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LEGAL AND JUDICIAL TRANSFORMATION IN MALAYSIA
By
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My speech consists of two parts. The first part is about something that has been done. The second part is about something that could and should be done. Both are in relation to law and the judiciary.

I wrote this speech before the occurrence of the Lahad Datu incident. I did not make any changes after that, except for correcting typographical errors. I would like to see how the first part of my speech will stand the test of time.

Part 1: What has been done

In 1970's, when I was a Deputy Registrar of the High Court in Kuala Lumpur, an African Judge who came to Malaysia for the first time to attend a conference said to me: "I thought Malaysia is under an emergency. I don't see any tanks and army road blocks in the streets." I replied, "Well, that is emergency in Malaysia. You can imagine what it is like when it is not."

Special powers against subversion, organized violence and acts and crimes prejudicial to the public as provided in Article 149 and Emergency powers as provided in Article 150 are absolutely necessary. The Constitution of every country has emergency provisions. Otherwise the Reid Commission would not have written them down in our Constitution. The provisions must remain so that they could be resorted to as and when it becomes necessary. We never know. I believe that a government must be able to rule and leaders must be able to lead, in accordance with the rule of law. Democracy should not be allowed to degenerate into mob rule. On the other hand, totalitarian rule is equally evil. To strike a fine balance between the two is important and difficult. All said and done, I believe that Malaysia has succeeded to do that in the last 55 years.

While emergency provision is permanent, the proclamation of emergency and the laws made under it are temporary in nature. (I am using the term "emergency" to cover both situations under Articles 149 and 150, where applicable). Common sense will tell us that "emergency" cannot be permanent. Otherwise there is something wrong either with the use of the word or with the country or with the people who rule it. It is also rather odd to have overlapping declarations of emergency, as if one declaration of emergency is not sufficient. You all know that in the Malay language, if you repeat the same word twice, the word loses its seriousness; in fact it introduces an element of pretence or imitation. For example, when you say, "buat kerja", that is a command. But, if you say "buat-buat kerja", that is pretending to work. Similarly, "kuda" is the real horse. "Kuda-kuda" is a piece of wood which is neither alive nor runs like a horse. Similarly, when you have more than one emergency declarations

operating simultaneously over the same are, the effect is lost. Over the last fifty five years, how many of us thought that we were living under an emergency?

However, the courts had throughout the existence of the proclamation of emergency, upheld the validity of the proclamations.

Beginning in 1970's, cases challenging the Proclamations of Emergency, laws made under them like the Internal Security Act 1960, Emergency (Public Order and prevention of Crime Ordinance 1969, Dangerous Drugs (Special Preventive measures) Act 1985 and Restricted Residence Act 1933 and actions or detention done or made under those laws began to appear court. They were mainly in the form of an application for an order of certiorari or habeas corpus. The order of certiorari is usually sought to quash an order made by the Minister of Home Affairs on the ground that it made contrary to law. Habeas corpus is sought to release a person detained contrary to law.

As far as I can remember and ascertain, the case of Teh Cheng Poh v. Public Prosecutor (1979) 1 MLJ 50 (11th December 1978) is the only case in which the court declared an emergency law void. It is a judgment of the Privy Council and it was decided that once Parliament had sat on February 20, 1971, the Yang di-Pertuan Agong did not have any power to make Essential Regulations having the force of law. The Essential (Security Cases) (Amendment) Regulations, 1975, are *ultra vires* the Federal Constitution and for that reason void. However, the same judgment upheld that the Proclamation of Emergency of May 15, 1969 which had not been revoked was still in force.

What followed was that Parliament enacted the Emergency (Essential Powers) Act 1979 (Act 216) which was backdated to 20th February 1971. This Act enacted as an Act of Parliament the Emergency (Essential Powers) Ordinance 1969 [*P.U. (A) 146/1969*], and provided for the validation of all subsidiary legislation made or purporting to have been made under the said Ordinance on or after 20 February 1971, and validated of all acts and things done under the said Ordinance or any subsidiary legislation made or purported to have been made thereunder. In brief, the Essential (Security Cases) (Amendment) Regulations, 1975 which was declared ultra vires the Federal Constitution and void by the Privy Council, was validated.

Actually, there is nothing wrong with that. That is how Parliamentary democracy and separation of powers work.

It should be noted that from 1st January 1978 appeal to Privy Council in criminal and constitutional matters were discontinued. Teh Cheng Poh's case must have been one of the few cases pending in the Privy Council then. From 1st January 1985 even appeals in civil matters were discontinued. That again is the rightful thing for an independent nation to do.

Prior to 24th August, 1989, the main ground for the application of habeas corpus was mala fide or "bad faith". It was usually argued that the detention were outside the scope of the law e.g. mere possession of firearms and breach of procedural rules. In most cases, the court dismissed the applications because mala fide was not proved or that the non-compliance with the procedural rules did not give rise to mala fide.

Regarding the scope of the detention order, the court would accept the subjective test of the Minister.[i]

Then, on 9th March, 1988 Peh Swee Chin J (as he then was) delivered his judgment in Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 MLJ 468. The main ground was the error of the date on which the detainee was alleged to have spoken on the alleged issue. The error was made by the police in the course of enquiries, which was admitted by the Minister of Home Affairs.

Peh Swee Chin J, inter alia, held:

- *(3) although the error relating to the sixth allegation was probably made in the course of enquiries by the police, the Minister cannot rid himself of the error of the police because the process starting with the initial arrest of the applicant under s 73 of the Act pending enquiries until the execution of a detention order made by the Minister would appear to be a continuous one.....*
- *(4) viewed objectively and not subjectively, the error, in all the circumstances, would squarely amount to the detention order being made without care, caution and a proper sense of responsibility. Such circumstances have gone beyond a mere matter of form;"*

On July 19, 1988, Peh Swee Chin J's judgment in Karpal Singh, *supra*, was reversed by the Supreme Court.[ii] See Minister of Home Affairs, Malaysia & Anor v Karpal Singh [1988] 3 MLJ 29. In allowing the appeal the court held:

- *(1) The learned judge in this case would seem to have failed to distinguish between grounds of detention stated in the detention order and the allegations of fact supplied to the detainee. In particular, he failed to recognize that whilst the grounds of detention stated in the detention order are open to challenge or judicial review if alleged to be not within the scope of the enabling legislation, the allegations of fact upon which the subjective satisfaction of the Minister was based are not. The learned judge therefore clearly misdirected himself.*
- *(2) Whether there is reasonable cause for the making of the detention order is something which exists solely in the mind of the Minister of Home Affairs and he alone can decide it and it is not subject to challenge or judicial review unless it can be shown that he did not hold the opinion which he professed to hold.*
- *(3) In this case the Minister of Home affairs had gone on affidavit to say that omitting the allegation of fact complained against, he would still have made the detention order having regard to the reports and the information relating to the conduct of the respondent upon which no doubt the rest of the allegations of fact were based. The learned judge was bound to accept these averments in the affidavit and could not inquire into the cause of the detention.*
- *(4) The flawed sixth allegation of fact was an error of no consequence which can be regarded as a mere surplusage especially in view of the affidavit of the Minister of Home Affairs is not subject to judicial review.*

Even though the judgment of Peh Swee Chin J was reversed by the Supreme Court, the Emergency (Public Order and Prevention of Crime) Ordinance 1969, the Internal

Security Act 1960 and the Dangerous Drugs (Special Preventive Measures) Act 1985 were amended.[iii] The amendments came into force on August 24, 1989.

Fourteen years later, in 2003, sitting in the Federal Court, I had occasion to refer to the amendments and I made the following remarks:[iv]

"Then came the amendments which reversed the law: what was considered as less important previously i.e. procedural non-compliance became important and what was considered as more important previously i.e. mala fide became non-consequential."

However, the Federal Court, in Kerajaan Malaysia & 2 Ors v Nasharuddin b Nasir [2003] 6 AMR 497 had decided that the amendments were constitutional.

So, after the amendments, the only justiciable ground was non-compliance with procedural rules. It is rather odd to me. However, believing in the separation of powers between the three branches of the Government, I do not question the legality of the amendments.

Four years after the amendments were made, the Supreme Court delivered its judgment in Aw Ngoh Leang v Inspector General of Police & 2 Ors (1993) 1 AMR 201. In that case, the Supreme Court issued the writ of habeas corpus just because only one copy of the form for the detainee to make representation was given to the detainee when the regulation says that two copies should be given, even though the detainee had made the representation and his appeal to the Advisory Board had been heard and disposed of. That judgment was written by L.C. Vohrah J and agreed to by Hashim Yeop Sani, CJ and Harun M Hashim, SCJ. That shows how important the rules of procedure have become at the expense of substantive law, in this respect. (I am making my next statement without referring to anybody in particular.) Lawyers are fond of saying that "law is an ass". To them, my question is "Who are the parents and what are they?"

Whatever my personal view about the amendments, sitting in the Federal Court in 2005, I reaffirmed its validity and reminded judges that in an application for judicial review under those laws, the only justiciable ground was procedural non-compliance and nothing else.[v]

Now that the proclamations of emergency and the said laws had been repealed, it is all history. However, I would like to make a few observations. First, I do not think that we should be too apologetic for having them before, or, if need be, even in future. I believe that the interest of the country and the nation is more paramount to the interest of individuals or groups. I was stranded in Kampung Baharu during the May 13 incident twelve days after I reported for work. I saw it, I experienced it and I say, it is better to shut the mouth of a few people or even to lock them up for a while than to risk people killing each other in the streets.

Secondly, At the Constitutional Court Judges' Conference in Manila in 2006, I posed this question and I am repeating it here: *Which is better, to have detailed provisions of the law and regulations governing such detentions or not to have any law at all but such detentions are done all the same?* I am referring to Guantanamo. In the first model (Malaysian model), there is a right to make representation to an independent

tribunal which makes recommendations to the appropriate authority whether the detention should be extended or not. From the day a person is arrested, he may, through his counsel, challenge his arrest and subsequent detention in Court and ask for a writ of habeas corpus to be issued. And, as I have mentioned, the Courts have always been very strict in ensuring that every provision of the law or regulation has been complied with. Such applications are argued in open court, written judgments are handed down and there is a right of appeal right up to the highest Court in the country.

In the second model (US model), there is no bad law, so to speak. But, people are arrested in other countries and detained in yet another country without trial. What legal remedies do they have? To whom do they make representations? How are they going to argue that their arrests and detentions have not been in compliance with the law or regulation thereof when there is no law or regulation governing their arrests and detentions, in the first place? Which is better?

Thirdly, it should be emphasized that the repeal of the declarations of emergency and the said laws is not a sign of weakness and that no one should abuse the newfound liberty.

Fourthly, one positive effect of the declarations of emergency and the introductions of the said laws was the development of judicial review as a branch of administrative law in Malaysia. I dare say that our judicial review law had developed more than in any other country in this region, indeed, at times, going a bit too far.

Now that is all history. I would like to see what difference the abolition of the declaration of emergency and those laws will make to the country.

Part 2: What should be done

I am now moving to Islamic banking, Islamic finance and *takaful*, which I will refer to only as “Islamic finance”.

Islamic finance had developed beyond anybody’s imagination in the last thirty years. What began out of the desire of pious Muslims to try to avoid committing a sin in their financial transactions had grown into trillion dollar business in six continents covering 75 countries.

Since the beginning and up to now, countries have focused on producing Shariah-compliant products. But, there is one area which no other country had done i.e. to produce Shariah-compatible law for the implementation of those products and settlement of disputes arising from them. What parties, even though they are Muslim-owned companies, do is to write in their contracts that the law of choice of the parties is the English or New York law and the court of choice is the court in England or New York. At the same time, they make it a term of the contract that the Shari’ah.

We know that the English law applicable is not completely Shariah-compatible. We know that English lawyers and Judges are not trained in Shari’ah. We know that most of the Judges are, at least, indifferent towards Shari’ah. It is further complicated by the application of the Rome Convention on the Law Applicable to Contractual

Obligations of 1980 and Rome I Regulation, European Parliament and Council Regulation No. 593/2008 of June 17, 2008 on the Law Applicable to Contractual Obligations (Rome I). How do you expect such courts to give judgment in accordance with Shariah? In fact, those courts have, in no uncertain terms said, that they would apply English law.

To choose the United States law as the law of choice is no better. *"There is concern by U.S. scholars that a choice of law that necessitates looking into Shariah law will run afoul of the First Amendment prohibition of state endorsement of a particular religion."*[vi] Some States have even passed laws prohibiting reference to Shari'ah.

We are just like a Muslim who takes the trouble to go and buy *halal* meat, then go to a non-*halal* restaurant and ask the chef to cook it. The chef is an honest man. He says, *"My cooking is not halal. I use wine as an ingredient."* The Muslim replies, *"No problem. I respect your integrity."* That is how smart we are.

So, there is a need for Shari'ah-compatible law in the documentation of Islamic finance transactions and, in addition, Shari'ah-friendly courts to settle disputes arising from those transactions.

This is where, I believe, Malaysia should move in, fast. We have many factors in our favour, compared to other countries. They are:

First, Malaysia, in the eyes of the world, is an Islamic country. Internationally, it is seen as model Islamic country. It is only natural for Malaysia to want to be the hub for Islamic finance.

Secondly, Malaysia is already the leader in Islamic finance.

Thirdly, no other Government in this world has done more than the Malaysian Government in developing and for the development of Islamic finance.

Fourthly, we already have a pool of Shari'ah scholars who have specialized in Islamic finance. Some of our Shari'ah scholars are sitting in Shari'ah Committees all over the world. We also have people in their thirties (to me, the right age), who are proficient in both Arabic and English who are also trained in law and Shari'ah. They are our potentials.

Fifthly, we have the Shari'ah Advisory Council of Bank Negara Malaysia (SAC, BNM) and the Shari'ah Advisory Council of the Securities Commission (SAC, SC) at national level, to make Shari'ah rulings on Islamic finance.

Sixthly, we already have the common law and the common law system in place and working comparatively well.

Seventhly, Malaysian lawyers and Judges speak English, our laws and judgments of our superior courts are in English.

Eighthly, our courts and arbitrators are efficient, competent and independent. Remember that the cases are pure civil cases based on contract involving

companies and individuals. There is no politics in it. Negative perception should not be an issue unless there are Malaysians who go around the world condemning our courts and arbitrators for ulterior motives. In terms of knowledge in Islamic finance, our Judges, Arbitrators and lawyers, taken as a whole, are at par with their counterparts in other countries, if not better.

Ninthly, we have the infrastructure. Our court rooms are among the best in the world, our transportation and communication are good, our streets and hotels are free from suicide bombing (so far), our cost of living is comparatively cheap and we have "summer" which is rather mild throughout the year. All these factors are conducive to foreign lawyers coming to do litigation here.[vii]

I think we have the right ingredients to take the lead to our advantage while doing a service to Shari'ah.

Indeed, we had actually started doing it with the establishment of the Law Harmonization Committee of Bank Negara Malaysia of which I am Chairman. So far, we have reviewed 17 laws including the National Land Code 1965, Contracts Act 1950 and the Rules of Court. Out of that, 7 issues have been identified as requiring legislative amendments to facilitate Islamic financial transactions, 8 issues do not require any change to the law and 4 issues are still under review. The provision regarding penalty for late payment of judgment debt came into force on 1 August 2012. It is the first of its kind in the world and it is working. Similarly, the law requiring the Court and the arbitrator to refer Shari'ah issues to the Shari'ah Advisory Council had been confirmed by the Court of Appeal as constitutional and valid and courts and arbitrators are now referring such issues for determination by the Shari'ah Advisory Council. The idea is to enable Shari'ah issues to be determined by Shari'ah, Islamic finance, legal and other experts jointly avoiding such issues to be determined by non-expert Muslim and non-Muslim Judges and to promote consistency in the rulings. Again, we are the first in the world to do so.

But, transforming the law is not all. Lawyers and judges must also educate themselves so that they have adequate knowledge of Islamic finance and Shariah to handle or deal with those cases. Lawyers should realise that there is a big business waiting for those with the required expertise. They should prepare themselves to grab the opportunity.

Regarding Judges, I urge judges, on their own, to start reading on the subject and the judiciary to conduct courses, at least to selected judges, on the subject.

I believe that the country that offers the best Shariah-compatible laws besides an efficient, incorruptible and respected judicial system and is able to apply the Shari'ah, where required, will be the country of choice for issuance of Islamic finance products, its law will be the law of choice and its courts as the courts and arbitrators as the forum of choice and for settlement of disputes in such cases. We should not be "an ummah of lost opportunity", to quote Sheikh Nizam Yaquby, a well-known Shari'ah scholar in Islamic finance.

Many people do not realize what Islamic finance has done and is doing to Shari'ah. Actually, it is developing and promoting the Shari'ah in a way that had never happened before, at least, not on this scale.

First, the Shari'ah, particularly mu'amalat, is going global. Non-Muslims in non-Muslim countries seek the advice of Muslim scholars who are experts in Islamic finance to launch an Islamic finance product. Non-Muslims have taken great interest to study the Shari'ah particularly pertaining to Islamic finance. Islamic economics and Islamic finance have become a popular subject in universities throughout the world. Thus, Shari'ah is no longer seen as an outdated medieval law meant for tribal desert dwellers. It is being studied and applied in billion-dollar international financial transactions in all the big cities in the world.

Secondly, Shari'ah is moving from personal law of Muslims to the main stream commercial law of the world. Common law and civil law lawyers are learning or getting advice on how to draft Shari'ah-compliant contracts. Shari'ah issue will continue to be litigated, argued and deliberated whether or not the courts rule on them eventually. Some courts may decline to rule on them but the fact that Shari'ah issues are litigated and argued before them, would make the subject familiar to them. In the end, I believe some lawyers and Judges, even in common law and civil law countries, indeed even in Japan, Korea, and Russia would become experts in it.

Thirdly, the Shari'ah itself, especially mu'amalat, is developing in a way that had never happened before. Shari'ah has now come into direct contact with common law and civil law. To cater for modern international Islamic finance and to compete with its conventional counterpart, the Shari'ah can no longer look to its traditional source alone. This is because, while the development of conventional finance over the last few centuries was accompanied by the development in the law, especially common law, there was no parallel development in Islamic finance and the Shari'ah. So, Shari'ah will have to adopt laws and procedure from common law or civil law jurisdictions and even from its conventional counterpart. Good example are the laws and rules that are now being used in Islamic finance. There are no ready-made equivalent of the Companies Act, the Contracts Act, the National Land Code etc. So those laws are being used. When the case goes to court, the Rules of Court is used. We found only one provision of the Rules of Court that is contrary to Shariah i.e. regarding interest after judgment. We have already introduced a Shariah-compliant rule to cater for cases arising from Islamic finance. On the other hand, we are introducing the Shari'ah principle of wa'd into the Contracts Act to give legal recognition to the principle which is used widely in Islamic finance. Guiding Principles and Standards issued by the Islamic Financial Services Board (IFSB) and Accounting and Auditing Organization for Islamic Financial Institutions (AAOIFI) dig deep into the archive of the conventional counterpart. It does not matter where the law or the rule comes from so long as it is not contrary to Shari'ah. When I was asked about a decade ago, "What is your definition of Islamic law?", my reply was "Any law that is not unislamic". I still hold the same view.

Without us realising it, actually there is a harmonisation of the laws going on. It is a two-way traffic, really. To me it does not matter the traffic from which direction is heavier so long as they don't collide with each other.

Fourthly, within the *Shari'ah* itself, we will see the disintegration of the *Mazhabs*. We know that one of the reasons that had led to the differences of opinions between the mazhabs was the geographical factor. For example, it was said that the earlier ruling of Imam Abu Hanifah that "qamar" refers only to alcoholic drink made from grapes

and, therefore, in modern terminology, tuak, stout, whisky and beer are not, was made at a time when a particular hadith had not "reached" him in Kufah. Later when his students came to know of the hadith, they revised his ruling. Imam Syafi'e revised his fatwas after living in Egypt for a few years. On the other hand, Imam Malik spent all his life in Madinah. That explains some of his views. Now such a situation does not arise anymore. Nowadays, all information, whether on facts or law, is accessible to all, no matter where they are, within minutes. Rulings made by a committee in the Middle East, Europe or elsewhere are known to other scholars everywhere in the world and vice versa. Scholars from different countries sit in the same committees all over the world. Transactions are not localised, like Imam Abu Hanifah selling cloth to a local customer in his shop in Kufah.

We live at a different time and in a different world. Shariah will adapt too. We are witnessing it. We should take the lead. I believe that we have all the ingredients to lead in this development. We should strive to make Kuala Lumpur the center for the development of modern mu'amalat in the world in the 21st century. Insha Allah.

Thank you.

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NOTES

[i] See Lee Kew Sang v Timbalan Menteri Dalam Negeri & 2 Ors [2005] 4 AMR 724.
[ii] See Minister of Home Affairs, Malaysia & Anor v Karpal Singh [1988] 3 MLJ 29.
[iii] By Act A740, Act A739 and Act 738, respectively.
[iv] See Abdul Razak Bin Baharudin & 7 Ors v. Ketua Polis Negara & 2 Ors (2005) 6 AMR 529
[v] Ibid.
[vi] Julio C. Colon, Choice of Law and Islamic Finance, TILJ.
[vii] For further discussion on this issue see