



**Resolution Adopted at the 75th Annual General Meeting of the Malaysian Bar
Held on 13 March 2021**

Resolution Regarding the Emergency (Essential Powers) Ordinance 2021

WHEREAS:

- (1) In December 2019, cases of “viral pneumonia” were identified in Wuhan, People’s Republic of China (“China”), and subsequently reported to the World Health Organization (“WHO”).¹ Shortly after, it was identified as a new type of coronavirus (novel coronavirus, nCoV) and later termed by WHO as “COVID-19”.
- (2) On 13 January 2020, the first case of COVID-19 in Thailand was reported.² By 27 January 2020, 11 countries (excluding China) reported laboratory confirmed COVID-19 cases, including Malaysia.³ WHO declared the COVID-19 outbreak as a “Public Health Emergency of International Concern” on 30 January 2020.⁴
- (3) In Malaysia, a Movement Control Order (“MCO”) was implemented on 18 March 2020 to 31 March 2020⁵ following a steep rise in the number of cases. The order would be extended over the course of 2020 and 2021, to date, as follows:

MCO:

- (a) 1 April 2020 to 14 April 2020;⁶
- (b) 15 April 2020 to 28 April 2020;⁷
- (c) 29 April 2020 to 12 May 2020;⁸

¹ Rolling updates on coronavirus disease (COVID-19) (31 July 2020), updated 31 July 2020. World Health Organization. Retrieved from: who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen.

² *Ibid.*

³ Epidemiological Update Novel coronavirus (2019-nCoV) (27 January 2020). Pan American Health Organization. Retrieved from: tinyurl.com/3c6se282.

⁴ Rolling updates on coronavirus disease (COVID-19) (31 July 2020), updated 31 July 2020. World Health Organization. Retrieved from: who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen.

⁵ Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020 [P.U.(A) 87/2020], and Prevention and Control of Infectious Diseases (Measures within the Infected Local Areas) Regulations 2020 [P.U.(A) 91/2020].

⁶ Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) Order 2020 [P.U. (A) 98/2020].

⁷ Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) (No. 2) Order 2020 [P.U.(A) 116/2020].

⁸ Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) (No. 3) Order 2020 [P.U.(A) 132/2020].

Conditional MCO: On 1 May 2020, the Prime Minister, YAB Tan Sri Muhyiddin Yassin (“Prime Minister”) announced the implementation of a Conditional MCO, beginning 4 May 2020. The daily number of COVID-19 positive cases on 1 May 2020 stood at 69 (compared to 117 on 18 March 2020),⁹ whilst total positive cases numbered at 6,071.¹⁰

(d) 13 May 2020 to 9 June 2020;¹¹

Recovery MCO: On 7 June 2020, the Prime Minister announced that the Conditional MCO would end on 9 June 2020, and the Recovery MCO would be implemented, beginning 10 June 2020. The daily number of COVID-19 positive cases on 9 June 2020 stood at 7, whilst total cases numbered at 8,336.¹²

(e) 10 June 2020 to 31 August 2020, and subsequent extensions.¹³

- (4) In addition, localised places would be put under Enhanced MCO as the need arose.
- (5) In September 2020, Malaysia witnessed a surge in the number of COVID-19 positive cases. This has been attributed to the snap Sabah state elections which took place on 26 September 2020.¹⁴ On 3 October 2020, the daily number of positive cases stood at 317¹⁵ — the highest single-day report of confirmed cases, at that time, since the start of the outbreak.¹⁶ This figure would continue to climb in the ensuing weeks.
- (6) On 23 October 2020, the Prime Minister sought an audience with His Majesty the Yang di-Pertuan Agong on the declaration of a state of emergency under Article 150(1) of the Federal Constitution by reason of the COVID-19 pandemic. On 25 October 2020, the Yang di-Pertuan Agong, in a statement released by the Istana Negara in the national language,

⁹ Situasi Terkini 18 Mac 2020 (18 March 2020). Kementerian Kesihatan Malaysia. Retrieved from: [covid-19.moh.gov.my/terkini/032020/situasi-terkini-18-mac-2020](https://www.moh.gov.my/terkini/032020/situasi-terkini-18-mac-2020).

¹⁰ Situasi Terkini 1 Mei 2020 (1 Mei 2020). Kementerian Kesihatan Malaysia. Retrieved from: [covid-19.moh.gov.my/terkini/052020/situasi-terkini-01-mei-2020](https://www.moh.gov.my/terkini/052020/situasi-terkini-01-mei-2020).

¹¹ Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) (No. 4) Order 2020 [P.U.(A) 146/2020].

¹² Situasi Terkini 9 Jun 2020 (9 June 2020). Kementerian Kesihatan Malaysia. Retrieved from: [covid-19.moh.gov.my/terkini/062020/situasi-terkini-09-jun-2020](https://www.moh.gov.my/terkini/062020/situasi-terkini-09-jun-2020).

¹³ Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) (No. 5) Order 2020 [P.U.(A) 180/2020]. The order would be further extended to 31 March 2021, via the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) (No. 6) Order 2020 [P.U.(A) 253/2020] and Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) (Extension of Operation) (No. 7) Order 2020 [P.U.(A) 399/2020].

¹⁴ “PM admits Sabah election among causes of spike in COVID-19 cases”, *Bernama*, 6 October 2020. Retrieved from: <https://www.astroawani.com/berita-malaysia/pm-admits-sabah-election-among-causes-of-spike-in-covid19-cases-262477>.

¹⁵ Situasi Terkini 3 Oktober 2020 (3 October 2020). Kementerian Kesihatan Malaysia. Retrieved from: [covid-19.moh.gov.my/terkini/102020/situasi-terkini-03-oktober-2020](https://www.moh.gov.my/terkini/102020/situasi-terkini-03-oktober-2020).

¹⁶ “Malaysia: Coronavirus Disease 2019 (COVID-19) Situation Report. Weekly report for the week ending 4 October 2020”, 6 October 2020. World Health Organization: Representative Office for Malaysia, Brunei Darussalam, and Singapore. Retrieved from: [who.int/malaysia/internal-publications-detail/covid-19-in-malaysia-situation-report-20](https://www.who.int/malaysia/internal-publications-detail/covid-19-in-malaysia-situation-report-20).

expressed that “*tiada keperluan buat masa ini untuk ... mengisytiharkan darurat di negara ini atau mana-mana bahagian negara Malaysia.*”¹⁷

- (7) The Malaysian Bar, on 23 October 2020, released a statement stating that a declaration of Emergency is unwarranted, as there are existing laws and mechanisms in place to manage the COVID-19 pandemic, such as the Prevention and Control of Infectious Diseases Act 1988 (Act 342) (“PCIDA”), which provides the Government with wide-ranging powers.
- (8) During the months of October to December 2020, Sabah, Selangor and the Federal Territories of Kuala Lumpur and Putrajaya, were placed under Conditional MCO again due to the rise in daily reported COVID-19 positive cases. The daily number of positive cases on 31 December 2020 stood at 2,525, whilst total cases numbered 113,010.¹⁸
- (9) By the end of January 2021, the MCO was reintroduced to all states except Sarawak.
- (10) On 11 January 2021, following an audience granted to the Prime Minister¹⁹ and upon the Prime Minister’s advice, the Yang di-Pertuan Agong issued a Proclamation of Emergency pursuant to Article 150(1) of the Federal Constitution to declare a state of Emergency for the whole Federation effective from 11 January 2021 to 1 August 2021 (“Proclamation of Emergency”).²⁰ The Emergency (Essential Powers) Ordinance 2021 (“Emergency Ordinance”)²¹ was also promulgated on 14 January 2021, and came into operation on 11 January 2021.
- (11) The Malaysian Bar, on 13 January 2021, released a statement maintaining its view that the PCIDA and other pieces of legislation were sufficient for the Government to manage the COVID-19 pandemic, and that its request for an Emergency Declaration appeared to be overblown. In a subsequent statement on 15 January 2021, we then highlighted our concerns arising out of the Emergency Ordinance, which afforded wide-ranging powers to the Executive branch.
- (12) Provisions of the Emergency Ordinance that are particularly concerning are:
 - (a) Suspension of Federal and State legislative proceedings (*sections 14 and 15*);
 - (b) Suspension of Federal and State elections (*sections 12 and 13*);
 - (c) Entrenchment of the position of the current Executive at Federal and State levels (*section 11*);

¹⁷ Kenyataan Media, 25 Oktober 2020. Dato’ Indera Ahmad Fadil Shamsuddin, Datuk Pengelola Bijaya Diraja, Istana Negara. Retrieved from: <https://tinyurl.com/ck3vm2m>.

¹⁸ Situasi Terkini 31 Disember 2020 (31 December 2020). Kementerian Kesihatan Malaysia. Retrieved from: covid-19.moh.gov.my/terkini/122020/situasi-terkini-covid-19-di-malaysia-31122020.

¹⁹ Speech text of the Special Announcement of Emergency: YAB Tan Sri Dato’ Haji Muhyiddin b Haji Mohd Yassin, Prime Minister of Malaysia, 12 January 2021. Retrieved from: pmo.gov.my/2021/01/teks-ucapan-pengumuman-khas-darurat/.

²⁰ Proclamation of Emergency [P.U.(A) 7/2021].

²¹ Emergency (Essential Powers) Ordinance 2021 [P.U.(A) 12/2021].

- (d) Vast powers afforded to the armed forces (*section 7*);
 - (e) Vast powers to temporarily take possession of any land, building or movable property (*section 3*) and to demand for the use of resources for any purpose (*section 4*). The assessment of compensation in these circumstances cannot be challenged by the Courts — an “ouster clause” (*section 5*); and
 - (f) An “immunity provision” (*section 10*) which seeks to shield the Government from any acts taken in carrying out the provisions of the Emergency Ordinance. The qualification that such acts must be done in “good faith” does not provide sufficient redress, as it still affords the Government with immunity in situations of negligence.
- (13) The Malaysian Bar is holding a watching brief in five suits which have since been filed in relation to the Proclamation of Emergency and the Emergency Ordinance. These suits were commenced by the following parties:
- (a) Non-governmental organisations (“NGOs”) and human rights groups, namely BERSIH 2.0, Suara Rakyat Malaysia (“SUARAM”), Centre for Independent Journalism (“CIJ”), ALIRAN, Kuala Lumpur and Selangor Chinese Assembly Hall (“KLSCAH”), Pergerakan Tenaga Akademik Malaysia (“GERAK”) and SAVE Rivers;
 - (b) Hassan b Abdul Karim;
 - (c) Datuk Seri Salahuddin b Ayub, Dato’ Johari b Abdul, and Abdul Aziz b Bari (commonly referred to as the “Pakatan lawmakers suit”);
 - (d) Dato’ Seri Anwar b Ibrahim; and
 - (e) Khairuddin b Abu Hassan.
- (14) Article 150(1) of the Federal Constitution provides for a Proclamation of Emergency **only** where a grave emergency exists, that is, where the security, economic life or public order of the Federation is threatened.
- (15) It should not be sought or invoked lightly as it effectively results in vast powers being placed at the hands and control of the Executive. The provisions of the Emergency Ordinance are drafted in a broad manner, and therefore present the potential and risk of abuse.
- (16) While it is recognised that during a health crisis, the normal functioning of society cannot be maintained, and that as a result of health measures taken, some rights and freedoms which ordinarily form an integral and necessary part of a democratic society will inevitably be encroached upon (such as in relation to movement), it remains vital that the fundamental values of democracy, rule of law and human rights standards are to be maintained, and any derogations thereto are necessary and proportional.

- (17) The Government has, since the beginning of the outbreak, effectively utilised its powers under PCIDA to manage the COVID-19 pandemic. Powers under PCIDA include:
- (a) declaring an area as an infected local area (*section 11*);
 - (b) prescribing measures to be taken to control or prevent the spread of the disease within or from an infected local area (*subsection 11(2)*) — such as restrictions in movement as imposed by the MCO;
 - (c) directing any person or class or category of persons living in an infected local area to subject themselves to isolation, observation or surveillance, and any other measures considered necessary to control the disease (*subsection 11(3)*);
 - (d) temporary requisitioning of premises (*section 26*);
 - (e) mobilising the police, customs and immigration officers, and officers from other government departments and agencies, to assist for the purposes of exercising any powers and/or regulations made, under PCIDA (*section 5*); and
 - (f) penalties and fines.
- (18) The MCO, Enhanced MCO, Conditional MCO and Recovery MCO contain sufficient enforcement and adequate measures to manage the spread of COVID-19 in the infected local areas.
- (19) It is incumbent on the Government to satisfactorily justify its decision for implementing a state of Emergency, and for resorting to suspending Parliament.
- (20) In particular, section 14 of the Emergency Ordinance is unprecedented in the history of Malaysia. This is the sole occasion²² where Parliament has been expressly suspended by reason of an emergency.
- (21) Such derogation from the rule of law is neither necessary nor proportional. Emergency powers should not result in a *carte blanche* of the Legislature’s powers being exercised by the Executive, particularly where the circumstances do not call for such extreme measures.
- (22) Adequate health and safety measures can be taken to ensure that sittings of Parliament carry on in a manner that is compliant with the recommended standard operating procedures (“SOPs”), as opposed to a blanket and total suspension for so long as the Emergency is in force (unless otherwise summoned by the Yang di-Pertuan Agong).

²² Whilst Parliament did not sit for a period of two years (1969 to 1971) as a result of the 13 May 1969 racial riots, this was due to the interruptions (caused by the riots) to the General Election which took place at that time. Parliament was dissolved on 20 March 1969, General Election was held on 10 May 1969, the riots ensued on 13 May 1969, and the Yang di-Pertuan Agong proclaimed a state of Emergency under Article 150 of the Federal Constitution (P.U. (A) 145/1969) on 15 May 1969. Pursuant to section 7 of the Emergency (Essential Powers) Ordinance 1969 (P.U.(A) 146/1959), elections to the Dewan [Rakyat] and the Legislative Assembly of any State which had not been completed, would be suspended until such date as the Yang di-Pertuan Agong might determine. Parliament resumed on 20 February 1971 (*The Straits Times*, 20 February 1971, page 14 from National Library Board, Singapore).

- (23) The earlier localised proclamations of Emergency and ordinances promulgated in Batu Sapi²³ and Bugaya²⁴ in Sabah, and in Gerik, Perak²⁵ in 2020, were made without a need to suspend Parliament or the Sabah State Legislative Assembly.
- (24) It is recognised that the Legislature fulfils core functions of representation, law-making and oversight. Legislative oversight, in particular, seeks to ensure that the Executive remains responsive and accountable for its actions — a **check and balance**.
- (25) The Legislature also provides the necessary counterbalance to the Executive’s powers during an emergency and functions to verify whether such emergency powers are still justified throughout the relevant period. Thus, Article 150(3) of the Federal Constitution stipulates that the Proclamation of Emergency and any ordinance promulgated **shall** be laid before both Houses of Parliament.
- (26) Furthermore, as held by the Privy Council in *Teh Cheng Poh*,²⁶ even while a Proclamation of Emergency is in force, where any further laws are required by reason of the Emergency, Parliament may, pursuant to its legislative authority under Article 44 and by reason of Articles 150(5) and (6) of the Federal Constitution, make laws with respect to any matter, if it appears to Parliament that the law is required by reason of the emergency.
- (27) Thus, the doctrine of separation of powers, which forms the basic structure of our Federal Constitution (as recognised by the Judiciary in *Semenyih Jaya*,²⁷ *Indira Gandhi*,²⁸ and *Alma Nudo Atenza*²⁹) is upheld even during an Emergency. Article 150 of the Federal Constitution envisages a functional Parliament, playing a critical role during the administration, and oversight, of an Emergency — such as guaranteeing transparent debate, ensuring accountability of the Government, and scrutinising the passing of laws, during a pandemic.
- (28) As expressed by the Yang di-Pertuan Agong³⁰ at an audience granted to the Yang di-Pertua (President) of the Dewan Negara, YB Senator Tan Sri Dato’ Seri Utama Dr. Rais Yatim, and the Yang di-Pertua (Speaker) of the Dewan Rakyat, YB Datuk Azhar Azizan Harun on 24 February 2021, the Emergency Ordinance allows Parliament to convene during the Emergency on a date as the Yang di-Pertuan Agong thinks appropriate upon the Prime Minister’s advice. The Yang di-Pertuan Agong also emphasised that Malaysia practises a

²³ Proclamation of Emergency (P.U. (A) 329/2020) and Emergency (Essential Powers) Ordinance 2020 (P.U. (A) 330/2020).

²⁴ Proclamation of Emergency (No. 3) (P.U. (A) 358/2020) and Emergency (Essential Powers) (No. 2) Ordinance 2020 (P.U. (A) 359/2020).

²⁵ Proclamation of Emergency (No. 2) (P.U. (A) 356/2020) and Emergency (Essential Powers) (No. 2) Ordinance 2020 (P.U. (A) 357/2020).

²⁶ *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50, Privy Council.

²⁷ *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* [2017] 4 MLRA 554, Federal Court.

²⁸ *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 2 MLRA 1, Federal Court.

²⁹ *Alma Nudo Atenza v PP & Another Appeal* [2019] 5 CLJ 780, Federal Court.

³⁰ Kenyataan Media (24 Februari 2021). Dato’ Indera Ahmad Fadil Shamsuddin, Datuk Pengelola Bijaya Diraja, Istana Negara. Retrieved from: tinyurl.com/573vr8zd.

system of democracy that is based on the principle of supremacy of the Constitution. As such, each branch of the administration — the Executive, Judiciary, and Parliament — must abide by that principle.

- (29) The incapacitation of Parliament is therefore unnecessary, irrational, unreasonable and/or disproportionate for the purposes of combating the COVID-19 outbreak. It is repugnant to the Federal Constitution, rendering it impossible to give effect to the intent and spirit of Articles 150(3) and 150(5).
- (30) The Executive should not usurp the legislative powers that rightfully vests in Parliament, nor should it be shielded from the necessary scrutiny it would normally be subjected to before Parliament. It is during times of crisis that public confidence in the legitimacy of the administration and its decisions must be assured and protected, warranting a higher threshold of accountability through, for example, legislative oversight.

THEREFORE, the Malaysian Bar hereby resolves that:

- (A) The Emergency Ordinance, including sections 14 and 15, is invalid and unconstitutional;
- (B) The Malaysian Bar *call* upon the Government to take the immediate necessary and/or appropriate steps to advise the Yang di-Pertuan Agong to summon a meeting of Parliament, and for the Proclamation of Emergency and the Emergency Ordinance and/or any subsequent ordinances, to be laid before Parliament in accordance with Article 150(3) of the Federal Constitution; and
- (C) The Malaysian Bar *mandate* the Bar Council to take any and all steps that it deems necessary and/or appropriate regarding the aforesaid Proclamation of Emergency and the Emergency Ordinance, including instituting legal proceedings, for and on behalf of the Malaysian Bar, to challenge the validity of the Proclamation of Emergency and/or the Emergency Ordinance and/or any subsequent ordinances; to seek interim and/or permanent reliefs, as may be deemed necessary; and to give effect to the resolutions above.