EMERGENCY POWERS IN NIGERIAN AND MALAYAN FEDERALISM

Nigeria is a federal realm of the Commonwealth. On attaining independence in 1960, it did so as a federation of three units called Regions — the Northern, Western and Eastern — together with a small federal territory — Lagos — containing the seat of the federal authority which is herein called the Centre. Nigeria became a Republic within the Commonwealth on 1 October 1963, and by this time a fourth Region had been created, the Mid-Western. The constitutional structure established in 1960 has to be traced through the Nigeria Independence Act 1960 of the United Kingdom Parliament, and the Nigeria (Constitution) Order in Council 1960 made by the Queen at Balmoral. The latter Order derived its formal validity from various sources, including the U.K. Foreign Jurisdiction Act 1890, because of the difficulty, familiar to Malaysians, that Nigeria included both Crown colonies and areas which were in various degrees and pursuant to numerous treaties under British protection. The Order in Council set out in schedules a Constitution of the Federation of Nigeria, and separate Constitutions for each of three Regions. The net result of the 1960 operation, however, possibly with the aid from the Statute of Westminster, was to vest in the federal Governor-General and the Parliament (as the Centre legislature is named) and the Region Governors and Legislatures (as the regional parliaments are named), acting together in prescribed manner, the power to amend the constitutional structure as a whole in fundamental as well as other matters; on many non-fundamental points, amendment power as to its own Constitution was vested in the Centre and each Region separately. In 1963, these powers were exercised so as to convert Nigeria into a Republic and in the process a fresh Constitution was enacted. The new Regional Constitutions follow closely those enacted in 1960, with only such amendments as are needed to make them consonant with the federal charges about to be mentioned. The most important single charge concerns the power of the Governors to dismiss Premiers ; on this point too, the federal provisions described hereafter in note 16 have been adopted by the Regions.

The 1963 Centre Constitution has important innovations in detail, including of necessity provisions as to the election and powers of the President. But it preserves the same basic federal structure as that established in 1960. The 1960 Centre Constitution had 154 sections, with a Schedule containing two Legislative Lists. The 1963 Constitution contains 166 sections and a Schedule with almost identical Legislative Lists. The section numbering of 1963 begins to diverge from that of 1960 when a new section 10 appears; from then until 32 of 1960, the addition of one will locate the corresponding provision of 1963; then the old provisions about the Governor-General (ss. 33-35) are replaced by new ss. 34-40 concerning the President. Correspondence resumes with new ss. 41 ff. similar to old ss. 35 ff. Subsequent additions or deletions of individual sections alter this relationship in minor ways. Among the more

important amendments not mentioned so far are the abolition of the former Judicial Service Commission and vesting of judicial appointment in the President and of removal in Parliament, and the abolition of the entrenched and separated office of Director of Public Prosecutions (old ss. 144-5; cf. new ss. 88 and 104). Most 1963 sections corresponding to 1960 sections are identical, and most of the differences are formal ones caused by the replacement of the Queen by the President. Hence with the above rough guide it is not difficult to follow the application of judicial decisions on the 1960 documents to the Constitution which came into force on 1 October 1963.

The system is 'truly federal'. Each governmental unit is fully equipped to carry out its functions in a substantially autonomous way, and even the fiscal arrangements have as in Malaya and West Germany been designed so as to give the Regions some financial independence, though as in all modern federations the central authority is acquiring a dominant financial position. Express legislative powers are vested in the federal Parliament, some exclusive and some concurrent, and the undefined residue of power is vested in the Regions. No important change in this relative distribution was made in 1963. The result is to give the Centre more powers than are possessed by the Australian and Canadian Centre, but fewer than are possessed by the Centre in Malaysia and India. There is an elaborate set of fundamental guarantees (Chap. III). Under the 1960 Ordinance, the Governor-General stood in the shoes of the Queen, and the President has been given no greater individual authority. He is required to act on advice except in four circumstances: firstly in certain cases of request for dissolution of Parliament, secondly in choosing the Prime Minister, thirdly in replacing the Prime Minister, and fourthly in appointing an Acting Prime Minister when the Prime Minister is not available to advise. He also gives personal approval to appointment of members of his own staff.[1] The Constitution to a considerable extent spells out and for the rest implies British-style responsible cabinet government, with its mingling of executive and legislative functions. Judicial power is separated, Judges given a high degree of independence, and — unusual even in written constitutions — are expressly required to be qualified lawyers.[2] There is a Centre Supreme Court, and separate Regional and Territory Courts. The judicial arrangements take for granted judicial power to review constitutional questions,[3] and a few such matters are expressly excluded from review — e.g. whether the President has in fact received advice which he is required to obtain.[4] Under the 1960 provisions, further appeal lay to the Judicial Committee of the Privy Council, but the 1963 Constitution abolished this appeal.[5]

The Nigerian Constitution is evidently the result of adapting to local circumstances general principles and particular sections taken from many federal models; the U.S.A., Canada, Australia, Malaya (as it then was)

1. New s. 93.
2. Chap. VIII.
3. See especially new s. 115.
4. New s. 93(3)
5. Ss. 120, 158(4).

and India have all made their contributions. Probably, however, Malaya was the biggest single influence. Certainly it was the chief source for the provision with which these notes are mainly concerned — the emergency power in new s. 70, old s. 65, sub-sect. (1) of which reads:

> "Parliament may at any time make such laws for Nigeria or any part thereof with respect to matters not included in the Legislative Lists as may appear to Parliament to be necessary or expedient for the purpose of maintaining or securing peace, order and good government during any period of emergency."

Sub-sect. (2) confines the operation of such laws to the emergency period. Sub-sect. (3) defines 'period of emergency' as being a period during which

> "*(a)* the Federation is at war
>
> *(b)* there is in force a resolution passed by each House of Parliament declaring that a state of public emergency exists; or
>
> *(c)* there is in force a resolution of each House of Parliament supported by the votes of not less than two-thirds of all the members of the House declaring that democratic institutions in Nigeria are threatened by subversion."

Sub-sect. (4) sets a limit of twelve months to emergency declarations with power, however, to extend for succeeding twelve month periods by like resolutions. S. 29 permits derogations from the fundamental rights during periods of emergency, and s. 30 requires that persons detained under emergency laws shall be allowed to refer their cases to an independent advisory tribunal, whose recommendations however need not be carried out.

The general plan of these provisions is clearly taken from the original Malayan s. 150, in particular the form of the extension of federal powers — adding matters otherwise with State power — and the express provision for overriding fundamental guarantees. In the Malaysian Constitution of 1963 s. 150 has been amended (possibly in the light of Nigerian experience) so that the method of extending federal power in an emergency by reference to residual powers no longer appears, instead, Parliament is then given power to make laws "with respect to any matter". In view of an argument put to the Nigerian Supreme Court in *Williams* v. *Majekodunmi*[6] it is surprising that the Nigerian provisions were not amended in similar fashion. The argument was that the only "emergency power" laws, capable of overriding relevant fundamental guarantees, which Parliament could make were those otherwise solely within Region power; in so far as Parliament made laws during an emergency which it could make in any event, these would be subject to all the fundamental guarantees. The Court in *Williams* v. *Majekodunmi*

6. 7 July 1962. No printed reports of this and other Nigerian Supreme Court decisions were available at writing. I am indebted to my learned friend Chief Rotimi Williams, Q.C. of the Nigerian Bar, who was both plaintiff and Counsel, for mss. copies of this and other Supreme Court decisions mentioned later. My thanks are also due to Professor L.C.B. Gower, Dean of Law at the University of Lagos, and to Mr. A. E. W. Park of that University, for copies of decisions, Constitutions, Acts and regulations and notes on their interrelation. None of these gentlemen are responsible for any legal interpretation, or political comment, in this paper.

did not have to determine this question, and refrained from doing so, because the fundamental guarantee in question (freedom of movement, old s. 26, new s. 27) in terms authorised reasonable restriction of movement in the interests of public safety, and the Court held that the emergency regulations in question, providing for orders restricting persons to specified parts of Nigeria, were valid on this test. Centre power to deal with the general subject was clearly given by item 18 on the Concurrent List — "maintaining and securing of public safety and public order" — irrespective if the existence of an emergency. Hence the argument still remains open in Nigeria, but not in Malaysia, that in so far as laws passed during an emergency come within the ordinary exclusive or concurrent powers of Parliament, then even though enacted in order to deal with the conditions of emergency they must be consistent with the fundamental guarantees as if no emergency existed. The Malaysian power under s. 150 is not unlimited because sub-sect. (6A) protects even from emergency laws the operation of certain other laws and constitutional provisions, but these reservations do not include the fundamental guarantees of individual rights and liberties.

On 29 May 1962, the Nigerian Centre Parliament carried in both Houses the following resolution:

> "That in pursuance of section 65 of the Constitution of the Federation it is declared that a state of public emergency exists and this resolution shall remain in force until the end of the month of December, 1963."

This was an exercise of the power in sub-sect. 3 (b) of old s. 65, new s. 70.[7] As the form of s.65(70) plainly allowed, Parliament had previously enacted an Emergency Powers Act which now came into operation. This Act conferred extensive regulation-making powers on the Governor-General in Council under which a series of regulations concerning detention of persons, restriction of persons to specified areas, regulation of meetings and similar familiar emergency provisions were promulgated. Here we are concerned with the Emergency Powers (General) Regulations 1962, regs. 4, 5, 6 and 7, whose contents were less usual. These provided in substance for the removal from office of the Government of the Western Region and its replacement by a federal Administrator. The Western Region Governor, Premier and Ministers were all required to cease performing their functions, and an Administrator and Commissioners — the Administrator being in fact a member of the Centre Senate and Minister for Health in the Centre Government — were appointed to perform their functions. Restriction orders were also made against the Western Region Governor and Premier and the other Ministers, and these in practice made it impossible for the Western Region Government to carry on, because the persons concerned were confined to various places outside the Region capital and centre of government at Ibadan and could not have held cabinet meetings nor maintained effective contact with the permanent civil service.

7. It is difficult to see why both (b) and (c) of s. 65(70) should have been retained, since a threat from subversion would also constitute a state of public emergency, no greater powers attend a declaration of emergency on the 'subversion ground, and the latter requires a two-thirds majority while the former requires only a simple majority. It seems likely that two alternative drafts originally under consideration have accidentally been retained.

The Centre resorted to these measures in order to deal with disturbances in the Western Region, which happened in the following way.[8]

Until February 1962, each Region had been under the preponderant control of one political party — in the East, the National Council of Nigerian Citizens (N.C.N.C.); in the North, the Northern People's Congress (N.P.C.); and in the West, the Action Group (A.G.). Each Region also elected a preponderance of members of the regional majority party to the Centre, where the Northern N.P.C. and the Eastern N.C.N.C. had since 1959 been allied in support of a coalition government under Prime Minister Sir Abubakar Balewa (N.P.C.); the A.G. accordingly formed the opposition at the Centre. In the North and East, the tendency had been for the most powerful political leaders to remain in the regional sphere and to leave federal matters to senior but not the most senior members of the respective groups. Thus in the preponderantly Hausa North, the most powerful local leader, Sir Amodu Bello, who as Sardauna of Sokoto is also a traditional ruler of immense local prestige, became Regional Premier. The preponderantly Ibo Eastern Region had produced in Dr. Nnamdi Azikiwe the most important single leader in the movement for independence, but on the achieving of independence he chose to become Governor-General, and is now President, and the main active leadership of the N.C.N.C. fell to the new Regional Premier, Dr. M. I. Okpara. In these two cases, the principal corresponding personalities at the Centre were the Prime Minister, previously deputy-leader of the N.P.C. in the North, and the Finance Minister, Chief Festus Okotie Iboh of the N.C.N.C. The latter two and indeed the federal Ministers generally have achieved a stature and autonomy which was probably inevitable, having regard to the powers of the Centre and to its location in Lagos, far removed from the Northern and Eastern Regional capitals, but which has been achieved sooner than might have been expected because of the ability of these men and because, notwithstanding the great differences in background and original outlook between North and East, they were able from the first to establish working personal relationships.

This process, however, inevitably caused a good deal of bitterness in the Western-based A.G., whose members had taken a leading part in the struggle for independence and whose people were the most advanced — commercially, industrially, in education and in political experience — of the whole country, but who were now excluded from federal power. The tension was increased because in this case the party leader and most influential personality, Chief Obafemi Awolowo, chose to transfer to the federal sphere, leaving his party Deputy, Chief S. L. Akintola, as Western Region Premier. But Awolowo continued to behave in many ways as if he were Region Premier, determining regional party policy and even endeavouring to determine matters of detailed administration in Western Region government. Unfortunately in this case geography made such a double role not impossible; Ibadan, the regional capital, is only 80 miles from Lagos. Moreover the federal territory is, like the Western Region, predominantly Yoruba in race and language and its people inclined to

8. The following narrative is derived partly from personal experiences of the author and partly from accounts of recent Nigerian history to be found in O.I. Odumosu, *Nigerian Constitution* (1963), J. P. Mackintosh, "Federalism in Nigeria" in (1962) 10 *Political Studies,* p. 223, and K. W. J. Post, "Nigeria Two Years After Independence" in (1962) 18 *World Today,* pp.468, 523.

follow the A.G. Hence Awolowo was under strong temptation to regard himself as the leader of a regional, racial and cultural opposition, not merely a political opposition to the Northern-Eastern coalition government.

The tension between Centre Government and Opposition, and between the Centre and the Western Region, was carried into most fields of political dispute, including foreign and economic policy. One expression of the tension, interesting for present purposes, was the occurrence and threat of extensive litigation between Region and Centre. In July 1961, the Centre launched a Commission of Inquiry into banking matters, in the hope of discovering things discreditable to a bank controlled by the Western Region and the A.G.; the A.G. personalities concerned resisted this in the Courts, and won in the Supreme Court and in substance in the Privy Council.[9] In April 1961, the Centre initiated the steps required under the Constitution[10] to create a fourth Region, to be carved out of the West — an obvious step to weaken the strength of the A.G. by reducing its base, and having little justification so long as the Northern Region retained a size and population enabling it to dominate the federation. The Western Region government then took proceedings to challenge the formal validity of the procedure adopted, and these were pending when matters came to a head in May-June 1962.[11] Some observations by Sir Abubakar Balewa at various stages of the subsequent history suggest that he and his Attorney-General resented and feared the intervention of the judiciary in what they considered to be mainly political disputes. Certainly they had some reason for feeling inferior in such matters, since the Western Region and the A.G. were better supplied with eminent constitutional silks and did not scorn to obtain the advice of non-Nigerian experts in constitutional law. Although the logic of Nigerian constitutional development was in the direction of constitutional rigidity with judicial review, the modern system most familiar to educated Nigerian leaders was the flexible United Kingdom one with its lack of judicial review; it is not surprising that the Northern and Eastern leaders, who had advocated federalism largely to protect themselves against the cunning Westerners, were now dismayed to find the legal weapons inevitable under this form of federation being used against themselves.

9. *Balewa* v. *Doherty* [1963] 1 W.L.R. 949. The decision is open to strong criticism. It puts the narrowest possible construction on the ambiguous decision of the Privy Council in the *Royal Commissions Case* [1914] A.C. 237, concerning incidental powers of inquiry in the Australian constitutional system. See Sawer, *Australian Constitutional Cases,* 2nd ed. p. 485, for criticism of the latter decision. The Nigerians, in the 1963 Constitution, have escaped the worst consequences of *Balewa,* v. *Doherty.* Following a hint in the Board's opinion, they have inserted "Tribunals of inquiry with respect to all or any of the matters mentioned elsewhere in this list" as a substantive item in the Exclusive List (item 29) and the Concurrent List (item 25); previously, the subject was included only as "incidental or supplementary" to the other items.

10. S.4(3). Same in 1963.

11. This was the issue which took the present writer to Ibadan in 1962. The main ground of resistance to the proposals arose from the peculiar wording of s. 4(3)(b), which had been drafted in anticipation of there being from the beginning four Regions — the fourth, Southern Cameroons, opting finally to join the Cameroon Republic. There were other arguments. West Region had a fighting case on the issue, but in this writer's opinion it would probably not have won if the matter had gone on. The suits were eventually abandoned and in 1963 all parties agreed to the formation of the Mid-West Region.

However, while Awolowo and many of the A.G. leaders in Ibadan played the game of all-out opposition to the Centre with increasing zest, Akintola, who had the responsibility of actually running the Western Region, played it decreasingly so. Probably he and others in the more conservative wing of the A.G. disliked the flirtations with the Ghanaian dictator and his pan-African fantasies in which some A.G. leaders engaged. Akintola and other Western Region Ministers were also conscious of the need to cultivate good relations with Centre Ministers, if the Western Region was to obtain its fair share of the external aid which was channelled through the Centre government; but such good relations appeared to other A.G. leaders, concentrating on the duties of opposition in Lagos, as treachery to their party. Hence feeling between Awolowo and Akintola became increasingly strained in late 1961 and early 1962. The Centre Government, no more tolerant of systematic opposition than other new African governments, was happy to encourage this development.

In February 1962, the A.G. split into a majority group, following the lead of Awolowo, and a minority group following the lead of Akintola. The Governor of the Western Region, who was also a traditional ruler (the Oni of Ife) and a leading member of the A.G., attempted to negotiate a settlement of the dispute, but ultimately, on 21 May, the Governor made an order removing Akintola from the Premiership and appointing A.D.S. Adegbenro, an Awolowo follower, as Premier in his place. The Governor did this on petition from a majority of members of the Regional House of Assembly, the legislature not then being in session. He acted under s. 33 (10) of the Western Region Constitution as it then stood, which empowered him to remove a Premier who "no longer commands the support of a majority of the members of the House of Assembly". Chief Akintola immediately contended that this power could not be exercised on a mere personal expression of opinion from members, but required a formal act of the legislature, such as a censure motion. He commenced proceedings against the Governor and against Adegbenro in the Regional High Court for injunctions and a declaration; these proceedings eventually reached the Supreme Court and the Privy Council. Meanwhile, however, Adegberno formed a government which with some minor embarrassments, due to Akintola and some of his Ministers retaining physical possession of rooms in their departments, took over the actual running of the Western Region and looked like securing the support of the permanent civil service and of the people.

Akintola's objections could obviously not have survived a meeting of the Regional legislature if at such a meeting it turned out that a majority supported the Adegbenro administration. It would probably have been wiser for the Governor to call the Houses into session in the first place. Perhaps, however, he and the majority faction of the A.G. had reason to fear the sort of activity by Akintola and his followers which in fact ensued when the House of Assembly met on 25 May and a motion of confidence in the Adegbenro government was moved. Followers of Akintola immediately started a violent demonstration, which ended only after police cleared the House with the aid of batons and tear gas. Each Region in Nigeria controls some police but the principal police force and the only one capable of firm and disciplined action in emergencies of this kind is federally controlled. The Governor and Adegberno urgently approached the Centre for police protection to enable the House to meet later on the

same day in order to pass the necessary resolutions. But Sir Abubakar Balewa announced that while he acknowledged an obligation to maintain the public peace in Ibadan, he would not regard as operative any resolution which the Region House might adopt while dependent on police protection. This was an extraordinary attitude to adopt; it amounted to substituting the opinion of the Centre Prime Minister for that of the Courts on the question whether a Regional legislature was validly operating, and it also offered a position of advantage to any minority group which chose by violence to prevent a regional legislature from carrying on its business. Inevitably, when the House attempted to meet again later on 25 May, the pro-Akintola group again created disturbances, and again the police cleared the House. On 28 May, the A.G. expelled Akintola and his group. On 29 May, the Centre Parliament carried the declaration of emergency and the measures mentioned above were put into force. Akintola, and those of his followers who still claimed to be Ministers, also had restriction orders made against them confining them to their home towns and villages, so that for the time being the Centre did not appear to be playing favourites.

The official reason given for the Centre action was that the government of the Western Region was paralysed, firstly because there were in existence two rival governments which claimed to be duly appointed, and secondly because it had been demonstrated that the Western Region legislature could not sit without the occurrence of disturbances which made proceedings impossible. It was said that this state of civil war in the Regional Government was likely to be communicated to the people at large and so lead to a general breakdown of law and order. The present writer happened to be in Ibadan during the week commencing with the declaration of emergency and is in a position to cast considerable doubt on the fears expressed by the Centre. Ibadan was certainly in a state of profound peace and nothing reported then or since gives any reason to suppose that the Region in general or the capital in particular would have failed to follow the lead of any given majority of the A.G. If the Centre Government and its police had followed the course suggested by the objective considerations of what the West Germans call "federal good faith"[12], they would have restrained Chief Akintola and his followers from pursuing the aggressive action they were taking, and the consequence would inevitably have been resolutions and other appropriate legislative acts in the Western Region legislature establishing the authority of the Adegbenro government, on any conceivable construction of s. 33 of the Western Region Constitution. The unlikelihood that any prolonged or popular disturbance would have occurred is indicated by what in fact followed. The Adegbenro and Akintola factions promptly obeyed the Centre orders. The Federal Administrator took office with no resistance of any sort, and proceeded to carry on the government of the Region with great efficiency, with the co-operation of the permanent civil service and the people, until 31 December 1962.

It is convenient here to summarise the subsequent political history. The rival A.G. factions continued argument and propaganda, the upshot of which was that Chief Akintola founded a new party, the United People's Party (U.P.P.), which by January 1963 had obtained the allegiance of the former minority N.C.N.C. group in the Western Region legislature and

12. See H. W. Bayer, *Die Bundestreue* (1961), especially pp. 23 - 45, 97-99.

also of sufficient former A.G. members for Akintola to have a potential majority.[13] On 7 July 1962 the Nigerian Supreme Court decided the suit by Akintola concerning the Premiership in his favour. The Centre, therefore, took the view that Akintola was the lawful potential Premier, and on the termination of the state of emergency he took over the running of the Western Region Government as Premier, appointing Ministers from his potential Assembly followers. The Queen had also meanwhile — on whose advice this writer does not know — removed the Oni of Ife from the Governorship and appointed as Governor a leading Western Region member of the N.C.N.C. The new Governor and the Premier, when satisfied that the latter could command a majority in the Assembly, called the latter together and their confidence in the outcome proved justified. The remaining pro-Awolowo minority in the Assembly became the Opposition. There was some minor embarrassment when in May 1963, the Privy Council reversed the Supreme Court's decision on the premiership question,[14] so casting retrospective doubt on Akintola's position since January 1963. But this was promptly cured by an amendment duly carried to s. 33 of the Western Region Constitution which, retrospectively to its commencement, enacted that a Premier could be removed by a Governor only on motion of confidence duly passed by the Regional legislature.[15] It is a sensible provision.[16] Constitutional monarchs and their gubernatorial or Presidential equivalents are well advised to inform themselves on such matters only by reference to events in the corporate life of legislatures.

Questions concerning the State of emergency came before the Supreme Court of Nigeria on five occasions in 1962. Three of these were stages

13. The disruption of the A.G. was accelerated by two other factors. In July 1962, the Centre appointed a Commission under Coker J. to investigate financial relations between the A.G., the West Region government and a regional development corporation. Its report, delivered in December, showed improper practices and put the main blame on the Awolowo faction. This was of less importance than might be expected, since in the African context interlocking of the finances of governments, monolithic parties and charismatic leaders is frequent; in 1956, a similar Commission made similar findings in relation to the Eastern Region, implicating the then Premier, Dr. Azikiwe, and the N.C.N.C.; (1954 Cmd. 51) ; but at an ensuing election he and his party were returned with increased majorities. More seriously, Chief Awolowo and other A.G. leaders were later charged with offences in the nature of sedition, and in October 1963 were convicted; an appeal was pending at this writing. The activities alleged were dated September 1962, when a mood of desperation in the A.G. leadership was only too probable.

14. *Adegbenro* v. *Akintola* [1963] 3 W.L.R. 63. The Board adopted the view that there was no ground for reading into the plain words of s. 33(10) of the Western Region Constitution any further requirement as to the way in which the Governor should become satisfied that a Premier had lost his majority. This was the dissenting view of Brett J. in the Supreme Court, and seems to this writer inescapable on the relevant wording.

15. Carried in the Western Region Assembly on the same day as the judgment, which had evidently been anticipated, and ratified by the Centre Parliament (as required by s. 5 of the Centre Constitution, old and new), on 3 June.

16. Substantially the same effect is achieved under the well drawn provisions of the 1963 Centre Constitution, ss. 68(5), 87(1), (2), (8) and (11) and 93; the net result is that a Prime Minister can be removed only if after a dissolution of the House of Representatives he fails to gain a majority. Such a dissolution must occur if a Prime Minister fails to resign after a confidence motion is carried against him in the House of Representatives.

in *Williams* v *Majekodunmi*:[17] the decision on an *ex parte* application for an interim injunction given 1 June 1962 (hereinafter called Williams No. 1), the decision on motion for an interlocutory injunction given 7 June (hereinafter called Williams No. 2), and the decision in the action given 7 July (hereinafter called Williams No. 3). The other two were stages in *Adegbenro* v. *Attorney-General of the Federation and ors.* :[18] the decision on motion for an interlocutory injunction given 7 July 1962 (hereinafter called Adegbenro No. 1), and judgment in the action given 7 July (hereinafter Adegbenro No. 2). Both plaintiffs contested the general validity of the declaration of emergency, and of the Acts and regulations consequential thereon.

Chief Williams, however, was mainly concerned with restriction orders made against him which would have confined him to his home town, and probably he had *locus standi* only on that issue. He was a member of the Nigerian Bar and Queen's Counsel, in active practice and much concerned with many constitutional cases then in progress apart from those arising from the emergency. He was also a leading member of the A.G., but not a member of the legislature, and there was no evidence whatever to suggest that he was personally concerned in any activities likely to disturb the peace; on the contrary, he had been one of the group which had tried to reconcile Akintola and Awolowo. In Williams No. 1, Brett, Taylor and Bairamian JJ. directed that plaintiff should be at liberty to attend the Supreme Court in Lagos in order to argue the motion which was dealt with in Williams No. 2. The argument on this motion ranged widely over the matters raised in the action and included suggestions that the declaration of emergency was unjustified by the circumstances. A Full Court consisting of Ademola C.J. and three Justices dismissed the motion. The main ground was that on the materials before it, the Court could not give interlocutory relief. It said *inter alia*: "that a state of public emergency exists in Nigeria is a matter apparently within the bounds of parliament, and not one for this Court to decide". It further pointed out that under s. 26 of the then Constitution, dealing with freedom of movement,[19] restriction orders were authorised irrespective of the existence of a state of emergency. In Williams No. 3, the same Court held that on the further evidence aduced at the trial, the restriction order in respect of Chief Williams was not reasonably justifiable and it was set aside with liberty to apply or an injunction. The Court was able to do this without going into any questions concerning the emergency, because old s. 26 (new s. 27) is not one of the sections which (under old s. 28, new s. 29) can be overridden by a declaration of emergency; instead, it has a built-in provision for restriction orders which are "reasonably justifiable in a democratic society.....in the interest of.....public order". Old s. 31 (new s. 32) guarantees access to the Courts to protect the fundamental rights, and this provision likewise is not overridden by a declaration of emergency. The Supreme Court has construed its authority under these sections liberally, so that it will canvass the reasonableness not only of

17. FSC 166/1962. The defendant was the Federal Administrator.

18. FSC 170/1962.

19. New s. 27. The Constitution thereby distinguishes between "personal liberty", dealt with by old s. 20, news 21, and "freedom of movement". Cf. *Robinson* v. *Balmain New Ferry Co. Ltd.* [1910] A.C. 295.

the Acts and regulations providing for restriction orders, but of individual restriction orders as well.

Adegbenro's claim could not be disposed of so easily, because he had apparent *locus standi* to complain not only about the restriction order affecting his freedom of movement, but also about his removal from the Premiership; indeed, even the restriction order affected him in a special way because it prevented him from performing the duties of Premier, as the Court recognised in Adegbenro No. 1. In that application, he was represented by Dingle Foot Q.C., of the English and Nigerian bars; the Centre authorities at first tried to prevent Mr. Foot from arguing the case, then required his departure as soon as his argument was completed, and refused to allow his return to argue at the trial of the action — an extraordinary display of pusillanimity on their part. In Adegbenro No. 1, the motion for an injunction to restrain interference with plaintiff's freedom of movement was refused in a judgment of Ademola C.J. and three Justices which bears the marks of haste. The substantive ground was that the issues raised were too serious to be disposed of in interlocutory proceedings, even for the purpose of enlarging Adegbenro's sphere of freedom, since the main justification for the state of emergency was the danger of violence which would attend any effort by Adegbenro to exercise the functions of Premier. There was again a hint that the Court could not go behind a declaration by Parliament that a state of emergency existed. In Adegbenro No. 2, the same Court ingeniously evaded a decision on the main issue — the argument that even a justified state of emergency could not authorise the removal of a Regional government. The Court pointed out that Adegbenro had standing to claim relief on this ground only because of his alleged position as Premier. But the question whether or not he had been validly appointed Premier was directly in issue in the suit *Akintola v Adegbenro* which was then *sub judice*; the Court could not now pre-judge the outcome of that suit, and hence could not treat Adegbenro as having the necessary *locus standi,* either on the claim that the order suspending him from the Premiership was invalid or on the claim that the restriction order was invalid because it affected the performance of his office. Then on the restriction order considered independently of his claim to the Premiership, the position remained the same as at the hearing of the interlocutory motion; since the violent clash between Adegbenro and Akintola followers was the very matter which led to the declaration of emergency, it could hardly be contested that a restriction order was reasonably justifiable under then s. 26 of the Constitution for the purpose of keeping the disputants apart. This part of the judgment contained an unjustified insinuation that the Governor had been at fault in appointing Adegbenro while Akintola was disputing the validity of his removal, and that Adegbenro had been at fault in accepting the responsibility.

The net result of these decisions, then, was that the Supreme Court did not deal with the issue of greatest general interest — namely whether under old s. 65, new s. 70, suspension of a Region government and its replacement by a Centre administrator were constitutional. Two points emerge with reasonable certainty from the five opinions mentioned. Firstly, the Court will not go behind a resolution of Parliament that a state of emergency exists. This is a reasonable construction of the Constitution; apart from the familiar difficulties of imputing bad faith to legislatures

and of interfering with political discretions,[20] the wording of old s. 65 (3), new s. 70 (3), seems designed to exclude the possibility of judicial review. The passing of the necessary resolution is not expressed in terms of making a decision on evidence which could be canvassed; it is expressed as a parliamentary activity which operates to attribute a particular characteristic — "being a period of emergency" — to a defined period of time. The second point was that objections to the emergency legislation on grounds of excessively wide delegation of power would not have been likely to receive very favourable consideration. The form of old s. 65, new s. 70 subsect. (1) does lend faint support to an argument that the laws had to "appear to Parliament" to be necessary, and so Parliament had directly to consider the substantive content of each law, but it is not a sufficiently strong argument to counter the overwhelming argument from authority, usage and practical common-sense which justified extensive parliamentary power to delegate. As Dixon C.J. of the High Court of Australia might prefer to put it, the delegation iteself is a law which "may appear to Parliament to be necessary or expedient" for the indicated purposes.[21]

Supposing that a Malaysian or Nigerian Court were faced squarely with the question — is the displacement of a State or Region government authority by the constitutional emergency power — how would they answer it? It is not possible to answer this question with any dogmatism. An answer would depend on the broad social assumptions of the Judges as to the kind of system they are interpreting. In neither country has a constitutional jurisprudence developed to the point where there is any body of juristic doctrine on such questions, nor have judicial personalities asserted themselves in a way making prediction on a personal basis feasible. There are two limiting possibilities with many possible variations in between.

At one limit is straight literal interpretation of the specific sections, using no assumptions about the general nature of the system or drawing no inferences from such assumptions as are held. This is the approach associated in Australia with the *Engineers' Case,*[22] and exemplified in most **of** the decisions of the High Court of Australia in which Sir Isaac Isaacs, as Judge and Chief Justice, and Sir John Latham, Chief Justice, were of the majority.[23] On this approach, there is no basis for denying to the Malaysian s. 150 an operation powerful enough to include displacement of State governments. With exceptions not now material, the power is to make laws "with respect to any matter", and laws displacing State governments cannot logically be denied the quality of coming under that

20. See P. E. Nygh, "The Doctrine of Political Questions within a Federal System", (1963) *5 Malaya L.R.,* p. 132; G. Sawer, "Political Questions", (1963) XV *Univ. Of Toronto L.J.,* p. 49; *Arthur Yates & Co. Pty. Ltd.* v. *Vegetable Seeds Committee* (1945) 72 C.L.R. 37.

21. *Victorian Stevedoring etc. Co. Pty. Ltd.* v. *Digman* (1931) 46 C.L.R. 73; G. Sawer "Separation of Powers in Australian Federalism", (1961) 35 *Australian L.J.,* pp. 183 - 187.

22. *Amalgamated Society of Engineers* v. *Adelaide Steamship Co. Ltd.* (1920) 28 C.L.R. 129.

23. For a characteristic opinion of Latham C.J., *South Australia* v. *Commonwealth* (First Uniform Tax Case) (1942) 65 C.L.R. 373 at 405 ff.

classification. In the State Banking Case,[24] Latham C.J. was prepared to use characterisation doctrines in order to protect States against federal interference, and there are traces of such a doctrine in the judgment of Evatt J. in West's Case;[25] on this view, laws dealing with State governments as such are laws with respect to State government, and, in the case of a Centre parliament with a list of express powers, can be valid only if the Parliament has been given a power under some such title. But no such doctrine can abridge the force of the Malaysian s. 150 (5). The case is not quite so obvious with the present Nigerian s. 70, but it is believed that the result must on his literal approach be the same. Even if the argument is accepted that in Nigeria an emergency adds only residual powers, so that the Centre must observe constitutional guarantees as to the others, the 'residue' is not simply what otherwise the Regional legislatures might alone enact; if that were the case, it could reasonably be argued that the Regional legislatures cannot abolish or suspend the Region Governors, Premiers and Ministers, so that neither can the Centre acting under s. 70. But the residue here relevant is "matters not included in the Legislative Lists", subject to the protection which ss. 18-32 provide for guaranteed individual rights. Adding to the Legislative Lists all conceivable matters not therein included, and substracting the individual rights still protected under Ch. III, the result is the same as in Malaya - a law to suspend or remove a Region government is within the matters so brought within Centre power and is not within the matters excepted.

At the other limit is the doctrine that a constitutional Court in a federal system is entitled to take note of the general characteristics of federalism and from them infer restrictions on powers whose amplitude, on a literal construction, would be inconsistent with federal principles. This approach has always influenced the Supreme Court of the U.S.A.,[26] but the constitutional dialectics of Australian federalism have caused the High Court in that country to study the American doctrines with more care than they are usually studied today in the U.S.A., and to bring out the consequences of these doctrines with greater conceptual sharpness than is to be found in the American decisions. This approach has been particularly characteristic of the decisions of the first Chief Justice of the High Court, Sir Samuel Griffith,[27] and of Sir Owen Dixon as Judge and Chief Justice.[28] The specific doctrines resulting from this approach are best summarised by Sir Owen Dixon in the following passage from the State Banking Case:[29] "The foundation of the Constitution is the conception of a central government and a number of State governments

24. *City of Melbourne* v. *Commonwealth* (1947) 74 C.L.R. 31.

25. (1937) 56 C.L.R. 657 at 687. This case also has a characteristic opinion by Latham C.J., expounding Engineers' Case principles.

26. See especially *New York* v. *U.S.* (1946) 326 U.S. 572.

27. See especially *D'Emden* v. *Pedder* (1904) 1 C.L.R. 91 and *Federated Amalgamated etc. Assn.* v. *N.S.W. Railway etc. Assn.* (1906) 4 C.L.R. 488.

28. See especially *City of Essendon* v. *Criterion Theatres* (1947) 74 C.L.R. 16 ff; *State Banking Case* 74 C.L.R. 76 ff; *Commonwealth* v. *Cigamatic Pty. Ltd.* (1962) 108 C.L.R. 376 ff.

29. *Op. cit.,* p. 82.

separately organised. The Constitution predicates their continued existence as independent entities." In that particular case, the doctrine was applied so as to deny to the Commonwealth power to compel States to bank with a particular bank, although a majority of the Court agreed that apart from the federal implication, such a law fell within Commonwealth power. On this view, it would be likely though not inevitable that even a power expressed in the terms of Malayan s. 150 (5) and Nigerian s. 70 (1) would be interpreted as not extending to the displacement of those State and Regional governments whose continued existence is predicated by the respective federal systems.

There are also arguments to be drawn from the context of the Constitutions, without relying on either simple literalism or on doctrines peculiar to a federal system. The trouble with such considerations is that they are apt to be contradictory. Thus it might be said that in both cases the draftsmen have been at pains to specify matters excepted from or protected against the operation of emergency laws, and these do not include the preservation of State or regional governments; *expressio unius est exclusio alterius.* On the other hand, it may seem unlikely that the draftsmen should have intended emergency powers to authorise a fundamental change in the constitutional structure - which could be continued indefinitely be repeated declarations of emergency - when they have otherwise gone to such pains to preserve the basic constitutional structure from amendment at the sole instance of the Centre.[30] It may also seem curious that so much trouble has been expended in protecting some individual rights against the operation of emergency laws, if the State or Regional institutions on whose laws and executive (and in Nigeria judicial) activities some of those rights depend can be put out of existence. Some importance may attach to the word "matter" in Malaysian s. 150 and Nigerian s. 70. In the Nigerian setting, it suggests a head of power as between a legislature and private persons — natural or corporate — subject to that power, rather than a relation between governments; even in the Malaysian case, the history of the section points to a similar meaning of 'matter'. But none of these arguments are very persuasive, one way or the other.

More interesting, however, is an argument drawn from a comparison of the Indian Constitution (adopted 1949), the Malaysian and the Nigerian Constitutions. In the discussion so far, the emphasis has been on the similarities between the latter two, but it is obvious that both drew heavily on the Indian model in relation to emergency powers; indeed, no other federal constitution of the English-speaking world provided precedents for such a purpose. The Indian emergency provisions authorise three main classes of 'emergency' operation. Firstly, there is the extension of the Centre legislative powers to cover matters not otherwise within Centre competence [31] — the formula originally used in the Malayan s. 150 and still used in the Nigerian s. 70. Secondly, there is power to give directions to States as to the way in which their executive power is to

30. In Malaysia, this is achieved by expressing the basic structure (as distinct from powers) of the States in separate State constitutions which only the State legislatures can amend. In Nigeria, see Centre Constitution s. 14, which requires concurrence of two Region legislatures for basic amendments.

31. Ss. 352, 250.

be used.[32] A similar provision is included in the Malaysian s. 150 (4). No such provision appears in the Nigerian section. Thirdly, there is express power for the President to "assume to himself all or any of the functions of the Government of the State", and to take incidental steps including "suspending in whole or in part the operation of any provisions of this Constitution relating to any body or authority in the State", but excluding from this power the structure and authority of the High Courts.[33] There is nothing in the Malaysian nor the Nigerian provisions corresponding to this third feature. Looking at the three as a series, historically and in type, one can infer that the Malaysian and Nigerian founders did not find it necessary or desirable to go so far as the Indians; they stopped short of empowering the Centre to set aside the structure as distinct from the competence of the States and Regions.

This argument gains some support from the way in which the three systems deal with a distinct though related matter — the behaviour of the States and Regions as administrators of federal law, apart from emergency conditions. On this point again the older English-language federations provide no precedents, but a principle of 'federal oversight' is deeply embedded in German federalism,[34] and may have influenced the Indian draftsmen. In any event the latter included express provisions requiring the States to give effect to federal law, generally and in respect of specific matters, and empowering the Centre to give directions to States in relation to such matters.[35] Malaysia makes more guarded and piecemeal provisions of the same purpose, including imposition of a general duty on States "not to impede or prejudice the executive authority of the Federation".[36] Nigeria likewise imposes on Regions a duty "not to impede or prejudice the exercise of the executive authority of the Federation or to endanger the continuance of federal government in Nigeria", and empowers the Centre Parliament, by two-thirds majority in each House, to declare that the executive authority of a Region is being exercised in breach of this requirement; thereupon Parliament acquires, as under s. 70, power to legislate on matters not included in the Legislative Lists, and the President acquires authority without Region consent to direct Region officials.[37] These provisions, then, define the special interest of the Centre in the stability and performance of the States and Regions and prescribe special courses to be taken to secure that interest; in no case is removal of the Region government as such expressly authorised, in the Indian and Malayan cases the retention of the structure of State governments is necessarily inferred, and in the Nigerian case its retention is a reasonable though not a necessary inference. Suspension or removal of a State or Region government would have been a fairly obvious remedy to prescribe for this type of case, but it has not been prescribed and is probably not authorised by the relevant provisions. For the more

32. S. 353.

33. Ss. 356, 357.

34. Maunz *Deutsches Staatscecht,* 9th ed., p. 202.

35. Ss. 256, 257.

36. Ss. 80, 81, 93(2), 94, 95. In Malaysia, the extent of actual State legislative and executive activity is relatively less than in India and Nigeria.

37. New Ss. 86, 71, 99.

generalised perils of war and civil commotion contemplated by the emergency provisions, direct operation of Centre authority on relevant individuals is indicated, rather than setting aside of the machinery of State or Region government, unless as in the Indian case the latter operation is directly authorised and its incidental problems provided against.

In the case of Malaysia, the above discussion has been concerned mainly with the emergency power under s. 150, since it is the most far-reaching provision. Similar problems can arise under the more limited power given by s. 149, and similar arguments would apply. In addition, however, the nature of the power itself — to "stop or prevent.... organised violence against persons or property" — is even less aptly worded than s. 150 to authorise suspension of State governmental agencies.

In this writer's view, the balance of these considerations points to a conclusion that the Malayan and Nigerian emergency powers do not authorise putting a State or Region under direct Centre administration, as India did with respect to Kerala in 1959 and as Nigerian did with respect to the Western Region in 1962.

This view, however, does not necessarily dispose of the other main issue in Adegbenro No. 2 — namely whether a restriction order made against a Region Governor or Minister could be attacked because its practical effect was to prevent him from discharging his official duties; a parallel problem could arise in Malaya. In the Nigerian case, it is believed that in practice this need not be a difficult problem. If the person restricted has engaged in criminal activities, there is nothing to stop appropriate proceedings against him as an individual and the Region administration has to accommodate itself to the problem so raised as if he had been arrested on an ordinary criminal charge when there is no emergency. On the other hand, if a restriction order is made not specifically against the individual but against any person occupying the official position in question, then this would probably be invalid as an indirect attempt to achieve the same effect as the invalid suspension orders. In the intermediate position where the restriction order is against the individual but the Centre is not prepared to go further, then the Nigerian Courts are in a powerful position to supervise the situation by reference to all the factors in the situation — including the continued existence of the Region government — and make orders accordingly; for example, by applying, as it might well have done, the presumption in favour of regularity, the Supreme Court could have confirmed Adegbenro in the office of Premier until Akintola's suit was determined, and meanwhile given the Governor and Ministers sufficient freedom of movement to carry on their functions, subject to undertakings and sureties for keeping the peace. In the case of Malaysia, s. 150 operates to override the fundamental guarantees in Part II entirely, leaving on such reserve power to the Courts as is provided for in Nigeria. Moreover, s. 151 makes express provision for appeals by detainees to a Board, and the effect is that they can be detained for up to three months without having any remedy. If a State Minister had a detention order made against him as an individual, it would be difficult to apply the arguments outlined above to save him from the operation of that order; hence a practical method of decimating a State government during an emergency is clearly indicated.

However, the fact that the possible role of the Courts in such matters

is probably limited, both in Malaysia and in Nigeria, is no reason for arguing that they should throw in the sponge at the first round or before the bout begins. In matters of government, there are arguments for taking the authoritarian course, as in most of the new African States and many of the Asian ones. There are even more arguments in favour of keeping the Courts out of questions of legislative competence, as in the United Kingdom, France and New Zealand. But if the conditions for a federal system with judicially-policed restrictions on competence naturally exist, as they do in Malaysia and Nigeria, then the Courts need to use their powers with a combination of courage and tact which requires very unusual qualities in their Judges. Nothing written above is intended to suggest that in the Nigerian crisis of 1962, the High Courts and the Supreme Court failed to live up to the highest traditions in these matters. Their decisions were at all points rationally defensible, having regard to the vagueness of relevant doctrines and scantiness of applicable precedent. They may have erred on the side of tact rather than of courage, but the behaviour and utterances of some of the Centre leaders suggested that unless tact were shown the whole structure of a federal rule of law might be swept away. The outcome was not discouraging; the emergency was not prolonged, as it might easily have been, and there is still the possibility of the system as a whole settling into orderly and accepted procedures so that similar strains do not again occur. However, the handling of emergency powers can become a test case in these countries both for the wisdom of the political leaders and for the juristic acumen of the Courts.

GEOFFREY SAWER*

* B.A., LL.M. of the Victorian Bar, Professor of Law, Australian National University.