CONSTITUTIONAL SUPREMACY, EMERGENCY POWERS AND JUDICIAL ATTITUDES*

Introduction

The proclamation of a state of emergency and the resultant conferment of law-making power in the Executive is an established and accepted feature of the Malaysian Constitution. It is a position that has been affirmed by several court decisions. Consequently a body of case law has developed on this subject which has helped to define sharply the scope and limits of the 'emergency powers' of the Executive in Malaysia when a Proclamation of Emergency is in force.

In this article it is proposed to discuss the subject from the standpoint of the doctrine of supremacy of the written constitution which is recognised by Article 4 of the Malaysian Constitution. The discussion will centre on whether the vitality of the supremacy doctrine, which gives primacy to the Constitution in relation to all other written laws, is adversely affected by the 'emergency powers' confided in the Executive by the Constitution during an Emergency. In particular, it is proposed to examine whether the law-making power conferred on the Yang di-Pertuan Agong, who is bound to act on the advice of the Executive in these matters, has a debilitating or dilutary effect on the supremacy doctrine envisaged under Article 4.

The writer proposes to discuss also the attitude of the courts towards emergency legislation. In a democratic state recognising the doctrine of separation of powers, it is the function of the judiciary to interpret the written constitution. This trite proposition was restated in the Privy Council recently by Lord Diplock in *Chokolingo* v. *Attorney General of Trinidad & Tobago*[1] as follows:-

> "Under a constitution on the Westminister model . . . which is based on the separation of powers, while it is an exercise of the legislative power of the state to make the written law, it is an exercise of the judicial power of the state, and consequently the function of the judiciary alone, to interpret the written law when made and declare the law where it still remains unwritten i.e. the English common law and the doctrine of equity . . ."

The discharge of this ordinary function of the courts is nevertheless fraught with controversy, particularly in the interpretation of controversial laws.

*This article was originally presented with slight modifications as a conference paper at the Seventh Malaysian Law Conference at Kuala Lumpur in October 1983 under the title "Emergency Powers and the Rule of Law".

[1][1981] 1 W.L.R. 106, 110H

It was acknowledged by Raja Azlan Shah F.J. (as he then was) in *Loh Kooi Choon* v. *Government of Malaysia*[2] in these words:

> ". . . I should add that right now no feature of our system of government has caused so much discussion, received so much criticism, and been so frequently misunderstood than the duties assigned to the courts and the functions they discharge in guarding the Constitution."

In a constitution which provides for checks and balances, the courts have the difficult and unenviable task of deciding, by interpretation, the limits of public interests and private rights. The controversy is more acute when the courts have to decide this question of competing rights whilst interpreting 'emergency legislation' which usually give pre-eminence to the right of the State to maintain law and order by the subordination of all other interests. In the face of such statutes the courts have undoubtedly a difficult task to perform in discharging their traditional role as guardians of individual liberty, and have often to settle, in lieu, for the passive role of a detached interpreter of written law. Whether the correct approach was taken in a given case is not just a matter of using the proper juristic technique but also one of judicial attitudes and disposition towards the larger questions that abut the issue at hand.

Emergency Legislation and Supremacy of the Constitution

Article 4(1) of the Federal Constitution declares:

> "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 observes that to 'misunderstand Article 4 is to misunderstand the whole document (i.e. the Constitution)'[3] It purports to establish the doctrine of constitutional supremacy in Malaysia in place of the doctrine 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 for the Rule fo Law to prevail in the country on the principles enunciated in the Constitution. Thus all laws passed by Parliament or the State Legislatures must conform to the provisions of the Constitution if they are not to be invalidated. Its

[2][1977] 2 M.L.J. 187, 188

[3]R.H. Hickling, *An Overview of Constitutional Changes in Malaysia; 1957-77* (Published in the Constitution of Malaysia: It's Development 1957-77: Ed. Tun Suffian, H.P. Lee, F. Trinidad; pp. 1-26 at p. 5)

significance was duly noted by the Federal Court in *Loh Kooi Chon* v. *Government of Malaysia*,[4] where it was observed (per Raja Azlan Shah F.J. (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'.[5]

The significance of Article 4 is seen by considering the question before the coming into force of the Federal Constitution. For example, in *Anchom bte Lampong* v. *Public Prosecutor*,[6] decided in 1939, the then Court of Appeal was confronted with the issue whether the state legislature of Johore was precluded by the Constitution of Johore, 1895, from revising or amending the Mohammendan Law applicable to the state. Poyser C.J. said of the status of the Johore Constitution:

> '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 sovereignity of the Sultan and the legislature and to treat Enactments of the Johore legislature as the English courts treat by-laws . . .'[7]

The position changed with Independence in 1957 and the coming into force of the Federal Constitution. This is demonstrated in a series of cases.[8] It suffices to quote what Suffian L.P. said in *Ah Thian* v. *Government of Malaysia*.[9]

[4] [1977] 2 M.L.J. 187

[5] at p. 188

[6] [1940] M.L.J. Rep. 18

[7] at p. 22 H-I

[8] *Stephen Kalong Ningkan* v. *Tun Abang Hj. Openg* (No. 2) (1967) 1 M.L.J. 46 *Assa Singh* v. *Menteri Besar, Johor* (1966) 2 M.L.J. 30; *Gerald Fernandez v. Attorney General, Malaysia* (1970) 1 M.L.J. 262. In *The City Council of Georgetown* v. *Govt. of the State of Penang* (1967) 1 M.L.J. 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 and Singapore*, 2nd Ed (1976), pp. 2-16.

[9] [1976] 2 M.L.J. 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 which 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[10]"

However, the supremacy of the Constitution envisaged under Article 4 is diluted by two features in the Constitution which enable the enactment of law inconsistent with the Constitution. The first is the amending power conferred on Parliament in respect of the Constitution under Article 159. The second is the law-making power confided in the Executive (on whose advice the Yang di-Pertuan Agong is bound to act) under Article 150 after a Proclamation of Emergency. It will be necessary for a proper consideration of the powers under Article 150 to first examine the amending power under Article 159.

Direct Amendment of the Constitution under Article 159

In the context of the amending power of Parliament under Article 159 it may be pertinent to examine whether the Constitution, as a self-contained document, declared to be the supreme law is insulated from any changes to itself. Can a law declared to be supreme and thereby binding on Parliament be itself amended by Parliament? It calls for a consideration of Article 4 in the context of Article 159.[11] In ***Phang Chin Hock*** v. ***Public Prosecutor,***[12] the Federal Court said that 'the rule of harmonious construction' in construing Article 4(1) and Article 159 enables them to hold

[10]Ibid at p. 113

[11]Article 159: (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.

[12][1980] 1 M.L.J. 70

that Acts of Parliament made in accordance with the conditions set out by Article 159 are valid 'even if inconsistent with the Constitution.'[13] Earlier in *Loh Kooi Choon* v. *Public Prosecutor*,[14] the Federal Court rejected the argument that the Constitution as the Supreme law cannot be inconsistent with itself. The decision was predicated on the reasoning 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).[15] In *Phang Chin Hock*, supra, Suffian L.P. arrived at the same result 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 led 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.[16]

In the result, these two decisions have established the rule that Parliament is clothed with power to make constitutional amendments that are inconsistent with the Constitution. The effect is as Raja Azlan Shah F.J. (as he then was) succinctly put it in *Loh Kooi Choon*, supra:

> '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.'[17]

The facile manner in which constitutional amendments with the far-reaching effect of being inconsistent with the Constitution can be undertaken under Article 159, requiring compliance only with the procedural requirements set out therein, places the Constitution at the complete disposal of a two-third majority in Parliament. The question naturally arises as to whether this has not in reality introduced the doctrine of parliamentary supremacy in place of constitutional supremacy in Malaysia?

Indirect Amendment of the Constitution by Emergency Laws

The subordination of the Constitution, save in some respects as will be seen in the ensuing discussion, indubitably occurs when an Emergency is in force and Article 150(6) comes into play. Article 150(6) reads:

> 'Subject to Clause 6(A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Pro-

[13] at p. 72 H-I

[14] [1977] 2 M.L.J. 187

[15] at p. 190

[16] *Op.cit* n. 13

[17] *Op.cit* n. 15.

> clamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution or of the Constitution of the State of Sarawak'.

Article 150 appears in Part XI intituled 'Special Powers Against Subversion, Organised Violence and Acts and Crimes Prejudicial to the Public, and Emergency Powers' and provides for a Proclamation of Emergency by the Yang di Pertuan Agong in certain situations threatening the security of the State. Clause (6A) says that Clause (6) aforestated shall not operate to validate any provision inconsistent with the provisions of this Constitution relating 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 or relating to religion, citizenship, or language.

In *Eng Keock Cheng* v. *Public Prosecutor,*[18] the Federal Court considered the effect of Article 150(6) in a case where, acting pursuant to powers conferred by the Emergency (Essential Powers) Act, 1964 passed by Parliament after the proclamation of an emergency, the Yang di Pertuan Agong made regulations dealing with special procedure for the trial of any person charged with an offence under any written law. The Act expressly declared that the Regulations shall be valid notwithstanding its inconsistency with the Constitution. Dealing with this question, Wylie C.J. (Borneo) said:

> '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.'[19]

In *Osman & Anor* v. *Public Prosecutor,*[20] the Privy Council rejected the argument for the appellants that the aforementioned Regulations were invalid as being inconsistent with the Constitution as violating the equal protection clause. Viscount Dilhorne, for the Board, described the effect of Article 150 as follows:

> 'By Article 150 of the Constitution the Yang di-Pertuan Agong was given power in certain circumstances to issue proclamation of emergency, and, while such proclamation was in force, Parliament was given power by Article 150(5), notwithstanding anything in the Constitution, to make laws with respect to any matter if it appeared to Parliament that the law was required by reason of the

[18] [1965] 1 M.L.J. 18

[19] *Ibid* p. 20

[20] [1968] 2 M.L.J. 137

> emergency. Article 150(6) provided that subject to Article 150(6A) (which is not relevant to this case), no provision of any Act of Parliament so passed shall be invalid on the ground of inconsistency with any provision of the Constitution.'[21]

It was accordingly held that because the said Regulations were made under emergency law they 'cannot be impeached' even if they were inconsistent with the Constitution.

In January, 1979, the Emergency (Essential Powers) Act, 1979 (Act 216), passed by Parliament was brought into force and back-dated to be effective from the 20th day of February, 1971, when Parliament first sat after the 1969 Emergency. The 1979 Act re-enacted the Emergency (Essential Powers) Ordinance 1969 as an Act of Parliament and validated all subsidiary legislation made under the said Ordinance, including those made after Parliament had sat and which were struck down by the Privy Council in *Teh Cheng Poh* v. *Public Prosecutor*.[22] It was enacted under Article 150(5) as an emergency law and declared, *ex-abudanti cautela,* that all regulations made thereunder shall be effective notwithstanding anything inconsistent with the Constitution (Section 2(41)).

The legislative history of Article 150(6) begins with the Reid Commission which recommended that the power given to Parliament to deal with an emergency should extend to making laws that could only be inconsistent with the fundamental liberty provisions of the Constitution.[23] In September 1963, Clause (6) was amended by removing this restriction and enlarging the power of Parliament to make laws inconsistent with the rest of the Constitution subject to the matters contained in Clause (6A) (which do not concern us presently). The enlarged clause (6) has remained since. The clear and unambiguous terms in which clause 6 is worded makes it obvious that it has an overriding effect on all other provisions of the Constitution (save for the matters set out in clause 6A) when a Proclamation of Emergency is in operation.

Emergency Rule and the Law-Making Power of the Yang di-Pertuan Agong

Under an Emergency, the legislative power shifts from Parliament to the Yang di-Pertuan Agong and that power, for all practical purposes, vests in the Cabinet. It creates a situation where both legislative and executive powers can be vested in one authority, namely the Cabinet.

In *N. Madhavan Nair* v. *Government of Malaysia,*[24] in considering whether an Emergency Ordinance was valid as having received the assent of the Yang di-Pertuan Agong, Chang Min Tat J. (as he then was)

[21] *Ibid* p. 138

[22] [1979] 1 M.L.J. 49; [1979] 2 W.L.R. 623

[23] Report of the Fed. of Malaya Constitutional Commission 1957, paras. 172-176, pp. 74-76.

[24] [1975] 2 M.L.J. 286

considered the legislative powers of the Yang di-Pertuan Agong during an emergency and said:

> 'Emergency rule which passes the legislative power from Parliament to the Yang di-Pertuan Agong has not displaced his position as a Constitutional Monarch, bound by the Constitution to act at all times on the advice of the Cabinet. . .[25] Executive power is in the hands of the Yang di-Pertuan Agong and his Cabinet. Though the Yang di-Pertuan Agong is with customary and loyal courtesy asked to be pleased to promulgate the Ordinance, it is clear that he as the Constitutional Monarch does not refuse. He has no discretion in the matter. . .'[26]

In *Teh Cheng Poh* v. *Public Prosecutor*,[27] the Privy Council considered the validity of emergency legislation promulgated by the Yang di-Pertuan Agong once Parliament had sat. In declaring such legislation invalid and ultra vires the Constitution, their Lordships of the Board considered the law-making power of the Agong and said:

> 'Although this (i.e. power to promulgate ordinances having the force of law), 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 affairs 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 satisfaction of a particular Minister to whom the Cabinet have delegated their authority to give advice upon the matter in question'.[28]

In the light of these decisions, the position is unambigous that the Yang di Pertuan Agong is a constitutional monarch 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),[29] are deemed, for purposes of judicial review, to be the decision and act of the Cabinet or the relevant Minister thereunder.

[25] *Ibid* at p. 289

[26] *Ibid* at p. 291

[27] [1979] 1 M.L.J. 49; [1979] 2 W.L.R. 623

[28] at p. 52C-E. See also Abdoolcader F.J. in *Balakrishnan* v. *Ketua Pengarah Perkhidmatan Awam* [1981] 2 M.L.J. 259, 263 E-F, and *Merdeka University Bhd.* v. *Govt. of Malaysia* [1981] 2 M.L.J. 356, 358

[29] 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.

The extent of the law-making power of the Yang di Pertuan Agong is set out in Article 150(2B) and (2C) (as amended by Constitutional Amendment Act A514 of 1981) as follows:

> Article 150(2B): 'If at any time while a Proclamation 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 2(B) 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."

This power to promulgate ordinances having the same force and effect as an Act of Parliament is conferred on the Yang di Pertuan Agong the moment a Proclamation of Emergency is made.

The Proclamation of Emergency and its Justiciability

The circumstances in which a Proclamation of Emergency may be issued was amended and enlarged by the Constitution Amendment Act A514 of 1981, and now reads as follows:

> Article 150(1): 'If the Yang di Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.'
>
> Article 150(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.'

It has been settled by the Privy Council in *Teh Cheng Poh's* case,[29a] that in Proclaiming a state of emergency the Yang di-Pertuan Agong does not act on his own but in reality on the advice of the Cabinet. The vital question, in so far as the power of judicial review of emergency legislation is concerned, is whether the Proclamation of Emergency is justiciable. The question was considered by the Malaysian courts in the *Ningkan* cases. In *Stephen Kalong Ningkan* v. *Government of Malaysia*,[30] the contention of

[29a] *Op.cit* n. 27

[30] [1968] 1 M.L.J. 119

the petitioner was that the Proclamation of Emergency over Sarawak by the Yang di-Pertuan Agong was *in fraudem legis*, and a sharp cleavage of opinion arose in the Federal Court on whether the Proclamation was justiciable. Barakbah L.P. (in the majority) 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"[31]

In a strong dissent, Ong Hock Thye F.J. (as he then was) decided the question to the contrary:

> "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 . . .[32]
>
> . . . 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 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."[33]

On appeal to the Privy Council,[34] the question of justiciability was not decided (the Privy Council having dismissed the appeal on other grounds) but Lord MacDermott for the Board said in regard to it that it 'is a constitutional question of far-reaching importance which, on the present state of the authorities, remains unsettled and debateable."

However, a decade later, in *Teh Cheng Poh's* case,[35] the Privy Council inclined in favour of justiciability when it restated that the Yang di Pertuan Agon was a constitutional monarch bound to act on the advice of

[31] at p. 122

[32] at p. 125

[33] at p. 126

[34] [1968] 2 M.L.J. 238, 242

[35] *Op.cit* n. 27

the Cabinet and that the Cabinet was itself amenable to the judicial remedy of mandamus.

The clear implication of that decision that a proclamation of emergency by the Yang di Pertuan Agong is justiciable was undone by Parliament enacting an amendment to Article 150 by the addition of a new Clause (8) by Act A514 in 1981 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."

Clause (8) is an ouster or privative clause and given its wide terms would seem effective to totally preclude justiciability of the Proclamation of Emergency. It is a moot point whether the principle in the *Firebricks*'[36] case that permits challenge on jurisdictional grounds in the face of an ouster clause would apply, but given the terms of the provision (Article 150(1) & (2)) under which a Proclamation is made there seems little scope for a jurisdictional challenge in point of law.

Does The Supremacy Doctrine Still Hold?

In the light of the foregoing, the conclusion is impelling that the doctrine of supremacy of the Constitution is of limited significance only. In normal times, (as opposed to times of emergency rule) it operates to invalidate ordinary written law not made in conformity with it, or, even if made under emergency rule, if it is not declared to be an emergency law under Article 150(6). However, from the standpoint of the preservation of Fundamental Rights entrenched in the Constitution, the doctrine of constitutional supremacy is of doubtful efficacy in view of the seemingly unbridled amending power confided in Parliament even during ordinary times. The position is compounded when a Proclamation of Emergency is in force. It is clear from the foregoing discussion that during emergency the doctrine loses all its value save and except to preserve the matters covered by Clause 6(A) of Articles 150 which are rendered inviolate.

[36]The Privy Council in South East Asia Firebricks Ltd v. *Non-Mettalic Mineral Workers Employees Unions* [1980] 2 M.L.J. 165.

The Courts and Emergency Laws

As a class of legislation, emergency laws have as their principal characteristic the reposing of extensive arbitrary power in the hands of the Executive. There is also a corresponding dimunition of individual rights and liberties. The controversial nature of such legislation impose a burden on the courts when they are confronted with a claim for liberty by a subject under these laws. The courts are faced with a dilemma as to their proper function in this regard; on the one hand, whether to merely interpret the written law passed by the legislature and give effect to its clear intendment no matter the consequence or, on the other, to continue their role as defenders of liberty protecting the rights of the individual against the tyranny of the executive and the legislature.

The Malaysian courts are modelled on the English legal system and judicial methods from England in the approach to controversial legislation have principally guided the approach taken by our courts. The English approach was expressed by Lord Diplock in his judgment in *Duport Steels Ltd.* v. *Sirs*[37] as follows:

> "My Lords, at a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statute is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount.'

The English courts have also accepted and adhered to the principle that it is not for them to question the wisdom of laws passed by Parliament. Lord Morris expressed this view in *Pickin* v. *British Railways Board*[38] as follows:

> "It is the function of the courts to administer the laws which Parliament has enacted. In the processes of Parliament there will be much consideration whether

[37] [1980] 1 W.L.R. 142, 157

[38] [1974] A.C. 765, 789 A-B

> a Bill should or should not in one form or another become an enactment. When an enactment is passed there is finality unless and until it is repealed or amended by Parliament. In the courts there may be argument as to the correct interpretation of the enactment: there must be none as to whether it should be on the Statute Book at all."

However, for our courts to adopt English methods without observing the essential distinction in the constitutional systems of the United Kingdom and Malaysia would be erroneous. A Constitution is a document suigeneris and a creation of the genius of its people. It calls for its own rules of interpretation to invoke the principles that animate the constitution. The point was made by the Privy Council in *Minister of Home Affairs* v. *Fisher*[39] and followed by Raja Azlan Shah C.J. (as he then was) in *Dato Menteri Othman* v. *Dato Ombi Syed Alwi*[40] in these terms:

> "A constitution is suigeneris, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case (Fisher's case): 'A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language that has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms'. The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *Attorney General of St. Christopher, Nevis and Anguilla* v. *Reynolds*.[41] It is in the light of this kind of ambulatory approach that we must construe our Constitution."

Nevertheless, the Malaysian courts like the English courts have largely adopted a conservative approach in their consideration of emergency legislation enacted by the government of the day to handle a threatened danger to the State. This judicial restraint was clearly demonstrated by the English courts in their treatment of challenges to wartime legislation in the 1940's. The courts took the stand that it was for the executive to decide on the appropriate actions to be taken in the national interest and the courts would not interfere. Professor Griffiths[42] gave this analysis of the judicial attitudes of the English courts during that period:

[39] [1979] 3 ALL. E.R. 21.

[40] [1981] 1 M.L.J. 29, 32 B-D

[41] [1979] 3 ALL E.R. 129, 136.

[42] J.A.G. Griffiths, *Public Rights and Private Interests* (The Academy of Legal Publications, Trivandrum, India, [1981] p. 36.

> "There was a period in the 1930's when the Government was beginning to take itself much stronger powers over private property than had been the case in the past . . . If in some way or another the minister or the government department deviated however slightly from the laid down procedure then the courts would declare the ministerial action ultra vires. The courts needed very little encouragement to declare the departmental or ministerial action ultra vires at that time. Then came the 1939-45 war and the executive was given very wide powers under the Emergency Powers Act 1939 and the Defence Regulations made thereunder: powers to take property without compensation, powers to detain people without trial and so on. No doubt because there was a national emergency, the judges shifted their ground and began to support the executive in almost everything it did. It was almost impossible successfully to sue the Crown, the government departments, in war time. The high water mark of this support for the executive is shown in the famous case of *Liversidge* v. *Anderson* (1942) A.C. 206. A majority of the House of Lords held that although the relevant regulation empowered the Minister to detain a person without trial only where the minister 'had reasonable cause to believe' that the person had hostile association, the minister would not be forced to disclose the basis of this 'cause'."

More recently, and under peace-time conditions, similar judicial self-restraint was shown by the English courts. In *Regina* v. *Secretary of State for Home Affairs, Exparte Hozenball,*[43] an alien served with a deportation Order for attempting to obtain information prejudicial to the security of the United Kingdom, applied for certiorari to quash the order on grounds of breach of natural justice. In dismissing the complaint, Lord Denning said:[44]

> "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 freedoms may have to take second place. Even natural justice itself may suffer a set-back. Time after time Parliament has so enacted and the courts have loyally followed. In the first world war in *Rex* v *Halliday* (1917) A.C. 260, Lord Finlay L.C. said: "The danger of espionage and of damage by secret agents . . . had to be guarded against." In the second world war in *Liversidge* v. *Sir John Anderson* (1942) A.C. 206, 219 Lord Maugham said:
>
> > ". . . there may be certain persons against whom no offence is proved nor any charge formulated, but as regards whom it may be expedient to authorise the Secretary of State to make an order for detention."
>
> That was said in time of war. But times of peace hold their dangers too. Spies, subverters and saboteurs may be mingling amongst us, putting on a most innocent exterior. They may be endangering the lives of the men in our secret service, as Mr. Hosenball is said to do.
>
> So it seems to me that when the national security is at stake even the rules of natural justice may have to be modified to meet the position."

[43] [1977] 1 W.L.R. 766

[44] at p. 778

In the United States there have been instances of similar judicial restraint in the attitude of the courts towards emergency measures. For example, during the second world war, the U.S. Supreme Court sanctioned the imposition of severe restrictions on the freedom of persons of Japanese ancestory as a justified war time measure: see *Hiraboyashi* v. *United States* 320 U.S. 81 (1943); *Korematsu* v. *United States* 323 U.S. 214 (1944). The decisions reflected the importance placed by the Court on state security above all other considerations. The comment was made in respecet of the *Korematsu* decision that:

> "The majority opinion agreed with the dissent as to the general unconstitutionality of imposing burdens on a person because of his race but there Justices felt that the needs of the nation, as provided at the start of the war, justified these measures."[45]

The stalwart libertarian on the Supreme Court, Justice William O. Douglas, who was with the majority in the above decisions, later admitted that they 'were extreme and went on the verge of war time power'.[46] Writing for the majority in *Exparte Endo* 323 U.S. 283 (1944) he led the court in curbing the extent of the Presidential executive order that it did not authorise the continued detention of Japanese Americans following a determination of their loyalty.

The experience of the Indian Supreme Court with their emergency legislation is of significance to us because of the many similarities between the two constitutions. The Indian Supreme Court was severely criticised for an abdication of its judicial function in safeguarding liberties during the 1975-77 Emergency particularly for its decision in the famous Habeas Corpus Case (*ADM. Jabalpur* v. *Shivkant Shukla* AIR 1976 SC 1207) when it upheld the suspension of the Writ of Habeas Corpus. Comparison was made to the activist stance taken by the Court during the 1962-68 Emergency as reflected in its decision in *Sandanandan* v. *State of Kerala* AIR 1966 SC 1925 (per Gajendragadkar C.J.: 'Even during an emergency the freedom of Indian citizens cannot be taken away without the existence of justifying security specified by the rules themselves'.) In comparing the role played by the court during the two emergencies, the interesting question posed is whether the restraint shown in the later emergency was judicial pusillanimity or a helpless Court faced with a plain reading draconian law. In his book on the Indian Supreme Court, Dr. Dhavan[47] has ventured this opinion:

[45]Novak, Rotunda & Young, *Constitutional Law* (West Publishing House, United States) (1978) p. 557

[46]James F. Simon: *Independent Journey : Life of William O. Douglas (Harper & Row)* p. 245

[47]Rajeev Dhavan, *Justice on Trial : The Supreme Court Today* (Wheeler Publishing) (1980) p. 175

"There is no doubt that in the 1962-68 emergency, the Court had examined the vires of a substantial number of detentions. In this case, however, the statute (the Maintenance of Internal Security Act, 1971 known as MISA) was so designed that the Court had no materials before it whereby it could determine whether the formally stated reasons for detention actually fell within the powers of the detaining authority. The protective insulation given to the statute was much greater than that given to any other statute. It is really pointless to discuss the narrow technical issues in this case. The broad point is that the Court cannot be blamed for a statute and a constitutional amendment which effectively barred its jurisdiction. The blame for MISA, and the detentions under it, cannot be swept in the direction of the Court. It is to the Court's credit that it brought the people of Indian in direct with the rigorous effect of this legislation rather than make a vain attempt to give the impression that it could dilute its effect. The Habeas Corpus case (1976) represents the high point of executive absolutism, not judicial cowardice."

Conclusion

The clear position taken by our courts is that it is their duty only to interpret the laws as passed by Parliament and that reform is a matter for the legislature. It finds support in what Lord Devlin said on the powers and responsibilities of English judges[48] which is to administer justice according to law. He emphatically decried the role of judges as law makers:

"Should judges be lawmakers, law reformers, and even social reformers? In the exercise of their craft they must be handymen, but I do not think they should aim higher. It is their job to apply the law and they must try to make it fit, but new suits and new fashions should be designed by legislators . . . What is the business of a court of law? To make law or to do justice according to law? This question should be given a clean answer. If the law and justice of the case require the court to give a decision which its members think will not make good law for the future, I think the court should give the just decision and refer the future to a law-making body."

In contrast is the judicial philosophy of Lord Denning:[49]

"My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law that impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule — or even to change it — so as to do justice in the instant case before him. He need not wait for the legislature to intervene: because that can never be of any help in the instant case. I would emphasise, however, the word 'legitimately': the judge is himself subject to the law and must abide by it."

[48]Patrick Devlin, The Judge (OUP — 1981) pp. vii, 12, 84

[49]Autobiography *The Family Story* (Hamlyn Paperbacks) 1981 at page 174.

Is Lord Devlin understating the judicial role or Lord Denning overstating it? It would be easy to surmise that its proper place is somewhere in between. But jurisprudentially speaking, there can be no objection to Lord Denning's injunction that it is the duty of the judge to do 'all he legitimately can to do justice in the instant case before him'. The Judge may not deliberately misconstrue a statute or ignore a precedent to give vent to his private conception of the justice of the situation. But acting on the Holmes dictate that there could be permissible judicial law-making 'between the interstices' the judge could resolve the ambiguity in statutory interpretation in favour of the victims of injustice or legitimately distinguish that harsh precedent that works against them. For example in *Public Prosecutor* v. *Shihabuddin bin Hj. Salleh & Anor*[50] the Federal Court held that there must be clearer words in the emergency regulation seeking to remove a traditional safeguard of an accused person before it can be considered as removed. It signifies the still important role the Courts can play as the guardians of constitutional liberties without encroachment onto the legitimate sphere of the Legislature or the Executive with regard to emergency laws. The courts may have no say on the laws that appear on the Statute Book but it is decidedly their province to interpret these laws and in the discharge of that function play a vital role in ensuring that the constitutional principles of freedom and democracy are safeguarded. It is well to remember the sage words of the eminent jurist, Justice Learned Hand: "If we are to keep our democracy there must be one commandment: Thou shall not ration Justice" (264 F 2d. 35).

C.V. Das*

*Advocate and Solicitor

[50][1980] 2 M.L.J. 273; Reaffirmed recently in *P.P.* v. *Nordin Johan* [1983] 2 M.L.J. 221.