

Session 3: Emergency Orders and Executive Powers (Outline of Presentation)
Presentation by A.G. Kalidas, President of the Malaysian Bar

This presentation is regarding the emergency measures implemented by the Malaysian government during the COVID-19 pandemic, and its impact on the separation of powers and the rule of law in Malaysia.

Timeline leading up to the Proclamation of Emergency in Malaysia

- **18 March 2020** - the Government of Malaysia imposed a Movement Control Order (“MCO”) to curb the outbreak of COVID-19.
- **September 2020** - the number of positive COVID-19 cases surged and continued to rise in the following weeks.
- **23 October 2020** - the Prime Minister sought an audience with His Majesty the King on the declaration of a state of emergency under Article 150(1) of the Federal Constitution by reason of the COVID-19 pandemic.
- **25 October 2020** – His Majesty the King expressed that there was no need for a state of emergency.
- **11 January 2021** – His Majesty the King, on the advice of the Prime Minister, issued a Proclamation of Emergency pursuant to Article 150(1) of the Malaysian Federal Constitution.
- **14 January 2021** - The first Emergency (Essential Powers) Ordinance 2021 was promulgated.
- **11 March 2021** - the second Emergency (Essential Powers) Ordinance 2021 was promulgated, coming into operation the following day.
- **26 July 2021** - the then-Law Minister informed the House of Representatives that all Emergency Ordinances had been revoked on 21 July 2021.
- **December 2021** - the Emergency Ordinances were revoked by Parliament.

No Judicial Power to Review the Validity of Emergency Proclamations

- The Judiciary does not have the jurisdiction and power to review the validity of the proclamation and any emergency ordinance promulgated.
- Articles 150(6) and (8) of the Federal Constitution purport to oust the jurisdiction of the Courts.

Lack of Checks and Balances under the Executive / Suspension of Parliament

- The Emergency Ordinances provided the Executive with extensive legislative powers, without any checks or balances by the Legislature.
- Parliament and State Assemblies sittings were suspended during the pandemic.

Criminalisation of the Dissemination of Fake News

- The Second Emergency Ordinance criminalised the dissemination of fake news regarding the COVID-19 pandemic and the state of Emergency.
- The Second Emergency Ordinance was criticised by many for reinstating controversial provisions from the repealed Anti-Fake News Act 2018 – an act that was repealed in 2019 after it was perceived as a draconian law that stifled freedom of speech.
- It has been speculated that the state of emergency was intended to insulate the Government from any form of criticism or dissent.

Measures taken by the Malaysian Bar

- The Malaysian Bar had commenced legal action in the High Court of Malaya for declaratory relief that certain provisions of the Federal Constitution, which relate to the Proclamation of Emergency, in their literal interpretation are overbroad and unconstitutional and some provisions of the Emergency Ordinances are unconstitutional.

Session 3: Emergency Orders and Executive Powers
February 9, 2022

Presentation by Shyam Divan, President-Elect, LAWASIA
Senior Advocate, Supreme Court of India

Outline

- A. Introduction: Impact of the pandemic in India
- B. Executive powers exercised and emergency orders passed during the pandemic
- C. Role played by Bar Associations in the country
- D. Case studies
 - i) Limitations on freedom of expression
 - (ii) Transparency and the PM Cares fund
 - iii) Vaccine capping and impact on private hospitals

A. Introduction: Impact of the pandemic in India

1. The first case of COVID-19 in India was reported in January 2020. Between March and May 2021, parts of India saw a brutal second wave of COVID-19, and the capital city faced shortages of oxygen and hospital beds. As of 27 January 2022, there have been 40,371,500 confirmed cases of COVID-19 with 491,700 deaths, reported to WHO. As of 17 January 2022, a total of 1,581,796,355 vaccine doses have been administered- 67% of the population has got at least one dose, and 50% of the population is fully vaccinated.
2. As many as 84 percent Indian households suffered a fall of income, for many into deep and stubborn poverty. The RBI estimated a GDP contraction of minus 8.7 to 7 per cent. 120 million jobs were lost, of which 92 million were in the informal sector. In 2021, FAO reported there were 200 million undernourished people in India and India was home to a quarter of all undernourished people around the world. Pew estimated that the number of poor people in India doubled from 55 million in 2020 to 120 million in 2021. Oxfam reports that daily-wage workers topped the numbers of people who committed suicide in 2020, followed by self-employed and unemployed individuals.

Source: [India needs a new social contract](#) | Indian Express

3. Particularly in the early days of the pandemic, the Indian State's response to control the spread of COVID-19 was disproportionately focused on using police powers of the state, rather than ensuring protection of the rights of citizens (civil, political and socio-economic).

Source: [C-HELP's Submission to the NHRC](#)

4. The state of emergency ensured by the pandemic resulted in the role of Parliament and public consultation for decision making being shrunk with wide ranging impact thereafter.
 - a) Between June 2014 and May 2019, 186 Bills were introduced out of which 142 saw no prior consultations.
 - b) The proportion of Bills being referred to parliamentary committees for study and consultation has drastically fallen from 60 per cent in the 14th Lok Sabha, 71 per cent in the 15th Lok Sabha, 27 per cent in the 16th Lok Sabha to just 11 per cent so far in the current Lok Sabha.

Source: [Why the growing lack of consultation in law-making is damaging democracy | The Indian Express](#)

5. Courts continued to work remotely, with a short return to physical hearings in a hybrid system that retained the virtual option. Some notable judgements were passed by the Supreme Court to address the ongoing crisis:
 - a) *In Re: Distribution of Essential Supplies and Services During Pandemic* – (Suo Motu Writ Petition - (Civil) No.3 of 2021:

A suo motu public interest litigation taken up by the Hon'ble Supreme Court, to ensure that there is a proper and effective distribution of essential supplies and

services during the pandemic to the people of India. The Supreme Court took cognizance of the large number of COVID-related infections throughout the country and has taken up the issues of supply of oxygen and essential drugs, the method and manner of vaccination and declaration of lockdown.

b) *The Chief Election Commissioner of India v. MR Vijayabhaskar* (2021) 9 SCC 770:

The Supreme Court dismissed the plea made by the Election Commission of India to restrain media from reporting the oral remarks of judges. The Court emphasized that the media coverage of court hearings was part of freedom of press, had a bearing on citizens' right to information and also on the accountability of the judiciary.

c) *Rambabu Singh Thakur v. Sunil Arora* (2020) 3 SCC 733:

The Supreme Court declared that it is *mandatory* for political parties [at the Central and State election level] to upload on their website detailed information regarding individuals with pending criminal cases (including the nature of the offences, and relevant particulars such as whether charges have been framed, the court concerned, the case number, etc.) who have been selected as candidates, along with the reasons for such selection, and why other individuals without criminal antecedents could not be selected as candidates.

B. Executive powers exercised and emergency orders passed amidst the pandemic

6. The main act in operation is the National Disaster Management Act, 2005 (“**DM Act**”) under which various emergency circulars/ notifications have been issued from time to time.
 - The DM Act is to “*provide for the effective management of disasters*”. The National Disaster Management Authority (NDMA) established under the Act is the nodal central body for coordinating disaster management, with the Prime Minister as its Chairperson. The NDMA lays down policies, plans and guidelines for the management of disasters, and also sets up State, District and Local level Disaster Management Authorities.
 - The DM Act bestows extensive powers on the Central Government and the NDMA. Under S. 6(3), the prime minister can exercise all the powers granted to the NDMA. Irrespective of any law in force (including overriding powers) the Central Government can issue directions to any authority anywhere in India to facilitate or assist in disaster management (Ss 35, 62 and 72). Importantly, any such directions issued by Central Government and NDMA must necessarily be followed by the Union Ministries, State Governments and State Disaster Management Authorities (Ss 18 (2) (b); 24(1); 36; 38(1); 38(2)(b); 39(a);39(d).
 - On March 24, 2020, the National Disaster Management Authority issued an order under Section 6(2)(i) of the Act, directing the ministries and departments of Government of India and State Governments along with State Disaster Management Authorities to take measures for “ensuring social distancing so as to

prevent the spread of COVID-19 in the country”. MHA guidelines released on the same day by the Home Secretary (acting as chairperson of the National Executive Committee, under Section 8 of the DM Act) prescribed the lockdown. This order has been [updated](#) from time to time.

7. State governments have, in addition to DM Act, used powers under the Epidemic Diseases Act, 1897 as well as various state-specific Public Health Acts (eg: Tamil Nadu Public Health Act, 1939) to deal with the crisis. For instance, taking cue from the ‘Containment Plan for Large Outbreaks (COVID 19)’ issued by the Union Ministry of Health & Family Welfare, the Nodal Ministry for biological disaster, several states issued COVID-specific Regulations. Kerala, in addition to the above, invoked legislative power under Entry 6 (Public health and sanitation) of State List and issued the ‘Kerala Epidemic Diseases Ordinance, 2020’. Overall, States have also have the legal power to deal with the pandemic under provisions of the Penal Code, including “punishments for disobeying orders of a public servant” and “malignant acts likely to spread infection of disease dangerous to life.” (Sections 188 & 270 IPC respectively).
8. The Epidemic Diseases Act, is a Victorian-era law which was enacted to tackle the plague. and needs urgent updating. For example, while the act focuses on government’s powers during an epidemic it does not specify its duties in controlling/preventing an epidemic, nor does it enunciate any rights available to the citizens in the event of an outbreak.

Source: [The Epidemic Diseases Act, 1897 Needs An Urgent Overhaul | Economic and Political Weekly](#)

Source: [C-HELP Explainer on NDMA](#)

C. Role played by Bar Associations

9. Bar Association of India:

The Bar Association of India filed an Intervention Application in Suo Moto Writ Petition (Civil) No. 3/2020: *In Re: Distribution of Essential Supplies and Services During Pandemic*. The Resolution adopted by the BAI noted the ramifications of the petition and observed that it must contribute to the efforts being made by the Court:

The Association is also aware of the importance of intervention by the Hon’ble Supreme Court of India particularly in relation to several federal issues that arise in ensuring coordination and cooperation between and amongst the States. Hence, the members were of a unanimous view that this has larger ramifications on ensuring right to life of people. It was also felt that given the nature of the suo motu proceeding initiated by Supreme Court it is appropriate that assistance is rendered by the bar. Accordingly, it was

unanimously resolved as follows : That the Bar Association of India should intervene by way of appropriate applications/petition in the matter of Suo Motu Writ Petition (Civil) No. 3/2020

10. Bombay Bar Association: Bombay Bar Association offered financial assistance to advocates.
11. Bar Council of Delhi: The Bar Council of Delhi has helped over 2,000 lawyers fighting Covid-19 with financial aid in the last month. The BCD said that since April, it has been extending the financial help of Rs 15,000 to lawyers who are under home quarantine and Rs 50,000 to those who had to be admitted due to Covid infection and did not have medical insurance.

So far, the council has released financial aid worth nearly Rs 3.59 crore. According to a press release issued by the BCD on Thursday, 2287 lawyers received Rs 15,000 each and 33 lawyers were given Rs 50,000 to cover their hospitalisation fee.

D. Case Studies

12. Limitations on freedom of expression

- Since the beginning of the pandemic, the government has launched a wave of repression and restrictions on peoples' freedom of speech. The executive used existing powers under the Information Technology Act, 2000, the Indian Penal Code, as well as more stringent laws like the National Security Act to clamp down on speech critical of the government's handling of the pandemic. Section 505 of the Indian Penal Code is a broad provision relating to "statements conducing to public mischief" and punishes acts of "rumour mongering" and circulation of false news.
 - For example, in April 2020, 640 cases had been registered against persons for allegedly "disseminating fake news and rumours on social media platforms".
 - In March 2020, an oncologist in Kolkata who posted a few photographs of doctors on social media who were wearing raincoats instead of medically appropriate gowns in a Covid-19 ward of a government hospital, was detained by the police and was charged with causing communal disharmony and criminal intimidation.
 - In 2020, a sedition case was filed against a senior journalist (Vinod Dua) over a YouTube broadcast of him criticizing the government's implementation of the COVID lockdown.
 - In February 2021, Twitter revealed it had been asked to disable over a thousand accounts under section 69A of the Information Technology Act. In March 2021, similar orders were issued for 52 tweets critical of the government's handling of the pandemic.
 - During the "Second Wave," in April and May 2021, the state police invoked the National Security Act against social media accounts who discussed the lack of oxygen supplies.

- In February 2021, the Union government expanded its powers to control information online, with the *Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021* which grant the Central Government extensive powers to regulate all content online, including the power to direct takedowns of content deemed to be “fake news,” as well as unprecedented power to regulate the content of digital news media.
 - Although the government claimed that these rules were finalised after “elaborate consultations with the public and stakeholders,” the previous draft did not contain crucial elements of the rules, including the code of ethics for digital news media, directions for traceability.
 - These rules have been challenged in several high courts across the country. In August 2021, the Bombay High Court stayed parts of the rules (Rules 9(1) and 9(3)) which mandate digital news publishers to adhere to a code of ethics, and to come under an oversight mechanism by the central government.

Source: [How is free speech being curtailed during the pandemic by the Indian government? - IFEX](#) (chronological summary)

Source: [How the Modi government's new IT rules jeopardise the right to privacy and free speech](#) (summary of challenges to the IT Rules)

Source: [IT Rules 2021: Bombay High Court Stays Oversight Mechanism On Publishers](#) (Bombay High Court's order)

13. PM-CARES and the lack of transparency

- The multiplicity of funds for disaster response has created grounds for fresh controversy. The DM Act provides for a National Disaster Response Fund (NDRF), under Section 46 (2), which is intended to meet expenses for emergency responses, relief, and rehabilitation in accordance with the guidelines laid down by the Central Government in consultation with the NDMA. The Act also provides for the creation of the National Disaster Mitigation Fund under Section 47(1). There is also the Prime Minister National Relief Fund, established in January 1948 in pursuance of an appeal by the then-PM Jawaharlal Nehru, to assist displaced persons from Pakistan. This fund is utilized to deal with emergencies, calamities, and emergency medical expenses.
- However, despite the presence of these funds, on 27th March 2020, the Prime Minister's office established a Prime Minister's Citizen Assistance and Relief in Emergency Situations Fund (“**PM CARES Fund**”), which was registered as a public charitable trust with its registered office at the Prime Minister's Office.
- The fund is intended to be available during public health emergencies, and other emergency and calamities. Questions have been raised regarding the need for a new fund when multiple funds exist already with similar objectives.
- The PM CARES Fund has received considerable state support, including an exemption from the operation of the Foreign Contribution (Regulation) Act, 2010 (which regulates foreign funding for NGOs); tax exemptions for contributions, as

well as approval to corporations to treat contributions to the PM Cares Fund as an expenditure towards “Corporate Social Responsibility” obligations.

- An important measure mentioned in the NDMA is to strengthen the “monitoring mechanisms for fund utilization and progress of implementation.” However, in contrast, the government has refused to include the PM CARES fund, under the ambit of the Right to Information Act.
- A writ petition seeking a declaration that the fund be considered a “State” functionary is pending in the High Court. However, the High Court has refused to hear this, and since 2021 despite it being listed several times, it has not been heard.

14. Medical regulation by the State of Maharashtra and the impact of regulation

- During the first wave of the COVID-19 pandemic, the State of Maharashtra was one of the worst-hit states in the country. Owing to several concerns including overcharging of patients, the State Government issued notifications capping the fees chargeable by the hospitals/ healthcare providers. Interestingly, the State Government not only regulated the fees for COVID-19 patients but also for non-COVID patients. Most importantly, it was unclear as to whether the State Government had issued the regulations under the Epidemic Diseases Act, 1897 or the Disaster Management Act, 2005.
- A writ petition was filed before the Nagpur High Court challenging these notifications on the ground that the State of Maharashtra did not possess the regulatory power under any legislation, including the Epidemic Diseases Act or the Disaster Management Act.
- In so far as regulation of non-COVID patients was concerned, the Nagpur High Court in *Hospitals Association v. State of Maharashtra*, 2020 SCC OnLine Bom 1868 held that the State Government had no executive power to regulate the hospitals/ healthcare providers in terms of their rates for non- COVID-19 patients.
- Presently, despite the clear mandate under S. 2 of the Epidemic Diseases Act, 1897 to defray the “*expenses incurred (including compensation if any)*”, the State Government has not taken any steps to compensate the hospitals/ healthcare providers for absorbing the burden of providing subsidized healthcare to COVID-19 patients.
- Assuming the Disaster Management Act, 2005 is applicable, S. 66(1) clearly provides that whenever any Committee, Authority or officer requisitions any premises, then the persons interested shall be paid compensation.
- However, none of the State Governments, including the State of Maharashtra, have undertaken to pay compensation to any of the hospitals/ healthcare providers. They have merely proceeded to pass the burden of subsuming the costs of healthcare onto the hospitals/ healthcare providers without providing them with any financial support.

15. Medical regulation by the State of Kerala

- During the second wave of the pandemic, the State of Kerala introduced a Government Order dated 10.05.2021 whereunder 50% of all hospital beds in the government as well private hospitals would be exclusively reserved for treatment of COVID-19 patients. This notification also included a rate-capping regulation for nursing, boarding, doctor's fees, etc. Importantly, this Government Order was upheld by the Hon'ble High Court of Kerala in a writ petition challenging the same.
- Subsequently, the State of Kerala introduced an order dated 16.06.2021 under which it allowed private hospitals to decide the rates '*for other categories of beds like private rooms and suites.*' The same was challenged before the Hon'ble Kerala High Court, which stayed the operation of the same on the ground that this would allow the hospitals to charge any rates for COVID-19 patients.
- Here again, there was no consideration of S.66(1) of the Disaster Management Act or S.2 of the Epidemic Diseases Act. The burden of absorbing the costs of treatment was passed onto the hospitals/ healthcare providers. Over-regulation of hospitals/ healthcare providers can lead to drastically reducing the quality of healthcare, which would surely not be the ideal solution for tackling a pandemic. The Hon'ble High Court failed to galvanize the State to undertake the task of compensating the hospitals/ healthcare providers for the overhead costs, which the State was mandated to undertake under the Disaster Management Act and the Epidemic Diseases Act.

Source: [Order of Kerala High Court upholding the Government Order dated 10.05.2021](#)

Source: [Order of Kerala High Court staying the Government Order dated 16.06.2021](#)

Session 3: Emergency Orders and Executive Powers

FIJI

February 9, 2022

Presenter: Richard Naidu

Brief legal and constitutional background

Former British colony, Independence in 1970

Four (and a half) coups and four constitutions since then (!)

Emergency powers in that time have typically been deployed in “hot”, constitutionally challenged situations (courts not sitting/guns pointed); little or no jurisprudence on the point.

No more than 3-400 private practitioners (many junior), so limited pool of lawyers for civil rights action to protect constitutional rights; few NGOs who specialise in public interest litigation; Human Rights Commission of the North Korean variety (so any meaningful litigation must be privately brought); so while we have our moments (!) we are not a population that pro-actively protects constitutional and human rights

Current legal provisions for emergencies

Constitution, Chapter 9 (s.154) – Emergency Powers:

PM may, on recommendation of Police and Military commanders, declare a state of emergency and make regulations if there are reasonable grounds to believe that:

- (a) security and safety of all or part of Fiji is threatened and
- (b) it is necessary to declare a state of emergency to deal effectively with the threat.

If Parliament is sitting at the time, the PM must refer the declaration to Parliament for confirmation.

If Parliament is not sitting the Speaker must, within 48 hours of declaration seek confirmation of declaration from MPs *through such measures of communication as necessary*.

If Parliamentary majority confirm, emergency continues for a month and must then be renewed.

If Parliamentary majority does not confirm, declaration and actions taken by it shall be deemed to be of no effect.

No specific Emergency Powers statute

Natural Disaster Management Act (NDMA) (requires Cabinet declaration of disaster and incorporates some emergency powers; for 30 days).

For Covid: Public Health Act

Fiji's Covid-19 response

Immediate: international border closures, social distancing and contact tracing rules, (periodic but limited) lockdowns, night-time curfews and confinement zones.

One declaration of natural disaster in April 2020 (through the NDMA) but not renewed.

All managed through the **Public Health Act** (which is not subject to constitutional Parliamentary oversight) and Minister's general power *to do all such other things as the Minister may deem necessary for the protection of public health* (s.69(1)(c), Public Health Act, under Part 7 (Infectious Diseases).

"Blunderbuss" approach taken to exercise a Ministerial "catch-all" power rather than specific powers given to Government officials to do specific things (eg requisitioning assets, controlling movement, ordering attendance for medical examination, to order the vaccination of unprotected persons, etc – powers given to the Permanent Secretary)

Limited litigation on these issues, principally around the detention and prosecution of rule-breakers (which has been enthusiastic and heavy-handed and involved almost automatic 48-hour detention) has established:

- a Facebook post of a PM's press conference before the gazetting of restrictions does not give the police the right to prosecute
- people sheltering overnight in a cybercafe are not breaching a curfew
- a summons incorrectly saying that an offender breached orders of the Prime Minister (it should have been the Health Minister) entitles you to acquittal

We've also seen an unseemly judicial tussle over the exercise of revisionary powers on convictions which will feature in the Court of Appeal later this year.

But (perhaps to the disappointment of some lawyers) most offenders prefer to plead guilty!

In 2021 – a strict (and Draconian) "**no jab, no job**" / "**no jab, no welfare payments**" policy, imposed (untidily) via the Health and Safety at Work Act, including for private sector employers – controversial but undoubtedly effective – vaccination rates now in the 1990s. Side effects: some anti-vaxxers have chosen to "tough it out" with a loss of some teachers, health workers and other skilled personnel; some suggestion that there is a market for forged vaccination cards; but as the Omicron threat begins to recede¹, some of these issues are fading from view.

¹after Fiji's Delta disaster, which had world-beating infection rates