

Prorogation of Parliament

1. Who can prorogue Parliament?

1.1 Only the Yang di- Pertuan Agong (“**YDPA**”) can prorogue the Parliament. Article 55(2) of the Federal Constitution states:

“The Yang di-Pertuan Agong may prorogue or dissolve Parliament.”

1.2 If there is no prorogation of Parliament, the Parliament must convene at least once every six months.

1.3 Article 55(1) of the Federal Constitution:

“The Yang di-Pertuan Agong shall from time to time summon Parliament and shall not allow six months to elapse between the last sitting in one session and the date appointed for its first meeting in the next session”.

2. In what circumstances can the Parliament be prorogued?

2.1 In **PP v Ooi Kee Saik & Ors** [1971] 2 MLJ 108, it was held that when the Parliament is not “sitting” or when the Parliament is not in session, the Parliament is prorogued.

2.2 In **PP v Khong Teng Khen & Anor** [1976] 2 MLJ 166, the court referred to the book “The Malaysian Parliament (Practice and Procedure)” by former Clerk of Parliament, Encik Ahamad bin Abdullah to explain the sitting of Parliament. It was held that *“the Malaysian Parliament is divided approximately into 5 or 6 parts, each part being called a session. Each session covers roughly a period of slightly less than one year, usually beginning in April, May or June. At the end of each session Parliament is prorogued by His Majesty by a proclamation published in the Gazette. After being prorogued neither House holds any meeting until a new session is summoned.”*

2.2 Article 55(2) appears to give unfettered powers for the YDPA to “prorogue” the Parliament.

2.3 However, Article 40(1) requires the YDPA to “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”. Article 40(1A) further states that the YDPA “shall accept and act in accordance with such advice”.

2.4 Article 40(2) suggests that the YDPA may only act in his discretion in the performance of the following functions:

- a. the appointment of a Prime Minister;
- b. the withholding of consent to a request for the dissolution of Parliament;
- c. the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such meeting.

2.5 Therefore, the YDPA must act in the advice of the Prime Minister before the prorogation of Parliament can happen. However, there are no local cases which discuss on the circumstances in which the YDPA can prorogue the Parliament.

2.6 Very recently, the United Kingdom was faced with similar conundrum. President Boris Johnson advised the Queen that the Parliament should be prorogued for five weeks in light of the Brexit crisis.

2.7 This was challenged in the case of ***R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland*** [2019] UKSC 41. The eleven-justice panel of the Supreme Court ruled unanimously that the prerogative power of prorogation was justiciable, and the ongoing prorogation of Parliament was both unlawful and void. The court utilised a three-prong test in determining the case.

2.8 *First*, was the matter justiciable?

Relying on the High Court of Justice ruling in the 1611 Case of Proclamations that "the King hath no prerogative but that which the law of the land allows him", the court found that it was. The court also found that the use of the prerogative power of prorogation is a use of the royal prerogative that was open to judicial review, as no party in the case argued that the court did not have the jurisdiction to rule on the existence or limits of the power of prorogation.

2.9 *Second*, what are the limits to the power of prorogation?

In ruling on this question, the court relied on the constitutional conventions of parliamentary sovereignty and democratic accountability. If the power of prorogation was unchecked, then the executive could indefinitely prorogue Parliament, undermining its sovereignty and obligation to make and scrutinise laws. The court quoted Lord Bingham's statement that the government's conduct being accountable to Parliament "lies at the heart of Westminster democracy", and the power of prorogation was limited by that principle. Hence, the court ruled that any prorogation would be unlawful "if it has the effect of frustrating or preventing, without reasonable justification, the ability of Parliament to carry out its constitutional functions as a legislature and as

the body responsible for the supervision of the executive", and if that was the case, there would be no need to rule on whether the motives of the executive were lawful.

2.10 *Third*, did prorogation frustrate the ability of Parliament to carry out its constitutional functions?

The court ruled that the prorogation of Parliament did have this effect. In particular, the court found that with the backdrop of the "fundamental [constitutional] change" of Brexit, as the elected representatives of the people, the House of Commons in particular had the right to scrutinise any Brexit plans from the government. Proroguing for five out of the eight weeks leading up to 31 October prevented Parliament from exercising its constitutional functions, which had an "extreme" effect on "the fundamentals of democracy".

2.11 The court found that the government had not provided a justification for such a prorogation; the government had only provided the Nikki da Costa memorandum as evidence, which only justified a State Opening on 14 October, not the date of prorogation. The court also found that the government offered no justification for a five-week prorogation when the normal period of preparation for a State Opening was four to six days, and that the da Costa memorandum did not take into account how the necessary scrutiny of any withdrawal agreement under the terms of the European Union (Withdrawal) Act 2018 could be scheduled.

3. What are the consequences of prorogation of the Parliament?

3.1 The Parliament will not be able to perform its legislative functions because the Parliament sessions will not be allowed to continue.

3.2 If the prorogation happens during the state of emergency, the King will maintain the power to enact necessary legislations on the advice of the Prime Minister, by virtue of Article 150(2B), which states that:

"if at any time while a proclamation of emergency is in operation, except when both houses of parliament are sitting concurrently, the yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require."

Emergency

4. What is emergency?

4.1 Article 150(1) provides for the proclamation of emergency by the YDPA. Article 150(1) reads:

“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 therefor is threatened, he may issue a Proclamation of Emergency making therein a declaration to the effect.”

4.2 The word “emergency” extends to wars, famines, earthquakes, floods, epidemics and the collapse of civil government.

4.3 In **Stephen Kalong Ningkan v Government of Malaysia** [1968] 2 MLJ 238 (PC), it was held that *“the word “emergency” as used in article 150(1) **cannot be confined to the unlawful use or threat of force** in any of its manifestations. While article 149 of the Federal Constitution is aimed at stopping or preventing subversion of that character, the terms of article 150 are **much less restricted**. Although an “emergency” to be within that article **must be not only be grave** but such as to threaten the **security or economic life** of the Federation or any part of it, the natural meaning of the word itself is capable of covering a very wide range of situations and occurrences, including such diverse events as wars, famines, earthquakes, floods, **epidemics** and the collapse of civil government.”*

4.4 The Privy Council referred to **Bhagat Singh & Ors The King Emperor** LR 58 IA 169
*“A state of emergency is something that does not permit of any exact definition: it **connotes a state of matters calling for drastic action....**”*

“Public Order”

4.5 The emergency must threaten public order. In the local case of **PP v Pung Chen Choon** [1994] 1 MLJ 566, the court adopted the test *“in determining whether an act affects law and order or public order is: Does it lead to disturbance of the current life of the community so as to amount to disturbance of public order or does it affect merely an individual leaving the tranquility of society undisturbed?”*

In this case it concerns with S8A of the Printing Presses and Publication Act on the prohibition of circulation of fake news.

4.6 In the Indian case of **Romesh Thappar v. State of Madras**, [1950 S.C.R. 594], the Supreme Court of India defined public order as: an expression which signifies a state of tranquillity which prevails amongst the members of a political society as a result of the internal regulations enforced by the Government which they have established.”

In this case it concerns with the Madras Maintenance of Public Order which prohibits entry into and circulation in the State of Madras a weekly Journal.

4.7 In the Indian case **Superintendent, Central Prison, Fatehgarh v. Ram Manohar Lohia**, [1960 2 S.C.R. 821]. public order is synonymous with public safety and tranquillity; it is the absence of disorder involving breaches of local significance in contradistinction to national upheavals, such as revolution, civil strife, war, affecting the security of the State.

In this case it concerns with the U.P. Special Powers Act 1932, section 3 which prohibits the instigation, by word or visible representation not to pay or defer payment of any extraction or even contractual dues to Government, authority or landowner.

“Security”

4.8 In the Supreme Court of India case of **State Of West Bengal vs Ashok Dey & Ors** 1972 AIR 1660, it was held that “Such a power with the State Leg stature, hedged in by effective safeguards as it is, appears to us to be necessary to enable it to deal with emergent situations necessitating enactments with respect to preventive detention for safeguarding the security of the State against violent activities secretly organised by anti- social and subversive elements with the intention of producing chaos”

“That, disturbance of public order in a State may in turn prejudicially affect its security, is also undeniable.”

In this case it concerns with the Prevention of Unlawful Activities Act 1970 which provides for preventive detention for more than 3 months.

5. Who can declare emergency?

5.1 According to Article 150(1), the YDPA can declare an emergency. However, case laws have interpreted Article 150 together with Article 40 of the Federal Constitution to mean that the declaration of emergency by the YDPA is a non–discretionary power.

5.2 In **N Madhavan Nair v. Government of Malaysia** [1975] 2 MLJ 286, the Court held 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 at all times on the advice of the Cabinet.”

5.3 The same position has been taken by the Privy Council in ***Teh Cheng Poh v. Public Prosecutor*** [1979] 1 MLJ 50 where Lord Diplock held:

“During that period, the Yang di-Pertuan Agong is empowered by Article 150(2) of the Constitution to “promulgate ordinances having the force of law, if satisfied that immediate action is required”.

6. What are the consequences of declaring emergency?

6.1 King acquires power to legislate.

6.1.1 During an emergency, if the two Houses of Parliament are not sitting concurrently, the YDPA may act under Article 150(2B) to promulgate ordinances having the same force and effect as an Act of parliament.

6.1.2 However, the precondition of Article 150(2B) can be easily satisfied. This is because the common practice is for one House to meet only after the other has adjourned. This means that during an emergency, even if one house of Parliament is holding meetings, the executive has powers under Article 150 to seize the initiative in the legislative field.

6.2 Extension of the legislative powers of Parliament.

6.2.1 During an emergency, the legislative authority of Parliament is widened immensely pursuant to Articles 150(5) and (6) of the Federal Constitution.

Article 150(5) reads: *“Subject to Clause (6A), while a proclamation of emergency is in force, parliament may, notwithstanding anything in this Constitution make laws with respect to any matter, if it appears to parliament that the law is required by reason of the emergency; and Article 79 shall not apply to a bill for such a law or an amendment to such a bill, nor shall any provision of this Constitution or of any written law which requires any consent or concurrence to the passing of a law or any consultation with respect thereto, or which restricts the coming into force of a law after it is passed or the presentation of a bill to the Dang Di-Pertuan Agong for his assent.”*

Article 150(6) reads: *“Subject to Clause (6a), 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.”

Article 150(6A) reads: “*Clause (5) shall not extend the powers of parliament with respect to any matter of Islamic law or the custom of the Malays, or with respect to any matter of native law or customs in the State of Sabah or Sarawak; nor shall Clause (6) validate any provision inconsistent with the provisions of this Constitution relating to any such matter or relating to religion, citizenship, or language.*”

6.2.2 Pursuant to Article 150(5), the Parliament can legislate laws required by the reason of emergency. In the enactment of such emergency legislations, the restrictions imposed by the constitution or written law are inapplicable. For instance, constitutional provisions requiring consultation with the states or the consent of any authority outside of Parliament do not apply pursuant to Article 150(5). The consent of the Conference of Rulers and the Governors of Sabah and Sarawak is also not needed pursuant to Article 150(5).

6.2.3 According to Article 150(6), the emergency legislation cannot be invalidated on the ground of inconsistency with any provision of the Constitution.

6.2.4 Fundamental rights can even be encroached by way of delegated legislation. In ***Johnson Tan Han Seng v PP*** [1977] 2 MLJ 66, the Essential (Security Cases) Regulations 1975 which sub-delegated the Yang di-Pertuan Agung’s powers to the Attorney General was held to be permissible.

The Regulation had the effect of sub-delegating the powers of the Yang di-Pertuan Agung to alter the mode of trial of persons offending against the regulations to the Attorney General.

6.3 Extension of executive powers of federal government.

6.3.1 While a proclamation is in force, the executive authority of the federation extends to any matter within the legislative authority of a state. Under Article 150(4), the federal government can give directions to the states or any of its officers. This effectively means that the separation of the federal and state executives is suspended.

7. Can the proclamation of emergency be challenged?

- 7.1 If the proclamation of emergency by the YDPA was not on the advice of the Prime Minister, then it can be challenged pursuant to Article 40(1) and 40(1A) of the Federal Constitution.
- 7.2 The court appears to be reluctant to challenge the proclamation of emergency. In **Stephen Kalong Ningkan v Government of Malaysia** [1968] 2 MLJ 238, it was held that *“it is not for their Lordships to criticise or comment upon the wisdom or expediency of the steps taken by the Government of Malaysia in dealing with the constitutional situation which had occurred in Sarawak, or to enquire whether that situation could itself have been avoided by a different approach. But, taking the position as it was after Harley J. had delivered judgment in September, 1966, they can find, in the material presented, no ground for holding that the respondent Government was acting erroneously or in any way mala fide in taking the view that there was a constitutional crisis in Sarawak, that it involved or threatened a breakdown of stable government, and amounted to an emergency calling for immediate action. Nor can their Lordships find any reason for saying that the emergency thus considered to exist was not grave and did not threaten the security of Sarawak. These were essentially matters to be determined according to the judgment of the responsible Ministers in the light of their knowledge and experience.”*
- 7.2 According to Article 150(6), the emergency legislations cannot be invalidated even on grounds of inconsistency with any provision of the Constitution.

8. Whether foreign contracts entered into by the executive during the state of emergency is valid?

8.1 Article 39 of the Federal Constitution provides for the executive authority of the Cabinet or any Minister authorized by the Cabinet.

Article 39 reads:

“The executive authority of the Federation shall be vested in the yang di-pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but parliament may by law confer executive functions on other persons.”

8.2 Article 80(1) of the Federal Constitution provides that the executive authority of the Federation extends to all matters in which the Parliament can make laws.

Article 80(1) reads:

“Subject to the following provisions of this Article the executive authority of the Federation extends to all matters with respect to which parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws.”

8.3 The Legislative List is contained in the Ninth Schedule, and para 6 includes federal Government contracts. Hence, the executive authority of Federation extends to matters of federal Government contracts.

8.4 Article 69(1) of the Federal Constitution allows the Federation to enter into contracts.

“the Federation has power to acquire, hold and dispose of property of any kind and to make contracts.”

Notes to Article 69(1) of the Federal Constitution refers to the Government Contracts Act 1949.

8.5 Section 5 of the Government Contracts Act 1949 which governs contracts made outside of Malaysia reads:

“All contracts made outside Malaysia on behalf of the Government or any State Government by a person either generally or specially authorized in writing in that behalf by the Yang di-Pertuan Agong shall, so far as they come within the jurisdiction of the courts of Malaysia, be deemed to be contracts made on behalf of that Government.”

8.6 The consequences of declaring a state of emergency are limited to Article 150(5) and Article 150(6) of the Federal Constitution, namely that (1) the King acquires power to legislate; (2) the extension of legislative powers; and (3) the extension of executive powers. Therefore, foreign contracts entered upon by the executive during the state of emergency remains valid.