EMERGENCY POWERS IN MALAYSIA: CAN THE YANG DI-PERTUAN AGONG ACT IN HIS PERSONAL DISCRETION AND CAPACITY?

Professor Hickling in his article "The Prerogative in Malaysia"[1] presents a thought-provoking discussion of the powers of the Yang di-Pertuan Agong in Malaysia. The issues and questions he raises as well as the answers he offers deserve careful and serious study by scholars and practitioners of constitutional law, government officials and also political decision makers. He makes a comprehensive examination of the constitutional provisions relating to the Head of State of Malaysia and his main inquiry is whether the Yang di-Pertuan Agong can be said to have prerogative powers similar or analogous to the prerogative in England. At the end of the discussion Professor Hickling contends that the Yang di-Pertuan Agong possesses "a battery of prerogative powers; that these exist under the cover of the Malaysian Constitution and the Acts and Ordinances passed thereunder and are, to that extent, curtailed thereby; that such powers are not necessarily impliedly curtailed by the existence of an unexercised power to legislate on 'the whole ground of something which could be done' pursuant to that power; but that the extent to which such prerogative powers can be exercised by the Yang di-Pertuan Agong himself, or by any of his Ministers, remains a no-man's land in which either party will trespass at his peril, bearing in mind the challenges possible on legal or political grounds."[2]

This brief note is to express disagreement with some views in that article. In doing this, the writer hopes that this is the kind of discussion which was invited when the article was described as a "trial foray into those uncertain areas lying beyond the boundaries of the letters of the Constitution; it raises issues which are likely to cause controversy... it is intended to stimulate thought upon the matter of the prerogative and its legitimate extent."[3]

This writer wishes to take issue with one fundamental argument of the author which is crucial to his general thesis and this concerns the provisions of the Malaysian Constitution in relation to emergency powers (Article 150). In his discussion of Article 150, he takes the view that two judgments in the *Ningkan* case[4] "clearly suggest that in the eyes of some Malaysian judges the Head of State has a personal discretion under Article 150 and that his subjective state of mind can seldom if ever successfully be called in question. Such an interpretation puts a useful brake on hasty or irresponsible cabinet or

1 (1975) 17 Mal. L.R. 207.
2 *Ibid* at 232.
3 *Ibid.*
* *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 1 M.L.J. 119 (Federal Court).

ministerial action".[5] He considers these to be "authoritative dicta" which "strongly support a personal discretion remaining in him in relation to the exercise of those constitutional powers requiring as a condition precedent to their exercise a subjective state of mind".[6] Earlier in the discussion he implies that the wording in Article 150 suggesting a subjective state of mind ("if satisfied...") confer a personal discretion on the Head of State.

This writer disagrees with the above view that the Yang di-Pertuan Agong has a personal discretion under Article 150. The discussion will proceed as follows. *First,* it will be shown that on an interpretation of the constitutional provisions alone there is no reasonable basis for interpreting Article 150 to confer a personal discretion in the Yang di-Pertuan Agong. *Secondly,* it will be shown that the case law (including the judgments cited by the author) does *not* incline to the view that the Yang di-Pertuan Agong has a personal discretion.

The relevant constitutional provisions

The starting point for any discussion whether the Yang di-Pertuan Agong, in the exercise of his functions under Article 150 acts on advice or in his personal discretion must surely begin with Article 40. In view of its importance, Article 40 is set out below:

> "40. (1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.
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> (2) The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say —
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> (a) the appointment of a Prime Minister;
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> (b) the withholding of consent to a request for the dissolution of Parliament;
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> (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 a meeting,
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> and in any other case mentioned in this Constitution.
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> (3) Federal law may make provision for requiring the Yang di-Pertuan Agong to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet in the exercise of any of his functions other than —
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> (a) functions exercisable in his discretion;
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> (b) functions with respect to the exercise of which provision is made in any other Article."

The first two clauses of Article 150, the provision dealing with emergency powers, read as follows:—

> "150. (1) If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security or economic life of the Federation or of any part thereof is threatened, he may issue a Proclamation of Emergency.

[5] At p. 223.
[6] *Ibid.*

> (2) If a Proclamation of Emergency is issued when Parliament is not sitting, the Yang di-Pertuan Agong shall summon Parliament as soon as may be practicable, and may, until both Houses of Parliament are sitting, promulgate ordinances having the force of law, if satisfied that immediate action is required."

The scheme of Article 40 is very clear. The prevailing principle at all times is that he "shall act in accordance with... advice" in the exercise of his functions. Clause (1) of Article 40 clearly indicates that he does not act in accordance with advice only where it is "otherwise provided by this constitution". The crucial question then is where else is it provided in the Constitution that he may not act in accordance with advice? Clause 2 of Article 40 provides three instances (which do not include emergency powers) when he may act in his discretion. But clause 2 also says that he may act in his discretion also "in any other case mentioned in this Constitution".

This writer's submission is that every instance of a power exercisable in his personal discretion must be "mentioned in this Constitution". Thus, if a function is not "mentioned in this Constitution" as exercisable in his personal discretion (clause 2 of Article 40) or where it is not "otherwise provided by this Constitution" (clause 1 of Article 40) such a function must be governed by the prevailing rule of acting in accordance with advice.

The above interpretation is enhanced by the fact that elsewhere in the Constitution, whenever there is an intention to confer further discretionary functions (that is, additional to the three instances in Article 40(2)), the Constitution *expressly* uses special language to convey such intention. A few examples may be provided. In Article 139(4) it is provided that the members of the Public Services Commission are appointed by the Yang di-Pertuan Agong "in his discretion" but after considering the advice of the Prime Minister and after consultation with the Conference of Rulers...". Note that the words "in his discretion" are used and he also only *considers* "the advice of the Prime Minister" and is not obliged to act in accordance with such advice. Again in Article 141(2) it is provided that the members of the Railway Service Commission are appointed by the Yang di-Pertuan Agong "in his discretion" but after considering advice of the Prime Minister and after consultation with the Conference of Rulers. Likewise, Article 143(l)(a) provides that the Yang di-Pertuan Agong "acting in his discretion but after considering the advice of the Prime Minister" may in a particular case appoint a member of a Service Commission for a period shorter than five years.

These are all examples of powers exerciseable by the Yang di-Pertuan Agong in his discretion which are not mentioned in Article 40(2) but are nevertheless instances departing from the prevailing rule of acting in accordance with his advice; but they are all instances expressly "mentioned in this Constitution" or "otherwise provided by this Constitution" as required by Article 40.

The similarity between these other instances and the three instances of personal discretion mentioned in clause (2) of Article 40 is that specific language is used to convey the intention that those functions are exerciseable in his discretion and this specific language is usage of the phrase "in his discretion".

The writer's conclusion after the above analysis is that if such express language to convey such intention is absent then the conclusion with respect to any provision in the Constitution which confers powers and functions on the Yang di-Pertuan Agong must be that such functions and powers are exerciseable by him only in accordance with advice. To adopt any other interpretation would be to ignore the clear and unambiguous provisions of Article 40.

On the basis of the preceding discussion, when we examine Article 150 (the provision on emergency powers) it can be seen at once that there is no such special language used to convey the intention that a personal discretion was envisaged. Therefore, the proper interpretation of Article 150 in the light of the preceding discussion must be that the power of the Yang di-Pertuan Agong in 150(1) to issue a proclamation of emergency, is a power exerciseable in accordance with the advice of Cabinet pursuant to Article 40. Likewise, his other powers such as the special legislative power (to promulgate ordinances) in Article 150(2) are also exerciseable in accordance with advice. The wording "if satisfied" in 150 should not confuse us for this, at best, has bearing on the question whether the objective test or the subjective test would be applicable when the courts are invited to review the validity of the exercise of such powers by the Yang di-Pertuan Agong acting in accordance with advice where any constitutional challenge is raised in litigation.

The history of the drafting of the Constitution is relevant and the writer wishes to refer to the Report of the Reid Constitutional Commission, 1957[7] for the recommendations and draft Constitution of the Commission influenced to a very significant extent the final Federal Constitution. On the Head of State, the Commission reported and recommended that he will "be the Head of State... but he must be a Constitutional Ruler. He must therefore act on the advice of his Ministers with regard to all executive action".[8] With regard to Emergency powers, the report of the Reid Commission nowhere implied that a personal discretion of the Head of State was contemplated. On the contrary, where the Reid Commission's draft article stated that "... the Yang di-Pertuan Besar shall have power to promulgate ordinances having the force of law", the Commission, in explaining this, stated "If Parliament is not sitting when the Proclamation is made *the Government* can make ordinances having the force of law".[9] (emphasis added). It is only too evident that the initial drafters of the Constitution envisaged that powers and functions of the Head of State under the provisions on emergency powers will in fact be exercised on advice.

The relevant case law

Hickling refers to the comment of two judges in the Federal Court in the case of *Stephen Kalong Ningkan* v. *Government of Malaysia* [1968] 1 M.L.J. 119 as clearly suggesting "that in the eyes of some Malaysian judges the Head of State has a personal discretion under

[7] H.M.S.O., Report of the Federation of Malaya Constitutional Commission, 1957.
[8] *Ibid.,* para. 58.
[9] Para. 175.

Article 150...". This writer will deal not only with the judicial comments relied on by the author but would also refer to other relevant judicial comments to show that the case law, far from suggesting that the Yang di-Pertuan Agong has a personal discretion under Article 150, in fact shows a trend to the contrary and affirms that the powers under Article 150 of the Yang di-Pertuan Agong are exercisable in accordance with advice,

(a) *Stephen Kalong Ningkan* v. *Tun Abang Haji Openg and Tawi Sli (No. 2)*[10]

First of all the writer wishes to refer to the elucidating judgment of Pike C.J. (Borneo). In this case which was unfortunately not mentioned in the article, it was stated and contended by the defendants that the acts of the Yang di-Pertuan Agong (pursuant to powers under Article 150) "cannot be questioned in any court". Chief Justice Pike dismissed this argument and said (emphasis added):

> "But since the Federation of Malaysia is the creation of a Statute, namely the Constitution of Malaysia, and that Statute was enacted by Parliament and is by article 161 defined as "written law", it is difficult to see any merit in this argument. The fact that by clauses (2) to (6A) of article 150 Parliament imposes controls of one sort or another upon the exercise of the power seems clearly to be against this contention. Furthermore, since under article 40 of the Constitution *the Yang di-Pertuan Agong is required to act upon the advice of the Cabinet in making a proclamation under article 150 (and indeed in all other matters except those mentioned in clauses (2) and (3) of article 40), 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.* Counsel also argued that since the power was vested in the Yang di-Pertuan Agong and since by article 32(1) the Yang di-Pertuan Agong is not liable to any proceedings whatsoever in any Court the act of the Yang di-Pertuan Agong is not challengeable in any Court. Article 32(1) only protects the Yang di-Pertuan Agong personally from proceedings in the court but cannot be construed to protect the Federal Government from action in the Courts in respect of its acts committed in the name of the Yang di-Pertuan Agong, and when the Yang di-Pertuan Agong acts on the advice of the Cabinet his act must be deemed to be the act of the Federal Government".[11]

It will be noted that Pike C.J. not only stated that the Yang di-Pertuan Agong is "required to act upon the advice of the Cabinet in making a proclamation under Article 150" but went on to say that the power in Article 150 cannot be argued to be analogous to the prerogative powers of the British Sovereign: both pronouncements being quite contrary to the propositions maintained in the article.

(b) *Stephen Kalong Ningkan* v. *The Government of Malaysia* (Federal Court)[12]

Let us now turn to the Federal Court decision in this case and the judgments of which are relied upon by Hickling as indicating that the judges there felt that the Head of State has a personal discretion in Article 150.

The two judgments in that case which are relied on to support the theory of personal discretion of the Yang di-Pertuan Agong are

[10] [1967J 1 M.L.J. 46.
[11] *Ibid,* at 47 (emphasis added).
[12] [1968] 1 M.L.J. 119.

those of the Lord President Barakbah and of Azmi CJ. (Malaya). The author draws this conclusion because at once stage the Lord President said that "the Yang di-Pertuan Agong is the *sole judge* (of whether a grave emergency exists) and once His Majesty is satisfied that a state of emergency exists, it is not for the court to inquire as to whether or not he should have been satisfied", and Azmi CJ. in his judgment had said "the Yang di-Pertuan Agong in the exercise of his power under clause (1) of Article 150 must be regarded as the *sole judge* of that. He alone could decide whether a state (of) emergency whereby the security or economic life of the federation was threatened did exist."

The question is whether the language used by the learned judges ("the sole judge" etc.) mean that the two judges felt that the Yang di-Pertuan Agong had a personal discretion.

This very point was dealt with by another writer Visu Sinnadurai in his analysis of this case.[13] Sinnadurai analysed the Lord President's judgment in that case to show that the Lord President in fact equated the Yang di-Pertuan Agong's action under Article 150 with *action of the Government.* For instance, the Lord President had said (at p. 122):

> "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." (emphasis added)

Therefore, although the Lord President did use the words "sole judge" he was using that phraseology in relationship to the question whether the actions under Article 150 were reviewable by the courts. As revealed by the above quotation the Lord President in fact considered the Yang di-Pertuan Agong's actions as acts of the Government. As Sinnadurai pointed out "the fact that the Lord President used the word "Government" seems to suggest that he must have been fully aware of the fact that it was on the cabinet's advice that His Majesty so was acting".[14]

(c) *Stephen Kalong Kingkan* v. *Government of Malaysia* (Privy Council)[15]

It is worthy of note that in the Privy Council phase of this case, the Report of their Lordships suggests throughout (especially by use of the term "Federal Government") that their Lordships understood the actions of the Yang di-Pertuan Agong in emergencies to be synonymous with actions of the Government. Indeed, when narrating the background to the case, Lord MacDermott said (at p. 240):

> "On the 14th September, 1966, a week after the judgment of Harley J., the Yang di-Pertuan Agong, *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 throughout the State of Sarawak under article 150 of that Constitution" (emphasis added).

(d) *N. Madhavan Nair* v. *The Government of Malaysia*[16]

Reference must also be made to this recent case. This case was published in the December 1975 issue of the Malayan Law Journal

[13] "Proclamation of Emergency — Reviewable?" (1968) 10 Mal. L.R. 130-131.
[14] At p. 131.
[15] [1968] 2 M.L.J. 238.
[16] [1975] 2 M.L.J. 286.

and probably was not available at the time Hickling wrote his article. It is very relevant however for its interpretation of clause 2 of Article 150. Chang Min Tat J. stated clearly that the Yang di-Pertuan Agong acts on advice when acting under Article 150: —

> "But while the legislative power has shifted from Parliament to the Yang Dipertuan Agung, the executive power of the Federation remains where it has always lain. By Article 39, the executive power of the Federation is vested in the Yang Dipertuan Agung and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet. However Article 40 limits the executive authority of the Yang Dipertuan Agung to acting on the advice of the Cabinet or of a minister acting under the general authority of the Cabinet. It is only in certain matters, spelt out to be the appointment of a Prime Minister, the dissolution of Parliament and the requisition of a meeting of the Council of Rulers that he has a discretion.
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> *Emergency rule which passes the legislative power from Parliament to the Yang Dipertuan Agung has not displaced his position as the Constitutional Monarch, bound by the Constitution to act at all times on the advice of the Cabinet."*[17]

Chang Min Tat J.'s categorical conclusion that in emergency rule the Head of State is bound "to act at all times on the advice of the Cabinet" only reinforces the equally clear conclusion by Pike C.J. in the first discussed case.

(e) *Lee Mau Seng* v. *Minister for Home Affairs, Singapore, & Anor.*[18]

The author distinguishes the Singapore decision of Lee Mau Seng on the ground that in that case the Singapore Court was concerned with a provision of the Internal Security Act and not with the provision of the Singapore Constitution. However, it is submitted that the Singapore case is extremely relevant because one of the arguments in that case was that the words "if the President is satisfied" meant that the legislature intended the President to be *personally* satisfied. The learned Chief Justice in Singapore rejected this argument and pointed out that to construe it thus would be in conflict with Article 5(1) of the Constitution of Singapore which required the President to act in accordance with advice. The learned Chief Justice therefore construed those words to mean "if the President acting in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet be satisfied". Since the phrase "if satisfied" in the Malaysian Article 150 is partly responsible for the Hickling's suggestion that the Yang di-Pertuan Agong has a personal discretion, the Singapore case of Lee Mau Seng and the reasoning of the learned Chief Justice therein are equally applicable to an interpretation of the Malaysian provision and to demonstrate that the wording "if satisfied" is not inconsistent with the requirement of having to act on advice.

Conclusion

In this brief note the writer has sought to assess Hickling's view that the Yang di-Pertuan Agong may exercise a personal discretion under Article 150. The relevant constitutional provisions and the

[17] At p. 289, emphasis added.
[18] [1971] 2 M.L.J. 137.

relevant decided cases have been examined and this writer has reached different conclusions, namely that:—

(a) the powers of the Yang di-Pertuan Agong under Article 150 are exerciseable in accordance with the prevailing rule in Article 40, that is, he acts in accordance with advice; he does not act in his personal discretion in his functions under Article 150;

(b) that the report of the Reid Commission and the case law that has emerged thus far strongly support this view;

(c) that the wording "if satisfied" in Article 150(1) and (2) is not incompatible with the requirement of acting on advice; the wording does not mean that the Yang di-Pertuan Agong has to be satisfied in his personal discretion but that the Yang di-Pertuan Agong acting in accordance with advice has to be satisfied.

The discussion in this brief note may appear academic to some extent for if, in a situation of grave crisis and turmoil the Head of State did act in his own discretion without Cabinet's advice few may question the Head of State's action in view of the unusual prevailing circumstances. On the other hand, scenarios can be envisaged where such actions of the Head of State could lead to further crises or discord in the country. A clarification of the legal position under the Constitution is therefore essential. In dismissing the contention that "if the President is satisfied" (in the Internal Security Act) meant the personal satisfaction of the President, Wee Chong Jin C.J. said in the case of *Lee Mau Seng* that the very nature of the power (of preventive detention) suggested that the President had to act on advice:

> "It is a power given by the Legislature in a parliamentary democracy to detain a person as a preventive measure and without trial initially for a maximum period of two years at a time. It seems to me inconceivable that Parliament could intend to confer such an arbitrary power on a constitutional Head of State who is not responsible for his actions to Parliament. In my opinion the only permissible construction under a parliamentary democracy must be that Parliament has conferred this power on the Cabinet which under article 8(2) is collectively responsible to Parliament and, therefore, answerable to Parliament for all its actions."[19]

If this is true of the Head of State's role in preventive detention then it is submitted that it must, *a fortiori,* be also true of the Head of State's role in emergency rule under the constitutional provisions. This is especially so when we bear in mind the even more far-reaching consequences of a Proclamation of Emergency and of emergency legislation, including the grave consequence that (save for a few exceptions) emergency legislation would be valid even if inconsistent with provisions of the Constitution.

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[19] *Ibid.,* p. 141.

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