

Understanding the Proclamation of Emergency in Malaysia

On 11 January 2021, the *Yang di-Pertuan Agong* declared a nationwide state of emergency that will be enforced until 1 August 2021 (“**Proclamation of Emergency**”). To understand the effect of such proclamation, it is necessary to take a glimpse into the foundation of the Federal Constitution (“FC”).

Federation Constitution is the Supreme Law of Malaysia

On 31 August 1957, following the proclamation of the Declaration of Independence, it was acknowledged that Malaysia is a constitutional monarchy based on Parliamentary Democracy. Under this system of government, the country’s FC represents the supreme law of Malaysia, as enshrined in Article 4(1) of the FC. Any law passed which is inconsistent with the FC shall, to the extent of the inconsistency, be void.

Also embedded in the FC is the separation of power into three branches of our Government, i.e., the Legislative (Parliament), Executive (Government) and Judiciary (Court), which are to check and balance each other’s functions and powers. The separation of powers, therefore, form the basic structure of the FC.

Powers of the *Yang di-Pertuan Agong* under the FC

Under Article 40(1) of the FC, the *Yang di-Pertuan Agong* shall act in accordance with the advice of the Cabinet or a Minister acting under the general authority of the Cabinet.

Article 150(1) and (2) of the FC empowers the *Yang di-Pertuan Agong* to make a proclamation of emergency if His Royal Highness is satisfied that a grave emergency exists whereby the security, or the economic life, or the public order in the Federation (Malaysia) or any part thereof is threatened or there is an imminent danger of the occurrence of such event (“**Emergency**”).

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In *Teh Cheng Poh v PP*,¹ the Court at page 52, said:

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

The subsequent insertion of Article 40(1A) to the FC, effective 24 June 1994, provides:

40. Yang di-Pertuan Agong to act on advice

...

(1A) In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.

Effect of the Proclamation of Emergency

(a) Functions of the Executive (commonly known as the “Government of the Day”)

Pursuant to Article 150(2B) of the FC, where both Houses of Parliament are not sitting concurrently² during the period of the Emergency, the *Yang di-Pertuan Agong* may promulgate ordinances (“**Emergency laws**”), if His Royal Highness is satisfied that certain circumstances exist which render it necessary to take immediate action. On a further reading of Article 150(6) together with (6A) of the FC, the Emergency laws are deemed valid even if they are inconsistent with the FC³.

Presently, both Houses of Parliament are not in session. As such, the *Yang di-Pertuan Agong* may, or if upon advice of the Cabinet, must promulgate ordinances, without having to comply with the necessary procedures or the proportion of the total votes required in the Houses of Parliament⁴.

Wherefore, on 14 January 2021, the *Yang di-Pertuan Agong* promulgated the Emergency (Essential Powers) Ordinance 2021 (“Ordinance 2021”)⁵. The Ordinance 2021 is deemed to have come into operation on 11 January 2021⁶. For ease of reference, the salient points of the Ordinance 2021 are set out in **Annexure “A”**. The Ordinance 2021 shall have the same force and effect as an Act of Parliament,⁷ until it is revoked or annulled by both Houses of Parliament, or until it lapses at the expiration of six months beginning with the date of cessation of the Proclamation of Emergency. By virtue of Section 18 of the Ordinance 2021, the provisions of the Ordinance 2021 shall prevail over any provision of the existing written law.

¹ [1978] 1 LNS 202

² Article 150(9) of the FC provides that the Houses of Parliament shall be regarded as sitting only if the members of each House are respectively assembled together and carrying out the business of the House.

³ “Except those provision of the FC relating to any such matter or relating to religion, citizenship, or language”.

⁴ Article 150(2C)

⁵ Emergency (Essential Powers) Ordinance 2021 was gazetted on 14 January 2021.

⁶ Section 1(2) of the Ordinance 2021

⁷ Article 150(2C) of the FC

(b) Functions of the Legislature (commonly known as the “Parliament”)

The FC does not suspend the function of the Parliament to make laws during the operation of the Proclamation of Emergency. Article 150(2B) of the FC, which empowers the *Yang di-Pertuan Agong* to make Emergency laws, only operates when both Houses of Parliament are not sitting concurrently. In *Teh Cheng Poh v PP*,⁸ the Court ruled that the *Yang di-Pertuan Agong* would lose his legislative powers to make emergency laws once Parliament had convened.

Even in the present state of Proclamation of Emergency, the Parliament may, notwithstanding anything in the FC, make laws in respect of any matter by reason of emergency, except matters regarding Islamic and native laws.⁹ Further, the Parliament may continue to safeguard the basic structure of the FC, by carrying out check and balance of the functions exercised by the Executive. This is so provided in Article 150(3) of the FC, whereby it shall be laid before both Houses of Parliament the Proclamation of Emergency¹⁰ and the Ordinance 2021, and the Parliament may pass a resolution to annul the Proclamation of Emergency and the Ordinance 2021.

Notwithstanding the above, under Sections 12 to 15 of the Ordinance 2021, the sitting and election of both Parliament and State Legislative Assembly are now being placed at the discretion of the *Yang di-Pertuan Agong*. Article 150 of the FC is silent on the suspension of the sitting and election of both Parliament and State Legislative Assembly when a proclamation of emergency is in force. In this regard, it would be helpful to refer to one of the prerequisites to promulgate an ordinance, that is, the presence of an urgency.

In light of the spike of COVID-19 cases nationwide, there is an immediate need to legislate and provide power to authorised persons to take necessary measures to combat COVID-19. However, it raises an intriguing question whether, and it is submitted that it is a matter reviewable by the Judiciary as to the proportionality to include the provisions to suspend the sitting of both Parliament and State Legislative Assembly in the Ordinance 2021.

(c) Functions of the Judiciary (commonly known as the “Court”)

In view of the foregoing, the role of Judiciary in the check and balance mechanism becomes crucial. It is a cardinal principle of law that the Judiciary is the ultimate interpreter of the FC and hence, the guardian to ensure that the Executive and the Legislature act within their constitutional limits. Where the exercise of powers by the Executive and the Legislature is *ultra vires* (wrong in law), it is the duty of the Court to intervene by way of judicial review as enshrined within Article 4(1) of the FC.

⁸ [1979] 1 MLJ 50

⁹ Article 150(5) of the FC

¹⁰ The Proclamation of Emergency is to be laid before the Parliament pursuant to Article 150(3) of the Federal Constitution, see P.U. (A) 7/2021 Proclamation of Emergency

In 1967, the Federal Court in *Stephen Kalong Ningkan*¹¹ by a majority judgment ruled that the circumstances which brought about the state of Emergency are non-justiciable. Upon appeal, the Privy Council¹² opined that “*whether a Proclamation under statutory powers by the Supreme Head of the Federation can be challenged before the courts on some or any grounds is a constitutional question of far-reaching importance which, on the present state of the authorities, remains unsettled and debateable*”¹³. The Privy Council left the question unanswered and to be dealt with in future proceedings which makes that course necessary.

In 1978, the Court in *Teh Cheng Poh v PP*¹⁴ had the opportunity to review the exercise of power by the *Yang di-Pertuan Agong* to proclaim an area as a security area pursuant to a Federal law. The Court opined that the Judiciary has the jurisdiction to inquire whether the purported exercise of the discretion was *ultra vires*. However, in 1981, the Parliament amended the FC¹⁵ and inserted Article 150(8), which came into force effective from 15 May 1981.

In essence, Article 150(8) of the FC provides that the validity of a proclamation of emergency and any ordinance promulgated during such proclamation cannot be determined by the courts. The effect of Article 150(8) of the FC was discussed in *Dato’ Seri Anwar Ibrahim v PP*¹⁶ in relation to an argument on abuse of process. The Federal Court said that by virtue of Article 150(8) of the FC, the Court has no jurisdiction to entertain or determine any application regarding the validity of the continuance in force of the ordinance.

In *Lim Jen Hsian v Ketua Pengarah Jabatan Pendaftaran Negara*¹⁷ the Court of Appeal encountered an ouster clause in Section 2, Part III, Second Schedule of the FC, whereby it provides that a decision of the Federal Government on citizenship shall not be subject to appeal or review in any Court. The Court of Appeal held that such ouster provision does not preclude the jurisdiction of the Court from entertaining a judicial review application.

Determination of Compensation

The ouster clause in Section 5(2) of the Ordinance 2021 which prevents challenge to the Court against the assessment of compensation in respect of the possession or utilization of any land, building or movable property, or resources made under Section 5(1) of the Ordinance 2021, raises another point of concern. The possible implication of Section 5(2) read in the context of Section 5(1) of the Ordinance 2021 is that it appears to usurp the judicial power of the Courts to decide on and award compensation.

¹¹ [1967] 1 LNS 167

¹² [1968] 1 LNS 146

¹³ It was referred to by the Federal Court in *Abdul Ghani Ali v PP* [2001] 3 CLJ 769

¹⁴ [1978] 1 LNS 202

¹⁵ Constitution (Amendment) Act 1981

¹⁶ [2002] 3 CLJ 457

¹⁷ [2018] 6 MLJ 548

In this regard, the Federal Court's recent decision in *Maria Chin Abdullah v Ketua Pengarah Immigration*¹⁸ recognised that the presence of ouster clauses would never deter the Court from examining any dispute or complaint that is referred to the Court. The Court is entitled to examine, evaluate and assess the exercise of power. In light of the above, it is submitted that the Judiciary should have the judicial power to hear any challenge brought before the Court.

This view can be substantiated by the apex court's decisions in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case*¹⁹ and *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*²⁰ where the apex court reaffirmed the principle that judicial power resides with the Judiciary.

The apex court in the aforementioned cases also allowed the Courts to declare legislations removing basic features of the constitutions to be void. Nonetheless, the majority decision of the Federal Court in *Maria Chin Abdullah (supra)* held a different view on the application of the doctrine of basic structure. A further deliberation and decision by the Federal Court directly on this important constitutional point would be of public interest. In this regard, our Chief Justice in the recent decision of *Maria Chin Abdullah (supra)*, said albeit in minority, and we so quote “*The supremacy of the FC in Article 4(1) and its corollary device of judicial power are basic features of the FC. Accordingly, the power of the Court to scrutinise State action whether legislative, executive or otherwise, cannot be excluded.*”

Can the Proclamation of Emergency be revoked sooner?

Pursuant to Section 2 the Ordinance 2021, there shall be an independent special committee to advise the *Yang di-Pertuan Agong* on the need to continue the Proclamation of Emergency. Thus, the Proclamation of Emergency may be revoked sooner before its expiry where circumstances warrant it.

In this regard, Lord Diplock when presiding in the Privy Council in *Teh Cheng Poh*²¹ at page 55, said “*Article 32(1) of the Constitution makes the Yang di-Pertuan Agong immune from any proceedings whatsoever in any court. So mandamus to require him to revoke the Proclamation would not lie against him; but since he is required in all executive functions to act in accordance with the advice of the Cabinet, mandamus could, in their Lordships' view, be sought against the members of the Cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the Proclamation.*”

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DISCLAIMER:

This article is for general information only and should not be relied upon as legal advice.
The position stated herein is as at the date of publication on 18 January 2021.

Annexure A - Salient Points of the Emergency (Essential Powers) Ordinance 2021

During the subsistence of the Proclamation of the Emergency²² in the Malaysia from 11 January 2021 to 1 August 2021, the powers conferred under the Ordinance 2021 are in addition to powers given under other legislations that are currently enforced and operative²³. In the event of inconsistency with other legislations, the provision of the Ordinance 2021 will prevail²⁴.

The salient points are highlighted below:

On the Administration of the Country

- **An Independent Special Committee²⁵**

An independent special committee (“Committee”) shall be established to advise the *Yang di-Pertuan Agong* on the continuing of the grave emergence threatening the security, economy and public order arising from the infections COVID-19 epidemic. The members of the special Committee shall be appointed by the *Yang di-Pertuan Agong*.

On this point, it is observed from the media statement released by the Royal Palace on 12 January 2021 that medical experts and Members of Parliament (from the Government and Opposition) will be appointed to advise the *Yang di-Pertuan Agong* on the duration of the Proclamation of Emergency. At the time of writing, the members of the Committee are yet to be announced.

- **Power to make Regulations²⁶**

As provided in the Ordinance 2021, the *Yang di-Pertuan Agong* may make regulations as may be necessary for the carrying into effect the provisions of the Ordinance 2021.

- **The Executive and its Legislative Powers²⁷**

The Prime Minister and the Cabinet existing immediately prior to the issuance of the Proclamation of Emergency on 11 January 2021, who have been conferred executive functions, continue to exercise the executive authority of the Federation. Similarly, the *Menteri Besar* or Chief Minister and State Executive Council or State Cabinet existing prior to the issuance of Proclamation of Emergency retain their executive function and continue to exercise such function.

The power to make subsidiary legislation under the Federal laws and State laws remains with and continue to be exercised by the authorised persons.

²² P.U.(A) 7/2021 Proclamation of Emergency

²³ Section 17 of the Ordinance 2021

²⁴ Section 18 of the Ordinance 2021

²⁵ Section 2 of the Ordinance 2021

²⁶ Section 16 of the Ordinance 2021

²⁷ Section 11 of the Ordinance 2021

- **Sitting or Election of Federal and State Legislative Bodies²⁸**

The Ordinance 2021 suspends the sittings of the legislative bodies, both Parliament and State Legal Assembly. Any meeting of the legislative bodies which has been summoned prior to the enforcement of the Ordinance 2021 that has not taken place is cancelled. Particularly, the provisions relating to the summoning, proroguing and dissolution of such legislative bodies under the Federal Constitution or State Constitution and any State law shall have no effect during the subsistence of emergency. The summoning, proroguing and dissolution of such legislative bodies shall be on a date as the *Yang di-Pertuan Agong* thinks appropriate. The constitutional provisions on election of the members of the Senate or State Legislative Assembly shall have no effect, when the Proclamation of Emergency is in force.

On the Specific Powers of the Ordinance 2021

The powers stipulated in the Ordinance 2021 are exercisable by the *Yang di-Pertuan Agong* or any person authorized by His Royal Highness (“HRH Authorised Person”).

- **Temporary Possession of Property²⁹**

Notwithstanding any provisions in the FC, the Ordinance 2021 empowers *Yang di-Pertuan Agong* or HRH Authorised Person to take temporary possession of any land, building or movable property (“Property”), in part or in full. In this regard, the *Yang di-Pertuan Agong* or HRH Authorised Person may give any directions that are necessary or expedient in connection with such taking of possession. The use of such Property is not subject to the restrictions imposed by law or any other instruments. The *Yang di-Pertuan Agong* or HRH Authorised Person may use such Property in such manner as he thinks expedient.

In taking the temporary possession or using the Property, the *Yang di-Pertuan Agong* or HRH Authorised Person may do anything over such land or movable property like any person who has interests, and prohibit or restricting the exercise of rights by any person who has interests over such property. In this regard, it shall be noted, upon request by or on behalf of *Yang di-Pertuan Agong* or HRH Authorised Person, the owner or occupier of the any land, building or movable property shall furnish information relating to the Property, which may reasonably be demanded.

Compensation in respect of the temporary possession shall be assessed by a HRH Authorised person, whose assessment shall be final and conclusive. The assessment of compensation cannot be challenged or questioned in Court on any ground. On this point, it is important to be aware that any contravention to the provisions regulating temporary possession is an offence under the Ordinance 2021³⁰.

- **Demand for Resources³¹**

The Ordinance 2021 enables human resources, facilities, utilities and assets, including the controller or manager of such resources to be demanded by the *Yang di-Pertuan Agong* or HRH Authorised person for any purpose as he deems necessary. In this connection, the *Yang di-Pertuan Agong* or HRH Authorized person may give any direction relating to the utilization, management and control of such resources to the person whose resources are demanded. The direction may include the imposition of any fees or charges that may be imposed by the person whose resources are demanded from.

Similarly, the compensation for the utilization of resources shall be assessed by a HRH Authorized person, whose assessment shall be final and conclusive. No further challenge or questions on the assessment can be brought to the Court. Any contravention to the provisions regulating the demand for resources including the direction is an offence under the Ordinance 2021³².

- **Prevention of Infectious Disease and Healthcare Professionals**

Subject to conditions as may be determined, Section 6(1) of Ordinance 2021 enables the *Yang di-Pertuan Agong* or HRH Authorised Persons to appoint any person to issue directions for treatment, immunization, isolation, observation or surveillance under paragraphs 11(3)(a) and (b) of the Prevention and Control of Infectious Disease Act 1988³³.

The *Yang di-Pertuan Agong* or HRH Authorised Person may exempt a health care professional, who is regulated under any of the following legislations, to comply with the address of the principal place of practice specified in any practicing certificate or its equivalent:

- (1) Medical Act 1971;
- (2) Dental Act 1971;
- (3) Registration of Pharmacists Act 1951;
- (4) Allied Health Professions Act 2016;
- (5) Medical Assistants (Registration) Act 1977;
- (6) Nurses Act 1950;
- (7) Midwives Act 1966;
- (8) Optical Act 1991; or
- (9) Estate Hospital Assistants (Registration) Act 1965³⁴.

- **Armed Forces³⁵**

The Armed Forces (the regular forces, the volunteer forces of Malaysia and any other forces which may be declared by the *Yang di-Pertuan Agong* to be armed forces), upon direction by the *Yang di-Pertuan Agong* or HRH Authorised Person, shall have all powers of a police officer provided under the Criminal Procedure Code. These powers are in addition to the powers provided to the Armed Forces under the Armed Forces Act 1972.

- **Offence³⁶**

Any person who contravenes provisions regulating the “Temporary Possession of Property” or “Demand for Resources” discussed above, or fails to comply with any demand or direction of the *Yang di-Pertuan Agong* or HRH Authorised Person commits an offence under the Ordinance 2021.

Upon conviction, the person will be liable to:

- (i) a fine of not exceeding RM5 million;
- (ii) imprisonment for a term not more than 10 years; or
- (iii) both.

In the event that the convicted person is a company, limited liability partnership, firm, society or other body of persons, the director, compliance officer, partner, manager, secretary or other similar officer who was responsible for the management of such entity at the time of commission of the offence would be implicated.

The office bearer may be charged severally or jointly in the same proceedings with the entity. He shall be liable to the same punishment or penalty as an individual upon conviction, unless he proves the commission of the offence was without his:

- (i) knowledge; and
- (ii) consent or connivance, and he had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence.

- **Immunity³⁷**

The Ordinance 2021 protects the Government, public officer or person appointed pursuant to Section 6(1) of the Ordinance 2021 from any action, suit, prosecution or any Court proceeding in respect of any act, neglect or default done or omitted by him in good faith whilst carrying out the provision of the Ordinance 2021.