



Action Report

Emergency Orders and Executive Powers

On February 9, 2022, LAWASIA and the American Bar Association (ABA) coordinated a dialogue on the challenges legal communities face because of the pandemic and how bar associations are responding. This dialogue, the third in a series of four Dialogues, centered around challenges in the use by governments of Emergency Orders and Executive Powers to respond to the pandemic. Below is a summary of the present situation in a variety of countries in Asia shared during the session, followed by more specific recommendations from each panelist.

1 What emergency orders or other regulations have been enacted by your government to address the pandemic and/or civil unrest during the pandemic? What powers does the legislation provide to authorities?

Malaysia: Following the surge of positive COVID-19 cases throughout the year of 2020, in January 2021, the Malaysian government promulgated the first Emergency (Essential Powers) Ordinance, followed by the second Ordinance in March which came into operation the day after. In December 2021, the Emergency Ordinances were revoked by Parliament. The issue was that the Judiciary did not have the power to review the validity of the proclamation and any emergency ordinance promulgated. The Emergency Ordinances provided the Executive with extensive legislative powers, without checks or balances by the Legislature. Parliament and State Assemblies sittings were suspended during the pandemic.

India: 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). The state of emergency created by the pandemic shrunk public consultation in decision making processes by Parliament. This had wide ranging impacts. 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 (the House of the People of India's Parliament), 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. The National Disaster Management Act granted extensive powers on the Central Government to issue directions to any authority anywhere in India to facilitate or assist in disaster management. Any such direction must be followed by the Union Ministries, State Governments, and State Disaster Management Authorities.

Fiji: The Fiji government declared a natural disaster in April 2020 through the National Disaster Management Act (NDMA), which (unlike a state of emergency) is not subject to constitutional Parliamentary oversight. It relied on a “blunderbuss” approach through general Ministerial powers under the Public Health Act to do such other things as the Minister may deem necessary for the protection of public health (as opposed to applying itself to the specific powers available to government officials to perform specific health-related tasks).

2 How inclusive are/were discussions on regulations to address fake news and doxing?

Malaysia: The Second Emergency Ordinance criminalized the dissemination of fake news regarding the COVID-19 pandemic and the state of Emergency. It was criticized 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.

India: 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. 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.”

3 Were bar associations and the legal community involved in the pandemic response?

Malaysia: The Malaysian Bar had commenced legal action in the High Court 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.

India: 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 to ensure that there is a proper and effective distribution of essential supplies and services during the pandemic. Bombay Bar Association and Bar Council of Delhi have helped lawyers and advocates who were under home quarantine and did not have medical insurance by providing financial assistance.

4 Where adopted, what has been the impact and its side effects?

India: 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. However, none of the State Governments 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.

Fiji: A strict “no jab, no job” policy was imposed under the Health and Safety at Work Act, which did improve vaccination rates, led to several side effects. Some anti-vaxxers have chosen to “tough it out” with a loss of some teachers, health workers, and other skilled personnel. People resorted to an illegal market to acquire forged vaccination cards. Additionally, the government created situations that allow for improper detention of citizens during a pandemic for minor offenses such as breaking curfew. The Police tended to detain curfew-breakers for the maximum constitutional 48-hour period because they could, and as a form of extra-judicial punishment. It was difficult to challenge these situations as most people were focused simply on pleading guilty to get their situation “over and done with”.

5 How do you see these regulations and the discussions play out? What are your recommendations?

It is best for executive bodies of governments to work with the legislative bodies to address emergency situations, but there must be a process to address a pandemic emergency at an accelerated pace. Another key factor to consider is how a government will frame the problem of a pandemic (public health issue vs. National security issue). This framing can be central to the analysis and resolution of those problems. The question of equity is also central to the analysis of legal issues in the pandemic, both in terms of the impact of the pandemic and the distribution of vaccines and therapeutics. Judicial review of executive orders is necessary for rule of law and the separation of powers. Lawyers and the bar are critical to the resolution of the tension between the need for immediate action and the maintenance of the rule of law.

Opening Remarks/Moderator

- Honorable M. Margaret McKeown, Special Advisor & Former Chair, ABA Rule of Law Board, Circuit Judge U.S. Court of Appeals for the 9th Circuit of the United States

Rapporteurs

- James Park Taylor
- Rania A. Attum
- Clare Kim

Presenters

- A G Kalidas, President of the Malaysian Bar (Malaysia)
- Shyam Divan, President-Elect of LAWASIA and Senior Advocate in the Supreme Court of India
- Richard Naidu, Partner at Munro Leys (Fiji)

Speakers' Action Tips

Offered by Hon. Margaret McKeown

- The executive and legislative bodies during a pandemic must balance public safety, security, and individual rights; however, as the pandemic progresses, public health and security appear to have trumped individual rights.

Offered by President of Malaysian Bar, A.G. Kalidas

- While normal functioning of society cannot be maintained during a pandemic and freedoms may be encroached, the fundamental values of democracy and constitutional safeguards must be maintained.
- Efforts to restrain judicial oversight of such orders or legislation should be rejected, even if based on legislation or constitutional provisions.
- The bar must act to uphold the course of justice and address the overuse of executive power. This may involve:
 - Legal challenges to emergency orders
 - Supporting the right of judicial review of all emergency orders and emergency legislation.
 - Challenging constitutional provisions that restrict judicial review should be challenged
 - Explaining to the public their legal rights and responsibilities in a pandemic.

Offered by Shyam Divan, President Elect of LAWASIA

- Legislative response to executive emergency orders may be too slow to address urgent needs. Lawyers and bar associations must be prepared to challenge mandates in the courts
- Bar associations should consider offering financial assistance to advocates and lawyers assisting those negatively impacted by emergencies. For example, people without medical insurance fighting COVID-19.
- Governments should not be allowed to use sedition laws to stifle comment during a pandemic.
- Governments should be deliberate and transparent to the public when creating multiple funds for the same purpose (e.g., disaster response, pandemic).
- Diplomatic measures should be used to make sure there is equity in supply and the ability of all countries to purchase vaccines
- During a pandemic the determination of intellectual property rights of the pharmaceutical companies should include consideration about how those rights will affect the distribution of life saving vaccines

Offered by Richard Naidu, Partner at Munro Leys, Fiji

- Legislation or emergency orders that attempt to remove such action from judicial oversight should be challenged.
- Legislative bodies should have procedures in place to respond to emergency situations such as a pandemic, to provide for emergency legislation for both policy and fiscal responses, while maintaining a degree of legislative oversight of the actions of the Executive.
- The authority of the Executive branch to issue and enforce emergency orders should be limited in time and scope, while at the same time flexible enough to allow responses to address changing threats. This may be done through either constitutional or legislative grants of authority. There must be a mechanism for both legislative and judicial oversight of any emergency orders issued by the executive branch of government.