

Sphere Of Influences In Public Policy Domain During Emergency To Combat COVID-19

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Abstract

The spreading of Covid19 as a global pandemic has tested countries around the world at many levels. From mental strength to economic resiliency and far stretching to include legality of issues. A year later, the world is still not in a better place. Malaysia, like others are fighting the thirds waves of the pandemic, believed to be more fatal than before. From March 2020 until to date, Malaysians have been placed under complete lockdown before that order was relaxed and tighten again when the numbers of infected patients and deaths skyrocketed. Now Malaysia is placed under emergency order and law. Strangely the emergency order is issued while the complete and conditional Movement Control Orders (MCO) are still in effect. Since an emergency is a situation where the country could not be managed under regular administrative system, it is important to know which parties that are majorly involved in currently running the country to fight Covid19 has the overriding power over the others, what are their rights or limitations. Between the emergency order, complete MCO and conditional MCO, which one should be prioritized and how long would Malaysia remain under emergency? The answer could be found by studying the sphere of influences in the public policy domain. The article is qualitative in nature; data is collected from legal documents, judicial precedents and article writings. The sphere of influences during emergency time is more complex than usual. The legislative and executive powers are concentrated to one or two party(s) with enormous authorities and expansive jurisdictions.

Keywords: sphere of influence, prioritization, public policy, Covid19

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■ 1.0 INTRODUCTION

The last two years have been very strange times indeed. The world is shocked, overwhelmed and almost paralyzed in many ways with the breakout of Covid19, first time detected in December 2019, Wuhan China before rapidly spreading out as global pandemic. Covid19 pandemic has no known or working vaccine so far. Like a domino effect, the world is forced to change its norms. People begun to undergo a complete lockdown, stay at home and keep their distances as precautionary measures and part efforts in assisting the medical teams as front-liners to fight the unseen but viciously fatal enemy. There are many variances in the Lockdown Order. China imposed a strict 3 months of mandatory and complete lockdown. Australia and New Zealand were quite relax at first but re-introduced a tightened new and full lockdown in bracing the second wave of pandemic. United States of America (USA), United Kingdom (UK) and Italy, are quite late in imposing lockdown order. Their citizens were still free to move around without much restriction while the rest of the world is staying inside. Those orders were reversed when the situations worsened weeks later.

Malaysia is placed under a total lockdown by virtue of Movement Control Order (MCO) issued under of Preventive and Control of Infectious Diseases Act 1988 (PCIDA 1988) and Preventive and Control of Infectious Diseases Regulations 1988 (PCIDR 1988) on 18th March, 2020. The lockdown lasted for a total period of 3 months before those rules were relaxed when the government managed to flatten the infection and fatality lines. Unfortunately the number of infected cases and fatality rapidly increase again parallel with the relaxation of the lockdown rules and order.

Now almost a year later, the situation in Malaysia has taken another turn. On 15th of Jan, 2021 all red-zone States are directed to undergo a complete lock down again, where movements are restricted within 10 km radius for essential purposes only. Other states are placed under Conditional MCO (cnMCO), where movements within the states or interstates are still allowable, except to and from red-zone states. On top of the Complete and Conditional MCOs, the government has announced Emergency Order (EO), invoked under Emergency Ordinance 1948 (EO 1948). The intended outcomes of the EO, complete MCO (cMCO) and cnMCO are nearly the same. They restrict, control or prohibit free movements (Government Gazette, 2021).

The article discusses about the concept of sphere of interferences (SOI) in the public policy domain of emergency. It shall refer to the legal documents currently in use to fight Covid19. The writing contributes to the literature that explores the benefits of building and understanding the big picture of things in policy process. Knowledge about what is available or present within or outside that sphere is also a part of evident-based policy making or policy implementation processes.

■ 1.1 BACKGROUND FACTS

Meriam Webster Dictionary (2013) defines sphere of interference (SOI) as a territorial area within which the influence or the interests of one party are held to be more or less paramount. That relationship would eventually form a network of supporting system or rivalry between one or more parties (MacMillan, Van Putten, & McGrath, 2003). According to Longman Dictionary (2018), the party(s) in the relationship could be a private individual, group of people, organization, society, legal entities, departments, units, states or even countries.

Regardless of who they are, the SOI concept focuses more on the domain or area where each party or group of parties posits. This is because the domains actually represent exertion of powers each party possess. The same has some bearing in influencing their perceptions about themselves as well as others. That perception is important as it would consequently influent their movements, willingness or unwillingness to cooperate, choices or options in decision making typically when one or more parties are perceived to have a more paramount position, dominant or lesser than the others (McGrath, Chen & MacMillan, 2003).

The SOI is like a set of overlapping circles. When parties start identifying their SOI in the public domain, they are actually determining those that are already within the networks. It is possible few of them may or may not have the inspirations to be part of the influence. If so, they shall be labeled as weak and placed in the most outer circle of the sphere. If the parties do have the powers to influent, control and change things, they are indeed strongest and shall be placed near the center, In short the strength of influence weakens based on the distance from

the center of the sphere (Fletcher, 2015). The key is not to identify whether particular parties or their traits are dispositive to the network but rather whether to what extent do the assertions of control and exclusion define the relationships (Weitz, 2011).

As such each party is valuable and could potentially tilt the equilibrium of the network to their advantages or disadvantages of others. This could happen even when there is no formal authority between them since these relationships or networks are mostly built upon trust or reciprocity. (Brogan & Smitten, 2017). Brogan and Smitten (2017) describe the advantages or disadvantages obtainable from such networks of relationship as social capital and added values or value created. The higher the social capital a party enjoys, the more gravity of influents it would have on others. People tends to gravitate towards the influencers and happy to maintain such “healthy network” since their opinions bear some weight. However, the sphere may likely to be strong in some spheres, departments, teams, divisions, and weak in others, thus parties within that sphere must know how to generate opportunities that are beneficial to them (Fletcher, 2015).

It is the perception, their dependencies or independencies from others within that networks that makes the network dynamic and complex. The opinion, perception or priorities could change, altering the situations or developments of events totally. More recent research findings have indicated that the issues within that sphere could be anything, wide ranging from mundane to more serious issues. For example from the topics of food and stretchable to include gender, human rights, business, defense or family matters (Van Jacksons, 2020, Steinberg, 2003).

The SOI is not a new concept. It has been around for centuries, first introduced and used in international relations and geopolitics (Hast, 2014; Brzezinski, 1997; Morgenthau, 1985). Though SOI does not denote a form of governance, but it produces a form of constructive order and maintenance thus manages to keep the relationships between parties of different interests in check (Hast, 2014).

Only in 1980s people started experimenting the concept outside the geopolitics domains. SOI was first tried in business management. The gurus in business management have fashioned the concept to maneuver competitors into a corner, reduce price wars through the business equivalent of “mutually assured destruction,” and shape the industry to the players’ mutual advantage (MacMillan, Van Putten, & McGrath, 1998). Soon it caught the attention of many board of directors of multi and transnational companies like Microsoft, Harley Davidson and CEMEX after seeing its logics and efficacy. By using SOI, the boards had devised management and strategic tools in identifying their competitors, choices of options to protect their core business, project their power outward to weaken rivals and prepare the way for future moves and moved towards new strategic directions (D’Aveni, 2004; 2001).

The success of SOI in giving companies the international presence as power brands and expands their market dominance globally has motivated others to give the concept SOI a try too (D’Aveni, 2004). Nowadays the SOI is used in assessing the efficiency of education system (CPRN, 2001), development of code of ethics and ethics training modular (Niles & Barbour, 2014), civil liberties (Hurrel, 2005), policy making and policy implementation (Ferguson & Hast, 2018; Steinberg, 2003; CPRN, 2001; D’Aveni, 2004). Each exercise strengthens the fact that SOI statistically does have significant impacts on decision making. It gives the parties clearer pictures and confidence in taking new directions after knowing where they stand and could potentially position themselves in that public domain.

■ 1.2 BACKGROUND FACTS

The announcement of EO on top of the second cycle of cMCO and cnMCO shocks the country. It is the first nationwide EO in the modern history of Malaysia. This is a new experience for the modern Malaysia, especially the millennia generations. As an ageing society 67percent of the population were born after 1969 (JPN, 2020). They are either unaware and have no recollection of the 1948 or 1969 emergency proclamations (BBC, 2020). The public too are confuse with the government’s latest public policy in combating Covid19 (NST, 2021). Is this the best approach? Why does Malaysia need EO in fighting Covid19 when the cMCO seems to be working and sufficient in the past? Is Malaysia under the governance of the military? Is it legally possible to have almost overlapping restrictions of movement orders first under PCIDA 1988 and followed by EO 1948? What would be the impacts of

each Order on the other and secondly on the society and nation? Between the EO, cMCO and cnMCO, which order takes precedent? Who amongst the parties in-charge of governing the country during emergency ruling has a faster mechanism in providing prompt answers or decisions?

In understanding the above situation, it is useful to identify the numerous parties involved in managing Malaysia during emergency ruling and know which documents they use. Also what do the various documents say about their rights, limitations, what can be done or not especially when they make decisions. Answers to the above questions could be reached by using the concept of SOI in public policy domain of Malaysia. This article writes about the (a) parties, (b) documents (s) and powers within the SOI in the public policy domain of Malaysia.

■ 2.0 DATA ANALYSIS AND FINDINGS

There are four legal documents applicable in handling the spreading of Covid19. They are the Federal Constitution (FC), EO 1948, PCIDA 1988 and PCIDR 1988 (amended 2020). All of them are federal laws and applicable throughout the nation.

Section 11 (1) of PCIDA 1988 confers and empowers Minister of Health (MOH) the legal powers to issue regulations to prevent and curb the spreading of any infectious diseases “*within or from any infected local area*” based on information from local or international sources (section 6(1)). Minister could under section 11(2) issue such order under Prevention and Control of Infectious Diseases Regulations 1988 (PCIDR 1988). The Prevention and Control of Infectious Diseases (Measures within Infected Local Areas (No 1) Regulations 2020 (the “MCO Regulations”) were gazetted by the Health Minister on 31 March 2020.

Section 11(2) of the Act uses the term “local area”. By simple understanding and literal interpretation of terms, the words “local area” would refer to a localized area which has been infected only. When the “local area” is indeed involving the whole country, any MCO issued under section 11(2) could not be applied on national basis. Likewise, the same provision could not be used to control movement between areas that were not so identified. In other words, people are still free to move across the country since prohibition of movement is only meant for infected local areas only. The government has no legal power thus has no authority to control or stop movement outside the areas that not identified and named or from unidentified area into the infected area. The only orthodox way to meet and satisfy section 11(2) is for the Minister to issue hundreds if not thousands of MCO for the intended areas that have been infected individually and specifically.

The above is tedious, not efficient and unable to solve the problems of Covid19 quickly. In circumventing the legal barriers and overcoming the problems of jurisdiction and applicability, there is a legal need to give the term “local area” a broader and expansive definition. Consequently, the Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas No. 2) (Amendment) Regulations 2020 (Order 2020 [P.U. (A) 87/2020] were amended on 3rd April 2020. The amended Order declares all States and Federal Territories in Malaysia to be infected local areas thereby making the MCO Regulations applicable to the whole of the country. The issuance of CMCO by the Ministry of Health later on is just a continuation of above order. It is covered by the amended Regulations and equally legitimate.

PCIDA 1988 allows authorized officers such as medical officers, Minister or health inspector to seek further assistant from other parties for the purpose of implementing and enforcing the cMCO or cnMCO. As provided separately under section 5 of PCIDA 1988, they can request the police to render assistance for the purpose of enabling the authorized officer to execute his duties.

As agent to the authorized officers, the police must not exceed the scope of their authority by assuming powers larger than those provided under the MCO Regulations. Should the police as a law enforcement officer gives any instruction not reasonably within the contemplation of the MCO Regulations, those instructions would contravene and ultra vires the Act.

The EO falls under the scope of the FC and EO 1948. Emergency is a situation where there is a perceived threat to the security, economic life or public order of the country or any part of it (Websters, 2013). Legally, emergency refers to a situation concerning the security, economy and public order that cannot be managed under

the regular administrative system (section 2 of EO 1948). In other words the economy, security or public order of Malaysia must be critical so much so the routine administration and daily management of the country cannot cope anymore. They need a special decree or intervention to be back on their feet again.

The emergency proclamation is legally allowable in Malaysia as found in part XI of FC. Generally Part XI deals with 3 special and important things. They are the rights to the Special Powers Against Subversive Acts, Organised Violence and Acts, Crimes Prejudicial to the Public and Emergency Powers. Part XI allows laws for preventive purposes to be made, including preventive detention for the purpose of dealing with emergencies.

Article 150 is placed under Part XI of FC. It grants the power to proclaim emergency exclusively to Yang DiPertuan Agong of Malaysia only. The exclusive power is parts of the prerogative powers enjoys by the monarchy which has long existed and present, even before the drafting of the Federal Constitution of Malaya. As Lord President Barakbah, in the majority decision stated in a landmark case once said “ *such power remains in the possession of the monarchical institution*” (Stephen Kalong Ningkan vs The Government of Malaysia, 1968).

Yang DiPertuan Agong could make such proclamation upon his satisfaction that such situation has arisen (Article 150(1) or is about to happen (Article 150(2)). Yang DiPertuan Agong does not need to wait for the actual breach of the peace or violence to take place. Any imminent threat suffices (Stephen Kalong Ningkan vs The Government of Malaysia, 1968). “*A state of emergency is something that does not permit any exact definition. It connotes a state of matters calling for drastic action....*” (Lord President Syed Barakbah in Stephen Kalong Ningkan vs The Government of Malaysia (1968).

Of course, whenever it involves Yang DiPertuan Agong, automatically the provision of Article 40 is activated. The decisions or actions of Yang DiPertuan Agong must be read in tandem and in light of Article 40. When proclaiming the emergency, Yang DiPertuan is acting and discharging his official capacity being the head of the country. Article 40 mandates for Yang DiPertuan Agong to act upon the advice of the Prime Minister (Abdul Ghani Ali Ahmad & Others v Public Prosecutor, 2001). Whether the Yang DiPertuan Agong can rightly reject and correctly denounce the advice of Prime Minister after listening to those advises is another subject matter and outside the scope of this article.

Procedurally, the proclamation of emergency and its order could only take effect after such proclamation is gazetted. From there onwards, all administrative power of running the country shall be vested in Yang DiPertuan Agong or his appointed, Director of Operations. Since Yang DiPertuan Agong is acting on the advice of the Prime Minister, this means realistically, the Prime Minister, being the head of Executive body of the government rules.

By virtue of the EO, Parliament, State Legislatives, elections and FC are suspended (Article 150(4)). The federal executive powers cover all provisions under the state legislative powers. Federal government can issue instructions to the state governments or any officer or state authority (Article 150(4)). The military may take the lead in matters relating to security if need be (Aziz, 2020). The possibility is more imminent if and when the emergency is declared due to threats against national security, foreign aggression or military attacks.

During the ruling of emergency, Yang DiPertuan Agong can enact laws called Ordinances with the same effect as an Act of Parliament (Article 150(2)(2A),(2B)(2C) and (3)), For example, 92 ordinances were enacted during the 1969 Emergency Proclamation. The EO can supersede the Federal Constitution (Article 150(4)), except on matters mentioned in Article 150 (6) and (6A).

Article 150 (2A) allows Yang DiPertuan Agong to make several emergency proclamations at the same time or at different times. Such power is even extended to Supply Ordinance (Aziz, 2020). The power vested in Yang DiPertuan Agong permits him to promulgate any ordinance when the two Houses of Parliament are absent or not sitting concurrently (Article 150 (2B)), provided he is satisfied that there is a necessity to promulgate any expenditure of the country (Article 150 (2) and (3)).

Yang DiPertuan Agung’s decision in proclaiming the EO cannot be challenged in any court on any ground (Article 150 (2) and (8a)). The amended Article 150 forbids the courts from reviewing the validity of any emergency laws or Ordinances passed by Yang DiPertuan Agung during the emergency period on any ground (Article 150(6), Article 150 (8)). This is due to the fact Yang DiPertuan Agong is not the sole ruler or act

autocratically since he is acting upon the advice of the Prime Minister at all times (Kam Teck v Timbalan Menteri Dalam Negeri, 2003). Whatever is done during the emergency period remains valid Article 150 (8); Kam Teck v Timbalan Menteri Dalam Negeri, 2003).

The emergency proclamation can continue to exist indefinitely even if the situation giving rise to it has ceased (Article 150(7); Johnson Tan v PP, 1977). It is revocable by the Yang DiPertuan Agong himself (Article 150(3)) or by a decision of both the Dewan Rakyat and the Dewan Negara, when both Houses of the Parliament convene concurrently or until it lapses six months after the proclamation of emergency ceased to be in force (Article 150 (7)).

■ 4.0 DISCUSSIONS

All the data above indicates few important things. There are many factors and considerations within the SOI of the public policy domain during the emergency ruling. Several of these factors and considerations are special and more important than others. Each is closely interlinked with others. Unlike any models of SOI before this, the positions of parties within the SOI during the emergency ruling are mostly centralized and concentrated at the middle. Understanding their positions, roles, authority or influent within the SOI are actually determining the future directions of the country and its people.

The EO, cMCO and cnMCO are issued for the sole purpose of curbing and preventing the spreading of Covid19. The orders are designed and formulated in such manner due to the characters and nature of Covid19 itself. Such important knowledge is being fed by foreign counterparts like World Health Organization, best practices of other countries, research findings from local or global academia or research institutions (section 11(2) of PCIDA 1988.). Prime Minister's Office or Ministry of Health, being the Ministry in-charge can communicate with the foreign counterparts directly or use the diplomatic channel through the Foreign Affairs Ministry. While WHO sits in the middle of the circle, the rest of foreign counterparts may be placed at the outer circle of the SOI. They are important but not to the extent of having the ability to change the current situations in a big manner.

The presence and roles of the Police and Military forces are mentioned in the cMCO and cnMCO. Now their roles are becoming more important especially with the introduction of the EO. They should be in the SOI too, somewhere between the central and outer circles of SOI, since they are instrumental in assisting the MOH to implement and enforce the cMCO and cnMCO. The proclamation of EO just heighten and increased their roles further.

The issuance of EO only affected the free movements of the society in terms of time, duration and locality. As regulated before, the rest of societies' socio-economic activities and daily affairs remain unchanged, subjected to the guidelines or Standard Operation Procedures (SOP) as provided by MOH. All essential business and services can operate according to the requirements of new normal. As a matter of public policy, there is a pre-requisite requirement for business entities to obtain a special letter from Ministry of International Trade and Industry (MITI) first before their business could fully operate. This makes MITI as an important and central part of the SOI too. The approval of MITI for business entities to carry out their business as usual during the pandemic is a lifeline that they need. That piece of letter of MITI helps the economy of the nation to stay afloat.

Legally, both cMCO and cnMCO are executive orders since they are issued by the Executive body of the government under the PCIDR 1988. The legal process of issuing executive order under Regulations is easier than proclaiming an EO. The EO is not executive order but legislative order. No members of the executive body of the government or Minister has the legal power to decide or declare an emergency. The rights and authority to make such declaration is reserved solely and exclusively for Yang DiPertuan Agong as dictated by the FC. The proclamation cannot be done arbitrarily but strictly under 3 special circumstances as stipulated by the FC only. Although the Prime Minister is legally mandated to offer his advices to, it remains the prerogative of Yang DiPertuan Agong either to agree or denounce his advice. Emergency could only be issued upon the satisfaction of Yang DiPertuan Agong. He must be personally satisfied that there is a threat to national security, or economic life or public order. Once proclaimed, the EO can be arbitrarily or easily withdrawn. Just like the requirements for its proclamation, the EO could only be revoked in 3 circumstances only and not before (Article 150 (7), (2A) and (3)). For example the fact the EO could only be revoked by both Houses of the Legislative body (Article 150(9)) indicates the special status of the EO. In terms of hierarchy, priority and importance, the cMCO takes precedent

over cMCO, whereas the EO overrides both orders. The EO can supersede the FC. Through the EO, the executive authority of the Federation can also extend to any matter within the legislative authority of a state, something which the cMCO and nMCO cannot do.

The special relations between Yang DiPertuan Agong and Prime Minister during the emergency ruling is very unique. Like a tug of war, both need to be present in managing and governing the country. When the power of the Parliament or State legislatures is suspended, judiciary system curtailed, and the administrative power of the government is funneled to Yang DiPertuan Agong. Likewise, it is pertinent for Yang DiPertuan Agong to ensure the Prime Minister is conveying correct information and advice. To great extent, both have and can influence each other because there are things where both or one of them could or could not do in discharging their duties. Those permissions or forbiddance would impact the nation gravely. They are undoubtedly at the center of the SOI. At this juncture, the roles of the legal experts and communities, academicians and researchers become more prominent than before. As a non-partisan quarter they need to be vigilant in overseeing that things are done accordingly.

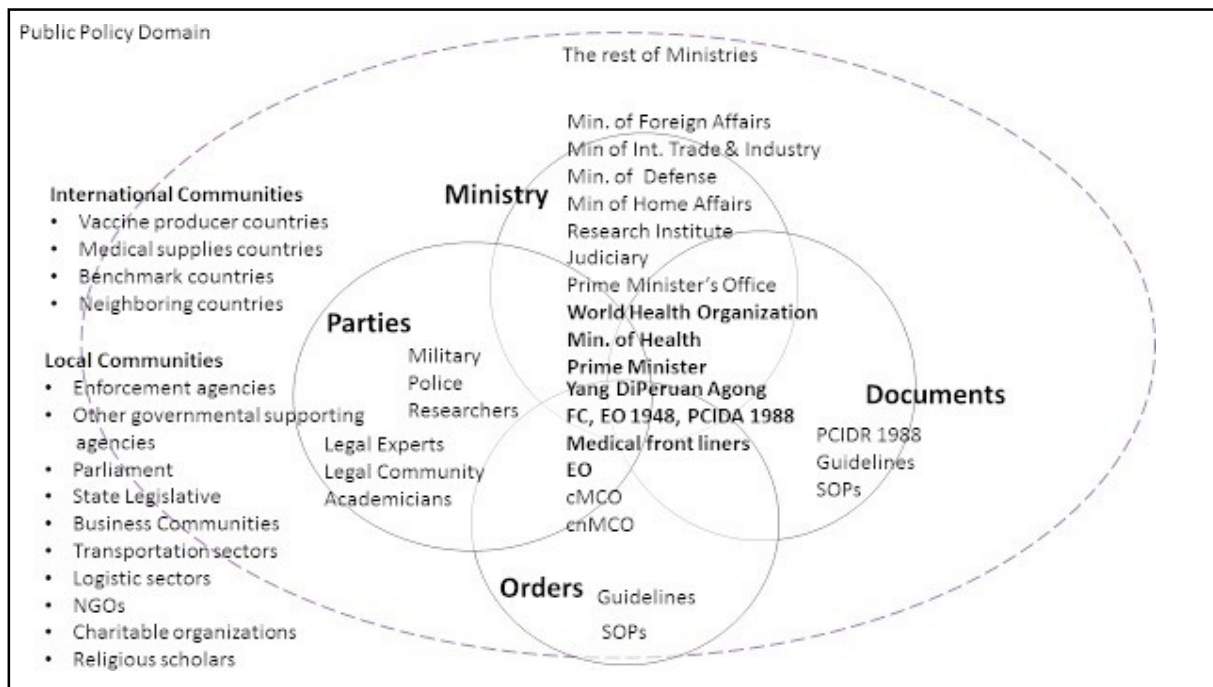


Table 1: The SOI of public policy during emergency in combating covid19

■ 5.0 CONCLUSION

As proven in other areas of studies, the concept of SOI is equally applicable in public policy, either for the purpose of designing and formulating policy documents, policy implementation and enforcement or legal orders. Determining the SOI in the areas of investigation makes things easier for decision makers to understand, review or decide.

Like studies before this, the SOI in public policy domain for the purpose of combating Covid19 is also complex. The links between parties are intricately interconnected. The SOI is not just a platform for one particular industry, sector or area of studies. The concept is flexible enough and can be used in multiple contexts including in offensive or defensive maneuvers. SOI determines how much power a party holds in relation to other players or rivals. A well-designed sphere orchestrates the party in question's grand strategy, balancing its power in the public domain in relationship to its rivals so the party can continue to maneuver freely without fear of retaliation and indeed mold the evolution of itself in a structured way that is most advantageous to itself.

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