EMERGENCY POWERS AND THE RULE OF LAW

Introduction

The rule of law and emergency powers lead an unhappy co-existence; the first is a principle of wide application which has as its overall purpose the subjection of governmental acts to defined legal criteria so as to avoid the toleration of arbitrary power, while the second consists of rules and principles with the avowed aim of supplying government with extremely broad powers in situations of crisis. Rule of law, as ordinarily understood, serves a limiting function, namely to ensure that government is conducted in accordance with accepted democratic norms. It is the very antithesis of arbitrary government, and once accepted as a basic feature of a constitutional system, no governmental power can be seen as lying beyond the pale of the law.[1]

Emergency powers, on the other land, are characterised by an expansion of power beyond the level acceptable in ordinary circumstances. In extraordinary times acts normally deemed violative of constitutional rules may be accorded legal respectability. Emergency conditions require emergency methods and solutions, if only to preseve and sustain an existing constitutional order. There is therefore some truth in the argument that strictly speaking non-democratic methods may be utilised in order to preserve democracy itself.

In discussing the role of emergency powers in democracies, the focus of attention should shift from the question whether emergency powers ought to be tolerated within a democracy to whether such emergency powers as exist at any one time are proportionate to the dangers threatening that democracy, for such powers may, under the guise of preserving democracy, lead to its destruction. Quite often a critic has to steer a difficult course, for his assessment is one of degree, of whether emergency powers, supportable in principle, has transcended the level between legitimate and illegitimate means of overcoming extraordinary circumstances.

The International Covenant on Civil and Political Rights outlines the above principle of proportionality in the following terms:

> In time of public emergency *which threatens the life of the nation* and the existence of which is officially proclaimed, the States Parties to the present Cove-

[1] The meaning explained above disregards one other view sometimes associated with the rule of law, namely that government must be conducted according to law, the *content* of the law being in itself unimportant. This view, compendiously expressed as "the principle of legality", is neutral and fails to accord due importance to those values which animate democratic constitutions. This neutral view adds little to our understanding of constitutions, and if accepted, all constitutions can be said to subscribe to the rule of law, irrespective of the underlying political ideologies.

> nent 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.[2]

As far as the Constitution of Malaysia is concerned, it is worthwile to note, as a point of reference, the comments offered by the framers of our Constitution, as embodied in the Reid Commission Report. The practical wisdom entertained by these early framers is highlighted in the following passage:

> 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 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.[3]

If the intention behind the original formulation is taken as the guiding rationale underlying emergency powers in Malaysia, it becomes readily apparent that while the need for emergency powers is acknowledged, these powers are nevertheless subject to well-defined constraints. The executive branch of government, for one part, is expected to rely sparingly on emergency powers to meet the exigencies of an existing emergency situation. The legislative branch is additionally expected to exert a measure of positive control over the continuing validity of emergency declarations as well as laws. Looming in the background is the judicial branch which, as guardian of the Constitution, is expected to check excesses of emergency powers in cases properly brought before the courts.

It is a cause of some concern that post — 1957 developments have thrown the original balance askew. There has arguably been a disclocation of the original scheme of emergency powers in the Malaysian Constitution, the present tendency being in favour of according greater say in emergency matters to the executive branch.

There is therefore a clear need to reassess the state of emergency powers in Malaysia, to question whether our commitment to democratic values and the rule of law has shown signs of erosion which cannot be defended under existing circumstances. In the course of this examination, the performance of the judicial branch has also to be laid bare, for erosion of the rule of law many result not only from overt action but also through neglect

[2] Art. 4; emphasis added. Malaysia is as yet not a party to the Covenant.

[3] *Report of the Federation of Malaya Constitutional Commission, 1957, para 172.*

and a general unwillingness to assert this high principle of our constitutional law. Arguably, the courts of Malaysia have assisted, perhaps through inadvertance, in accumulating emergency powers in favour of the executive and the legislature. In effect the accumulation of powers is preponderantly in favour of the executive branch, since practical politics ensure the control of the legislature by the executive.

Constitutional Provisions

(a) *General*

Under Article 150 of the Constitution, extremely wide executive and legislative powers are conferred to deal with an emergency situation. This provision has been subject to a number of far-reaching amendments since its inception in 1957, which has served to broaden these powers even further. The latest amendment in force is effected by the Constitution (Amendment) Act 1981.[4]

The law relating to emergency powers pre-dates the independence Constitution, and the Reid Commission, in formulating the draft constitutional proposals, acknowledged its existence and relevance.[5] At the time of constitution-making, therefore, a situation of emergency was very much a pressing issue, and the powers conferred on the High Commissioner under Emergency Regulations Ordinance, 1948 were even then extremely broad.[6] Indeed, the power under the 1948 Ordinance which facilitated the declaration of a 'state of emergency' on occasions of 'emergency' or 'public danger' extended that which existed under an earlier legislation, namely the Emergency Regulations Enactment, 1930.[7] Even under the 1957 Constitution, the 1948 Ordinance, and subsidiary legislation made thereunder, were for a time continued in force by virtue of Article 163, a transitional provision.[8]

[4]Act A514.

[5]It stated: "We must 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 recommendations on the footing that it is then still in existence". *Report of the Federation of Malaya Constitutional Commision*, 1957, *para* 173.

[6]The Ordinance was described in its long title as "An Ordinance to confer on the High Commissioner power to make regulations on occasions of emergency or public danger." Under section 3(i) the following power to declare a state of emergency was adumbrated: "The High Commissioner, 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 may, by proclamation. . ., declare that a state of emergency exists."

[7]A Federated Malay States Enactment (F.M.S. Cap. 4). Section 3(i) of the 1948 Ordinance reproduced in identical form section 2(i) of the 1930 Enactment.

[8]This provision, since repealed by the Constitution (Amendment) Act 1963, section 8, read: "The Emergency Regulations Ordinance, 1948, and all subsidiary legislation made thereunder shall, if not sooner ended by a Proclamation. . ., cease to have effect on the expiration of one year beginning

In its original form, Article 150 allowed the Yang DiPertuan Agong to issue a Proclamation of Emergency if His Majesty was satisfied that a grave emergency existed which threatened the security or economic life of the Federation "whether by war or external aggression or internal disturbance."[9] There then followed a duty to summon Parliament "as soon as may be practicable" if Parliament was not sitting when the Proclamation was issued. Until both Houses of Parliament sat, the Yang DiPertuan Agong could promulgate ordinances having the force of law if satisfied that immediate action was required[10] A Proclamation and any ordinance had to be laid before both Houses of Parliament, and, if not sooner revoked, ceased to be in force after the following periods: (a) in the case of a Proclamation, at the expiration of two months from the date of its issue, (b) in the case of an ordinance, at the expiration of fifteen days from the date when both Houses first sat. However, where resolutions were passed by each House of Parliament, before the expiration of these respective periods, approving them, the Proclamation or any ordinance could continue in force.[11] Under emergency powers, Parliament could make laws with respect to any matter in the State List (other than Muslim law or Malay custom), and could extend the duration of Parliament or a State legislature, as well as suspend any election.[12] Additionally, the executive authority of the Federation could extend to any matter within the legislative authority of a State, to include the giving of directions to a State government.[13] It was also provided that any law or ordinance passed under Article 150 should not be regarded as invalid in spite of any inconsistency with Part II of the Constitution (fundamental freedom).[14]

The above original provisions have been subsequently amended in the following manner:[15]

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with Merdeka Day, or, if continued under this Article, on the expiration of a period of one year from the date on which it would have ceased to have effect but for the continuation or last continuation." The Regulations and subsidiary legislation remained in force until July 31, 1960. They were repealed by a Proclamation dated July 29, 1960 (L.N. 185 of 1960). Up till this time, they had been kept in force by annual resolutions. See *Malayan Constitutional Documents*, Vol. 1, 2nd edition, 128; Sheridan and Groves, *Constitution of Malaysia*, (3rd ed, 1979), 417.

[9]See also draft provision 138(1), *Reid Commission*, which required the "Federal Government" to be satisfied. The change to "Yang DiPertuan Agong" has inconsequential effects since the latter has to act on cabinet advice. For a view that His Majesty can exercise a personal discretion, see Hickling, *"The Prerogative in Malaysia"* (1975) 17 Mal. L.R. 207, and a reply thereto in Jayakumar, *"Emergency Powers in Malaysia: Can the Yang DiPertuan Agong Act in his personal discretion and capacity?"* (1976) 18 Mal. L.R. 149.

[10]Article 150(2), as unamended.

[11]Clause (3), *ibid*.

[12]Clause (5).

[13]Clause (4).

[14]Clause (6).

[15]See Jayakumar, "Emergency Powers in Malaysia", in Suffian, Lee and Trindade (ed.), *The Constitution of Malaysia: its Development*, 328, which discusses the amendments passed up to 1977.

(i) ***Constitution (Amendment) Act, 1960.***

The time limits of two months (for a Proclamation) and fifteen days (for an ordinance) were deleted.[16]

(ii) ***Malaysia Act, 1963.***

The words 'whether by war or external aggression or internal disturbance' were deleted.[17] In place of the original clauses (5) and (6), new clauses (5), (6) and (6A) were substituted. Under the amended clause (5) the legislative power of Parliament to make laws with respect to any matter, if it appeared to Parliament to be required by reason of the emergency, was enlarged. Likewise, under the amended clauses (6) and (6A), a provision of any ordinance passed under Article 150, or any like Act of Parliament which declared that the law appeared to Parliament to be required by reason of the emergency, could not be rendered invalid on the ground of inconsistency with any provision of the Constitution; the powers of Parliament did not, however, extend to the following matters: Muslim law, Malay custom, native law or custom in a Borneo State, religion, citizenship, and language.[18] Significantly, although the original wording allowed emergency laws which were inconsistent with Part II, this subsequent amendment allowed a more all-embracing inconsistency, namely with 'any provision' of the Constitution, except for the seven matters stated above.

(iii) ***Emergency (Federal Constitution and Constitution of Sarawak) Act, 1966.***

This legislation affected a temporary amendment to clause (5) and (6), allowing the making of an emergency law which conflicted with provisions of the State Constitution of Sarawak.[19]

(iv) ***Constitution (Amendment) Act, 1976.***[20]

This Act involved a mere change of wording, substituting the term "Islamic" for "Muslim" wherever the term occurred in the Constitution, including Article 150.[21]

[16]Section 29 of the Act.

[17]Section 39(1) of the Act.

[18]Section 39(2).

[19]See secton 3(1) of the 1966 Act.

[20]Act A354.

[21]Section 45 of the Act.

(v) ***Constitution (Amendment) Act, 1981.***[22]

This Act introduces far-reaching changes to Article 150, enlarging both its wording and the powers exercisable during a state of emergency. The original scheme (as subsequently amended up to 1981) has undergone a transformation, and previous controls over the exercise of emergency powers have been further relaxed. The full ramifications of these changes are discussed below.

(b) ***The Present Law***

Article 150(1) now reads:

> If the Yang DiPertuan 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.[23]

A proclamation of Emergency may be issued "before tha actual occurrence of the event which threatens the security, or the economic life, or public order" if the Yang DiPertuan Agong "is satisfied" that there is an "imminent danger" of its occurrence.[24] The Yang DiPertuan Agong's power under the Article includes the ability to issue different Proclamations "on different grounds or in different circumstances", regardless of any Proclamation having been already issued or still in operation.[25] The continued existence of multiple Proclamations is now, therefore, sanctioned expressly by the Constitution.[26] Where a Proclamation of Emergency is in force, and both Houses of Parliament are not then sitting concurrently, the Yang DiPertuan Agong can promulgate such ordinances "as circumstances appear to him to require" if satisfied "that certain circumstances exist which render it necessary for him to take immediate action."[27] For this purpose, the Houses of Parliament are to be regarded as "sitting" only where "the members of each House are respectively asembled together and carrying out the business of the House".[28] An or-

[22]Act A514.

[23]See section 15(a) of A514. A threat to "public order" is a ground not included previously. See however the Emergency Regulations Ordinance, 1948 which mentioned "public danger".

[24]Clause (2). Arguably, this is a slight departure from previous law.

[25]Clause (2A). See section 15(b) of A514.

[26]See *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50, for a statement of the previous law and the controversy surrounding it.

[27]Clause (2B).

[28]Clause (9). No such definition was given under previous law, but a number of cases attempted to clarify the provision.

dinance made in such circumstances has the same force and effect as an Act of Parliament. This power 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."[29]

The 1981 amendment leaves untouched the following existing clauses: (3), (4), (5), (6), and (6A).[30] Thus, as previously, a Proclamation of Emergency or any ordinance made under emergency power must be laid before both Houses of Parliament.[31] They cease to have effect in either of the two circumstances: (a) upon the passing of resolutions by both Houses annulling them, or (b) upon a revocation.[32] Where a Proclamation of Emergency ceases to be in force (by revocation or annulment), an ordinance made under clause (2B) and any other emergency law shall likewise cease to have effect six months after the date the emergency ceases to be in force, "except as to things done or omitted to be done before the expiration of that period." Under clause (5), Parliament may, while an emergency is in force, pass laws "with respect to any matter" if it appears to Parliament that the law is "required by reason of the emergency." Any constitutional provision, or any provision under any written law, which requires any consent, concurrence or consultation in regard to a law being passed shall not apply in the case of a Bill passed under the clause.[33] Likewise, any provision which restricts the coming into force of a law after it is passed, or the presentation of a Bill to the Yang DiPertuan Agong for his assent, does not apply. Clause (6) addresses itself to emergency ordinances and Acts of Parliament which are inconsistent with a constitutional provision. A provision in such ordinance or Act, passed under Article 150, shall not be invalid on account of the inconsistency, provided in the case of an Act the law contains a declaration that it appears to Parliament to be required by reason of the emergency. As stated earlier, the inconsistency can be with *any* provision of the Constitution, except in regard to the seven matters listed in clause (6A), namely Islamic law, Malay custom, native law, native custom, religion, citizenship and language. It is apparent that, since the 1981 amendment, clause (6) has to be read in

[29]Clause (2C).

[30]The reference to "Clause (2)" as it appears in Clause (3) is now however to be read as "Clause (2B)"; section 15(c) of the 1981 Act.

[31]It is significant that while under previous law the Yang Dipertuan Agong had the duty to summon Parliament as soon as may be practicable, the 1981 amendment, in substituting the new clause (2) above, deletes it.

[32]Clause (7); unamended by the 1981 Act.

[33]Article 79, which requires the lapse of four weeks and consultation with State Governments before Parliament can proceed with a Bill proposing a change in the law on a matter within the Concurrent List (and also as to limited matters in the State List on which the Federation can exercise power), is expressly mentioned and excluded.

conjunction with clause (2C) which provides than an emergency ordinance shall be treated as having the same force and effect as an Act of Parliament, and the broad power conferred as regards an Act (under clause (5)) now extends expressly to an ordinance as well by virtue of clause (2C).

A new clause (8) introduces a major change by stipulating the non-justiciability of matters referred therein. That a significant inroad into judicial review is intended can be readily seen in the express wording of the clause which, owing to its importance, deserves to be quoted *in extenso:*

> "(8) Notwithstanding anything in this Constitution —
>
> (a) the satisfaction of the Yang DiPertuan 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 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."[34]

From the discussion above, the scheme underlying emergency powers in Malaysia can plainly be seen as conferring very wide legislative and executive powers. In terms of legislative powers, both Parliament and the executive can legislate on the same breadth of powers. The executive cannot, however, promulgate ordinances after Parliament has sat, but may take immediate action to legislate if, at the time an emergency is declared, Parliament is not sitting. Where Parliament has been summoned, an ordinance must be laid before both Houses (assuming it has not been previously revoked), as must also a Proclamation of Emergency. By this requirement, some measure of Parliamentary control is retained, though its effectiveness, under present circumstances, may be slight.[35] A Proclamation or an ordinance, when laid, continue in force unless resolutions are passed anulling them.

Since emergency legislation can be inconsistent with the Constitution and yet remain valid, emergency legislative power (whether exercised by the executive or Parliament) is indeed a negation of ordinary principles of constitutionalism; but the continuance of the power is dependent on the existence of a state of emergency, and where the latter ceases to exist, the former also lapses. Emergency legislation, therefore, is temporary in duration although extensive in scope. Also, Article 150 does not have the ef-

[34] See section 15(d) of the 1981 Act.

[35] Since clearly the executive predominates in Parliament, it invariably amounts to supervision of the executive by the executive.

fect of suspending non-emergency constraints,[36] unless possibly amended or otherwise affected by express emergency legislation. An Act passed during an emergency does not, therefore, *ipso facto* assume the breadth of immunity conferred by the Article. It must be declared to have been required by reason of the emergency.

The scheme purports to exclude judicial review by making non-justiciable the satisfaction of the Yang DiPertuan Agong, the Proclamation, any declaration in the Proclamation, and any emergency ordinance.[37] As between judicial and Parliamentary controls, the scheme relies more on the latter.

In regard to executive power, a state of emergency permits the extension of federal legislative power to the states, even over matters which are within the legislative authority of the states. Federal-state relations undergo a major change with the proclamation of an emergency, since effectively a federal structure changes, *albeit* temporarily, into almost a unitary one.[38]

An assessment of emergency powers has to take into account the above-mentioned scheme which has itself undergone changes in the direction of reduced judicial control and expanded executive-legislative powers.

The case law: judicial response

As a general rule, judicial performance is not seen at its best during times of emergency for a number of legal and policy reasons. The Malaysian experience in this regard is not an isolated one. For instance, when common law cases are studied they display clearly a reluctance to interfere with executive as well as legislative determinations during times of war. In *R V Halliday*[39] it was said by Lord Atkinson:

> However precious the personal liberty of the subject may be, there is something for which it may well be, to some extent, sacrified by legal enactment, namely, national success in. . . war or escape from national plunder or enslavement.[40]

Similarly, in *The Zamora*[41] Lord Parker held:

> Those responsible for national security must be the sole judges of national security. It would be obviously undersirable that such matter should be made the subject of evidence in a court of law of otherwise discussed in public.[42]

[36] See Jayakumar, "Emergency Powers in Malaysia", *supra*, 333.

[37] Presumbably, an Act of Parliament, passed during an emergency, is still justiciable.

[38] At least in terms of executive power. The transformation cannot be total since certain State matters (Islamic Law, Malay custom, native law and native custom) are immune; see Clause (6A).

[39] [1917] A.C. 260.

[40] *Ibid*, 271.

[41] [1916] A.C. 77.

[42] *Ibid*. 107.

Even Lord Denning in *R.* v *Secretary of State ex parte Hosenball*[43] has been reported as stating:

> There is a conflict between the interests of national security on the one hand and the freedom of the individual on the other. The balance betwen these two is not for a court of law.[44]

As these cases typify, the courts, when faced with emergency powers, may resort to ritualistic incantations on the importance of the rule of law and judicial review, but in effect tend to hold in favour of upholding the exercise of emergency powers.[45]

Control by the courts in emergency situations tends to be illusory, and Malaysian decisions provide clear examples. It is therefore more realistic, when appraising emergency powers in Malaysia, not to overestimate the potential of the judiciary as a bulwark against encroachments on the rule of law. On a number of important legal issues (some of which are now academic since overtaken by constitutional amendment, though they remain illustrative of the general judicial attitude), Malaysia courts have shown an extreme reluctance to interfere, and have at times conferred more powers to the executive and the legislature then were possibly warranted by clear constitutional text.

(a) *The issue of justiciability*

In *Stephen Kalong Ningkan* v *Government of Malaysia*[46] the Privy Council, alluding to whether a Proclamation of Emergency could be challenged in judicial proceedings, described the question as one "of far-reaching importance which, on the present state of the authorities, remained unsettled and debatable".[47] The Federal Court[48] in the same case had split two to one on the issue, with the majority favouring the view that such Proclamation was not justiciable.[49] The majority view is a particularly strong one since the judges even rejected the possibility of questioning a Proclamation on the ground that it was issued *mala fide*. Barakbah L.P., for instance, declared:

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

[44]*Ibid.*, 783.

[45]See generally, Schwartz, "War Power in Britain and America", 20 N.Y.L.Q. Rev. 325 (1945); C.P. Cotter, "Constitutionalizing Emergency Powers: The British Experience", 5 Stan. L. Rev., 382 (1953).

[46][1968] 2 M.L.J. 238.

[47]*Ibid*, 242, per Lord MacDermott.

[48]*Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 1 M.L.J. 119.

[49]Barakbah L.P., Azmi C.J. (Malaya). Ong Hock Thye F.J. disagreed.

> In my view the question is whether a court of law could make it an issue for the purpose of a trial by calling in evidence to show whether or not His Majesty the Yang DiPertuan Agong was acting in bad faith in having proclaimed the emergency. 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 interest 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[50]

Likewise, Azmi c.J. regarded the Yang DiPertuan Agong as the "sole judge" on this question, even when a question of *bona fide* was put in issue.[51] Although the operative provision, Article 150(1), contained qualifying words by which His Majesty's power was to be exercised only in relation to specified purposes, whether a state of emergency, whereby the security or economic life of the Federation was threatened, did exist was an issue which His Majesty alone could decide.

The exact wording of Article 150(1), as it stood at the time *Ningkan* was litigated, read:

> If the Yang DiPertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or any party thereof is threatened, he may issue a Proclamation of Emergency.

On its wording, the *Yang DiPertuan Agong's* "satisfaction" had to be in respect of a "grave emergency" which threatened the "security" or "economic life" of the Federation, or any part of it. These qualifying words, in the view of the majority, concerned matters which were within the sole discretion of His Majesty. Indeed, the Lord President refused to allow even the calling of evidence to show the existence of *mala fides* in the act of proclaiming an emergency, and thought it incumbent on the court to assume good faith on the part of the *Yang DiPertuan Agong*. This is in stark contrast to the opinion of the minority judge, Ong Hock Thye F.J., who refused to regard the above "words of limitation" as "meaningless verbiage", holding:

> . . .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.[52]

[50] At p. 122.

[51] At p. 124.

[52] At p. 126. Despite the emphatic tone of his dissent *on this issue*, Ong F.J. finally decided that the appellant had not proven *mala fides* on the facts. There was, therefore, a unanimous rejection of the appellant's case, although on different grounds.

In *Ningkan* the Proclamation of Emergency was issued in respect of the State of Sarawak where a question had earlier arisen as to whether the Governor of the State could dismiss a Chief Minister only on the strength of a letter signed by twenty-one out of forty-two members of the *Council Negeri* (the State's Legislative Assembly). Believing that Stephen Kalong Ningkan had ceased to command the confidence of the majority of the members, the Governor dismissed him, appointing a new Chief Minister in his place. Ningkan petitioned the High Court which decided in his favour, the judge holding that, under the State Constitution of Sarawak, the Governor could dismiss a Chief Minister, if at all, only upon a proper vote of no confidence passed on the floor of the legislative assembly.[53] A week after the decision reinstating Ningkan as Chief Minister, the Federal Government issued the Proclamation of Emergency under which the Emergency (Federal Constitution and the Constitution of Sarawak) Act, 1966 was passed. Important provisions in the Sarawak Constitution were amended by this law so as to equip the Governor with wide powers, enabling him to summon the Council Negeri on his own initiative (as opposed to the need for a request from the Chief Minister previously), and also to dismiss the Chief Minister in his absolute discretion. When a vote of no confidence was finally carried in the *Council Negeri* (summoned by the Governor), Ningkan was again dismissed.

It was argued, on the appellant's behalf, that no "grave emergency" existed, since there were no outward signs of disturbances, hostilities, or threats of either. The Proclamation was therefore made in *fraudem legis* with the intention of removing him from the post of Chief Minister. The augmented powers of the Governor, made possible by the 1966 emergency legislation,were thus *ultra vires* and void, leading consequently to an invalidation of his decision to dismiss Ningkan.

The issue of justiciability had to be squarely faced. The High Court, on a preliminary issue, conceded in favour of justiciability[54] As has been seen above, the Federal Court by a majority held otherwise. The Privy Council, however, proceeded on the assumption that the issue was justiciable, and found against the appellant because he did not discharge the onus of proving *mala fides*.

The issue was again highlighted, although in different contexts, in *Public Prosecutor* v *Ooi Kee Saik & Ors*[55] and *Johnson Tan Han Seng* v *Public*

[53] *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli* [1966] 2 M.L.J. 187; per Harley Ag. C.J. (Borneo). *Adegbenro* v. *Akintola* [1963] 3 W.L.R. 63 (Privy Council) was considered and distinguished. In *Adegbenro*, the Board read the meaning of lack of "support' as including the situation where such was evidenced by a letter written by a majority of the members of the Western Nigeria House of Assembly.

[54] See *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli* (No. 2) [1967] 1 M.L.J. 46; per Pike C.J. (Borneo). Since *mala fides* had been pleaded, the judge held that there was "a cause of action within the jurisdiction of the court."

[55] [1971] 2 M.L.J. 108 (High Court (Malaya); per Raja Azlan Shah J (as he then was)).

Prosecutor.[56] Both cases concerned the validity of emergency laws, but the judgments alluded to the question of justiciability of a Proclamation of Emergency. In *Ooi Kee Saik*, Raja Azlan Shah J repeated the *Ningkan* (Federal Court) approach:

> The fact that the Yang DiPertuan Agong issued the proclamation showed that he was so satisfied that a grave emergency existed whereby the security of the whole country was at stake. . . Indeed the proclamation is not justiciable (see *Bhagat Singh* v *King-Emperor* and *King-Emperor* v. *Benoari Lai Sharma*). The same principles governing discretionary powers confided to subordinate administrative bodies cannot be applied to the Yang DiPertuan Agong and are inapplicable.[57]

In *Johnson Tan Han Seng*, the question was not so much whether a Proclamation of Emergency was invalid at the time of its issue but whether a valid Proclamation could lose its validity by "effluxion of time" or "change of circumstances". The challenged Proclamation was issued on May 15th, 1969, under which a number of emergency ordinances were promulgated. Acting under the Emergency (Essential Powers) Ordinance No. 1, 1969, the executive published the Essential (Security Cases) Regulations, 1975 which effected major changes to criminal procedure. It was argued that no state of emergency existed in fact in 1975 — the year the Regulations were made. Since a lapse of nearly seven years had intervened and the circumstances which warranted the Proclamation in 1969 had disappeared, the Proclamation could not be regarded as still operative. It had lost its validity through change of circumstances. Consequently, the Ordinance and Regulations, being dependent on a valid Proclamation, were similarly of no effect. The trials of the accused under the 1975 Regulations could not, therefore, be sustained.

A unanimous Federal Court rejected the contention, and the same attitude of adroit judicial self-restraint was examplified. Suffian L.P. clearly recognised the question as "political", agreed that the law applicable in Malaysia in this connection was the same as that in England and India, and approved the following statement by Krishna Iyer J in the Indian case of *Bhutnath* v *State of West Bengal*:[58]

> . . .we have to reject summarily [this] submission as falling outside the orbit of judicial control and wandering into the para-political sector. 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 and not to the courts. The traditional view. . . that political questions fall outside the area of judicial

[56] [1977] 2 M.L.J. 67 (Federal Court; Suffian L.P., Raja Azlan Shah and Wan Suleiman F.J.J.).

[57] *Op. cit.*, 113. This statement is *obiter* since no challenge as to the validity of the Proclamation was made.

[58] A.I.R. 1974 S.C. 807.

> review, is not a constitutional taboo but a pragmatic response of 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. . . The rule is one of self-restraint and of subject matter, practical sense and respect for other branches of government like the legislature and executive.[59]

It is clear from *Johnson Tan* that a Proclamation of Emergency could not lose its force by a mere judicial pronouncement on the matter, and indeed it was not within the power of the court to do so. Only where, in accordance with the wording of Article 150, a Proclamation is revoked (by the executive) or annulled (by Parliamentary resolutions) does it lose its validity.[60]

(b) The Privy Council and *Teh Cheng Poh*

The view expressed in *Johnson Tan* leads to the following result: since a Proclamation of Emergency loses its validity only by revocation or annulment, where a number of different Proclamations have been issued and not revoked or annulled, all remain in force. The possibility of co-existing multiple Proclamations was implicitly recognised by the Privy Council in the *Ningkan* case,[61] but eleven years later in *Teh Cheng Poh* v *Public Prosecutor*[62] this view was partly retracted. This latter holding impinges on the justiciability issue and transforms the assumption in *Ningkan* into a working principle, and indeed may even have extended it.

At the time *The Cheng Poh* was heard, four different Proclamations[63] had been issued, namely:

(a) 1964 Proclamation (a response to the Indonesian confrontation);
(b) 1966 Proclamation (applicable only to Sarawak and issued to deal the unsettled political situation there referred to above);
(c) 1969 Proclamation (issued after the eruption of racial riots); and
(d) 1977 Proclamation (applicable only to the state of Kelantan to deal with a local political crisis).

[59] *Ibid.*

[60] See also *Public Prosecutor* v. *Khong Teng Khen & Anor* [1976] 2 M.L.J. 166; e.g. judgment of Wan Suleiman F.J.: "The ultimate right to decide if an Emergency exists or has ceased to exist... remains with Parliament, and it is not the function of any court to decide on that issue." (at p. 177).

[61] [1968] 2 M.L.J. 238, 242: ". . . the continuing existence of earlier Emergency Proclamations or Acts. . . could not, in the circumstances, justify a different conclusion. The emergency, the subject of this appeal, was distinct in fact and kind from those that had preceded it, and the powers conferred by article 150 were in being and not spent when it arose."

[62] [1979] 1 M.L.J. 50 (Lords Diplock, Simon, Salmon, Edmund-Davies and Davies and Keith).

[63] See L.M. 271/1964; P.U. 339A/1966; P.U.(A) 145/1969; P.U.(A) 358/1977. Also, Sheridan & Groves, *Constitution of Malaysia*, (3rd ed., 1979), 359.

None had been expressly revoked or annulled. The Board noted that the power to issue, as well as to revoke, a Proclamation vested in the *Yang DiPertuan Agong*, but expressed the view that the Constitution did not require the revocation power to be "exercised by any formal instrument".[64] The Board then in fact recognised a new principle: it was possible for an earlier Proclamation to be *impliedly* revoked by a subsequent one. The Board held:

> In their Lordships' view, a proclamation of a new emergency declared to be threatening the security of the Federation as a whole must by necessary implication be intended to operate as a revocation of a previous Proclamation, if one is still in force.[65]

Teh Cheng Poh concerns the validity of security regulations made under an ordinance promulgated as a result of the 1969 Proclamation. To the question whether powers under the earlier 1964 Proclamation could still be drawn, the Board replied in the negative. After the issue of the 1969 Proclamation, previous powers under the Emergency (Essential Powers) Act could no longer be relied on.

This new principle clearly amounts to a judicial invalidation of earlier Proclamations of Emergency, and the unquestioned assumption on which this is erected seems to be that the continuing validity of a Proclamation is justiciable, at least to the extent specified by the principle. Thus, the Proclamation of 1969 impliedly repealed the 1964 Proclamation, but it seems doubtful whether the 1969 Proclamation could be seen as invalidating the localised 1966 Proclamation (for Sarawak), and likewise the subsequent 1977 Proclamation (for Kelantan) could not be said have superseded that of 1969. The *Teh Cheng Poh* principle applies only where a new Proclamation covers the same area and the same subject-matter as a previous one.[66]

There are dicta in *Teh Cheng Poh* which arrogates to the judiciary extremely wide powers to supervise the exercise of executive discretion, but it may be reading too much from the decision to conclude positively that as a result a Proclamation could be declared invalid outside the confines of the principle discussed above. Directing attention to the Yang DiPertuan Agong's discretionary power to proclaim a security area (a statutory power under section 147 of the Internal Security Act, 1960), the Board expressed the view that "as with all discretions conferred upon the Executive by Act of Parliament, this did not exclude the jurisdiction of the court to inquire whether the purported exercise of the discretion was nevertheless

[64] *Op. cit.*, 53. Opinion delivered by Lord Diplock.

[65] *Id.*

[66] Cf. the more cautious comment in Sheridan & Groves, *Constitution of Malaysia*, *supra.*, 370. The authors suggest that the 1977 Proclamation may have revoked the 1969 Proclamation "either as to the whole of Malaysia or as to the state of Kelantan." It seems doubtful whether this view can be supported on a proper reading of *Teh Cheng Poh*.

ultra vires. . .'[67] Where the conditions warranting the proclamation of a security area ceased to be relevant, the Board was willing to regard any failure to initiate action to revoke the proclamation as an abuse of power, stating:

> Apart from annulment by resolutions of both Houses of Parliament it [the statutory proclamation] can be brought to an end only by revocation by the Yang DiPertuan 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 courts powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power to revoke would be an abuse of his discretion. . . mandamus could, in their Lordships' view be sought against members of the Cabinet requiring them to advise the Yang DiPertuan Agong to revoke the Proclamation.[68]

It is tempting to extrapolate this wide dicta to the control of discretionary power conferred directly by the Constitution, such as the power to proclaim a state of emergency under Article 150(1), but it is certainly against the tenor of *Teh Cheng Poh* itself, and the weight of past judicial decisions, to regard a Proclamation of Emergency as justiciable in this sense. There was no attempt in *Teh Cheng Poh* to equate principles applicable to the control of statutory powers with those relating to direct constitutional powers.

In line with the cases showing judicial reluctance to consider a Proclamation of emergency as justiciable are cases considering an ancillary question, namely whether the duty of the *Yang DiPertuan Agong* to summon Parliament, "as soon as may be practicable"[69] after such Proclamation, was open to challenge. In *Public Prosecutor* v *Ooi Kee Saik*,[70] the failure of His Majesty to summon Parliament as soon as possible, it was argued, resulted in the invalidation of an emergency ordinance (on the facts Ordinance No. 45 which amended the Sedition Act, 1948) since by constitutional requirement an ordinance had merely a temporary existence and must obtain legislative sanction upon the summoning of Parliament. His Majesty had waited twenty-two months after the 1969 Proclamation to do so. This argument was shortly dismissed, the matter being categorised as "above judicial review".[71] His Majesty was regarded as the sole judge on the question when Parliament could possibly be summoned. The same response can also be found in *Melan Abdullah* v *Public Prosecutor*,[72] the

[67][1979] 1 M.L.J. 50, 53.

[68]At p 55. Mandamus issues against the Cabinet since in this connection the *Yang DiPertuan Agong* must act on Cabinet advice.

[69]Article 150(2).

[70][1981] 2 M.L.J. 108.

[71]*Ibid.*, 113; per Raja Azlan Shah J. (as he then was).

[72][1971] 2 M.L.J. 281.

judge expressing the view that he did not think the court was "competent" to decide the issue.[73] This abdication of judicial review, like the refusal to regard a Proclamation of Emergency as justiciable, in effect meant a broadening of the power to legislate by ordinance without the interposition of speedy Parliamentary supervision. The issue is of course now academic since the 1981 amendment has abolished the constitutional duty to summon Parliament as soon as may be practicable, though when Parliament is in session an ordinance must still be laid before both Houses.[74]

(c) Meaning of "emergency"

The reluctance to regard a Proclamation of Emergency as justiciable (excepting *Teh Cheng Poh*) has to be related to the view judges have taken as regards the emergency concept itself. The cases show an inclination to read the term very widely, with consequent effect on the efficacy of judicial review. Reference in this connection may be made to the dissenting judgment of Ong Hock Thye C.J. in *Ningkan* where the issue of justiciability was conceded, but nevertheless the contested Proclamation was upheld because the political crisis surrounding the leadership struggle in Sarawak was regarded as producing a grave emergency. Even if a Proclamation is regarded as justiciable, it is accurate to conclude, as one commentator does,[75] that a broad concept makes any allegation of *mala fides* difficult to prove.

In *Bhagat Singh* v *King Emperor*[76] (an appeal from India) the Privy Council described a state of emergency thus: "A state of emergency is something that does not permit of any exact definition: it connotes a state of matters calling for drastic action".[77] That the concept is not necessarily limited only to actual violence, or threat of violence, or breach of the peace is clearly illustrated by the *Ningkan* case. Lord MacDermott in the Privy Council, while conceding that "emergency" under Article 150(1) must not only be grave but also such as to threaten security or economic life, gave the term its natural meaning as to cover "a very wide range of situations

[73] *Ibid.*, 283; per Ong C.J. (Malaya).

[74] In this connection also, see the following cases on the proper meaning of "when Parliament is sitting": *Public Prosecutor* v. *Khong Teng Khen* [1976] 2 M.L.J. 166 ("means sitting and actually deliberating"); *Fan Yew Teng* v *Public Prosecutor* [1975] 2 M.L.J. 235 (includes "when Parliament has been dissolved and the general election to the new Parliament has not yet been completed:); *Ooi Kee Saik*, *supra*, ("when Parliament is prorogued or dissolved"). The issue is of course very significant since ordinance-making power is exercisable only when Parliament is not "sitting". These judicial attempts at clarification are now overriden by the 1981 Amendment.

[75] See Jayakumar, "Emergency Powers in Malaysia", *supra* 339.

[76] A.I.R. 1931 P.C. 111.

[77] Approved in *Stephen Kalong* v *Government of Malaysia* [1968] 2 M.L.J. 238 (Privy Council), at p 242.

and occurrence, including such diverse events as wars, famines, earthquakes, floods, epidemics and the collapse of civil government."[78]

The recent amendment in 1981 has further expanded the concept by adding a threat to "public order" as another permissible purpose, and allows a state of emergency to be proclaimed before the actual occurrence of the event threatening security, economic life or public order provided there is imminent danger that such event will occur.[79] This legislative extension of the concept may perhaps be considered as adding little to the sweeping scope accorded to the concept by judicial articulation, since the overall tenor of the *Ningkan* clarification is itself extremely broad; the line between the existence of an emergency and an imminent danger thereof may be indeed thin.

Reference may also be made in this connection to *Government of Malaysia* v *Mahan Singh*[80] where Lee Hun Hoe C.J. seemed to merge the common law doctrine of necessity with emergency powers under Article 150. In his Lordship's opinion, Article 150 gave wide powers to the *Yang DiPertuan Agong* ("so wide that he could in the interest of the nation. . . act as he though fit."[81]) leading consequently to the following result:

> All acts done by His Majesty. . . in an emergency were dictated by necessity and so long as they were done in good faith the courts could not question them for the simple reason that in an emergency state necessity and interest were of paramount importance over individual rights. . . 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 take for granted.[82]

Although his lordship put the matter in such wide terms, invoking the doctrine of state necessity in support, the judgment also made clear that *mala fide* acts could be reviewed. This judgment is therefore both expansive and restrictive. However, even assuming review of *mala fide* acts may be supported, to analyse emergency powers in terms of state necessity opens up many possibilities which create their own problems.

"State necessity" as a juridical concept has appeared in cases involving (a) an assumption of power by revolution; (b) an assumption of power by established military authorities where a breakdown of constitutional machinery occurs; and (c) an assumption of power by military authorities in the face of civil war or insurrection.[83] The last category refers to the

[78] *Id.*

[79] See discussion, *supra*, p. 92.

[80] [1975] 2 M.L.J. 155 (Federal Court).

[81] *Ibid.*, 165.

[82] *Id.*

[83] See e.g. Leslie Wolf-Phillips, *Constitutional Legitimacy: A study of the doctrine of necessity*, Third World Foundation Monograph 6, 3. The author does not, however, separate categories (b) and (c) as outlined above.

classical martial law situation where necessity is invoked to justify rule by the military in place of normal civil authorities. The second category may include the third, but whereas normal martial law does not have the effect of replacing an existing constitution and merely suspends it for the duration of martial law, the second category may well lead, by invocation of state necessity, to a permanent change in constitutional structure. Assumption of power by revolutionary means, the first category, would refer to a forcible take-over of state power as, for instance, in a *coup d'etat*.[84]

It is not clear whether *Mahan Singh* really attempts to incorporate principles of martial law, as applicable at common law, to expressly sanctioned emergency powers, and if so, to what extent. The concepts of "emergency" and "martial law" may perhaps be better understood as juridically separate, such that cases concerning state necessity are only obliquely relevant in clarifying the scope of Article 150. A distinction is called for since "martial law" is much broader, and the consequent powers under it more extensive. To premise the scope of emergency powers under the Malaysian Constitution on state necessity may perhaps lead to a clouding of these two separate concepts, though admittedly circumstances which warrant martial law may also be dealt with by proclaiming a state of emergency as the concept of emergency is broad enough to cover such circumstances.[85] Neverthelss, controls over emergency powers, brought into being by written constitutional provisions, are different in nature and extent as compared with those relating to martial law. For instance, while under martial law it may be that courts cannot question the acts of the military authorities, even if such acts contravene fundamental rights,[86] under emergency powers judicial controls are either extended or limited according to express or necessarily implied constitutional or statutory provisions. Control of martial law looks to common law and the argument based on state necessity, whereas in the case of emergency powers written constitutional or statutory provisions are determinative.

(d) Ordinances, Emergency Acts and Delegated Legislation

It is noted earlier that ordinances, and Acts passed under emergency powers, if declared to be necessary to deal with an emergency, are valid even if they contravene provisions of the Constitution, except such matters as are insulated under clause (6A) of Article 150. However, an ordinance can only be promulgated by the *Yang DiPertuan Agong* during

[84] i.e. an assumption of power in a way not sanctioned by the pre-existing constitution.

[85] It is an interesting question whether martial law can exist outside the framework of a written constitution which does not provide for it.

[86] See e.g. *Marais* v *General Officer Commanding* [1902] A.C. 109 (Privy Council); *Re: Clifford and O'Sullivan [1921] 2 A.C 109 (H.L.) cf. Egan* v *Macready* [1921] 1 I.R. 26,265. *Marais* also established the rule, that acts of the military, if *mala fide*, could be reviewed after martial law had lapsed, unless an Act of Idemnity was passed.

the period before the Houses of Parliament sit. Legislative power in an emergency is therefore shared betwen the executive and the legislature, subject to the provision requiring ordinances to be laid before Parliament when the latter is summoned and sitting.

Several related problems have arisen concerning the following matters:

(a) whether such ordinance or Act can be so broadly phrased and confer extensive powers to the executive so as to amount to an excessive delegation or abdication of power by the legislature;
(b) whether delegated legislation can be passed under an enabling ordinance or Act and nevertheless remains valid despite being inconsistent with constitutional provisions;
(c) whether such delegated legislation, if provided under an ordinance, can still be made after Parliament has sat; and
(d) whether such ordinance or Act is justiciable on the ground that it is not necessary for purposes of the emergency.

(i) Excessive delegation

The wording of Article 150(6), which allows the passing of Acts and ordinances inconsistent with any provision of the Constitution (except matters specified in clause (6A)), is extremely broad. Only two limitations on emergency legislative power appear clearly from the text, namely (a) the law must be passed while a Proclamation of Emergency is in force, and (b) the law, if an Act, must include a declaration that it appears to Parliament to be required by reason of the emergency. If these are the only limitations on the passing of an Act or ordinance, judicial review is therefore reduced to a minimum. In a crop of cases since 1966, the courts have been persuaded to in effect read some implied limitations on emergency legislative power. It has been argued that, wide though the power may be, it is subject to the general principle that there can be no excessive delegation of legislative power. The cases have proceeded on two general lines of argument: (a) it is not constitutionally permissible for Parliament or the *Yang DiPertuan Agong*[87] to pass an Act or ordinance, which delegates legislative power to some other body, without setting out some "policy", "scope" and "standard" within which such delegated power has to be exercised, and (b) the delegation must not be so wide as to amount in effect to an "abdication" or "abrogation" of power in favour of the delegate on the part of Parliament or the *Yang DiPertuan Agong*. Indeed, there is a third line of argument, premised on the maxim *delegatus non potest delegare*, which holds that since Parliament and the *Yang Dipertuan Agong* are themselves delegates under the Constitution, no sub-delegation under the guise of emergency power is permissible.

[87]His Majesty is relevant here because, as previously noted, primary legislative power vests with the *Yang DiPertuan Agong* too in an emergency.

The controversy over the breadth of legislative power in the context of delegated legislation has similarly arisen in India and the United States, and the position taken in both countries has been in favour of reading implied limitations on legislative power. Delegation is permitted so long as the enabling legislation contains some policy, scope or standard which binds the delegate. The formulation of policy is regarded as an "essential legislative function" and that the legislature cannot relinquish in favour of the delegate.[88]

In Malaysia the above arguments have not been totally accepted by the courts so far as emergency powers are concerned. For example, in *Eng Keock Cheng* v *Public Prosecutor,*[89] the first reported case on the issue, the maxim *delegatus non potest delegare* was held not applicable to limit the power of Parliament under the Constitution of Malaysia since in no sense was the Parliament of Malaysia a delegate. By Article 44 of the Consitution, the legislative power of the Federation is "vested" in Parliament and "from no point of view can Parliament be said to be exercising a delegated power when it exercises its power to legislate by Act of Parliament given to it under the Constitution, not even when it is exercising a power to amend the Constitution or to provide contrary to provisions of the Constitution."[90] On the question of the abdication of legislative power, however, the Federal Court seems to suggest a willingness to incorporate the requirement that an enabling Act conferring extremely wide powers must set out some scope or policy.

Section 2(4) of the Emergency (Essential Powers) Act, 1964, passed during the state of emergency proclaimed in 1964, provided that any essential regulation, order, rule or by-law made under the Act was to have effect "notwithstanding anything inconsistent therewith contained in any written law other than [the] Act or in any written instrument having effect by virtue of any written law other than [the] Act." The appelant was tried under the Emergency (Criminal Trials) Regulations, 1964 which denied him the normal rules of criminal procedure, specifically the right to a preliminary inquiry and a jury. The Regulations left it to the discretion of the Public Prosecutor whether or not to certify a case as one to be tried in accordance with these Regulations. The Act enabled the Public Prosecutor to exercise a discretion under subordinate legislation which conflicted with Article 8 and yet, by the terms of the Act, remained valid. That result, it was argued, Parliament could not allow. Under the Constitution there was no provision for Parliament to delegate extensive powers to a subordinate authority to legislate contrary to the Constitution. Further, the enabling Act was

[88]See Jain & Jain, *Principles of Administrative Law,* (1979), 29-52 for a lucid statement of the Indian position. For U.S. law see e.g. Schwartz, *Administrative Law* (1976), 31-47. The U.S. position has a different dimension since Congress is treated as a delegate under the Constitution and the maxim *delegatus non potest delegare* applies. Doctrinally, Congress must retain its "primary" legislative function, leaving the delegate to exercise a "secondary"-one.

[89][1966] 1 M.L.J. 18 (Federal Court; Barakbah C.J. (Malaya), Wylie C.J. (Borneo), Tan Ah Tah F.J.).

[90]Per Wylie C.J. (Borneo) at p. 20.

so widely couched as to amount to an abrogation by Parliament of its legislative power.

The Court had little difficulty in disposing of the first contention, holding:

> 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.[91]

As for abdication or abrogation of legislative power, the Federal Court, although conceding that the Act enabled delegated legislation to be made covering a very wide area, managed nevertheless to find a saving "policy" or "scope" in section 2(1) of the Act which empowered the executive to make Essential Regulations which were "considered desirable or expedient for securing the public safety, the defence of the Federation, the maintenance of public order and supplies and services essential to the life of the community."

Although *Eng Keock Cheng* may be regarded as a case favourable to the doctrine of excessive delegation since the Federal Court referred to the ability of Parliament to delegate *part* of its legislative power, as opposed to the whole, and found a policy or scope controlling the delegated legislation, it is difficult to appreciate how a power under Article 150 can be controlled and invalidated in this manner. The Indian authorities on delegated legislation were held not entirely applicable since the Constitution of India does not contain a provision similar to Article 150(5), and the ease with which the Court found a suitable scope or policy within the extremely broad words in the Act of 1964 exemplifies how ineffective the doctrine can be in the context of emergency powers.

Eng Keock Cheng was followed two years later by *Osman* v *Public Prosecutor,*[92] a Privy Council decision, where the correctness of the view in the former seemed to have been assumed. Instead, counsel for the appellants adopted a different strategy, namely to limit the interpretation of the Emergency (Essential Powers) Act, 1964 as to exclude any authority to make regulations which conflicted with the Constitution. The Act allowed the making of such regulations with power to amend, suspend or modify any "written law". Contrary to the contention advanced on behalf of the appellants, the Privy Council, relying on the Interpretation and General

[91] *Id.*

[92] [1968] 2 M.L.J. 137; on appeal from the Supreme Court, Singapore. The offences concerned (bombing and murder) were committed in Singapore at the time when she was a member State of Malaysia. The law applicable to the accused was the same Emergency (Criminal Trials) Regulations, 1964, as arose in *Eng Keock Cheng*.

Clauses Ordinance, 1948, read "written law" as including the Constitution.[93]

A more illustrative case in perhaps *Government of Malaysia* v *Mahan Singh*,[94] where the issues discussed were in a sense wider than those highlighted in *Eng Keock Cheng* and *Osman*. Here a public servant had had his service terminated in the public interest, as provided under the Public Officers (Conduct and Discipline) (General Orders, Cap. D) Regulations, 1969. The "Chapter D" Regulations were made under emegency powers invoked as a result of the serious racial incident of May 13th 1969. These Regulations were made not by the *Yang DiPertuan Agong* but by a Director of Operations, and the termination of service complained of had been decided on by the latter instead of the former, as should have been the case under normal constitutional requirements. It was argued, *inter alia*, that the delegation of law-making power to the Director of Operations was unconstitutional as amounting to an abdication of power by the *Yang DiPertuan Agong*. By the same token, the Regulations were void and the applicant's termination of service could not be supported.

The constitutional issues raised were therefore highly significant, although a greater part of the judgments in *Mahan Singh* dealt with the law relating to public service under the Constitution.[95] The delegation effected in 1969 was extremely broad and presented as near a position to abdication of power. Yet the delegation was upheld.

Following the outbreak of serious racial riots, a state of emergency was proclaimed on May 15th, 1969. Elections to the House of Representatives had not then been completed and therefore no Parliament was sitting or capable of being summoned to sit. On the same day the Proclamation was issued, the *Yang DiPertuan Agong* passed the Emergency (Essential Powers) Ordinance No. 1[96] Section 2(1) of the Ordinance authorised His Majesty (the executive) to make essential regulations which he considered 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.[97] Sub-section (3) declared that such essential

[93]See in this connection Article 160(1) and the 11th Schedule which allow recourse to be made to the Ordinance of 1948 for purposes of constitutional interpretation.

[94][1975] 2 M.L.J. 155 (Federal Court; Suffian L.P., Lee Hun Hoe C.J. (Borneo), Ong Hock Sim F.J.).

[95]Se Part X of the Constitution, especially Article 135 (restriction on dismissal and reduction in rank). Case-law has drawn a distinction between "dismissal" and "termination". In the case of the former, natural justice principles and other procedural safeguards apply; these are not relevant in a "termination" case where the terms of the contract are determinative. As noted earlier, *Mahan Singh* concerns "termination".

[96]See P.U.(A) 146.

[97]Sub-section (2) particularised certain matters (without prejudice to the generality of the power under sub-section (1)) on which such regulations could be made, and ended with an extremely wide provision: "(p) provide for any other matter in respect of which it is in the opinion of the Yang DiPertuan Agong desirable in the public interest that regulations should be made."

regulations could in turn provide for a sub-delegation of rule-making power on some other authority or person. Sub-section (4) further provided that such delegated and sub-delegated legislation were to have effect "notwithstanding anything inconsistent therewith contained in any written law, including the Constitution or the Constitution of any State, other than this Ordinance or in any instrument having effect by virtue of any written law other than this Ordinance."[98]

A day later (May 16th), the Emergency (Essential Powers) Ordinance No. 2 was promulgated by His Majesty[99] under Article 150(2), delegating the executive authority of Malaysia to a Director of Operations, a person designated by the *Yang DiPertuan Agong*.[1] The Director of Operations, acting in accordance with the advice of the Prime Minister, was to exercise and be responsible for the exercise of the executive authority of Malaysia. Article 40[2] of the Constitution was not to apply to the exercise of the delegated executive authority.[3] Under section 8, the Director of Operations was empowered to make essential regulations under section 2 of the Ordinance No. 1 "for any or all of the purposes as set out in that section." In exercise of this power, the Director made the "Chapter D" Regulations, under which the applicant in *Mahan Singh* had had his service terminated.[4]

Eng Keock Cheng, with its apparent holding that the *Yang DiPertuan Agong* could delegate only part of his power, was referred to by the Federal Court, but this narrower view was rejected. Both Suffian L.P. and Lee Hun Hoe C.J. (Borneo) were clearly of the opinion that if His Majesty could delegate part of his power, he may indeed delegate all of it. The judges could not see any "abdication" of power in the extensive delegation to the Director of Operations, since His Majesty could still be regarded as retaining a final measure of control. As held by Suffian L.P.:

> . . .after promulgating Ordinance No. 2 of 1969 His Majesty remained Yang DiPertuan Agong, still retained such power as he might have wished to exercise, and indeed has since then. . .in exercise of his royal power repealed that Ordinance.[5]

[98] In 1970, some thirty-six Essential Regulations were made under section 2 and these covered a wide area. See e.g. Essential (Disposal of Dead Bodies and Dispensation of Inquests and Death Inquiries) Regulations; Essential (Directions to the Public Services) Regulations; Essential (Newspapers and Other Publications) Regulations; Essential (Clearance of Squatters) Regulations; Essential (Modification of Registration of Dentists Ordinance, 1948) Regulations; and Essential (General Orders, Chapter D) Regulations.

[99] P.U.(A) 149.

[1] Section 2(1).

[2] i.e. containing the rule that the Yang DiPertuan Agong has to act on Cabinet advice and outlines the scope and instances of His Majesty's discretionary powers.

[3] Section 2(2).

[4] In effect these Regulations suspended the older "Chapter D" Regulations of 1968 and replaced them.

[5] At p 161.

Similarly, Lee Hun Hoe C.J. (Borneo) supported the delegation "because he [the Yang DiPertuan Agong] still retained certain constitutional powers which he alone could exercise."[6] In his lordship's opinion, the argument seeking to invalidate the delegation (in essence a contention that the delegation conflicted with the Constitution) could not at all be supported by virtue of Article 150(6). If, by this provision, legislation could be passed and remained valid despite any constitutional inconsistency, it would be "otiose" to consider whether the delegated legislation made by the Director of Operations conflicted with the Constitution.[7]

Both *Eng Keock Cheng* and *Mahan Singh* are Federal Court decisions, and therefore the true position as regards the doctrine of excessive delegation in Malaysia remains in doubt since it is not at all clear whether the earlier decision is not regarded as having been qualified by the latter.[8] However, even on a generous view of the *Eng Keock Cheng* decision, judicial control over delegation of emergency powers cannot truly be said be highly significant. Even in non-emergency situations, judicial experience in India and the United States has shown how the insistence on a proper "standard", "policy" or "scope" in the enabling legislation has been demonstrated to be little more than a mere matter of form, rather than substance.[9] Courts are generally more willing to uphold a legislation and strive to find a suitable "standard", even though such standard may be formulated in wide, and therefore vague, terms. In Malaysia, the existence of such judicial willingness, coupled with the express constitutional licence under Article 150(6), renders the ineffectiveness of an excessive delegation doctrine perhaps that more evident.

(ii) Subsidiary legislation conflicting with constitutional provisions

Related to the discussion on excessive delegation above is the issue whether, under the express terms of the Constitution, a delegated or subdelegated legislation, even if allowed generally under Article 150, can be made and remain valid inspite of being inconsistent with constitutional provisions. The cases referred to above have been shown to offer an affir-

[6] At p 164.

[7] *Id.*

[8] Subsequent cases have appeared to treat *Eng Keock Cheng* as the ruling decision, without sufficient attention being accorded to *Mahan Singh*. See e.g. *N. Madhavan Nair* v *Government of Malaysia* [1975] 2 M.L.J. 286; *Public Prossecutor* v *Khong Teng Khen* [1976] 2 M.L.J. 166.

[9] See e.g. Schwartz, *Administrative Law* (1976) 37. In the U.S. case of *New York Central Securities* v *United States* 287 U.S. 12 (1932), "in the public interest" was held to accord a sufficient standard. Also, *Amalgamated Meat Cutters* v *Connally* 337 F. Supp. 737. For instances where the U.S. Supreme Court struck down legislation for excessive legislation, see *Schechter Poultry Corp.* v *United States* 295 U.S. 495 (1935) and *Panama Refining Co.* v *Ryan* 293 U.S. 388 (1935). For Indian law, see e.g. Shukla, *The Constitution of India*, (6th ed. 1975), 402-411. Relevant case-law include *In Re Delhi Laws* Act [1975] S.C.R. 747, *Rajnarain Singh* v *Chairman P.A. Committee* [1955] 1 S.C.R. 290, where delegations were invalidated.

mative answer, but there the issue was co-mingled with the larger question of excessive delegation. It is, however, possible to perceive the issue as somewhat separate and argue on the basis of the express wording of Article 150(6). Under this provision, "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".[10] It can therefore be plausibly argued that since the clause makes express reference to an "ordinance" and an "Act of Parliament", only these can retain their validity inspite of any constitutional inconsistency."[11] Indeed, this was one of the arguments advanced before the Federal Court in *Public Prosecutor* v *Khong Teng Khen*.[12] Suffian L.P. found no merit in this argument, and reading clauses (2) and (6) in conjunction, decided against this attempt to limit the power of the executive to pass extremely wide regulations under emergency powers.

It is questionable whether a proper reading of Article 150(6) necessarily results in a conclusion adverse to the conferment of legislative power on the executive to pass subsidiary legislation which conflict with the Constitution. On its wording, *any* ordinance and *any* Act of Parliament, passed in an emergency, remain valid. In the case of an Act, for example, the clause requires that the law must appear to Parliament to be required by reason of the emergency. Parliament may deem it "required by reason of the emergency" to enable the executive to possess extensive legislative power to make emergency regulations which may conflict with the Constitution. The Act itself remains unimpeachable and regulations made, if at variance with the Constitution, are technically *intra vires* the Act. To argue that these regulations can nevertheless be struck down as being violative of the Constitution leads to an unusual result which perhaps can be supported only on a strained interpretation of clause (6) together with *inferences* drawn as to the role of Parliament in an emergency.

The holding in *Khong Teng Khen* on this particular point may be regarded as correct and fits into the general scheme of emergency powers in Malaysia. Final, as well as supervisory, control remains with Parliament, but the scheme envisages extremely wide powers being conferred on that institution, to include the power to authorise the making of delegated legislation which conflict with constitutional provisions, if such appears to Parliament to be required by reason of the emergency. This analysis ought to

[10] This is, of course, made subject to clause (6A). Emphasis added.

[11] See e.g. Jayakumar, "Constitutional Limitations on Legislative Power in Malaysia," (1967) 9 Mal. L. Rev. 96, at p. 113: ". . .considering the entire tenor of Article 150 noting the grave consequences that will arise from the exercise of these powers, the proper interpretation of Article 150 must be that if any rule needs to be promulgated which overrides constitutional provisions, it is Parliament alone which may undertake this task."

[12] [1976] 2 M.L.J. 166, 170.

apply *mutatis mutandis* to ordinances promulgated by the *Yang DiPertuan Agong* since these have to be laid before Parliament. Where an ordinance allowing wide regulations to be made is not annulled upon laying, it may be presumed that Parliamentary sanction to the grant of delegated legislative power is thereby given.[13]

(iii) Delegated legislation made under enabling ordinance after the sitting of Parliament

The preceding discussion has shown how the Constitution of Malaysia has been interpreted so as to allow the making of emergency delegated legislation which may be very extensive in scope, even to the extent of overturning normal constitutional prohibitions on state power. The argument in relation to enabling Acts of Parliament is relatively clear: such Acts can delegate powers to the executive, and provided regulations made are *intra vires* these Acts, they cannot be invalidated on the mere ground of constitutional inconsistency. The position as regards regulations made under ordinances has provoked different responses and display a cleavage of opinion between the Federal Court and the Privy Council. Although regulations may be made under an ordinance, and, despite any constitutional inconsistency, remain valid, it has been held in *Teh Cheng Poh* v *Public Prosecutor*[14] that such regulations cannot continue to be made after Parliament has sat. In *Khong Teng Kheng*,[15] however, a contrary holding was reached.

Khong Teng Khen considered the validity of the Essential (Security Cases) Regulations, 1975 and the associated Essential (Security Cases) (Amendment) Regulations of the same year. The accused were tried and convicted of offences under section 57(1) of the Internal Security Act, 1960, which fell within the category of "security offence". The trial was therefore conducted not in accordance with ordinary criminal procedure and evidence but under the rules prescribed by the 1975 Regulations. These Regulations were made under the Emergency (Essential Powers) Ordinance, 1969, but whereas the Ordinance was promulgated during the period when Parliament was not sitting, the Regulations were not so made. Parliament had

[13]The view advanced by Jayakumar, *op. cit*, that it is Parliament alone which can pass any rule which conflicts with the Constitution perhaps takes an optimistic view of the capabilities of Parliament to deal with the myriad problems arising in an emergency, especially where the situation is a grave one. Under some emergency circumstances, it may indeed not be possible to summon Parliament with speed, or if so summoned, to expect the body to perform its legislative function with an attention to details. It is more realistic to confine Parliamentary role in the circumstance to a general supervisory one. The advantages of speed and flexibility, so demanded in an emergency, can be better achieved by delegated legislation which may conflict with the Constitution, if such is thought necessary to deal with the emergency, provided the parent legislation lays down some standard or guideline.

[14][1979] 1 M.L.J. 50 (Privy Council).

[15][1976] 2 M.L.J. 166.

been summoned, after a period of suspension of Parliamentary rule, and had been sitting since February 1971.

The Federal Court's attention was drawn to Article 150(2) which required the Yang DiPertuan Agong, after proclaiming a state of emergency, to summon Parliament as soon as may be practicable. It was only during the interval between the proclamation and the sitting of Parliament that the executive could promulgate ordinances and make regulations thereunder. Where Parliament had sat, that body alone possessed the power to allow the making of regulations which could even conflict with the Constitution. In other words, the enabling power under an ordinance, laid before that body and not subsequently revoked or annuled, could not be relied on to permit the executive to pass regulations once Parliament had sat.

The Federal Court, by a majority,[16] regarded the issue whether Parliament had or had not sat as irrelevant.[17] By a curious reasoning, the majority held in favour of the Regulations' validity since these were made not under Article 150(2) but under section 2 of the Ordinance. As argued by Suffian L.P.:

> His Majesty has power to make Ordinances under clause (2) of Article 150 only when Parliament is not sitting. In the case of regulations under section 2 of the Ordinance they may be made by His Majesty whether or not Parliament is sitting.[18]

This attempt at validating regulations made by the executive by looking more at the terms of an ordinance, rather than the relevant enabling constitutional provision, leads to the following result: ordinances can only be made before Parliament has sat, but regulations (made by the same repository of power, namely the executive) can still be made after the sitting of Parliament, provided the ordinances contain the requisite enabling provision; thus, where an ordinance allows the making of regulations which conflict with fundamental rights, these may be made many years later[19] without the need for any other Parliamentary sanction aside from the earlier laying requirement made mandatory for an emergency ordinance. As suggested earlier in this section fulfilment of the laying requirement may be argued as according an *implied* Parliamentary saction that wide-ranging regulations could still be made under an ordinance without further Parliamentary scrutiny. However, the majority argument in the Federal Court approached the problem from a narrower premise, almost to the extent of regarding Article 150(2) as irrelevant so far as regulations were concerned.

[16]Ong Hock Sim F.J. dissenting.

[17]See Suffian L.P. at p 169. Wan Suleiman F.J. agreed, at p 176.

[18]*Id.*

[19]The 1975 Regulations, for example, were made six years after the Proclamation of a state of emergency and four years after Parliament began sitting.

The same question was brought before the Privy Council in *Teh Cheng Poh*[20] where a different answer, relying more on the general scheme underlying Article 150(2), was given. In the Board's view, the power to promulgate ordinances was exercisable only until both Houses of Parliament were sitting, and thereafter any law required by reason of the emergency must be made by Parliament in the exercise of the legislative authority of the Federation under Article 44 of the Constitution. Once Parliament had sat, the power to legislate by ordinance did not revive, even during periods when Parliament was not sitting,[21] unless a new Proclamation of Emergency was issued by the Yang DiPertuan Agong. Likewise, regulations could not be made under an ordinance after Parliament had sat, the Board holding that it "must look behind the label to the substance." The Board expressed in strong terms:

> There are only two sources from which the Yang DiPertuan Agong as such can acquire power to make written law, whatever label be attached to it: one is by a provision of the Constitution itself; the other is by the grant to him of subordinate legislative power by an Act passed by the Parliament of Malaysia in whom by Article 44 of the Constitution the legislative authority of the Federation is vested. So far as his power to make written laws is derived from Article 150(2) of the Constitution itself, in which they are described as "ordinance", 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's lifting itself by its own boot-straps. If it be thought expedient that after Parliament has first sat the Yang DiPertuan Agong should continue to exercise a power to make written laws equivalent to that to 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.[22]

The Essential (Security Cases) Regulations, 1975, made after Parliament had sat, were therefore declared unconstitutional and void. The judgment itself, however, did not go so far as to deny any rule-making power on the part of the executive after Parliament had sat; it was expressly acknowledged that such delegated power could be permitted, provided it was achieved by an Act of Parliament.[23] The thrust of the argument in this case is as follows: the power to promulgate ordinances and regula-

[20] [1979] 1 M.L.J. 50. Se Lord Diplock at p 51: "The instant appeal is. . ., in effect, an appeal against conclusions of law to be found in the judgment of the Federal Court in *Khong Teng Khen's* case as well as in the instant case."

[21] Presumably including the circumstances when Parliament is in recess or prorogued.

[22] *Id.*

[23] That such regulations could conflict with constitutional provisions was also agreed; *Osman* v *Public Prosecutor* [1968] 2 M.L.J. 137 approved (at p 53).

tions thereunder lapses after Parliament begins its sitting, and thereafter only Parliament could make laws, or authorise the executive to make subsidiary legislation, to deal with an emergency situation. By this reasoning, preference should be given to the primary legislative authority which, by Article 44, is vested in Parliament. The power reposed in the executive to promulgate ordinances and delegated legislation thereunder is a temporary expedient which is displaced when Parliament is summoned and sitting. Rules made prior to the period when Parliament begins sitting are saved, even if these are made under ordinances, but thereafter the executive cannot purport to exercise any legislative power unless expressly authorised by the proper legislative body, Parliament.

As a case on emergency powers, *Teh Cheng Poh* is a striking illustration of a rarely-seen interventionist approach, and its invalidation of the Essential (Security Cases) Regulations, 1975 affected not only the immediate case but a host of other criminal cases similarly tried under the Regulations. The Privy Council decision cannot, however, be seen as a simple invalidation of an unconstitutional law since other views were expressed on the powers of the Attorney-General to charge persons under the Internal Security Act. On the facts, the accused had been charged, under section 57(1) of the Act, with possession of a firearm and ammunition, an offence carrying the death penalty. The exact charge related to possession of firearm and ammunition in a "security area," brought into being by a proclamation made by the Yang DiPertuan Agong under Part II of the Act. Special laws applied to offences committed in a security area, to include section 57 of the Act which made the death sentence mandatory in firearms cases. Although there were other less drastic laws[24] in existence which covered these offences, the Board held that the Attorney-General had no choice but to charge these offences under section 57 of the Act if they were committed in a security area[25] Therefore, in reversing the Federal Court decision, the Privy Council in fact regarded the *trial* as a nullity (since the procedure followed was that prescribed under the invalid 1975 Regulations), but held the *charge* (section 57(1), Internal Security Act) valid. The case was then remitted to the Federal Court for further consideration as to whether or not to order a new trial.

e) The Aftermath of *Teh Cheng Poh:* Emergency (Essential Powers) Act 1979[26]

[24] i.e. Arms Act, 1960; Firearms (Increased Penalties) Act, 1971.

[25] At p 56. Nevertheless, the Board agreed that the discretionary power of the Attorney-General to prosecute was a wide one. This discretion extended to the framing of charges for a lesser or greater offence. Article 8(1) could not be regarded as having been infringed thereby: "All that equality before the law requires is that the cases of all potential defendants to criminal shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute for a particular offence should not be dictated by some irrelevant consideration."

[26] See Sheridan & Groves, *Constitution of Malaysia,* (3rd ed., 1979) 370-373, for a useful account and brief background of the Act.

The Privy Council decision prompted a legislative response by way of the Emergency (Essential Powers) Act, 1979, enacted under Article 150(5), with a long title reading: "to enact as an Act of Parliament the Emergency (Essential Powers) Ordinance, 1969, and to provide for the validation of all subsidiary legislation made or purporting to have been made under the said Ordinance on or after February 20th, 1971, and for the validation of all acts and things done under the the said Ordinance or any subsidiary legislation made or purporting to have been made thereunder. . ." The Emergency (Essential Powers) Ordinance, 1969 (the parent legislation under which the disputed Essential (Security Cases) Regulations, 1975 were made) itself was repealed,[27] but the Act reproduced the substantial rule-making powers of the Ordinance[28] and further provided for the validation of regulations made under the Ordinance, whether before or after Parliament had sat, and these were deemed to have been made under the Act.[29] Additionally, these regulations could be amended, modified or repealed as it they had been made under provisions of the Act.[30] By section 9(3) it was enacted:

> Any prosecution instituted, trial conducted, decision or order given, in respect of any person in any court or any other proceeding whatsoever had, or any other act or thing whatsoever done or omitted to be done, under or by virtue of the Ordinance or any subsidary legislation whatsoever made or purporting to have been made thereunder is declared lawful and hereby validated.

The legislative attempt to undermine the basis of the *Teh Cheng Poh* decision can also be seen in section 11 of the Act which reversed the view of the Board that, where a firearm offence was committed in a security area, the Public Prosecutor had no choice but to prefer a charge under section 57 of the Internal Security Act. Under sub-section (1) of the aforementioned provision, the Public Prosecutor was expressly empowered to elect to charge any person under any other law notwithstanding that the area within which an offence was committed was a security area. Sub-section (2) reinforced the general conferment of discretionary power and particularised that any charge preferred by the Public Prosecutor, before or after the commencement of the 1979 Act, under the Arms Act, 1960, the Firearms (Increased Penalties) Act, 1971, or any other law not passed under Part XI of the Constitution was declared lawful and "hereby validated". The same validation was accorded to "any *trial* conducted, or decision or order made or given, in consequence of such charge."

[27] See s 13(1) of the 1979 Act.

[28] S. 2.

[29] S. 9(1); s. 13(2).

[30] S. 9(2); s. 13(2).

Whereas the Board in *Teh Cheng Poh* was willing to consider the invalidation of a security area proclamation, upon a proper application, the 1979 Act denied the courts jurisdiction to consider the matter by providing:

> s. 12No 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 DiPertuan 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.

However, in partial deference to the Board's decision, appeals already heard by the Federal Court which had resulted in a confirmation of a verdict of guilty to a charge framed under the Internal Security Act, and tried according to the procedure specified by the Essential (Security Cases) Regulations, were provided with a procedure for review. Within thirty days after the publication of the Act (or such further time as may be allowed), the Public Prosecutor or the unsuccessful appellant could apply to the Federal Court to have the case reviewed, and the court was to have jurisdiction to make such order as it deemed fit.[31]

Not surprisingly, the Act was challenged, but the clear view emerging from the Federal Court has been in favour of regarding Parliament as having the power to enact such legislation with retrospective effect, and, on the wording of the Act, as not enacting in a manner amounting to an assumption of judicial power. In the subsequent case bearing the same title, *Teh Cheng Poh* v. *Public Prosecutor*,[32] the Court simply held:

> The regulations having been ruled to be *ultra vires*, it is open to Parliament to validate them and, further, to validate them with retrospective effect. . . It is not disputed that the Act in question deals with a federal subject with respect to which the federal Parliament has power to legislate and that under clause (5) of Article 66 of the Constitution Parliament may "make laws with retrospective effect."[33]

To the argument that the 1979 Act encroached on the judicial power of the Federation, which by Article 121 was vested in the courts, the court

[31] S. 10.

[32] [1979] 2 M.L.J. 238 (Federal Court; Suffian L.P., Raja Azlan Shah C.J. (Malaya), Lee Hun Hoe C.J. (Borneo), Wan Suleiman and Chang Min Tat F. JJ.).

[33] *Ibid.*, at p 239, per Suffian L.P. delivering the unanimous judgment of the court. Following the Privy Council decision, the conviction and sentence of the accused had been set aside. The Federal Court held that it was not possible to validate the previous conviction and sentence (since a nullity) and ordered a new trial. See also *Su Ah Ping* v *Public Prosecutor* [1980] 1 M.L.J. 75 (Federal Court; Suffian L.P., Wan Suleiman F.J. and Hashim Yeop Sani J.), where the conviction had not been quashed; *held*, it had been validated by the Emergency (Essential Powers) Act 1979 and thus subject to appeal in the ordinary way.

in *Phang Chink Hock* v. *Public Prosecutor*[34] found no ground to conclude that Parliament had by the Act attempted to decide the question of guilt or innocence of the accused, holding:

> That question has as a matter of a fact been decided by a court which was directed to follow a certain judicial procedure. There is no justification for importing a fiction that there has been no judicial trial and that it is the legislature that declares the guilt of the accused and imposes sentences on them;. . . their convictions and sentences are in due course subject to appeal and. . . in some cases subject to review.[35]

Phang Chin Hock, coming so soon after the liberal approach taken by the Privy Council, perhaps provides a timely reminder that in a conflict involving the courts and the legislature, it may be overly optimistic to expect the former to continue an activist stand in a situation where the latter has made it clear, through such Act as the Emergency (Essential Powers) Act, 1979, that it intends to upset an inconvenient judicial ruling. The route followed by the Federal Court in this case is highly illustrative. In the attempt to uphold the 1979 Act the Court manifested both liberal and cautious approaches, thought the latter was preponderant. A narrow view was of course taken as to the concept of legislative adjudication by perhaps drawing a distinction between an *indirect* legislative attempt to undermine a judicial decision and a *direct* one. The Federal Court appeared to adhere to the view that so long as the factual questions of guilt and innocence, and sentence, are still left for the courts to determine, there can be no ground to suppose a legislative transgression of judicial power. An Act is valid even if it completely alters what was earlier perceived by the courts to be correct law. Where, however, the legislature intervenes directly, as for example by denying the courts jurisdiction to try pending cases, the courts may regard the attempt as unconstitutional. This conclusion seems to follow from the Federal Court's approval of two Indian decisions: *Piare Dusadh* v. *Emperor*,[36] and *Basanta Chandra* v. *Emperor*.[37] In the first case, the legislature intervened to confer jurisdiction on the courts which had been held not to have had jurisdiction, whereas in the second the legislature provided for the discharge of proceedings challenging the validity of detention orders which were pending in the courts. The first was held a valid exercise of legislative power, the second a direct disposal of cases by the legislature itself.[38]

[34][1980] 1 M.L.J. 70 (Suffian L.P., Wan Suleiman & Syed Othman F.JJ).

[35]*Ibid*, at p 74.

[36]A.I.R. 1944 F.C.1.

[37]A.I.R. 1944 F.C. 86.

[38]See approval in *Phang Chin Hock*, at p 75.

Argument was also addressed to section 12 of the 1979 Act which, as seen earlier, denied the courts jurisdiction to determine any question on any ground regarding the validity or continued validity of any proclamation issued by the Yang DiPertuan Agong in exercise of any power vested in him by an ordinance or Act passed under Part XI of the Constitution. It was argued that the provision ousted the jurisdiction of the courts in a way as to amount to destroying a "basic structure" of the Constitution. The Federal Court read the provision as not having this effect since it covered only proclamations issued under an Act of ordinance, not however proclamations of emergency issued under the Constitution.[39] The wording of section 12, literally read, clearly supports this conclusion, but it is instructive to note how, in order to dispose the argument advanced, the Court was *impliedly* willing to consider the point that a Proclamation of Emergency, if made unimpeachable by the legislature, may well result in an ouster of jurisdiction of the courts in a constitutionally impermissible manner.[40] The reasoning is curious, but achieves a judicially desired end, namely upholding the Emergency (Essential Powers) Act, 1979. Judicial technique may sometimes use liberal arguments to support an attitude of judicial restraint. Liberal principles may be alluded to, but by reading down a challenged provision so as to avoid an unconstitutional result, the actual holding may be nearer to judicial restraint that activism.

The Emergency (Essential Powers) Act, 1979 proved to be the thin end of the wedge, for a more comprehensive revision of the law relating to emergency powers came subsequently in 1981 by way of the Constitution (Amendment) Act of the year. As seen in the preceding discussion, Article 150 of the Constitution of Malaysia generated a large body of case law, but the main theme underlying nearly all these cases has been an attitude of judicial restraint. Nowhere is this seen more clearly than in decisions handed down by the Federal Court. However, even the Privy Council in the *Ningkan* decision cleverly side-stepped the difficult question of justiciability of a Proclamation of Emergency, and validated the action of the Federal government in the circumstances of the case. The exception

[39] See also in this connection *Lim Woon Chong* v *Public Prosecutor* [1979] 2 M.L.J. 264 where the Federal Court examined whether the Proclamation of 1969 had been laid before the Senate, and in so doing rejected that it was barred by section 12 of the 1979 Act.

[40] *Phang Chin Hock* concerns an emergency Act of Parliament, not a Constitutional Amendment Act. It is doubtful if the same attitude will be expressed if the Constitution is amended with the same purpose, as has now been down, *vide* Constitution (Amendment) Act, 1981, s. 15(d). If several decisions on citizenship provisions are anything to go by, an ouster clause inserted in the Constitution itself need not necessarily lead in a total abdication of review power on the part of the judiciary. Under section 2, Part III of the Second Schedule, it is clearly provided that "a decision of the Federal Government under Part III of this Constitution shall not be subject to appeal or review in any court." The provision has been held not to preclude courts issuing orders of certiorari for jurisdictional error or even manifest error of law on the face of the record. See *Soon Kok Leong* v *Minister of Interior* [1969] 2 M.L.J. 175. Cf. *Liew Shin Lai* v *Minister of Home Affairs* [1970] 2 M.L.J. 7. Of course, qualitatively the power to affect citizenship is different from that relating to proclaiming a state of emergency (a Cabinet decision over a highly political matter), and this may disincline the courts to adopt a similar attitude.

to this line of development is *Teh Cheng Poh* which struck down the Essential (Security Cases) Regulations, 1975 as unconsitutional, and proferred some wide-ranging dicta with respect to the continuing validity to previously-proclaimed states of emergency and to the control of executive power exercised under emergency legislation generally. Even *Teh Cheng Poh* did not, in the final analysis, (if one disregards the dicta) present itself as very activist in tone, for the case did not totally disallow the executive from passing subsidiary legislation which conflicted with constitutional provisions. Indeed, it allowed that to be achieved if an enabling Act was passed after the period both Houses of Parliament began to sit, the reasoning being supported by what the Privy Council deemed to be the constitutional scheme of division of legislative powers in an emergency. In a way the Emergency (Essential Powers) Act, 1979 takes its cue from the decision, for here an Act of Parliament is passed to supersede and validate the Emergency (Essential Powers) Ordinance, 1969. However, the case presented itself as an inconvenient decision which needed speedy resolution, and, as elaborated above, the resulting legislative intervention effected changes which substantially undermined the basis of the Privy Council holding. The changes have in turn been challenged and upheld by the Federal Court as constitutional, in a manner which suggests a return to the pre-*Teh Cheng Poh* attitude of judicial restraint.

It is against the background of preponderant judicial restraint that the 1981 amendment to Article 150 has to be perhaps assessed. There were inconvenient dicta, in *Teh Cheng Poh* and dissenting judgments elsewhere, which suggested various avenues of control of emergency power, and these are now sufficiently covered by the amendment. The scheme underlying Article 150 has been clarified so as to reduce the scope of judicial review. With an attitude of judicial self-limitation already preponderant, the 1981 amendment achieves the effect of narrowing still further an already limited scope.

4. Recent developments

When the Constitution (Amendment) Act, 1981 was passed and assented to, an observer of Malaysian constitutional law might be forgiven for believing that the highpoint of constitutional amendment in Malaysia had been reached. After all, the numerous amendments to Article 150 supplied whatever powers then thought lacking on the part of the executive and the legislature. But one is hard put to match the ingenuity and industry of the legal draftsmen in particular and legal advisors to the government in general. What was believe to represent the pinnacle of executive-legislative power in 1981 has now been further amended.

The Constitution (Amendment) Bill, 1983 has been passed by the Houses of Parliament, and presently awaits the royal assent. The Bill presents repercussions which stretch beyond emergency powers under Article 150, but these far-reaching changes are not germane to our present discussion. When attention is focused on Article 150, however, Clause 20 of the Bill makes

plain not so much an increase of executive power, but more a realignment of political forces within that executive power already broadened to an extreme by the 1981 Act.

Whereas the present law places the discretionary power to issue a Proclamation of Emergency and pass ordinances on the Yang DiPertuan Agong, Clause 20 of the present Bill interposes the satisfaction *of the Prime Minister*. Under present law, the Yang DiPertuan Agong acts upon the advice of Cabinet or a Minister acting under the general authority of Cabinet, as clearly established under Article 40(1) of the Constitution. In effect therefore the satisfaction whether or not to have a Proclamation issued, for example, is that of a collective body of Ministers, namely Cabinet.

It is difficult to envisage why it is now deemed necessary to substitute the collective satisfaction of Cabinet for the satisfaction of a single Minister, *albeit* a Prime Minister. Since the Prime Minister heads the Cabinet anyway, one might suppose a process of consultation with his Cabinet colleagues would precede the Prime Minister forming the abovementioned "satisfaction" and then tendering advice to the Yang DiPertuan Agong to issue a Proclamation of Emergency. If this analysis represents true practice, then the present amendments are unnecessary. If the amendments are meant to alter current practice, they may in the end create more problems than they are meant to solve, for the 'satisfaction' referred to is presumably the *personal* satisfaction of the Prime Minister. Who will then advise the Yang DiPertuan Agong if circumstances arise which warrant a Proclamation of Emergency, and the Prime Minister is for some reason or other unavailable or unable at the immediate moment to form that personal satisfaction?

When the 1983 Bill is assented to and the Act comes into force, Article 150 will read as follows:

> 150(1) If the *Prime Minister* 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 *shall advise the Yang DiPertuan Agong accordingly and the Yang DiPertuan Agong shall then* 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 *Prime Minister* is satisfied that there is imminent danger of the occurrence of such event *and advises the Yang DiPertuan Agong accordingly*.
>
> (2A) The power conferred on the Yang DiPertuan Agong by this Article *to issue a Proclamation of Emergency* shall include the power to issue different Proclamations on different grounds or in different circumstances *as may be advised by the Prime Minister*, whether or not there is a Proclamation or Proclamations already issued 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 Prime Minister is satisfied that certain circumstances exist which render it necessary that immediate*

action be taken, he shall advise the Yang DiPertuan Agong to promulgate such ordinances as the Prime Minister deems necessary, and the Yang DiPertuan Agong shall then accordingly promulgate such ordinances.

(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 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 annuling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2B).

(4) (unchanged)

(4) (unchanged)

(5) (unchanged)

(6A) (unchanged)

(7) (unchanged)

(8) Notwithstanding anything in this Constitution —

(a) the satisfaction of *the Prime Minister mentioned in Clauses (1), (2) and (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), *whether or not arising under Clause (2);*

(ii) the continued operation of such Prolamation;
(iii) any ordinance promulgated under Clause (2B); or
(iv) the continuation in force of any such ordinance.

(9) (unchanged)

5. Some conclusions

Except for a brief interlude between 1960 and 1964, Malaysia has remained under a state of emergency which continues to this day. Vast and impressive changes have since occurred in the social and economic life of this country. And present-day internal security and defence problems have improved considerably, though it cannot be said that the threats of internal subversion and external aggression have withered away completely. Nevertheless, it remains ironical to realise that emergency powers under the Constitution of Malaysia have increased disproportionately to solid

improvements in the spheres of defence and socio-economic life. The Malaysia of 1983 is a far more secure and stable country, and it seems self-defeating to argue otherwise.

The continuing reliance on emergency powers represents therefore a kind of oddity. Not only is this country presently under a legal, as opposed to an actual, emergency, it strangely tolerates the continuance of three and possibly four different Proclamations of Emergency, each overlapping with the other. This layered, legal emergency can be defended only upon some compelling justification being furnished, if the country is to remain true to its commitment to the rule of law and the norms of limited government and democracy which that high principle represents.

In the opinion of this paper-writer at least, a strong case can be made for a reversal of the trend hitherto seen which leads to an over-accumulation of emergency powers in the executive branch, with corresponding reductions in the supervisory function of Parliament and the review power of the courts. Ideally speaking, the trend ought to be in the direction of a reversal to the pre-1960 situation, whereby Proclamations and ordinances have definite life-spans, subject to parliamentary sanction evidenced through a resolution to prolong the periods of their continuing into force. Proclamations and ordinances could then be subject, for instance, to annual parliamentary approval. Ideally speaking too, the circumstances warranting the invocation of emergency powers could be further clarified, and the breadth of emergency powers be made commensurate with the particular type of emergency faced by the nation. The 'emergency' concept presently entrenched in the Malaysian Constitution is too ill-defined, covering, on the one hand, wars and open insurrections, and, on the other, famines, civil disturbances, and threatened breakdowns of constitutional government. Each of these circumstances qualitatively different, and the ideal emergency structure ought to reflect this.

It is perhaps overly unrealistic to hope for these changes to be achieved through constitutional amendments different in form, content and strategy from those already passed. The changes could, however, form part of a longterm strategy to be fully realised when we become truly convinced that present-day emergency powers are somehow too drastic and erode the rule of law.

For the immediate future, the present trend can perhaps be checked in a different way. The executive and legislative branches ought perhaps to resist sponsoring and passing further constitutional amendments enlarging or even realigning existing emergency powers. Powers available presently are ample enough to meet emergency needs. And courts could begin to approach emergency powers with a greater sensitivity to the rule of law, though an activist stand is hardly to be expected, given various limiting precedents.

Even if Article 150 remains in its present form, its actual impact on Malaysian polity can be reduced by rethinking and streamlining the various Proclamations now still in force throughout the Federation. All other Proclamations, except that of 1969, can be revoked without prejudicing the

national interest. Indeed, even the 1969 Proclamation can be narrowed down and confined to various defined areas of the country, such as border areas, where the threat to national security is real and immediate.

Previous developments in emergency laws have in the main had a debilitating effect on morale. To reverse the trend would signal a fresh and welcome commitment to our belief in democratic government. A change in this direction would therefore have an enhancing effect on the quality of democratic life in Malaysia, while representing a timely act of courage and confidence.

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