Exploring the Royal Prerogative Under Article 150 of the Malaysian Federal Constitution

A recent attempt by the current Prime Minister of Malaysia to seek a royal proclamation of emergency under Article 150 of the Federal Constitution ("**FC**") fell flat when Malaysia's federal monarch the Yang di-Pertuan Agong ("**YDPA**"), as he is officially called, declined to make the proclamation. If made, the YDPA would have paved the way for rule by decree, enabling the YDPA on the advice of the Cabinet, to enact ordinances having the force of law.

After several tense days during which the YDPA granted audiences to the Prime Minister and former ministers, the palace announced that it considered the proclamation of an emergency unnecessary. This seemed to side with the popular sentiment that a state of emergency at this time would have been disastrous for the national economy.

Despite the desired outcome[1], interesting legal and constitutional issues remain unanswered. Doubts linger as to whether the YDPA was legally entitled to reject a recommendation of the Cabinet for such a proclamation.

With whom the right lies

Article 150(1) of the FC provides that *"If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect."* However, this power must be read in tandem with Article 40 of the FC which provides:

> *"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."*

This means that the YDPA has no ability to act independently on his own free will and can only be prompted by the advice he receives from the executive arm of government. Arguably it would also prevent the YDPA from acting unilaterally.

Notwithstanding, this general prescription of the YDPA's authority, Article 40(2) of the FC, provides for instances where the YDPA may act at his own discretion and 3 situations are expressly allowed as follows:

> *"The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say: (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,*

[1] Many considered the Prime Minister's move as an attempt to frustrate a possible vote of no confidence in Parliament, and not motivated by a desire for national safety and stability due to the alarmingly large number of new corona virus cases.

and any action at such a meeting, ***and in any other case mentioned in this Constitution.****"*

Innocuous as it may seem, it is the last phrase of this Article that is likely to be the source of much controversy because it suggests a residual discretion by the YDPA and opens the possibility of the YDPA exercising authority independent of or contrary to the advice of the Cabinet in circumstances outside those prescribed under Article 40(2)(a), (b) or (c). Where this further discretion may lie requires an inspection of other provisions within the FC which could be interpreted to allow the YDPA to act at his own will.

Does the Agong have a residual discretion under Article 150?

The possibility of a residual discretion of the YDPA appears to exist in the wording of Article 150(1). The Article permits the YDPA to proclaim an emergency *"If the Yang di-Pertuan Agong* ***is satisfied*** *that a grave emergency exists…".* It is arguable that Article 150(1) gives the YDPA the discretion to refuse the advice of the Cabinet if the YDPA is not in fact satisfied that a grave emergency exists. This would be founded on the logic that the satisfaction of the YDPA is a determination that only the YDPA can make, and therefore must constitute a discretion reserved to him. This means that the YDPA could if he personally believed on good grounds that no emergency situation existed, he could refuse a proclamation of emergency even where he is advised to the contrary by his ministers. An appealing yet dangerous possibility as it could grant an unelected ruler the power to ignore the dictates of elected representatives of the people.

On another equally compelling logic, one could ask, if the YDPA is to be satisfied with the state of the nation, how else would he arrive at that determination unless advised by his ministers? The YDPA is after all a constitutional monarch and therefore a creature of statute with no independent means of communing in any constructive way with the nation or its condition except through the instruments and agencies of a legitimate government. Any advice he may receive outside of constitutional channels must be deemed informal and therefore lack the transparency and accountability that a democracy demands. For this reason, it could be argued that in order to be satisfied, the YDPA is still compelled to seek the advice of the Cabinet. The YDPA must be careful not to cross the thin line that separates assumed monarchical privilege (howsoever perceived) and true political authority.

Yet one other argument against a liberal construction of the words "is satisfied" would be to read Article 150(1) purposively as giving the YDPA a discretion to act but not to refrain from acting. Since the YDPA may not act unilaterally except on the advice of the Cabinet, the exceptions to this would only be for acts where the YDPA had a discretion to perform a function without the advice of the Cabinet such as those expressly envisaged under Article 40(2), and not decline to act where he has received advice to the contrary.

Perhaps the resolution of this conundrum may be found in the construction of the language of the sweep up provision at the end of Article 40(2) itself. "…and any other case" seems to be a clear reference to the three previous situations mentioned in Article 40(2). These are specific acts of the constitutional monarch. The language is quite specific and should not be read as meaning "any other discretion". Therefore, it would suggest that the FC is intended to refer to a specific defined function akin to the situations stated in paragraphs (a), (b) and (c). Any further discretion would

similarly have to lie in a certain role that was an express constitutional function, rather than a liberty to exercise some kind of judgment or discretion, implied by syntax or a construction of statutory langauge.

Past controversies

If the YDPA's refusal to proclaim an emergency is challenged, it will not be the first time that Article 150(1) has come before the courts. In Stephen Kalong Ningkan vs. The Government of Malaysia (1968) 1 MLJ 119, the Federal Court by a 3 to 2 majority held that a proclamation of an emergency by the YDPA was not justiciable and it was not open to the courts to enquire whether the YDPA had in fact established that a state of emergency threatening the security or economic life of the country existed. The question before the court in Stephen Ningkan's case may be different in that the YDPA in that instant did act in accordance with the advice of the federal cabinet and thus in conformity with Article 40(1) of the FC.

Future challenges

Perhaps a better and less controversial way forward (at least for the monarchy) would be to accept that Article 150 does not give the YDPA any discretion to act contrary to the advice of the Cabinet and to steer disgruntled litigants towards taking action against the government for a wrongful exercise of ministerial authority instead. This is not without successful legal precedent and was displayed when the UK Supreme Court ruled[2] recently that the advice given by Boris Johnson to the Queen to suspend Parliament (hitherto considered "not justiciable") was indeed unlawful as it prevented Parliament from carrying out its normal function.

It remains to be seen whether the Federal Court in a future challenge would consider that the YDPA has a similar non-justiciable discretion when it comes to refusing the advice of the Cabinet, even if that Cabinet is not one that took office through a general election[3].

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[2] R (on the application of Miller) vs. The Prime Minister (2019) EWHR 2381 (QB)

[3] Malaysia's current cabinet was formed after the resignation of Tun Dr. Mahathir and when its current Prime Minister was asked to form a new government by the YDPA on the basis that his coalition commanded a majority in Parliament.