

**Title** : Article 150, Proclamation of Emergency by the Yang diPertuan Agong: The Issue Related and the Cases

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# **Article 150, Proclamation of Emergency by the Yang di-Pertuan Agong: The Issue Related and the Cases.**

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## **Abstract**

*Proclamation of Emergency under Article 150 is one of the provisions provided under Federal Constitution to maintain the country security and stability. Proclamation of Emergency are not occasionally happen in this country and rarely used but it is very important to maintain the harmonious country and the citizen. Even though the state of emergency the event that the country and the government trying to avoid, there is always a probability that it might happen as what happen in May 1969 Riots. Therefore, there is need to thoroughly understand on this Article. This assignment is aim to discuss on the issue relating to the Proclamation of the emergency on how it works, the power of the Yang di-Pertuan Agong as the head of the state in proclaiming the emergency and many more other issue relating to this Article.*

## **Introduction**

The term of emergency comes from the Latin word 'emerge' which means 'a condition, similar to a state of war, in which some ordinary processes of government may be altered or suspended to deal with an unforeseen occurrence or threat'.<sup>1</sup>

In June 1948, the colonial government declared an emergency throughout Malaya to counter insurgency by the Communist Party of Malaya

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<sup>1</sup> Emergency Power, Scribd, 2020, retrieved from <https://www.scribd.com/document/456081483/Emergency-Power>

(CPM). Because of that incident, the Reid Commission recommended the insertion of special power against subversion which would operate irrespectively of any emergency which is now in Article 150 of Federal Constitution which gives the Power to the Yang di-Pertuan Agong to proclaim the emergency against the country or the state.<sup>2</sup>

In **Madhavan Nair v Government of Malaysia (1975) 2 MLJ 286**, Chan Min Tat Judge observed that the Federal Constitution does not provide any procedure for the promulgation.<sup>3</sup> The court referred to the Shorter English Oxford English Dictionary which provides the definition of promulgation as official publication of a new law. Promulgate means to expose to the public view and to make known by public declaration.

The privy council in **Bhagat Singh v The King-Emperor LR 58A 169**, a state of emergency is something that does not permit of any exact definition. It connotes a state matters calling for drastic action, which is to be judged as such by someone.

The Proclamation of Emergency as said above have no specific or exact definition either by the court judge or the Constitution. But, it can be said that it is the drastic order by the government when there is situation that threatened the security of the country or situation where there is need of the proper control by the government.

### **In what kind of situation that the Proclamation of Emergency supposed to be made?**

A state of emergency is a situation in which a government is empowered to perform actions or impose policies that it would normally not be permitted to undertake. A government can declare such a state during a natural disaster, civil unrest, armed conflict, medical pandemic or epidemic or other biosecurity risk. Such declarations alert citizens to change their normal behaviour and orders government agencies to implement emergency plans.

Proclamation of Emergency can be made by the Yang di-Pertuan Agong if he satisfied that a grave emergency exists whereby the security or economic

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<sup>2</sup> Liviniah, P., Singaporeinfo: Malayan Emergency, retrieved from [https://eresources.nlb.gov.sg/infopedia/articles/SIP\\_2019-06-12\\_145539.html](https://eresources.nlb.gov.sg/infopedia/articles/SIP_2019-06-12_145539.html)

<sup>3</sup> Page 289

life, or public order in Federation or any part thereof is threatened.<sup>4</sup> Article 150(2) also provided that such proclamation may be issued before the actual occurrence of the threatened event by way of preventive action if the Yang di-Pertuan Agong is satisfied that there is imminent danger of its occurrence.

The privy council stressed the concept of emergency in **Stephen Kalong Ningkan v Government of Malaysia (1968) 2 MLJ 238** case,

*'It is not confined to unlawful use or threat or force in any of its manifestation. The natural meaning of the word itself is capable of covering a very wide range of situations and occurrences, including such diverse elements as wars, famines, earthquake, floods, epidemics and the collapse of civil government'*

The Yang di-Pertuan Agong also may also issue different Proclamations of Emergency on different grounds or in different circumstances regardless whether a Proclamation(s) are already in operation.

This Proclamation of Emergency ceased to have effect until the Parliament sitting back or after the lapsed of the period of six months from the date of Proclamation of Emergency is made.<sup>5</sup>

### **The validity of the law enacted under Article 150 of Federal Constitution**

Article 150 of Federal Constitution permits the Yang di-Pertuan Agong, acting on the advice of Cabinet to issue a Proclamation of Emergency and to govern the situation by issuing the new law known as Ordinances that are not subjected to judicial review if he satisfied that the grave emergency exists.<sup>6</sup> It also may be issued before the actual occurrence of the event if Yang di-Pertuan Agong is satisfied that there is imminent danger of the occurrence of such event.<sup>7</sup>

According to Article 150 (5), while the Proclamation of Emergency is in force, Parliament may make law with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency.

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<sup>4</sup> Article 150 (1) of Federal Constitution

<sup>5</sup> Article 150(7) of Federal Constitution

<sup>6</sup> Article 150 (2B) of Federal Constitution

<sup>7</sup> Article 150 (2) of Federal Constitution

The Emergency Ordinance enacted will have the same force as an Act enacted by the Parliament even though it did not go through the normal procedure for the new law to be enacted. This Ordinance also remain effective until they are revoked by the Yang di-Pertuan Agong or being annulled by the parliament or until it lapses as provided under clause (2C) of Article 150.<sup>8</sup>

Such ordinances and emergency related Acts of Parliament are valid even if they are inconsistent with the Constitution except those constitutional provisions which relate to matters of Islamic law or custom of the Malays, native law or customs of Sabah and Sarawak, citizenship, religion or language.<sup>9</sup> Since Merdeka, four emergencies have been proclaimed, in 1964 (a nationwide emergency due to the Indonesia-Malaysia confrontation), 1966 (Sarawak only, due to the Stephen Kalong Ningkan political crisis), 1969 (nationwide emergency due to the 13 May riots) and 1977 (Kelantan only, due to a state political crisis).<sup>10</sup>

In **Eng Keock Cheng v PP (1966) 1 MLJ 18**, it was the appellant was convicted of offences under s 57(1)(a) and (b) of the Internal Security Act 1960 ('the ISA') and sentenced to death. One of the points raised on appeal was that the procedure adopted by the learned trial judge for the trial was a procedure appearing in the Schedule to the Emergency (Criminal Trials) Regulations 1964 ('the 1964 Regulations') being seemingly the procedure referred to in regulation 4 thereof which, in so far as it purports to authorize any one of the many deputy public prosecutors to deprive a man charged with a capital offence of the protection of a preliminary enquiry and of a jury, is ultra vires.

The Federal Court was of the view that the true effect of art 150 of the Constitution 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, and that this necessity included authority to delegate part of that power to legislate to some other authority, notwithstanding the existence of a written Constitution.

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<sup>8</sup> Article 150 (2c) of Federal Constitution

<sup>9</sup> Article 150 (6) and (6A) of Federal Constitution

<sup>10</sup> Chapter 7 (The 13 May Riots and Emergency Rule) by Cyrus Das in Harding & Lee (2007) Constitutional Landmarks in Malaysia – The First 50 Years, p. 107. Lexis-Nexis

In case of **Abdul Ghani bin Ali Ahmad & Ors v Public Prosecutor (2001) 3 MLJ 561**, one of the issues that arise in this case is whether the Essential (Security Cases) (Amendment) Regulations 1975 (ESCAR) was invalid and unconstitutional, which resulted in the trial under ESCAR being invalid and unconstitutional as it infringes the right under Article 5 and 8. The court dismissed the appeals by referring to the *Eng Keock Cheng v PP* that Article 5 and 8 were not absolute and subject to other provisions which in this case situation was Article 150 of the Federal Constitution.<sup>11</sup>

The Emergency power should not exceed what is required to handle the emergency state. The infringement of fundamental rights is only satisfied to such an extent as may be necessary to meet any particular danger which threatens the nation. Certain human rights are non-derogable under any circumstances. As for the example, the right to life, prohibition of torture, freedom from slavery and freedom of religion should not be taken from the citizen the state of emergency without the valid reason by the government or authority.

The power to promulgate ordinances having the force of law is expressed to be exercisable only until both Houses of Parliament are sitting. It lapses as soon as Parliament sits. Thereafter while the proclamation of emergency remains in force any further laws required by reason of the emergency are to be made by Parliament in the exercise of the legislative authority of the Federation vested in it by art 44 of the Constitution, but freed by art 150(5) and (6) of many constitutional restrictions upon the legislative powers of Parliament which apply except when a proclamation of emergency is in force.<sup>12</sup>

It can be summarized that the Ordinance enacted during the period of emergency shall be valid up until the proclamation in pursuance of which it was promulgated has ceased to have effect or it is revoked or the Parliament by resolution annuls it.

**Role of Yang di-Pertuan Agong in proclaiming emergency: discretionary power or need to act on advice?**

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<sup>11</sup> Page 562

<sup>12</sup> *The Cheng Poh v Public Prosecutor* (1979) 1 MLJ 50, page 52

The issue that arise here is whether the Yang di-Pertuan Agong act on his own initiative to proclaim an emergency even if the Prime Minister or the Cabinet does not advice?

This issue have to different view where one commentator has argued that the Yang di-Pertuan Agong possesses a range of prerogative powers, the power to proclaim the emergency being one of them. The view have in turn, been disputed by another commentator who has argued on the basis of Constitutional Commission and precedents that the Yang di-Pertuan Agong acts on Cabinet advice in Proclaiming an Emergency.<sup>13</sup>

Article 150 states that *“If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect”*

This Article should be read together with Clause (1) Article 40 which provided *‘In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet except as otherwise provided by this constitution’* and also with Clause (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’.*<sup>14</sup>

In **Teh Cheng Poh v Public Prosecutor (1979) 1 MLJ 50**, the Privy Council decided that,

*‘Although this (emergency ordinance-making power) like other powers under the Constitution, is conferred nominally upon the Yang di-Pertuan Agong by*

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<sup>13</sup> Omar Imtiyaz. 1996. Right, Emergencies, and Judicial Review, page 94. Retrieved from [https://books.google.com.my/books?id=v\\_PIX6WBZgcC&pg=PA93&lpg=PA93&dq=whether+can+questioned+the+proclamation+of+emergency+by+YDPA+in+court&source=bl&ots=jZrcPCqNOW&sig=ACfU3U3Ocdp41qe6XnbUWZiCillizPG2rg&hl=en&sa=X&ved=2ahUKewjEh4iwn9roAhUFibcAHRfxDj4Q6AEwBnoECAwQLA#v=onepage&q=whether%20thce%20YDPA%20have%20power%20to%20proclaim%20emergency&f=false](https://books.google.com.my/books?id=v_PIX6WBZgcC&pg=PA93&lpg=PA93&dq=whether+can+questioned+the+proclamation+of+emergency+by+YDPA+in+court&source=bl&ots=jZrcPCqNOW&sig=ACfU3U3Ocdp41qe6XnbUWZiCillizPG2rg&hl=en&sa=X&ved=2ahUKewjEh4iwn9roAhUFibcAHRfxDj4Q6AEwBnoECAwQLA#v=onepage&q=whether%20thce%20YDPA%20have%20power%20to%20proclaim%20emergency&f=false)

<sup>14</sup> The Star, Emergency power of the monarch: Reflecting On The Law, 2013, Shad Saleem Faruqi, retrieved on 15 May 2020 from <https://www.thestar.com.my/opinion/letters/2013/02/07/emergency-powers-of-the-monarch>

*virtue of his office as the Supreme Head of the Federation and is expressed to the exercisable if he is satisfied of a particular matter, his functions are those of a constitutional monarch and except on certain matters that do not concern the instant appeal, he does not exercise any of his functions under the Constitution on his own initiative but is required by Article 40(1) to act in accordance with the advice of the Cabinet*<sup>15</sup>

In **Madhavan Nair v Government (1975) 2 MLJ 286**, Chan Min Tat Judge on his judgement also stated that,

*‘Emergency rule which passes the legislative power from Parliament to the Yang di-Pertuan Agong has not displaced his position as the Constitutional Monarch, bound by the Constitution to act all the time on the advice of the Cabinet*<sup>16</sup>

Chan Min Tat Judge stated clearly in this case that the Yang di-Pertuan Agong acts on advice when acting under Article 150 with the words ‘ at all the times on the advice of the Cabinet’.

In **Abdul Ghani bin Ali (Commat)@ Ahmad v Public Prosecutor (2001) 3 MLJ 561**, the issue raised in this case is whether the Proclamation of Emergency by the Yang di- Pertuan Agong was invalid on the ground that the Yang di-Pertuan Agong did not act on advice of the Cabinet as required by Article 40(1) of the Federal Constitution.

The court decided that the Yang di-Pertuan Agong must act on advice of the Cabinet in proclaiming emergency. The Federal Court opined:

*“Moving next to the argument that the Yang di-Pertuan Agong can act on his own discretion when exercising his power under Article 150(1) of the Constitution, I need only say that I agree with the learned Dr Cyrus Das when he (in Governments & Crisis Powers p 237 that there can be no doubt that the Privy Council’s opinion in the case of the Teh Cheng Poh case settles the point*

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<sup>15</sup> Page 52

<sup>16</sup> Page 289



*firmly that the Yang di-Pertuan Agong does not have a personal discretion under Article 150(1) but has at all times to act on Cabinet advice.<sup>17</sup>*

Therefore, based on the Article 150 and Article 40 of the Federal Constitution and the decided cases, the Yang di-Pertuan Agong in Article 150(1) to issue a proclamation of emergency, is a power exercisable in accordance with the advice of Cabinet pursuant to Article 40 and likewise, his other powers such as the special legislative power to promulgate ordinances in Article 150(2) are also exercisable in accordance with the advice.<sup>18</sup>

### **Whether can question the proclamation of emergency by Yang di-Pertuan Agong in court?**

Article 150 (1) provided that *'if the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or 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'*.

Clause (8) of Article 150 also provided that

*(a) notwithstanding anything in this constitution, the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and*

*(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding in whatever form, on any ground regarding the validity of-*

- I. A proclamation under Clause (1) or of a declaration made in such proclamation to the effect stated in Clause (1)*
- II. The continued operation of such proclamation;*
- III. Any ordinance promulgated under Clause (2B); or*
- IV. The continuation in force of any such ordinance*

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<sup>17</sup> Page 601

<sup>18</sup> S.Jayakumar, Emergency Powers in Malaysia: Can the Yang di-Pertuan Agong Act in His Personal Discretion and Capacity?(1976) 18 MALAYA LAW REVIEW 149. Retrieved from [https://www.jstor.org/stable/24863150?read-now=1&seq=2#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/24863150?read-now=1&seq=2#page_scan_tab_contents)

The burden of proof on anyone challenging a proclamation of emergency may be heavy and difficult to discharge since the policies followed and the steps taken by the responsible government may be founded on the information and apprehensions which are not known to, and cannot always be made known to, those who seek to impugn what has been done.<sup>19</sup>

Based on the case of **Stephen Kalong Ningkan v Government of Malaysia (1968) 2 MLJ 238**, the petitioner questioned the Proclamation of Emergency made for the state of Sarawak as invalid. The Federal Court dismissing the appeal. Barakbah Lord President decided that,

*‘in my opinion the Yang di-Pertuan Agong is the sole judge and once His Majesty is satisfied that a state of emergency exists, it is not for the court inquire as to whether or not he should have been satisfied’*

In appeal at the Privy Council, did not find it is necessary to decide whether the proclamation was justifiable or not. Assuming that the proclamation justifiable, the Privy Council found council had not proven his case.

Based on the constitution amendment 1981 Act No. 514 of 1981, the amendment declare that the satisfaction of the Yang di-Pertuan Agong in proclaiming emergency to be “final and conclusive” and not changeable “in any court by any ground. By this amendment also, the courts also did not have any jurisdiction to determine question relating to the continued operation of the Proclamation of Emergency.<sup>20</sup>

As for today, this issue would be probably settled with the insertion of clause 8 under article 150 of Federal constitution which provide that “ *the satisfaction of Yang di-Pertuan Agong....shall be final and conclusive and shall not be challenge or called in question in any court on any ground*”<sup>21</sup>

In the case of **Dato’ Seri Anwar bin Ibrahim v Public Prosecutor (2002) 3 MLJ 193**, Haidar FCJ decided that no challenged could be made to the

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<sup>19</sup> Stephen Kalong Ningkan v Government of Malaysia (1968) 1 MLJ 119.

<sup>20</sup> Right, Emergencies and judicial review, imtiaz omar, 1996, Kluwer Law International, Netherlands.

<sup>21</sup> Abdul Aziz Bari, Farid Sufian Shuaib, Constitution of Malaysia Text and Commentary, Kuala Lumpur, Pearson Malaysia, 2009.

continued operation of ordinances made under Article 150. The learned judge stated that

*'No court has the jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of, inter alia the continuation in force of the Ordinance. The argument that such provision is harsh and unjust should be addressed to the legislature and not the courts'*

Therefore, based on the amendment 1981 on Clause (8) , the Proclamation of Emergency by the Yang di-Pertuan Agong is not under the court's jurisdiction to question on its validity.

### **Conclusion**

For the conclusion as a whole, even though the power to proclaim the emergency was given by the Constitution to the Yang di-Pertuan Agong, he still bound by the advice of the Cabinet and the prime minister in making the decision. It is not a sole discretion of the Yang di-Pertuan Agong. The decision made in declaring the state of emergency could not be challenge by saying it is unconstitutional as it is not based on the decision of the Yang di-Pertuan Agong alone, but it is made after the agreement of the government after looking the situation as a whole.

Proclamation of Emergency is not an easy decision by the Yang di-Pertuan Agong and the government. The responsibility of each citizen in this country is to make sure that our country is safe and free from any problems that can affect the administration of the government. So that the incident like what happen in 15 May 1969 which need the government to proclaim the emergency would not happen again.