

# Laws are for public interest

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## STILL RELEVANT: The constitution of every country has emergency provisions

IN the 1970s, when I was a deputy registrar of the High Court in Kuala Lumpur, an African judge who came to Malaysia for the first time to attend a conference said to me: "I thought Malaysia is under an Emergency. I don't see any tanks and army roadblocks in the streets."

I replied, "Well, that is Emergency in Malaysia. You can imagine what it is like when it is not."

Special powers against subversion, organised violence and acts and crimes prejudicial to the public as provided in Article 149 and Emergency powers as provided in Article 150 are absolutely necessary.

The constitution of every country has emergency provisions. Otherwise the Reid Commission would not have written them down in our Constitution.

The provisions must remain so that they could be resorted to as and when it becomes necessary. We never know.

I believe that a government must be able to rule and leaders must be able to lead, in accordance with the rule of law.

Democracy should not be allowed to degenerate into mob rule. On the other hand, totalitarian rule is equally evil. To strike a fine balance between the two is important and difficult. All said and done, I believe that Malaysia has succeeded to do that in the last 55 years.

While emergency provision is permanent, the proclamation of emergency and the laws made under it are temporary in nature. (I am using the term "emergency" to cover both situations under Articles 149 and 150, where applicable).

Common sense will tell us that "emergency" cannot be permanent. Otherwise there is something wrong either with the use of the word or with the country or with the people who rule it. It is also rather odd to have overlapping declarations of emergency, as if one declaration of emergency is not sufficient.

In the Malay language, if you repeat the same word twice, the word loses its seriousness; in fact it introduces an element of pretence or imitation.

For example, when you say, "buat kerja", that is a command. But, if you say "buat-buat kerja", that is pretending to work. Similarly, "kuda" is the real horse. "Kuda-kuda" is a piece of wood which is neither alive nor runs like a horse.

Similarly, when you have more than one emergency declaration operating simultaneously over the same area, the effect is lost.

Over the last 55 years, how many of us thought that we were living under an emergency?

However, the courts had throughout the existence of the proclamation of emergency, upheld the validity of the proclamations.

Beginning in the 1970s, cases challenging the proclamations of emergency, laws made under them like the Internal Security Act 1960, Emergency (Public Order and prevention of Crime Ordinance 1969, Dangerous Drugs (Special Preventive measures) Act 1985 and Restricted Residence Act 1933 and actions or detention done or made under those laws began to appear in court.

They were mainly in the form of an application for an order of certiorari or habeas corpus.

The order of certiorari is usually sought to quash an order made by the minister of home affairs on the ground that it was made contrary to law. Habeas corpus is sought to release a person detained contrary to law.

Now that the proclamations of emergency and the said laws had been repealed, it is all history. However, I would like to make a few observations.

FIRST, I do not think that we should be too apologetic for having them before, or, if need be, even in future.

I believe that the interest of the country and the nation is more paramount to the interest of individuals or groups.

I was stranded in Kampung Baaru during the May 13, 1969, incident 12 days after I reported for work.

I saw it, I experienced it and I say, it is better to shut the mouth of a few people or even to lock them up for a while than to risk people killing each other in the streets.

SECOND, at the Constitutional Court Judges' Conference in Manila in 2006, I posed this question and I am repeating it here: which is better, to have detailed provisions of the law and regulations governing such detentions or not to have any law at all but such detentions are done all the same?

I am referring to Guantanamo. In the first model (Malaysian model), there is a right to make representation to an independent tribunal which makes recommendations to the appropriate authority whether the detention should be extended or not.

From the day a person is arrested, he may, through his counsel, challenge his arrest and subsequent detention in court and ask for a writ of habeas corpus to be issued.

And, as I have mentioned, the courts have always been very strict in ensuring that every provision of the law or regulation has been complied with.

Such applications are argued in open court, written judgments are handed down and there is a right of appeal right up to the highest Court in the country.

In the second model (United States model), there is no bad law, so to speak. But, people are arrested in other countries and detained in yet another country without trial.

What legal remedies do they have? To whom do they make representations? How are they going to argue that their arrest and detention have not been in compliance with the law or regulation thereof when there is no law or regulation governing their arrests and detentions, in the first place? Which is better?

THIRD, it should be emphasised that the repeal of the declarations of emergency and the said laws is not a sign of weakness and that no one should abuse the newfound liberty.

FOURTH, one positive effect of the declarations of emergency and the introductions of the said laws was the development of judicial review as a branch of administrative law in Malaysia. I dare say that our judicial review law had developed more than in any other country in this region, indeed, at times, going a bit too far.

Now that is all history. I would like to see what difference the abolition of the declaration of emergency and those laws will make to the country.



Yemeni inmate at Guantanamo Bay Abdulrahman al-Shubati has been held for almost 11 years without charge. In the Malaysian model, there is a right to make representation to an independent tribunal. Reuters pic