

# CONSTITUTIONAL LANDMARKS in Malaysia

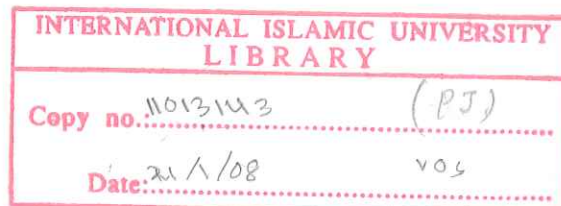
*The First 50 Years*  
1957-2007

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## CHAPTER 9

# The Emergency Powers (Kelantan) Act 1977

Khairil Azmin Bin Mokhtar

In 1977, a decade after the proclamation of emergency in the state of Sarawak,<sup>1</sup> another state of emergency was declared. This time it was directed at the state of Kelantan, on the east coast of the Malay Peninsula. The 1977 Proclamation was strikingly similar to the 1966 Proclamation, except for a few details. Both Proclamations related to a particular state, and in both states the parties in power were components of the ruling coalition. The 'threat or grave situation' that led to the proclamation of emergency in both states related to the refusal of the head of the government to resign. The differences, by no means insignificant, were that in Sarawak it concerned a Chief Minister opposed by the Federal Government, while in Kelantan it concerned a Menteri Besar (Chief Minister) favored by the Federal Government. Another difference was that the 1977 Proclamation was made by the Yang di-Pertuan Agong with respect to his own state, while the Proclamation over Sarawak was made by the Yang di-Pertuan Agong with respect to another state. This chapter looks at the circumstances leading to the political crisis which involved the State of Kelantan and the use of emergency powers to resolve it.

### **Prelude to the Political / Constitutional Impasse in the State of Kelantan**

Kelantan has always been acknowledged as a stronghold of the Pan-Malayan Islamic Party or *Parti Islam SeMalaya* (PAS). Since independence, the Alliance, which later became the National Front or *Barisan Nasional* (BN), has formed the government at federal level. However, in the State of Kelantan, since the 1959 general election (the first parliamentary and state elections held in Malaya after *Merdeka*) PAS had

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<sup>1</sup> For which, see ch.5.

obtained a majority of the seats in the state and formed the state government.<sup>2</sup> This reflects a certain peculiarity of the political outlook of the people of Kelantan. The 1963 case initiated by the Government of Kelantan against Tunku Abdul Rahman, the then Prime Minister of Malaya, and the Government of the Federation of Malaya is yet another instance of the independent Kelantanese mind-set resisting the dictates of the Federal Government.<sup>3</sup>

The case in some ways portrays the State of Kelantan, with its PAS-led government, as the champion of states' rights in Malaysian federalism; also as the 'new' advocate of the Malay Rulers. If PAS carefully trod along the right path, it could not only manage to have a good relationship with the Malay Rulers, it could replace UMNO (United Malays National Organisation), which has traditionally been associated with the Malay Rulers, as the primary party of the Malays. Control of a state government gives an opposition party and its members tremendous political confidence. The state could be used as an independent government platform and a clear symbol of political potential, a beacon of hope to party followers in other parts of the country. This gives the ruling party at the federal level another cause for dislodging PAS from the seat of power in Kelantan.

In 1972, with the New Economic Policy in place,<sup>4</sup> the then Prime Minister Tun Abdul Razak, the Alliance and UMNO President, met the PAS President and Kelantan's Menteri Besar, Dato' Mohamad Asri Muda, to form a grand coalition to further Malay interests, and BN was formed by UMNO/Alliance and opposition parties; PAS joined the coalition.<sup>5</sup> As a component of the coalition PAS had to cooperate with other component parties in all matters including the allocation of seats in the general election. Consequently in the 1974 general election, PAS had to give up some state seats in Kelantan not only to UMNO but also to MCA (Malaysian Chinese Association), and had to consult the leaders of the coalition over nominees of the party for the election. PAS nevertheless was allocated with the majority of seats in Kelantan. Upon BN's victory in the 1974 general election, a number of important PAS leaders were brought into the Federal Cabinet by Tun Abdul Razak.<sup>6</sup> In Kelantan, the BN, through the victory of PAS, UMNO and MCA representatives, formed the state government.

The crack between PAS and UMNO started to open immediately after the 1974 election over the choice of Kelantan's Menteri Besar. Dato' Mohamad Asri, now a minister in the Federal Cabinet, preferred Wan Ismail bin Wan Ibrahim. However, Tun Abdul Razak, the then Prime Minister, nominated Datuk Mohamad Nasir, another PAS Assemblyman. In the end, the choice of the Prime Minister prevailed and Datuk Mohamad Nasir was appointed the Menteri Besar with Wan Ismail as the Deputy Menteri Besar.<sup>7</sup> This should have given a clear indication to PAS that as a component of BN, it no longer had unlimited and effective control over its state.

<sup>2</sup> In the 1959 election PAS also formed government in the state of Terengganu which is geographically adjacent to Kelantan. The Menteri Besar of PAS-led state government in Kelantan were as follows: Datuk Ishak Lotfi (1959–64), Datuk Mohd Asri Muda (1964–72) and Datuk Mohamad Nasir (1972–8).

<sup>3</sup> *Government of State of Kelantan v Government of the Federation of Malaya & Tunku Abdul Rahman* (1963) MLJ 355; for which, see ch.3.

<sup>4</sup> For which, see ch.8.

<sup>5</sup> Datuk Asri was the president of PAS from 1970 to 1982.

<sup>6</sup> Among members of PAS who were brought into the Federal Government were Yusuf Rawa who was made Deputy Minister in the Cabinet; and the Head of the Dewan Ulama (Religious Council) of PAS, Tuan Guru Nik Aziz Nik Mat, was brought into the Yayasan Dakwah Islamiyyah (Islamic Da'wah Trust) and the Majlis Kebangsaan Hal Ehwal Agama Islam (National Council for Islamic and Muslim Affairs). Other PAS leaders were given positions as ministers and junior ministers in the Cabinet. Asri Muda himself was brought into the Cabinet, along with Hasan Adli.

<sup>7</sup> B.H. Shafruddin, *The Federal Factor in the Government and Politics of Peninsular Malaysia* (Singapore: Oxford University Press, 1987), 348.

The coalition had a negative impact on PAS in Kelantan. Due to the merger, the PAS-led government had to operate within the limits imposed by their membership in the BN. Eventually the autonomy that PAS had enjoyed slowly receded. It was perceived in some quarters that the coalition was more advantageous to the federally elected PAS elite compared to their elected representatives in the state. Consequently, in Kelantan, despite the coalition, UMNO and PAS rivalries simmered over matters of power and public policy.<sup>8</sup>

The new Menteri Besar, who was favoured by UMNO but not his own party, had taken several high profile actions such as calling for the investigation of allegations of corruption of members of his party, and cancelling a timber company's lease that benefited PAS. Naturally, these measures caused resentment within his party.<sup>9</sup> His failed attempt to unseat Datuk Mohamad Asri as the President of PAS in June 1975 had sharpened factionalism in PAS and aggravated resentment against him. Calls for his resignation were made amidst accusations that he was closer to UMNO than PAS, and apparently forgetting that he was a PAS member. These developments not only soured relations between the Datuk Mohamad Asri and Datuk Mohamad Nasir factions but also, between UMNO and PAS. Calls were made frequently to review PAS's coalition with UMNO. The death of Tun Abdul Razak, the architect of the UMNO-PAS merger, in 1976 may have further strained the relation between the two parties.<sup>10</sup> PAS, dissatisfied with the distribution of the benefits of coalition, were of the view that the new UMNO leaders had little sympathy for PAS.<sup>11</sup> These separate but related predicaments only further exacerbated the already strained relationship between PAS and UMNO particularly at state level in Kelantan.

Despite his promise to step down, which was later followed by calls for him to resign when he failed to go by the promised date, the Menteri Besar held on to his office and fought off his expulsion from the party.<sup>12</sup> Consequently, a motion of 'no-confidence' was passed against him in the Assembly. Instead of stepping down, the Menteri Besar requested the Regent as the Head of State to dissolve the state legislature. The Regent (the Sultan had at that time become the Yang di-Pertuan Agong) neither requested the Menteri Besar to resign in accordance with the motion nor dissolved the assembly. It was claimed that these problems prompted a political and constitutional impasse which in turn provoked untoward incidents that led to the state of emergency being declared in the state.

<sup>8</sup> G.P.Means, *Malaysian Politics. The Second Generation* (Singapore: Oxford University Press, 1991), 61.

<sup>9</sup> Shafruddin, above, n 7, 348.

<sup>10</sup> The negotiations for the coalition between UMNO-PAS were conducted by Tun Abdul Razak and Dr Ismail Abdul Rahman, respectively the Prime Minister and Deputy Prime Minister and also the UMNO President and Deputy President, on the one hand, and Dato' Mohamad Asri, PAS President, and Abu Bakar Hamzah, on the other. Dr Ismail and Tun Abdul Razak died in 1973 and 1976 respectively. Abu Bakar Hamzah was expelled from PAS in 1974. After the change of leadership in UMNO upon the demise of Tun Abdul Razak, Datuk Asri had to conduct relations with Dato' Hussein Onn (the Prime Minister and UMNO President), Dr Mahathir Mohamad (Deputy Prime Minister and UMNO's Deputy President), and Tengku Razaleigh (Finance Minister, UMNO's Vice-President, and Chairman of Kelantan UMNO State Liaison Committee).

<sup>11</sup> Shafruddin, above, n 7, 349.

<sup>12</sup> It was claimed that the Menteri Besar had written to the PAS President indicating that he would retire on 31 August 1977. However the date came and went without his resignation. In September 1977 the Kelantan PAS State Liaison Committee (SLC) demanded the resignation of Datuk Mohamad Nasir, followed by notice of a motion of no confidence against the Menteri Besar given to the State Legislative Assembly's Secretary. In a meeting held on 26 September 1977, the National PAS Central Executive Committee demanded Datuk Mohamad Nasir's resignation within three days. However the Menteri Besar did not resign within the stipulated time, thus on 29 September 1977 the PAS Central Executive Committee (CEC) voted to expel Datuk Mohamad Nasir from PAS for not adhering to its earlier decision. The expulsion decision however, was considered 'technically' invalid, by the Kelantan High Court. PAS CEC held another meeting later in early October and decided to expel Datuk Mohamad Nasir. Following this the Kelantan PAS pursued its no-confidence motion in the State Legislative Assembly (SLA). At the 15 October 1977 meeting of the SLA the no-confidence motion against the Menteri Besar was passed. All 20 PAS Assemblymen voted for the motion. Datuk Mohamad Nasir, 12 UMNO and one MCA Assemblyman walked out while the votes were being counted. *Ibid*, 350.

## Constitutional Issues and Events Immediately Prior to the Proclamation of Emergency

### Motion of 'No-confidence' and Refusal to Resign

One of the constitutional issues arising from the incident is the refusal of the Menteri Besar to resign despite the passing of a no-confidence motion and the apparent rejection of his request for the dissolution of the assembly.<sup>13</sup> The Menteri Besar, who is the head of State Government and the President of the Executive Council, is appointed by the Ruler.<sup>14</sup> The appointment is based on the Ruler's judgment as to who commands the confidence of the majority of the members of the State Legislative Assembly. Within the same provision, it is stated that the Menteri Besar shall have the option either to request the Ruler to dissolve the Legislative Assembly or tender the resignation of the Executive Council (and impliedly his position as Menteri Besar) in the event he ceases to command the confidence of the majority of the members of the Assembly.

The motion of 'no-confidence' passed by the Legislative Assembly of Kelantan on 15 October 1977 required the Menteri Besar to take one of the options available to him. He eventually decided not to resign but requested the Regent to dissolve the Assembly, which was tacitly refused, as the silence or inaction of the Regent may be understood to mean. The ensuing question is: does this leave the Menteri Besar with no option but to resign? The answer seems to be positive. In such event, the refusal of the Menteri Besar to resign or to tender the resignation of the Executive Council is tantamount to breaching the Constitution and the concept of popularly elected government. Furthermore, the call for his resignation accords with parliamentary practice following the passage of a no-confidence motion. The refusal of the Menteri Besar to step down despite knowing that he no longer commanded the confidence of the majority, and in the light of the Regent's tacit disapproval of his request for dissolution of the assembly, could be regarded as conduct unbecoming and unconstitutional which unfortunately triggered events that led to the proclamation of emergency.

It should be noted that when the motion of no-confidence was passed, the Menteri Besar was no longer a member of PAS.<sup>15</sup> He was opposed by representatives from his former party unanimously in the Assembly; nevertheless the Menteri Besar still received support from some members of the party. Although the support did not legally justify him remaining in office after the vote of no-confidence or after the sacking from his party, the Menteri Besar seems to have believed that he still had moral if not legal authority, however weak it might have been, to cling to power.<sup>16</sup>

The Menteri Besar might also have argued that, as a component of the BN coalition, the choice of the selection of the Menteri Besar rests with the President or central leadership of the BN, and not of the component party unilaterally. In fact the decision of the Menteri Besar not to resign was made after consultation with Dr Mahathir Mohamad, the then Deputy Prime Minister who was acting on behalf of the Prime Minister to solve the crisis in Kelantan.<sup>17</sup> This argument claims that in practice it seems to be the

<sup>13</sup> The relevant provision over this matter is s 2 of the 8<sup>th</sup> Schedule to the Federal Constitution. Section 2 (2) states, 'The Executive Council shall be appointed as follows, that is to say:

(a) the Ruler shall first appoint as Menteri Besar to preside over the Executive Council a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly; ...' Section 2(6) provides, 'If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request the Ruler dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.'

<sup>14</sup> Above, n 13.

<sup>15</sup> Above, n 12.

<sup>16</sup> The PAS Religious Council and several National and State PAS leaders, amongst others, supported Datuk Mohamad Nasir.

<sup>17</sup> Shafruddin, above, n 7, 350.

Prime Minister as head of the ruling coalition who chooses the heads of government in states controlled by the BN. Such an impression is created by the fact that, in states where the BN governs, the role of the Head of State has been reduced to rubber stamp when it comes to appointment of the head of the of the state government.<sup>18</sup> However, persuasive as this view may be, the law remains that the head of state has discretion in determining who shall be the Menteri Besar or Chief Minister.<sup>19</sup> To interpret it differently amounts to defiance of the clear and unambiguous words of the Constitution. The requirement that the Menteri Besar or Chief Minister must be a member of the Assembly and appoints members of the Executive Council from amongst Members of the Assembly is the important element of a responsible government.<sup>20</sup> Moreover, the practice of the BN and its components is political practice of the ruling party only. It does not amount to constitutional practice or convention, and thus cannot be said to have the force of law.<sup>21</sup>

### *Silence of the Regent*

The power to dissolve the Assembly is one of the Head of State's discretionary powers as expressed and embedded in the Federal Constitution and State Constitutions;<sup>22</sup> thus the Sultan's decision to dissolve or not to dissolve the Assembly is his prerogative, and his approval or disapproval of such request tendered by the Menteri Besar cannot be said to be illegal or unconstitutional.<sup>23</sup> It is a delicate question, however, as to whether it was the Regent's silence or indecision, which resulted in the emergency.<sup>24</sup> Tun Suffian was of the view that the Regent felt that the prevailing political turmoil and confusion was bad enough, and simply 'held his hand'<sup>25</sup> between 15 October and 9 November 1977, which was the most significant period of the political and constitutional crisis.

The Regent, aiming to observe constitutional rectitude, took legal advice when the Menteri Besar requested a dissolution. An observer states that 'the Regent, if left to his own devices, would have granted a dissolution within a few days'.<sup>26</sup> However, as events below evidenced, his inaction was in order for solutions to emerge, rather than to intensify the political tension.

<sup>18</sup> Abdul Aziz Bari, *Cabinet Principles in Malaysia: The Law and Practice* (Kuala Lumpur: The Other Press, 2002), 23.

<sup>19</sup> Schedule 8 to the Federal Constitution, s 2(1)(a), provides that the Ruler may act in his discretion in the appointment of a Menteri Besar. On the same note, s 1(4) states that in appointing a Menteri Besar the Ruler may, in his discretion, dispense with any provision in the Constitution of this State restricting his choice of a Menteri Besar, if in his opinion it is necessary to do so in order to comply with the provisions of the section.

<sup>20</sup> Bari, above, n 18, 23.

<sup>21</sup> Decisions of Malaysian courts provide the indication that constitutional convention is unacceptable as a source of Malaysian constitutional law. One of the reasons for the unwillingness to treat it favourably is the existence of a written constitution. For instance, an argument based on constitutional convention was rejected by the court in *Government of State of Kelantan v Government of the Federation of Malaya & Tunku Abdul Rahman* (1963) MLJ 355. Nevertheless no explicit rejection or ultimate decision was made by the court as regards to the legal status of constitutional convention. See also ch.13.

<sup>22</sup> Schedule 8 to the Federal Constitution, s 1(2)(b).

<sup>23</sup> Whether it is appropriate or not is a question of fact which the Sultan knows best. In situations involving many interests and his state is in jeopardy, it is only prudent that he takes time to make the decision so that it would be an informed decision, see ch.13.

<sup>24</sup> See A.J. Harding, *Law, Government and the Constitution in Malaysia* (Kuala Lumpur: Malayan Law Journal, 1996), 162, n 44.

<sup>25</sup> Mohd. Suffian, *Malaysia and India. Shared Experiences in Law* (Nagpur: All India Reporter Ltd, 1980), 81.

<sup>26</sup> R. Kershaw, *The Kelantan Crisis of 1977: Implications for Federalism*, Discussion Paper, Institute of Commonwealth Studies, University of London, 6.

As the crisis unfolded, federal leaders had tried to provide formulas for non-confrontational solutions. Representing the Prime Minister was Dr Mahathir, who was sent to Kelantan to offer a peace formula. The formula, however, was rejected and in reply PAS submitted counter-proposals. A second proposal by the Prime Minister submitted later was also rejected. Eventually on 2 November, after the rejection of the second proposal, Tun Hussein Onn, who replaced Tun Abdul Razak as a Prime Minister, met a PAS delegation led by Datuk Asri in order to resolve the deadlock. After two hours of tense negotiations, the Prime Minister gave PAS 72 hours to respond to his proposals. It was claimed that Tun Hussein stated that his proposals were made in the name of the Prime Minister and not in his capacity as head of UMNO or the BN. He also issued an ultimatum: accept the proposals or federal rule will be imposed over Kelantan.<sup>27</sup>

The negotiation process could have allayed concerns that the Regent's inaction was improper. It could be said that he was waiting for the conflicting parties to solve the problem and come up with an agreed formula. Unfortunately, as it later turned out, diplomacy broke down.

The silence of the Regent over the request for dissolution was also due to intervention by his father, who was the Yang di-Pertuan Agong at the time. A well-experienced and diligent monarch, he advised his son to temporise. Soundings were taken with a view to an alternative State Government based on a different permutation of Assemblymen. The Yang di-Pertuan Agong believed that a new Kelantan state government could be built without the need for election.<sup>28</sup>

The intervention by the Yang di-Pertuan Agong, who is the Supreme Head of the Federation and part of the federal authority, and who had temporarily handed over his power as Ruler to his son, in the circumstances is not undue or improper because it concerned his state. Perhaps it should be understood in the context of a father-son relationship rather than Yang di-Pertuan Agong / Regent context. The event thus could not be interpreted or be used as a basis to claim that federal authority, be it the Yang di-Pertuan Agong or the Prime Minister, has the legal standing to interfere with the business of the heads of the states in performing their discretionary functions. To interpret it differently would not be in line with the federalism and constitutional monarchy which are the quintessence of the Malaysian constitution.

## Proclamation of Emergency and Emergency Rule in Kelantan

### *The 1977 Proclamation of Emergency*

The Regent's indecision over the Assembly's dissolution, Datuk Mohamad Nasir's unwillingness to resign, and the futile efforts to reach a consensus between UMNO and PAS over the composition of a new state government<sup>29</sup> clearly meant that a political impasse had emerged. These coupled with several disorderly incidents such as curfews, public rallies and demonstrations gave the federal authorities the ostensible justification in declaring emergency for the state. The Prime Minister had given advice, and the Yang di-Pertuan Agong had acted accordingly, to proclaim the emergency on 8 November 1977. In the Proclamation it is stated that it was made because the Yang di-Pertuan Agong was 'satisfied that a grave Emergency exists whereby the security and economic life of a part of the Federation, to wit, the State of Kelantan, are threatened.'<sup>30</sup> In doing so the Sultan of Kelantan, who was the Yang di-Pertuan Agong, did

<sup>27</sup> Means, above, n 8, 62 and Ranjit Gill, *Razaleigh: Unending Quest* (Petaling Jaya: Pelanduk Publications, 1986), 154–5.

<sup>28</sup> Kershaw, above, n 26, 6.

<sup>29</sup> The Kelantan PAS SLC had decided on an all-PAS line-up for a new State Government and a name for the post of Menteri Besar. It meant UMNO members were totally excluded in the new government. UMNO meanwhile demanded that the approval of the Prime Minister Tun Hussein, who had been recently appointed to replace the late Tun Abdul Razak, must be sought first regarding the composition of the new government and the nominee for the Menteri Besar, and that the BN concept required UMNO's inclusion.

<sup>30</sup> Proclamation P.U.(A) 358/77.



not proclaim the emergency on his own will over his own state. This is quite obvious because as mentioned earlier the Prime Minister had given an ultimatum to PAS leaders either to accept the proposal prepared by the federal ruling party or federal rule would be effected in Kelantan. Malaysia's unique system of hereditary constitutional monarchy at state level and elected, albeit by an exclusively Royal Electoral College with its own federal-state dimension, at the federal level, was tested by the Yang di-Pertuan Agong coming from the state in question.

When he moved the Emergency Powers (Kelantan) Bill 1977 in Parliament on the same day the emergency was proclaimed, the House was informed by the Prime Minister that by 8 November 1977, 19 people had been seriously injured, 35 houses and shops damaged and more than 280 arrests had been made. Four thousand additional police personnel had been sent to maintain law and order in the State, and police curfew imposed in Kota Bahru and Kubang Krian. Even though things were not out of control, the Prime Minister expressed fears that the disturbance would lead to racial clashes and spread to the other states. He believed that 'if this happens it will threaten the security of the nation as well. This possibility is all the more serious because Kelantan shares a common border with Thailand'. He also touched on the silence of the Regent over the request for the dissolution, being of the view that 'the Regent has not made any decision, probably because he felt that whatever decision he made will cause dissatisfaction among certain groups'. The Prime Minister, while agreeing that the Bill had political implications, also in his speech said that 'God is my witness, I am not playing politics'.<sup>31</sup>

Was there really a state of emergency that warranted the use of Article 150? Did the situation in Kelantan constitute a 'grave threat to security and to the economic life' of Kelantan? Was there a real prospect that the violence in Kelantan would spread to other states? Tun Suffian seems to share the view of the Federal Government. Describing the impasse and events in Kelantan as 'breakdown of government' he nevertheless felt the constitutional and political controversies were 'rather tame'.<sup>32</sup>

Opposing the Emergency Bill in the house, Datuk Asri in his speech charged that the use of Article 150 in Kelantan represented a gross transgression of democratic rights.<sup>33</sup> An Emergency Proclamation with its ensuing powers, which allowed federal rule in Kelantan, was only warranted in extreme cases, and when other measures had failed. However, he claimed 'in this case no other measure has been tried or even considered'. He also stated, 'future generations will judge whether this is a real emergency or an emergency of convenience'.<sup>34</sup>

Indeed the justification of the Proclamation did come under criticism later. It has been commented that 'the Kelantan problem was from beginning to end a political crisis which on all accounts had not degenerated into a state of civil disorder' and there was justifiable scepticism as to whether a state of emergency had to be declared to resolve the crisis.<sup>35</sup> An authority also wrote that in this case the constitutional problems could be resolved through the operation of the State Constitution, and there was no grave or real threat to the security that justifies the federal government's intervention in the state.<sup>36</sup> Another observer also opined that there was little evidence of either serious racial tension or communist involvement in relation to the disturbances which at the time were not vigorously discouraged by the Government. The use of emergency measures in this case had been a purely political manoeuvre.<sup>37</sup>

<sup>31</sup> Malaysian Parl Deb (Dewan Rakyat) 8 November 1977, paras. 4120–2.

<sup>32</sup> Suffian, above, n 25, 80.

<sup>33</sup> Malaysian Parl Deb (Dewan Rakyat) 8 November 1977, para. 4148.

<sup>34</sup> *Ibid*, paras. 4132 and 4143.

<sup>35</sup> C.V. Das, *Governments and Crisis Powers: A Study of the Use of Emergency Powers Under the Malaysian Constitution and Parts of the Commonwealth* (Kuala Lumpur: The Malaysian Current Law Journal, 1996), 178.

<sup>36</sup> Harding, above, n 24, 163.

<sup>37</sup> S. Barraclough, 'The Dynamics of Coercion in the Malaysian Political Process' (1985) 19 *Modern Asian Studies* 797, 818.

*Federal Rule in the State of Kelantan*

The power and structure of government during emergency rule was based on the Emergency Powers (Kelantan) Act 1977. The passing of the Emergency Act effectively suspended the Constitution of the State of Kelantan. At the apex of the hierarchy, in reality, was the Prime Minister, whose authority was exercised on his behalf by the Director of Government, State of Kelantan, who was appointed by and subjected to any direction given by the Prime Minister, and was given all the authority, powers, duties and functions of the Menteri Besar or the Executive Council.<sup>38</sup> Hashim Aman, a senior Malaysian Administrative and Diplomatic Service officer who, before the appointment, was Secretary-General of the Ministry of Defence, was appointed the Director.<sup>39</sup> In carrying out his function, the Director might, whenever he deemed it desirable or expedient to do so, seek the advice of the Emergency State Advisory Council consisting of the State Secretary; the State Legal Adviser; the State Financial Officer; the Director of Lands and Mines of the State; the Chief Police Officer of the State; and such other persons, being not more than four, as might be appointed by the Prime Minister.<sup>40</sup> Legislative authority of the State meanwhile was to be exercised by the Ruler acting on the advice of the Director.<sup>41</sup>

Despite the overarching power of the federal executive in the State under emergency rule, it was claimed that in order to ensure that the effects of the Bill did not impinge upon the Kelantan State Constitution, the office of the Menteri Besar, State Executive Council, and the State Assembly were not abrogated. Thus Datuk Mohamad Nasir and three UMNO Assemblymen remained as Menteri Besar and Executive Council members respectively. Nevertheless even the Prime Minister admitted that they do not have any real significant power.<sup>42</sup> On 12 February 1978, a Proclamation<sup>43</sup> was gazetted whereby the Proclamation made on 8 November 1977 was revoked and the Emergency Powers (Kelantan) Act 1977 was repealed. Emergency rule in Kelantan was lifted on that day.

After a four-month period of federal rule, full governing powers were returned to Datuk Mohamad Nasir and the three UMNO Executive Council members. The following day the State Legislative Assembly was dissolved upon request by the Menteri Besar in order to pave the way for a state general election scheduled for 11 March that year. In the meantime a caretaker State Government with Datuk Mohamad Nasir, who had since formed a new party, Berjasa, as Menteri Besar, Hussein Yaakob as Deputy Menteri Besar, and the former three UMNO Executive Council members was formed. Earlier agreement on a partial UMNO-Berjasa electoral pact had been reached for the coming election.<sup>44</sup> In the election, PAS won only two seats, UMNO 22 seats, MCA one seat, and Berjasa 11 seats. A BN State Government was formed with an UMNO Menteri Besar, Mohammad Yaakob.<sup>45</sup>

The appointment of the former Menteri Besar as the head of the caretaker government is in line with practice elsewhere, and does not infringe provisions in the Federal and State Constitutions.<sup>46</sup> However, it should be noted that in this episode, the appointment of the former Menteri Besar as the head of the

<sup>38</sup> The Emergency Powers (Kelantan) Act 1977 ss 1, 4, 5, 7.

<sup>39</sup> Shafruddin, above, n 7, 362, n 49.

<sup>40</sup> The Emergency Powers (Kelantan) Act 1977 s 9.

<sup>41</sup> The Emergency Powers (Kelantan) Act 1977 s 10.

<sup>42</sup> Shafruddin, above, n 7, 351–2.

<sup>43</sup> P.U.(A) 46/78.

<sup>44</sup> Shafruddin, above, n 7, 351–2.

<sup>45</sup> *Ibid.*

<sup>46</sup> Schedule 8 to the Federal Constitution, s 2(2), states that 'if an appointment is made while the Legislative Assembly is dissolved a person who was a member of the last Legislative Assembly may be appointed but shall not continue to hold office after the first sitting of the next Legislative Assembly unless he is a member thereof.' See Bari, above n 18, 30–4.

caretaker government means that a person who had lost the support of the majority members of the Assembly could, if the Regent so desired, be 'restored'.<sup>47</sup> It is perceived that the appointment was an exercise of discretion by the Regent. Since he is vested with the executive power, than he could assign anybody to form the caretaker government.<sup>48</sup>

## Conclusion

In federalism, any kind of threat or political coercion should be avoided between the components,<sup>49</sup> especially where drastic measures and a Proclamation of Emergency are resorted to. Since Malaysia is a highly centralised federation, in resolving political disputes or constitutional impasses such in the Kelantan episode, it is viewed that there is no real need to use coercive methods and the use or threat of an emergency by the Federal Government against the states. The 1977 Proclamation is the last state of emergency declared until today. The 1977 Proclamation of Emergency in Kelantan should not create a trend in the use of coercive means by the federal executive against the states to undermine regional autonomy even if it is in the control of an opposition party.

From 1990 up to the present, Kelantan is under PAS government and apparently no coercive method has ever been mentioned or suggested against the opposition-led government in the state. Even during the Sabah incident,<sup>50</sup> despite the state's geographic distance from the federal government seat of power and its border with three countries, no emergency was declared for the state.<sup>51</sup> These instances show the federal government's self-restraint. It is hoped that drastic action and use of emergency powers shall not be repeated in unwarranted situations. It would be more assuring if the previous proclamations were revoked or annulled, because the threat to security no longer exists, which makes them redundant or spent. New proclamations could be made, where there is a real new threat or grave emergency, without much difficulty.

<sup>47</sup> The powers of the constitutional monarch with respect to caretaker government is worth more careful study especially in countries where democracy is young, and more so where there is a breakdown of the elected political leadership, as in the case of Thailand where the monarchy has often saved the situation. The Kelantanese, like the Thais, are known to have considerable deference to the monarch.

<sup>48</sup> In the State Constitution of Kelantan, Article 10 states that 'the executive authority of the State shall be vested in His Royal Highness but executive functions may by law be conferred on other persons or authorities'. At the federal level, Article 39 of the Federal Constitution provides that 'the executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive function on other persons'.

<sup>49</sup> K.C. Wheare, *Federal Government*, 4<sup>th</sup> edn, (London: Oxford University Press, 1963), 53, 86–7.

<sup>50</sup> For which, see ch. 13.

<sup>51</sup> See A.J. Harding, 'Turbulence in the Land Below the Wind: Sabah's Constitutional Crisis of 1985/6' [1991] XXIX *Journal of Commonwealth and Comparative Politics* 86.