

RSOG Leadership Forum:
“Legal and Judicial Transformation in Malaysia”
with
YABhg. Tun Hamid bin Haji Mohamad
Ex-Chief Justice of Malaysia

When

5 April 2013

Where

Razak School of Government

Who

YABhg. Tun Hamid bin Haji Mohamad

About The Forum

The Malaysia’s former Chief Justice critically examined the Political Transformation Program and the issues that needed to be addressed to engender greater democratisation particularly with regards to the national security. The key questions to at the forum were: what were the challenges that are apparent in our current legal system; and what can Malaysia do to further strengthen the legal and judicial transformation of our nation. Tun Hamid also offered examples of the Political Transformation Program, citing Islamic finance and takaful.

Summary

YABhg. Tun Hamid divided his presentation into two parts: the first part consisted of what the Malaysian government had been with regards to national security. The second part was on what the Government should do in order to further strengthen the legal and judicial transformation in Malaysia.

He stated that in the past, the Malaysian government had the right to call for a state of Emergency whenever it was necessary. He continued by explaining that every other country has the same power and uses that power to maintain its national security. If a state of Emergency is totally unnecessary, then it would not have been incorporated into the

Malaysian Constitution by the Reid Commission. He explained that “special powers against subversion, organized violence and acts of crimes prejudicial to the public in Article 149 as well as Emergency powers as articulated in Article 150 is absolutely necessary”. However, he also commented that there needs to be a balance between the security of the community and the rights and freedom of the individual.

Even though many laws have been revised and repealed (such as the Emergency Ordinance 1969, the Internal Security Act 1960 and the Dangerous Drugs Act 1985), he reiterated that the Malaysian government should not be too apologetic for having these laws. At certain times, the safety of the nation trumps the right of the individual. He stated that he experienced the May 13 incident and therefore believes that some individuals should be detained in order to prevent many lives from being lost.

He continued by comparing the laws of detainment in Malaysia and in the United States. He indicated that Malaysia’s laws on security, emergency and detention are constitutional and still preserve the rights of a detainee. From the day the person is arrested, the detainee may challenge his or her arrest and detention in Court by asking for legal representation, provided that it is done through the detainee’s council.

On the contrary, the detention laws in Guantanamo were not constitutional because the detainees do not have the right to be represented to an independent tribunal. Although the Americans claim that there is no such thing as “bad law”, however, the policies on the ground reflect otherwise. For instance, he explained that the American government implements rendition, where suspected terrorists are arrested in other countries and detained in another country without trial.

The second part of Tun Hamid’s speech focused on what the Government should do to further strengthen the legal and judicial transformation in Malaysia. He gave the Islamic finance as an example.

He started by commenting that Islamic finance started when a group of pious Muslims were concerned as to whether their financial transactions were in compliance with the Islamic principles, especially *riba*. However, that concern grew into a trillion dollar business covering 6 continents.

He further noted that although many countries have focused on Shariah-compliant products, no country has produced shariah-compatible law for the implementation of those products and no proper procedural settlement of disputes had been established. The courts use English or New York law which it is not totally Shariah-compatible. Therefore, it is fundamental to properly establish laws that are Shari’ah compliant especially pertaining to the documentation of Islamic finance and Shariah-compliant courts to settle these disputes.

He also stated that Malaysia has most of the important elements to take the lead in the Islamic finance while making it Shari’ah compliant. The establishment of the Law Harmonization Committee of Bank Negara Malaysia is to enable Shari’ah issues to be determined by experts of the required fields such as Shari’ah, Islamic finance and law. The

committee has reviewed a number of laws, by which some of them have been identified as required to be amended to facilitate Islamic financial transactions. However, he emphasized that in addition to transforming the laws, lawyers and judges should educate themselves so they will be wise when handling such cases.

Moreover, Islamic finance is promoting Shari'ah in a way that had never happened in a major scale before. First of all, the mu'alamat is now a global phenomenon where non-Muslims in Western and Asian countries are seeking the advice of Muslim scholars especially relating to Islamic finance. Therefore, Shari'ah is no longer seen as a backward legal system because it is being studied and applied in international companies all around the world.

Secondly, instead of becoming a set of laws only for Muslims, Shari'ah is starting to become an international commercial law. Common and civil law lawyers have started to learn on how to draft Shari'ah compliant contracts.

Thirdly, the Shari'ah has become into direct contact with common law and civil law. In order for Islamic finance to become a global development, the Shari'ah cannot depend on just traditional sources. Instead, the Shari'ah will have to adopt laws and procedures from common law jurisdiction. By doing so, harmonization of laws will occur which is highly encouraged as long as the laws do not clash with Islamic principles.

Fourthly, within the Shari'ah itself, there will be less emphasis on Mazhabs (different legal school of thought). Since Islamic finance is part of a global phenomenon, this means that its rulings cannot be based on different localities so that the rulings can be universal. For example, rulings made by a committee in the Middle East, Europe or elsewhere are known to other scholars in other parts of the world.

Conclusion

Tun Hamid concluded that today, people live in a different world thereby subjecting Shari'ah to change as well. He believes that Malaysia should take the lead in change especially because we have the elements to drive the change. He hopes that Kuala Lumpur will be the centre for development of modern mu'amalat in the 21st century.

Issues Raised

1. In a democratic society, there needs to be a balance between the power of the state and the rights and freedom of the people.
2. In the modern world today, Muslims should refer to other sources when creating something new in order to ensure that new products and services still adhere to the principles of Islam.
3. Law is not the only factor that is needed to address and solve racial issues. It also requires common sense as well as sacrifice for Malaysians to continue living in harmony.

About the Speaker

Tun Abdul Hamid was Malaysia's Former Chief Justice from November 2007 to October 2008. In the course of his carrier, he was also appointed as Judge of the Special Court and Judge of the Shari'ah Court of Appeal for the State of Penang. It means that he had served as Judge in all the courts in the country, Civil as well as Shari'ah.

He is now Chairman of the Law Harmonizing Committee of Bank Negara Malaysia, a member of the Shari'ah Advisory Council of Bank Negara as well as of the Securities Commission, and a member of the Shari'ah and Civil Law Harmonizing Committee of Brunei Darussalam.

Contact

To get more information on this event, please contact us via email at programmes@rsog.com.my

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