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# A new dawn beckons

The Prime Minister's announcement on a number of changes to the country's laws, including ending the Emergency, will have massive positive implications.

**T**HE Prime Minister's speech last night evoked the kind of hope and exhilaration I felt many decades ago on Aug 28, 1963, when I heard American civil rights leader Martin Luther King, Jr. deliver his "I have a dream" speech at the steps of Lincoln Memorial.

The Prime Minister pointed to a number of changes that he intends to bring to the country. Many of these proposals will have massive positive implications for the country's legal system, its administration of justice and the sovereignty of law over personal discretion. He promised that:

> The emergency proclamations that are in operation will be presented to Parliament for annulment;  
> The Internal Security Act will be repealed but replaced with two security laws framed under the Constitution's anti-subversion provision of Article 149;

> The Restricted Residence Act and the Banishment Act will be brought to an end; and

> The much-criticised Printing Presses and Publications Act will be amended.

It will take some time and considerable research to fathom the full implications of the above pronouncements. Needless to say, the impact on the legal life of the community, the rights of the citizens, the powers of the Home Minister and the police will be monumental.

The rule of law will be strengthened and the days of the omnipotence of the Government will come to an end. Looking at the implications of the lifting of the Emergency, the following salient features of emergency laws must be noted:

**Ordinary legal system eclipsed:** Under Article 150, once a proclamation of emergency by the Yang di-Pertuan Agong is gazetted, the floodgates are lifted and legislative powers of Parliament are greatly broadened. Parliament can make laws that violate, suspend or bypass any constitutional provision except six items in Article 150(6A).

All fundamental rights except freedom of religion can be violated. The federal-state division of powers can be disturbed and state powers usurped.

Emergency laws do not require a two-thirds majority. Neither do they require the consent of the Conference of Rulers or the Yang di-Pertua Negeri of Sabah and Sarawak.

Judicial review on constitutional grounds is ousted because of Article 150(6).

An emergency law has no time limit and can continue as long as the emergency lasts.

Malaysia has been under such a state of emergency continuously since 1964. For all practical purposes, an emergency legal system eclipsed the ordinary legal system for the last 47 years.

**The King's power to make laws:** As with the powers of Parliament, the powers of the federal executive are immensely enlarged during an emergency.

the Yang di-Pertuan Agong acquires plenary and parallel ordinance-making powers under Article 150(2B) as long as the two houses of Parliament are



not sitting concurrently.

The executive's power of ordinance-making is as large as Parliament's power of legislation. The entire Constitution can be suspended except for six topics in Article 150(6A).

Since 1964, the Yang di-Pertuan Agong has promulgated nearly 92 emergency ordinances. Among these is the Emergency, Public Order and Prevention of Crime Ordinance, which is a favourite with the police and which results in more preventive detentions than even the Internal Security Act.

**Executive power to give instructions:** Under Article 150, the Federal Government acquires powers to give directions to the states in contradiction with the meticulous federal-state division of powers.

If the emergency proclamations are repealed, what effect will that have on the legal system?

**Restoration of normal laws:** If the two proclamations of national emergency in 1964 and 1969 are repealed, the country will return to the normal operation of the constitutional system.

The five or so emergency laws made by Parliament under the authority of these proclamations will cease to operate. Any detention under these laws will have to be terminated.

**Emergency ordinances will end:** As with the emergency laws enacted by Parliament, the 90 or so emergency ordinances promulgated by the Yang di-Pertuan Agong (and the hundreds of subsidiary laws made thereunder) will also cease operation.

However, the cessation of emergency laws is not immediate. Under Article 150(7), there is a grace period of six months during which the emergency laws may still continue to operate. Once the six months expire, the expiry of the laws is automatic and no individual repeal is necessary. However, no action (e.g. for damages) can be taken for anything validly done under previous laws.

Some may wonder whether the Yang di-Pertuan Agong, in his discretion, may refuse the Prime Minister's advice to restore the rule of law and to lift the proclamations of emergencies?

In a long line of other cases, it has been held that emergency rule does not alter the position of the Yang di-Pertuan Agong as a constitutional monarch bound to act on advice.

The case of PP v Mohd Amin Mohd Razali (2000) altered the law slightly: it held that during the dissolution of Parliament, the Yang di-Pertuan Agong is not bound by the caretaker government's advice on emergency matters.

Amin is, of course, not relevant to the Prime Minister's speech last night because Parliament is not under dissolution and the Prime Minister's

advice is binding on the King

**Judicial review strengthened:** The lifting of the Emergency will remove the eclipse of ordinary laws. The possibility of judicial review of executive and legislative measures will be enhanced. Many human rights will be restored.

The demise of hundreds of emergency laws, some conferring preventive detention powers and others excluding due process, will be a defining moment for Malaysian democracy.

However, the euphoria that is bound to be felt as a result of these wholesome developments must be tempered with caution.

**New proclamations:** The lifting of the 1964 and 1969 emergencies does not prevent the re-issuing of a new proclamation of emergency and the promulgation of new emergency Acts and ordinances, if circumstances so demand.

**Subversion laws stay:** Even if the Emergency is lifted, Parliament is still armed with anti-subversion powers under Article 149. New security laws under Article 149 have been suggested by the Prime Minister. Existing laws like the Dangerous Drugs Preventive Measures Act will not be affected by the lifting of the Emergency unless the Government sets about to apply the reformatory paint brush to them as well.

**Police Act remains:** Controversial ordinary laws like the Police Act, the Official Secrets Act and the Universities & University Colleges Act will remain in the statute book though, of course, they will face pressure to accommodate the spirit of the times.

Some may, therefore, regard the lifting of the Emergency as merely a cosmetic measure because Articles 149 and 150 still arm the Government and Parliament with massive power to suspend constitutional guarantees.

Such a perspective is unduly cynical. It amounts to an all-or-nothing attitude. Whatever reforms are adopted and implemented must be welcomed. They may be harbingers of new things to come. They will certainly set a new mood and may be the catalyst and impetus for further improvements to the human rights scene.

A government receptive to the lifting of the Emergency cannot be indifferent to improving the situation of laws under Article 149.

All in all, one must applaud the Prime Minister's courage, his willingness to listen to the voice of the people, his receptiveness to the felt necessities of the times, and his exhilarating agenda for reform.

The Attorney-General's office also deserves congratulations for advising the Prime Minister on the incongruence between the rule of law and the state of emergency lasting 47 years.

So, let Sept 16, 2011 go down in our history as "a joyous daybreak" to end the long night of the Emergency.

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