

Reforming the Administration of Justice: Hopes and Challenges for the New Malaysia

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Keynote Speech

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I am very honoured to have been invited to speak at the Tan Sri Dato' Seri Dr Abdul Malek law conference this year. He is a man I knew well. I had appeared before him and I believe that on the 31st of May 2007, when he passed, Malaysia lost (and I quote Justice KC Vohrah) 'the Chief Justice that this fair country should have had but never had.'

Professor Datuk Dr Paul Chan, Vice-Chancellor and Co-Founder, HELP University; Datin Dr Chan Kam Yoke, CEO and Co-Founder, HELP University; Professor Dr Khong Kim Hoong, Deputy Vice Chancellor (Academic), HELP University; Professor Dato' Dr Zakaria Bin Ahmad, Deputy Vice Chancellor (Research), HELP University Dato' Mah Weng Kwai, (Retired Judge of the Court of Appeal, Malaysia), SUHAKAM Commissioner & Adjunct Fellow of the Faculty of Law & Government and I would add, one of those who were part of the Institutional Reforms Committee ("IRC" for short) who I had the pleasure of working with; Puan Sri Roziah Sheik Mohammad and the family members of the Late Tan Sri Dato' Seri Dr Abdul Malek; distinguished members of the faculty and organising committee, the real VIPs here - the students, ladies, and gentlemen.

Independence of the Judiciary – The Crises

Justice Vohrah had also said this about the late Tan Sri Dr Malek Ahmad. He said and I quote, 'Tan Sri also refused to succumb to doing what was wrong and he rebuffed two top Judges who tried to importune him to do just that.' At Tan Sri's memorial and on behalf of the Malaysian Bar, I said this - 'The late Tan Sri Dato' Seri Abdul Malek Ahmad knew what it was to be a Judge. He knew the sacred trust that was his office. He knew that to be a great Judge one had to have independence and integrity, courage and compassion, dignity and honour. He knew that in him was vested the heavy burden of deciding the fate of his fellow man and that this burden had to be discharged honestly and to the best of his ability. He knew it, he cherished it, he lived it'.

One wonders what Tan Sri Malek would have to say today in relation to the startling revelations by a Court of Appeal judge, Justice Hamid Sultan, in an affidavit that was disclosed to the public not very long ago. From those revelations, it appears that the kind of interference that Justice Vohrah had spoken about continues. We remember, so clearly, the long history of interference with the Judiciary - the 1988 judicial crisis. We witnessed the removal of the then Lord President and three other sitting judges. There was the 1996

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poison pen letter which contained a long list of alleged corruption and abuse in the Judiciary. This was followed by the 2002 Lingam case scandal on the brokering of judicial appointments. And the 2017 controversial extension of the then Chief Justice, Tun Md Raus Sharif and the then Court of Appeal President, Tan Sri Zulkefli Ahmad Makinuddin - which were all challenged by the Bar.

So we have had a bit of a history where the Judiciary is concerned when we talk about interference. What do we mean by interference? Going by international standards on the independence of the Judiciary, what is required is that, 'the Judiciary shall decide matters before them impartially on the basis of facts and in accordance with the law without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect from any quarter or for any reason'. This is a fairly comprehensive standard that ensures the independence of the Judiciary. In other words, it is clear that there cannot be any form of influence, direct or indirect.

There is no doubt that one of the institutions that suffered a crisis of confidence before the 9th of May 2018 was indeed the Judiciary and it was one of the institutions that the IRC looked at when we had our deliberations, and issued our report. We are pleased that the current Judiciary has taken steps to put in place improvements. But let me go back to the Pakatan Harapan manifesto. In relation to the Judiciary, this is what Promise No. 19 states - that they will firstly, ensure that the appointment of judges is to be based on merit and experience regardless of political influence; secondly, that the power of the Prime Minister to influence the appointment of judges be removed so that there can be no abuse of power; thirdly, that the membership of the JAC will be decided by the Parliamentary Select Committee with reference to the YDPA and Rulers' Council; and finally, that judges must provide written judgments.

Hence, there was clearly a commitment in the manifesto that there would be changes in relation to the Judiciary, to make it independent. The Judiciary, for me, is the most important institution in the country because if the Judiciary is sound, there is nothing the Executive can do, there is nothing Parliament can do, there is nothing anyone can do that falls outside the rule of law. Only the Judiciary can determine such matters and only the Judiciary can ensure that, in fact, the rule of law is upheld - and that is where there was a sense of frustration before the 9th of May 2018. For example, having been involved in some of the election and sedition cases, and charges being brought against the opposition politicians at that time, you had a sense that, in fact, there was an undermining of the rule of law, that there was no real respect for what the rule of law meant.

Politics seemed to become so much a part of the decision-making or so much a part of the manner in which decisions were handed down. This was the feeling that was there which caused the crisis of confidence in the Judiciary. But it did not just happen over the course of a year or two. I would pin down the crisis of confidence to run from the 1980s to the 1988 judicial crisis. From then it appeared that it was very hard to recover from the crisis. Hence, it is important that the Judiciary is indeed independent and that there is no interference. We are talking about something that happened thirty years ago and it has taken a long time to recover from a crisis of this nature.

Who are the ones who can ensure that the rule of law is always upheld, who can ensure that the Judiciary is independent? Ultimately, the judges themselves. They are the ones whom we look to, to ensure that there is independence to the best of their abilities. They are human beings too, they make mistakes. If there are mistakes, you have an appellate

process that can correct it, but ultimately, it is about the Judiciary standing up for the rule of law and ensuring that interference is impossible.

Reforming the Judiciary

a. Balloting

There are individuals, alongside the new Chief Justice, who have taken on some of the suggestions of the IRC. They now have a collegiate style of governance. They have a system of balloting for choosing panel judges. In the past, one of the problems was certain judges were always picked to hear certain cases, or it appeared that way. When you have a balloting system, that means it is random and it is an internationally recognised method by which you ensure that no “judge-choosing” takes place - something that was prevalent, particularly in the time of the “Lingam” era.

b. Efficiency of the Courts

The courts have also introduced the use of technology to improve efficiency. The courts now have a consultative committee with the Bar Council, alongside consultation on the promotion of judges. There is a stipulation that written judgments must be made in the appellate courts and a summary provided to the media in public-interest cases. The courts have been proactive in continued legal education. They have worked with the UNDP and introduced a report on an international framework for court excellence, focusing on key areas such as court leadership.

c. Judicial Appointments Commission (the JAC)

At the end of the day, we need many more fundamental reforms. There must be a no-nonsense approach to integrity, to excellence, to judgment-writing, to hard work. They can do all that, but ultimately, what we are looking for is for some kind of commitment of the government to ensure that the appointment of the Judiciary will be independent and that is where the JAC comes in. I recall that it was introduced after the “Lingam” Walk-For-Justice by the lawyers. The JAC was established, but unfortunately, because it does not have constitutional foundation - in other words, it is not a constitutional body - all it can do is to make recommendations. The Prime Minister can ignore every recommendation that the JAC makes because constitutionally, it is up to the Prime Minister to advise the Yang Di-Pertuan Agong.

One of the recommendations made by the IRC is that the JAC should be a constitutional body to ensure that the Executive cannot interfere with the Judiciary by way of the appointments process. This requires a constitutional amendment. I believe that is one of the key constitutional amendments that the IRC has called for.

d. Royal Commission of Inquiry (RCI)

The recent announcement on the establishment of the RCI on the Judiciary arising out of the affidavit that was sworn by Justice Hamid Sultan is an extremely important move for the country and for the Judiciary. The Bar has been fighting for the establishment of the RCI for years in order to review the whole system and to come up with comprehensive reform measures that would put the country far ahead in respect of the rule of law.

We are looking forward to that RCI. Of course, we are still waiting with bated breath to find out what the terms of reference are and of course, it has to be carefully conducted as it is inquiring into the Judiciary. It is essential that the RCI is run professionally and with great care. But at the end of the day, we must get meaningful recommendations from the RCI.

e. Ombudsman

There may also have to be an Ombudsman system where complaints in relation to judicial conduct from members of the public can be made, similar to the Judicial Appointment and Conduct Ombudsman in the UK. At present, a complaint can be made to the Chief Justice in writing and then it is up to the Chief Justice, as I understand it, whether the complaint should be dealt with, and the only outcome is the removal of the judge on the basis of misconduct. This is a cumbersome and long process, and should only take place in the most extreme circumstances. Nevertheless, public complaints have to be dealt with and there should be a mechanism for this.

Challenges facing the Judiciary and the administration of justice

a. Dealing with critique of the Judiciary

Lord Atkin in 1936 said ‘Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and the respectful, even though outspoken, comments of ordinary men’.[†] What did His Lordship mean? This was a case which involved contempt proceedings and basically, His Lordship was of the view that individuals should not be held in contempt for the respectful opinions they hold about the Judiciary. The judges and the Judiciary must be tough enough to take criticism, and I quote, His Lordship when he referenced ‘respectful criticism’. In other words, if people criticise the Judiciary, it should be respectfully done. That was the position in 1936. What would Lord Atkin be saying today, in view of technological advances? I think this is one of the biggest challenges the Judiciary is facing.

What do you do when thousands of messages in social media go viral, criticise the Judiciary or make even derogatory remarks? How much of that can we police? Is contempt of court a good enough process to contain what people are saying about the Judiciary, given the manner in which information is passed around? In my own experience, the Judiciary vindicates itself through its judgments and it has to continue doing that. It cannot be oversensitive and it cannot worry too much about comments because of the volume of comments out there. But there are also good comments about the Judiciary. We know that there are excellent judges who are hardworking with integrity, and those judges, their judgments, their conduct, will speak for itself. The reality is everyone will be judged on a daily basis. Instead of reacting to this vitriol, it is important to know what the people are saying.

b. AG’s Chambers

When we make reference to the administration of justice, it includes not only the judiciary but also the Attorney-General’s Chambers. The former AG cleared the former Prime Minister of all charges over 1MDB, basically declared him innocent. The Bar challenged this and went to court to set aside that decision, to say ‘Look, the Attorney-General cannot

[†] *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322.

declare anyone innocent, only the court can do it. You are not a judge. You decide if there is a prima facie case and then, you leave it to the Judiciary to decide whether the person is innocent.’ But of course, we were thrown out at every stage. The former Attorney-General also refused to assist with the request for mutual legal assistance to the other countries which were investigating the 1MDB scandal. The frustration is, despite the whole world watching, if the institutions of administration of justice are going to ignore the rule of law, there is so little ordinary citizens can do, and of course, the Bar tried. We went to court, but we failed and this is why I say the Judiciary is so critical. If we had gone to court and won, as I believe we should have, things would have been very different. Things would be so different if that final arbiter - the judges – on the basis of the rule of law. At present the role of the office of the AG is a fused one. On the one hand, the Attorney-General advises the Cabinet and acts for the government, and on the other hand, also prosecutes – i.e. acting on behalf of the people and prosecuting crimes. A potential conflict can arise. Therefore, one of the key things that should happen is the splitting of the role of the AG and the Public Prosecutor.

c. The Role of the Malaysian Bar

The Malaysian Bar has always stood up for what is right no matter what the consequences. Some positive changes have taken place such as the establishment of the JAC. If the Bar stands by the rule of law, which it has always done, it becomes the beacon for everyone else. Everyone awaits the Bar’s view on a matter because, at the end of the day, the lawyers must lead the way with public opinion on these issues as they understand the intricacies of the law better than anyone else. Lawyers must lead the way on human rights and other issues as we have a crucial role as the Bar to uphold one of its most important purposes which is to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour - the motto of the Bar which is in our statute. In fact, it is a legal requirement that we uphold the cause of justice.

d. Reform of the Police

When talking about the administration of justice, we need to look at the police and the disappointingly slow pace of reforms requires mention. You would have heard recently people complaining about the slow pace of reforms in this country. The slow pace is one thing; my issue is with the “u-turns”. The “u-turn” the government has made on the death penalty, on the Sedition Act - a seventy-year-old Act which we still find relevant in today’s Malaysia, and the one I find most worrying is the “u-turn” in relation to the police commission.

It is absolutely critical that the IPCMC (Independent Police Complaints and Misconduct Commission) must be established in view of all the deaths in custody, the unanswered and forced disappearances – all extra-judicial activities where there has been no accountability. What about members of the police who do not obey court orders? What about Indira Gandhi’s child who still cannot be found despite a Federal Court order? In other words, if the police do not feel like enforcing the court order, then it will not be done. This type of behaviour has been going on and I view it as activity outside the confines of the rule of law i.e. it is extra-judicial.

I wish to make reference to the Wang Kelian human trafficking death camps which has turned out to be another disaster. The human trafficking racket resulted in death camps in Wang Kelian. The SUHAKAM report revealed that the camps were destroyed in 2015 resulting in the destruction of important evidence. I recall reading the Malay Mail account

of their brave reporters who walked up the hill and found the death camps. I went cold as I could not believe that this is happening in Malaysia. The killing of people and burying them for no one to find. Trafficking exists because of corruption and corruption exists because of poor enforcement of the rule of law. So, basically, corruption kills.

Further, with the death camp sites destroyed, how is the new RCI that has been set up (which I welcome) going to determine exactly what happened? Across the Thai border where the same things were found, over a hundred people, I believe, have been prosecuted. How many have been prosecuted here? Nobody has been called to account for the deaths. This is the kind of lawlessness that we have had in the past that we must stop.

Concluding Remarks

If there is rule of law, there is certainty. So, when your client comes to you, you can advise them and say this is the law and this is the likely result. Of course, you can never be entirely certain. Nevertheless, it is very important for us to be able to trust the system so that that law is upheld and that is why the rule of law is also tied to our economy. Foreigners want to invest in a country where there is certainty. So, at the end of the day we want a fairer and just system. The rule of law provides for stability. One good thing I can tell you is that the present government is at least talking about the rule of law. Whether they understand it is, of course, another thing altogether. Sometimes, I think they are mistaking rule of law for rule by law – there is a big difference.

In the past ten months, the new government has faced innumerable challenges. One of the challenges this government faces is meeting the high expectations of the people and we may be unreasonable, but I think we must keep our expectations high because if this government does not make the change, who will? If the previous coalition comes back, things will never change. For example, a Minister came out saying the police are not happy with the IPCMC. It is the same story. Why is the Minister back-tracking? Lack of political will is the other challenge. Does the government have the political will to carry out the reforms promised?

There is also the challenge of a reluctant civil service. To add to this, there is the loss of public support for the government. My own view is that it is because the government is not communicating to the public enough. If you tell the public, look this is why we are postponing this, this is the reason why we are holding out, the public will understand.

Further, there is the concern amongst the public because unfortunately, the politicians are thinking about the next election. We do not want to think about the next election. We have another four years. That is the difference between a statesman and a politician – the politician thinks of the next election, a statesman thinks of the next generation - and we need them at present to be statesmen and not politicians.

Finally, the challenge of dealing with corruption. It is endemic. It is deep within our system and it is not easy to get rid of.

I would end with this, I have been one of the fiercest critics of the past government as well of this government because, for me, the reform agenda must move because we do not have time. I end with an Abraham Lincoln quote, 'Nearly all men can stand adversity, but if you want to test a man's character, give him power'. We did give them power. They have power. Let us see if their character can withstand the test of power. Thank you.