state of public emergency was declared on 23 May 1966. It is common knowledge that the Government extended the period of emergency from time to time, not because there was any real emergency, but for purposes of expediency, so as to enable them to keep in force emergency regulations. It is not in dispute that while there was a state of emergency in this sense at the time when the incident occurred, there was no real emergency, but, on the contrary, stability throughout the country.This incident occurred during a period when there was a fictitious state of emergency in law but no real emergency in fact".³⁰

The characterisation of the continued state of emergency as fictitious necessarily entailed a refusal by the Court to accept the proclamation as conclusive. A similar refusal but under different circumstances was made by the Lesotho High Court in *Law Society of Lesotho v. Minister of Defence and Internal Security*.³¹ In this case the King had proclaimed a state of emergency purporting to act under the Emergency Powers Act, 1982. The Act provided that the Prime Minister could declare a State of Emergency with the approval by resolution of the Assembly. Following a military takeover of the Government in 1986, the office of Prime Minister was abolished, and the Assembly also ceased to exist. By an Executive Order passed by the Military Government the executive and legislative powers were vested in the King who was to act on the advice of the Military Council. The instant case arose out of the detention during the emergency of certain lawyers representing detainees in Court. The Law Society picked up the cudgels on behalf of the detained lawyers and challenged the validity of the Emergency. The High Court ruled that the

30. At p. 111.

31. [1988] LRC (Const.) 226.

Emergency Powers Act had become inoperable because it envisaged a complimentary role for the Prime Minister and the Assembly. Since both had become non-existent, the declaration of emergency by the King was null and void because there is "no power in any authority under the Act to declare an emergency".³²

It would not be incorrect to say that these two cases are exceptional. The general trend of decisions from Africa show a marked deference to the executive fiat, whether it be an elected or a military government. The courts have themselves come to realise it. This was reflected in the lament of Ademola C.J. in the Nigerian case of *Wang & Ors v. Chief of Staff, Supreme Headquarters Lagos*,³³ when construing the decrees of the Military Government of Nigeria precluding judicial review, that "the law courts of Nigeria must as of now blow muted trumpets".

The approach taken generally by courts in other jurisdictions, however, is to move towards favouring some form of review over the power to declare an emergency. India provides an example. The relevant Indian provision³⁴ is similar to the Malaysian provision. The earlier approach is exemplified in *P. Venkateshamma v. The State of Andhra Pradesh*³⁵ where the Court declared:

32. At p. 238. After this judgment was delivered, the Emergency Powers Act, 1982 was repealed and replaced by the Emergency Powers Order 1988 which provided that the King may, by proclamation in the Gazette declare a state of emergency; the Order itself declared that a state of emergency existed with effect from 24 February 1988 when the first Proclamation which was voided by the Court was made: Ibid pp. 227-228.

33. [1986] LRC (Const) 319 at 330i.

34. Article 352(1) reads: "If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened whether by war or external aggression or armed rebellion, he may, by Proclamation, make a declaration to that effect....."

35. AIR 1976 AP 1.

"Whether or not there is a real emergency and whether the President was justified in making a proclamation under Article 352, is a matter which is not within the preview of the Court. The Proclamation of emergency under Article 352 enjoys immunity from attack in a Court of law".³⁶

This approach was reminiscent of the view taken by the majority in the Federal Court in Ningkan's case. In a series of decisions since, the Indian Supreme Court has edged away from the terse position taken by the Andhra Court. In a landmark decision, called the *Privy Purse's case*,³⁷ the Supreme Court decried the notion that the President of India held an exalted position that rendered his actions immune from review by the courts. Shah J. ruled that the exercise of powers by the President was justiciable:

"The President is not invested with any political power transcending the Constitution, which he may exercise to the prejudice of citizens. The powers of the President arise from and are defined by the Constitution. Validity of the exercise of those powers is always amenable to the jurisdiction of the courts, unless the jurisdiction is by precise enactment excluded. Power of the Supreme Court..... cannot be bypassed under a claim that the President has exercised political power".³⁸

In the *State of Rajasthan v. Union of India*,³⁹ the Supreme Court was concerned with the President's powers under Article 356 to impose Presidential Rule in any state where he is satisfied that the state cannot be run in accordance with the provisions of the Constitution. The Court ruled that the satisfaction was subjective and may not be reviewed from the standpoint of the correctness or adequacy of the facts and circumstances on which the satisfaction of the Government was based. However, the Court ruled that review was not excluded and may be open in certain circumstances:

36. Ibid.

37. *H.M. Madhav Rao Scindia v. Union of India* AIR 1971 SC 530. The case was concerned with the constitutionality of the Indian Government's action in abolishing the privy purses of the royal families.

38. At para. 143.

39. AIR 1977 SC 1361.

"...(I)f the satisfaction is malafide or is based on wholly extraneous and irrelevant grounds, the Court would have jurisdiction to examine it, because in that case there would be no satisfaction of the President in regard to the matter in which he is required to be satisfied. The satisfaction of the President is a condition precedent to the exercise of power..... and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid".⁴⁰

In the later case of *Minerva Mills Ltd. v. Union of India*,⁴¹ Bhagwati J. expanded on the justiciability question. The case was concerned generally with the power of Parliament to amend the Constitution. However, Bhagwati J., in obiter, dealt also with the extent to which the Court can review the constitutionality of a proclamation of emergency issued under Article 352(1):

"There is no bar to judicial review of the validity of a proclamation of Emergency issued by the President..... But the constitutional jurisdiction of the Supreme Court does not extend further than saying whether the limits on the power conferred by the Constitution on the President have been observed or there is a transgression of such limits. The Court cannot go into the question of correctness or adequacy of the facts on which the satisfaction of the Central Government is based. The satisfaction of the President is a condition precedent..... (I)f it can be shown there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid. Where therefore the satisfaction is absurd or perverse or mala fide or based on a wholly extraneous or irrelevant ground, it would be no satisfaction at all and it would be liable to be challenged before a Court...".⁴²

In all these cases, as in the early Privy Council cases,⁴³ the door for challenge on mala fide grounds was kept open. There is no justification therefore, on precedent and authority, for the view taken by the majority in the Federal Court in Ningkan's case that a Proclamation of Emergency was

40. per Bhagwati J. at p. 1414-1415 (para.144).

41. AIR 1980 SC 1789.

42. Paras. 103-105, pp.1837-1838.

43. Except for *Bhagat Singh v. King Emperor* AIR 1931 PC 111.

conclusive and not impugnable on any ground. The disinclination of the Privy Council, when Ningkan's case went on appeal, to rule on the justiciability question spoke against the stand of the Federal Court rather than in favour of it.

Malafides as a ground of challenge has always been available and has come a long way since its occlusion under the royal prerogative cases. For example, the Australian High Court had ruled in an early case: "(It) is not open to impute mala fides with respect to the issue of a royal Proclamation, which is the act of the King by himself or his representative".⁴⁴ Now the consideration is not whether mala fides is available as a head of challenge but with functional matters in relation to it like the burden of proof and the standard to be discharged in bringing the challenge. This is inextricably linked with what is the proper meaning of "malafide" or "acts of bad faith". Malafide as a head of challenge may exist independently of *Wednesbury* unreasonableness,⁴⁵ and the Diplock categorisation of grounds of challenge of administrative decision-making in *Council of Civil Service Unions v. Minister for Civil Service*.⁴⁶

44. *Duncan v. Theodore* [1917] 23 CLR 510; affirmed on appeal by the Privy Council [1919] 26 CLR 276. The decision may no longer be considered as stating the correct law in Australia since the decision in *Re Toohey* [1980-81] 151 CLR 170 which ruled in favour of the justiciability of vice-regal acts.

45. Based on Lord Greene M.R.'s classic judgment in *Associated Provincial Picture Homes Ltd v. Wednesbury Corporation* [1947] 2 AER 680, that a patently unreasonable decision may be vitiated in law. In that case, Lord Greene himself said: "Bad faith, dishonesty - those, of course, stand by themselves": at p. 682.

46. [1984] 3 AER 935 per Lord Diplock: "Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently

A decision may be said to be mala fide when it is made for an improper purpose or is the product of an abuse or misuse of power. In *Cannock Chase District Council v. Kelly*,⁴⁷ the English Court of Appeal said, per Megaw LJ: "(It) seems to me that an unfortunate tendency has developed of looseness of language in this respect, that bad faith or, as it is sometimes put, "lack of goodfaith", means dishonesty; not necessarily for a financial motive, but still dishonesty..... It must not be treated as a synonym for an honest, though mistaken, taking into consideration of a factor which is in law irrelevant". This attempt at a definition by the Court of Appeal appears stringent and unduly restrictive if by those words Megaw LJ intended to exclude from the categorisation of mala fide acts, actions taken for an unauthorised purpose which may not be actuated by dishonesty, personal gain or malice. The wider definition in the Calcutta case of *Ram Chandra Chaudhari v. Secretary to Government, West Bengal*⁴⁸ that mala fides did not necessarily involve malicious intent is more consonant with decisions that have in England and elsewhere vitiated executive action for misuse or abuse of power.⁴⁹

contd.....

46. classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety": at p. 950 h-j.
47. (1978) 1 AER 152 at p. 156 d-f.
48. AIR 1964 Cal 265.
49. Eg. *Municipal Council of Sydney v. Campbell* [1925] AC 338 (in furtherance of an ulterior object); *Congreve v. Home Office* [1976] 1 AER 697 (misuse of power); *Laker Airways Ltd v. Department of Trade* [1977] 2 AER 182 (discretion exercised for ulterior purpose); *Wheeler v. Leicester County Council* [1985] 2 AER 1706 (use of statutory power to further a political policy).

Lord Diplock, speaking in dissent, in *McEldowney v. Forde*⁵⁰ said in respect of the subjective power given to the executive to enact emergency legislation that an improper purpose may be obtained by a honest misconstruction of the words:

"The relevant inquiry which the court has to make when subordinate legislation made under words of delegation of this kind is challenged is not whether his belief was justified but whether it existed. The absence of such belief may connote mala fides on the part of the maker of the subordinate legislation ie. that he has used the delegated power with the deliberate intention of achieving an effect other than that described in the words of delegation, but it does not necessarily do so. He may have honestly misconstrued the words of the statute describing the effect to be achieved and for this reason have failed to form the relevant belief".⁵¹

The absence of "a belief" or, in the language of the emergency provisions we have considered so far, - "of satisfaction" - is what the Indian Supreme Court in the *Rajasthan* case and the *Minerva Mills* case spoke of as a condition precedent. Thus, as the Privy Council said in the *Ross-Clunis* case,⁵² if it could be shown that there were no grounds on which the satisfaction could be honestly formed, the proclamation may be impugned.

The major hurdle to clear under a ground of attack based on mala fide is the burden of proof that has to be discharged.⁵³ The Indian Supreme Court in a number of cases has dealt with this question. In *E.P. Royappa v. State of Tamil Nadu*,⁵⁴ the Court spoke of the burden as being a heavy one to discharge

50. [1971] AC 632.

51. At p. 660 D-F.

52. [1958] 2 AER 23, 33.

53. The Privy Council in *Ningkan's* case was emphatic that the burden lay on the person challenging the proclamation: [1970] AC at 390 B.

54. AIR 1974 SC 555.

and that it demands proof of a high order of credibility. In *G.S. Rawjee v. State of Andhra Pradesh*,⁵⁵ realising the difficulty of those making the allegation of malafides being able to fully appraise the Court of all the circumstances relevant for a proper determination, the Court called on those against whom allegations are made to come forward and place before the Court either their denials or their version of the matter. It signalled a move not to allow wrong-doing by officialdom to go unchecked by default. Thus in *Pratap Singh v. State of Punjab*,⁵⁶ the Supreme Court made the significant observation:

"The difficulty (of establishing the state of a man's mind) is not lessened when one has to establish that a person in the position of a minister apparently acting in the legitimate exercise of power has, in fact, been acting mala fide in the sense of pursuing an illegitimate aim. We must, however, demur to the suggestion that mala fide in the sense of improper motive should be established only by direct evidence, that is it must be discernible from the order impugned or must be shown from the notings in the file which preceded the order. If bad faith would vitiate the Order, the same can, in our opinion, be deduced as a reasonable and inescapable inference from proved fact".⁵⁷

The approach of the Indian Supreme Court, however, is at variance with that of the Privy Council in *Ningkan's* case. *Ningkan* was a paradigm case of an emergency being declared with an ulterior objective in mind. The Privy Council acknowledged that it was not unreasonable for the appellant *Ningkan* to have concluded that the emergency was in reality designed to remove him from office; but it was insufficient to satisfy the Privy Council. The Board observed:

"That the appellant (*Ningkan*) regarded the Federal Government's action as aimed at himself is obvious and perhaps natural; but he has failed to

55. AIR 1964 SC 962 at 969-70.

56. AIR 1964 SC 72.

57. AT para.8.

satisfy the Board that the steps taken by the Government, including the Proclamation and the impugned Act, were in fraudem legis or otherwise unauthorised by the relevant legislation".⁵⁸

It is difficult to appreciate what further proof the Privy Council required to establish mala fide other than the undisputed sequence of events that demonstrated compellingly that the real objective was the removal of Ningkan from office: first, the successful court case which reinstated Ningkan to office,⁵⁹ and next, an emergency that provided the umbrella for his removal. This was especially so as the security threat alleged by the Government was never properly identified. The emphasis before the Federal Court in this respect was the communist threat, whereas, before the Privy Council, it was the remnants of the Indonesian Confrontation. Thus the Privy Council was prepared to accept the mere assertion of the relevant government of a threat to its security, as opposed to the overwhelming evidence provided by the uncontroverted facts that the real motivation behind the Emergency was the removal of Ningkan from office. The Privy Council's approach has placed an unattainable standard of proof on persons challenging the bona fides of a Proclamation; a Proclamation of emergency would not carry a "brand of invalidity on its forehead";⁶⁰ its invalidity will have to be established by facts aliunde. The admissibility of external evidence to review the propriety

58. [1970] AC at 391F.

59. *Stephen Kalong Ningkan v. Tun Abang Hj. Openg* [1966] 2 MLJ 187. The judgment was delivered on 7 September 1966, and the Proclamation of Emergency was declared on 14 September 1966, after a week of intense political manoeuvring: see discussion in Chapter VI on the Sarawak Emergency. One academic termed the events as "the clearest example of the manipulation of the Constitution to create conditions to justify the proclamation of an emergency": Yash Ghai, The Politics of the Constitution: Another Look At the Ningkan Litigation (1986) 7 Sing. L.R. 147 at 161.

60. Per Lord Radcliffe in *Smith v. East Elloe RDC* [1956] 1 AER 855 at 871 H in the context of ministerial orders being impugned before the courts.

of emergency measures was accepted by Lord Pearson in *McEldowney v. Forde*,⁶¹ and would reflect the correct position today notwithstanding the archaic view taken by Barakbah LP in *Ningkan's* case.⁶² The approach of the Indian Supreme Court in *Pratap Singh's* case that mala fide is a matter of inference from surrounding facts is a realistic approach that commends itself and is evident from the cases where a finding to that effect was made. In *Municipal Council of Sydney v. Campbell*,⁶³ the Privy Council held that an acquisition of land by the local authority was actuated by improper motive after examining the surrounding circumstances that showed that a previous attempt at acquisition had failed. It deserves reiteration, however, that the evidence needed to establish mala fides must be cogent and convincing befitting the seriousness of the allegation.⁶⁴

In summary, the trend in case-law show a leaning in favour of justiciability, and not to treat the Proclamation as sacrosanct or conclusive. In the words of Gibbs CJ. in the landmark Australian case of *Re Toohey*: "(NO) convincing reason can be suggested for limiting the ordinary power of the Courts to inquire whether there has been a proper exercise of a statutory power by giving the Crown a special immunity from review. If a statutory power is granted to the Crown for one purpose, it is clear it is not lawfully exercised if it is used for another. The Courts have the power and duty to ensure that statutory powers are exercised only in accordance with law".⁶⁵

61. [1971] AC at 657 A-C.

62. [1968] 1 MLJ at 122E: "(It) is incumbent on the court to assume that the Government is acting in the best interest of the State and to permit no evidence to be led otherwise".

63. [1925] AC.

64. See the cases of *Yeap v. Government of Kelantan* [1986] 1 MLJ 482 PC, and *Government of Malaysia v. Jagdis Singh* [1987] 2 MLJ 185 SC.

65. [1980-81] 151 CLR 170 at 193.

It is equally clear that a decision does not enjoy any special immunity from review because it is a decision of the Cabinet.⁶⁶ In so far as Malaysia is concerned, the Ningkan cases cannot be said to have spoken the last word on the justiciability question. A look should also be taken of the later decision of the Privy Council in *Teh Cheng Poh v. Public Prosecutor*,⁶⁷ which although not concerned directly with the justiciability of a proclamation of emergency, dealt with the Yang di-Pertuan Agong's law-making power during a state of emergency and the declaration of the whole of Malaysia as a security area under the Internal Security Act 1960. The Privy Council pronounced in clear terms that the actions taken by the Yang di-Pertuan Agong as a constitutional monarch are subject to judicial review as in reality being the actions of the Cabinet. In dealing with the power of proclamation of an area as a security area under the Act aforementioned, the Privy Council observed:

"The power to proclaim an area as a security area with the consequences that this will entail is a discretionary one. It is for the Yang di-Pertuan Agong (again, in effect, the cabinet) to form an opinion whether public security in any area of Malaysia is seriously disturbed or threatened by the causes referred to in the section, and to consider whether in his opinion it is necessary for the purpose of suppressing organised violence of the kind described. But, as with all discretions conferred upon the executive by Act of Parliament, this does not exclude the jurisdiction of the Court to inquire whether the purported exercise of the discretion was nevertheless ultra vires either because it was done in bad faith (which is not in question in the instant appeal) or because as a result of misconstruing the provision of the Act by which the discretion was conferred upon him the Yang di-Pertuan Agong has purported to exercise the discretion when the conditions precedent to its exercise were not fulfilled or, in exercising it, he has taken into consideration some matter which the Act forbids him to take into consideration or has failed to take into consideration some matter which the Act requires him to take into consideration".⁶⁸

66. See *South Australia v. O'Shea* [1987] 61 ALJR 477; see generally the informative article by M.C. Harris, The Courts And the Cabinet: "Unfastening The Buckle" (1989) PL 251.

67. [1980] AC 458; [1979] 2 MLJ 50.

68. At p. 472.

The Privy Council also spoke in terms of the Agong's satisfaction being a condition precedent, the absence of which would make the declaration unlawful. As regards the failure of the Agong to revoke a proclamation when it was called for, the Privy Council said that the Cabinet was amenable to an order of mandamus:

"In their Lordships' view, however, the discretion whether and when to revoke a security area proclamation is not entirely unfettered. The proclamation is lawful because it is considered by the Yang di-Pertuan Agong to be necessary to make an area a security area for the purpose, not of suppressing violence by individuals generally but of suppressing existing or threatened organised violence of the kind described in the section. Once he no longer considers it necessary for that particular purpose it would be an abuse of his discretion to fail to exercise his power of revocation, and to maintain the proclamation in force for some different purpose. If he fails to act the Court has no power itself to revoke the proclamation in his stead. This, however, does not leave the Courts powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise its power of revocation would be an abuse of his discretion. Article 32(1) of the Constitution makes the Yang di-Pertuan Agong immune from any proceedings whatsoever in any Court. So mandamus to require him to revoke the proclamation would not lie against him; but since he 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".⁶⁹

The decision in *Teh Cheng Poh* may be taken as supplying the omission in *Ningkan's* case where the Privy Council declined to rule on whether a proclamation was justiciable. The Government's argument before the Board in *Teh Cheng Poh's* case was similar to that in *Ningkan*, viz. that a proclamation under Article 150 was conclusive as to the existence of an emergency.⁷⁰ But

69. At p. 473. For a decision from another Commonwealth country where the *Teh Cheng Poh* decision was not followed and Lord Diplock's dicta on mandamus was described as "startling", see the Cayman Island's case of *In Re Fedele* [1988] LRC (Const) 879, 883e. But see the Canadian case of *Air Canada v. Attorney General of British Columbia* [1988] LRC (Const) 38, where the Supreme Court applied Lord Diplock's dicta to hold that mandamus may lie against the Attorney General to tender the requisite advice for the issuance of a fiat.

70. See Counsel's arguments reproduced at p. 463 E-F.

the tenor and reasoning of Lord Diplock's judgment shows an emphatic repudiation of the notion that a proclamation is conclusive or that it is immune from review. Since that decision, the Federal Court had occasion to hold affirmatively that actions of the Yang di-Pertuan Agong although couched in the subjective language of a discretion was not immune from judicial review. Under Section 6(1) of the University and University Colleges Act, 1971 the Agong is authorised to establish a national university if he "is satisfied" that it is in the national interest to do. The provision came for consideration in the *Merdeka University Bhd* case,⁷¹ where Suffian LP held: "In the past such a subjective formula would have barred the Courts from going behind His Majesty's reasons for his decision to reject the plaintiff's application; but, as stated by the learned Judge (Abdoolcader J.) administrative law has since so far advanced such that today such a subjective formula no longer excludes judicial review if objective facts have to be ascertained before arriving at such satisfaction and the test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable".⁷²

In the result, on the current state of Malaysian case authorities, the leaning in favour of justiciability is clearly discernible and may be taken as concluding the issue if not for certain statutory changes in 1981. We shall examine below these and certain other factors constituting an impediment to justiciability.

71. *Merdeka University Bhd v. Government of Malaysia* [1982] 2 MLJ 243.

72. At p. 246 G-I.

The Impediments To Justiciability

The impediments to judicial review of a Proclamation of Emergency under Article 150 are two-fold:

- (a) the juristic principle called "the political question" doctrine; and,
- (b) the ouster of the Court's jurisdiction under Article 150(8).

(a) The Political Question Doctrine

Two superior Courts of distinction have suggested that matters like the declaration and termination of a state of emergency or executive action during an emergency are not suitable for judicial determination. Lord Pearson in *McEldowney v. Forde*⁷³ observed with regard to the power of ministerial rule-making during an emergency:

"The Northern Ireland Parliament must have intended that somebody should decide whether or not the making of some proposed regulation would be conducive to the "preservation of the peace and maintenance of order". Obviously it must have been intended that the Minister of Home Affairs should decide the question..... The Courts cannot have been intended to decide such a question, because they do not have the necessary information and the decision is in the sphere of politics, which is not their sphere".⁷⁴

The Indian Supreme Court in *Bhut Nath Mate v. State of West Bengal*⁷⁵ observed with regard to whether a real emergency exists:

"In our view, this is a political, not justiciable issue and the appeal should be to the polls and not to the Courts..... (It is) a pragmatic response by the Court to the reality of its inadequacy to decide such issues and to the scheme of the Constitution which has assigned to each branch of government in the larger sense a certain jurisdiction".⁷⁶

73. [1971] AC 632.

74. At p. 655 D-E.

75. AIR 1974 SC 806.

76. Per Krishna Iyer J. at 811 (paragraph 16).

Some academic writers have also expressed the view that cases like the dismissal of *Ningkan*⁷⁷ in Sarawak and its twin in Nigeria, *Adegbenro v. Akintola*,⁷⁸ were not really suitable for judicial resolution.⁷⁹

The political question doctrine is a juristic technique that enables the Court to decline to adjudicate on a dispute on the ground that the subject-matter is not fit for judicial determination either because it lies outside the judicial domain or because there are not available judicially manageable standards to decide the issue. It has its origins in the constitutional principle of separation of powers. It has been described as "a creature of the theory of separation of powers"⁸⁰ which purports to keep the executive,

77. [1966] 2 MLJ 187.

78. [1963] 3 AER 544; [1963] AC 614.

79. See K.J. Keith, The Courts And The Conventions Of the Constitution (1967) 16 ICLQ 542 who submits that it should not have been assumed in both cases that because the relevant rules were to be found in the Constitution that the issues were fit for judicial determination. The writer relies on the subsequent political action taken to nullify the decisions as bearing out his proposition. He advances the approach taken by the United States Supreme Court in the nineteenth century case of *Luther v. Borden* 48 U.S. (7 How) 1 [1849] that it is inexpedient for a court to determine who should rightfully govern a state. As regards Harley Ag. C.J.'s decision in the *Ningkan* case, Keith provides the interesting information that Harley's reliance (at p.195) on the passage from de Smith's book (*The New Commonwealth And Its Constitutions* at p. 87) had failed to note that in the part preceding the paragraph quoted, de Smith had himself queried "it would be surprising if a Malaysian Court could be persuaded to investigate whether the Yang di-Pertuan Agong has acted in strict conformity with ministerial advice, despite the absence of an exclusionary clause" (p.546, foot-note (181)). See also Geoffrey Sawyer, Political Questions (1963-64) Vol.XV University of Toronto Law Journal 49 at 54-56, who relying on *Luther v. Borden*, suggests that the American "political questions" doctrine deserved to be argued in the Nigerian case. For a criticism of Sawyer's view on ground of inconsistency, see B.O. Nwabueze, Judicialism In Commonwealth Africa (C. Hurst & Co London, 1981 Ed.) at p.42. See also the discussion that follows there that the *Luther v. Borden* doctrine is extinct or obsolete.

80. Rajeev Dhavan, Justice On Trial: The Supreme Court Today (Wheeler Publishing Co. Ltd., Allahabad, 1980) p. 150.

legislative and judicial functions of the state separate and independent of each other. The doctrine has seen its development and fruition largely in American Constitutional law. Thus there is little if not no discussion of it in the texts on British Constitutional Law where non-justiciable areas have been pigeon-holed under established heads of exclusion.⁸¹ The British technique has been adopted in the Commonwealth countries, and even in Australia where a written constitution and a federal system of government puts it closer to the American model.⁸² The Australian approach, adopting English judicial methods, is also largely the juristic thinking of the Malaysian courts. Thus certain fields have always been recognised as being outside the sphere of judicial intervention, like foreign relations and treaty obligations;⁸³ defence policy and armaments;⁸⁴ matters falling within the purview of the legislature,⁸⁵ and matters of pure administration not giving

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81. Geoffrey Sawer, *op.cit.* p. 49-50. See also Alex Castles, Justiciability: Political Questions, in Locus Standi (Ed. Leslie Stein) (Law Book Co. Australia, 1979) at 225-26.
82. P.E. Nygh, The Doctrine of Political Questions Within A Federal System (1963) 5 Mal. L.R. 132.
83. Eg. *Republic of Italy v. Hambros Bank* [1950] 1 AER 430; see also the Australian case of *South Australia v. Commonwealth* [1961] 108 CLR 130, involving treaty obligations within a federation. See also the American case of *Sarnoff v. Shultz* 409 U.S. 929 [1972] where the Supreme Court denied certiorari in a petition where the legality of the Vietnam war was involved.
84. Eg. *Chandler v. DPP* [1962] 3 AER 142 per Lord Radcliffe: "If the methods of arming the defence forces and the disposition of those forces are at the decision of Her Majesty's Ministers for the time being, as we know that they are, it is not within the competence of a court of law to try the issue whether it would be better for the country that the armament or those dispositions should be different" (p. 151 C-D).
85. See *Hj. Salleh Jaffarudin v. Datuk Celestine Ujang* [1986] 2 MLJ 412 SC.

rise to any legal questions.⁸⁶ Likewise it is accepted that it is not in the province of the judiciary to question the wisdom or necessity to pursue a particular policy or pass a certain legislation. In *Loh Kooi Choon v. Government of Malaysia*,⁸⁷ the Federal Court, adopting English decisions on point,⁸⁸ observed:

"The question whether the impugned Act is "harsh and unjust" is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our Courts ought not to enter this political thicket..... Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference with fundamental rights, normally must address themselves to the legislature, and not the Courts; they have their remedy at the ballot box".⁸⁹

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86. Eg. *Attorney General Fiji v. DPP* [1983] 2 AC 673, a remarkable case involving a dispute between the Attorney General and the Director of Public Prosecutions over an administrative directive issued by the former affecting the latter, per Lord Fraser: "(Their) Lordships are not concerned with questions of whether the issue of the directions are necessary or expedient. These are political questions which are not justiciable..... The sole question for the Courts is whether the directions are validly made in accordance with the Constitution" (p.678 C-D). As to when a non-statutory departmental circular may be subject to judicial review, see *Gillick v. West Norfolk Area Health Authority* [1985] 3 AER 402, involving a controversial circular issued by the Health Department on the giving of advice to girls under 16 on contraceptives, which was challenged on sufficiently identifiable legal grounds. See also discussion of the *Gillick* decision from a larger perspective in Simon Lee's, *Law And Morals* (OUP, 1986) pp. 48-63, and *Judging Judges* (Faber & Faber, London, 1988) pp. 73-87.
87. [1977] 2 MLJ 187.
88. *Vacher & Sons Ltd. v. London Society of Compositors* [1913] AC 107, 118. See the more recent cases of *Pickin v. British Railways Board* [1974] AC 765, 789 A-B and *Duport Steels Ltd. v. Sirs* [1980] 1 WLR 142, 157. See generally, the present writer's, *Constitutional Supremacy, Emergency Powers and Judicial Attitudes* (1983) JMCL 69, 80-81 on the stand of the Malaysian courts on the justiciability question.
89. At p. 188 D-H, per Raja Azlan Shah FJ (as he then was). For a case stating that the court is not concerned with the political, social or economic desirability of a project, see the Australian case of *Australian National Airways v. Commonwealth* [1945] 71 CLR 29. See also

In addition to these areas, Malaysian courts have also recognised that matters of royal succession and accession to the throne are non-justiciable.⁹⁰

It follows that the political question doctrine operates outside this arena of traditionally excluded areas of judicial review. Under American constitutional law, where it has seen its fullest development, the doctrine is explained as raising "an issue whose settlement has been entrusted by the Constitution to another branch of the government, or that the problem is in a field where the judges have no special competence, or that as a practical matter the issue is one with which the judicial process cannot cope".⁹¹ The principal proponent of this doctrine of judicial self-restraint was Justice Felix Frankfurter of the United States Supreme Court. He coined the phrase "political thicket"⁹² which has since been used in several jurisdictions where reference has been made to the doctrine.⁹³ According to his thesis: "(It) is hostile to a democratic system to involve the judiciary in the politics of the

contd...

89. Abdoolcader J. (as he then was) in the Malaysian case of *Merdeka University Bhd v. Government of Malaysia* [1981] 2 MLJ 356, where he observed: "(The) court's powers to make declarations is confined to matters justiciable in the courts and limited to legal and equitable rights and does not extend to moral, social or political matters" (at p.366A).

90. See *Dato Menteri Othman v. Dato Ombi Syed Alwi* [1981] 1 MLJ 29 FC 70; *Daeng Baha Ismail v. Tunku Mahmood Iskandar* [1987] 1 MLJ vi. For an African parallel, but ruling in favour of justiciability, see *Marealle v. The Changga Council* [1963] EA 131.

91. See Walter Murphy & C. Herman Pritchett, Courts, Judges And Politics: An Introduction To The Judicial Process (3rd Ed. Random House, New York) at p. 223.

92. *Colegrove v. Green* 328 U.S. 549 [1946].

93. In Malaysia, *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187, 188; In India, *State of Rajasthan v. Union of India* A 1977 SC 1361, 1414.

people".⁹⁴ The Frankfurter doctrine, while conceptually defensible, soon fell out-of-step with the surge of activism generated by the Warren Court. In his lifetime, Frankfurter saw his thesis denuded of much of its content. In the seminal case of *Baker v. Carr*⁹⁵ the United States Supreme Court overruled the Frankfurter thesis and set out the test as being whether the question "textually demonstrates a constitutional commitment of the issue to a coordinate political department".⁹⁶ In subsequent cases, the Supreme Court further narrowed the application of the doctrine⁹⁷ and in the important "executive-privilege" case of the *United States v. Nixon*⁹⁸ it decided in favour of justiciability without even mentioning the doctrine.⁹⁹

The common law courts outside the United States, fortunately, never got tangled with the political question doctrine. The courts in Australia, India and Malaysia, applying English judicial methods, have approached issues with a political flavouring purely as to whether it presents a legal question capable

94. *Colegrove v. Green*, op.cit.

95. 369 U.S. 186 [1982]. The decision was Frankfurter's last major case before retirement: see H.N. Hirsch, The Enigma of Felix Frankfurter (Basic Books, New York, 1980) pp. 197. For an interesting discussion of the impact of the *Baker v. Carr* decision that it does not "affirm the essence of what was denied in *Colegrove v. Green*", see Alexander Bickel, The Least Dangerous Branch: The Supreme Court At The Bar Of Politics (Yale University Press, 1962) pp.195.

96. Op.cit p.217.

97. *Powell v. McCormack* 295 U.S. 486 [1968].

98. 41 L. Ed. 2d. 1039 [1973].

99. For a discussion of the doctrine in the context of security-related questions, see Edwin B. Firmage, The War Powers And The Political Question Doctrine (1977) Vol. 49 Univ. of Colorado Law Review, 65. For a compelling argument that the doctrine is an unnecessary complication that has "mised lawyers and courts", see Louis Henkin, Is There A Political Question Doctrine? (1976) 85 Yale Law Journal 597, 622.

of adjudication.¹⁰⁰ On constitutional matters, where disputes arose out of the working of a written constitution, the approach has been as stated by Dixon J. of the Australian High Court:

"The Constitution is a political instrument. It deals with government and government powers..... It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling".¹⁰¹

This perceptive approach found adherence in India. In *State of Rajasthan v. Union of India*, Bhagwati J. dealt in extenso with the American doctrine in the context of a challenge to the decision by the President to take-over the administration of a state:

"(It was) urged that having regard to the political nature of the problem, it is not amenable to judicial determination and hence the Court must abstain from inquiring into it. We do not think we can accept this argument. Of course, it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional termination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. A constitution as a matter of purest politics is a structure of power and as pointed out by Charles Black in "Perspectives in Constitutional Law":

100. Eg. a claim whether a Minister was suitable to continue in office does not raise any legal question for adjudication: *Sukumaran v. Union of India* AIR 1986 Kerala 122; *Periasamy s/o Sangili v. Dato Samy Vellu* [1990] 2 CLJ 282.

101. *Melbourne Corporation v. Commonwealth* [1947] 74 CLR 31, 82. In Britain, working with an unwritten constitution, it is the function of judicial review of administrative action that has drawn the strongest criticism of judges as being political: see eg. JAG Griffith, *The Politics Of The Judiciary* (3rd Ed. 1984) "...The simple thesis that the Judiciary cannot, under our system, act neutrally but must act politically" (Preface); Ronald Dworkin, *Political Judges And The Rule Of Law* (1978) Maccabean Lecture in Jurisprudence, Proceedings of the British Academy London, OUP p.260: "A judge who decides on political grounds, of course,

"constitutional law" symbolizes an intersection of law and politics, wherein issues of a political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law, thinking as lawyers think".

It will, therefore, be seen that merely because a question has a political colour, the Court cannot fold its hands in despair and declare "Judicial hands off". So long as a question arises whether an authority under the constitution has acted within the limits of its power or exceeded it, it can certainly be decided by the Court. Indeed it would be its constitutional obligation to do so. It is necessary to assert in the clearest terms, particularly in the context of recent history, that the Constitution is *Suprema lex*, the paramount law of the land, and there is no department or branch of Government above or beyond it. Every organ of Government, be it the executive or the legislature or the judiciary, derives its authority from the Constitution and it has to act within the limits of its authority. No one howsoever highly placed and no authority howsoever lofty can claim that it shall be the sole judge of the extent of its power under the Constitution or whether its action is within the confines of such power laid down by the Constitution. This Court is the ultimate interpreter of the Constitution and to this Court is assigned the delicate task of determining what is the power conferred on each branch of Government, whether it is limited, and if so, what are the limits and whether any action of that branch transgresses such

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101. is not deciding on grounds of party politics..... But the political principles in which he believes, like, for example, the belief that equality is an important political aim, may be more characteristic of some political parties than others". For a spirited defence of the judges, see Lord Hailsham's speech in a House of Lords debate: "They (those opposing judges) are under the curious illusion that the judges are not already in politics. Lord Diplock, as one of the authors of the *Anisminic* decision, practically abolished an Act of Parliament about the Foreign Compensation Commission. What about Gouriet?... What about the Laker dispute? How about the Tameside education dispute? What about the decision invalidating Mr. Roy Jenkins' policy on wireless licences? How about the various decisions of this House and the Court of Appeal on the Race Relations Act? And what about their recent decisions on the trade union legislation?.... If they (the judges) assume jurisdiction they are in politics; if they decline jurisdiction they are in politics. All they can hope to be is impartial...": 396 H.L. Deb. 1382 (Nov 29, 1978), reproduced in HWR Wade, Constitutional Fundamentals (The Hamlyn Lectures, Stevens, London, 1980) pp. 76-77. NB: Lord Hailsham was mistaken in stating that Lord Diplock sat in the House on the *Anisminic* decision. Diplock L.J. (as he then was) gave the decision in the Court of Appeal in the *Anisminic* case and was reversed by the House of Lords.

limits. It is for this Court to uphold the constitutional values and to enforce the constitutional limitations. That is the essence of the rule of law."¹⁰²

The fact that an issue arises out of a political dispute or would determine the outcome of a political contest is no bar to judicial resolution if it presents a legal question for adjudication. The Malaysian Court had to decide in one case whether the appointment of a person as Chief Minister, after the revocation of the appointment of another, raised a justiciable issue. The Court correctly ruled in favour of justiciability, and perceptively observed:

"The mere fact that a litigant seeks the protection of a political right does not mean that it presents a political question. Whether a matter raises a political question; whether it has been committed by the Constitution to another branch of government is itself a matter for judicial determination because the Constitution has made the Courts the ultimate interpreter of the Constitution. The Courts accordingly cannot reject a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.... (The) primary issues of the appointment and revocation.... are legal and justiciable question clearly within the competence of judicial consideration and determination".¹⁰³

In the specific area of justiciability of a proclamation of emergency, as to whether the doctrine operates to preclude review as suggested by Lord

102. *State of Rajasthan v. Union of India* AIR 1977 SC 1361, 1412-13. For a criticism of the decision for assuming without discussion that the doctrine applies in India, see H.M. Seervai, *Constitutional Law of India* 3rd Ed. Vol.II (Tripathi, Bombay, 1984) pp.2205 et.seq. Seervai's thesis is that in the absence of a complete separation of powers in India where the Executive dominates the Legislature, unlike in the United States, there is no room for application of the doctrine. In the earlier case of *I.C. Golak Nath v. State of Punjab* AIR 1967 SC 1643, Subba Rao CJ rejected the notion that the amending power of Parliament involved political questions: "The wide proposition that the power to amend is a sovereign power, that the said power is supreme to the legislative power, that it does not permit any implied limitations and that amendments made in exercise of that power involved political questions and that, therefore, they are outside judicial review cannot be accepted". (paras. 36-39).

103. *Tun Adnan Robert v. Tun Mustapha* [1987] 1 MLJ 471, 485; also reported as *Mustapha v. Mohammad* in [1987] LRC (Const) 16, 45.

Pearson¹⁰⁴ and Krishna Iyer J.¹⁰⁵, it would seem that the march of authorities has since subsumed this viewpoint. In India, there is the dicta of Bhagwati J. in the later case of *Minerva Mills Ltd. v. Union of India*¹⁰⁶ where he observed:

"There is no bar to judicial review of the validity of a proclamation of Emergency issued by the President under Article 352 Clause (1). Merely because a question has a political complexion, that by itself is no ground why the Court should shrink from performing its duty under the Constitution, if it raises an issue of constitutional determination. It would not therefore, be right for the Court to decline to examine whether in a given case there is any constitutional violation involved in the President issuing a Proclamation of Emergency under Clause (1) of Article 352".¹⁰⁷

More compelling is the decision of the Privy Council in *Teh Cheng Poh v. Public Prosecutor*.¹⁰⁸ The case, inter alia, dealt with the justiciability of emergency regulations passed by the Malaysian Government, and the proclamation of the whole of Malaysia as a security area wherein the illegal possession of firearms was made a capital offence. In a benchmark decision, Lord Diplock cut through the cobwebs of uncertainty surrounding the position of the Yang di-Pertuan Agong acting under his emergency powers following the Ningkan cases,¹⁰⁹ and ruled that the actions of the Yang di-Pertuan Agong were

104. *McEldowney v. Forde*, see n.73, supra.

105. *Bhut Nath v. State of West Bengal*, see n. 75, supra.

106. AIR 1980 SC 1789.

107. At p. 1793.

108. 1980 AC 458; 1979 2 MLJ 50.

109. This refers to the tortuous path taken by the Ningkan cases in court where justiciability of the proclamation came up for determination in two separate proceedings; first, before Pike CJ in Borneo, (1967) 1 MLJ 47, where it was ruled that the Proclamation was reviewable on ground of bona fide; and later, before the Federal Court sitting in its original jurisdiction, (1968) 1 MLJ 119, which ruled that the Proclamation was not justiciable.

amenable to judicial review as being in actuality the decisions of the Cabinet. On the failure of the Yang di-Pertuan Agong to revoke a security area proclamation where the conditions necessitating it had since disappeared, Lord Diplock stated in strong terms that it would be an abuse of discretion not to revoke the proclamation, and that mandamus would lie to compel the Cabinet to tender the appropriate advice. The decision of the Privy Council was a strong vote in favour of justiciability. It was a declaration that judicial remedies would lie for abuse of emergency powers. It was of equal significance that no argument was advanced by the Government that the issues that came up for consideration were not justiciable as being political questions.

The political question doctrine has rightly been cribbed and limited in its application. It has the potential of becoming a judicial alibi for the courts to decline to adjudicate on controversial cases involving government policy.¹¹⁰ In third world countries, given the precarious position generally held by the rule of law, this could well amount to judicial abdication. The fears expressed by Professor Nwabueze of Nigeria bear full examination:

110. Judicial concern that the Courts should not interfere with matters of policy may sometimes be taken to extraordinary lengths. This can be seen in the decision of the Malaysian Courts in two immigration cases involving detention and incarceration of persons without a Malaysian passport for overstaying. In *Andrew s/o Thamboosamy v. Superintendent of Pudu Prison* [1976] 2 MLJ 16, Suffian LP said:

"Under the Immigration Ordinance, only the Executive has power to release the appellant. Whether or not the Executive should do so is a matter of policy for them. They have information and sources of information not available to the Court and are moved by political economic, social and cultural consideration which the Court is not well equipped to apply, and judges should be slow to embarrass them into any course of action".

"When the (political question) doctrine is extended so as to shelter violations of constitutionally guaranteed rights of individuals, then the door is thrown wide open to the judiciary's abdication of its responsibility as the guardian of the constitution and of the rights of the individual against governmental interference. The easy escape from duty that it offers is too tempting and too dangerous to be conducive to constitutionalism. For constitutionalism requires that political no less than judicial action should be governed by rules. To admit an uncontrolled discretion in a Court to decline, on political question or other grounds, to decide justiciable cases is to overthrow the rule of law. Jurisdiction must be assessed or declined in accordance with rules of law, not discretion".¹¹¹

(b) The Ouster Clauses: Article 150(8) And Section 12 of the Emergency (Essential Powers) Act, 1979

Clause (8) was first introduced into the scheme of Article 150 in 1981 together with the other radical changes discussed previously. The cause of these changes was the landmark decision of the Privy Council in *Teh Cheng Poh's* case delivered on December 11, 1978. The decision shook the Malaysian Government and threw into disarray the whole corpus of emergency laws made by

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110. In the present writer's opinion this reasoning, with respect, would seem to be out of step with the current trends in administrative law. The reliance on "political economic, social and cultural" considerations in making a detention order must surely be exceptional: See the House of Lord's decisions in *Khawaja v. Secretary of State* [1983] 1 AER 765 for the Court's duty to examine the records in immigration, repatriation and detention cases, and *Wheeler v. Leicester City Council* [1985] 2 AER 1106, for vitiation of a decision which was based on grounds of political policy. The decision in *Andrew's* case has since been followed in *Re Meenal* [1988] 2 MLJ 299. In the later case the court said that in these matters recourse should be had to the appropriate authorities and not the Courts (per Hashim Yeop Sani J (as he then was)). For a discussion of these and other cases reflecting the judicial trends in Malaysia on administrative law cases, see the present writer's, Administrative Law And The Citizen (1983) CLJ 65, 70-71.

111. Nwabueze, op.cit. p.39.

the Yang di-Pertuan Agong since 20 February, 1971 after Parliament had sat.¹¹² The Malaysian Government's immediate reaction was to re-enact the Emergency (Essential Powers) Ordinance No. 1 of 1969 into the Emergency (Essential Powers) Act, 1979 and to validate all the emergency laws made under the Ordinance after Parliament had sat. It was the obvious intention of the Government by the enactment of exclusionary clauses to forestall any form of judicial review of the proclamation of an emergency or its continuance or the validity of emergency laws, as was suggested strongly by Lord Diplock in *Teh Cheng Poh's* case. The exclusionary clauses are clause (8) of Article 150 and Section 12 of the Emergency (Essential Powers) Act, 1979. They read as follows:-

"Clause (8):

Notwithstanding anything in this Constitution -

- (a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and
- (b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of -
 - (i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);
 - (ii) the continued operation of such Proclamation;
 - (iii) any ordinance promulgated under Clause (2B); or
 - (iv) the continuation in force of any such ordinance".

Section 12:

"No court shall have jurisdiction to entertain or determine any application or question in whatever form, on any ground, regarding the validity or the continued operation of any proclamation issued by the Yang di-Pertuan Agong in exercise of any power vested in him under any Ordinance promulgated, or Act of Parliament enacted, under Part XI of the Federal Constitution."

112. See discussion in Chapter V on the background and scope of the Constitution (Amendment) Act A514 of 1981.

The effect of Section 12 may first be considered. Whilst it might have been the intention of the draftsman that Section 12 should operate as a comprehensive exclusionary clause, the express words of the provision suggest otherwise.¹¹³ The words "under any Ordinance promulgated, or Act of Parliament enacted under Part XI of the Federal Constitution" are words of limitation. The Federal Court in *Phang Chin Hock v. Public Prosecutor*,¹¹⁴ rightly observed: "(It) only precludes the courts from questioning the validity of proclamations issued under Acts or Ordinances based on Part XI of the Constitution, not that of proclamations of emergency issued under the Constitution".¹¹⁵ Thus Section 12 is at present confined only to proclamations of a security area under section 47 of the Internal Security Act, 1960 because that is the only statute under Part XI of the Constitution that presently authorises the Yang di-Pertuan Agong to issue proclamations. Notwithstanding its limited field of operation, section 12 is a pointed attempt to override the suggestion by Lord Diplock in *Teh Cheng Poh's* case that mandamus may lie to compel the Cabinet to tender advice to the Yang di-Pertuan Agong to revoke the proclamation of a security area if its continuance is no longer justifiable.¹¹⁶ The words "on any ground" make the provision of wide

113. Authors Sheridan & Groves make a scathing criticism of the drafting of the Act. They observe: "(The) whole of the draftsmanship of the Act is so ghastly that trying to interpret it is probably a waste of time": see Sheridan & Groves, The Constitution of Malaysia, 4th Edn (Malayan Law Journal, Singapore, 1987) p.394.

114. [1980] 1 MLJ 70. See also the earlier case of *Lim Woon Chong v. Public Prosecutor* [1979] 2 MLJ 264 for the expression of a similar opinion (per Suffian LP at 266 F-G).

115. At p.74C-D. For a case dealing with the application of the Act as a whole, see *Su Ah Ping v. Public Prosecutor* [1980] 1 MLJ 75.

116. [1980] AC 458 at p.473; [1979] 1 MLJ 50.

application within its field of operation, and any challenge to the validity of a proclamation would encounter an insurmountable hurdle unless the challenge is on the ground of ultra vires.

The restrictions inherent in Section 12 are however absent in Clause (8). There can be little doubt that Clause (8) was intended to, and does, cover a wide sphere of emergency measures. In its sweep it covers the proclamation and duration of an emergency, and the enactment and continuance of an emergency ordinance. If the words are given their literal meaning, there will undoubtedly be a complete foreclosure of judicial review. In the view of one academic writer, Clause (8) raises serious implications as to the state of constitutionalism in Malaysia because the Cabinet will be given carte blanche authority to do as they please.¹¹⁷ The learned author argues that clause (8) has consigned all questions concerning emergency powers to the absolute discretion of the Government, and may lead to an eclipse of constitutional government.¹¹⁸ This undoubtedly is a legitimate observation if Clause (8) is treated as a complete ouster clause. The question in law for our present purposes is whether Clause (8) achieves its intended objective of completely ousting judicial review?

A salutary principle that the Courts have emphasised consistently is that statutory provisions seeking to exclude the jurisdiction of the Courts will always be construed strictly and not as a matter of natural intendment.

117. See H.P. Lee, Emergency Powers In Malaysia in Trinidad & Lee, The Constitution of Malaysia: Further Perspectives And Developments, (OUP, Singapore, 1986) at p.150. The learned author suggests that Clause (8) as an amendment to Article 150 may be challenged by applying the "basic structure" principle evolved by the Indian Supreme Court (*Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1373) that there is an implied limitation in the power of Parliament not to amend the Constitution by altering its basic features.

118. *Ibid.* at p.151.

It was stated by the Privy Council in *Secretary of State v. Mask & Co.*¹¹⁹ as follows:

"It is settled law that the exclusion of the jurisdiction of the Civil Courts is not to be readily inferred, but that such exclusion must either be explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the Civil Courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure".¹²⁰

The modern statement on privative clauses may be taken as given in the landmark decision of the House of Lords in *Anisminic Ltd v. The Foreign Compensation Commission*.¹²¹ In that case, decisions of a tribunal called the Foreign Compensation Commission were sought to be protected by a finality clause that read:

"The determination by the Commission of any application made to them under this act shall not be called in question in any court of law".

Lord Reid, who gave the first speech, spoke of a well established principle that a provision ousting the ordinary jurisdiction of the Court must be construed strictly, and that if such a provision is reasonably capable of having two meanings, that meaning must be taken that preserves the ordinary jurisdiction of the Court.¹²²

119. AIR 1940 PC 105.

120. Per Lord Thankerton at 110.

121. [1969] 1 AER 208; 1969 2AC 152. The decision was described by Lord Diplock as a landmark in the development of administrative law in England: see *O'Reilly v. Mackman* [1982] 3 AER 1124 at 1129.

122. At p.213B. See also the interesting decision of the Tanganyika Court of Appeal in *Marealle v. The Chagga Council* [1963] EA 131, decided before the *Anisminic* case, that spoke of giving a restrictive meaning to words limiting the jurisdiction of the courts (per Gould J.A. at 137).

However, the significance of the *Anisminic* case lies in the clear statement by the Law Lords that an ouster clause does not protect jurisdictional errors. The expression of this principle by Lord Reid and Lord Pearce deserve full examination. Both judges took a common approach in dealing with the question; first, that only a real determination was protected and not a determination that was in law a nullity. Next, they expatiated on when a determination, although ex facie a valid determination, could nevertheless be classified a nullity in law. Dealing with these steps, Lord Reid first said:

"(Determination) means a real determination and does not include an apparent or purported determination which in the eyes of the law has no existence because it is a nullity. Or, putting it in another way, if one seeks to show that a determination is a nullity, one is not questioning the purported determination - one is maintaining that it does not exist as a determination. It is one thing to question a determination which does exist; it is quite another thing to say that there is nothing to be questioned..... A person aggrieved by an order alleges that it is a forgery or that the person who made the order did not hold that qualification or appointment. Does such a provision require the court to treat that order as a valid order? It is a well established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly - meaning, I think, that, if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.....

 Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity. If the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any enquiry even whether the document relied on was a forgery, I would have expected to find something much more specific than the bald statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think that it is necessary or even reasonable to construe the word "determination" as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity.¹²³

In dealing with the same question, Lord Pearce said:

123. At pp. 212 - 213.

"It has been argued that your Lordships should construe "determination" as meaning anything which is on its face a determination of the commission including even a purported determination which has no jurisdiction. It would seem that, on such an argument, the court must accept and could not even enquire whether a purported determination was a forged or inaccurate order which did not represent that which the commission had really decided. Moreover, it would mean that, however far the commission ranged outside their jurisdiction or that which they were required to do or however far they departed from natural justice, their determination could not be questioned. A more reasonable and logical construction is that by "determination", Parliament meant a real determination, not a purported determination. On the assumption, however, that either meaning is a possible construction and that, therefore, the word "determination" is ambiguous, the latter meaning would accord with a long established line of cases which adopted that construction".¹²⁴

On when decisions would amount to a nullity, it is sufficient if we look only at the clear statement on this by Lord Reid:¹²⁵

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the enquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly".¹²⁶

124. At p.237 F-I.

125. Lord Pearce says much the same thing: see pp.234-235.

126. At pp. 213 - 214.

The approach taken in the *Anisminic* case of a strict construction of ouster clauses, and the description of the errors that make a decision a nullity, has been fully adopted in Malaysia. It has largely been considered in the context of the privative or "no-certiorari" clause of the Industrial Relations Act, 1967 that seeks to protect decisions of the Industrial Court from judicial review. In a Malaysian appeal to the Privy Council on the provision, the Board recorded that the *Anisminic* decision ensured that the finality clause did not preclude review for jurisdictional errors.¹²⁷ A catena of cases since that decision, many of them decisions of the Supreme Court, have kept abreast with the developments in English administrative law and recognised that an ouster clause will not prevail against *Anisminic* errors.¹²⁸ Moreover, it has even been said that the time has come to recognise the view propounded by Lord Denning in *Pearlman v. Governors of Harrow School*¹²⁹ of obliterating the distinction between errors within jurisdiction and those without jurisdiction.¹³⁰

The decision in point, for our purposes, is *Re Tan Boon Liat @ Allen et al*¹³¹ decided under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. The case concerned certain detention orders made by the Yang di-Pertuan Agong acting under powers given by the Ordinance. The detainees

127. See *South East Asia Firebricks Ltd v. Non-Mettalic Union* [1980] 2 AER 689; [1980] 1 MLJ.

128. See *Hotel Equatorial v. Hotel Union* [1984] 1 MLJ 363; *Inchcape Malaysia Holdings v. RB Gray* [1985] 2 MLJ 297; *Sabah Banking Employees Union v. Sabah Commercial Banks Association* [1989] 2 MLJ 284.

129. [1979] QB 56.

130. Per Mohd. Azmi SCJ in *Enesty Sdn. Bhd. v. Transport Workers Union* [1989] 2 MLJ 284. For a contrary view, see the High Court decision of *Viking Askim Sdn. Bhd. v. Union* [1991] 1 CLJ 552.

131. [1977] 2 MLJ 108.

challenged the detention orders in habeas corpus proceedings as being ultra vires the Yang di-Pertuan Agong's powers. It was contended that the Yang di-Pertuan Agong had acted without reference to a body called the Advisory Board which is to consider all representations made to it by the detainees and recommend on their continued detention within three months of receipt of the representations. Section 6(2) of the Ordinance carried a finality clause to the effect that "every decision of the Yang di-Pertuan Agong thereon shall be final and shall not be called into question in any court". Suffian LP applied the *Anisminic* principle and ruled that the ouster clause did not apply: "(The) section applies only to real decisions, not to ultra vires decisions, of His Majesty and here clearly His Majesty's decision was ultra vires".¹³²

An ultra vires exercise of power or a mala fide exercise of it prevails against the effect of an ouster clause. An event like the declaration of an emergency in Lesotho by the King in February 1988 under a provision that empowered only the Prime Minister in consultation with the legislative assembly to declare an emergency would be invalid,¹³³ and cannot be protected by a finality clause. In the words of Mason J. of the Australian High Court:

"The approach of the courts to the construction and application of privative clauses is instructive. The privative clause is the conventional expression of the legislative intention that a decision shall not be challenged in the courts. Yet, notwithstanding the wide and strong language in which these clauses have been expressed, the courts have traditionally refused to recognise that they protect manifest jurisdictional errors or ultra vires acts".¹³⁴

132. At p. 109 H-I.

133. See the facts given in *Law Society of Lesotho v. Minister of Defence* [1988] LRC (Const) 226.

134. *Church of Scientology v. Woodward* [1980-82] 154 CLR 25 at 55-56.

A decision which is ultra vires or made without jurisdiction would not be "a real determination" in *Anisminic* terms and cannot be protected by an ouster clause. *Re Tan Boon Liat*, ante, shows that the rule is the same no matter how high the personage whose action is challenged. A similar statement comes from the unlikely jurisdiction of Fiji in a case decided in the aftermath of the 1987 military coup that destroyed the democratic polity of the country.¹³⁵ The deposed Prime Minister, Dr Bavadra, filed a legal suit challenging the validity of the decision of the Governor-General made on the day of the coup to declare an emergency and dissolve Parliament. The action was sought to be struck out on the ground that the actions of the Governor-General, as the representative of the Queen, were not justiciable. In dismissing the application, Rooney J. of the Fiji Supreme Court held that a cause of action was disclosed because "anything done in the Queen's name which is contrary to law is a nullity" and it is a principle that applied to any "purported exercise of the prerogative by Her Majesty's Governor-General which is subsequently found by the courts to be unlawful and unconstitutional".¹³⁶

The *Anisminic* approach, however, is not universally accepted by third world courts. It will be realistic to distinguish between the treatment given in cases involving a highly controversial issue of significance and one which is merely a journeyman's case. The reality behind judicial attitudes, especially of judges in developing countries, where the relationship between the executive and the judiciary does not rest on a firm foundation, is to

135. For a narrative account of the coup on 14 May 1987, see Kenneth Bain, Treason At Ten: Fiji At the Crossroads (Hodder & Stoughton, London, 1988). For a legal analysis of the constitutional issues presented by the coup, see Yash Ghai, A Coup By Another Name? The Politics of Legality, The Contemporary Pacific, September 1990, p.12 etseq.

136. *Bavadra v. Attorney General* [1988] LRC (Const) 13 at 23.

avoid making decisions that will embarrass the Executive. The release of a detainee whose continued incarceration is not pivotal to the Government's perception of security, like in *Re Tan Boon Liat*, ante, does nevertheless strike a note of optimism and should not have its value minimised. But one cannot conclude from it that the Malaysian courts will show equal robustness in overcoming clause (8) involving the validity of a proclamation of emergency. As one academic writer, who studied the *Ningkan* litigation, observed: "(The) past record of the Malaysian judiciary may have encouraged the Government to believe that the role of the judiciary is that of docility and submission to its will".¹³⁷

One philosophic explanation given as to why courts should abstain from thwarting executive actions in areas involving law and politics is the likelihood of the decision, in matters of high constitutional or political importance, being reversed by remedial legislation or the decisions rendered ineffective by being nullified.¹³⁸ The first *Ningkan* decision in Sarawak reinstating the dismissed Chief Minister was effectively nullified by the Proclamation of an Emergency seven days later paving the way for his eventual removal. The emergency accomplished what could otherwise only be achieved by

137. See letter dated 19 May 1990 from Yash Ghai (Sir YK Pao Professor of Public Law, University of Hong Kong) to the Editor, ROCKET, published in the ROCKET Vol. 23/5, 1990 at p.3.

138. See K.J. Keith, The Courts And The Conventions of the Constitution, (1967) 16 ICLQ 542 who has propounded the view that the *Ningkan* case and the Nigerian case of *Adebenro v. Akintola*, ante, are not suitable for judicial resolution because of their high political import. He wrote: "The writer does not conclude that the Nigerian and Sarawak courts should have refused to consider these cases. But theimmediate political action (which must have been a possibility at the time of litigation) to nullify the decisions surely establish that the question of justiciability should have been carefully and anxiously considered, and that it should not have been assumed that the issues were fit for judicial determination simply because the relevant rules were to be found in the Constitution" (p.549).

way of an appeal to the Federal Court with the attendant possibility of failure. The Swaziland case of *Ngwanya v. Deputy Prime Minister*¹³⁹ is a case-study of executive action to nullify an unfavourable court decision. The petitioner Ngwanya was elected to the Swaziland Parliament much to the displeasure of the ruling party. Soon thereafter he was the subject of a deportation order signed by the Deputy Prime Minister on the ground that he was not under the Constitution "a person who belongs to Swaziland". Ngwanya's challenge in the High Court failed, and whilst an appeal was pending to the Court of Appeal, the Government amended the Immigration Act to make it compulsory for such complaints to be dealt with by a special tribunal whose decision was appealable to the Prime Minister. The decision of the Prime Minister was to be final and not subject to review by a court of law. The Court of Appeal held that the amendment to the Immigration Act was ultra vires the Constitution as confiding a judicial power on the Executive and held Ngwanya's deportation unlawful. Soon after the judgment of the Court of Appeal the King staged a coup by abrogating the separate existence of the Parliament and the Judiciary and vesting all power in himself. Thus the coup achieved what the court had said could not be done. Similarly, in Lesotho, the 1988 emergency proclaimed by the King in the absence of the Prime Minister, who was earlier deposed in a coup, and which was declared by the High Court to be invalid for want of power, was nullified by an Order issued by the Military Council. The Council by the Order repealed the statute that only empowered the Prime Minister to declare an emergency and substituted it with an

139. Swaziland Civil Appeal No. 1 of 1973. See account of the case in T. Akinola Aguda, *The Judiciary In A Developing Country*. (Ed. Marasinghe & Conklin, *Essays On Third World Perspectives In Jurisprudence*, MLJ Publication, Singapore, 1984) pp.150-151.

Ordinance that authorised the King to exercise the power. The Order proceeded to declare that a state of emergency existed from the time of the first proclamation which was invalidated by the court.¹⁴⁰

It is not surprising, therefore, if in some African jurisdictions, the courts bow to the clear pronouncement of the statutory exclusionary clause and abstain judicially from interfering. The reasoning in *Anisminic* that a finality clause only protects "real determinations" has found no adherence in these courts. The approach is one of pure statutory construction. A case in point is the Nigerian decision of *Wang & Ors v. Chief of Staff, Supreme Headquarters, Lagos*.¹⁴¹ It was a case concerning a decree issued by the Military Government of Nigeria that authorised preventive detention. The relevant decree contained also a finality clause that stated "No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this decree". A further provision suspending the fundamental rights chapter of the Nigerian Constitution carried the rider: "(A)ny question whether any provision (of the Constitution) has been or is being or would be contravened by anything done or proposed to be done in pursuance to this Decree shall not be inquired into in any court of law". In the face of these provisions, the Lagos Court of Appeal ruled that a habeas corpus petition did not lie. The Court reasoned: "(W)hile the language of the Decree does not use express words ousting the jurisdiction of the court, it cannot be said that the words used are not a bar to bring legal proceedings against any person for anything done or intended to be done in

140. See Editor's Note in report of *The Law Society of Lesotho v. Minister of Defence* [1988] LRC (Const) 226.

141. [1986] LRC (Const) 319

pursuance to the Decree".¹⁴² The exceptional part of the judgment is Ademola CJ's abject acceptance that the Military Government has effectively silenced the law courts on matters of safeguards and liberties: "(On) the question of civil liberties, the law courts of Nigeria must as of now blow muted trumpets".¹⁴³

These African decisions, whilst illustrative of the tensions attendant to judicial decision-making in nascent democracies, must be regarded as standing on their own. They do not follow the growing trend in many Commonwealth countries of seeking greater accountability of the Executive. The attitude and approach of the Indian Supreme Court on this question is probably the most instructive. The Indian Court has looked at finality clauses, even in the Constitution, as purely an administrative law question. Thus a finality clause could be overridden on purely *Anisminic* grounds even if it is designed to protect constitutional actions by the head of state like proclamations of emergency and the like. Article 356 of the Indian Constitution that authorises the President by proclamation to take over the administration of a state where there has been a break-down in government carried clause (5),¹⁴⁴ that read as follows: "... (The) satisfaction of the President ... shall be final and conclusive and shall not be questioned in any court on any ground". In *State of Rajasthan v. Union of India*,¹⁴⁵ the

142. At p.330 a-b

143. Ibid at (i). For a decision that explains the legal status of the military decrees as collectively forming the grundnorm or fundamental law of Nigeria, see *Nigerian Union of Journalists v. Attorney General of Nigeria* [1986] LRC (Const) 1.

144. Repealed by the 44th Amendment Act, 1978.

145. AIR 1977 SC 1361

Supreme Court considered the justiciability of the President's satisfaction under the provision and held that the finality clause did not preclude review:

"The satisfaction of the President is a condition precedent to the exercise of power under Article 356 clause (1) and if it can be shown that there is no satisfaction of the President at all, the exercise of the power would be constitutionally invalid. Of course by reason of clause (5) of Article 356, the satisfaction of the President is final and conclusive and cannot be assailed on any ground but this immunity from attack cannot apply where the challenge is not that the satisfaction is improper or unjustified, but that there is no satisfaction at all. In such a case it is not the satisfaction arrived at by the President which is challenged but the existence of the satisfaction itself".¹⁴⁶

This reiterates what was said in *Anisminic* that a real determination is protected but not a determination which is a nullity. The Indian Constitution in Article 352, dealing with emergencies, had also a finality clause. It was later repealed by the 44th Amendment in 1978. Clause (5), with minor differences, was in pari materia with the Malaysian Clause (8). It is likely that the latter, introduced in 1981, was modeled on the former. The Indian provision read as follows:

"(5) Notwithstanding anything in this Constitution, -

- (a) the satisfaction of the President mentioned in clause (1) and clause (3) shall be final and conclusive and shall not be questioned in any court on any ground;
- (b) subject to the provisions of clause (2), neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of -
 - (i) a declaration made by Proclamation by the President to the effect stated in clause (1); or
 - (ii) the continued operation of such proclamation".

146. Per Bhagwati and A.C. Gupta J.J. at pp.1414-1415 (para. 144). In *A.k. Roy v. Union of India* AIR 1982 SC 710, the Supreme Court held that the repeal of clause (5) by the 44th Amendment in 1978 opened the door to judicial review of the grounds of the President's satisfaction itself.

The exclusion clause was considered by Bhagwati J. in *Minerva Mills Ltd v. Union of India*:¹⁴⁷

"The satisfaction of the President is a condition precedent to the exercise of power under Article 352 clause (1) and if it can be shown there was no satisfaction of the President at all, the exercise of the power would be constitutionally invalid. Where therefore the satisfaction is absurd or perverse or mala fide or based on a wholly extraneous and irrelevant ground, it would be no satisfaction at all and it would be liable to be challenged before a court, notwithstanding clause (5)(a) of Article 352".¹⁴⁸

The scope of challenge as stated in this case, although narrow, was nevertheless significant.

In summary, one can glean from the cases that judicial review may still lie in spite of a finality clause where there has been a total want of authority to act e.g. the Lesotho case where the King declared the emergency instead of the Prime Minister who only was authorised by the relevant statute;¹⁴⁹ or for any ultra vires acts e.g. where the satisfaction on record was not that of the relevant person¹⁵⁰ or was for an unauthorised reason;¹⁵¹ or where the satisfaction is mala fide,¹⁵² absurd or perverse.¹⁵³

147. AIR 1980 SC 1789

148. At paras. 103-105

149. See the *Law Society of Lesotho* case [1988] LRC (Const) 226

150. See, by analogy, the Singapore case of *Ch'ng Suan Tze v. Minister of Home Affairs* [1989] 1 MLJ 69, where a detention order was struck down because the satisfaction required was that of the President and not that of the Permanent Secretary of the Home Affairs Ministry who seemed to have acted.

151. e.g. The argument that failed in *The State (Sierra Leone) v. Adel Osman* [1988] LRC (Const) 212, that there was no provision in the relevant statute to declare an "economic emergency".

152. e.g. The argument of *fraudem legis* raised in the *Ningkan* case [1970] AC 379, that the Proclamation of emergency was done in bad faith with the ulterior motive of removing Ningkan from office.

153. e.g. The emergency in Lesotho in 1988 was declared because of an increase in the incidences of house-breaking, armed robbery, motor-

The *Anisminic* principle and its restatement by the Australian and Indian courts is an example of judicial resistance to sanctioning uncontrolled government power and to maintain the constitutional checks and balances that is needed in any parliamentary democracy. If the courts decide to "blow muted trumpets" as suggested by the Nigerian court in *Wang's* case, ante, there will truly be "the eclipse of constitutionalism" as feared by one academic writer when considering the impact of the newly introduced Clause (8) of Article 150 excluding judicial review of emergency actions.¹⁵⁴

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153. vehicle and stock-theft, all matters that could have been dealt with by adequate policing: see *Law Society of Lesotho* case [1988] LRC (Const) 226.

154. H.P. Lee, op. cit. p.151

CHAPTER XTHE DURATION AND CONTINUANCE OF A STATE OF EMERGENCYIntroduction

In *Mahan Singh v. Government of Malaysia*,¹ Lee Hun Hoe C.J. (Borneo) observed with reference to the 1969 Emergency: "(An emergency) was temporary in nature; it ceased to exist once Parliament annulled the Proclamation". But in truth the 1969 emergency has been one long uninterrupted moment. Like the 1964 Emergency, declared to meet the Indonesian Confrontation which was never revoked although the event itself passed into oblivion, the 1969 Emergency has to date not been revoked. The Kelantan emergency in 1977 was the only emergency that was officially revoked by repeal of the Emergency Powers (Kelantan) Act, 1977.² Thus the Emergencies that were declared subsequent to the 1964 Emergency (in 1966, 1969 and 1977) have all been overlapping emergencies.

A permanent or perpetual state of emergency presents a profound challenge to constitutionalism in any country professing democratic values. In Malaysia, the return to parliamentary rule, after the 1969 Emergency was made on 20 February 1971 but the Emergency itself was never revoked. Thus the Government retained the capacity to make and enact emergency laws under Article 150(2)³ and under the principal emergency legislation called the

1. [1975] 2 MLJ 155 at 165 B-C.

2. P.U.(A) 46 Gazette 12.2.78.

3. The provision was amended by the Constitution (Amendment) Act A 514 of 1981.

Emergency (Essential Powers) Ordinance No. 1 of 1969.⁴

The Duration of Emergencies

A perpetual state of emergency raises the question whether the real purpose for continuing an emergency is to enable rule by decree. An African court went so far as to characterize such a state of affairs as "a fictitious emergency". In the Ugandan case of *Namwandu v. Attorney General*,⁵ Saldanha J. observed:

"A state of public emergency was declared on 23 May 1966. It is common knowledge that the Government extended the period of emergency from time to time, not because there was a real emergency, but for purposes of expediency, so as to enable them to keep in force emergency regulations. It is not in dispute that while there was a state of emergency in this sense at the time when the incident occurred, there was no real emergency, but, on the contrary, stability throughout the country..... there was a fictitious state of emergency in law but no real emergency in fact".⁶

The decision was an exceptional one. The trend in case law in the Commonwealth, past and present, does not support the approach of the Ugandan court. The cases show that save in exceptional cases, of clear proof to the contrary, the judiciary does not sit in judgment of the executive's statement of belief that there is a need to continue the emergency.

The early cases that dealt with the question were war-cases purporting to define when hostilities end. The cases arose mostly out of the exercise of the war-power to enact emergency legislation although the war had abated. The

4. Emergency laws made under this Ordinance after Parliament had sat on 20 February 1971 were struck down as invalid by the Privy Council in *Teh Cheng Poh v. Public Prosecutor* [1980] AC 458; [1979] 2 MLJ 50. After this decision the Ordinance was re-enacted as an Act of Parliament and called the Emergency (Essential Powers) Act, 1979.

5. [1972] E.A. 108.

6. At p. 111 G-I.

first set of cases were those that dealt with the effect of the armistice that was signed to end the First World War. The war had seen for the first time the creation of an elaborate legislative armoury in several countries conferring arbitrary power on the executive to prosecute the war. An example was the Defence of the Realm Act, 1914 in Britain. In *The King v. Governor of Wormwood Scrubbs Prison*,⁷ the question was whether the power of preventive detention under the defence regulations made under the 1914 Act could still be exercised after the hostilities had ceased. Lord Reading CJ said the question whether the emergency continued to exist or not was for the Executive alone to decide. He held:

"As the Executive has not seen fit to revoke the proclamation it continues in force, unless the war is at an end. But the war is not at an end; we are still in a state of war. Though the war with Germany has come to an end the termination of the war has not yet been declared".⁸

In his supporting judgment, Avory J. held that procedurally and substantively the proclamation based upon a special military emergency could only be revoked by an Order in Council.⁹

In the United States, a similar question arose at about the same time. In *Hamilton v. Kentucky Distilleries & Warehouse Co*,¹⁰ the issue was whether Congress retained the power to enact a war-time legislation after the cessation of hostilities with Germany. The War-Time Prohibition Act, 1918 making it unlawful to sell or transport alcohol was enacted after the armistice with Germany was signed. The contention of the challengers was that with demobilization the war emergency was removed and that when the emergency

7. [1920] 2 KB 305.

8. At p.312.

9. At p.315.

10. 251 U.S. 106 [1919]

ceased the statute became void. Mr. Justice Brandeis, who wrote for the Supreme Court, said that, of the war power upon which the very life of the nation depends, a wide latitude of discretion must be accorded. He held:

"(It) would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued. In view of facts of public knowledge..... that the treaty of peace had not yet been concluded, that the railways are still under national control by virtue of the war powers, that other war activities have not been brought to a close, and that it cannot even be said that the manpower of the nation has been restored to a peace footing, we are unable to conclude that the act has ceased to be valid".¹¹

Proof in clear and cogent terms that the war danger had elapsed was emphasised by the Privy Council as a precondition before judicial intervention was permissible. In a Canadian appeal, *Fort Frances Pulp & Power Company Ltd v. Manitoba Free Press Company Ltd*,¹² the Privy Council had to consider the validity of legislation passed by the Dominion Parliament of Canada after the cessation of hostilities on a subject matter which during peace time was ordinarily reserved for the provincial legislature. Viscount Haldane said:

"(Very) clear evidence that the crisis had wholly passed away would be required to justify the judiciary, even when the question raised was one of ultra vires which it had to decide, in overruling the decision of the Government that exceptional measures were still requisite".¹³

The Board went on to observe that although actual war had ceased "the effect of war conditions might still be operative".¹⁴

11. At p.111. See, however, the subsequent case of *Chastleton Corporation v. Sinclair* 264 U.S. 543 [1924], dealing with the post-war operation of rental controls introduced during the war, where the Supreme Court held that "it was open to the court to inquire whether the exigency still existed upon which the continued operation of the law depended" (p.548).

12. [1931] AC 695.

13. At p. 706. For a discussion of Canadian cases dealing with emergencies, including those in this area, see Herbert Marx, The Emergency Power And Civil Liberties In Canada (1970) 16 McGill L.J. 39.

14. At p. 708. In the later Privy Council case of the *Co-operative Committee on Japanese Canadians v. Attorney General for Canada* [1947] AC 87 at 101.

The *Fort Frances* criteria were not followed in Australia. In the case of *The King v. Foster*,¹⁵ the Australian High Court observed that the effects of war "will continue for centuries" and therefore opted for stricter proof of the need for the continued operation of war-time legislation.¹⁶ The Court held that the continued existence of a formal state of war, after the enemy has surrendered, is not enough in itself to bring or retain within the Commonwealth legislative power over defence the same wide field of control as fell within it while the country was engaged in conflict with powerful enemies. The test propounded was: "unless the Court could see with reasonable clearness how it is incidental to the defence power to prolong the operation of a war measure, it is the duty of the Court to pronounce the enactment beyond the legislative power".¹⁷ This admirably reasonable proposition was followed in the later case of *Queensland Newspapers Pty Ltd v. McTavish*,¹⁸ where the Court spoke of the post-war period when such legislation could validly operate as "any reasonable period of transition required for winding up the arrangements of war".¹⁹

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14. Lord Wright made a similar observation: "(V)ery clear evidence that an emergency has not arisen or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of ultra vires, in overruling the decision of the Parliament that exceptional measures were required or were still required". See also the decision of the Canadian Supreme Court in Reference As To The Validity Of The Wartime Leasehold Regulations [1950] SCR 124 for the observation that the Court will not find that there is no emergency "unless the contrary is very clear".

15. [1949] 79 CLR 43.

16. At p. 83.

17. At p.84.

18. [1951] 85 CLR 30.

19. At p. 47. In the earlier case of *Dawson v. The Commonwealth* [1946] 73 CLR 157, the High court of Australia ruled that the defence power

However, Australian decisions may be distinguished since there is under the Australian Constitution no requirement for the defence power to be invoked only pursuant to a declaration. In this regard, the Malaysian position is closer to the English and Indian experience. In the *Governor of Wormwood Scrubbs Prison's* case, Avory J. took the rigid position that a proclamation of emergency brought about by official pronouncement could only be ended by an Order in Council and there was no room for a judicial assessment, independent of that, that emergency conditions had ceased.²⁰ In the case of *Willcock v. Muckle*,²¹ after the Second World War, a special bench of seven judges of the Court of Appeal in England, considered whether the National Registration Act, 1939, which was passed at the outbreak of the war, continued in force after the emergency created by the war had long lapsed. It was acknowledged that there was no Order in Council as contemplated by the statute to declare that the emergency was at an end. The judges were unanimously of the view that the Act continued in force because of this technicality. But grave disquiet was expressed by the judges that legislation intended to meet an emergency was continued in spite of the emergency having ceased. Lord Goddard C.J. observed:

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19. includes not only a power to prepare for and to prosecute the war, but also a power to wind-up after a war and to restore a condition of peace as gradually as the particular circumstances may require. See also *Australian Textiles Proprietary Ltd v. Commonwealth* [1946] 71 CLR 161.
20. *Supra*, note 7.
21. [1951] 2 AER 367. See the Indian case of *Pannalal v. State of Hyderabad* AIR 1954 Hyderabad 129 which held that emergency legislation cannot be allowed to outlast the emergency that brought it forth. See also the decision of the United States Supreme Court in *Chastleton Corp. v. Sinclair* 264 U.S. 543 [1924], where it was held that it was competent for the court to inquire whether the exigency that justified a particular law continued to exist.

"To use Acts of Parliament, passed for particular purposes during war, in times when the war is past, except that technically a state of war exists, tends to turn law-abiding subjects into lawbreakers, which is a most undesirable state of affairs".²²

A similar opinion was expressed by Devlin J:

"I think it would be very unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated in different circumstances and for different purposes".²³

The decision in *Willcock's* case inspired an influential article by a former Chief Justice of Malaya doubting the validity of the continued state of the 1969 emergency in Malaysia.²⁴ The article was written shortly after the majority decision of the Federal Court in *Khong Teng Khen's*²⁵ case was delivered. That case for the first time dealt with the law-making power of the Yang di-Pertuan Agong under the 1969 Emergency after Parliament had reconvened on 21 February 1971. The case arose out of a dispute over the mode of the trial of certain accused persons charged with illegal possession of firearms under the Internal Security Act. After the accused persons had been committed for trial, the Attorney-General certified under the Emergency (Security Cases) Regulations, 1975 that the offences were security offences and therefore to be tried under the special rules of evidence provided for under the Regulations. The latter was made under the Emergency (Essential Powers) Ordinance No. 1 of 1969 which itself was dependent for its life upon the continued state of emergency in the country. The defence objected to the

22. At. p. 369E.

23. At p. 370 G.

24. Tan Sri Ong Hock Thye, Is The 1969 State of Emergency Still An Existing Fact? (1976) Vol ix INSAF, 3.

25. [1976] 2 MLJ 165.

certification and caused the trial judge, Wan Hamzah J. (as he then was), to state certain questions of law for the opinion of the Federal Court regarding the constitutionality of the Regulations. The principal question was whether the Yang di-Pertuan Agong could exercise his law-making powers once Parliament had sat, and whether the Regulations made in 1975 were invalid. The learned judge was himself of the view that the Yang di-Pertuan Agong was not authorised to legislate once Parliament had sat.²⁶ The Federal Court, by a majority (Suffian LP; Wan Suleiman FJ), held that Article 150(2), limiting the law-making power of the Yang di-Pertuan Agong, did not apply to the Regulations because they were made under the Ordinance and not under the Constitution. The decision was subsequently overruled by the Privy Council in *Teh Cheng Poh's* case²⁷ which stated that there was a logical fallacy in the Federal Court's reasoning. The Privy Council held that the Ordinance, which was itself dependent upon the emergency under Article 150 for its continued life, could not give a right to the Yang di-Pertuan Agong to make laws independent of Article 150: "that would be tantamount to the Cabinet lifting itself up by its own boot-straps" (per Lord Diplock).²⁸

The former Chief Justice also denounced the views expressed by the majority judges in *Khong Teng Khen's* case as regards the continued state of the emergency in the country. For example, Wan Suleiman FJ had observed: "The ultimate right to decide if an Emergency exists or had ceased to exist therefore remains with Parliament, and it is not the function of any court to

26. At p. 172 E-G (reproduced in the dissenting judgment of H.S. Ong FJ in the Federal Court).

27. See note 23, *supra*.

28. [1980] AC 458 at 468-69; [1979] 2 MLJ 50.

decide on that issue".²⁹ In response, H.T. Ong wrote: "A state of emergency is a fact which, at any given date, either exists or does not exist" and observed that the restoration of diplomatic and friendly relations between Indonesia and Malaysia ended the Confrontation just as effectively as if there were a Proclamation of its termination.³⁰ The learned writer also concluded that the emergency proclaimed on May 15, 1969 had died a natural death, and in consequence, that the Emergency (Essential Powers) Ordinance No. 1 of 1969 was no longer operational.

The impact of the article in legal circles was significant. It provided the impetus, and the arguments, for the first challenge ever to the legality of the continued state of emergency in the country under the emergency proclaimed on 15 May 1969. The challenge was made in *Johnson Tan v. Public Prosecutor*.³¹ In that case, the contention was that the Essential (Security Cases) Regulations, 1975 were invalid because the Emergency (Essential Powers) Ordinance No. 1 of 1969 had lapsed by force of changed circumstances. It was contended that the 1969 emergency, although valid at the time it was proclaimed, had by 1975 ceased to be valid because of the change in circumstances viz. that another general election had been held and the country had returned to normalcy. The arguments succeeded at first instance. In a judgment that adopted the reasoning contained in the former Chief Justice's article, Harun J (as he then was) held:

29. Op. cit. at p.177 F-G.

30. Op. cit. at p.5.

31. [1977] 2 MLJ 66. See also the later case of *Chong Soon Koy v. Public Prosecutor* [1977] 2 MLJ 78, where a similar argument was raised, and rejected by the Federal Court.

"It will be ridiculous in the extreme to prosecute any person to-day for an offence under the Internal Security Act with reference to the 1964 Proclamation (to deal with Indonesian confrontation). In *Willcock v. Muckle*, Lord Goddard C.J., at p. 851 said: "This Act (the National Registration Act, 1939) was passed for security purpose; it was never passed for the purposes for which it was apparently being made. To use Acts of Parliament passed for particular purposes in wartime when the war is a thing of the past - except for the technicality that a state of war exists - tends to turn law-abiding subjects into lawbreakers, which is a most undesirable state of affairs".

In the same case, Devlin J, at p. 853 said:-

"I think that it would be unfortunate if the public were to receive the impression that the continuance of the state of emergency had become a sort of statutory fiction which was used as a means of prolonging legislation initiated under different circumstances and for different purposes".

If I am correct in holding that the 1964 Proclamation has lapsed, the question arises whether the same can be said for the 1969 Proclamation. On the facts it is clear that the tragic events of May 13, 1969 and the weeks that followed are a thing of the past. The occasion for which the Proclamation P.U.(A) 148 (declaring all areas in the Federation as security areas for the purposes of ISA) was made was for particular purposes which no longer exist, at least not on February 9, 1976, when this alleged offence was committed. It is now more than seven years after these unhappy events and I must hold that the 1969 Proclamation has also lapsed. In the *Petition of the Earl of Antrim and Eleven Other Irish Peers*, Lord Reid at page 1149 said: "A statutory provision becomes obsolete if the state of things on which its existence depended has ceased to exist so that its object is no longer attainable".³²

On appeal, the judgment was reversed. Suffian LP held that the 1969 proclamation had not lapsed and was still in force. He relied on Clause (3) of Article 150 which read: "A proclamation of emergency and any ordinance promulgated under Clause (2)... if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses of Parliament annulling such proclamation or ordinance". Suffian LP interpreted the clause as follows:

"In my view these words mean..... that a proclamation of emergency ceases to have effect only

32. Harun J's judgment has never been reported. The only published record of it are the extracts reproduced in Suffian LP's judgment (in the appeal court) at pp. 67-68, *ibid*.

- (a) if revoked or
- (b) Parliament by resolution annuls it".³³

He held further that the law of Malaysia is the same as that in England and India, that whether a Proclamation of Emergency should or should not be terminated is not for the courts but for the executive to decide. In his supporting judgment, Raja Azlan Shah F.J. (as he then was) summed up the arguments of the challengers as follows:

"The forefront of the argument raised before us on behalf of all the accused is that the 1975 regulations are void because Ordinance No. 1 of 1969 under which the regulations were made, and a fortiori the Proclamation of Emergency of 1969, the basis of the said ordinance, have lapsed by effluxion of time. It is said that seven years have gone by since the 1969 Proclamation, that circumstances have since changed for the better and that we are now living in happier times, and therefore the Ordinance and consequently the Proclamation have outlived their purpose and must be considered repealed by effluxion of time. That is tantamount to saying that the Ordinance and the Proclamation can lose their force without express repeal".³⁴

He also concluded that the Proclamation ceases only by revocation or express annulment by resolution of both Houses of Parliament. In this regard it may be noted that the Government has never accepted the proposition that conditions had changed justifying the withdrawal of the Emergency. In moving the Emergency (Essential Powers) Bill, 1979 in Parliament on January 17, 1979, the Law Minister gave statistics of the number of security-based incidents in the country during the 1970's, and said:

"Some people may claim that everything appears to be peaceful and normal - that there does not appear to be a state of emergency; that there is no more need for the existence of the Proclamation of Emergency or the Proclamation of the Security Area. That this appears to be so is not owing to the non-existence of the state of emergency but to the efforts of the government and the security forces in keeping the state of

33. At p.68.

34. At p.73.

emergency under control. Let it be known that there are still hidden dangers lurking around and within our midst simmering under the surface".³⁵

35. Speech by the Honourable Minister of Law, Datuk Seri Hamzah Abu Samah in the Dewan Rakyat, Malaysia, on January 17, 1979, reported in (1979) 1 MLJ lxx. According to the Law Minister (at p. lxxiii):

"In the period from the 15th May, 1969 to the 4th November, 1975 [i.e. from the promulgation of the Emergency (Essential Powers) Ordinance, 1969 to the day immediately before the coming into force of the Essential (Security Cases) (Amendment) Regulations, 1975] to be referred to as the first period and from the 5th November, 1975 to the 31st December, 1978 (the second period), casualty and other figures are as follows, bearing in mind that the first period is over a span of more than six years whereas the second period covers slightly more than three years:

Security forces casualties

First period	-	.208 killed, 556 wounded
Second period	-	187 killed, 363 wounded

Civilian casualties

First period	-	120 killed, 24 wounded
Second period	-	48 killed, 54 wounded

Communist terrorist/underground casualties

First period	-	466 killed, 5645 arrested or captured, 885 surrendered (including 628 returnees during operation Sri Aman in Sarawak).
Second period	-	99 killed, 2848 arrested or captured, 45 surrendered.

Incidents

First period	-	379 contacts, 771 ambushes, shootings, booby-traps and flag hoistings.
Second period	-	114 contacts, 404 ambushes, shootings, booby-traps and flag hoistings.

Communist terrorists sightings and discovery of communist terrorists camps, resting places and food dumps

First period	-	4725 sightings, 366 camps, 625 resting places, 328 food dumps.
Second period	-	2519 sightings, 195 camps, 333 resting places, 232 food dumps.

It was obvious that the Federal court in *Johnson Tan's* case had rejected the proposition advanced in the former Chief Justice's article that an emergency could lapse by effluxion of time or changed circumstances. The article was nevertheless cited in the arguments before the Privy Council in *Teh Cheng Poh's* case advancing the same proposition.³⁶ In this case a twin-headed argument was put forward to declare the Emergency (Security Case) Regulations, 1975 invalid. The first was that the Yang di-Pertuan Agong could not in 1975 exercise his powers of law-making under the Emergency (Essential Powers) Ordinance No. 1 of 1969 because the conditions of the emergency had lapsed; the second, on which the case was ultimately won, was that the Agong had lost the power of law-making once Parliament had sat. The first argument

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35. *Weapons, ammunition and explosives seized by security forces*

First period	-	1097 weapons, 35750 rounds of ammunition, 578 explosives.
Second period	-	343 weapons, 23053 rounds of ammunition, 2214 explosives.

Weapons, ammunition, explosives and equipment lost by security forces

First period	-	153 weapons, 2417 rounds of ammunition, 17 explosives, 2 wireless equipment.
Second period	-	53 weapons, 1445 rounds of ammunition, 5 explosives, 2 wireless equipment.

From the 15th May, 1969 to the 31st December, 1969 a total of 532 operations have been carried out by our security forces against the communist terrorists and subversive anti-national elements. The terrorists and these elements pose a very grave and continuous threat to the security and economic life of our country and there can be no abatement of the existing state of emergency. To relax it or remove it would be tantamount to an abdication of our duty as the elected representatives of the people to safeguard the security of the nation and uphold the trust placed in us by the people to do what is right."

36. See arguments of Counsel reproduced in [1980] AC at 461.

had a profound effect on the status of the emergency in Malaysia. The Privy Council was obviously conscious of this fact, and of the other fact that by the time the appeal came before them the right of appeal from Malaysia on matters of the Constitution had already ceased.³⁷ Thus the Privy Council judges here, like their predecessors in *Ningkan's* case, deftly side-stepped the question and declined to answer it. Lord Diplock said:

"Since they (their Lordships) have held the Essential (Security Cases) (Amendment) Regulations 1975 to be invalid upon the ground that they were made after the Yang di-Pertuan Agong's power to make them had expired, it is unnecessary to decide whether or not they were invalid on the alternative and more far-reaching ground advanced by the defendant; namely, that by the time the regulations were made the emergency proclaimed on May 15, 1969, was over and the emergency proclamation of that date had ceased to be in force. As their Lordship's jurisdiction to advise His Majesty the Yang di-Pertuan Agong on the effect of any provision of the Constitution had been withdrawn from January 1, 1978, except in appeals that were already pending on that date, they do not think it appropriate to express opinions on questions of law falling within this category unless they are essential for the decision of an appeal that was pending on that date".³⁸

The refusal of the Privy Council to answer the question affirmatively could be construed as a reluctance to endorse the ratio decidendi of the Federal Court's decision in *Johnson Tan's* case. However, the difficulty in making this conclusion lies in that there is no record of *Johnson Tan's* case having been cited in the arguments before the Privy Council.³⁹ The omission is puzzling because it was the Government's argument before the Board that it was not appropriate for the courts to look behind a proclamation of emergency to determine whether or not an emergency exists, and that such questions, if at

37. Appeals on constitutional matters ceased as of 1 January 1978.

38. Op.cit at p.470 F-G; at p.54 F-H.

39. Op.cit. n.37.

all, should be left to the local (ie. Malaysian) courts to decide. *Johnson Tan's* case was the obvious authority in support of this proposition.

The position has, however, not remained static. As part of the legislative measures taken to reinstate the armoury of emergency laws struck down by the Privy Council in *Teh Cheng Poh's* case, the Government amended Article 150 in 1981 to, inter alia, include an exclusionary clause that also sought to preclude judicial review of the continuance of a state of emergency.⁴⁰ Article 150 Clause (8)(b)(ii) and (iii) read as follows:

"No court shall have the jurisdiction to entertain or determine any application, question or proceedings, in whatever form, on any ground, regarding the validity of -

- (i)
- (ii) the continued operation of such Proclamation.
- (iii) any ordinance promulgated under Clause (2B)".

The width of this exclusionary clause is obvious. Whilst the principle in the *Anisminic* case,⁴¹ restating the acknowledged rule of construction that provisions ousting judicial review would be construed strictly, is of relevance, its practical application in the context of this provision is limited. A material point of distinction is that, unlike in the case of a challenge to the issuance of a Proclamation of Emergency (which may call into question the propriety of the exercise of a power on *Anisminic* grounds⁴² or

40. The amendments were effected by the Constitution (Amendment) Act, A514 of 1981. A full discussion of the amendments is found in Chapter VI.

41. *Anisminic Ltd v. Foreign Compensation Commission* [1969] 1 AER 208 HL; [1969] 2 AC 152.

42. See Lord Reid at p. 213-214; Lord Pearce at p.234-35.

for *Wednesbury* unreasonableness),⁴³ these principles do not fit the mould where the challenge is a failure to exercise a power, namely to revoke the continued state of emergency. The relevant principles in this regard would be those governing the grant of an order of mandamus. Lord Diplock himself in *Teh Cheng Poh's* case, in the context of the Yang di-Pertuan Agong's failure to revoke a security area proclamation under the Internal Security Act, 1960 where the situation called for it, observed that the proper remedy is for an order of mandamus against the Cabinet to tender the appropriate advice to the Yang di-Pertuan Agong to revoke the proclamation.⁴⁴ Any court faced with an application for a mandamus directed at the Cabinet to tender advice to the Yang di-Pertuan Agong to revoke the proclamation of emergency would find Clause (8)(b)(ii) a difficult hurdle to clear in the absence structurally of the availability of *Anisminic* or *Wednesbury* grounds to aid the effort.⁴⁵ It is obvious that Clause (8)(b)(ii) was inserted in Article 150 *ex abundanti cautela* by the draftsman. The amendment was merely declaratory of the current attitude of the Malaysian Courts as seen in *Johnson Tan's* case not to review the decision of the executive to continue the Emergency.

43. Per Lord Greene M.R. in *Associated Picture Houses Ltd v. Wednesbury Corporation* [1947] 2 AER 647, that a patently unreasonable decision may be vitiated in law.

44. Op.cit. at p.473.

45. There is additionally the restrictive provisions of the Specific Relief Act, 1950, governing the grant of mandamus, namely, Section 44(1) which reads:

"44.(1) A Judge may make an order requiring any specific act to be done or forbore, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or any court subordinate to the High Court:

India, with a noted activist judiciary, most of the times, has likewise taken a similar approach. One of its foremost judicial activists, Krishna Iyer J., himself took this view in *Bhut Nath Mate v. State of West Bengal*:

"It was argued that there was no real emergency and yet the Proclamation remained unretracted with consequential peril to fundamental rights. In our view, this is a political, not justiciable issue and the appeal should be to the polls not to the courts".⁴⁶

In the earlier case of *PL Lakhanpal v. Union of India*,⁴⁷ the Indian Supreme Court was faced with the submission that to continue the emergency three years

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45. Provided that -

- (a) an application for such an order be made by some person whose property, franchise, or personal right would be injured by the forbearing or doing, as the case may be, of the said specific act;
 - (b) such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person or court in his or its public character, or on the corporation in its corporate character;
 - (c) in the opinion of the Judge the doing or forbearing is consonant to right and justice;
 - (d) the applicant has no other specific and adequate legal remedy; and
 - (e) the remedy given by the order applied for will be complete.
- (2) Nothing in this section shall be deemed to authorize a Judge -
- (a) to make any order binding on the Yang di-Pertuan Agong;
 - (b) to make any order on any servant of any Government in Malaysia, as such, merely to enforce the satisfaction of a claim upon that Government; or
 - (c) to make any order which is otherwise expressly excluded by any law for the time being in force."

46. AIR 1974 SC 806 at 811 (para.16). See also the cases of *Ghasi Ram v. State* AIR 1966 Rajasthan 247, and *K.K. Modi v. Union of India* AIR 1976 Calcutta 20.

47. AIR 1967 SC 243. For a criticism of the continuation of the emergency brought about by the 1962 border war, and a discussion of the cases that have considered this question, see G.O. Koppell, The Emergency, The Courts And Indian Democracy (1966) Vol. 8 J. of Indian Law Institute, 287. In the significant case of *Makhan Singh v. State of Punjab* AIR 1964 SC 381 at 403, the Supreme Court observed: "How long the Proclamation of Emergency should continue and what restrictions should be imposed on the

after the India/China border war in 1962, which was the occasion for its imposition, and after hostilities had ceased, was "a fraud on the Constitution". The court declined to determine the question and reasoned as follows:

"We were told that the President in his address to Parliament in February this year did not state that the Emergency continued to exist..... However that may be, Article 352 itself by Clause (2) provides that a Proclamation issued under Clause (1) may be revoked by a subsequent Proclamation and shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. This clause also states that the Proclamation shall be laid before each House of Parliament. It has not been stated that the House of Parliament did not approve of the Proclamation within the period of two months. It would appear, therefore, that the only way a Proclamation ceases to have effect is by one of the events mentioned in this clause. None of them has happened. Nothing contained in an address by the President to the Houses of Parliament can operate to terminate the Proclamation".⁴⁸

The approach taken by the Indian Courts accord with that of the Federal Court in *Johnson Tan's* case. It is unlikely that there would be any change in the attitude of the Malaysian courts in the future on this question given the kind of case-support it receives from other Commonwealth jurisdictions for the position it has taken.

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47. fundamental rights of the citizens during the pendency of the emergency, are matters which must inevitably be left to the executive because the executive knows the requirements of the situation and the effect of compulsive factors which operate during periods of grave crisis, such as our country is facing today."
48. At p.245 (para.4) per Sarkar C.J. In *Minerva Mills Ltd v. Union of India* AIR 1980 SC 1789, Bhagwati J. also observed: "Neither Article 352 nor any other Article of the Constitution contains any provision saying that a proclamation of Emergency validly issued under Clause (1) shall cease to operate as soon as the circumstances warranting its issuance have ceased to exist".

Overlapping Proclamations of Emergencies

A further area relating to prolonged emergencies is that of successive proclamations or overlapping proclamations of emergency. The first nationwide emergency that was declared in the country after independence was on 3rd September 1964 arising from Indonesia's Policy of Confrontation. The Proclamation of this Emergency was never expressly revoked although the circumstances that led to it had long lapsed. Thus when the Sarawak Emergency was declared on 14 September 1966 it technically overlapped the 1964 Emergency within the territorial limits of Sarawak. The Proclamation relating to the Sarawak Emergency itself was silent on the fact that it was an overlapping proclamation.⁴⁹ But it was evident that the Government was uncertain as to whether the 1964 Emergency was sufficient for its purposes in Sarawak in 1966. Thus the Explanatory Statement that accompanied the Emergency (Federal Constitution and Constitution of Sarawak) Amendment Bill, 1966 carried the following statements:

"Paragraph 2: There is already in force a proclamation of emergency issued on September 3, 1964 in respect of the whole Federation, the occasion for which is a matter of public knowledge.

"Paragraph 3: The Yang di-Pertuan Agong in exercise of his powers under Article 150 of the Constitution, has on September 14, 1966 issued a further proclamation in respect of Sarawak only, in order to deal with the present crisis as a distinct emergency additional to the emergency already proclaimed".⁵⁰

49. P.U. 339A Gazette Tambahan No. 45A, 14 September 1966. See also Appendix B. For example, the Proclamation for the Kelantan Emergency expressly declared that it was in addition to the 1969 Emergency: see P.U.(A) 358 8 November 1977 (see also Appendix B).

50. Bill dated 19 September 1966, Government Gazette dated 19 September 1966.

It is implicit in this Statement that the Government was of the opinion that the 1964 Emergency, and more particularly the Emergency (Essential Powers) Act, 1964 may not have been adequate to deal with the Sarawak crisis. When the crisis went to the court in *Ningkan's* case,⁵¹ the Privy Council held that Article 150, as it then stood, did not preclude successive proclamations of emergency for different reasons. Lord Macdermot said that in spite of "the continuing existence of earlier emergency proclamations" the powers under Article 150 "were in being and not spent".⁵² A different view was taken by the Privy Council in the later case of *Teh Cheng Poh* where Lord Diplock proceeded on the implied revocation theory. The question arose in the context of whether the Emergency (Essential Powers) Act, 1964 enacted after the 1964 Emergency, was still extant for purposes of legitimating the Security Cases Regulations 1975 made under the 1969 Emergency. The Board had struck down the Regulations as invalid. The Privy Council reasoned as follows:

"It has not been contended on behalf of the Attorney-General that the Emergency (Essential Powers) Act, 1964 was still in force in 1975 so as to constitute an alternative source from which the Yang di-Pertuan Agong could derive authority to make Essential Regulations. Their Lordships agree that after the emergency proclamation on May 15, 1969, no reliance can any longer be put upon the Act. From its long title and recitals it is manifest that powers conferred on the Yang di-Pertuan Agong under section 2 were intended to be exercisable only for the duration of the previous emergency proclaimed on September 3, 1964. It does not appear that the proclamation of that emergency was ever expressly revoked nor was it annulled by resolutions passed by both Houses of Parliament under Article 150(3) of the Constitution. The power to revoke, however, like the power to issue a proclamation of emergency, rests in the Yang di-Pertuan Agong, and the Constitution does not require it to be exercised by any formal instrument. In their Lordship's 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".⁵³

51. [1970] AC 379.

52. At p.399 F-H.

53. [1980] AC at 469 F-H. There has been some controversy as to what the Privy Council actually decided in this context i.e. whether it meant

This was the first time that the implied revocation theory was said to be applicable to emergencies under Article 150. This development led to the insertion of an express provision on overlapping proclamations in the amendments made to Article 150 by the Constitution (Amendment) Act A514 of 1981. A new Clause (2A) was added to Article 150, which reads:

"The power conferred on the Yang di-Pertuan Agong by this Article shall include the power to issue different Proclamations on different grounds or in different circumstances, whether or not there is a Proclamation or Proclamations already issued by the Yang di-Pertuan Agong under Clause (1) and such Proclamation or Proclamations are in operation".

It will be noted that the thrust of the provision is to declare the right of the Yang di-Pertuan Agong to issue successive Proclamations of emergency and not to save emergencies that are moribund or had lapsed by effluxion of time. Thus it is obvious that the 1981 amendments which were expressly enacted to overcome the unpalatable parts, from the Government's standpoint, of the Privy Council's judgment in *Teh Cheng Poh's* case was nevertheless prepared to accept that the 1964 Emergency, although not expressly revoked or annulled, was for all practical purposes extinct. There is also the implicit acceptance of the implied revocation theory in that Clause (2A) talks of the power to issue successive proclamations "on different grounds or in different circumstances". The words "different grounds" and "different circumstances" would be read disjunctively, so that, even if the ground for the successive emergency is the same as the earlier one it would be valid if the circumstances occasioning it are different. Thus even if this provision had

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53. that a Proclamation confined to one state can never be revoked by a Proclamation declared for all Malaysia or vice versa. The view point expressed by M/s Sheridan & Groves, The Constitution of Malaysia (4th Edn) (MLJ Publication, Singapore, 1987) at pp.390, that "the question is whether the later proclamation is inconsistent with the continued operation of the earlier one" is, it is submitted, the correct interpretation.

been extant before the 1969 Emergency was declared, it would not have made a difference to the power of the Government to declare a second emergency on security grounds just because there was already in existence an earlier emergency (ie. the 1964 Emergency) on security grounds; the basis for the emergencies may have been the same i.e. a security threat, but the circumstances occasioning them may be different: the 1964 Emergency was declared under the threat of external aggression whereas the 1969 Emergency was on the basis of internal disturbances and riots. In short, the new provision ensures that the Government's power to proclaim successive emergencies is not hampered or hindered by an earlier emergency declared for a special purpose.

The 1981 amendments also sought to overcome any form of challenge to emergency legislation on the ground that they were outliving the emergency itself. By Clause 8(2)(iii) it is provided that: "No court shall have jurisdiction to entertain or determine any application, question or proceedings, in whatever form, on any ground, regarding the validity of:-

(iii) any ordinance promulgated under Clause (2B)."

Although the provision makes express reference to "an ordinance" it would be read as including emergency regulations as well.⁵⁴ An argument broadly along these lines was raised in the case of *Jaffanese Cooperative Society Ltd v. Bank Negara Malaysia*.⁵⁵ The case concerned remedial action taken by Bank Negara Malaysia (Central Bank) under the Emergency (Protection of Depositors) Regulations, 1986 to place an ailing cooperative under receivership. The

54. The courts have in the past refused to countenance any argument that sought to distinguish emergency "regulations" from emergency "ordinances": see *Mahdevan Nair v. Government of Malaysia* [1975] 2 MLJ 286 at 292; *Osman v. Public Prosecutor* [1968] 2 MLJ 137.

55. [1989] 3 MLJ 150 SC.

Regulations were made in 1986 by the Yang di-Pertuan Agong under the Emergency (Essential Powers) Act, 1979 to stem the run on many cooperatives which were functioning as illegal deposit-takers and were unable to meet their deposit liabilities. It was argued by the challengers that the regulations could not be invoked because the conditions existing at the time when the Regulations were made were no longer existent. The Supreme Court upheld the decision of the High Court that a distinction existed between the making of the Regulations and the exercise of powers under it. The reasoning was that so long as the parent legislation (i.e. the Emergency Act) remained in force, the regulations may be invoked and applied with the force of law.

The argument that emergency legislation cannot outlast the emergency that brought it forth is a proposition that has succeeded in some jurisdictions. In *Pannalal Lahoti v. State of Hyderabad*,⁵⁶ the State High Court in India ruled that the Hyderabad Defence Regulations were operative only during the period of the emergency for which it was promulgated and deemed to have lapsed without any express repealment. Misra CJ said:

"(It) may be pointed out that a temporary legislation must terminate either on a specified date or on the happening of a specified event. But if the date or the event is not specified, it cannot be allowed to outlast the emergency that brought it forth. The Hyderabad Regulation having been made to meet the situation created by declaration of war against Germany must be deemed to have come to an end when the emergency ceased to exist".⁵⁷

The Australian cases like, *Rv. Foster*,⁵⁸ also support the proposition that war

56. AIR 1954 Hyderabad 129.

57. At p.135 (para.30). See contra the case of *Rattan Lal v. State* AIR 1969 J&K 5, which took the opposite view that it is not for the executive to determine if the limited period for which the emergency regulations were made had expired.

58. [1949] 79 CLR 43.

measures cannot survive the war itself and will be given a life only for a reasonable war period after the war.

Notwithstanding the compelling arguments found in these cases, a Malaysian court would find itself ham-strung by precedents and constitutional amendments that point the opposite direction. *Johnson Tan's* case is in point. Even in *Teh Cheng Poh's* case in relation to whether a security area proclamation could be revoked by the court where the circumstances for it have ceased, Lord Diplock said:

"Apart from annulment by resolutions of both Houses of Parliament it (the security area proclamation) can be brought to an end only by revocation by the Yang di-Pertuan Agong. If he fails to act the court has no power itself to revoke the proclamation in his stead. This, however, does not leave the court powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power or revocation would be an abuse of his discretion. Article 32(1) of the Constitution makes the Yang di-Pertuan Agong immune from any proceedings whatsoever in any court. So mandamus to require him to revoke the proclamation would not lie against him; but since he is required in all executive functions to act in accordance with the advice of the cabinet, mandamus could, in their Lordship's view be sought against the members of the cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the proclamation".⁵⁹

A compelling argument may be advanced that the Diplock reasoning is applicable also to the question whether a court has jurisdiction to decide on the continuance of a proclamation of an emergency when the circumstances that necessitated it have ceased to exist. However, a court examining the question will find the exclusion clause barring judicial review, namely Clause 8(b)(ii), a rather insurmountable hurdle to clear. The intention of Parliament is clear. The determination of when an emergency should cease is to be left to the sole decision of Parliament, which in practical terms, is the executive Government of the day.

59. Op.cit. p.473F-H.

The prolonging of an emergency beyond the circumstances that brought it forth raises profound questions as to the state of constitutionalism in the country. The reasoning of Wan Suleiman FJ in *Khong Teng Khen's* case⁶⁰ may be defensible in justifying the proclamation of an emergency, but if a Proclamation is not revoked when the crisis is over, necessity or *salus populi ex suprema lex* ceases to be a justification. The omission to revoke the Proclamation when it is called for would raise questions of abuse of a discretionary power. The Diplock solution⁶¹ of an application for mandamus directed at the Cabinet to advise revocation of the Proclamation may be a judicial remedy of use in theory only. No one would be prepared to wager the success of a forensic effort of that magnitude.

60. Op.cit. at p.77 G-H. "Those having misgivings about the sweeping powers which become vested in the Yang di-Pertuan Agong (and in effect, in the Executive) during an emergency can find solace in that the very institutions of Parliamentary democracy may be destroyed overnight if not for the emergency powers."

61. See *Teh Cheng Poh's* case, ante.

CHAPTER XIEMERGENCY LAWS AND THE FEATURES OF EMERGENCY GOVERNMENTIntroduction

Except for the short period of three over years between 1960 and 1964, Malaysia has continuously been under emergency rule. The fact of an emergency government, however, is not manifest, and an observer may well be excused for thinking that the country is in a state of normalcy. The latter is arguably the true state of affairs. There is no outward manifestation of troop movement or of the army being on alert or of roadblocks and curfews. The country continues to prosper under an impressive 8% economic growth rate. The confidence in the political stability of the country by both the foreign and local investor belies the legal state of affairs. It is the Government's position that the prevailing calm and peace is the product of emergency rule. In moving the adoption of the Emergency (Essential Powers) Bill, 1979 in Parliament on 17 January, 1979, the Law Minister said:

"Let it be known that there are still hidden dangers lurking around and within our midst, simmering under the surface..... The Proclamation of Emergency in 1969 has had to continue and will have to continue because it cannot be gainsaid that there has existed and still does exist a grave emergency whereby the security and economic life of the country has been and continues to be threatened".¹

The impact of emergency rule is probably felt only in the law and order arena, visibly in the use of emergency legislation like the Emergency (Security Cases) Regulations, 1975 in firearms cases. There is also the political

1. See speech reproduced in (1979) 1 MLJ lxx at lxxiii.

offence of sedition governed by the Sedition Act, 1960 as amended by the Emergency (Essential Powers) Ordinance No. 45/1970 which came into force on August 10, 1970.² The amendment widened the offence of sedition to include questioning the special privileges accorded to the Bumiputras under Article 152 of the Federal Constitution.³ By the Constitution (Amendment) Act, 1971 which came into force on March 10, 1971 the offence of sedition was also extended to apply to speeches in Parliament.⁴ The enlargement of the sedition law was the direct result of the 1969 riots. It was designed to curb the resort to inflammatory and racially inciting speeches for political gains. In the opinion of the Government the amendments paved the way for the return to parliamentary rule on February 21, 1971. In *Mark Koding's* case, Suffian LP spoke of it as "the resumption of parliamentary democracy".⁵ But a

2. Sedition is the articulation of a view proscribed by the state authorities. The trial of the offence squares with Becker's definition of a political trial: "the perception of a direct threat to established political power is a major difference between political trials and other trials" (Theodore Becker, Political Trials, The Bobbs-Merrill Co. Inc., Indianapolis, 1971, at p.xi). The proscription of the expression of certain views may be justified for law and order purposes but it becomes part of the apparatus upon which the existing power structure in a country is built. For example, British colonial rule in India was regularly characterized by the trial of the Indian nationalistic leaders for the offence of sedition: see A.G. Noorani, Indian Political Trials (Sterling Publisher, New Delhi, 1978). The viewpoint is held that even in a developed democracy the trial of certain offences involving official secrets, conspiracy, public order etc. are politically motivated and those trials would be political trials: see Peter Hain's, Political Trials In Britain (Pelican Books, 1985). For a discussion of the police perspective in the political process of maintaining law and order, see Tom Bowden, Beyond The Limits Of The Law (Penguin Books, 1978).
3. See *Public Prosecutor v. Ooi Kee Saik* [1971] 2 MLJ 108.
4. For a case dealing with the validity of the amendment, see *Mark Koding v. Public Prosecutor* [1982] 2 MLJ 120.
5. At p. 123B.

constitutionalist will find that description less than accurate if it be noted that the return to parliamentary rule was not accompanied by a revocation of the Proclamation of Emergency or the abrogation of emergency laws.

Malaysia is today in the constitutionally exceptional position of having two legal regimes functioning simultaneously providing thereby an option to the Government in office at anytime to act under one or the other. There is the civil law system comprised of the ordinary laws made by Parliament. There is also the corpus of emergency laws made under the Emergency (Essential Powers) Act, 1979 and its precursor, the Emergency (Essential Powers) Ordinance No. 1 of 1969. In the paragraphs that follow we shall examine how the two systems purport to co-exist and the essential features of emergency government that distinguishes it from ordinary civil government.

Emergency Government: The Creation of Special Bodies And The Delegation of Executive Power

Article 150 itself is silent as to the formation of an emergency government and the form it should take. This is explained by the Reid Commission Report which did not contemplate that the organic structure of government should be changed by an emergency. It was only envisaged that the Federal Government should possess more powers to deal with an exigency both administratively and legislatively. It was to include the power to give directives to the State Governments and to enact legislation that may infringe the Constitution.⁶

6. See Reid Commission Report, Paragraph 175, p.76.

Until the present Emergency declared on 15 May 1969 there was no change in the apparatus or structure of government as a result of an emergency. The 1964 Emergency, brought about by the Indonesian Confrontation, was distinguished only for the enactment by Parliament of the Emergency (Essential Powers) Act, 1964 which armed the Government with special legislative powers to combat the emergency.⁷ There was, however, no change in the structure and apparatus of government. There was still Cabinet rule and Parliament met and functioned as usual. The real change in the form and system of government came with the 1969 Emergency. There was created the office of Director of Operations, and a special body called the National Operations Council, which for all practical purposes effectively governed the country for the period that it was in existence. When the Kelantan Emergency was declared in November, 1977 a similar apparatus was adopted with the appointment of a Director of Government and a special body called the State Advisory Council.

The special apparatus created during the 1969 Emergency, which functioned for 21 months after the Proclamation may be seen as a role-model of the type of emergency government that could be adopted should a similar exigency arise in the future. It therefore merits a closer scrutiny.

According to the then Attorney General, the 1969 Emergency was different from the previous emergencies because during the anti-communist Emergency and the Indonesian Confrontation Emergency the people were united against an external enemy. In 1969 the people were divided amongst themselves. It was possible "for parliamentary rule to continue in the first type of situation

7. Eg. Emergency (Criminal Trials) Regulations, 1964: see *Eng Keock Cheng v. Public Prosecutor* [1966] 1 MLJ 18 which dealt with the validity of the Regulations.

but not in the second".⁸ However, the practical reason that called for a special type of government during the 1969 Emergency was that Parliament stood dissolved when the Emergency was proclaimed and could not be convened because of the suspended elections. The country was under a caretaker cabinet at that time. But this by itself would not explain the special governmental machinery that was created to combat the destructive forces unleashed by the race-riots of May 1969. The problems were of a dimension never encountered before by the country. It was not one of law and order only but threatened the future of democracy itself. It was a watershed in the constitutional life of the country. The situation was so grave that soon after the riots broke out, the Minister of Home Affairs Tun (Dr) Ismail declared: "Democracy is dead in this country".⁹

The caretaker Government had to act swiftly to reassert its authority. On 2 August 1969, the General Officer Commanding (the Army), Peninsula Malaysia, took an oath on behalf of his officers and men, pledging loyalty and support to the Tunku and his government. According to one political writer it was a turning point:

"This may well have saved the day both for the Tunku and his supporters (as well as the Chinese), because at that time, when parliament was suspended and a state of emergency had been declared, in the final analysis, power rested with the military, and whoever controlled the military, controlled the country".¹⁰

Initially, the Government acted under its existing armoury of laws to meet the civil unrest. For example, on 13 May itself, soon after the outbreak of

8. See Foot-note (30) of Milne & Mauzy's Politics And Government in Malaysia (Federal Publications, 1978) at p.84 quoting Attorney General, Tan Sri Abdul Kadir Shamsuddin.

9. See Leon Comber, 13 May 1969: A Historical Survey of Sino-Malay Relations (Heineman Asia Publication, 1986 Reprint) at p. 73.

10. Ibid at p. 78.

violence, the Minister of Home Affairs invoked his powers under the Public Order (Preservation) Ordinance, 1958 and declared the riot-torn areas as being "in a state of danger to public order".¹¹ On 14 May, the declaration was enlarged to cover the whole of West Malaysia.¹² Pursuant to the declaration the police were vested with a plenitude of powers to restore law and order including the imposition of curfew and the prohibition of assemblies.¹³ But it was evident that the Government was of the opinion that the problems manifested by the race-riots were far greater than that of mere law and order. The Government was right in this perception. As a leading oppositionist of that time acknowledged: "After the May 13 riot of 1969, it became clear to many people that the pre-election (May 10, 1969) mode of conducting politics cannot be allowed to continue. A number of politicians agitated along communal lines using offensive and inflammatory language, distorting issues beyond recognition..... The need for an agreement on fundamentals was obvious".¹⁴ The

11. P.U.(A) 162/69. The initial areas covered by the order were the police districts of Kuala Lumpur, Petaling Jaya, Kuala Langat, Klang, Kuala Selangor, Kuala Kubu Bharu, Rawang and Kajang. Section 3(1), under which the Minister acted, reads as follows:-

"If in the opinion of the Minister public order in any area in Malaysia is seriously disturbed or is seriously threatened the Minister may, if he considers it to be necessary for the purpose of maintaining or restoring public order in the area so to do, proclaim in that area of a state of danger to public order."

The Ordinance was revised in 1983 as the Public Order (Preservation) Act, 1958 (Act 296).

12. P.U.(A) 163/69.
13. See generally the police powers listed in Part III of the Act, Sections 4 to 22.
14. See Dr. Syed Hussein Alatas, The Rukunegara And The Return To Democracy in Malaysia (1971) Vol. 4 No. 2 Pacific Community (Tokyo) 800 at 801-802.

Public Order (Preservation) Act 1958, or for that matter the Internal Security Act 1960, were law and order statutes and in that respect were corrective rather than curative. It may be attributing more prescience than properly due to say that the Government had, in the uncertain hours after the outbreak of violence on May 13, settled upon an emergency under Article 150 as the only means to resolve the larger issues at stake. It is more likely that the Tunku and Tun Razak¹⁵ saw the need to arm the Government with overriding legal powers without being hobbled or curbed by legal restraints. Almost immediately, the uncompleted elections in Sabah and Sarawak had to be stopped, and in the other States the legislative assembly was not to be convened. Thus on 15 May, together with promulgating the Emergency (Essential Powers) Ordinance No. 1 of 1969 suspending the elections,¹⁶ a Directive was issued under Article 150(4) by the Yang di-Pertuan Agong to all the States not to summon the legislative assemblies until such date as may be determined by the Agong.¹⁷ A proclamation of emergency under Article 150 provided the legal basis for swift action without legal restraints. Emergency government was considered a more palatable option than military or martial rule although the role of the military during the 21 months that followed was noticeably greater than under civilian rule.¹⁸

15. The Deputy Prime Minister, and later Director of Operations. He was the central figure in the 21 months of emergency rule without a Parliament.

16. Section 7.

17. P.U.(A) 147/69.

18. The Chief Executive Officer appointed under the Emergency (Essential Powers) Ordinance No. 2 of 1969 was the Army Commander in Chief, and the Regional Army Commanders were all appointed to the State Operation Councils.

In his affidavit submitted to the High Court in *Mahdevan Nair's* case,¹⁹ Tun Razak deposed that on May 15 he had personally taken the Emergency (Essential Powers) Ordinance No. 1 of 1969 to the Yang di-Pertuan Agong for his signature. The Ordinance (hereinafter referred to as "Ordinance No. 1") was structured on the format of the Emergency (Essential Powers) Act, 1964 passed by Parliament during the Indonesian Confrontation Emergency. Like its precursor, it authorised the Yang di-Pertuan Agong to promulgate emergency regulations having the force of law. However, the principal legislation of the 21 month emergency rule under the National Operations Council was the Emergency (Essential Powers) Ordinance No. 2 of 1969 (hereinafter called "Ordinance No. 2") made on 17 May. It provided the basis and the framework of the emergency government of that period. Its most significant feature was the creation of the post of a Director of Operations and the formation of a cabinet-like body called the National Operations Council (NOC) to assist the Director in his functions. The establishment provision, Section 2 read as follows:

"2.(1) The executive authority of Malaysia referred to in Article 39 of the Constitution and all powers and authorities conferred on the Yang di-Pertuan Agong by any written law are hereby delegated to a Director of Operations who shall be a person designated by the Yang di-Pertuan Agong.

(2) The Director of Operations as designated under sub-section (1) shall act in accordance with the advice of the Prime Minister and shall exercise and be responsible for the exercise of the executive authority of Malaysia and of the powers and authorities referred to in sub-section (1); and Article 40 of the Constitution shall not apply to the exercise of the executive authority and the exercise of the powers and authorities referred to in sub-section (1)".

Section 3 provided that the Director "shall be assisted by a council known as the National Operations Council" to consist of such persons as the Director

19. [1975] 2 MLJ 286 at 288-89.

may appoint "in his absolute discretion". Additionally, by Section 4, the Director of Operations was to be assisted by a Chief Executive Officer who was to be appointed by the Director "in his absolute discretion". The special emergency bodies created at federal level were reproduced at state level by the formation of State Operations Committees and District Operations Committees (see Sections 5 and 6).

On the same day as the promulgation of Ordinance No. 2 i.e. 17 May, the Yang di-Pertuan Agong appointed the Deputy Prime Minister, Tun Haji Abdul Razak as the Director of Operations "to exercise the executive authority of Malaysia under Article 39 of the Federal Constitution and all powers and authorities conferred upon the Agong by any written law".²⁰ The enormity of the authority vested in the Director of Operations was obvious on the face of the instrument of delegation itself. It was made complete by Section 8 of Ordinance No. 2 which also vested in the Director the legislative powers of making emergency regulations conferred on the Yang di-Pertuan Agong under Section 2 of Ordinance No. 1. The observation of Chang Min Tat J. in *Mahdevan Nair's case*²¹ that under emergency rule the legislative power shifts from Parliament to the Yang di-Pertuan Agong, when transposed to the legal position obtaining during the 21 months after the Proclamation, meant that all legislative and executive power now vested in one person, the Director of Operations. This feature when considered with the fact that Parliament was dissolved and could not be reconvened,²² and coupled further with the fact

20. P.U.(A) 150/69. On 12 June 1969, the Yang di-Pertuan Agong designated Tun Dr. Ismail, the Minister of Home Affairs, as the person to exercise the powers and functions of Tun Razak as Director of Operations, in the event of the latter's illness or incapacity: see P.U.(A) 185/69.

21. [1975] 2 MLJ at 289.

22. The elections which were yet to be completed in Sabah and Sarawak were suspended by a Directive issued by the Yang di-Pertuan Agong under Article 150(4): see P.U.(A) 147/69.

that all key executive appointments were made by the Director in "his absolute discretion", left no room for doubt as to the omnipotence of his power. In the circumstances, one may well ask: what then was the function of the Prime Minister and of his Cabinet and Ministers during this period? We may now examine this question.

Tun Razak's appointment was evidently done at the behest of the Tunku. The latter himself explained:

"(The) primary duty of the government was to save lives and property. I realised as for myself that owing to my eye trouble and the work involved I would not be able, or expected, to tackle the task efficiently of administering the country and overseeing the Emergency at the same time.

So I obtained the approval of His Majesty to appoint Tun Abdul Razak, who was both Deputy Prime Minister and Minister of Defence, to be the Director of the proposed National Operations Council. He was the right man, younger and more active, full of vim and vigour, and better suited to the arduous task of restoring the country to normalcy in view of his vast experience in handling the portfolios of both Defence and National Development..... The best man suited to carry out the major task was Tun Razak. It was my belief that with the assistance of members of the Cabinet, of the Security Forces, of Government Service and of all good citizens, our job could be achieved in good time.

I was therefore prepared to step down a rung or two to give Tun Razak full authority to carry on with this important task, but I still remained Prime Minister, and thus responsible for the prosecution of the Emergency, Tun Razak being in continuous consultation with me".²³

The Tunku's explanation may be understandable from the standpoint of why Tun Razak was chosen to fill the post, but it does not explain why it was necessary to create this omnipotent post and vest in a single person all legislative and executive authority. It was obvious that, in some relevant quarters, May 13 reflected the Tunku's misjudgment of the mood of the people and of his decline. He had lost the considerable Chinese electoral support

23. See Tunku Abdul Rahman, May 13: Before & After (Utusan Melayu Press, Kuala Lumpur, 1969) at pp.100-101.

that he had always had in previous elections. At the same time, and probably more importantly, he was opposed by a strong body of young Malay intellectuals within his own party who were strongly of the opinion that the Tunku was not doing enough to fulfill Malay aspirations. The May 13 outbreak and the failure of the ruling party for the first time to attain a two-third majority in Parliament advanced the political stature of this group. The call for the Tunku's resignation was now openly spoken and written about. In the first few months of the Emergency it gained a pitch that called for the authorities to openly warn the agitators of reprisals and a banning of the publications as prejudicial to public security.²⁴ Thus it must have been realised in the first days of the May 13 outbreak that some person other than the Tunku was needed for the immediate task of restoring law and order and to guide the country under conditions of neo-martial law. Hence the creation of the post of Director of Operations; an appointment which is not provided for under the Federal Constitution. The insertion of the requirement in section 2(1) of Ordinance No. 2 that the Director "shall act in accordance with the advice of the Prime Minister" was to reconcile the two principal offices which then existed in the administration of the country. The Tunku correctly observed that he was prepared "to step down a rung or two" to give Tun Razak "full authority".²⁵

24. The Minister of Home Affairs, Tun (Dr.) Ismail said over television on 2 August 1969: "I must warn the extremists and others as well that if the anti-Tunku campaigns or activities are carried out in such a manner as to cause undue fear and alarm among members of any community I will not hesitate to exercise my powers under the law against those responsible": reproduced in Leon Comber, op.cit. p.78. A series of inflammatory articles critical of the Tunku were banned by the Internal Security (Prohibition of Documents) Orders Nos. 11 & 12 of 1969 made on 11 October 1969 and 15 October 1969 respectively: see P.U.(A) 429/69 and 430/69.

25. See the Tunku's May 13: Before & After op.cit. p.101.

A comprehensive look at the delegation of powers to the Director would disclose that the requirement of acting on the advice of the Prime Minister was substantively not as significant as it may first appear. The Tunku was right when he said that he had to step down a rung or two but was not correct when he described Tun Razak's appointment as Director of the National Operations Council (NOC). The NOC, by Section 3 of Ordinance No. 2, was formed to assist the Director in his functions and not the other way. The scheme of Ordinance No. 2, by creating the post of Director of Operations and vesting the powers that it did in him, left no room for doubt that the Director was to assume the governance of the country. Section 2(1) delegated to him not only the executive authority under Article 39 of the Constitution but also all powers and authorities conferred on the Yang di-Pertuan Agong by any written law. In this connection, the terms of Article 39 are significant:

"The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet, but Parliament may by law confer executive functions on other persons".

In essence, by the said section 2(1), the Director was to assume singly the functions of the Cabinet. He was to be assisted for this purpose by the NOC and a Chief Executive Officer. In *Mahan Singh v. Government of Malaysia*,²⁶ the delegation of powers under section 2 was challenged as not being a delegation but an abdication of powers by the Yang di-Pertuan Agong. In rebuffing this challenge, Suffian LP said:

"If His Majesty may delegate part of his power, he may delegate all of it, and there is no question of abdication in the instant case; after promulgating Ordinance No. 2 of 1969. His Majesty remained Yang di-Pertuan Agong, still retained such power as he might have wished to exercise.....".²⁷

26. [1975] 2 MLJ 155. This report is the decision of the Federal Court. The case went on appeal to the Privy Council and the decision was reversed but not on the constitutional grounds argued in the Federal Court: see [1978] 2 MLJ 133.

27. At p.161 F-G.

The judgment may be criticised as having, unfortunately, confused power for position. It was not the contention there that the Director assumes the position of the Yang di-Pertuan but whether it was constitutionally permissible for His Majesty to so completely delegate away all his executive powers. If Suffian LP had intended to say that the Agong still retained some vestige of executive power that conclusion would also be open to doubt. By Section 2(2) of Ordinance No. 2 it was stipulated that Article 40 of the Federal Constitution was not to apply to the exercise of executive authority by the Director. Article 40(1) reads as follows:

"In the exercise of his functions under the Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet".

The exclusion of Article 40 meant that the Director was not obliged to act on Cabinet advice. In his supporting judgment in *Mahan Singh's* case, Lee Hun Hoe C.J. (Borneo) observed that the only control on the Director was that he must act in accordance with the advice of the Prime Minister.²⁸ This was for all purposes, probably, the more accurate position.

Thus, the real question was, what was meant by the phrase "shall act in accordance with the advice of the Prime Minister" in Section 2(1)? Did it in substance provide a check and control on the powers exercised by the Director? One of the principal draftsman of the Emergency Ordinances explained the purport of this requirement in a paper presented shortly after the creation of the post of Director:

"The fact that he (the Director) has to act in accordance with the advice of the Prime Minister does not necessarily mean that he has to

28. At p. 164A.

refer for the advice of the Prime Minister every matter that he is going to deal with or every action that he is going to take. This, however, simply means that in the absence of any advice to the contrary by the Prime Minister, the Director of Operations is free to exercise his powers and authority at his own discretion according to what he thinks is best for the country although it is of course open to him on his own initiative to consult and obtain advice from the Prime Minister on certain major policy matters. If the Prime Minister is consulted by the Director of Operations, the Prime Minister may give his advice summarily there and then or may reserve the matter for his own further consideration or for discussion with his Cabinet colleagues. In any event the Prime Minister is not bound to consult his Cabinet colleagues since he can advise the Director of Operations summarily; and whatever advice the Prime Minister gives to the Director of Operations, that advice is binding on the latter".²⁹

The interpretation proffered by the draftsman places less value on the requirement for "advice" than the plain meaning of the words themselves. The suggestion is that the Director was not duty bound to seek advice but where such advice is given he is bound to act in accordance with it. As events went, Tun Razak was in virtual charge of the administration of the country during the 21 months of NOC rule.³⁰ As some political commentators observed:

"The Tunku remained as a multi-racial symbol, but, increasingly, important policy decisions; such as the pace of return towards parliamentary democracy, and the re-orientation of foreign policy bore the imprint of Tun Razak".³¹

Initially, the task of the Emergency Government was to restore law and order. It's first actions confirmed this. The Chief Executive Officer (CEO) appointed under Section 3 by the Director was the Chief of the Armed Forces

29. See Tun Salleh Abbas, Government Under the 1969 Emergency, Paper prepared on 4 June 1969, and reproduced in his Constitution, Law & Judiciary (Malaysian Law Publishers, Kuala Lumpur, 1984) p.62 at p.67.
30. See Dr Chandra Muzaffar, Freedom In Fetters (ALIRAN Publication, June 1986, Penang) at pp.328-329.
31. Milne and Mauzy, Politics And Government In Malaysia (Federal Publication, 1978) at p.89.

Staff.³² The appointment was made on 17 May 1969 on the day that the Director was himself appointed. The appointment of the General commanding the Army as CEO and the placement of the regional army commanders in the State Operations Councils emphasized the law and order approach of the Emergency Government. For example, the first set of laws made by the Director in the exercise of his delegated legislative power under Section 8 of Ordinance No. 2 was the Essential (Disposal of Dead Bodies And Dispensation of Inquests And Death Inquiries) Regulations, 1969.³³ By these Regulations made on 18 May 1969 the Police were authorised to dispose off the bodies of persons killed as a result of the disturbances and to dispense with the holding of an inquest or a death inquiry. The "disturbances" were defined by the Regulations as the acts of violence for the suppression of which the Proclamation of Emergency was declared on 15 May 1969. At the same time, other public order remedial measures were taken which considerably enhanced the power of the police and army authorities to undertake restorative action. On 13 May 1969, on the immediate outbreak of violence in and around Kuala Lumpur, the Minister of Home Affairs declared the whole of Malaysia to be in "a state of danger to public order".³⁴ This was done under Section 3(1) of the Public Order (Preservation) Ordinance, 1958 by which the police were authorised to impose curfews, cordon-off areas, erect barricades and barbwire at any place for the purposes of restoring public order. On 15 May 1969 the Yang di-Pertuan Agong acted under Section 47 of the Internal Security Act 1960 to proclaim the whole

32. P.U.(A) 151/69.

33. P.U.(A) 153/69.

34. P.U.(A) 163/69.

of Malaysia as a security area for the purposes of the Act.³⁵ The effect of this was to render any person caught in possession of unlicensed firearms anywhere in the country liable for the death penalty. In addition to the enlargement of his law enforcement powers, the Director, in the first days of his appointment, also exercised the powers reserved for the Yang di-Pertuan Agong and called out the reservists in the armed forces.³⁶ The swift enforcement action had its desired effect and within weeks law and order was generally restored throughout the country. The process of rehabilitating a wounded nation, and of preventing a repetition of the tragic events, then began.

In the twenty-one months of NOC rule, it was frequently asked whether the Cabinet was a redundant body. A Cabinet had been appointed by the Yang di-Pertuan Agong at the instance of the Prime Minister after the riots and Ministers were designated specific civil portfolios. In theory the likelihood of conflict or misunderstanding arising between the two bodies was there but in reality it was diminished by the fact that the key persons in the NOC, like the Director (Tun Razak), the Minister of Home Affairs, Tun Dr. Ismail, and the others, i.e. Tun Tan Siew Sin (Minister of Finance) and Tun V.T. Sambanthan (Minister of Works) were also members of the Cabinet. However, it will be inaccurate to say that the NOC was concerned only with public order questions and that the civilian administration of the country was left to the Cabinet. On 21 May 1969 the CEO in the exercise of his powers under Section 4(2) of Ordinance No.2 appointed a Chief of Civil Affairs to assist him in the

35. P.U.(A) 148/69. For a judicial consideration of the effect of a security area proclamation, see the judgment of the Privy Council in *Teh Cheng Poh v. Public Prosecutor* [1980] AC 458; [1979] 2 MLJ 50.

36. See P.U.(A) 154/69 and 155/69.

discharge of his functions.³⁷ The then Solicitor General who was one of the architects of the emergency laws explained the need for the appointment of Cabinet Ministers in these terms:

"(D)espite completeness of powers vested in the Director of Operations, there are still a large number of statutory powers conferred by written law on different Ministers. For example, under the Education Act, powers of the Minister of Education are still exercisable by that Minister, and under the Internal Security Act, powers of the Minister of Home Affairs are still left there to be exercised by him..... Hence it is necessary to appoint Ministers, legally speaking, solely for the purpose of enabling these Ministerial statutory powers to be exercised and not essentially for the purpose of convening the Cabinet".³⁸

On the question of accountability, the learned Solicitor General wrote:

"The answer (to whom are the Ministers responsible) is that they must exercise these powers in such a way as to accord with the policy and guide or directions which the Director of Operations is entitled to issue from time to time. The authority of the Director to issue directions to the Ministers is founded on Section 2(1) of the Ordinance No. 2 which delegates "the executive authority of Malaysia referred to in Article 39" to the Director. This executive authority is none other than the conglomeration or sum total of all powers which are vested in different persons and authorities by written laws in Malaysia".³⁹

Tun Salleh was firmly of the view that the Cabinet was subordinate to the Director of Operations by virtue of Ordinance No.2. He was also of opinion that it was not necessary for the Cabinet to meet unless the Prime Minister thought it useful to consult the Cabinet before advising the Director on any particular matter.

It was thus abundantly clear that the civil administration of the country was also firmly in the hands of the Director of Operations during the twenty-one month period. On the day of the appointment of the Chief of Civil Affairs, the CEO issued a circular to the Civil Service intitled "Chief

37. The person appointed to the post was the Minister for Law and Attorney General, Tan Sri Abdul Kadir Shamsuddin: see P.U.(A) 168/69.

38. See Tun Salleh Abbas, op.cit. pp.67-68.

39. Ibid.

Executive Officer's Order No. 1 dated 21 May 1969" which defined the function and powers of the Civil Affairs Chief as follows:

".....the Chief of Civil Affairs shall be responsible for co-ordinating all matters relating to civil administration and notwithstanding any powers and authorities conferred on any Ministries or Departments by any written laws for the time being in force, the Chief of Civil Affairs is hereby empowered to issue policy instructions generally relating thereto and in particular on the following:-

- (i) Finance including fiscal policies;
- (ii) Education;
- (iii) National development, rural and industrial;
- (iv) Trade and Commerce;
- (v) Transport;
- (vi) Lands and Mines and Forest;
- (vii) Service and Establishment including recruitment, promotion and discipline in the Federal and State Services;
- (viii) Labour and industrial relations;
- (ix) Immigration and National Registration.

Ministries requiring policy decisions on matters for which they are responsible are directed to refer such matters to the Chief of Civil Affairs for decision. A Civil Affairs Secretariat has been set up at Federal House, Jalan Hishamuddin, Kuala Lumpur.

All existing rules, regulations and circulars affecting Government administration continue to operate but will be subject to this Order and any directives which may from time to time be issued by the Chief of Civil Affairs".⁴⁰

The governance of the civil service itself was dealt with by the Director and the NOC and not by the Cabinet. On 17 July 1969, the Director made the Essential (General Orders, Chapter D) Regulations, 1969⁴¹ which introduced a

40. Ibid. at p.69.

41. See P.U.(A) 273/69. The Public Officers (Conduct And Discipline) (General Orders, Chapter D) Regulations, 1968 were suspended for the duration of the Emergency.

fresh set of disciplinary rules in the civil service, including the notorious Regulation 44 which provided for the compulsory retirement of a civil servant in the public interest.⁴² On 9 October 1969, the Director legislated in the field of employment law by enacting the Essential (Employment) Regulations, 1969⁴³ and on 21 October 1969 he made the Essential (National Land Code) Regulations, 1969 in the area of land law and tenure.⁴⁴

The relationship between the NOC and the Cabinet was symbiotic. Subject to the advice of the Prime Minister, the Director of Operations and the NOC had the final say in the governance of the country. The retention of the post of Prime Minister and a Cabinet was, by hindsight, a symbolic move which contributed substantially to the restoration of confidence in the country both domestically and internationally. From its first steps in restoring public order, the NOC moved towards grappling with some of the deep-rooted problems facing the country that had manifested itself in the race riots of May 1969. This was largely the problem of ethnic divisiveness and the promotion of inter-racial harmony. A National Consultative Council (NCC) was set up and given this task. The Tunku devoted a major part of his time, until his retirement from office in September 1970, in promoting goodwill and harmony amongst the races. The NOC and the Cabinet co-existed during this period without any crisis or disagreement which could have arisen from the overlapping functions. In the words of the political commentators Ralph Milne & Diane Mauzy:

42. See *Mahan Singh's case*, supra.

43. See P.U.(A) 409/69.

44. See P.U.(A) 414/69.

"It was not possible to draw a strict line separating their (the NOC and the Cabinet) activities. Although, theoretically, the NOC was meant to be concerned only with decisions regarding the Emergency and related matters, the number of related matters was very large, so great was the impact of the crisis. There was inevitably some duplication between the NOC and the Cabinet, but Tun Razak sat on both, and he and the Tunku were in frequent communication. It was only when attempts were made to define the relationship between the two bodies too closely that contradictions were apparent".⁴⁵

On 20 February 1971 Parliament was reconvened after the suspended elections in Sabah and Sarawak were completed. Evidently it was only after the ruling party was confident of a two-thirds support in Parliament through the vote of the Sarawak United Peoples Party (SUPP) that it decided to end the NOC rule and revert to parliamentary rule. The Yang di-Pertuan Agong repealed Ordinance No. 2 on 19 February 1971 by the promulgation of the Emergency (Essential Powers) Ordinance No. 77 of 1971.⁴⁶ By this Ordinance the NOC was abolished together with the State Operation Councils, as was also the special appointments of a CEO and the Chief of Civil Affairs. However, the post of Director of Operations was retained with the qualification that the post was to be filled by the Prime Minister. The retention of the post of Director was significant in many respects. By September, 1970 the Tunku had resigned as Prime Minister and was succeeded by the Deputy Prime Minister, Tun Razak, who was also at the material time the Director of Operations. Thus the need to bifurcate the executive authority of the Federation was no longer present since the Director of Operations had become the Prime Minister. The repeal of Ordinance No. 2, however, did not diminish the power and authority of the Director. By Section 2(2) of Ordinance No. 77 the legislative powers

45. Politics And Government in Malaysia, op.cit. p.86.

46. P.U.(A) 62/71.

exercisable previously by the Director was now delegated to the Director in the person of the Prime Minister.⁴⁷ Thus the constitutional position that obtained when Parliament reconvened in February 1971 was in a substantive legal sense no different from what it was before. The difference arguably was the outward removal of the features of the twenty-one months rule in the form of the NOC and the high profile played by the Police and the Army Commanders who had served at federal and state levels in the emergency government. In other respects, the Director of Operations continued to govern in the form of the Prime Minister supported by a Cabinet instead of the NOC. In the months that ensued the Director was not referred to publicly by that appellation but called the Prime Minister so that for all outward purposes the post had ceased to exist.⁴⁸

In constitutional terms, therefore, it is debateable whether the reconvening of Parliament on 20 February 1971 was in every sense a return to parliamentary democracy. It was *strictu sensu* a conditional return to a parliamentary system whilst keeping intact the ready apparatus of an emergency government. This was made possible by the non-revocation of the Proclamation of Emergency and the non-repeal of Ordinance No. 1. The condition for

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47. Ordinance No. 77 has never been repealed and technically remains in force. The full import of this feature has, however, never been studied.
48. But until the decision of the Privy Council in *Teh Cheng Poh v. Public Prosecutor*, which clarified the position, it would have been technically possible for the Prime Minister, as Director of Operations, to exercise his legislative powers notwithstanding the presence of Parliament by reason of the terms of Ordinance No. 77: see [1980] AC 458; [1979] 2 MLJ 50. The decision held that the Yang di-Pertuan Agong had lost his legislative powers to make emergency laws once Parliament had reconvened on February 20, 1971. The reasoning would apply a fortiori to the powers of the Director of Operations who would be exercising the legislative powers delegated to him by the Yang di-Pertuan Agong.

reconvening Parliament was clearly enunciated by the then Minister of Home Affairs, Tun (Dr) Ismail, in March 1970 in London:

"The return to parliamentary democracy will now depend entirely on the results of the general elections in Sarawak and Sabah. If the Alliance (the ruling party) fails to get the two-third majority necessary for approving amendments to the Constitution then we will have to negotiate with the Opposition about support in our wish to isolate in the Constitution the several contentious communal problems. If they do not agree, then I do not see how we can recall Parliament. The blame for this will rest on the Opposition. If on the other hand, the Alliance gets the two-third majority, then the blame for any delay in returning to parliamentary democracy will rest with us".⁴⁹

The political message that this statement conveyed was obvious. As events went, the election results in Sabah and Sarawak gave the ruling Alliance Party the two-third majority they sought in Parliament. Thus the Constitution (Amendment) Bill, 1971 was passed in March 1971 amending Article 10 (Free Speech) to curb the public discussion of racially sensitive issues both in and outside Parliament.⁵⁰ In his speech at the first session of Parliament on 23 February 1971, the Prime Minister, Tun Razak announced that the free-wheeling political style of the past was over:

49. Quoted in Dr. Syed Hussein Alatas, The Politics of Coalition In Malaysia (1972) Current History, 271 at 272. In his speech at the reconvening of Parliament on 23 February 1971, the Leader of the Opposition criticised strongly the conditions under which Parliament was resumed:

"(W)e strongly deplore the Sword of Damocles which the Government has hung over the reconvening of Parliament with their oft-repeated threats that Parliament will be disbanded if it does not provide the necessary two-thirds majority vote to amend the Constitution. No member of Parliament with self-respect will allow this political blackmail to deter him from saying or doing what he believes in.....": see speech by Mr. Lim Kit Siang, Parliamentary Debates, 23 February 1971 at p. 73.

50. The Constitution Amendment Act A30 of 1971 which came into force on 10th March, 1971 added a new clause (4) to Article 10 which read:

"..... Parliament may pass law prohibiting the questioning of any matter, right, status, position, privilege or sovereignty or prerogative established or protected by the provisions of Part III (citizenship), Article 152 (Malay Language), Article 153 (special privileges) or Article 181 (sovereignty of the Rulers) otherwise than in relation to the implementation thereof as may be specified in such law".

"The disturbances of May 1969 mark the darkest period in our national history. By dint of prudent and imaginative policies, we have carefully moved ourselves away from the abyss which then confronted us. Today life has generally returned to normal. But we shall be extremely foolish and irresponsible if we forget the lessons of 13 May. It is easy for us to do nothing now and to hope that somehow things will turn out all right. But a country cannot be governed upon hopes. If we do not act, or if we do not take precautions now, we shall stand condemned before our people as failing in our duty. Surely, everyone wants to ensure that the tragedy of 13th May will never ever be repeated in this country. Such a calamity, if it should occur, would be more widespread and more catastrophic in its consequences. We have already paid a heavy price for the irresponsibility and indiscipline of a small group of people who were out to bring trouble and chaos. We cannot take chances now because what is at stake is the very survival of our nation".⁵¹

In constitutional terms, May 1969 is a watershed in the parliamentary life of Malaysia. The Parliament that was dissolved on 20 March 1969 for the purposes of the general elections on 10 May 1969 was never to regain its former pre-eminence. It lost its status as the sole legislative body for the country. The continued retention of parallel emergency powers by the Government by the non-repeal of the Proclamation of Emergency enables the Yang di-Pertuan Agong, which in substance is the Cabinet, to also exercise legislative powers in the form of emergency laws on account of the continued emergency.

51. Malaysian Parliamentary Debates, 23 February 1971 at p.53. For a criticism that the NOC rule of 21 months was prolonged for political purposes by the Alliance Party to regain its strength, see Dr. Syed Hussein Alatas: "The reason given by the Government for the 21 month emergency rule in Malaysia were the condition of the country and the need to bring about a consensus for amending the constitution. These two reasons were not valid. The real reason was the condition of the UMNO which was not yet ready to return to normal rule because of its own internal crisis", The Politics of Coalition in Malaysia, op.cit. p.271. See also Dr. Chandra Muzaffar, Freedom In Fetters, op.cit. p.328: "(It) was the Alliance (the ruling party called the Alliance Party), or more specifically a group within UMNO, that benefited from the aftermath of May 13th. To repeat, it is doubtful whether the Alliance would have recouped in such remarkable manner, or Tun Razak and his loyalists assumed leadership when they did, if it had not been for the 21-month suspension of parliamentary democracy."

It is apparent that the Emergency Government that functioned for 21 months would be the role-model for fashioning any future emergency government. In fact the framework of the NOC-style government was adopted for Kelantan when an emergency was proclaimed in that State on 8 November 1977.⁵² By the Emergency Powers (Kelantan) Act 1977 the executive authority of the State was taken over by the Federal Government and the legislative power of the State Assembly was assumed by the Ruler of the State. The Menteri Besar (Chief Minister) and his Executive Council were relieved of their powers. There was instead appointed a Director of Government who was to have "the direction, control and charge of the Government of the State" (Section 8). The Director was subject to the control and direction of the Prime Minister (Section 7). In his speech in Parliament on 8 November 1977, when moving the Kelantan Emergency Bill, the then Prime Minister Tun Hussein Onn stated that the Director would be his personal choice and answerable to him:

"The executive authority (of the State) shall be exercised by an official of the Federal Civil Service and to him shall be delegated the executive, functions and powers of the Menteri Besar and Executive Council. We want to ensure this official succeeds. He shall be chosen by me personally and would be answerable to me, and would be subject to directions and orders from me. I would in turn be answerable to the cabinet for the administration of Kelantan and the Cabinet in turn would be answerable to Parliament".⁵³ (English Translation)

The scheme of the Act left no room for doubt that the administration was placed under the control of the Prime Minister who governed the State through the Director appointed by him. The similarity it bore to the 1969 model was apparent. In fact, in the debate in Parliament, the Opposition Leader labelled

52. See Chapter VI for a discussion of the circumstances leading to the declaration of an emergency in Kelantan.

53. Malaysian Parliamentary Debates, 8 November 1977 at p.4123.

the emergency government in Kelantan as "an NOC-type rule".⁵⁴ The Act itself was passed under Article 150(5) of the Federal Constitution. By reason of this the suspension of the State Government and of the Legislative Assembly by an Act of the Federal Parliament was placed beyond the pale of constitutional challenge.

RULE BY EMERGENCY LAWS: THE ECLIPSE OF THE DOCTRINE
OF CONSTITUTIONAL SUPREMACY

Emergency government is characterised more by authoritarianism than arbitrariness. The new rulers anxious to legitimate their government in the eyes of the people would attempt to project themselves as acting under the law. For example, under the Nigerian emergency following the military take-over, the basic law or grundnorm of the country was said to be contained in the plenitude of the military decrees passed by the Military Government.⁵⁵ The issuance of decrees having the force of law is closely associated with military governments or juntas. In Malaysia, from the British period, the practice was not to issue decrees but to legislate formally to create the special power. For example, during the Communist Emergency, 1948-1960, which was the fore-runner to the subsequent emergencies in Malaysia, the British Colonial Government was assiduous about obtaining legal backing for all its actions. They achieved this by the promulgation of emergency laws. These laws were formally enacted by the appropriate legislative body and duly published in the gazette. For example, the Legislative Council of the Federation of Malaya passed the Emergency Regulations Ordinance 1948 on 7 July 1948 pursuant

54. Ibid. pp. 4154 et. seq. See also speech reproduced in Lim Kit Siang, Time Bombs In Malaysia (May, 1978) p.247 et. seq.

55. See the case of the *Nigerian Union of Journalists v. Attorney General of Nigeria* [1986] LRC (Const) 1.

to which the British High Commissioner of Malaya was empowered to make emergency regulations to deal with the Emergency. He was authorised to act without recourse to the Legislative Council which was at that time the sole legislative authority in the Federation. As one commentator of that time observed: "The scope and intensity of the Emergency Regulations effected a complete coercive embrace of the population".⁵⁶ After independence, the British practice of administering an emergency through emergency laws was continued by the Malayan Government. The system adopted was the same, namely, of having a principal emergency statute under which power is delegated to an authority to make emergency regulations without reference to the legislature. The Yang di-Pertuan Agong replaced the High Commissioner as the law-making authority. Thus under the 1964 Emergency, the principal emergency legislation was the Emergency (Essential Powers) Act, 1964 passed by Parliament pursuant to which power was given to the Yang di-Pertuan Agong to make emergency regulations.⁵⁷ However, under the 1969 Emergency, the principal emergency legislation, namely, the Emergency (Essential Powers) Ordinance No.1 of 1969 was made by the Yang di-Pertuan Agong himself under Article 150(2) of the Constitution because Parliament was dissolved on 20 March 1969 for the general elections and was not in session when the Emergency was proclaimed on 15 May 1969. Under Ordinance No.1 the Yang di-Pertuan Agong delegated to himself the power to make emergency regulations having the force of law. On January 17, 1979, as a result of the decision of the Privy Council in *Teh Cheng Poh's*

56. See R. Dhu Renick, The Malayan Emergency: Causes And Effect, Journal of Southeast Asian History (1965) Vol.6 No.2 at p. 19.

57. The principal regulation was the Emergency (Criminal Trials) Regulations, 1964 providing for an expedited criminal trial procedure which dispensed with a preliminary inquiry: see *Eng Keock Cheng v. Public Prosecutor* [1966] 1 MLJ 18; *Mohamed Sidin v. Public Prosecutor* [1967] 1 MLJ 106.

case,⁵⁸ Ordinance No.1 was re-enacted as an Act of Parliament and termed the Emergency (Essential Powers) Act 1979 with retrospective effect to 17 May 1969. It continues in force to this day. This legislation was made under the express power given to Parliament under Clause (5) to enact legislation for the purposes of the emergency.

We may now look at the emergency laws passed under the 1969 Emergency.

Emergency Ordinances Under The 1969 Emergency:-

The present Emergency declared on 15 May 1969 is characterized by the multitude of emergency laws made under Ordinance No.1 of 1969. Until Parliament was reconvened on 21 February 1971 it was the sole source of legislative power in the country. It may be noted that the Parliament which had been dissolved on 20 March 1969 could not be reconstituted because of the uncompleted elections in Sabah and Sarawak when the emergency was proclaimed on 15 May 1969. Thereafter the elections were suspended and the convening of the State Assemblies was halted by a decree issued by the Yang di-Pertuan Agong under Article 150(4).⁵⁹

Thus the 1969 Emergency presents the role-model for a study of how an emergency is administered through emergency laws. The first act of the Yang di-Pertuan Agong after Proclaiming the Emergency on 15 May 1969 was to enact the principal emergency legislation. This was Ordinance No.1 and Ordinance No. 2 enacted on 17 May but operational with effect from 15 May. Ordinance No.1 became the fountain-head for all subsequent emergency legislation. Under it

58. The decision in this case was delivered on 10th December, 1978: [1980] AC 458; [1979] 2 MLJ 50.

59. P.U.(A) 147/69.

the Yang di-Pertuan Agong was empowered to make subsidiary legislation, called emergency regulations, for the purposes of the emergency. By Ordinance No.2, the Yang di-Pertuan Agong established the framework for an emergency government by creating the special office of Director of Operations and a special cabinet-like body called the National Operations Council (NOC) to assist him. They governed the country for 21 months until Parliament was reconvened on 21 February 1971. During this period a total of 77 emergency ordinances was enacted under Article 150(2).⁶⁰ They covered a wide spectrum of matters from law and order subjects at one end to pure matters of administration like pensions and planning at the other. The initial set of Ordinances, made in the months of May and June, 1969, were primarily designed to combat the law and order problems created by the May 13 disturbances and to deal with the intercepted elections in Sabah and Sarawak. Ordinances Nos.1 and 2 were principally designed for this purpose. Ordinance No.3⁶¹ amended the Eighth Schedule to the Federal Constitution to provide for an indefinite postponement of the convening of Parliament. It was also designed to facilitate Treasury supply by providing for expenditure from the Federal and State Treasury pursuant to central Treasury Instructions and without the requisite supply vote from the federal or state legislatures. Ordinance No. 4⁶² made on 12 June 1969 contained a set of preventive detention laws, called the Emergency (Internal Security and Detention Orders) Regulations, 1964,

60. See (1977) 2 MLJ lii for a list of the emergency ordinances as prepared by the Librarian of the Attorney General's Chambers. A total of 92 ordinances were enacted. Of them, 77 was enacted by the NOC Government which was in office until 19 February 1971: see Ordinance No. 77 (P.U.(A) 62/71).

61. P.U.(A) 170/69.

62. P.U.(A) 186/69.

enacted during the 1964 Emergency to continue in operation for the duration of the present Emergency. By Ordinance No.5⁶³ dated 25 June 1969, called the Emergency (Public Order and Prevention of Crime) Ordinance 1969, the power of preventive detention was given to police officers to detain persons who have acted or are likely to act in a manner prejudicial to public order or for the prevention of crimes of violence.⁶⁴ Under Ordinance No. 8,⁶⁵ enacted on 2 August 1969, the power to legislate in the States was given to the State Operations Committees with the concurrence of the Director of Operations.

Under Article 150, as it then stood, there was no limit to the law-making power of the Yang di-Pertuan Agong other than that found in Clause (2).

The provision, before its amendment in 1981, read as follows:

"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 Ordinance having the force of law, if satisfied that immediate action is required".

The restriction contained in Clause (2) was two-fold. The first, was the requirement that the Yang di-Pertuan Agong be "satisfied" that "immediate action" by way of emergency legislation is required. This condition has not been challenged in any case during the time this provision was in force and any challenge would most likely have failed.⁶⁶ There was, however,

63. P.U.(A) 187/69.

64. For a discussion of the scope of this law, see *Yeap Hock Seng v. Minister for Home Affairs* [1975] 2 MLJ 279; *Re Tan Boon Liat* [1976] 2 MLJ 83.

65. P.U.(A) 307B.

66. For a discussion of the scope of legal challenge to a decision based on the subjective discretion of the Yang di-Pertuan Agong, see *Merdeka University v. Government of Malaysia* [1981] 2 MLJ 356; on appeal [1982] 2 MLJ 243.

a number of cases that have considered the second of the restrictive elements in Clause (2), namely, the period in which the Yang di-Pertuan Agong is authorised to make laws. This period was defined as "until both Houses of Parliament are sitting". In *Khong Teng Khen v. Public Prosecutor*,⁶⁷ the Federal Court had to consider whether the Yang di-Pertuan Agong could still exercise his law-making powers under Clause (2) after Parliament had reconvened on 21 February 1971. In answering the question in the affirmative, the court gave a literal meaning to the word "sitting" as "meaning sitting and actually deliberating".⁶⁸ As H.S. Ong F.J. said in his dissent, the absurdity of the literal meaning was that it could provide for week-end legislation by the Agong when Parliament is in recess.⁶⁹ The decision was mercifully overruled by the Privy Council in *Teh Cheng Poh v. Public Prosecutor*,⁷⁰ which held that the Yang di-Pertuan Agong could not legislate under Clause (2) once Parliament had reconvened. Lord Diplock said: "The power to promulgate Ordinances having the force of law is expressed to be exercisable only until both Houses of Parliament are sitting. It lapses as soon as Parliament sits. Thereafter while the proclamation of emergency remains in force any further laws required by reason of the emergency are to be made by Parliament in the exercise of the legislative authority of the Federation vested in it by Article 44 of the Constitution".⁷¹ Lord Diplock went on to say:

67. [1976] 2 MLJ 166.

68. At p. 169G.

69. At p.172 E-F.

70. [1980] AC 458.

71. At p. 466 E.

"So far as his (the Yang di-Pertuan Agong) power to make written laws is derived from Article 150(2) of the Constitution itself, in which they are described as "ordinances", it comes to an end as soon as Parliament first sits after the proclamation of an emergency; he cannot prolong it, of his own volition, by purporting to empower himself to go on making written laws, whatever description he may apply to them. That would be tantamount to the Cabinet lifting itself by its own bootstraps. If it be thought expedient that after Parliament had first sat the Yang di-Pertuan Agong should continue to exercise a power to make written laws equivalent to that which he was entitled during the previous period to exercise under Article 150(2) of the Constitution the only source from which he could derive such powers would be an Act of Parliament delegating them to him".⁷²

Following the decision of the Privy Council, Clause (2) was deleted by the Constitution (Amendment) Act A514 of 1981 and replaced with a new Clause (2B) which reads:

"If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require".

The amendment effectively reinstated the reasoning of the Federal Court in *Khong Teng Khen's* case. This is made abundantly clear by the new clause (9) which reads:

"For the purpose of this Article the Houses of Parliament shall be regarded as sitting only if the members of each House are respectively assembled together and carrying out the business of the House".

By Clause (9) the apparent limitation in Clause (2B) is made illusory because it is not in the practice of the Malaysian Parliament for both Houses to sit concurrently or be assembled together otherwise than for ceremonial purposes. In *Khong Teng Khen's* case, both Suffian LP and H.S. Ong F.J. made an observation relying on Ahmad Abdullah's book on "The Malaysian Parliament

72. At pp. 468-469. The decision was delivered on 10 December 1978. On 17 January 1979, the Emergency (Essential Powers) Act was passed by Parliament delegating to the Yang di-Pertuan Agong the same powers of emergency law-making that he previously had.

(Practice and Procedure)" that "the two Houses do not sit continuously throughout a session".

The amendment also removed a further limitation on the Yang di-Pertuan Agong's law-making power. This is in respect of the obligation under Clause (2) that Parliament should be summoned "as soon as may be practicable". The requirement enunciated the salutary principle that parliamentary rule is the norm and emergency government the exception. However, even previously, the interpretation given by the courts to this phrase had denuded it of any practical value. In *Melan Abdullah v. Public Prosecutor*,⁷³ the amendment to the Seditious Act by Emergency Ordinance No. 45 of 1970 was challenged on the ground that the Yang di-Pertuan Agong could not have validly enacted the Ordinance because he had not, contrary to Clause (2), summoned Parliament "as soon as may be practicable". Ong CJ rejected the argument with a one-line response remarkable for its brevity: "I do not think this or any court is competent to decide when it was practicable for Parliament to be convened during an Emergency".⁷⁴ The question arose again in another seditious case, *Public Prosecutor v. Ooi Kee Saik*.⁷⁵ This time the repudiation by the court was in even stronger terms placing the question beyond the pale of judicial review. Raja Azlan Shah J. (as he then was) said: "His Majesty is again the sole judge of "when it is possible to summon Parliament and the matter is above judicial review..... the long delay in summoning Parliament does not

73. [1971] 2 MLJ 280.

74. At p. 283 H.

75. [1971] 2 MLJ 108.

affect the validity of Ordinance No. 45".⁷⁶ Given the pronouncements made in these cases,⁷⁷ the deletion of Clause (2) by the 1981 amendments was merely the removal of a restriction which in any event had proven to be illusory.

Emergency Regulations

The rule by emergency laws has its greatest impact in the power bestowed upon the Yang di-Pertuan Agong to make emergency regulations under the principal Emergency Ordinance. The Emergency (Essential Powers) Act, 1964 provided for this in section 2, following the model set by the Emergency Powers Ordinance 1948 under the pre-independence Federation of Malaya Government. This was carried over when the Emergency (Essential Powers) Ordinance No. 1 was enacted on 17 May 1969 and later when it was re-made by Parliament as the Emergency (Essential Powers) Act 1979 on 17 January 1979.

For our present purposes, we may conveniently look at section 2 of the 1979 Act, which reads:

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

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

76. At p. 113 B.

77. Eg. see their adoption in the subsequent case of *Fan Yew Teng v. Public Prosecutor* [1975] 2 MLJ 235. In both *Ooi Kee Saik's* case and *Fan Yew Teng's* case, the courts also considered the phrase "when Parliament is not sitting" in Clause (2) and read it as a requirement that Parliament should actually be in session and deliberating.

- (a) make provisions of the apprehension, trial and punishment of persons offending against the regulations, and for the detention, exclusion and deportation of persons whose detention, exclusion or deportation appears to the Minister of Home Affairs to be expedient in the interests of the public safety or the defence of Malaysia;
- (b) create offences and prescribe penalties (including the death penalty) which may be imposed for any offence against any written law (including regulations made under this Act);
- (c) provide for the trial by such courts as may be specified in such regulations, of persons guilty of any offence against the regulations;
- (d) make special provisions in respect of procedure (including the hearing of proceedings *in camera*) in civil or criminal cases and of the law regulating evidence, proof and civil and criminal liability;
- (e) make provisions for the control of aliens;
- (f) make provisions for directing and regulating the performance of services by any persons;
- (g) authorise -
 - (i) the taking of possession, control, forfeiture or disposition on behalf of the Government of Malaysia, of any property or undertaking;
 - (ii) the acquisition, on behalf of the Government of Malaysia, of any property other than land;
- (h) authorise the entering and search of any premises;
- (i) prescribe fees or other payments;
- (j) provide for amending any written law, for suspending the operation of any written law and for applying any written law with or without modification;
- (k) make provisions for the control of the harbours, ports and of territorial waters of any State in Malaysia and of the movements of vessels;
- (l) make provisions for the transportation by land, or water, and the control of the transport and movement of persons, animals and things;
- (m) make provisions for trading, storage, exportation, importation, production, and manufacture;

- (n) make provisions for the supply and distribution of food, water, fuel, light and other necessities;
- (o) provide for any other matter in respect of which it is the opinion of the Yang di-Pertuan Agong desirable in the public interest that regulations should be made.

(3) Essential Regulations may provide for empowering such authorities, persons or classes of persons as may be specified in the regulations to make orders, rules and by-laws for any of the purposes for which such regulations are authorised by this Act to be made, and may contain such incidental and supplementary provisions as appear to the Yang di-Pertuan Agong to be necessary or expedient for the purposes of the regulations.

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

By this provision the Yang di-Pertuan Agong is empowered to make emergency regulations if he considers them "desirable or expedient" (sub-section (1)) or "necessary or expedient" (sub-section (2)). These are considered to be words of the widest amplitude. Generally, it will not be possible to assail the regulations made under them on the basis that they were not desirable or necessary.⁷⁸ The Commonwealth courts have also consistently taken the view that it is not for the judges to review whether the relevant law-making authority was correct in making the conclusion that there was a necessity for the laws or whether it had acted upon sufficient information in enacting them. In *R v. Comptroller General of Patents*,⁷⁹ dealing with the validity of a certain Regulation made under the Defence of the Realm Act, 1939, Clauson LJ said:

78. See *Attorney General for Canada v. Hallet & Carey Ltd.* [1952] AC 427; see generally D.C. Pearce, Delegated Legislation (Butterworths, Sydney, 1977) pp. 118 et. seq.

79. [1941] 2 KB 306.

"It was argued that the Regulation was not necessary or expedient for securing the public safety..... but it appears to me, as a matter of construction of the Act to be quite clear that the criterion whether or not His Majesty has power to make a particular Regulation is not whether that Regulation is necessary or expedient for the purposes named, but whether it appears to His Majesty to be expedient or necessary for the purposes named to make the Regulation..... this Court has no jurisdiction to investigate the reasons or the advice which moved His Majesty to reach the conclusion that it was necessary or expedient to make the Regulation".

A similar approach was taken by Lord Pearson in *McEldowney v. Forde*:

"The Northern Ireland Parliament must have intended that somebody should decide whether or not the making of some proposed regulation would be conducive to the "preservation of the peace and the maintenance of order"The courts cannot have been intended to decide such a question because they do not have the necessary information and the decision is in the sphere of politics, which is not their sphere".⁸⁰

And Lord Guest in *Akar v. Attorney General of Sierra Leone*⁸¹ observed:

"Emergency laws cannot be challenged on grounds that it was not reasonably justifiable for the situation".

However, this is not to say that emergency regulations may not be challenged under any circumstances. If the regulations are made even before an

80. [1971] AC 632 at 655 D-F.

81. [1969] 3 AER 384 at 395.

emergency is declared,⁸² or by the wrong authority,⁸³ or fall outside the authorised subject matter of law-making,⁸⁴ or are inherently vague or uncertain,⁸⁵ or are so unrelated to the object that they are unlikely to

82. Both the law-making provisions of Article 150, namely, Clause (2B) and Clause (5), have as a condition precedent that a Proclamation of Emergency "is in operation" (Clause (2B)) or "is in force" (Clause (5)). Thus the fact of a Proclamation of Emergency having been made and not been revoked would be regarded as a condition of law-making, the absence of which will render the regulations invalid (see the Privy Council in *The Bribery Commissioners v. Rannasinghe* [1964] 2 AER 785: "(The) legislature has no powers to ignore the conditions of law making that are imposed by the instrument which itself regulates its power to make laws" (p.792D)). However, see the Nigerian case of *F.R.A. Williams v. Dr. M.A. Majekodunmi* [1962] 1 All N.L.R. 413 where it was held that under their Federal Constitution (since abrogated by the military coup) Parliament has power to enact legislation to have effect during a period of emergency even though no emergency exists at the time of enactment. The correctness of this decision is however doubtful even as a matter of construction of their Constitution. The provision (section 65(1 and 2)) read: "Parliament may at any time make laws..... for the purposes of maintaining or securing peace..... during any period of emergency. Any provision enacted in pursuance of this section shall have effect only during a period of emergency". The Lagos Supreme Court held that subsection (1) enables Parliament to make the necessary laws at any time whether there is an emergency on or not". The emphasis on the words "at any time" without reference to the context provided by the words "during any period of emergency" possibly explains the error made by the Court.
83. See eg. *Law Society of Lesotho v. Minister of Defence & Internal Security* [1988] LRC (Const) 226, where under the relevant law the wrong authority had declared an emergency and it was held not to matter that the office of the relevant authority had been abolished by the military government. See also the American case of *Walsh v. City of River Rouge*, 385 Mich. 623, 189 N.W. 2 318 [1971]: only the Governor and not the City Mayor could declare martial law during a riot.
84. See the South African case of *Metal & Allied Workers Union v. State President of Republic of South Africa* [1986] 4 SA 358 where it was held that certain parts of the Emergency Regulations made by the State President were invalid because he "had not limited himself to objects which have a bearing on public safety, the maintenance of public order or any other matter referred to in the empowering section".
85. "A by-law must be certain in the sense that it must contain adequate information as to the duties of those who are to obey" per Williams J. in *Brunswick Corporation v. Stewart* [1941] 65 CLR at 99. See also *King Gee Clothing Co. Pty. Ltd. v. The Commonwealth* [1945] 71 CLR 184 per Dixon J. at 194. This ground was canvassed briefly without success in

fulfil their purpose,⁸⁶ the regulations may be struck down. In this regard the court would be guided by the extent of discretion given to the law-making authority by the principal legislation. The Court of Appeal of the West Indies observed in an appeal from the island of St. Christopher, Nevis & Anguilla that there was a distinction between an instrument that authorises the Governor in an emergency to "take any measures that are reasonably justifiable for dealing with the situation" and one which merely authorises "the Governor to make such laws as he considers necessary or expedient". The Court said:

"The one gives dictatorial powers to the Governor enabling him to act by decree and to issue orders which, once made in good faith are beyond challenge. The other makes justiciable by an objective test the measures which the law authorises. What appears to the Governor to be necessary or expedient may not on an objective test be reasonably justifiable in the particular situation that exists. Many things have been done in the name of expediency which are quite unjustifiable on the known facts".⁸⁷

In *McEldowney v. Forde*,⁸⁸ the House of Lords ruled that emergency law-making was a legislative and not an executive act. It would then follow that the courts will not generally go behind what has been enacted, to inquire how an enactment was made, or whether it arose out of incorrect information or actual

contd...

85. the Malaysian case of *The Jaffanese Cooperative Society Ltd. v. Bank Negara Malaysia* [1989] 3 MLJ 150 in respect of the validity of the Emergency (Protection of Depositors) Regulations, 1986 made by the Yang di-Pertuan Agong under the Emergency (Essential Powers) Act 1979.
86. Eg. *The King v. The University of Sydney Ex parte Drummond* [1943] 67 CLR 95, that the National Security (Universities Commission) Regulations were bad as being unrelated to the object of national security because it prevented qualified students who have not been called up from attending university.
87. Per AM Lewis CJ in *Charles v. Phillips and Sealey* [1967] 10 W.I.R. 423 at pp. 433-34.
88. Op. Cit.

deception by someone on whom reliance was placed: see *Hoani Tukino v. Aotea District Maori Land Board*.⁸⁹

Clause (6) of Article 150 And The Supremacy Doctrine

The most important feature of emergency legislation, whether promulgated by the Yang di-Pertuan Agong under Clause (2B) or enacted by Parliament under Clause (5), is their overriding quality ie. they override the Constitution and are valid even if they are inconsistent with it. This underscores both the significance and potency of a continued state of emergency. It gives the Government the option of by-passing the Constitution by the enactment of emergency legislation. In short, emergency legislation could scuttle the doctrine of constitutional supremacy enunciated in Article 4 of the Federal Constitution. The provision reads:

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

Article 4 is central to the meaning of the Constitution. It has been said that: "to misunderstand Article 4 is to misunderstand the whole document (ie. the Constitution)".⁹⁰ The vitality of the supremacy provision has generally been appreciated by the Courts. In *Ah Thian v. Government of Malaysia*,⁹¹ Suffian LP observed:

"The doctrine of supremacy of Parliament does not apply in Malaysia.... Under our Constitution written law may be invalid on one of these grounds:

89. [1941] AC 308 PC.

90. R.H. Hickling, An Overview of Constitutional Changes In Malaysia: 1957-77 (Ed. Suffian, Lee & Trinidad, The Constitution of Malaysia: Its Development 1957-77) at p.5.

91. [1976] 2 MLJ 112 at 113.

- (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter with respect to which the State Legislature has no power to make law, Article 74; or
- (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, Article 41; or
- (3) in the case of State written law, because it is inconsistent with Federal law, Article 75".

In Clause (6) of Article 150, the Constitution purports to make an express exception to Article 4. Clause (6) reads:

"Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution".

The objective behind giving emergency laws a super-quality is obvious. In *Eng Keock Cheng v. Public Prosecutor*⁹² Wylie C.J. (Borneo) interpreted Clause (6) as follows:

"The true effect of Article 150 is that, subject to certain exceptions set out therein, Parliament has, during an emergency, power to legislate on any subject and to any effect, even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved. This necessarily includes authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution".

The Privy Council in *Osman & anor v. Public Prosecutor*⁹³ made a similar observation.

92. [1966] 1 MLJ 18 at 20-G.

93. [1968] 2 MLJ 137 PC at 138F-H. In the subsequent case of *Mahan Singh v. Government of Malaysia* [1975] 2 MLJ 155, the point was raised but not considered by the Federal Court, on account of it not having been pleaded, that Clause (6) saves only laws but not executive acts, eg. executive decisions inconsistent with the Constitution. In the present writer's view, the point bears merit because Clause (6), like a finality clause, seeks to give immunity and should therefore be construed strictly.

The superior status of emergency regulations is further assured by section 2(4) of the Emergency (Essential Powers) Act 1979 and its precursors in Ordinance No. 1 of 1969 and the Emergency (Essential Powers) Act 1964. Section 2(4) reads:

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

The width of this provision is astounding. It seeks to insulate from challenge not only the subsidiary laws but any executive action in the form of "order, rule or by-law" duly made under them. There have been numerous challenges to the provision since it was first introduced under the Emergency (Essential Powers) Act, 1964. These challenges were generally made under two broad headings: first, that it was unconstitutional for Parliament to delegate to the Yang di-Pertuan Agong the power to enact regulations inconsistent with the Constitution, and secondly, that the scope of the provision was limited by the words "written law" and the phrase "other than this Act". The first of the propositions was considered and repelled in *Eng Keock Cheng's* case. The court held that the answer is to be found in Clause (6) of Article 150 and that the "Act having been declared to be required by reason of the emergency, none of its provisions can be held invalid on account of the effect of any provision in that written Constitution".⁹⁴ In the later case of *Mahan Singh v. Government of Malaysia*⁹⁵ there was an even more substantial challenge to the Yang di-Pertuan Agong's delegated power of law-making. It arose out of the

94. Op. cit. p.20C.

95. [1975] 2 MLJ 155.

delegation, in turn, by the Agong of his law-making powers to the Director of Operations under the Emergency (Essential Powers) Ordinance No. 2 of 1969. It was argued, following Wylie C.J. (Borneo)'s observation in *Eng Keock Cheng's* case,⁹⁶ that Ordinance No.2 achieved a complete delegation of power and it amounted to an abdication of powers and was therefore ultra vires the Constitution. Suffian LP made short shrift of the argument with the syllogism: "If His Majesty may delegate part of his power he may delegate all of it".⁹⁷ In his supporting judgment, Lee Hun Hoe C.J. (Borneo) was more comprehensive. He said:

".....Ordinance No. 2 of 1969 was enacted pursuant to Article 150 and Clause (6) of that Article expressly provides for legislation that may override the provisions of the Constitution. The result is that in the case of any legislation enacted under a power which gave it validity notwithstanding inconsistency with the Constitution it would be otiose to consider whether such legislation would be inconsistent with any provision of the Constitution..... It would be futile to argue that the delegation of powers by His Majesty or, for that matter, Parliament would be against the Constitution. The short answer to such an argument is provided by Article 150(6)".⁹⁸

The second proposition may be considered by examining first how section 2(4) stood under the precursor statute, the Emergency (Essential Powers) Act, 1964 passed during the Indonesian Confrontation Emergency. It then read as follows:

"An Essential Regulation and any order, rule, or by-law duly made in pursuance of such a regulation, shall have effect notwithstanding anything inconsistent therewith contained in any written law other than this Act or in any instrument having effect by virtue of any written law other than this Act".

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96. Op. Cit. at p.20 ie. the Yang di-Pertuan Agong had "authority to delegate part of (the) power to legislate to some other authority" (emphasis added).
97. Op. cit. at p. 161F.
98. Op. cit. p. 164-165.

In *Osman & Anor v. Public Prosecutor*,⁹⁹ it was contended that the Emergency (Criminal Trials) Regulations, 1964 were ultra vires the Constitution and that it was not saved by sub-section (4) itself because the phrase "written law" therein does not include the Constitution. The Privy Council merely concluded that they "find nothing in the context which requires them to give a different meaning to the words "written law" than that prescribed by the Ordinance and they do not consider that the words of Article 150(5) "any provision of this Constitution or of any written law" are any indication that the words "written law" in the Act were intended to have any different meaning to that stated in the Ordinance".¹⁰⁰ However, when Ordinance No. 1 of 1969 was enacted after the Emergency was declared in May 1969, Section 2(4) was reproduced with the addition of the words "including the Constitution or the Constitution of any State" after the words "written law". A repetition of the argument in *Osman's* case was duly foreclosed.

However, there are still the words "other than this Act", and its implication. On a plain reading of the words and, in their context, it was a reiteration of the basic rule of construction with regard to delegated legislation that they cannot conflict with the parent legislation. The only case to have considered the effect of those words is *Mohamed Sidin v. Public Prosecutor* where, unfortunately, the arguments of the appellant were rather poorly formulated.¹⁰¹ The challenge was again with regard to the Emergency (Criminal Trials) Regulations 1964, to the effect that Regulations 4 and 5,

99. [1968] 2 MLJ 137.

100. Ibid at p.139 E-G.

101. [1967] 1 MLJ 106.

which enable the Public Prosecutor to decide whether an accused person should be tried by the ordinary process or under the more stringent rules of the Regulations, were ultra vires and offensive to the rights of equal treatment provided by Article 8 of the Constitution. The Federal Court had previously ruled in the same case on a special reference that the Regulations were not ultra vires Article 8. It was now contended that the Regulations were discriminatory and, therefore, ultra vires not of the Constitution but of the Act. The basis of this argument was unfathomable because the anti-discriminatory provision (Article 8) is found only in the Constitution and not in the Act. The Federal Court rightly dismissed the argument stating "we find it difficult to follow this line of reasoning".¹⁰² The inapposite manner in which the point was developed in *Mohamed Sidin's* case should not, however, diminish the inherent value of the words "other than this Act" in the provision. They are words of limitation intended to limit the scope of protection provided by the sub-section. It would still be open to challenge subsidiary legislation under the Act if they exceed the bounds or traverse outside the authorised subject matters defined in Sections 2(1) and (2).

The most recent application of Section 2(4) was in *The Bank Negara* case.¹⁰³ The question arose in the context of the powers exercised by Bank Negara (the Central Bank) over the assets of an insolvent deposit-taking financial institution under the Essential (Protection of Depositors) Regulations, 1986.¹⁰⁴ These Regulations were made by the Yang di-Pertuan Agong

102. Ibid at p. 108D.

103. *Jaffanese Cooperative Society Ltd. v. Bank Negara Malaysia* [1989] 3 MLJ 150.

104. P.U.(A) 237/86.

as emergency legislation in July 1986 under section 2(4) of the Emergency (Essential Powers) Act 1979. The background to this law was the urgent need to immediately protect the interests of innocent depositors by freezing the assets of illegal and unauthorised deposit-taking cooperatives which had become unable to meet their deposit liabilities. The problem was widespread involving hundreds of thousands of people throughout the country. It was realised that the existing law, especially the Cooperative Societies Act 1948 was inadequate to deal with the situation.¹⁰⁵ The Government felt that it would be too late to wait for the next session of Parliament to pass new legislation. It accordingly invoked its emergency law-making powers under the Emergency (Essential Powers) Act 1979 to pass the Regulations. The Regulations authorized the Central Bank to, inter alia, freeze the assets of deposit-takers and their directors and to restrict the departure from jurisdiction of persons concerned with the affairs of deposit-taking bodies. Further, the Central Bank was authorized to assume control of the affairs of a deposit-taker and to place it under receivership. The Jaffanese Cooperative Society being a shareholder of the Central Cooperative Bank Bhd. (CCB), one of the affected deposit-takers, sought to challenge the placement of a receiver over the affairs of the CCB on the ground, inter alia, that the Regulations empowered the taking and/or disposition of the property of a deposit-taker not on behalf of the Government. The Supreme Court ruled that "the Regulations have effect under section 2(4) notwithstanding anything therein inconsistent

105. For a background to the problem, see the Government White Paper dated November, 1986 titled "Report On The Deposit Taking Cooperatives", Order Paper 50 of 1986.

with any written law including the Constitution or the Constitution of any State".¹⁰⁶

On a strict reading of Clause (6) of Article 150 it should be confined in application to only "ordinances promulgated under" Article 150 and an "Act of Parliament which is passed while a Proclamation of Emergency is in force". It should follow that essential regulations made under Section 2 of the Emergency (Essential Powers) Act 1979 would fall outside the protection of Clause (6). The Courts have, however, not read the provision in that limited fashion. They have extended the protection under Clause (6) to "emergency regulations" as well. In *Mahan Singh v. Government of Malaysia*,¹⁰⁷ it was held that the validity of the delegation of powers to the Director of Operations to make the Public Officers (Conduct & Discipline) Regulations 1969 was protected by Clause (6). In *Eng Keock Cheng's* case,¹⁰⁸ likewise the Emergency (Criminal Trials) Regulations, 1964 was upheld by the ultimate reliance on Clause (6). This conclusion may be less assailable than the reasoning of the courts would suggest. The question really is whether Section 2(4) is itself ultra vires or invalid. Where a legislative provision is challenged as to its vires it must be tested against the tenets of a higher law, namely, the Constitution. However, Section 2(4), which sanctions unconstitutional legislation or actions if done in the course of an Emergency is itself protected by Clause (6). Thus, there is little or no scope to assail the provision or what it protects other

106. Op.cit at pp.153-54.

107. [1975] 2 MLJ 155.

108. [1966] 1 MLJ 18.

than the argument that the essential regulation made under section 2 or any rule or by-law are themselves ultra vires the 1979 Act. This would be the effect of the words "other than this Act" in the provision itself. Further, if any delegated legislation is enacted by the Yang di-Pertuan Agong, which does not reasonably relate to the subject-matters enumerated under Section 2(1) or (2), they would be ultra vires the Act and invalid. This limited scope of challenge, however, is open only to subsidiary legislation made under the Act. There is, of course, no limitation or restriction under Clause (6) to the scope of emergency legislation that may be passed by Parliament during an emergency.

Clause (6A) of Article 150

The only limitation on the overriding nature of emergency legislation under Article 150 are those expressed in Clause (6A). The provision reads as follows:-

"Clause (5) shall not extend the powers of Parliament with respect to any matter of Islamic law or the custom of the Malays, or with respect to any matter of native law or custom in the State of Sabah or Sarawak; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship or language".

Clause (6A) was inserted in Article 150 on 16 September 1963 by the Malaysia Act, 1963. By Section 39 of the said Act the existing Clauses (5) and (6) of Article 150 were substituted with new Clauses (5), (6) and (6A). The Explanatory Statement that accompanied the Act in bill-form in Parliament does not give any reason for the insertion of Clause (6A).¹⁰⁹

109. See Government Gazette dated 13 August 1963.

The purpose of Clause (6A), however, is obvious. It is to place the subjects enumerated therein beyond the reach or touch of emergency legislation. They may be tabulated as follows:

- (1) Islamic law;
- (2) the custom of the Malays,
- (3) native law or custom in Sabah and Sarawak;
- (4) the constitutional guarantees on: (i) religion (ii) citizenship, and (iii) language.

The subjects reflect the fundamental concerns of the multi-racial and multi-religious communities of Malaysia. Except for the guarantee on citizenship, they relate to the personal law and beliefs of the Malaysian peoples. The matters on citizenship and language reflect the understanding upon which the Alliance Party under the first Prime Minister Tunku Abdul Rahman Putra Al-Haj forged cooperation between the immigrant and the indigenous communities to work jointly and harmoniously towards independence. In short, the non-Malay residents of Malaya were given citizenship rights whilst the Malays were assured of the continuity of the Sultanate system, the special position of Islam and the status of the Malay language as the national language. Of these, it may be noted that only the position of the Rulers is not entrenched in Clause (6A). There is no explicable reason for this especially since the Malay Rulers through the Conference of Rulers play a distinctive role in the constitutional system of the country.

Be that as it may, the effect of Clause (6A) is that no ordinance promulgated by the Yang di-Pertuan Agong under Clause (2B), nor shall any Act of Parliament passed under Clause (5), alter the status of the subject matters entrenched under Clause (6A). Thus, any emergency legislation that is inconsistent with the present constitutional position obtaining in respect of the subject matters enumerated in Clause (6A) would be ultra vires and void.

This would be the true position inspite of the presence of the ambivalent words, "extend the powers of Parliament". It refers to the fact that these subjects form part of the State List in respect of which the State legislatures only have authority to legislate.¹¹⁰ It would follow that by Clause (6A), this reservation may not be altered nor could the power be usurped by the Federal Government to regulate these matters by way of emergency legislation. As one academic writer observed, the rights mentioned in Clause (6A) are more deeply entrenched in the Constitution than any other rights.¹¹¹

Impact On Fundamental Liberties

At a conceptual level it has always been recognised that fundamental rights should not impede governmental action during a state of emergency. Thus, international covenants have provided for the derogation of human rights during times of national emergency. Article 4 of the International Covenant On Civil And Political Rights reads:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin".¹¹²

110. See the Ninth Schedule to the Federal Constitution.

111. See Shad S. Faruqi, Fundamental Liberties In Malaysia: An Overview (1985) Vol. 18 No. 3 INSAF 50 at 54.

112. See Brownlie's International Legal Documents.

Article 15(1) of the European Convention on Human Rights 1950 likewise permits member states to derogate in time of war or other public emergencies, but only to the extent strictly required by the exigencies of the situation.¹¹³

When the Reid Commission drafted the independence Constitution they provided for the encroachment of fundamental rights during times of emergency but only to the extent necessary to meet the exigency. The recommendation read as follows:

"Neither the existence of fundamental rights nor the division of powers between the Federation and the States 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. We therefore recommend that the Constitution should authorise the use of emergency powers by the Federation but that the occasions on which, and so far as possible the extent to which, such powers can be used should be limited and defined".¹¹⁴

The Reid Commission was obviously influenced by the fact of the Communist Emergency of 1948 which was then in force. Under the Emergency Regulations Ordinance of 1948, the Colonial Government was empowered to abridge fundamental liberties to deal with the Emergency. The Ordinance provided for the right of detention without trial. It also authorised collective punishment i.e. the punishing of the residents of a locality for consorting with communist insurgents.¹¹⁵

The Reid Commission had recommended that the special powers to handle an emergency should be of two types. The first was where identified organised

113. Ibid. See also David Bonner, Emergency Powers In Peacetime (Sweet & Maxwell, London, 1985) pp. 83 et. seq.

114. Reid Commission Report, para. 172 pp. 74-75.

115. See generally D. Rhu Rennick, The Malayan Emergency: Causes and Effect, (1965) Journal of Southeast Asian History Vol. 6 No. 2 p. 27 et. seq.

violence was perceived from a body of persons, in which event the Government was empowered to enact special legislation to deal with that threat without declaring an emergency.¹¹⁶ The second was wider in context and ambit i.e. the power of the Government to declare a state of emergency where there was a threat to national security.¹¹⁷

The recommendations of the Reid Commission were adopted and incorporated in the Federation Constitution as Articles 149 and 150 respectively. In this review, it is proposed to examine only the features of the emergency provisions of the Malaysian Constitution that authorise abridgement of fundamental rights and not undertake a case by case study of its infringement under times of emergency.

In its original form, Article 150 only authorised the infringement of fundamental rights. Clause (6) as it then stood read:

"No provision of any law or ordinance made or promulgated in pursuance of this Article shall be invalid on the ground of any inconsistency with the provisions of Part II and Article 79 shall not apply to any Bill for such law or any amendment to such Bill".¹¹⁸

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116. Clause 137 of the Draft Constitution of the Federation of Malaya, adopted later as Article 149 of the independence Constitution.
117. Ibid. Clause 138, later adopted as Article 150 of the Federal Constitution.
118. Part II of the Federal Constitution contains the fundamental liberty provisions. The fundamental rights contained in the Constitution may be tabulated as follows: Right to Life and Liberty (Article 5), Freedom from Slavery (Article 6), Equality before the law (Article 8), Freedom of Movement (Article 9), Freedom of Speech And Association (Article 10), Freedom of Religion (Article 11), Property Safeguards (Article 13). Many of these rights are qualified rights giving the state the power to regulate them in the interests of state security and public morality. For a comprehensive review of fundamental liberties under the Malaysian Constitution, see Shad S. Faruqi, Fundamental Liberties In Malaysia: An Overview (1965) INSAF Vol. 18 No. 3 p. 50; see also R.H. Hickling, Some Aspects Of Fundamental Liberties Under The Constitution Of The Federation Of Malaya (1963) MLJ xliv. For a general discussion of the status of human rights in developing societies, see T.S. Fernando, Are The Maintenance Of The Rule Of Law And The Ensuring Of Human Rights Possible In A Developing Society (1968) 2 MLJ iii.

Under the 1963 amendments to Clause (6),¹¹⁹ the provision was amended to enable infringement of any provision of the Constitution, subject to the limits prescribed in Clause (6A). In the result, the only fundamental liberty which is protected today from the onslaught of emergency legislation is the freedom of religion under Article 11. Thus it has been rightly observed that "the right to religion cannot be suspended in times of emergency".¹²⁰

Under Article 149

Both Article 149 and Article 150 fall under Chapter XI of the Federal Constitution which is captioned "Special Powers Against Subversion, Organised Violence, And Acts And Crimes Prejudicial To The Public And Emergency Powers". Yet there are significant differences in the scope and application of the two provisions. Article 149 may first be considered. It reads:

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

- (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
- (b) to excite disaffection against the Yang di-Pertuan 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 maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or

119. Act 26 of 1963 (the Malaysia Act). See Chapter V for a full discussion of these amendments.

120. Shad S. Faruqi, op. cit. p. 54.

- (f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Articles 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

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

The principal legislation passed under Article 149 is the Internal Security Act 1960 known everywhere by its acronym "ISA". It will not be incorrect to describe the history of Article 149 as being the history of the ISA.

The ISA was passed in the session of Parliament on 21-22 June 1960 to coincide with the intended declaration of the cessation of the Communist Emergency on 31 July of the same year. The Bill was intituled "An Act to provide for the internal security of Malaya, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia, and for matters incidental thereto". There was little doubt that the principal, if not sole, reason proffered by the Government as a justification for the Bill was to combat the communist threat believed to be extant notwithstanding the revocation of the Emergency. In moving the second reading of the Bill in Parliament on 21 June 1960 the Deputy Prime Minister, Tun Abdul 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 has 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".¹²¹

Given the speech in Parliament as to the reason for the ISA, the question is whether the ISA could be used for purposes other than to deal with the threat of communist subversion? There is on the face of the statute itself no discernible limitation or restriction which confines it to application only to communist saboteurs. However, Article 149, pursuant to which the ISA was passed, requires Parliament to identify the threat and adopt legislation appropriate to deal with that threat. This would be the proper import of the phrases in Clause (1): "that action has been taken or threatened" and "any provision of that law designed to stop or prevent that action". The question arose in the case of *Theresa Lim Chin Chin v. Inspector General of Police*.¹²² The Supreme Court held that the parliamentary speeches stating the objective of the law cannot govern its construction. The Court said:

"The expression "that action" (in Article 149) in our view has no consequence to determine or limit the scope of the Act. The Act is valid and from the wording of the provisions of the Act there is nothing to show that it is restricted to communist activities".¹²³

Theresa Lim Chin Chin's case arose out of the October 1987 mass arrest under the ISA of 106 persons in a police operation code-named "Operation Lallang". It was the most controversial use of the ISA since its enactment. The ISA was for the first time declared as not being used for the avowed

121. Malaysian Parliamentary Debates, 21 June 1960, at p. 1185. The "evil enemy" referred to were the communist terrorists.

122. [1988] 1 MLJ 293; [1988] LRC (Const).

123. At p. 296F-G. Professor R.H. Hickling who drafted the ISA has expressed surprise that the power of detention (in his words: "deliberately interlocked with Article 149") could be used against non-communists: see Preface to his Essays On Malaysian Law (Pelanduk Publications, 1991).

purpose of incarcerating communist subversives and sympathisers but to deal with those who were said to be de-stabilising the country. Those arrested were prominent politicians, including opposition politicians and government backbenchers, trade unionists, community workers, environmentalists, Chinese educationists, Church workers and Islamic teachers. The Government White Paper on the arrests intituled "Towards Preserving National Security", carried the following observation:

"The Internal Security Act 1960 in particular enables the authorities to prevent any person from acting in a manner prejudicial to security, the maintenance of essential services or the economic life of Malaysia. The enforcement of this law is therefor not restricted to the communist threat alone.....

.....
 (The) liberal and tolerant attitude (of the Government) was exploited in an irresponsible manner by various quarters for their own selfish interests. Issues which are sensitive to the various communities were deliberately played up, thus creating racial tension.....

.....
 (The) Government decided to act swiftly and firmly to contain the situation in the interests of stability and the welfare of the people.

From October 27 until November 14, 1987, police arrested and detained for the purposes of investigation 106 persons under Section 73(1) of the Internal Security Act 1960 in connection with activities considered prejudicial to security. Assemblies and rallies were prohibited and the licences of four publications were revoked".¹²⁴

It falls outside the scope of this study to enquire into the reasons and justification for "Operation Lallang".¹²⁵ However, what is of interest is the declared statement by the Government that the ISA would not be limited in use

124. Dated 14 March 1988; Extracts published in the New Straits Times of 24 March 1988 pp. 2-3.

125. The reasons proferred in The White Paper have been criticised in some quarters on the basis that the arrests were mostly of government critics, and that the rising racial tensions of that period could have been curbed by timely preventive action: see ASIaweek November 6, 1987 pp. 51-52. See also the Amnesty International Report, Malaysia: Operation Lallang. Detention Without Trial Under The Internal Security Act, December 1988 AI INDEX: ASA 28/18/88, and M/s Frank, Markowitz,

to the communist threat alone. It elicited a response in the form of an affidavit in habeas corpus proceedings from the first Prime Minister of Malaysia, Tunku Abdul Rahman whose administration had enacted the ISA. According to the Tunku, the ISA was "designed and meant to be used solely against the communists". The Tunku said:

"My cabinet colleagues and I gave a solemn promise to parliament and the nation that the immense powers given to the Government under the ISA would never be used to stifle legitimate opposition and silence lawful dissent".¹²⁶

In December, 1989 the issue arose again when the Communist Party of Malaya (CPM) officially renounced their policy of armed struggle in Malaysia and signed a pact to that effect with the Government. The question then arose whether the ISA would now be withdrawn. The Prime Minister, Dr. Mahathir Mohamed, gave quietus to the issue when he declared:

"The ISA has been useful in avoiding racial flareups. The ISA was not merely to contain the communist menace. The situation had been tense (in 1987) and it had nothing to do with communist activities. It was a racial problem and we were forced to use the ISA, and the tension was immediately diffused".¹²⁷

contd...

125. McKay & Roth, The Decline In The Rule Of Law In Singapore And Malaysia (Report of the Committee on International Human Rights of the Association of the Bar of the City of New York) pp. 32-37. Several local accounts critical of the detentions are also available: see, The Real Reason (Publication of the Opposition Democratic Action Party, 1988); Tangled Web (CARPA 1988); Kua Kia Soong, Behind The Wire (Chinese Assembly Hall Publication, 1989). At the same time there were detentions made in Singapore under its Internal Security Act identical in terms to the Malaysian statute. For a criticism of the Singapore detentions, see Silencing All Critics (Human Rights Violations In Singapore: An Asia Watch Report, September 1989); The Rule Of Law And Human Rights In Malaysia And Singapore (A Report of the Conference held at the European Parliament, 9-10 March 1989 organised by KEHMA-s (The European Committee for Human Rights In Malaysia and Singapore, and the Rainbow Group, European Parliament; Published by KEHMA-s Belgium)).

126. Dismissing The Writs, Far Eastern Economic Review 3 December 1987.

127. The Star, December 2, 1989 p. 1. See also the case of *Tuang Pik King v. Menteri Hal Ehwal Dalam Negeri* [1989] 1 MLJ 301, where Edgar Joseph J. ruled that the ground of inciting racial sentiments fell within the scope of the ISA.

Thus, the ISA continues in force today with its acknowledged purpose being much broader than "the threat" envisaged within the contemplation of Article 149 when it was first enacted on 31 July 1960.

A law passed under Article 149 is expressly authorised to override the fundamental guarantees contained in Article 5 (liberty of the person), Article 9 (prohibition of banishment and freedom of movement), Article 10 (freedom of speech, assembly and association) and Article 13 (right to property). Thus, the ISA is a valid law although its preventive detention provisions are totally inimical to the freedom and liberty of the individual. The only safeguard for a detainee is the right of representation to an Advisory Board constituted under Article 151 whose recommendation in any event is not binding on the Yang di-Pertuan Agong (effectively for this purpose, the Government).¹²⁸ The preventive detention provisions themselves confer little, if not, no safeguards to the detainee. These provisions are Sections 8 and 73 of the Act. The latter is a remarkable provision that has probably no equivalent outside Malaysia and Singapore. It authorises the police to preventively detain a person who is suspected of being a threat to security for purposes of investigation. The provision reads as follows:

128. Article 151 reads:

151."(1) Where any law or ordinance made or promulgated in pursuance of this Part provides for preventive detention -

- (a) the authority on whose order any person is detained under that law or ordinance shall, as soon as may be, inform him of the grounds for his detention and, subject to Clause (3), the allegations of fact on which the order is based, and shall give him the opportunity of making representations against the order as soon as may be;
- (b) no citizen shall continue to be detained under that law or ordinance unless an advisory board constituted as mentioned in Clause (2) has considered any representations made by him

"73.(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe-

- (a) that there are grounds which would justify his detention under Section 8; and
- (b) that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

(2) Any police officer may without warrant arrest and detain pending enquiries any person, who upon being questioned by the officer fails to satisfy the officer as to his identity or as to the purposes for which he is in the place where he is found, and who the officer suspects has acted or is about to act in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.

(3) Any person arrested under this section may be detained for a period not exceeding sixty days without an order of detention having been made in respect of him under section 8:

Provided that -

- (a) he shall not be detained for more than twenty-four hours except with the authority of a police officer of or above the rank of Inspector;
- (b) he shall not be detained for more than forty-eight hours except with the authority of a police officer of or above the rank of Assistant Superintendent; and

contd...

128.

under paragraph (a) and made recommendations thereon to the Yang di-Pertuan Agong within three months of receiving such representations, or within such longer period as the Yang di-Pertuan Agong may allow.

(2) An advisory board constituted for the purposes of this Article shall consist of a chairman, who shall be appointed by the Yang di-Pertuan Agong and who shall be or have been, or be qualified to be, a judge of the Supreme Court or a High Court, or shall before Malaysia Day have been a judge of the Supreme Court, and two other members, who shall be appointed by the Yang di-Pertuan Agong after consultation with the Lord President of the Supreme Court.

(3) This Article does not require any authority to disclose facts whose disclosure would in its opinion be against the national interest".

(c) he shall not be detained for more than thirty days unless a police officer of or above the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector-General or to a police officer designated by the Inspector-General in that behalf, who shall forthwith report the same to the Minister.

(4)-(5) (Repealed).

(6) The powers conferred upon a police officer by sub-sections (1) and (2) may be exercised by any member of the security forces, any person performing the duties of guard or watchman in a protected place and by any other person generally authorized in that behalf by a Chief Police Officer.

(7) Any person detained under the powers conferred by this section shall be deemed to be in lawful custody, and may be detained in any prison, or in any police station, or in any other similar place authorized generally or specially by the Minister."

The constitutionality of the provision was challenged in *Theresa Lim Chin Chin's* case. The argument that investigative preventive detention under Section 73 is unconstitutional was rejected by the Supreme Court. The Court ruled that the police detention under Section 73 was part of a single process leading to the order of detention under Section 8. However, what the Supreme Court would seem to have failed to appreciate was that a police detention under Section 73 need not result in a ministerial order of detention under Section 8. In that event, it was possible for a person to be detained and released, all under Section 73, without being accorded the rights under Article 151 of making representations to an Advisory Board. It should then follow that a law that enables or authorises this is unconstitutional. The reasoning of the Supreme Court that it falls "within one scheme of preventive detention legislation" does not answer the contention that a detention that begins and ends under Section 73 would not enjoy the constitutional protection of Article 151.

The principal provision providing for preventive detention, however, remains Section 8. Sub-section (1) reads as follows:

"8.(1) If the Minister is satisfied that the detention of any person is necessary with a view to preventing him from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof, he may make an order (hereinafter referred to as a detention order) directing that that person be detained for any period not exceeding two years."

The main question under section 8 (and also Section 73) has always been whether the discretion of the detaining authority is to be evaluated on a subjective basis or objective basis. In this the ghost of *Liversidge v. Anderson*,¹²⁹ which has long been discarded in England,¹³⁰ and elsewhere in the Commonwealth,¹³¹ continues to rule in Malaysia. Since the early decision of the Federal Court in *Karam Singh v. Menteri Hal Ehwal Dalam Negeri*,¹³² the Malaysian courts have held that the discretion of the detaining authority is not reviewable on an objective criteria. In two recent cases, the Supreme Court was addressed on the fact that *Liversidge's* case and the subjective criteria approach has been expressly overruled in England. In *Re Tan Sri Raja Khalid Bin Raja Harun*,¹³³ the Supreme Court declined to follow the trends elsewhere, stating:

129. [1942] AC 206.

130. The courts of the highest authority in England ie. the House of Lords and the Privy Council have since rejected the majority decision in *Liversidge's* case: see *Nakkuda Ali v. Jeyaratne* [1951] AC 66; *IRC v. Rossminster* [1980] AC 952; *Khawaja v. Home Secretary* [1984] AC 74. In *Rossminster's* case, Lord Diplock observed pointedly: "The time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right" (p. 1011).

131. Eg. in Pakistan, see *Ghulam Jilani v. Government of West Pakistan* PLD 1969 SC 373, *Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri* PLD 1969 SC 14; in Zimbabwe, see *Minister of Home Affairs v. Austin* [1987] LRC (Const) 567; in South Africa, See *Hurley v. Minister for Law And Order* [1985] 4 SA 709;

132. [1969] 2 MLJ 129.

133. [1988] 1 MLJ 182.

"We would prefer to adopt a realistic rather than a pedantic approach on a matter such as this..... Here we are dealing with an Act authorised and enacted under the special provisions of the Constitution, namely, Part XI providing for "special powers against subversion, organised violence, and acts and crimes prejudicial to the public, and emergency powers".¹³⁴

It was, unfortunately, merely the statement of a conclusion without any reason being proffered for it. Later, in *Theresa Lim Chin Chin's* case, the Supreme Court sought to improve on its stand:

"Thus, whatever these decisions have decided and developments of the law elsewhere, especially in England relating to fairness of the process of executive decision-making, in the context of our case we are constrained by the following two propositions. First, we agree with the opinion of the Chief Justice that national interest is wider than national security..... Secondly, Section 16 of the ISA and Article 151 Clause (3) clearly authorise the executive not to disclose any information relating to national security".¹³⁵

Probably, only the second of the propositions stated above merits comment. It is obvious that the Court had confused the requirements of proof before a judicial tribunal for the test to be applied by it.¹³⁶ As Lord Atkin in his dissent in *Liversidge's* case pointed out: "(IF) the subjective theory is right and (the Minister) has indeed unconditional power..... it is enough for him to say he exercised the power".¹³⁷ Thus, it should follow that the absence of proof should not preclude judicial review of the discretion of the detaining authority because the review cannot be dependent upon whether or not the detaining authority chooses to furnish particulars and reasons for the detention.

134. At p. 186H and 187E.

135. Op. cit. p. 297E-I.

136. See the pointed criticism of the Supreme Court's reasoning by the Singapore Court of Appeal in *Chng Suan Tze v. Minister of Home Affairs* [1989] 1 MLJ 69 at 80.

137. Op. cit. at p. 247.

The general reticence in the review position taken by the Supreme Court is seen further in the distinction sought to be made between "allegation of facts" and "grounds of detention". In *Karpal Singh v. Menteri Hal Ehwal Dalam Negeri*,¹³⁸ the Supreme Court ruled that "whilst the grounds of detention order are open to challenge on judicial review if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not". This has been the invariable approach of the Malaysian and Singapore courts since *Karam Singh's* case. However, the Singapore Court of Appeal in its 1989 decision in *Chng Suan Tze's* case¹³⁹ termed the distinction "illogical" stating that allegations of fact are as much evidence of the matters taken into consideration as grounds of detention. It creates the absurdity of where, if the allegations of facts are wholly unrelated to the grounds of detention, the Court is powerless to strike down the detention because the latter is reviewable but not the former. In practical terms, the distinction is blurred and leads to unnecessary casuistry. The decision in *Re Tan Sri Raja Khalid*,¹⁴⁰ where the detention was held to be unlawful, would not have been possible if the Court was not also convinced that the allegations of fact do not support the grounds of detention. What the court had in fact stated was that the detaining authority was wrong to conclude that the allegations of fact constitute a threat to security as opposed to disclosing mere criminal conduct. In the subsequent case of *Minister of Home Affairs v. Jamaluddin bin Othman*,¹⁴¹ the Supreme

138. [1988] 1 MLJ 468.

139. See note (213) supra.

140. Op. Cit.

141. [1989] 1 MLJ 418.

Court ruled that the preventive detention of a Malay convert for propagating the Christian religion among Malays was unlawful. The Court held that mere participation in meetings and seminars for the dissemination of Christianity among Malays, without more, could not be a threat to security. Again the court could not have come to this conclusion without reviewing on an objective basis the allegations of fact. Thus, although the Court said that "the grounds for detention read in the proper context are insufficient to fall within the scope of the Act" it is patently obvious that the Court had decided that the allegations of fact do not support the belief that the detainee is a threat to security.

The Singapore courts have generally kept in line with the Malaysian decisions on the reviewability of ISA detentions largely because of the identical nature of the two laws. Thus for years the tepid decision of the Malaysian court in *Karam Singh's* case was adopted and applied in Singapore through the Court of Appeal decision in *Lee Mau Seng v. Minister of Home Affairs*.¹⁴² In December 1988, the Court of Appeal overruled *Lee Mau Seng* in *Chng Suan Tze v. Minister of Home Affairs*.¹⁴³ The decision was a veritable *tour de force* and is admirable for the painstaking collection and discussion of English, Malaysian and other Commonwealth cases bearing on the subject. The Court held, in essence, that the subjective test adopted in *Karam Singh's* case and its progeny was no longer supportable and that the objective test should govern the determination by the courts of whether the matters relied upon by

142. [1971] 2 MLJ 137; For a critical assessment of the judgment, see Rowena Daw, Preventive Detention in Singapore: A Comment On The Case Of Lee Mau Seng (1972) 14 Mal. L.R. 276.

143. [1989] 1 MLJ 69.

the executive fall within the object and purposes of the Act.¹⁴⁴ The decision, however, had a short life. The Singapore Government acted swiftly to stem its impact by legislative changes. First, the Constitution (Amendment) Act 1 of 1989 was passed on 27 January 1989 providing for any question that arises in court relating to any decision or act done by the executive under any Act passed under Article 149 (the Singapore equivalent) to be determined in accordance with any law passed by Parliament for this purpose. Thereafter, the Singapore Parliament amended the ISA on 30 January 1989 vide the Internal Security (Amendment) Act 2 of 1989, by which, inter alia, it was declared that the law governing any review of executive action was that obtaining on 13 July 1971 (ie. the date of the judgment in *Lee Mau Seng's* case).¹⁴⁵

Malaysia followed suit. In spite of the reaffirmation of the subjective test in *Tan Sri Raja Khalid's* case and in *Theresa Lim Chin Chin* it was evident that the Government was concerned that the ground-breaking precedent set by the Court of Appeal of Singapore in *Chng Suan Tze's* case may be followed by the Malaysian Courts. Thus, by the Internal Security (Amendment) Act 1989, judicial review of preventive detention was sought to be severely restricted by the insertion of a new Clause 8B, which read:

144. See also Sin Boon Ann, Judges and Administrative Discretion - A Look At Chng Suan Tze v. Minister of Home Affairs [1989] 2 MLJ ci.

145. The amendments were unsuccessfully challenged in *Teo Soh Lung v. Minister of Home Affairs* [1989] 2 MLJ 449; [1990] 2 MLJ 129 (Court of Appeal). See also *Vincent Cheng v. Minister for Home Affairs* [1990] 1 MLJ 449. For a general discussion of judicial review of preventive detention in Singapore after the 1987 arrests, see Yee Chee Wai et al, Judicial Review of Preventive Detention Under The Internal Security Act - A Summary Of Developments (1989) 10 Sing.L.R. 66. See also, Tan Yock Lin, Some Aspects Of Executive Detention In Malaysia And Singapore (1987) 29 Mal. L.R. 237; H.F. Rawlings, Habeas Corpus And Preventive Detention In Singapore And Malaysia (1983) 25 Mal. L.R. 324.

"8B.(1) There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

(2) The exception in regard to any question on compliance with any procedural requirement in subsection (1) shall not apply where the grounds are as described in Section 8A.

8C. In this Act, "judicial review" includes proceedings instituted by way of -

- (a) an application for any of the prerogative orders of *mandamus*, prohibition and *certiorari*;
- (b) an application for a declaration or an injunction;
- (c) a writ of *habeas corpus*; and
- (d) any other suit, action or other legal proceedings relating to or arising out of any act done or decision made by the Yang di-Pertuan Agong or the Minister in accordance with this Act."

The Explanatory Statement that accompanied the Amendment Bill dealt with the reasons for the amendments with refreshing candour:

"The new Section 8B removes from judicial review all acts done and decisions made by the Yang di-Pertuan Agong or the Minister in exercise of their discretionary power under the Act except in regard to any procedural requirement governing such act or decision. The intention of this new section is to decisively reaffirm the principle that the subjective test applies in determining the proper exercise of discretionary power by the Minister as laid down in the case of *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, followed in the case of *Theresa Lim Chin Chin v. Inspector General of Police* [1988] 1 MLJ 293. This provision is necessary to avoid any possibility of the courts substituting their judgment for that of the Executive in matters concerning security of the country as has been done by courts in certain foreign countries which base their decisions on conditions totally different from Malaysia's. In matters of national security and public order, it is clearly the Executive which is the best authority to make evaluations of available information in order to decide on precautionary measures to be taken and to have a final say in such matters; not the courts which have to depend on proof of evidence".¹⁴⁶

In tabling the Amendment Bill in Parliament on 23 June 1989 the Prime Minister

Dato Seri Dr. Mahathir Mohamad said:

"(The) interventionist role of judicial decisions and trends of foreign courts should not be copied because such action was against the concept of separation of powers between the executive and the judiciary that was upheld in Malaysia

If the courts can reverse the executive's decision, it would make it impossible for the executive to make any decision for fear that the courts would intervene. The ruling party would then be immobilised because it would then be waiting for the decisions of the courts and the result of, appeals to higher courts".¹⁴⁷

The Bar Council in a Press Statement criticised the amendments in strong terms stating that the Malaysian Government was "taking the cue from Singapore". The Council further commented:

"The effect of the amendments is to confer upon the Executive absolute power over the liberty of citizens, and the people, of this country. This is totally unacceptable and is repugnant to the basic concept of government by democracy".¹⁴⁸

It is unlikely that the Malaysian Supreme Court would react differently from the Singapore Court of Appeal (in *Teo Soh Lung's* case) when faced with a constitutional challenge as to the vires of the amendments. The reticent and non-interventionist approach generally of the Supreme Court¹⁴⁹ in preventive detention case is unlikely to change in the foreseeable future given the present trend of decisions.

147. The STAR, June 24, 1989 p.1. "PM on Why The Need to Remove Judicial Review".

148. Press Statement dated 23 June 1989; portions (not the above) reproduced in The STAR, *ibid.* p.4.

149. Outside purely procedural questions concerning the detention (eg. *Public Prosecutor v. Koh Yoke Koon* [1988] 2 MLJ 301 SC, where the detention order was held unlawful because the detainee was detained at an unauthorised place) the Supreme Court has generally repelled any challenge to a detention which calls for a judicial evaluation of the reasons for detention. For example, the staleness or remoteness of the incidents upon which the detention is ordered which generally is an

Under Article 150

Preventive detention laws are not limited to Article 149. Under Article 150, the Yang di-Pertuan Agong is also empowered under his general law-making powers during an emergency to enact preventive detention laws, if he deems it necessary for the purposes of the emergency. A preventive detention law under Article 150 is likely to be more pervasive than one under Article 149 because, being an emergency law, it can generally override the Constitution, unlike a law under Article 149 which can only be inconsistent with some of the fundamental liberty provisions in Part II of the Constitution. During the present Emergency declared on 15 May 1969, two emergency laws relating to preventive detention were made. The first was Ordinance No. 4, the Emergency (Internal Security) (Modification of Laws) Ordinance 1969,¹⁵⁰ which extended the ISA as an emergency law and substituted the Minister of Home Affairs as the detaining authority in place of the Yang di-Pertuan Agong. The second, and more importantly, was Ordinance No. 5, the Emergency (Public Order And

contd...

149. acceptable ground to invalidate the detention in other jurisdictions (eg. India, see *Prasad Chaturvedi v. State of M.P.* 1983 3 SCC 443; *Vijay Narani Singh v. State of Bihar* 1984 3 SCC 14) has not been accepted by the Supreme Court: see *Menteri Hal Ehwal Dalam Negeri v. Chua Teck* [1990] 1 MLJ 104 SC. The court ruled that the argument on staleness goes to sufficiency or relevancy of the facts, "an inquiry outside the powers of the court; there is hardly any need to refer to any authority for this" (p.105). But it would appear that the Supreme Court failed to consider the earlier decision of the Penang High Court in *Yit Hon Kit v. Minister for Home Affairs* [1988] 2 MLJ 638 at 645 et seq, on this very question where the argument had succeeded. The decision in *Yit Hon Kit's* case may now be considered to have been overruled *sub silentio*. NB: The decision in *Koh Yoke Koon's* case itself, *supra*, has since been legislatively overruled by the Internal Security (Amendment) Act 1988 in so far as detention under that statute is concerned.

150. P.U.(A) 186/69.

Prevention of Crime) Ordinance, 1969,¹⁵¹ by which the Minister of Home Affairs is authorised to order the detention, for a period of up to two years, of any person who is "acting in any manner prejudicial to public order" or whose detention "is necessary for the suppression of violence or the prevention of crimes involving violence".¹⁵² The provision has been given a wide interpretation by the courts so as to cover even trafficking in drugs.¹⁵³ The test for detention is, like in the ISA cases, the subjective satisfaction of the Minister, which is therefore not open to judicial review save where mala fides is alleged, or that the grounds fall outside the scope of the Ordinance or that a condition precedent for making the detention order was not complied with.¹⁵⁴

The most controversial emergency legislation, however, has been the Essential (Security Cases) (Amendment) Regulations 1975 (hereinafter referred to as ESCAR).¹⁵⁵ The Regulations were introduced to govern the mode of trial in criminal cases where the offence is classified as "a security offence". A "security offence" is defined in Regulation 2(1) as an offence against Sections 57 to 62 of the ISA (all relating to the unlawful possession of firearms, ammunitions or explosives in a security area). The Attorney General was also authorised to certify any offence under any written law as a "security offence", in which event, the trial of the offence was to be

151. P.U.(A) 187/69.

152. Section 4.

153. See *Menteri Hal Ehwal Dalam Negeri v. Mohd. Zambri* [1990] 1 MLJ 102 SC.

154. See *Athappen s/o Arumugam v. Menteri Hal Ehwal Dalam Negeri* [1984] 1 MLJ 67.

155. P.U.(A) 362/75.

governed by the Regulations and not by the ordinary rules of criminal procedure. This apart, the other provisions were also considered harsh as removing the traditional safeguards afforded to a criminal accused. The introduction of the Regulations met with protest and drew strong criticism from the Bar Council¹⁵⁶ and international Human Rights Organisations. Between 1st August and 6th August 1982, the latter sponsored an International Mission of Lawyers headed by Barbara Calvert QC to visit Malaysia. The purpose of the visit was "to examine the working of the national security legislation (of Malaysia)" including the Regulations.¹⁵⁷ The Mission listed the following as the significant provisions of concern under the Regulations:

"1. No matter what the age of the person alleged to have committed the offence, he or she will be tried under the procedures provided by ESCAR. Juveniles as was apparent in the case of a fourteen year old boy, Lim Hiang Seoh, are deprived of the protection afforded by the Juvenile Courts Act 1947. (See Regulation 3(3)).

2. A security case must be tried by a High Court without a preliminary enquiry being held in the Magistrates Court. (See Regulations 5 and 6).

3. The Magistrate on a charge being preferred by the Public Prosecutor whose right it is to specify the charge has a mandatory duty to commit the accused to the High Court. (See Regulation 6(1)).

4. The Public Prosecutor may specify the High Court to which the accused is to be committed. (See Regulation 8).

5. The accused is tried by a Judge alone not by a Judge with the assistance of assessors or by a Jury. The right to jury trial is abolished. (See Regulation 7).

156. See unpublished monograph by Dato Param Cumaraswamy, Essential (Security Cases) Regulations 1975 - Is The Rule Of Law In Jeopardy? (Paper Delivered At The Third Malaysia Law Conference, October 13-15, 1975). See also Letter from the Bar Council To The Government, INSAF Vol.XIV No. 2 April 1981 at pp. 4-5; and, ESCAR: Legal And Procedural Problems, INSAF Vol.XV No. 3, October 1982 at pp.46-47.

157. See The Report Of The International Mission Of Lawyers To Malaysia (Mimeograph published by Marram Books, 101 Kilburn Square, London, 1983).

6. Any number of offences whether or not of the same kind or committed as part of a series of acts may be tried together and any number of accused may be tried together if the Public Prosecutor so certifies. For example, if A is alleged to be found in Penang in possession of grenades in January of 1980 and is alleged to have indirectly supplied B with supplies which raises a presumption that B has or will act contrary to public security in January of 1979, both offences and both A and B can be tried together. Supplies cover food or clothing. (See Regulation 10).

7. Under Regulation 13 of ESCAR it appears to be mandatory for the accused to enter his defence but this does not and it has been so held mean that he has to give evidence or make a statement. He has the right to remain silent. (See both Regulations 13 and 14 and Public Prosecutor v. Sihabudin bin Haji Salleh [1980] 2 Malayan Law Journal, 273).

8. Witnesses may if the Court is satisfied that they are afraid to disclose their identity be permitted to give evidence so that neither the accused nor his Counsel can see the person. The evidence may be given if the Court so rules through an interpreter. (See Regulation 19).

9. Evidence of accomplices or young persons need not be corroborated. (See Regulation 21(2)).

10. The admission of hearsay evidence, secondary documentary evidence and identification by photographs of the accused being shown to the identifier. (Regulations 21(3), (4) and (5) and Regulations 24(1) and (2)).

11. No differentiation is made in the weight to be given to evidence whether direct, hearsay or uncorroborated (Regulations 21(7) and 25).¹⁵⁸

The Report concluded that the Regulations contravened the Universal Declaration of Human Rights in denying fair trial to an accused person.¹⁵⁹

The controversial legislation led to a decision by the Malaysian Bar on 18 October 1977 to advise lawyers to boycott ESCAR trials. The Bar's stand was conveyed in a letter to the Government in the following terms:

158. Ibid. at pp. 38-39. The most controversial conviction under the Regulations was that of a 14 year old boy for illegal possession of firearms: see *Lim Hang Seah v. PP* [1978] 2 MLJ 68. There was a public outcry over the death sentence imposed on the boy. The death sentence was later commuted by the Government to one of detention at a reform school until the age of 21.

159. Ibid. at pp. 46-48.

"In these circumstances, most members of the Bar could not see what service they could render to an accused person tried under the Regulations. Their appearance in Court at these trials did not seem to have any significance beyond lending to the whole proceedings a semblance of respectability and impressing upon the world that to all intents and purposes the ritual of a proper trial had been observed and that the accused person had been properly convicted and deserved the mandatory sentence passed on him. It is this that the Bar is against; and it is in this context that one must consider the feeling of the Bar when deciding to pass the Resolution".¹⁶⁰

The statistics available for the period 1976 - 1981 showed that 112 persons were brought to trial under the Regulations; of this 64 were found guilty and sentenced to death; 17 were acquitted but re-arrested and detained under the ISA.¹⁶¹

Generally, emergency laws may also override property rights. Article 13 of the Federal Constitution, which declares that "No person shall be deprived of his property save in accordance with law" would not ordinarily insulate private property from compulsory acquisition if sanctioned by law. What it does protect is expropriation by executive fiat. However, that protection may be lost under emergency laws as property rights are not entrenched under Clause (6A) of Article 150. The only decision to-date to consider the inroads that emergency laws can make into property rights is *The Jaffanese Cooperative Society Ltd. v. Bank Negara Malaysia*.¹⁶² The case concerned the powers of the Central Bank under the Essential (Protection of Depositors) Regulations, 1986, a piece of emergency legislation made under section 2 of the Emergency

160. See letter published in INSAF Vol. XIV No. 2 April 1981 at p.4. For a study of the implications of the boycott, see A. Rahim Said: The October Boycott: Its Causes, Consequences And Implications For Legal Practice In Malaysia, INSAF Vol. XIV No. 1, January 1981 at p. 23 et seq.

161. See ESCAR: Legal And Procedural Problems, INSAF Vol. XV No. 3 October 1982 at p. 48.

162. [1989] 3 MLJ 150 SC.

(Essential Powers) Act 1979, to freeze the property of deposit-taking institutions that are unable to meet their deposit liabilities. They also vested the Central Bank with wide powers, which in the instant case was used to appoint receivers and managers over an ailing cooperative and empowered the receivers to sell or dispose off or transfer the assets of the cooperative to a nominated rescuing body. The shareholders of the cooperative attacked the exercise of these powers as amounting to an acquisition of property which was not being done on behalf of the Government and therefore ultra vires. The Supreme Court repelled the challenge by simply stating that section 2(4) of the 1979 Act provided for emergency regulations to have effect even if they are inconsistent with the Constitution.

If not for the overriding quality given to emergency laws by Article 150(6), and if made under the 1979 Act by section 2(4) thereof, a law like the Protection of Depositors Regulations, 1986 would be unconstitutional as permitting deprivation of property without compensation. Reference may be made to the decision of the Indian Supreme Court in *Dwarkadas Shrinivas v. Sholapur Spinning & Weaving Co. Ltd.*¹⁶³ In that case the Court had to consider an emergency measure passed specially to save an ailing labour-intensive textile company by enabling the Government to pass the properties and effects of the

163. AIR 1954 SC 119. See also *Attorney General Of The Gambia v. Jobe* [1984] 1 AC 689, where the Privy Council held that an executive order freezing bank accounts would be a seizure of property and violative of property rights. See also the war-time decision of the English Court in *Jones (Machine Tools) Ltd v. Farrel* [1940] 3 AER 608, which held that the Emergency Powers (Defence) Act, 1939, empowering the making of regulations authorising taking possession or control of an undertaking, did not authorise the making of a regulation to "carry on" an undertaking. However, see criticism of the decision by the Court of Appeal in *R v. Comptroller of Patents Exparte Bayer Products* [1941] 2 AER 677 at 682.

company into the hands of persons nominated by the Government. The question was whether the taking which was done for a public purpose to safeguard production of an essential commodity and to avoid mass unemployment offended the property rights of the shareholders. The Court struck down the law as in effect being a deprivation of property without compensation and therefore unconstitutional.

On the question of compensation, it is arguable that unless the emergency measure prohibits the payment of compensation, the property-owner would be entitled under established principles of constitutional law for compensation for the loss of his property. Thus, the appropriating authority would not be entitled to take property under the prerogative power of handling an emergency and avoid paying compensation when a specific statute authorises the taking under similar circumstances but with the payment of compensation: see *Attorney General v. De Keyser's Royal Hotel*;¹⁶⁴ *Burmah Oil Company v. Lord Advocate*.¹⁶⁵ A statute that provides for appropriation of private property, even in times of emergency, would usually provide for the rate of compensation or in the least provide guidelines for its determination. In *Attorney General for Canada v. Hallet & Carey Ltd.*,¹⁶⁶ the relevant Order in Council expropriating wheat and barley stored in various elevators in Canada stated that it was compensatable at "the old maximum price". The Privy Council said the Order was not invalid and made no adverse comment about the rate of compensation. The Courts would also read compensation clauses beneficially. In the Irish case of *Regine (Secretary of State) v. County Court Judge For*

164. [1920] AC 508.

165. [1964] 2 AER 348.

166. [1952] AC 427.

Armagh,¹⁶⁷ the Northern Ireland Court held that the damages suffered by the owner of a lorry, which was stopped by an army patrol and diverted from its journey, thereby missing a cargo that had to be collected, was compensatable under a provision of the Emergency Provisions Act 1973 that read: "Where under this Act any real or personal property is taken, occupied, destroyed or damaged or any other act is done interfering with private rights of property, compensation shall, subject to the provisions of this section, be payable by the Ministry".

Impact On Federal-State Relations

The pervasiveness of emergency powers may be seen in the encroachment by the Federal Government into the rights of the States during an emergency. The carefully crafted balance between the Centre and the States in legislative and executive powers is subordinated to the overriding demands of dealing with the emergency. In short, the demarcation of powers under the Constitution is no barrier to the pervasive control that the Federal Government may exert when a state of emergency is declared over a State. It has happened twice in the constitutional history of the country. The first was in September 1966 when Sarawak was placed under a state of emergency. The other was in November 1977 when an emergency was declared in the State of Kelantan. Both emergencies have been criticised as being motivated by political considerations and not solely by concerns of state security.¹⁶⁸

167. [1981] N.I. 19.

168. Eg. on Sarawak, see Yash Ghai, The Politics Of The Constitution: Another Look At The Ningkan Litigation (1986) 7 Sing. L.R. 147; on Kelantan, see Lim Kit Siang, Time Bombs In Malaysia (Kuala Lumpur, 1978) at p.248.

The only provision of Article 150 which deals directly with state rights is Clause (4). It reads:

"While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof".

The obvious purpose of the provision is to confer overriding powers on the Central Government to run the affairs of a State during an emergency. The mode of governing is also prescribed, namely, by the giving of directions. This method was first invoked during the 1969 emergency. On 15 May 1969, together with the Proclamation of Emergency by the Yang di-Pertuan Agong, a Direction under Clause (4) was issued by His Majesty to all the States "directing" that their respective legislative assemblies are not to be summoned until such date as may be determined by the Yang di-Pertuan Agong.¹⁶⁹ The May 1969 Emergency was proclaimed at a time when the general elections in the East Malaysian States of Sabah and Sarawak had yet to be completed. The Direction was not solely to await the completion of the suspended elections, but also to ensure that, in the interim, there is no interference with the executive power of the Federation by the exercise of any legislative power by the States. We have already examined the features of the special emergency government, in the form of the Director of Operations and the National Operations Council, that was established to govern the country in the twenty-one months when Parliament remained prorogued.¹⁷⁰ In fact the continued suspension of the legislative power of the States by the Direction forementioned under Clause (4) was to facilitate the total assumption of the government of the country by the

169. See P.U.(A) 147 of 1969.

170. See earlier parts of this Chapter.

Director of Operations under Emergency Ordinance No. 2 of 1969. On 2 August 1969, the Yang di-Pertuan Agong, at the instance of the Director of Operations, promulgated Emergency (Essential Powers) Ordinance No. 8 of 1969.¹⁷¹ The Ordinance was declared to be made as a result of the Direction given under Clause (4) preventing the summoning of the state legislative assemblies. By the said Ordinance, the legislative power in the States was to be confided to the Ruler or Governor of the State who was to assent to any laws passed by the State Operations Council set up by Ordinance No. 2 of 1969 (section 3(2)). By section 8, the Ordinance was expressly declared to prevail over the provisions of the Eighth Schedule to the Federal Constitution which outlays a uniform scheme of legislative government in all the States of the Federation by the insertion of certain compulsory provisions in the various State Constitutions. The end result was to confer total governance over the States by the Director of Operations during the twenty-one months of rule by the National Operations Council.

The scope of Clause (4) is truly wide. It should be noted that except for the requirement that the Proclamation of Emergency must continue to be in force, there is, on the face of it, no other restriction or limitation to its application.

It has always remained an enigma why the Federal Government did not invoke Clause (4) in September, 1966 to resolve the so-called constitutional impasse in Sarawak. The Sarawak crisis arose out of the moves by the Federal Government to oust the incumbent Chief Minister, Stephen Kalong Ningkan, from office. The impasse developed over the refusal of Ningkan to call for a sitting of the Council Negeri, the legislative assembly, and take a vote of

171. P.U. (A) 307B/69.

confidence. The State Constitution confided the power of convening a sitting of the Council Negri on the Chief Minister and not the Governor. The Federal Government which was seeking Ningkan's ouster was therefore faced with a constitutional hurdle. Clause (4) could have provided the answer after the Proclamation of Emergency over Sarawak was made on 14 September 1966. A directive could have been issued to the Speaker of the Council Negri, who would fall within the category of "officer or authority" in Clause (4), to convene a sitting of the assembly and take a vote of confidence on Ningkan. Instead, the Federal Government took the controversial course of forcibly amending the Sarawak Constitution by empowering itself to do so by a temporary amendment (the first of its kind) of the Federal Constitution. This was the Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966.¹⁷² By section 4, the Act overrode the provisions of the State Constitution and empowered the Governor of the State to convene a sitting of the Council Negeri. These drastic moves were naturally looked upon with great concern by many Sarawakians. One Sarawak parliamentarian argued that the legislation violated one of the conditions of Sarawak's entry into Malaysia, namely, the inviolability of the State Constitution.¹⁷³

At the heart of the complaint over the Sarawak affair lay the failure by the Federal authorities to obtain the consent of the state legislature to the amendment of the State Constitution. However, an amendment to the State

172. Act No. 68 of 1966.

173. Speech by Stephen Yong, Malaysian Parliamentary Debates, 19 September 1966, Vol. III col. 2081, recorded in Shafruddin Hashim, The Constitution And The Federal Idea In Peninsula Malaysia (1984) JMCL Vol. II 139 at 171. On the question of whether the forcible amendment violated the terms of Sarawak's entry into Malaysia, the Privy Council observed in *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 2 MLJ 238 at 244 that an intention to arm the Federal Parliament to amend or modify the Constitution of Sarawak temporarily during an emergency "must be imputed to the parties to the Malaysia Agreement of 9th July, 1963" (at p.244).

Constitution may be the least of the draconian measures that may be taken by the Federal Government over a State during an emergency. The State Constitution may itself be suspended or placed on a moratorium. It happened in Kelantan in November, 1977. By the Emergency Powers (Kelantan) Act 1977, there was a de facto suspension of the Kelantan State Constitution by the freezing of the powers of the Menteri Besar (section 4), the Executive Council (section 5), and of the Legislative Assembly (section 10). A Director of Government was appointed by the Prime Minister who assumed the functions of both the Menteri Besar and the Executive Council, and was to be subject "to general or specific directions" from the Prime Minister with which he was obliged "to forthwith comply, and give effect to" (section 7). The end result was to impose Federal Government rule in the State through the declaration of an emergency.¹⁷⁴

Another aspect of emergency powers affecting the State is the distribution of legislative powers between the State legislatures and the Federal Parliament stated in Part VI of the Federal Constitution. Article 76 permits encroachment by the Federal Parliament into the legislative arena of the state legislatures only in certain limited spheres eg. the implementation of treaty obligations and the promotion of uniformity of laws. These restrictions may be overridden by emergency laws which are declared to be valid even if they are inconsistent with the Constitution. It may be noted generally that State rights are not one of the subjects protected under clause (6A) of Article 150 from interference by emergency legislation.

The end result is that a state of emergency effectively converts the federal structural system into a unitary one.¹⁷⁵

174. Shafruddin Hashim, *ibid.* p. 172.

175. See Ariff Yusof, Emergency Powers And The Rule Of Law (1983) 10 JMCL 87 at 95.

CHAPTER XIIC O N C L U S I O NIntroduction

The apparent institutionalization of the state of emergency in Malaysia poses the greatest threat to constitutionalism in the country. The emergency declared on 15 May 1969, in the wake of the race-riots in Kuala Lumpur, continues unabated to this day. The Government has repudiated any suggestion that the situation warrants the discontinuance of the state of emergency. In a speech in Parliament, a decade after the Emergency was first proclaimed, the Law Minister declared:

"Some people may claim that everything is peaceful and normal - that there does not appear to be a state of emergency; that there is no more need for the existence of the Proclamation of Emergency or the proclamation of the security area. That this appears to be so is not owing to the non-existence of the state of emergency but to the efforts of the government and the security forces in keeping the state of emergency under control. Let it be known there are still hidden dangers lurking around and within our midst simmering under the surface..... The Proclamation of Emergency in 1969 has had to continue and will have to continue because it cannot be gainsaid that there has existed and still does exist a grave emergency whereby the security and economic life of the country has been and continues to be threatened".¹

After more than twenty years of a state of emergency, it is evident that both politicians and the public have become desensitized to the implications of its continuance. The emergency has well and truly become a constitutional way of life in Malaysia. Nevertheless, the problem posed to constitutionalism by a permanent state of emergency is far-reaching.

1. Speech by the Law Minister, Dato Hamzah Abu Samah, delivered in Parliament on 17 January 1979 in moving the second reading of the Emergency (Essential Powers) Bill, 1979, reproduced in (1979) 1 MLJ lxx at lxxiii.

It is evident that the Government has come to regard the excess power conferred by the state of emergency as part of the normal apparatus of government.² In Malaysia, where the same political party has been in power since Independence, the Government may claim a certain legitimacy to its decision not to revoke the state of emergency because it has successively been returned to office whilst holding on to the Emergency. However, the continued state of emergency has itself never been an issue in the several parliamentary general elections held since 1969 and may well throw some doubt as to the veracity of this claim. All of this is reflective of a surprising degree of

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2. The observation by Michael P. O'Boyle with regard to the emergency situation in Northern Ireland is apposite: "The frequent use of emergency powers to cope with crises, coupled with the success of these powers, acclimatizes administrators to their use, and make recourse to them in the future, all the easier. The danger is, that succeeding generations of administrators inherit these powers as being efficient and unobjectionable, and in a particular emergency, do not give proper consideration to the possibility of less drastic measures being used": Emergency Situations And The Protection of Human Rights; A Model Derogation Provision For a Northern Ireland Bill of Rights (1977) Vol. 28. N.I.L.Q. 160 at 164. See also the judicial observation by Gajendragadkar CJ of the Indian Supreme Court in *Sadanandan v. State of Kerala* AIR 1966 SC 1925 at 1930: "In conclusion, we wish to add that when we come across orders of this kind by which citizens are deprived of their fundamental right of liberty without a trial on the ground that the emergency proclaimed by the President in 1962 still continues and the powers conferred on the appropriate authorities by the Defence of India Rules justify the deprivation of such liberty, we feel rudely disturbed by the thought that continuous exercise of the very wide powers conferred by the Rules on the several authorities is likely to make the conscience of the said authorities insensitive if not blunt, to the paramount requirement of the Constitution that even during Emergency, the freedom of Indian citizens cannot be taken away without the existence of the justifying necessity specified by the Rules themselves. The tendency to treat these matters in a somewhat casual and cavalier manner which may conceivably result from the continuous use of such unfettered powers, may ultimately post a serious threat to the basic values on which the democratic way of life in this country is founded. It is true that cases of this kind are rare, but even the presence of such rare cases constitutes a warning to which we think it is our duty to invite the attention of the appropriate authorities".

apathy amongst the public and politicians alike. In the absence of a critical press, there is little or no public discussion of the implications of this state of affairs.

Perpetual Emergencies, Constitutionalism And Future Safeguards

The complete impotence of any body or organisation other than the perpetrators of the emergency themselves to revoke it is a significant point to note. In delivering the epochal decision of the Privy Council in *Public Prosecutor v. Teh Cheng Poh*,³ Lord Diplock dropped a bombshell when he suggested quite plainly that the Cabinet should be amenable to an order of mandamus to advise the Yang di-Pertuan Agong to revoke a security area proclamation if the occasion for its revocation had arisen. The Government acted swiftly to curb any judicial pronouncements along these lines. In January 1979, the Emergency (Essential Powers) Act, 1979 was passed seeking to preclude the court from, inter alia, questioning the continued operation of any Proclamation issued by the Yang di-Pertuan Agong under an Act of Parliament.⁴ A more complete ouster was achieved by the Constitution (Amendment) Act A514 of 1981 which, inter alia, purported to oust the jurisdiction of the courts from questioning the proclamation of an emergency and/or the continuance of a state of emergency.⁵ This amendment was the last of a series of six amendments over two decades that had steadily denuded Article 150 of the safeguards originally found in the provision.⁶ The

3. [1980] AC 432; [1979] 1 MLJ 52.

4. Section 12.

5. Article 150(8)

6. For a detailed discussion of the various amendments, see Chapter V.

significant changes were in the area of parliamentary and judicial scrutiny and review of a Proclamation of Emergency. The diminution of the role of Parliament in reviewing a Proclamation was achieved by the amendments in 1960 and 1981. By the 1960 amendments,⁷ the provision that a Proclamation would automatically lapse within two months of its issue, unless approved by a resolution of both Houses of Parliament, was replaced by the present provision (clause (3)) which in essence, declares that the Proclamation may continue indefinitely unless annulled by resolutions passed by both Houses. The effect of the amendment was to create Proclamations of indefinite duration. In the absence of any imperative under Clause (3) requiring that a Proclamation should be laid before Parliament within a defined period, or the time within which Parliament should be convened to decide on the continuance of a Proclamation, the pathway was cleared for the executive Government to ride on an Emergency as long as it wants. Any ambiguity in the subordination of Parliament's role in this regard was removed by the 1981 amendments⁸ that deleted the former Clause (2) requiring the Yang di-Pertuan Agong "to summon Parliament as soon as may be practicable". This set of amendments also brought in the judicial ouster provision for the first time in Article 150.

The attempt at foreclosing any form of early review of a Proclamation is portentously debilitating to constitutional government. The reason lies in the 1963 amendments to Article 150.⁹ By this set of amendments the law-making power of Parliament during an emergency was considerably enhanced. Unlike previously, Parliament was now authorised to make laws with respect to any

7. Constitution (Amendment) Act No. 10 of 1960.

8. Constitution (Amendment) Act A514 of 1981.

9. Constitution (Amendment) Act No. 26 of 1963.

matter if it appears to Parliament that the law is required by reason of the emergency. Moreover, and more importantly, by the new Clause (6), all emergency laws, whether an ordinance promulgated by the Yang di-Pertuan Agong or an Act of Parliament, override the Constitution and are deemed to be valid even if inconsistent with the Constitution. The pervasive sweep of this provision is limited only by Clause (6A) that places six (6) subjects beyond the reach of emergency laws, namely: (i) Islamic law, (ii) the custom of the Malays, (iii) native law and custom in Sabah and Sarawak, (iv) religion, (v) citizenship, and (vi) language. The amendments left no room for doubt that, except in these matters, the Constitution was to be subordinate to emergency laws.

In short, Article 150 in its present form provides every opportunity for abuse and misuse. The dangers presented to constitutional government by the provision is not mitigated by its utility in times of a real emergency. The fact that the executive government should be empowered to take swift action to deal with an exigency threatening the life of the nation does not justify the removal of the safeguards originally built into the provision. It was never intended by the Reid Commission, in drafting the independence Constitution, that a state of emergency should be a perpetual feature of government. As events went the advantages in governing under a perpetual state of emergency were too great for the Government to surrender. The advantage, in the main, lies in the enhanced law-making power that the Government enjoys. An emergency enables the Government to rule under two parallel legal regimes that co-exist with each other. The option lies at the hand of the Government of the day at any given time whether to act or legislate under the one or the other. In essence, it is lawfully possible for the Government to ignore Parliament and the Constitution and to take action, both legislative and executive,

entirely under its emergency powers. Under Clause (2B), the Yang di-Pertuan Agong is empowered at his discretion to make emergency laws called Ordinances. This is in addition to his extant power under section 2 of the Emergency Essential Powers Act 1979 to make emergency regulations on a wide variety of subjects. Given that these emergency laws are virtually beyond the pale of judicial challenge by the fact that they enjoy a status higher than that of the Constitution itself, the inevitable result is the complete subordination of the Constitution and the civil law system to the regime of emergency laws.

Thus Article 150 provides the means by which the Constitution and its processes may be scuttled or by-passed at the whim of the Executive. The only assurance against an abuse of Article 150 is the good sense and benevolence of those in office. Constitutionalists would find this of little comfort. One is reminded of the well-known words of Jefferson in advocating a written bill of rights for the American people: "In questions of power, let no more be said of confidence in man, but bind him down from mischief by the chains of the Constitution".

Therefore, is it not arguable that a provision that enables the Constitution and constitutional safeguards to be by-passed, and which provides for perpetual crisis rule, is itself inimical to the founding principles of the Constitution? The objection to Article 150, in its present form, is not to the provision of crisis powers to deal with an emergency, but to the absence of any adequate safeguards against abuse. In essence, this objection may be articulated compendiously as follows: the ease with which an emergency may be proclaimed solely on the subjective opinion of the Executive government; the absence of any check or control on the continuance of the emergency other than a vote of revocation by Parliament; the vesting of unbridled power in the Executive government during an emergency without a proportionality between the

crisis and the powers needed to deal with it; and, the loss of the Constitution's status as the supreme law of the land during an emergency. Could it be argued therefore that Article 150 as amended is destructive of the basic features of the Constitution? The "basic features" test was devised by the Indian Supreme Court in the landmark case of *Kesavananda Bharati v. State of Kerala*¹⁰ to place an implied restraint on the power of Parliament to alter the Constitution beyond its basic features. It was posited in that case that Parliament inherently lacked the capacity to amend the Constitution so as to interfere with its basic structure.¹¹ Sikri CJ identified them as: (1) the supremacy of the Constitution, (2) republican and democratic form of government, (3) secular character of the Constitution, (4) separation of powers, and (5) federalism. In the subsequent case of *Indira Nehru Gandhi v. Raj Narain*,¹² the Supreme Court expanded on the theme and added the rule of law, equality before the law, and free and fair elections, as also being essential features of a democratic constitution. In *Minerva Mills v. Union of India*,¹³ the Supreme Court applied the doctrine to strike down amendments to the Constitution designed to overcome the limiting effect of the doctrine itself, and to preclude judicial review of the constitutionality of any amendment. In affirming the doctrine, the Supreme Court used language that is particularly apposite to Article 150:

10. AIR 1973 SC 1461.

11. The case is voluminous running into 566 pages of the All India Reporter. For a summary of the arguments and the judgments, see Fundamental Rights Case: The Critics Speak Ed. Surendra Malik, (Eastern Book Co., Lucknow). For a discussion of the case in a British legal journal, see David Gwynn Morgan, The Indian Essential Features' Case 1981 Vol. 30 ICLQ 307.

12. AIR 1975 SC 2299.

13. AIR 1980 SC 1789.

"Our Constitution is founded on a nice balance of power among the three wings of the State, namely, the Executive, the Legislature and the Judiciary. It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If Courts are totally deprived of that power, the fundamental rights conferred upon the people will become a mere adornment because rights without remedies are as writ in water. A controlled Constitution will then become uncontrolled. Clause (4) of Art. 368 totally deprives the citizens of one of the most valuable modes of redress which is guaranteed by Article 32. The conferment of the right to destroy the identity of the Constitution coupled with the provision that no court of law shall pronounce upon the validity of such destruction seems to be a transparent case of transgression of the limitations on the amending power. If a constitutional amendment cannot be pronounced to be invalid even if it destroys the basic structure of the Constitution, a law passed in pursuance of such an amendment will be beyond the pale of judicial review because it will receive the protection of the constitutional amendment which the courts will be powerless to strike down".¹⁴

Given the judicial conservatism of the Courts, the doctrine faces an uncertain reception in Malaysia. In the first of the cases that referred to the doctrine, there was an implicit acceptance of the principle of "basic features". Abdoolcader J. blandly asserted that he agreed with Chandrachud J. in *Indira Nehru Gandhi v. Raj Narani* that the equality provision is part of the basic structure of the Constitution and a basic feature thereof: see *Public Prosecutor v. Dato Harun Hj. Idris*.¹⁵ But the Federal Court in *Loh Kooi Choon v. Government of Malaysia*,¹⁶ gave an equally bland reason for rejecting the doctrine. Raja Azlan Shah FJ (as he was then) merely stated: "A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power". It is apparent that there is a certain degree

14. Ibid.

15. [1976] 2 MLJ 116 at 120.

16. Ibid at p. 88.

of misconception as to the effect of the doctrine. The "basic structure" argument is principally designed to preserve the Constitution in its essential form and not to subject it to the vagaries of a passing majority in Parliament. Ironically in the *Loh Kooi Choon* judgment itself, there was a recognition that the Constitution is founded upon three basic concepts, identified as being: (a) the chapter on fundamental rights, (b) federalism and, (c) separation of powers. In the later case of *Phang Chin Hock v. Public Prosecutor*,¹⁷ Suffian LP ventured a more plausible reason for rejecting the Indian doctrine. He saw in the autochthonous nature of the Indian Constitution and in its Directive Principles of State Policy, sufficient disparity with the Malaysian Constitution to justify the rejection of the doctrine. Like in the earlier case, the reasoning exhibits more a repudiation of the theory on policy grounds than for any cogent reasons of principle. The Suffian argument that the Malaysian Constitution was the product of an Anglo-Malayan joint effort and therefore, presumably, not subject to any implied restraints as to its mutability, is assailable on first principles. The doctrine has little, if nothing, to do with the historicity of a constitution, but everything to do with its basic characteristics. If a written Constitution has a core, which explains the *raison d'etre* of its existence, the question is whether a passing majority in Parliament should be permitted to alter it beyond recognition?¹⁸ *Phang Chin Hock* is, nevertheless, a significant decision because it dealt squarely with the question, inter alia, of whether a provision like section 2(4) of the Emergency (Essential Powers) Act, 1979 could possibly be valid.

17. [1980] 1 MLJ 70.

18. For a criticism of the Suffian judgment, see Andrew Harding, The Death Of A Doctrine? (1979) 21 Mal. L.R. 365. The last word on the subject has probably not been said. In the later case of *Mark Koding v. Public Prosecutor* [1982] 2 MLJ 120, the Federal Court did not reject outright

Academic writing has favoured the reception of the doctrine. For example, there is a viewpoint that Clause (8) that purports to oust judicial review of a Proclamation or continuance of a state of emergency has led to "an eclipse of constitutional government" and has undermined the basic structure of the Constitution.¹⁹ There is considerable force in this argument. The systematic amendment of Article 150 since 1960 has denuded it of all safeguards. In particular, both Clause (6), and section 2(4) of the 1979 Act, are repugnant to the basic concept of constitutional supremacy which is a cornerstone of the Constitution.

The absence of the proportionality element in the emergency laws beg the question whether it is necessary for successfully combating an emergency that Government should be given *carte blanche* authority to override the Constitution willy-nilly as it pleases? The fundamental principle embodied in international covenants, whether Article 4(1) of the International Covenant on Civil and Political Rights or Article 15(4) of the European Convention on Human Rights, is derogation from constitutional obligations only to the extent necessary to meet the exigency. The Malaysian provision is a renunciation of this essential principle of proportionate derogation. It is therefore arguable that the Article 150 that resulted from the amendments is an affront to constitutional government and destructive of the basic structure of the Constitution.

contd...

18. the application of the doctrine but said instead that it was unnecessary to decide the question on the facts of the case. Meanwhile, the doctrine has unequivocally been rejected by the Singapore Courts: see *Teo Soh Lung v. The Minister for Home Affairs* [1989] 2 MLJ 449, and *Vincent Cheng v. Minister for Home Affairs* [1990] 1 MLJ 449.

19. See Professor H.P. Lee in The Constitution of Malaysia: Further Perspectives and Developments (Ed. F.A. Trindade & H.P. Lee) at pp. 150-151.

The question of safeguards is accordingly of paramount concern to the future of constitutionalism in Malaysia. At the heart of the problem is the tilted structure of Article 150 which has consigned Parliament to a marginal role in the invocation and operation of a state of emergency. The judicial role is also denied any place in the printed scheme of the provision. It is evident, from beginning to end, that Article 150 is envisaged and intended solely to be an occasion of executive decision - making. We have already seen the steady stream of amendments over two decades that has denuded Article 150 of its original character. As it stands today it provides for executive absolutism which generally is the bane of third world democracies. Lord Finlay's assurance in *Halliday's* case that Parliament may confide great power in the Executive in times of public danger "feeling certain that such power will be reasonably exercised"²⁰ belongs to an alien time and clime. In new democracies, it is not uncommon for tensions or an uneasy relationship to exist between the executive and the other organs of state, especially the judiciary. It cannot be taken for granted that executive power will be scrupulously managed without upsetting the delicate balance of power with the other organs of state. The experience of several of the new Commonwealth countries with a Westminster - style government is absolute power in the hands of the Executive, either in pretended or actual form. In several cases the latter is in the form of a military government. Pakistan's trysts with military governments is the most dominant historical feature of its constitutional life.²¹ Bangladesh, which had a painful military gestation, is

20. *R v. Halliday Ex parte Zadig* [1917] AC 260 at 265.

21. See generally TKK Iyer, Constitutional Law In Pakistan: Kelsen In the Courts (1973) 21 Am J of Comp Law 759.

likewise bedevilled by a dominant military. More recently, the two military coups in Fiji leave little room for doubt that since 1987 the power in that country has shifted, probably irrevocably, to the military.²² The subversion of constitutionalism by a hyper-active military, like in Pakistan or Bangladesh, is only one of the several means by which constitutional government can be derailed. Emergencies, or crisis government, is of the more insidious variety; if uncontrolled, the constitution become the means for the transition from democratic to un-democratic government. The provision of checks and controls against the perpetuation of crisis government is thus vital for the sanctity of constitutional government.

The absence of checks in the Malaysian system at all points is patently obvious. On the question of declaring an emergency, two problems arise. The first is the absence of any check on the power of the executive - government in declaring an Emergency, and the second, the circumstances when an Emergency may be called. On the first question, the current position is that the Yang di-Pertuan Agong is constitutionally bound to proclaim an emergency on advice being tendered to that effect by the Cabinet.²³ It is generally accepted that in a cabinet-style government, the Prime Minister is not merely *primus inter pares* but the dominant figure in both the Executive and Parliament. The consequences of this in relation to an emergency was seen in India's experience. The dubious emergency declared by the late Mrs. Indira Gandhi in June 1975, acting on her own and without cabinet consultation, brought about the 44th amendment to the Indian Constitution after her government was

22. See Yash Ghai, A Coup By Another Name? The Politics Of Legality, *The Contemporary Pacific*, Vol. 2, No. 1, Spring 1990, at 11.

23. For a discussion of whether the Yang di-Pertuan Agong could act on his own in Proclaiming a State of Emergency, see Chapter VIII.

overwhelmingly repudiated at the polls in 1977. The amendment required that the advice tendered to the President to proclaim an emergency should in future be that of the Cabinet and not that of the Prime Minister alone, and should be communicated in writing. The efficacy of this provision as a safeguard against bogus emergencies is, however, doubtful. Whilst it may prevent a recurrence of a Mrs. Gandhi type of emergency,²⁴ it does not assure that emergencies would not be declared for dubious reasons. It is confessedly impossible to provide against this event, other than the existence of a strong and vigilant press, and a voting public that can recognize and act against abuse. The presence of a combination of all these factors in a third world democracy is generally unlikely.

In Malaysia, the ethno-centric nature of the society is a feature that generally governs all political actions in the country. The democratic tradition is therefore to be sought in the actions of the dominant political force in the country which shapes its future and destiny, namely, the Malay community. Hitherto, the preference among the Malays for electoral government and for the Constitution that entrenches and safeguards their language, religion and culture, is very evident. However, in the absence of an alternative Malay based, non-ideological and non-theocratic political party, and in that sense in the absence of a Malay based two-party system, the likelihood of a Government suffering repudiation at the polls merely on account of its having abused its emergency powers is unlikely. Thus, a government is not likely to be defeated and voted out of office in Malaysia on account only of unreasonably perpetuating emergency rule. It follows that,

24. See Chapter VII for an account of the Indian Emergency, and Kuldip Nayar's The Judgment (Vikas Publishers, New Delhi, 1977) for a first-person narrative account.

unlike in India in 1977, rejection at the polls as a sanction against abuse of emergency powers is not a likely event in Malaysia for the reasons discussed above.

The second question presents a better opportunity for some form of check. The present circumstances in which an emergency may be called are patently wide. Clause (1) of Article 150 enables an emergency to be declared if "a grave emergency" exists which causes a threat to the "security, economic life or public order of the Federation". This was the result of the loosening in 1963 of the tighter phraseology that existed previously, namely, the presence of the words "whether by war or external aggression or internal disturbance". Additionally, two other factors make the provision of even wider amplitude. The first is the enabling of territorially localized emergencies by the presence of the words "or any part thereof of the Federation" in Clause (1). The other, which is quite invidious, is found in Clause (2), providing for emergencies to be declared for preventive reasons ie. "before the actual occurrence of the event which threatens the security or economic life or public order of the Federation" provided there is "imminent danger of the occurrence of the event". The width of the provision is truly stupendous. Academics who have commented on this have all called for a specific definition of the situations which justify an emergency.²⁵ However, it is submitted that an attempt at precision in definition by itself would not ensure against the possibilities of abuse. One cannot totally escape the use of words like "threat to public order" or "internal disturbance" as the basis of declaring

25. See Azmi Khalid, Emergency Powers And Constitutional Changes (1983) ALIRAN Quarterly Vol. 3 No. 3, 5 at 7. See similar proposal in Dr. Chandra Muzaffar's, Freedom In Fetters (ALIRAN Publication, June 1986) at pp. 219-220.

an emergency where it is to be called on account of eg. a civil disorder. At best one can marginally improve against the possibilities of abuse by narrowing the breadth of the provision. This may be done by enumerating the circumstances for declaring emergencies to specific instances like natural disasters and calamities, civil disorder and commotion threatening supplies and services, war and external aggression. Article 16(1) of the Fifth French Republic (1958) is an example of tighter phraseology than most emergency provisions. It reads: "When there exists a serious and immediate threat to the institutions of the Republic, the independence of the Nation, the integrity of its territory or the fulfillment of its international obligations, and the regular functioning of the constitutional public authorities has been interrupted, the President of the Republic takes the measures required by the circumstances, after consulting officially the Prime Minister, the Presidents of the Assemblies and the Constitutional Council".²⁶ The provision for prior consultation with the Heads of the other organs of State is salutary.

Superadded to this should be the qualification proposed by Professor Twining in his appraisal of the Diplock Report on Northern Ireland.²⁷ The suggestion was, inter alia, that the exercise of emergency powers should conform with internationally accepted standards as postulated in international covenants, like the Universal Declaration of Human Rights 1948 and the European Convention for the Protection of Human Rights And Fundamental

26. Reproduced in (1969) 82 Harvard Law Review 1704 at 1713 (Foot-note (46)) under "Notes: Recent Emergency Legislation In West Germany"

27. W.L. Twining, Emergency Powers And Criminal Process: The Diplock Report (1973) Crim. L.R. 406, 408. See also David Bonner, Combating Terrorism In Great Britain: The Role Of Exclusion Orders (1982) PL 262, for a comprehensive discussion of how safeguards may be provided to prevent abuse of the Secretary of State's power to make "exclusion orders" under the Prevention of Terrorism Act, 1976 in the United Kingdom.

Freedoms, 1959. He suggested further that such powers should be invoked in individual cases only where the ordinary powers and procedures would be inadequate. For example, Article 4(1) of the International Covenant on Civil and Political Rights speaks of a "public emergency which threatens the life of a nation". It is a yardstick that is more rigorous than the phrase "grave emergency" found in Clause (1) of Article 150. It imports a degree of danger which is commensurate with the vast powers ordinarily delegated to the executive during an emergency. Moreover, the other proposal by Professor Twining that it should be a remedy of last resort to be invoked only if the ordinary powers and procedures are inadequate also injects the element of proportionality between the problem and the remedy. This again conforms with the norms set in international covenants. The *First Greek case*²⁸ decided that the civil disorder in Greece did not pass the test under Article 15(1) of the European Convention of Human Rights of being an emergency "threatening the life of the nation" and that the civil unrest was something for which police remedial action was sufficient. The case followed the definition given by the European Court on the phrase "public emergency threatening the life of the nation", as "an exceptional situation of crisis or emergency which affects the whole population and constitute a threat to the organised life of the community".²⁹

28. [1969] 12 Y.B.E.C.H.R. 75. The decision of the European Commission of Human Rights was described in an ICJ study on emergencies as "the high-water mark of international jurisprudence concerning states of emergency..... because it was the only time that a judicial or quasi-judicial international tribunal applying the provisions of a human rights treaty has made a finding that the emergency purportedly justifying derogation from the treaty did not in fact exist": States of Emergency: Their Impact On Human Rights (International Commission of Jurists) 1983, at p. 451.

29. *Lawless v. Ireland* [1961] 1 E.H.R.R.15. See generally discussion in David Bonner, Emergency Powers In Peacetime (Sweet & Maxwell, London, 1985) at pp.84-85.

The incorporation of a more stringent definition is unlikely in Malaysia in the absence of a strong public opinion on these matters. The International Commission of Jurists has observed that Malaysia, Thailand, Ghana and India have not subscribed to any of the international human rights treaties and are therefore not subject to the norms prescribed by them or to evaluation by any international judicial tribunal.³⁰

Equally debilitating to constitutional government is the evident lack of any check on the duration of an emergency. The initial provision, before the 1960 amendment,³¹ provided that a Proclamation would lapse if not approved by both Houses of Parliament within two months of its being made. The effect of the amendment was to invert the process of parliamentary check on an emergency. Whereas previously there was a positive obligation on the Executive to obtain Parliamentary approval within a limited time, there is now no restriction as to when approval is to be obtained. If a Proclamation is made when Parliament is not in session, it is open to the Executive to wait till Parliament ordinarily meets to lay the Proclamation before it or to skip the first session altogether because there is no injunction that the laying of the Proclamation should be in the session soon after the Proclamation was made. This factor coupled with the insertion of Clause (8) in the 1981 amendments to oust judicial review of the continuance of a state of emergency makes the position clear, from the Executive's viewpoint, that the duration of a state of emergency is entirely a matter of its discretion. Judicial opinion has

30. See ICJ Study, *supra*, at p.453.

31. See Constitution Amendment Act No. 10 of 1960.

confirmed this. In *Johnson Tan's* case,³² the Court took the literalist approach stating that a proclamation may be revoked only by the procedure provided for under the Constitution, namely, by a resolution of Parliament, and rejected the argument that it could lapse by effluxion of time or changed circumstances. In *Ooi Kee Saik's* case,³³ the Court held that the summoning of Parliament to discuss the continuance of an emergency is a matter solely for the judgment of His Majesty (meaning the Cabinet) and the matter is above judicial review.

In the face of this judicial abstinence, it is trite that parliamentary check is the only real remedy against the unwarranted continuance of a state of emergency. The obvious safeguard would be to revert to the pre-1960 position of a positive affirmation by Parliament within a stipulated time of the necessity for an emergency. This conforms with the United Kingdom and New Zealand models, the latter providing for emergencies of fixed duration.³⁴ These statutes mandate the Government to summon Parliament to ratify the emergency if Parliament was not sitting when the emergency was declared. The United Kingdom provision requires that Parliament be summoned within five days whereas the New Zealand statute provides for seven days. The New Zealand provision was tightened, ironically at the same time as the Malaysian provision was loosened, to delete the requirement previously existing of

32. [1977] 2 MLJ 66. In the Indian case of *Bhut Nath Mate v. State of Bengal* AIR 1974 SC 806, 811, the Supreme Court held that the withdrawal of a state of emergency is a political, not justiciable, issue and the appeal should be to the polls not to the courts.

33. [1971] 2 MLJ 280.

34. Section 1(2) of the United Kingdom Emergency Powers Act, 1920, and Section 2(2) of the Public Safety Conservation Act, 1932.

merely to communicate the Proclamation to Parliament at the next ensuing session.³⁵ It may be noticed the Malaysian law does not even carry the requirement of laying the Proclamation before Parliament at the next ensuing session. It is left to the discretion of the Executive to bring the proclamation before Parliament at any session of their choosing.

Probably the most pernicious aspect of emergency powers in Malaysia today, which may explain the Executive's reluctance to surrender the power, is the uncontrolled and uncanalised law-making authority acquired by the Executive during an emergency. There is, apart from Clause (5) of Article 150, the Emergency Essential Powers Act, 1979, the principal emergency legislation, which in turn gives untrammelled power to make subsidiary emergency laws. This Act depends upon the continued emergency for its life. Looking first at the Constitutional provision, a law under Clause (5) of Article 150 may be made on any subject so long as it is declared by Parliament that the law is required by reason of the emergency.³⁶ The Courts will not generally sit in judgment of whether Parliament had rightly decided that the law was necessary for the emergency.³⁷ In the result, a simple majority in Parliament may enact any law relating to the emergency which by virtue of Clause (6) overrides the Constitution and is valid even if it is inconsistent with the Constitution.

35. See generally Stanley Yeo, Scrutinizing Declarations And Durations of Emergencies (1983) 2 MLJ vi at pp.viii - ix, and Legislative Control of Emergency Powers in New Zealand and Britain: An Appraisal (1984) Vol. V Sing. L. Rev.112.

36. The only limitation are the subjects covered by Clause (6A), namely, Islamic law, the custom of the Malays and the native customs of the Borneo states, religion, citizenship and language, which are all placed beyond the reach of emergency laws.

37. Per Lord Guest in *Akar v. Attorney General of Sierra Leone* [1969] 3 AER 384, 395: "Emergency laws cannot be challenged on grounds that it was not reasonably justifiable for the situation". See also *McEldowney v. Forde* [1971] AC 632 per Lord Pearson at p.655.

This situation renders nugatory, for the duration of an emergency, the safeguard in the Constitution that the Constitution may not be amended except by a two-third majority in Parliament. When it is noted that even executive laws and orders made under the Emergency Essential Powers Act 1979 are superior to the Constitution,³⁸ it has to be acknowledged that the legal regime under an emergency is unchecked and uncontrolled governing and government. The absence of any requirement to maintain a proportion between the need to diminish democratic values and the exigencies created by the emergency is, to say the least, startling.

The absolutism of emergency rule has its closest parallel to the absolutism under military or martial law regimes. For example, after the Supreme Court of Nigeria declared a Decree of the Federal Military Government invalid, the Military Government passed the Federal Military Government (Supremacy and Enforcement of Powers) Decree 1970 which nullified the decision of the Supreme Court, made Decrees of the Military superior to the Constitution and excluded altogether judicial review of Military Decrees.³⁹ Thus, executive absolutism is the most distinctive feature of emergency government. It is characterized by rule by decree whether by executive orders or by the medium of emergency laws. This reality may not be apparent where there co-exists, as in Malaysia, alongside emergency rule, the trappings of democratic government like Parliament, a civil service system, and a judiciary each purporting to discharge its respective roles. In a parliamentary system where the executive dominates the legislature, the option

38. Section 2(4).

39. See Justice Mohammed Bello (Chief Justice of Nigeria), *The Role Of The Judiciary In Commonwealth Africa*, Vol. 9 No. 2 Dec. 1991, Commonwealth Judicial Journal, 9 at 11.

at the hand of the executive to make laws superior to the Constitution in the form of emergency laws or to by-pass Parliament altogether and promulgate executive legislation is an awesome power. This lies at the heart of the complaint about the pervasive nature of emergency powers. In the absence of any safeguard over the exercise of this law-making power, the only check would seem to be the democratic spirit of the leaders themselves, or ultimately the vote and sanction of the electorate.

Again, the recommended safeguard is to adopt the norms set by international treaties, namely, to maintain a sense of proportion between the derogation sought and the exigencies of the emergency.⁴⁰ The minimum derogation principle will, in the least, afford a yardstick for the judiciary to evaluate if the departure from established constitutional rights was justified in the circumstances.⁴¹ As one Commonwealth Attorney General so appositely observed:

"Such review (either in Parliament or the Courts) must be available to ensure that when great powers are used, the occasion for their exercise is appropriate. The people who have used them should not be the judge".⁴²

40. See Professor W.L. Twining, *supra*.

41. For eg. per Lord Diplock in his dissent in *McEldowney v. Forde* [1969] 2 AER 1039 at 1071 relied, inter alia, on the proportionality element contained in the Proviso to Section 1(3) of the Civil Authorities (Special Powers) Act (Northern) Ireland) 1922, which stated: "The ordinary course of law and avocations of life and the enjoyment of property shall be interfered with as little as may be permitted by the exigencies of the steps required to be taken under this Act". In holding the ministerial regulations made under the provision invalid, Lord Diplock said: "A regulation which creates an offence so wide in its terms as to make unlawful conduct which cannot have the effect of endangering the preservation of the peace and the maintenance of order is not in my view rendered valid merely because the description of the conduct penalised is also wide enough to embrace conduct which is reasonably likely to have that effect" (p.1071).

42. Geoffrey Palmer, later Prime Minister of New Zealand, in Unbridled Power: An Interpretation of New Zealand's Constitution & Government (2nd Ed., 1987, Auckland, OUP) at p. 179.

The choice between Parliament or the Courts as the appropriate forum to review the exercise of emergency powers is one of frequent debate. The preference for Parliament is almost pervasive.⁴³ Unlike the Courts, Parliament is not limited to evaluating the legality of emergency action but the very question of whether the emergency measures were justified. The legislature's role in this regard is understandably preferable because of the democratic principle that the people's representatives should have the ultimate say whether to affirm or rescind a state of emergency. There are, however, certain inherent weakness in Parliament's role. Under a parliamentary system, the reality is that the executive Government dominates Parliament. This factor plus the party-whip system would assure the Government a safe passage of approval through Parliament. This factor is doubly strong in third world democracies that do not generally have strong parliamentary traditions. The presence of a dominant leader and the absence of a two-party system would spell political oblivion for any politician who chooses to break party-ranks. The pressure for conformity is greater in a situation like in Malaysia where the same political party has been in power since independence and expulsion from the ruling party could well spell political doom for a rebel parliamentarian.

It has been suggested that parliamentary approval of a state of emergency should be by an enhanced majority.⁴⁴ It is doubtful, however, whether this would provide an additional safeguard in a country like Malaysia where the Government has, except for the 1969 - 1971 period, been able to

43. Amongst local academics, see Stanley Yeo, *supra*, Dr. Chandra Muzaffar, *supra*, Azmi Khalid, *supra*. For others, see generally, *inter alia*, David Bonner, *supra*, at pp.37 et seq, and W.L. Twining, *supra*.

44. See Dr. Chandra Muzaffar, *supra*.

command a two-third majority in Parliament. The answer may not also lie in statistically increasing the approval requirement to a four-fifth vote. For example, the party in power in Singapore has for many years had a clean slate of all but one or two of the seats in Parliament. Under the Westminster system, where the separation between the Executive and Parliament is blurred, the scrutinizing role of Parliament tends to be exaggerated. The reality is that a vote to rescind an emergency is unlikely if it is to result in the downfall of the Government.

As a former Prime Minister of New Zealand observed, the people who invoke emergency powers cannot be the judge of its necessity.⁴⁵ The evaluation has to be made by an independent body. It is preferable if the body has a supra-national character like the European Commission of Human Rights or the European Court of Human Rights. Decisions like the *First Greek case*,⁴⁶ which rejected the Greek Government's right to derogate from its human rights obligations on account of "an emergency", were possible because of the international character of the tribunal. There is presently no equivalent to international tribunals of this type outside Europe. In these countries the judicial determination has to be undertaken by the municipal courts. One cannot altogether be enthusiastic about this prospect. The role of national courts in the protection of human rights and civil rights in times of emergency has been generally dismal.⁴⁷ After a comprehensive look at the

45. Geoffrey Palmer, *supra* n.42.

46. See, *supra*, n.28.

47. See generally, George J. Alexander: The Illusory Protection Of Human Rights By National Courts During Periods of Emergency (1984) Vol.5 Human Rights Law Journal, 1; William E. Conklin: The Role Of Third World Courts During Alleged Emergencies (Essays On Third World Perspectives In Jurisprudence Ed. Marasinghe and Conklin, Malayan Law Journal, Singapore, 1984) p.69 et.seq.; N.K.F. O'Neill, Human Rights In the Hands Of Judges: The Experience In The Pacific Island Nations (1983) Vol.2 LAWASIA pp.194 et.seq.

performance of the courts in the common law countries, including the United States, Professor Alexander opts for political persuasion as the realistic choice, saying: "It is better to accomplish it than to rely on the demonstrably unreliable courts in times of grave emergency".⁴⁸ In his survey of third world courts, William Conklin observes: "In the face of government declarations of emergency the judiciary have played a subservient passive role".⁴⁹

Crisis government, with its attendant accumulation of powers by the Government, creates a crisis in the judiciary itself. Nigeria presents an object lesson. When the Supreme Court in *Lakanmi v. Attorney General (West)*⁵⁰ ruled that a military edict could not confiscate the property of an individual, the Federal Military Government reacted by promulgating a Military Decree that nullified the decision of the Supreme Court and made a Decree superior to the Constitution. It is not surprising that judicial attitudes have become conditioned to the awesome might of the Executive to thumb its nose at court decisions. Faced with an all-embracing ouster clause that seemed to insulate military decrees in Nigeria from judicial review, Ademola C.J. lamented: "the law courts of Nigeria must as of now blow muted trumpets".⁵¹

48. George J. Alexander, *ibid.*

49. William Conklin, *op.cit.*n.47 p.69.

50. See account of the case in Justice Mohammed Bello's, The Role Of The Judiciary In Commonwealth Africa, *op.cit.* at p.11. See also the experience of Ghana in August 1962 at the trial of the persons accused of the attempted assassination of President Nkrumah. Their acquittal provoked an amendment to the relevant law to authorize the President in the interest of the State to declare a decision of the court to have no effect: B.O. Nwabueze, Judicialism In Commonwealth Africa: The Role Of The Courts In Government (C.Hurst & Co., London, 1977) at pp.200-201. The Chief Justice who acquitted the accused was subsequently dismissed by Nkrumah: see Nwabueze at p.277.

51. *Wang v. Chief of Staff, Supreme Headquarters Lagos* [1986] LRC (Const) 319 at 330.

In Pakistan, like in Nigeria, the overbearing presence of the military is a perpetual menace. The remarkable jurisprudence that has emanated from that country's courts, alternating between Kelsen and the necessity doctrine,⁵² to deal with the legal vacuum created by repeated military overthrow of the Constitution, has nevertheless been described by Professor De Smith as "fundamentally political judgments dressed in legal garb".⁵³ The Chief Justice who decided one of the first of these cases⁵⁴ described candidly the anguish of the times: "If the court had found against the Governor General there would be chaos..... who could enforce a decision against the Governor General. At moments like these, public law is not to be found in the books; it lies elsewhere".⁵⁵ The reality of the position of the courts vis-a-vis a menacing executive, unlikely to brook "judicial interference", was well described by a judge of the Bangladesh Supreme Court:

"For developing countries no uniform judicial role can be fashioned out. In some of the developing countries, the very existence of the judiciary as an institution is at stake. In that unenviable condition, the primary

52. See discussion generally in TKK Iyer, Constitutional Law In Pakistan: Kelsen In the Courts [1973] 21 Am J of Comp. Law 759. See also discussion of the Pakistan cases and of the principles involved, by the Privy Council in the Rhodesian crisis case: *Madzimbamuto v. Lardner Burke* [1968] 3 AER 561.

53. S.A. De Smith, Constitutional Lawyers In Revolutionary Situations (1968) 7 Western Ontario L Review 93 at 98. It is not usual for judges to criticise the judgments of the courts of other countries especially ascribing motives for the way decisions are made. An exception was the statement of Justice Abdur Rahman Choudhury of the Bangladesh Supreme Court when he criticised the leading Pakistan decision in *The State v. Dosso* PLD 1958 SC 533, dealing with revolutionary situations, as follows: "I would prefer to think of the judgment in Dosso's case as based not on the doctrine of necessity or reality but of expediency": ICJ Publication On Independence Of Judges And Lawyers In South Asia, Nov. 1987 (Proceedings of the Kathmandu Seminar, Sept. 1987) at p.36.

54. *In Re Special Reference* PLD 1955 FC 435.

55. Muhammad Munir CJ quoted in S.A. De Smith, *op.cit.* at 98.

role of a judge will be, if he does not decide to leave his post, to hold on. If he fails to roar like a lion it is understandable. If he keeps a glum face and gives a withering look then that will be good work. For the time being the worthwhile role for him will be to do justice between a citizen and a citizen, so that a foundation may be laid for the future when a citizen will be able to expect justice against the mighty and the overbearing as well. In the present day world there are bad omens and good auguries. In some societies rays of early dawn are chasing away the darkness".⁵⁶

These observations posit the dilemma in which the judiciary in third world democracies are placed. Professor Conklin ventured three identifiable reasons for the passive judicial stance of these courts: first, the institutional inefficacy of the courts when compared to the legislature or the executive; secondly, the rule of majoritarianism that requires a passive judiciary; and thirdly, that the written constitutions themselves require a passive role of the judiciary.⁵⁷ However, none of these reasons lay emphasis, as seen in the passages above, on the judicial psychology of the judges themselves. The pervasive judicial philosophy among these judges is self-restraint. It will be

56. Justice Muhammad Habibur Rahman, The Role Of The Judiciary In Developing Societies: Maintaining A Balance, in Law, Justice and the Judiciary: Transnational Trends (Ed. Tun Salleh Abas and Professor Visu Sinnadurai) Professional (Law) Book Publishers, Kuala Lumpur, 1988, 41 at 44. This book has an ironic side-tale to it. The speech by one of the Editors, Tun Salleh Abas, at the launching of the book was used by the Government of Malaysia as one of the grounds to remove him from the Lord Presidency of the Supreme Court. As Professor H.P. Lee says in his review of the book: "The ousting of Tun Salleh highlights the fact that, despite all the lofty assertions of a vital role in the maintenance of the rule of law, the judiciary in a developing society is simply a fragile bastion": (1991) Vol.2 Public Law Review (Law Book Co., Sydney) at p.61.

57. Conklin, *supra*, n.47 at p.81 et.seq. Limiting the role of the judiciary on majoritarian principles is *par excellence* the cry of populism. The best riposte is the rebuttal of the former Chief Justice of India, P.N. Bhagwati: "The argument has been that in a bona fide democracy, the majoritarian rule should prevail and that the majoritarian government would become a hollow shell, if a duly elected, legally constituted body of the people's representatives is denied the right and the ability to respond to the people's majoritarian wishes as expressed by their representatives. Why should an undemocratically constituted body of

inaccurate to speak of this outlook as conservatism or ideologicalism.⁵⁸ It is generally grounded on a less estoric basis. Whether it is borne out of self-preservation or an appreciation of reality, it does not enure to the promotion

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57. judges, who are not responsible to the people through the ballot box, be accorded an overriding power to strike down what the majority of the people want? Is not the legislature or executive branch of government equally capable of judging and interpreting the constitutionality of a proposed measure? Are they not equally devoted to the principle of government under law? The answer to this argument is obvious where there is a written constitution: it is not the elected representatives of the people who have the final voice for even the majority (of the representatives) are under the constitution and are bound to obey its mandate. It is the constitution which is supreme and not the elected representatives of the people in the legislature and its mandate of the constitution cannot be defied by the majority. Now the question as to what are the limits imposed on the power of the legislature or of the executive by the provisions of the Constitution cannot be left to be decided by the legislature or the executive. That would make the limits meaningless and illusory for, like Humpty Dumpty in *Alice in Wonderland*, they can say: "The words mean what I say they mean": The Role Of The Judiciary in Developing Societies: New Challenges in Law & Justice Ed. Salleh Abas & Sinnadurai, op. cit. 25 at 35. That the principle of majoritarianism continues to provide justification for self-restrain and may govern judicial decision-making in Malaysia is seen in the recent statement of the present Lord President of the Supreme Court of Malaysia, Tun Hamid Omar: "(I)n future related concepts like the role of the Executive, legislative(sic) and Judiciary, including lawyers in the country might have to be reviewed. In a bona fide and practical democratic system, rule by majority should therefore receive support because the Government would only be an empty shell if the lawful body representing the people was denied the rights and means to fulfill the people's aspirations. In this respect, a question may arise as to why the Judiciary, although free to pass judgments, is given absolute power to reject certain decisions of the Executive representing the majority": New Straits Times, January 28, 1992 at p.6.
58. An example of a judiciary accused of being ideological is the South African judiciary. Its judiciary under the apartheid regime has been likened to the courts of Nazi Germany which stood aside and allowed grave injustices to be perpetrated against its Jewish citizens. In her study of the South African judiciary, Adrienne Van Blerk observes: "The critics of the judiciary lay the blame on an alleged abdication by the judges of their responsibility, or on temperamental disposition rooted in the allegation that the increase on the Bench of Afrikaans-speaking

of constitutionalism. Thrice in Malaysia's judicial history the courts let pass an opportunity to limit the limitless spread of emergency powers. In *Ningkan's* case,⁵⁹ the grounds were fertile for striking down the Proclamation of Emergency as having been made *in fraudem legis* for the real reason of removing a recalcitrant Chief Minister. In *Johnson Tan's* case,⁶⁰ the wholly sustainable decision of Harun J. (as he was then) that emergency law-making powers could not be invoked in 1975 on the basis of the 1969 Emergency, was reversed by a Federal Court that gave worshipful-importance to the letter of the Constitution as to how an emergency may be terminated. In *Mahan Singh's* case,⁶¹ the Federal Court refused to see the distinction between delegating a power and abdicating it in the context of the Emergency (Essential Powers) Ordinances Nos. 1 and 2 of 1969 by which all the executive and legislative power of the Federation was reposed in the person of the Director of Operations. It took the Privy Council in *Teh Cheng Poh's* case⁶² to inform the Malaysian judiciary that a literalist approach in interpreting the Constitution, as they did in *Khong Teng Khen's* case,⁶³ militated against the spirit of that august document which had intended that the legislative power

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58. judges has rendered the Bench more conservative, and consequently pro-executive and politically partisan": Judge And Be Judged (Juta & Co Ltd., Cape Town, 1988) pp.103-104. Dr. Van Blerk herself does not wholly agree with the criticism and points that pro-executive judgments had been handed down by so-called liberal judges even before the present Government acceded to power: at p.104.

59. [1968] 1 MLJ 119; [1970] AC 379.

60. [1977] 2 MLJ 50.

61. [1975] 2 MLJ 155.

62. [1979] 2 MLJ 50; [1980] AC 458.

63. [1976] 2 MLJ 165.

should, except in grave circumstances, be vested in a Parliament. Even the Indian Supreme Court, one of the activist courts in the Commonwealth, failed to acquit itself credibly during the 1975-77 emergency. The infamous *Habeas Corpus* case,⁶⁴ sanctioning the abrogation of personal liberty by presidential decree, was the nadir of the Indian Judiciary. Since then the Court has climbed back into confidence with bold innovative decisions in the socio-economic field ensuring that access to justice to the mass of its impoverished people is not just a dream.⁶⁵ Its new activism may be seen in this passage from its judgment in the case of the *Bihar Legal Support Society v. The Chief Justice India*:⁶⁶

"...that the weaker sections of Indian humanity have been deprived of justice for long, long years: they have had no access to justice on account of their poverty, ignorance and illiteracy. They are not aware of the rights and benefits conferred upon them by the Constitution and the law. On account of their socially and economically disadvantaged position they lack the capacity to assert their rights and they do not have the material resources with which to enforce their social and economic entitlements and combat exploitation and injustice. The majority of the people of our country are subjected to this denial of access to justice on account of their poverty, ignorance and illiteracy. They are not aware of the rights and benefits conferred upon them by the Constitution and the law. The majority of the people of our country are subjected to this denial of access to justice and overtaken by despair and helplessness; they continue to remain victims of an exploitative society where economic power is concentrated in the hands of a few and

64. *ADM Jabalpur v. Shivkant Shukla* AIR 1976 SC 1207. See the scathing criticism of the majority judgment in H.M. Seervai's, The Emergency, Future Safeguards And The Habeas Corpus Case: A Criticism (Tripathi, Bombay, 1978): "Coming at the darkest period in the history of independent India, it (the decision) made the darkness complete" (at p.vii).

65. See N.K.F. O'Neill, How The Indian Supreme Court Survived The Emergency (1981) Vol. 1 LAWASIA 362; see also generally Judicial Activism And Social Change Ed. K.L. Bhatia (Deep & Deep Publications, New Delhi, 1990).

66. AIR 1987 SC 38.

it is used for perpetuation of domination over large masses of human beings. This court has always, therefore, regarded it as its duty to come to the rescue of those deprived or vulnerable sections of Indian humanity in order to help them realise their economic and social entitlements and to bring to an end their oppression and exploitation. The strategy of public interest litigation has been evolved by this Court with a view to bringing justice within the easy reach of the poor and the disadvantaged sections of the community. This Court has always shown the greatest concern and anxiety for the welfare of the large masses of people in the country who are living a life of want and destitution, misery and suffering and has become a symbol of the hopes and aspirations of millions of people in the country...".

The challenge facing the courts of the new democracies is to make the justice system relevant to the people. The Courts have to discharge the dual function of fulfilling this role, and performing the other, namely, its traditional function of acting as the arbiter between the citizen and the State. Their role in this regard is no less important than the first especially when individual rights and liberties are imperilled by the claim of State interests. The question always is can the Courts safeguard freedom or will they be overwhelmed by the all-embracing power of the Executive? The answer to this would determine whether the rule of law is allowed to operate in a given society. If the Courts are unable to keep the other organs of the State within their constitution boundaries, or if there is scant regard for the opinion of the Courts, or if crucial aspects of executive power are put beyond the pale of judicial inquiry, as in the discharge of emergency powers, the pathway is cleared for government by decree and not government by laws.

However, to inject a tone of realism, it will be unrealistic to lay too much emphasis on the role of the courts. Scrutiny of emergency action must still be the responsibility of both Parliament and the Courts. We have examined at some length the shortcomings in the discharge of this function by both institutions. In answering the question whether the courts are fitted to provide an effective check against the oppressive exercise of power by

government, an Australian judge said it depended, inter alia, on the quality of judges.⁶⁷ In the ultimate, it is the quality and vigilance of the people that determines if they are able to safeguard their freedoms.⁶⁸ The level of political consciousness and maturity of the people is the ultimate arbiter and check against state lawlessness. For no oppressive regime, whether military or otherwise, can prevail against the will of the people.

67. See Justice Brennan of the Australian High Court: "Governments, preoccupied with the pressing problems of the day and having little knowledge of and less sympathy with the judicial method, often fail to see that the courts are, and must be seen to be, separate from the other branches of government. Their independence must be respected - not for the sake of some foolish notion of status but in order that they may perform their necessarily lonely function. A free and democratic society could not be long maintained if governments were to seek to impose on the courts controls of the kind properly imposed upon the Departments of State. It would be a cautionary reflection for any government that was minded to do so that, should they come into opposition, the precedent that they had set might rob them of the law's protection": Courts, Democracy And The Law (1981) 65 ALJ 32 at 40.
68. This is the call in Burma today that the people should first liberate themselves from their fear. In the words of the Burmese human rights activist and opposition leader, Ms. Aung San Suu Kyi: "It is not power that corrupts but fear. Fear of losing power corrupts those who wield it and fear of the scourge of power those who are subject to it": Statement on Being Awarded the Sakharov Prize For Freedom. Reproduced in New Straits Times Aug. 10, 1991. Now published in her, Freedom From Fear (Penguin, 1991) p. 180.

APPENDIX A

FEDERAL CONSTITUTION

PART XI

SPECIAL POWERS AGAINST SUBVERSION, ORGANISED
VIOLENCE, AND ACTS AND CRIMES PREJUDICIAL
TO THE PUBLIC AND EMERGENCY POWERS

§149. Legislation against subversion, action
prejudicial to public order, etc.

- (1) If an Act of Parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation:-
- (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
 - (b) to excite disaffection against the Yang di-Pertuan 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 maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
 - §(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof,

any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13, or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill.

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

§150. Proclamation of emergency

- (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.

- (2) A Proclamation of Emergency under Clause (1) may be issued before the actual occurrence of the event which threatens the security, or the economic life, or public order in the Federation or any part thereof if the Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.
- (2A) The power conferred on the Yang di-Pertuan Agong by this Article shall include the power to issue different Proclamations on different grounds or in different circumstances, whether or not there is a Proclamation or Proclamations already issued by the Yang di-Pertuan Agong under Clause (1) and such Proclamation or Proclamations are in operation.
- (2B) If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.
- (2C) An ordinance promulgated under Clause (2B) shall have the same force and effect as an Act of Parliament, and shall continue in full force and effect as if it is an Act of Parliament until it is revoked or annulled under Clause (3) or until it lapses under Clause (7); and the power of the Yang di-Pertuan Agong to promulgate ordinances under Clause (2B) may be exercised in relation to any matter with respect to which Parliament has power to make laws, regardless of the legislative or other procedures required to be followed, or the proportion of the total votes required to be had, in either House of Parliament.
- §(3) A Proclamation of Emergency and any ordinance promulgated under Clause (2B) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2B).
- (4) While a Proclamation of Emergency is in force the executive authority of the Federation shall, notwithstanding anything in this Constitution, extend to any matter within the legislative authority of a State and to the giving of directions to the Government of a State or to any officer or authority thereof.
- §(5) Subject to Clause (6A), while a Proclamation of Emergency is in force, Parliament may, notwithstanding anything in this Constitution make laws* with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a Bill for such a law or an amendment to such a Bill, nor shall any provision of this

* See temporary amendment vide s. 3(1)(a) Act 68/1966.

Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a Bill to the Yang di-Pertuan Agong for his assent.

§(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution*.

§(6A) Clause (5) shall not extend the powers of Parliament with respect to any matter of Islamic law or the custom of the Malays, or with respect to any matter of native law or custom in the State of Sabah or Sarawak; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.

(7) At the expiration 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 this Article, any law made while the Proclamation was in force, shall cease to have effect, except as to things done or omitted to be done before the expiration of that period.

§(8) Notwithstanding anything in this Constitution:-

(a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and

(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of:-

(i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);

(ii) the continued operation of such Proclamation;

(iii) any ordinance promulgated under Clause (2B); or

(iv) the continuation in force of any such ordinance.

§(9) For the purpose of this Article the Houses of Parliament shall be regarded as sitting only if the members of each House are respectively assembled together and carrying out the business of the House.

* See temporary amendment vide s. 3(1)(a) Act 68/1966.

APPENDIX B

PROCLAMATION OF EMERGENCY
THE FEDERAL CONSTITUTION

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

(PUBLIC SEAL)

SYED PUTRA JAMALULLAIL.
Yang di-Pertuan Agong

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

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

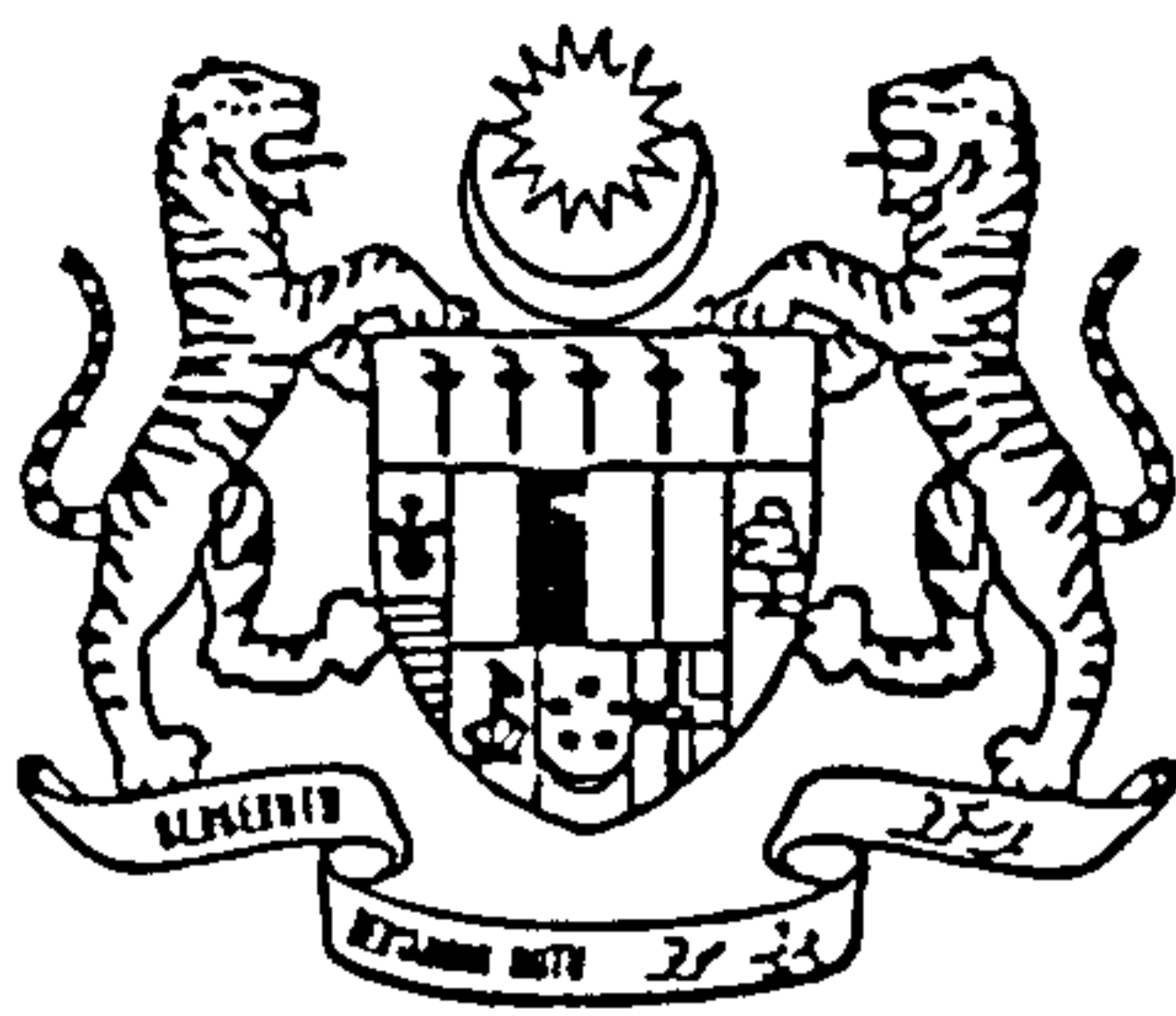
NOW, THEREFORE, We, Tuanku Syed Putra ibni Al-Marhum Syed
Hassan Jamalullail by the Grace of God of the States and territories of
Malaysia Yang di-Pertuan Agong in exercise of the powers aforesaid
do hereby proclaim that a State of Emergency exists, and that this
Proclamation shall extend throughout the Federation.

Given at Our Istana Negara in Our Federal Capital of Kuala Lumpur,
this third day of September, 1964.

By His Majesty's Command,

TUNKU ABDUL RAHMAN PUTRA,
Prime Minister

*(To be laid before Parliament pursuant to Article 150 (3) of the
Federal Constitution.)*



THE 1966
SARAWAK
EMERGENCY

MALAYSIA

Warta Kerajaan
SERI PADUKA BAGINDA
DI-TERBITKAN DENGAN KUASA

HIS MAJESTY'S GOVERNMENT GAZETTE
PUBLISHED BY AUTHORITY

fil. 10
Bil. 20

14th September, 1966

TAMBAHAN No. 45A
PERUNDANGAN

P.U. 339A.

PROCLAMATION OF EMERGENCY

THE FEDERAL CONSTITUTION

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

(PUBLIC SEAL)

TUANKU ISMAIL NASIRUDDIN SHAH,
Yang di-Pertuan Agong

WHEREAS WE are satisfied that a grave Emergency exists whereby the security of a part of the Federation, to wit the State of Sarawak, is threatened:

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

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

Given at Kuala Trengganu, this fourteenth day of September, one thousand nine hundred and sixty-six.

By His Majesty's Command,

TUN HAJI ABDUL RAZAK BIN DATO' HUSSAIN,
Deputy Prime Minister

[To be laid before Parliament pursuant to Article 150 (3) of the Federal Constitution.]

tersebut ada-lah dengan ini mengishtiharkan t keadaan Dzarurat sedang berlaku dan bahawa ishtiharan ini hendak-lah meliputi seluroh Persekut

DI-PERBUAT di-Istana Beta di-Ibu Kota Persekutu Kuala Lumpur, pada Lima belas haribulan Mei, 1969.

Dengan Titah Perintah Baginda,

TUNKU ABDUL RAHMAN PUTRA AL-HAJ,
Perdana Menteri

PROCLAMATION OF EMERGENCY

THE FEDERAL CONSTITUTION

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

TUANKU ISMAIL NASIRUDDIN SHAH,

(Public Seal) *Yang di-Pertuan Agong*

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

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

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

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

By His Majesty's Command,

TUNKU ABDUL RAHMAN PUTRA AL-HAJ,
Prime Minister

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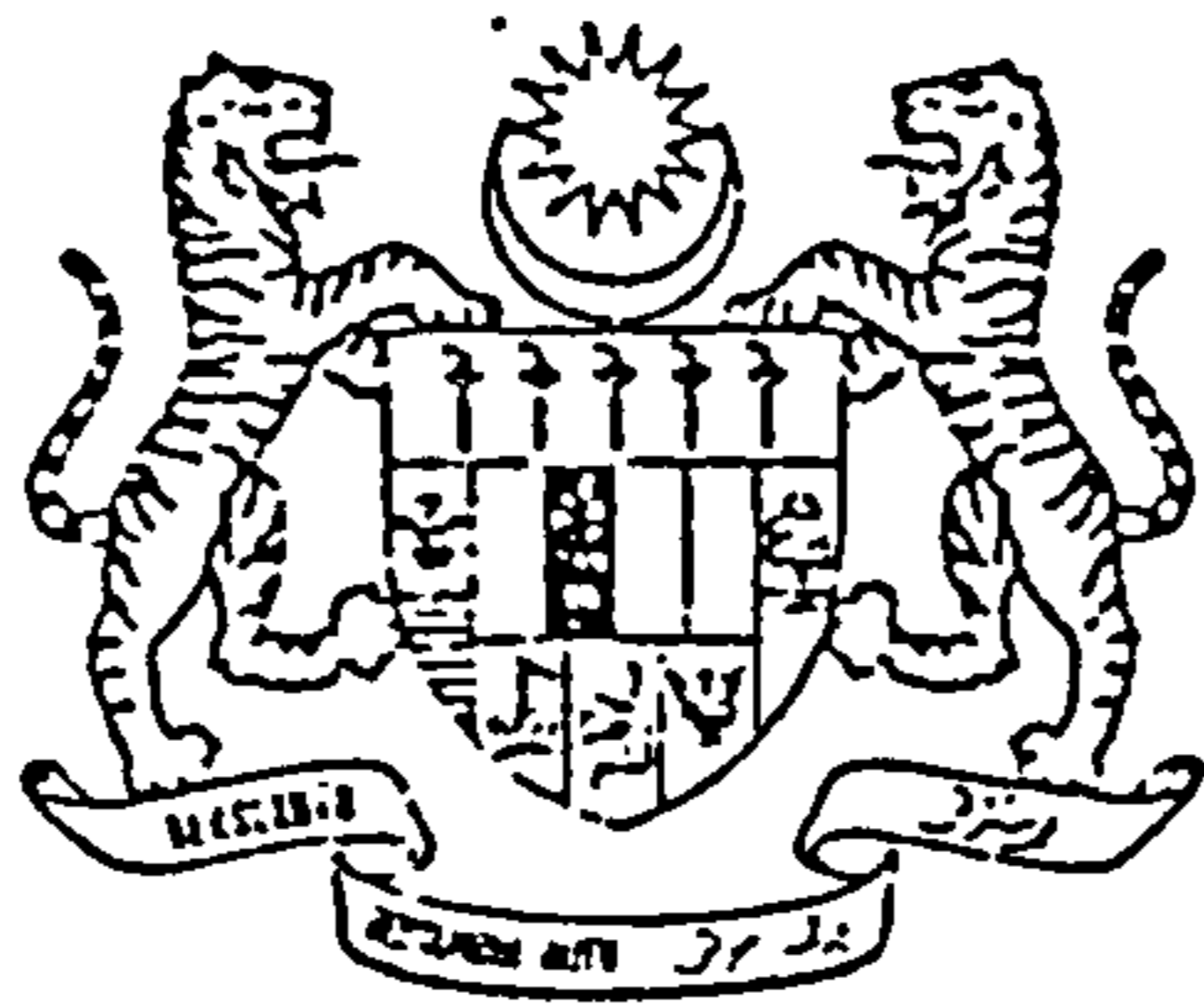
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MALAYSIA

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THE 1977
KELANTAN
EMERGENCY

Emergency 1977

Warta Kerajaan
SERI PADUKA BAGINDA
DITERBITKAN DENGAN KUASA

HIS MAJESTY'S GOVERNMENT GAZETTE

PUBLISHED BY AUTHORITY

Jil. 21
No. 22

8th November 1977

TAMBAHAN No. 73
PERUNDANGAN (A)

P.U. (A) 358.

PERISYTIHARAN DARURAT

PERLEMBAGAAN PERSEKUTUAN

OLEH DULI YANG MAHA MULIA SERI PADUKA BAGINDA
YANG DI-PERTUAN AGONG DENGAN KURNIA ALLAH BAGI
NEGERI-NEGERI DAN WILAYAH-WILAYAH MALAYSIA,
KEPALA UTAMA NEGARA

(Mohor Besar)

TUANKU YAHYA PETRA IBNI AL-MARHUM
SULTAN IBRAHIM,
Yang di-Pertuan Agong

BAHAWASANYA BETA adalah berpuashati bahawa suatu Darurat besar sedang berlaku yang mengancam keselamatan dan kehidupan ekonomi bagi sebahagian Persekutuan, iaitu Negeri Kelantan:

DAN BAHAWASANYA Perkara 150 Perlembagaan meng-
untukkan bahawa dalam keadaan yang tersebut BETA boleh
mengeluarkan Perisytiharan Darurat:

MAKA, OLEH YANG DEMIKIAN, BETA, Tuanku Yahya Petra
Ibni Al-marhum Sultan Ibrahim dengan Kurnia Allah bagi
Negeri-negeri dan wilayah-wilayah Malaysia Yang di-
Pertuan Agong pada menjalankan kuasa-kuasa yang
tersebut adalah dengan ini mengisytiharkan bahawa keadaan

Darurat sedang berlaku dan bahawa Perisytiharan ini hendaklah meliputi seluruh wilayah-wilayah Negeri Kelantan:

DAN BETA adalah dengan ini mengakui bahawa Perisytiharan ini tidaklah dengan apa-apa cara mengurangkan kuasa, tetapi hendaklah menjadi tambahan kepada, Perisytiharan Darurat yang dikeluarkan oleh BETA pada 15hb Mei 1969, yang disiarkan dalam *Warta* No. P.U. (A) 145 pada tarikh yang sama.

DIPERBUAT di Istana Beta di Ibu Kota Persekutuan di Kuala Lumpur pada Lapan haribulan November, seribu sembilan ratus tujuh puluh tujuh.

Dengan Titah Perintah Baginda,

DATUK HUSSEIN ONN,
Perdana Menteri

(Akan dibentangkan dalam Parlimen menurut Perkara 150 (3) Perlembagaan Persekutuan.)

PROCLAMATION OF EMERGENCY

THE FEDERAL CONSTITUTION

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

(Public Seal)

TUANKU YAHYA PETRA IBNI AL-MARHUM -
SULTAN IBRAHIM,

Yang di-Pertuan Agong

WHEREAS WE are satisfied that a grave Emergency exists whereby the security and economic life of a part of the Federation, to wit, the State of Kelantan, are threatened:

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

NOW, THEREFORE, WE, Tuanku Yahya Petra Ibni Al-marhum Sultan Ibrahim by the Grace of Allah of the States and territories of Malaysia Yang di-Pertuan Agong in exercise of the powers aforesaid do hereby proclaim that

a State of Emergency exists, and that this Proclamation shall extend throughout the territories of the State of Kelantan:

AND WE hereby declare that this Proclamation shall not in any manner derogate from, but shall be in addition to, the Proclamation of Emergency issued by us on the 15th day of May 1969, published in the *Gazette* in P.U. (A) 145 of the same date.

GIVEN AT Our Istana Negara in Our Federal Capital of Kuala Lumpur, this Eighth day of November, one thousand nine hundred and seventy seven.

By His Majesty's Command,

DATUK HUSSEIN ONN,
Prime Minister

(To be laid before Parliament pursuant to Article 150 (3) of the Federal Constitution.)