

# Drastic Solutions: A Comparative Study of Emergency Powers in the Commonwealth

*Edward Philips\**

“The problems of public order in an emergency pose agonising choices and stir deep passions. The subject is topical and urgent in Northern Ireland today but it has a much wider significance, for it raises basic questions about any society’s response to dissent and to violence.”<sup>1</sup>

This survey will concentrate on the various constitutional provisions for proclamations of emergency in Malaysia and India, with a few references to emergency situations in other parts of the Commonwealth.<sup>2</sup> Generalisations regarding the diverse jurisdictions to be found within the Commonwealth are always suspect, and rightly so. However, the Constitutions of Malaysia and India display a sufficient number of common characteristics that render a comparison between them worthwhile.

The written constitutions of the New Commonwealth states<sup>3</sup> display, on paper, a considerable distrust of the Executive. This is not surprising in the context of colonial history, but it also acknowledges the tensions, ethnic, racial and political, present in these states. Accordingly, provision was made for drastic powers to be invoked should these tensions boil over. At the same time there was an attempt to limit abuse of power through a written constitution and provisions for a bi-cameral

\* Of the School of Law, University of Buckingham.

1. Twining, *Emergency Powers: A Fresh Start*, quoted in Lee, *Emergency Powers* (Sydney, 1984), p.1.

2. India obtained its independence in 1947. Its Constitution may be described as autochthonous, *i.e.* it was drafted and adopted by the Indian Legislature itself and, unlike the constitutions of most other Commonwealth states, for instance, Malaysia and Zimbabwe, does not owe its validity to UK or colonial legislation. The Indian Constitution, in particular its provisions on fundamental rights and emergency powers, has served as a precedent in nearly all the Commonwealth states subsequently obtaining independence. Malaysia became independent in 1957 as the Federation of Malaya. In 1963 it was joined by Sabah, Sarawak and Singapore to form the new Federation of Malaysia. In 1965 Singapore left the Federation. The Constitution of the Republic of Singapore runs on parallel lines to the Malaysian Constitution and the provisions relating to emergency powers are similar.

3. The term ‘New’ Commonwealth, although strictly inaccurate – India, for instance, has been independent for 42 years and Malaysia for 33 – is nonetheless useful to distinguish these states which became independent after the Second World War, as opposed to the ‘old’ Statute of Westminster Commonwealth.

legislature along the Westminster model, an independent judiciary enjoying security of tenure, an impartial civil service, a bill of rights patterned variously on that in the Indian Constitution or on the European Convention of Human Rights and, fundamentally, political pluralism to safeguard against domination by any single ethnic, racial or political group. In addition, a number of states, including India, Malaysia and Nigeria, sought a further safeguard in a federal system of government. The serious student of comparative constitutional law will, no doubt, be able to list a much more comprehensive list of similarities and, indeed, differences, but this will, perhaps, be sufficient as a starting point for discussion.

One point which may usefully be made here is the influence exerted by the emergency powers applied in the United Kingdom during the two World Wars. The wartime legislation has done much to shape the modern approach to emergencies in the Commonwealth, particularly in the sphere of legislative and judicial review of their use. It is not uncommon in both India and Malaysia to find the courts referring to the United Kingdom wartime legislation and the cases decided thereunder for their persuasive value.

The provisions on emergency powers in the constitutions of the New Commonwealth raise a number of common issues:

1. the circumstances which must exist in these jurisdictions before a proclamation of emergency may be made;
2. the constitutional formalities of such a proclamation;
3. legislative review of emergency proclamations;
4. the possibility of judicial review;
5. the constitutional formalities for the continuation of the emergency;
6. the extent to which constitutional rights are suspended;
7. the question as to whether proclamations of emergency could ever be consistent with the concept of constitutionalism and with the rule of law.

Perhaps all of the above may be summed up in the single question: Are there adequate safeguards against the abuse of emergency powers by an Executive determined to maintain control? Viewed in this context, 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.<sup>4</sup>

### **Definition of emergency**

There are four main types of emergency: wartime, as opposed to peacetime; and civil, as opposed to martial. In this context, a 'civil' emergency refers to a situation where neither the legislature nor the courts have been suspended, while a 'martial'

4. See Arif, "Emergency Powers and the Rule of Law", [1983] *Journal of Malaysian and Comparative Law* 87.

emergency refers to the imposition of martial law, a situation where the armed forces have replaced civil administration and the constitution itself has been suspended. This has frequently been the case in Pakistan. In the *Begum Nusrat Bhutto* case (1977), Chief Justice Anwarul Haq detailed six separate periods of martial law in Pakistan since independence.<sup>5</sup> It is submitted that the concept of 'martial law', which may lead to the suspension or even abrogation of the constitution, should be kept juridically separate from the concept of 'emergency'. Under the latter, while parts of the constitution may be temporarily suspended (usually the Bill of Rights), the constitutional machinery itself continues in operation. It is frequently the case, therefore, that the legislature and the courts carry on functioning.

Emergency powers may be defined as those extraordinary powers permitted to government to deal with threats to the nation that cannot adequately be met with ordinary powers. In some Commonwealth states there are broad categorisations of what may be labelled an 'emergency'. Article 150 of the Malaysian Constitution, for instance, declares that an emergency occurs when the "security or economic life of the Federation" is threatened. In the United Kingdom itself a State of Emergency would exist if it appears to the Crown that there have occurred or are about to occur, events of such a nature as to be calculated to deprive the community or any substantial part of it, of the essentials of life by interfering with the supply and distribution of food, water, fuel or light, or with the means of locomotion.<sup>6</sup>

Any further attempt, however, to define an 'emergency' and 'emergency powers' must be futile. They are by nature elastic concepts.<sup>7</sup> This was recognised by the Privy Council in *Stephen Kalong Ningkan v. Government of Malaysia*<sup>8</sup> where Lord MacDermott observed that the natural meaning of the word itself was capable of covering a wide range of situations and occurrences, while in *Bhagat Singh v. The King Emperor* the Privy Council held:

"A State of Emergency is something that does not permit of any exact definition: it connotes a state of matters calling for drastic action."<sup>9</sup>

In Nigeria, in the case of *Lakanni v. The Attorney-General (West)*, the Supreme Court declared:

"We think it wrong to expect that constitutions must make provisions for all

5. See Wolf-Phillips, *Constitutional Legitimacy: A Study of the Doctrine of Necessity* (London, 1979).

6. Emergency Powers Acts 1920 and 1964.

7. For a United Nations' listing of the wide range of threats recognised in written constitutions which permit emergency powers, reference may be made to UN Department of Economic and Social Affairs, *Study of the Rights of Everyone to be Free from Arbitrary Arrest, Detention and Exile*, UN Doc/E/CN4/826 Rev 1 (1965), p.184.

8. [1970] A.C. 379, at p.390.

9. A.I.R. 1931 P.C.111.

emergencies. No constitution can anticipate all the different forms of phenomena which may beset a nation."<sup>10</sup>

### **Circumstances under which an emergency may be declared**

If threats to the stability or well-being of the nation cannot be met adequately and effectively with normal powers then resort to emergency powers may be justifiable. In fact, non-use of such powers would be dangerous; there is some truth in the argument that, however drastic the solution, non-democratic powers may be used to preserve democracy itself. A typical instance is the threat of external aggression, as happened during the border war between India and China when India proclaimed a State of Emergency in 1962 and during the Malaysian-Indonesian 'confrontation' when Malaysia made a similar proclamation in 1964. Emergency powers may also be invoked when the state is threatened by internal insurrection and terrorism, as happened during the communist insurrection in Malaya (Malaysia as it then was), where a State of Emergency was declared by the High Commissioner in 1948, and the Canadian terrorist crisis of 1970 where, at the request of the Quebec Government, the Prime Minister invoked the War Measures Act of 1914.

The need for emergency powers is recognised in Commonwealth constitutions, to a greater or lesser degree. It is also recognised by the various international conventions. For instance, article 15 of the European Convention on Human Rights permits derogations "in times of war or other public emergency threatening the life of the nation".<sup>11</sup> The underlying rationale is therefore necessity – *salus populi, suprema lex esto* (the safety of the people is the highest law). It needs to be repeated, however, that the true test of the viability of any legal system is its ability to respond to crises without permanently sacrificing the element of constitutionalism under the rule of law. As such there should only be resort to emergency powers where the executive can demonstrate in the legislature and in the courts that these powers are both absolutely necessary and that existing powers are inadequate. Whilst the use of emergency powers is recognised, the recognition is qualified to the extent that there are limits which a state cannot exceed. Though "the flame of individual right and justice must burn more palely when it is ringed by the more dramatic light of bombed buildings",<sup>12</sup> the resort to emergency powers in a democratic society does not permit the extinguishing of the flame.<sup>13</sup> In particular, the temptation to use emergency powers to deal with ordinary crises should be resisted. Unfortunately, the temptation to use emergency powers to validate unconstitutional action has proved irresistible in

10. Sc.58/69 of April 24, 1970 (unreported), per Ademola CJ, quoted in Nwabueze, *Constitutionalism in the Emergent States* (London, 1973), p.203.

11. See also article 4 of the International Convention on Civil and Political Rights 1966.

12. *Conway v. Rimmer* [1968] A.C. 910, at p.982 per Lord Pearce.

13. Lee, *Emergency Powers* (Sydney, 1984), p.4.

many parts of the New Commonwealth.<sup>14</sup>

In the case of *Asma Jilani v. Government of the Punjab* the Chief Justice of Pakistan cited the dissenting judgment of Lord Pearce in *Madizimbamuto v. Lardner-Burke*,<sup>15</sup> and held:

“I too am of the opinion that recourse has to be taken to the doctrine of necessity where the ignoring of it would result in disastrous consequences to the body politic and upset the social order itself but I respectfully beg to disagree with the view that it is a doctrine for validating the illegal acts . . .”<sup>16</sup>

### **Constitutional provision**

In Malaysia, the relevant provision is contained in Article 150 of the Federal Constitution:

(1) If the [King] is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

The Federation of Malaya – since 1963 the Federation of Malaysia – achieved independence in 1957 in the midst of an armed insurrection by communist terrorists. The new Constitution was itself conceived against a backdrop of a state of emergency which had in fact been declared in 1948 when the terrorists of the Malayan Communist Party began their campaign of destruction. The law relating to emergency powers, therefore, pre-dates the independence constitution. At the time the constitution was drafted the situation of emergency was very much a pressing issue, and the powers conferred upon the High Commissioner under the Emergency Regulation Ordinance 1948, were extremely broad. In fact, section 3(1) of the Ordinance was in the same terms as section 1(1) of the U.K. Emergency Powers Act of 1920.

The insurrection was defeated and the Emergency subsequently lifted but given the rather inauspicious start it perhaps comes as no surprise to discover that a State of Emergency has been, more or less, in constant existence to meet the various crises which have erupted at various times since independence.

14. See, e.g., the cases involving unconstitutional action in removing Chief Ministers in Malaysia and Nigeria: *Stephen Kalong Ningkan v. Government of Malaysia* [1970] A.C. 379; *Adegbenro v. Akintola* [1963] 3 W.L.R. 63. In both these cases emergency powers were invoked in order to prevent challenges as to the constitutionality of the action taken. It is not only in the New Commonwealth that the lure of emergency powers has proved to be too alluring. In 1971 the state of Queensland invoked an emergency in order to ensure that a rugby match could proceed: see *Dean v. Attorney-General of Queensland* [1971] Qd.R.391.

15. [1969] 1 A.C. 645.

16. P.L.D. 1972 S.C.230, at p.242.

The launching of an intensive 'confrontation' by Indonesia during the Sukarno era resulted in a state of emergency being declared by the King on 3 September 1964. (The 1964 Emergency, it must be noted, has never been expressly revoked. One consequence of this, by a historical oddity, is that the Proclamation of Emergency still prevails in the Republic of Singapore which was at the relevant time a component part of the Federation of Malaysia.) On 14 September 1966, a constitutional *impasse* in the state of Sarawak regarding the dismissal of the Chief Minister resulted in article 150 being invoked by the Federal Government in relation to that state.<sup>17</sup> Racial riots led to a Declaration of Emergency on 15 May 1969. Finally, in 1977, the Federal Government invoked emergency powers to deal with a political crisis in the state of Kelantan. Only one of these emergencies has ever been specifically revoked. In 1962, the Proclamation of Emergency declared in 1948 was lifted. Consequently, during the 33 years since Malaysia gained its independence, only 2 years have been spent in a non-emergency situation.

In India, as in Malaysia (and for that matter, in Nigeria and Kenya) the emergency provisions in the Constitution were predated by colonial legislation, in this case the Government of India Act 1935 which itself perpetuated earlier similar legislation.

In India, the main emergency provision is contained in article 352 of the Union Constitution:

(1) If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance, he may, by Proclamation, make a declaration to that effect, in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation.

Article 352 is further supplemented by article 356 which provides for a Proclamation of Emergency in the event of the breakdown of the constitutional machinery of any state in the Union and the President being satisfied that "the government of the State cannot be carried on in accordance with the provisions of this Constitution". Article 360 further provides for a State of Emergency when "the financial stability or credit of India" is threatened.

A comparison with the Malaysian Constitution reveals that there is no specific provision in that Constitution for a breakdown in the constitutional machinery of any state in the Federation. Nevertheless, such an eventuality would be covered by the "security" and "public order" clauses. In any event, the lack of such specific provision did not prevent the 1966 Proclamation of Emergency in the state of Sarawak caused by the constitutional *impasse* there nor did it prevent the Federal

17. See *Stephen Kalong Ningkan, supra*.

Government from invoking the 1977 Proclamation to deal with the political crisis in the state of Kelantan.

A further similarity between the constitutional provisions is that a Proclamation may in fact be made in *anticipation* of a "grave emergency" and before the actual occurrence of the event. The Malaysian article 150(2) and the Indian article 352(3) are in substantially the same terms on this point. However, there is no equivalent clause in either articles 356 or 360, leading to the conclusion that in India the breakdown of constitutional machinery or economic crisis must have actually occurred before the President may act, while in Malaysia this appears not to be the case.

In India an emergency was proclaimed for the first time in 1962 when the Chinese attacked its northern borders. The Proclamation declared that a grave emergency existed whereby the security of India was threatened by external aggression. The emergency continued until 1968 when it was lifted by another Proclamation by the President. In 1971, the outbreak of war with Pakistan resulted in a Proclamation of Emergency which was not revoked until 1977. In the meantime, a further Proclamation was made in 1975 on the ground that the security of India was threatened by "internal disturbance". This Proclamation was effectively terminated in 1978. Thus, on a rough count, India has been under emergency rule for 12 out of the 42 years of independence.

### **The constitutional formalities of Proclamations of Emergency**

Article 150(1) of the Malaysian Constitution vests the power of proclaiming an emergency with the King. In *Stephen Kalong Ningkan* the question arose as to whether the existence of the emergency was an issue which the King alone could decide. The majority of the Federal Court decided that this concerned matters which were within his sole discretion.<sup>18</sup> 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 upon the court to assume good faith on the part of the King. In stark contrast was the opinion of the minority judge, Ong FJ, who refused to regard the "satisfaction" of the King that a "grave emergency" existed as meaningless verbiage, holding:

"[The words] 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."<sup>19</sup>

18. [1968] 1 *M.L.J.* 119.

19. *Ibid.*, p.126.

In this case 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 the Chief Minister on the strength of a letter signed by 21 out of 42 members of the Council Negeri (the State Legislative Assembly). Believing that 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.<sup>20</sup> 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 dismiss the Chief Minister in his absolute discretion. When a vote of no confidence was finally carried in the Council Negeri, Ningkan was again dismissed.

It was argued, on Ningkan's behalf, that no "grave emergency" existed, since there were no outward signs of disturbances, hostilities, or threats of either.<sup>21</sup> 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*, leading consequently to an invalidation of his decision to dismiss Ningkan. The Federal Court, as noted above, refused to question whether the conditions specified by article 150(1) were satisfied. On appeal to the Privy Council, it was held that Ningkan's appeal was to be dismissed as he could not discharge the onus of proving *mala fides*. This was a strange view to take. The real question was whether a State of Emergency as defined by the Constitution existed. Under a written constitution the courts possess the power to question this finding of fact, a power which does not exist in the absence of a written constitution and in a jurisdiction such as the United Kingdom.<sup>22</sup>

A dispute which has arisen out of the *Ningkan* cases is the question as to whether the King, in exercising the power to issue a Proclamation, is exercising a prerogative power. This is the contention, among others of Professor Hickling in his article "The Prerogative in Malaysia".<sup>23</sup> It is submitted that this cannot be the position. Article 40 is very clear:

(1) In the exercise of his functions . . . the [King] shall act in accordance with the advice of the Cabinet or of a Minister acting under the general

20. [1966] 2 *M.L.J.* 187.

21. A similar argument failed in the Nigerian case of *Adegbenro v. Akintola*, *supra*, n.14.

22. An interesting contrast is provided by the United States Supreme Court which has exercised its powers of review to the full: see, e.g., the celebrated case of *Marbury v. Madison* (1803) 1 Cranch 137. For an example of a case in which the Supreme Court sought to control the exercise of the Presidential executive power, see *ex parte Endo* 323 U.S.283 (1944).

23. (1975) 17 *Malaya L.R.* 207.

authority of the Cabinet, except as otherwise provided by this Constitution . . .

It is true that the article provides for exceptions but these operate only when expressly provided. Article 150 contains no such provision. Moreover, the various judgments in the *Ningkan* case are sufficiently clear. In the High Court, Chief Justice Pike declared:

“ . . . since under article 40 of the Constitution the [King] is required to act upon the advice of the Cabinet in making a proclamation under article 150 . . . it cannot, I think, be argued that the power conferred by article 150 is a prerogative power analogous to certain powers of the British Sovereign.”<sup>24</sup>

In the Federal Court the Lord President equated the exercise of the power by the King with action by the Government:

“In an act of the nature of a proclamation of emergency, issued in accordance with the constitution, in my opinion, it is incumbent upon the court to assume *that the Government* is acting in the best interest of the State and permit no evidence to be adduced otherwise.”<sup>25</sup>

In the Privy Council, Lord MacDermott said:

“On the 14th September, 1966 . . . the [King] *acting, it may be presumed, on the advice of the Federal Cabinet as required by article 40(1) of the Federal Constitution*, proclaimed a state of emergency . . .”<sup>26</sup>

In its original form article 150 provided that once the King had issued a Proclamation of Emergency, there followed a duty to summon Parliament “as soon as practicable” if Parliament was not sitting when the Proclamation was issued. Until both Houses of Parliament sat, the King could promulgate Ordinances having the force of law if satisfied that immediate action was required (article 150(2) as unamended). A Proclamation and any Ordinance had to be laid before both Houses 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 15 days from the date when both Houses sat. However, where resolutions were passed by each House of Parliament, before the expiration of these respective periods, approving them, the Proclamation and any Ordinance could continue in

24. [1967] 1 *M.L.J.* 46, at p.47.

25. [1968] 1 *M.L.J.* 119, at p.122 (emphasis added).

26. [1968] 2 *M.L.J.* 238, at p.240 (emphasis added).

force (clause 3). In addition, 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.

In 1960, however, the time limits of 2 months (for a Proclamation) and 15 days (for an Ordinance) were deleted.<sup>27</sup> Further amendments were added in 1981.<sup>28</sup> The King's power under the article was now to include 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.<sup>29</sup> The continued existence of multiple Proclamations is now, therefore, sanctioned expressly by the Constitution.<sup>30</sup>

In this connection, reference may be made to the 42nd Amendment 1976, to the Indian Constitution. This added a new clause 4 to article 352 which permitted a multiplicity of Proclamations to be in force at the same time. However, the 44th Amendment has now deleted clause 4. It is clear enough that the Malaysian clause 2(a) followed the example of the Indian clause 4. However, it is perhaps too much to hope that the Indian abandonment of that controversial provision will be emulated in Malaysia.

Under the new article 150(2)(b) where a Proclamation is in force and both Houses are not then sitting concurrently, the King may 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." For this purpose, under clause 9, the Houses of Parliament are to be regarded as "sitting" only where "the members of each House are respectively assembled together and carrying out the business of the House."

The 1981 Constitution (Amendment) Act also removed the constitutional duty of the King to summon Parliament as soon as may be practicable. This is significant since Parliament has the power to pass resolutions under clause 3 to annul both Proclamations and Ordinances made thereunder. It is worth noting that after the Proclamation of 1969, Parliament only sat again in February 1971, after a period of almost 20 months.

Where a Proclamation of Emergency ceases to be in force (by revocation or annulment), an Ordinance made under clause (2)(b) and any other emergency law shall cease to have effect 6 months after the date the emergency ceases to be in force.

The constitutional formalities under the Indian Constitution are similar to those under the Malaysian Constitution. While the President may proclaim an emergency, he, like the Malaysian monarch, is a constitutional Head of State and he exercises his powers on the advice of his ministers. Article 74 of the Constitution lays down:

27. Constitution (Amendment) Act 1960, s.29.

28. Constitution (Amendment) Act 1981.

29. Article 150 (2A), added by s.15(b) of the 1981 Act.

30. See *Teh Cheng Poh v. Public Prosecutor* [1979] 1 M.L.J. 50, discussed *infra*.

There shall be a Council of Ministers with the Prime Minister at the head, to aid and advise the President in the exercise of his functions.

An interesting question has arisen as to whether the President (or the Malaysian monarch) may issue a Proclamation on the advice only of the Prime Minister. Article 352 (like article 150 of the Malaysian Constitution) did not exclude the possibility of a Prime Minister advising the issue of a Proclamation of Emergency without the authority of the Cabinet – as Mrs Gandhi actually did, professing that a rule of business enabled her so to act. The 44th Amendment has removed this defect. An Indian Prime Minister cannot now advise the President to make a proclamation of emergency on the Prime Minister's sole authority, for the amended article requires that a Proclamation shall not be made "unless the decision of the Union Cabinet that such Proclamation may be issued has been communicated to him in writing".<sup>31</sup> This issue has had interesting parallels in Malaysia. In the Constitution (Amendment) Act 1983, article 150 was amended to read as follows:

(1) If the *Prime Minister* is satisfied that a grave emergency exists . . . *he shall advise the [King] accordingly and the [King] shall then issue a Proclamation . . .*<sup>32</sup>

The Amendment Act precipitated a political crisis, both on this as well as other grounds. Accordingly, in 1984 a further Constitution (Amendment) Act was passed to restore article 150 to the pre-1983 position. Nevertheless, it is still a live issue in Malaysia (as it also probably is under the UK Emergency Powers Acts of 1920 and 1964) and is particularly significant as the Government is a coalition government. As such the Prime Minister may have difficulty in persuading the members of the Cabinet who are not of his own party that an emergency should be proclaimed by the King.

### **Legislative review**

In its original form article 352 of the Indian Constitution provided that a Proclamation of Emergency:

- (2) (b) shall be laid before each House of Parliament;
- (c) shall cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolution of both Houses of Parliament:

One result of the tinkering with the Constitution by Mrs Gandhi's regime

31. See Seervai, *Constitutional Law of India* 3rd ed. (New Delhi, 1981), p.435.

32. Emphasis added.

during the 1975 emergency and the consequent damning report of the Shah Commission into the abuse of power during the emergency was that there has been, what may be termed, a 'libertarian backlash'. The safeguards contained in article 352 have been further strengthened, a process that is unique among emergent nations, whether part of the Commonwealth or otherwise, where the dominant trend has been towards the erosion of constitutional safeguards.

Under the new provisions of the 44th Amendment, first, the approval of the Proclamation by each House is to be given within one month and not two months as before. This stands in sharp contrast with article 150 of the Malaysian Constitution which has been amended such that Parliament need not even be summoned to sit. Secondly, under the new provisions, the approval of the Proclamation by each House is not to be by a simple majority as before, but by a majority of not less than half the membership of each House and a majority of two-thirds of those present and voting. Thirdly, a provision has been added such that a Proclamation of Emergency would lapse within 6 months unless each House has approved of its continuance by the aforesaid majorities and this provision applies to the continuance of the Proclamation for successive periods of 6 months. Fourthly, although the approval of the continuance of a Proclamation of Emergency requires the special majorities mentioned earlier, the newly added clause 7 obliges the President to revoke the Proclamation if the House of the People (the lower House) passes a resolution disapproving the Proclamation, or its continuance, by a simple majority. Fifthly, the new Amendment further provides that if one-tenth of the membership of the House gives notice in writing of their desire to move that the Proclamation, or its continuance, be disapproved, then on receipt of such notice, the Speaker, if the House is in session, or the President, if the House is not in session, shall call a special sitting of the House within 14 days from the receipt of the notice, for the purpose of considering the resolution.

### **The justiciability of Proclamations of Emergency and emergency legislation**

It is the function of the judiciary to interpret the written constitution – a proposition repeated by Lord Diplock when delivering the judgment of the Privy Council in *Chokolingo v. Attorney-General of Trinidad & Tobago* as follows:

“Under the constitution on the Westminster model . . . which is based on the separation of powers . . . it is an exercise of the judicial power of the state, and consequently the function of the judiciary alone, to interpret the written law when made . . .”<sup>33</sup>

However, the roll-call of emergency cases in all parts of the emergent nations of

33. [1981] 1 W.L.R. 106, at p.110.

the Commonwealth display a sad conformity of judicial passivity and a reluctance to uphold the very constitution they have been sworn to protect. Neither has the Privy Council, in the increasingly rare situations where it is still the final court of appeal, supplied the tenacity lacking in Commonwealth jurisdictions. Few, indeed, are the occasions when it has delivered judgments unfavourable to the executive. It would not be an exaggeration to say that there has been an over-zealous attention to formalistic legalism and none to constitutional values and the doctrines of constitutionalism.

Perhaps this is not too surprising given the common law tradition inherited by commonwealth judges and illustrated by cases such as *Liversidge v. Anderson*,<sup>34</sup> *Duport Steels Ltd. v. Sirs*<sup>35</sup> and *Pickin v. British Railways Board*.<sup>36</sup> The fact remains, however, that the Commonwealth judges are dealing with a written constitution and the guiding principles must surely be different.

In India, the question as to whether a Proclamation of Emergency was justiciable was decided even before independence in the case of *Bhagat Singh v. King-Emperor*, where an Ordinance made by the Governor-General under section 72 of the Government of India Act 1919, was challenged on the ground that there existed no emergency to justify the taking of the action by the Governor-General. The Privy Council held:

“The petitioner asked the Board to find that a state of emergency did not exist. This raises directly the question who is to be the judge of whether a state of emergency exists. A state of emergency is something that does not permit of any exact definition. It connotes a state of matters calling for drastic action which is to be judged as such by someone. It is more than obvious that that someone must be the Governor-General and he alone.”<sup>37</sup>

In a long line of cases, the Indian courts have held that the issue of a Proclamation does not require any conditions precedent, apart from the ‘satisfaction’ of the President. In *Makhan Singh v. State of Punjab*, as to the continuation of the Proclamation of Emergency and the imposition or restrictions on fundamental rights, the Supreme Court held:

“How long the Proclamation of Emergency should continue and what restrictions should be imposed on the fundamental rights of citizens during the pendency of emergency are matters . . . left to the Executive.”<sup>38</sup>

Nonetheless, the Supreme Court accepted the possibility that justiciability may lie

34. [1942] A.C. 206.

35. [1980] 1 W.L.R. 142.

36. [1974] A.C. 765.

37. A.I.R. 1931 P.C. 111.

38. A.I.R. 1964 S.C. 381, 403.

if *mala fides* could be proved. The high water-mark of judicial passivism was reached in *ADM Jabalpur v. Shukla*.<sup>39</sup> This was a case under article 359, dealing with the power of the President to suspend fundamental rights, in this case *habeas corpus*. The Supreme Court held that the courts had no jurisdiction to set aside an order of detention on the plea that it was illegal or *mala fide*. The Supreme Court sought to justify the departure from its ruling in *Makhan Singh* on the basis of the difference in phraseology in the Presidential Orders of 1962 and 1975 involved in those two cases respectively.

In any event, there was an attempt to put the matter beyond dispute, for the time being at any rate by the 42nd Amendment which added a new clause to article 352:

5. Notwithstanding anything in this Constitution –

(a) the satisfaction of the President mentioned in clause 1 and clause 3 shall be final and conclusive and shall not be questioned in any court on any ground;

(b) . . . neither the Supreme Court nor any other court shall have jurisdiction to entertain any question, on any ground, regarding the validity of [the issue of a Proclamation or the continued validity of a Proclamation].

The possible effect of this provision and the judicial response to it was never put to the test as it was swept away by the reforms of the 44th Amendment. This merely means, of course, that the *status quo* has been maintained. The courts will still not review a Proclamation unless it be on the very difficult ground of *mala fides*.

The position of justiciability is no better in Malaysia. In the *Stephen Kalong Ningkan* case the Federal Court had decided by a majority of two to one that a Proclamation of Emergency was not justiciable, even on the grounds that it was issued *mala fide*.<sup>40</sup> Lord MacDermott in the Privy Council described the question as one “of far-reaching importance which, on the present state of the authorities, remained unsettled and debatable.”<sup>41</sup> In the event, the Privy Council proceeded on the assumption that the issue was justiciable, and found against the appellant as he did not discharge the onus of proving *mala fides*.

The issue was again raised in *Public Prosecutor v. Ooi Kee Saik*<sup>42</sup> and *Johnson Tan Han Seng v. Public Prosecutor*.<sup>43</sup> Both cases concerned the validity of emergency laws but the judgments alluded to the question of justiciability of Proclamations of Emergency. In *Ooi Kee Saik*, Raja Azlan Shah J repeated the approach of the Federal Court in the *Ningkan* case:

39. A.I.R. 1976 S.C. 1207.

40. [1968] 1 M.L.J. 119.

41. *Ibid.*, p.242.

42. [1971] 2 M.L.J. 108.

43. [1977] 2 M.L.J. 67.

“The fact that the [King] 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 Lal Sharma*). The same principles governing discretionary powers confided to subordinate administrative bodies cannot be applied to the [King] and are inapplicable.”<sup>44</sup>

As in India, constitutional amendment has sought to remove conclusively any possibility of judicial review. Unlike India, however, it appears that the new provision will remain for the foreseeable future. This new provision was added by the Constitution (Amendment) Act of 1981 which provides that the “satisfaction” of the King when issuing a Proclamation “shall be final and conclusive and shall not be challenged or called in question in any court on any ground.” The same applies regarding:

- 150(8)(b)(ii) the continued operation of such Proclamation
- (iii) any ordinance promulgated . . .
- (iv) the continuation in force of any such Ordinance.

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 in May 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 7 years had intervened and the circumstances which warranted the Proclamation of 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 Proclamation which had ceased to be in force, were similarly of no effect. The conviction of the accused under the 1975 Regulations could not, therefore, be sustained.

A unanimous Federal Court rejected this contention, with the same attitude of judicial self-restraint exhibited in other parts of the Commonwealth. The Lord President characterised 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*:

44. *Supra* n.42, at p.113.

“ . . . 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, non-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 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.”<sup>45</sup>

Implicit in the *Johnson Tan* decision was a recognition that a Proclamation of Emergency could not lose its force by a “mere” judicial pronouncement on the matter. The courts have held that article 150 is clear: a Proclamation remains in force unless revoked (by the Executive) or annulled (by Parliamentary resolution). Reference may also be made to *Public Prosecutor v. Khong Teng Khen* where the court held that the ultimate right to decide if an emergency exists or has ceased to exist remains with Parliament and that it was not the function of the courts to decide on that issue.<sup>46</sup>

The *Johnson Tan* decision leads to the result that where a number of different Proclamations have been issued and not revoked or annulled, all remain in force. In *Teh Cheng Poh v. Public Prosecutor* this view was partly retracted.<sup>47</sup> At the time this case was heard, four different Proclamations had been issued – those of 1964; 1966; 1969; and 1977. None of the above had been expressly revoked or annulled. The Privy Council (composed of Lords Diplock, Simon, Salmon, Edmund-Davies and Keith) noted that the power to issue, as well as to revoke, a Proclamation vested in the King but expressed the view that the Constitution did not require the revocation power to be “exercised by any formal instrument”. The Privy Council then formulated a new principle: it was possible for an earlier Proclamation to be *impliedly* revoked by a subsequent one. Their Lordships held:

“ . . . 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.”<sup>48</sup>

In the most liberal pronouncement yet to be found in any of its judgments in

45. A.I.R. 1974 S.C. 807.

46. [1976] 1 *M.L.J.* 166.

47. [1979] 1 *M.L.J.* 50.

48. *Ibid.*, p.53.

emergency cases from the Commonwealth, the Privy Council went on to hold:

“Apart from annulment by resolutions of both Houses of Parliament it [the Proclamation] can be brought to an end only by revocation by [the King]. 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 Lordship’s view, be sought against members of the Cabinet requiring them to advise [the King] to revoke the Proclamation.”<sup>49</sup>

The effect of the decision was to invalidate the Emergency (Essential Powers) Ordinance 1969, and all the regulations made thereunder. This, however, proved to be only a temporary setback to Executive domination. Using its two-thirds majority in Parliament, the Government succeeded in enacting the impugned Ordinance as an Act of Parliament, the Emergency (Essential Powers) Act 1979. Moreover, the Act was given retrospective effect and deemed to have come into force in 1971, thus effectively negating the ruling of the Privy Council.

### **Protection of fundamental rights during an emergency**

The question as to whether any of the fundamental rights contained in the Malaysian Constitution receive protection during an emergency must be answered in the negative. The provisions of article 150 are clear enough:

6. . . . 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.

Interestingly, while clause 6 is extremely broad it does contain a saving provision which in effect operates as a limitation, albeit a minor one and without practical significance, upon the Executive even during an emergency. This is that no Ordinance or Act of Parliament shall:

6.(a) . . . . extend the powers of Parliament with respect to any matter of Muslim law or the custom of the Malays, or with respect to any matter of native law or custom in a Borneo State; nor shall clause 6 validate any

49. *Ibid.*, p.55. See also *Attorney-General of St. Christopher, Nevis and Anguilla v. Reynolds* [1980] A.C. 637. Cf. the Australian case of *Farey v. Burrett* (1916) 21 C.L.R. 450. This involved the validity of regulations made under the emergency provisions of the War Precautions Act 1914–1915. The court refused to question the “judgment, wisdom and discretion” of the executive.

provisions of this Constitution relating to any such matter or relating to religion, citizenship or language.

Under the Indian Constitution, article 358 suspends the operation of article 19 (containing fundamental rights) during the operation of an emergency. The effect of article 358 is that it suspends the restrictions on the power of the State to make any law in contravention of the provisions of article 19. It is worth noting that there is no equivalent provision to clause 6(a) of the Malaysian Constitution.

### **Emergency powers and the rule of law**

The question must be asked as to whether the rule of law can co-exist with emergency powers. At first glance, it might be deduced that their co-existence can only be an unhappy one. The former 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 arbitrary abuse of power, while the latter consists of rules and principles with the avowed aim of supplying government with extremely broad powers.

However, if it is accepted that emergency powers are necessary and, after all, no matter how stable a country professes to be, it can never be totally insulated from aberrant conditions, then this need not be inconsistent with the rule of law or with the principles of constitutionalism. This is so only provided that the emergency powers are subject to well-defined constraints. Thus, the executive must only rely sparingly on emergency powers to meet crisis situations; the legislature is expected to exert a measure of positive control over the continuation of emergency laws; while the judiciary, as the guardian of the constitution, is expected to check excesses of emergency powers in cases properly brought before the courts. It is submitted that Nwabueze is correct in his analysis when he writes that emergency powers can be accommodated with constitutionalism if they are conceived as a temporary aberration occurring once in a long while and provided they are not so sweeping as to destroy or suspend the restraints of constitutional government completely.<sup>50</sup>

It submitted that developments in Malaysia since independence have thrown this 'balance' askew, such that the original commitment to democratic values and the rule of law shows signs of erosion which cannot be defended under present circumstances. Sadly, this is true of most of the emergent nations of the Commonwealth.<sup>51</sup> Emergencies in the new states are much too frequent; they have tended to become the normal order of things, thus replacing constitutional government with emergency administration. This is despite the fact that the essence of the concept of emergency is its provisional or temporary status. It follows, therefore, that it should be terminated as soon as the circumstances which brought it into existence are reasonably controlled or no longer exist.

50. Nwabueze, *Constitutionalism in the Emergent States* (London, 1973).

51. See, *ibid.*, p.174.

Reference may be made at this point to the recommendations of the International Law Association as follows:

- (a) The duration of a State of Emergency shall never exceed the period strictly required to restore normal conditions.
- (b) The duration of the period of emergency (save in the case of war or external aggression) shall be for a fixed term established by the constitution.
- (c) Every extension of the initial period of emergency shall be supported by a new declaration made before the expiration of each term (*i.e.*, with the approval of the legislature). A strict scrutiny of every extension of the period of emergency is imperative; prior approval is essential since the reason of urgency which might have justified the initial declaration by the executive may no longer be relevant.
- (d) The legislature shall not be dissolved during the period of emergency but shall continue to function effectively; if dissolution of a particular legislature is warranted, it shall be replaced as soon as possible by a legislature duly elected in accordance with the requirements of the constitution which shall ensure that it is freely chosen and representative of the entire nation.<sup>52</sup>

Lee<sup>53</sup> quotes statistics to the effect that from 1946 to 1960, States of Emergency have been proclaimed on no less than 29 separate occasions in British dependent territories alone. There is a tendency to abuse the concession of emergency powers in the constitution not only by using them for purposes for which they were not intended but also by using them to suspend constitutional government altogether.

Perhaps this is not altogether too surprising. Emergency powers must be seen as one of the constitutional devices, and, some would argue, a necessary device, for adjusting the political, economic and social imbalances to be found in the racially and ethnically heterogeneous societies of Britain's former colonies. This is especially true of those states of the Commonwealth which inherited geographically unrealistic borders and substantial minority groups. These are factors which have posed almost insurmountable problems even in the 'old' Commonwealth, Canada for instance, and in the United Kingdom itself.

Emergency powers may be permissible when the circumstances are such that they are invoked by a Government which is politically and legally accountable. Such a Government may be able to invoke emergency powers without unduly sacrificing the ideals of constitutionalism. Unfortunately, in states where the executive is all-powerful, the legislature ineffectual and the judiciary timid, emergency powers can only, at best, be regarded as a negation of constitutionalism and, at worst, as authorised tyranny.

52. The 1984 Paris Minimum Standards of Rights Norms in a State of Emergency; for further details see Chowdhury, *Rule of Law in State of Emergency* (London, 1989).

53. *Emergency Powers* (Sydney, 1984), p.6.