

## THE CONSTITUTION AND HUMAN RIGHTS: REVISITING THE CONTRIBUTION OF TAN SRI HARUN M. HASHIM

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### ABSTRACT

This article looks at the importance of the Constitution in providing a framework of government in a country to ensure the rule of law prevails and to avoid the masses from being the mere tools of the capricious elite. The judiciary being the arbiter of dispute plays an indispensable role in bringing life to the black letters of the written Constitution. In this regard, the article tentatively looks at the contribution of a former Supreme Court Judge, Tan Sri Harun M. Hashim on his approach to interpreting fundamental liberties and the interactions between the different organs of government. The distillation of approaches of one of the prominent judges of Malaysia may better inform the development of the law. The article also looks at his contribution in raising awareness on human rights during his tenure as the Vice-Chairman of SUHAKAM. The article adopts a doctrinal method by probing the Federal Constitution, related statutes and case law. Secondary sources including journal articles are examined to provide reviews and observations regarding the related legal areas and the development of the law. The article concludes with the finding of the continuing influence of the judgment and writings of Tan Sri Harun M. Hashim in different areas of law including human rights, contempt of courts and constitutional law.

**Keywords:** Human Rights, Constitution, Rule of Law, Harun Hashim, Contempt of Court.

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[Received: 19 August 2023, Accepted: 25 November 2023, Published: 11 December 2023]



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## **PERLEMBAGAAN DAN HAK ASASI MANUSIA: MELIHAT KEMBALI SUMBANGAN TAN SRI HARUN M. HASHIM**

### **ABSTRAK**

Makalah ini melihat kepada kepentingan Perlembagaan dalam menyediakan kerangka kerajaan sesebuah negara bagi memastikan kedaulatan undang-undang mengatasi dan mengelakkan masyarakat dari dijadikan alat untuk golongan elit yang rakus. Kehakiman yang merupakan pemutus pertikaian memainkan peranan yang tidak dapat diganti dalam memberikan pengertian terhadap huruf-huruf di dalam lembaran Perlembagaan bertulis. Dalam hal ini, makalah melihat kepada sumbangan mantan Hakim Mahkamah Agong, Tan Sri Harun M. Hashim berkenaan pendekatan beliau dalam mentafsir hak asasi dan hubungan antara organ Kerajaan. Pengekstrakan pendekatan salah seorang hakim terkemuka Malaysia akan memberi pemahaman terhadap perkembangan undang-undang. Makalah ini melihat kepada sumbangan beliau dalam meningkatkan kesedaran hak asasi manusia semasa beliau menjawat Timbalan Pengerusi SUHAKAM. Makalah ini mengguna pakai kaedah doctrinal dengan mengkaji Perlembagaan Persekutuan, statut berkaitan dan laporan kes. Sumber sekunder termasuk makalah jurnal dikaji untuk mendapatkan ulasan dan pemerhatian mengenai undang-undang berkaitan dan perkembangan undang-undang. Makalah ini diakhiri dengan dapatan pengaruh berterusan penghakiman dan tulisan Tan Sri Harun M. Hashim dalam pelbagai bidang undang-undang termasuk hak asasi manusia, penghinaan mahkamah dan undang-undang perlembagaan.

**Kata kunci:** Hak Asasi Manusia, Perlembagaan, Kedaulatan Undang-Undang, Harun Hashim, Kesalahan Menghina Mahkamah.

## **INTRODUCTION**

It is pertinent to consider the essential role played by the Federal Constitution to ensure the nation-state develops to its full potential. As a document that establishes the organs of government and imbues it with different powers, it plays a vital role in balancing the powers between different organs and in ensuring adequate protection is given to the masses from the might of the state organs. Apart from providing the system of governance for the country, the Federal Constitution also provides the guarantee of fundamental liberties to its citizens to live to the fullest within the prescribed norms. In the application of the norm-setting of the Federal Constitution, judges play an important role in interpreting and applying the law contained in the statutes and also in the common law. The words of the judges are the law. One of the judges who have left his mark is Tan Sri Harun M. Hashim in his capacity as a judge and as a Commissioner of the Human Rights Commission of Malaysia better known as SUHAKAM.

## **THE CONSTITUTION, THE STATE AND HUMAN RIGHTS**

The Constitution of a nation the most fundamental law, and in a country with a written Constitution it is the supreme law. It is a set of rules governing a nation and defines the powers of the governmental organs. To be the bulwark of a nation, a binding constitution which has a special procedure for its amendment could be a place of refuge for the masses to claim their rights and shield them from capricious powers. The Constitution must connect with the indigenous elements of the nation and represent the aspiration of the country for it to claim legitimacy. The Federal Constitution of Malaysia embodies these elements.

The need for written rules defining and guiding the exercise of governmental powers and protecting the masses is ever more indispensable for a country freeing itself from the yoke of imperialism and besets with communal, ideological and security tension arising from the policy of the colonial master. The different segments of society defined by ethnicity, colour, class and religion seek the protection afforded by the constitution. In this regard, the drafters of the Constitution put up a chapter on fundamental liberties in the proposed constitution.

As a new nation-state emerging from colonial yoke and embarking upon a project of federalising the different polities consisting of nine protectorates Malay Sultanates, two former British Straits Settlements and later States of Sabah and Sarawak, this new federated polity requires a basic framework that could glue all these constituents together and for them to thrive in the period during which observers, taking into account the communal tension and communist threat, were betting on a short life-span of the new Federation of Malaya that came to life in 1957. The Constitutional Commission consisting of judges and academics from England, Canada, India and Pakistan, and led by Lord Reid drafted the constitution based on the terms of reference provided and with inputs from different groups in the society including the political parties and alliances.<sup>1</sup>

It is the Constitution that sets the parameters of the government in determining its responsibilities and the remit of its powers. The government is responsible for creating institutions for the benefit of the people, to stipulate administrative processes and bestow socio-economic protections. Thus, the existence of a constitution is essential for the perseverance and smooth operation of a democratic state as without it a society would lack the kind of solid foundation it ought to be built.

The Federal Constitution proclaims the fundamental liberties which serve as shields for the citizens against the tyranny of the government. Also, being the supreme law of the land, any form of violation of its provisions could be challenged in court. The constitution at the same time gives powers to the three arms of the government, namely, the executive,<sup>2</sup> legislative,<sup>3</sup> and judiciary.<sup>4</sup> This ensures, on one hand, that the rights of the masses are protected and, on the other hand, that the authorities of the state are given their due regard, adequate recognition, and legitimacy, which in turn instils and reaffirms the confidence of the masses in them.

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<sup>1</sup> Joseph M. Fernando, "A Playmaker and Moderator: Lord Reid and the Framing of the Malayan Federal Constitution" (2019) 50:3 *Journal of Southeast Asian Studies* 431.

<sup>2</sup> Articles 39-43 of the 1957 Federal Constitution of Malaysia

<sup>3</sup> Articles 44-65 of the 1957 Federal Constitution of Malaysia

<sup>4</sup> Articles 121-131 of the 1957 Federal Constitution of Malaysia

From another perspective, the Constitution is indispensable in protecting the citizens from the vagaries of the state. A written Constitution is regarded as supreme since the state itself has made succinctly clear that it is subject to the Constitution. The Constitution regulates the relations between the ruled and the ruler. The Constitution as an expression of the will of a society fits the role of demarcating boundaries of powers of the governing and the governed. In this context, the Constitution provides the platform for the establishment of the rule of law that produces a limited government.

The rule of law envisages the absence of arbitrary powers, that no one is above the law, and both principles require the existence of an independent judiciary. It may be said that the phrase rule of law sometimes has lost its lustre caused by the abuse it suffered by the different heads of government and rulers to justify their political agenda. Nevertheless, one may take heed that the principle refers to the “principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards”.<sup>5</sup>

The rule of law also requires “measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.<sup>6</sup> This description encapsulates the features of the rule of law espoused by AV Dicey in his *The Law of the Constitution* in reference to the absence of arbitrary powers, the equality before the law and the Constitution as the result of the ordinary law of the land.<sup>7</sup>

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<sup>5</sup> William Davis and Helga Turku, “Access to Justice and Alternative Resolution” (2011) *Journal of Dispute Resolution* 47.

<sup>6</sup> The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (S/2004/616, 23 August 2004).

<sup>7</sup> AV Dicey (Ed. JWF Allison), *The Law of the Constitution*, Oxford: Oxford University Press, 2013.

## SUHAKAM

The guarantee by the Federal Constitution of fundamental liberties does not in itself hinder transgression by those in power and superior. Everyone must be vigilant to protect the fundamental liberties. It may be proven necessary to provide additional safeguards and framework in ensuring compliance with the guaranteed human rights. Such an additional human rights framework is the Human Rights Commission of Malaysia better known as SUHAKAM (*Suruhanjaya Hak Asasi Manusia Malaysia*). In the 1990s, Malaysia underwent a political and economic upheaval.<sup>8</sup> During that time the Human Rights Commission of Malaysia Act 1999 was gazetted on the 9<sup>th</sup> of September 1999 establishing SUHAKAM. Thirteen commissioners were appointed to govern its affairs as the first group of commissioners. Tan Sri Dato' Musa Hitam was appointed chairman and headed the commissioners while Tan Sri Harun M. Hashim was designated Vice-Chairman.<sup>9</sup>

The main functions of SUHAKAM as stated by the Act are to promote awareness of and provide education relating to human rights; to advise and assist the Government in formulating legislation and procedures and recommend the necessary measures to be taken; to recommend to the Government with regard to subscription or accession of treaties and other international instruments in the field of human rights; and to inquire into complaints regarding infringements of human rights.<sup>10</sup> Thus, the commission has not only the role to create

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<sup>8</sup> Khong Kim Hoong, "Malaysia 1990: The Election Show-down" (1991) *Southeast Asian Affairs* 161; James Chin, "Malaysia in 1997: Mahathir's Annus Horribilis" (1998) 38:2 *Asian Survey* 183.

<sup>9</sup> There were eleven other members of the commission, namely Tan Sri Datuk Seri Panglima Simon Sipaun; Tan Sri Dato' Hj. Zainal Abidin; Dato' K. Pathmanaban; Dato' Mahadev Shankar; Dato' Dr. Salleh bin Mohd. Nor; Dato' Lee Lam Thye; Datuk Dr. Chiam Heng Keng; Professor Dato' Mohd. Hamdan Adnan; Dr. Mohammad Hirman Ritom bin Abdullah; Puan Mehrun Siraj; Cik Zainah Anwar. See <https://suhakam.org.my/about-us/> (Accessed 3<sup>rd</sup> August, 2023).

<sup>10</sup> Section 4, Human Rights Commission of Malaysia Act, 1999.

awareness<sup>11</sup> and to educate on matters relating to human rights, it has also to inquire on the possible abuse of human rights.<sup>12</sup>

The powers of the commission reflect the above functions including undertaking research and disseminating results of the research; advising the government; verifying infringement of human rights; visiting places of detention and issuing public statements.<sup>13</sup> In performing its function, the Act provides that the commission shall have regard to the Universal Declaration of Human Rights to the extent that they are not inconsistent with the Federal Constitution.<sup>14</sup>

Apart from the said Act, there also exists a SUHAKAM Charter which spells out the statutory responsibilities of SUHAKAM (as listed above), how the functions will be carried out, the strategic plans of actions and core values guiding the operation of SUHAKAM, namely, respect, independence, integrity, engagements, efficiency, openness and capacity development.<sup>15</sup>

Considering the activities and the actions taken by SUHAKAM since its formation, it could be said that the commission is involved in raising and addressing human rights-related matters in the country. It has engaged with government agencies, the private sector and the

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<sup>11</sup> Tan Sri Harun M. Hashim spoken in many events and made statements relating to human rights in his capacity as the Deputy Chairman of SUHAKAM. [See for instance his keynote address in Harun Hashim, “SUHAKAM’s Achievements in Monitoring Democracy and the Rule of Law” in *SUHAKAM: After 3 Years*, organised by ERA Consumer Malaysia, 5<sup>th</sup> July 2003, Penang, Malaysia; “Utamakan aspek keselamatan sebelum benarkan rapat umum”, *Utusan Malaysia*, 20<sup>th</sup> September 2003; “ISA an animal, hard to explain: Suhakams Harun Hashim”, *Malaysiakini*, 14<sup>th</sup> May 2001.

<sup>12</sup> Tan Sri Harun M. Hashim are members working groups and panel of inquiries as documented in the SUHAKAM Annual Reports. See for instance SUHAKAM, *SUHAKAM ANNUAL REPORT 2001*, Human Rights Commission Malaysia: Kuala Lumpur, 2002, at 62 where it is explained that Tan Sri Harun M. Hashim is in the Complaints and Inquiries Working Group looking at the issues involving the government departments, professional negligence and violation of employment rights.

<sup>13</sup> Section 4(2), Human Rights Commission of Malaysia Act, 1999.

<sup>14</sup> Section 4(4), Human Rights Commission of Malaysia Act, 1999.

<sup>15</sup> Official Portal Human Rights Commission of Malaysia <https://www.suhakam.org.my/about-suhakam/piagam-suhakam/> (Accessed on 28th September, 2020).

public. The involvement of the commission with the “KESAS Highway Incident” is an example of engagement. The said incident, which occurred during an opposition rally in the year 2000, led to SUHAKAM setting up numerous public hearings and conducting investigations to uncover the allegation of abuse of power that occurred at the hands of the police.<sup>16</sup> The term of reference for the inquiry is to determine any violation of human rights, the perpetrator and the measure to prevent such violation. SUHAKAM also considers issues of human rights under the socio-economic areas such as the land rights of indigenous peoples.<sup>17</sup> The terms of reference of the inquiry are to determine the constitutional and legal recognition of the indigenous people’s right to land and to review policies and laws to better protect and promote their rights.

The active participation of Malaysia in the United Nations Commission on Human Rights (UNCHR) in the early 90s and during the 1993 World Conference on Human Rights held in Vienna has been claimed to be significant in the establishment of the commission.<sup>18</sup> In explaining the plan to establish SUHAKAM, the Foreign Affairs Minister enlightened that “the establishment of the (commission) is testimony to the earnest desire of the government to protect and promote the human rights of all Malaysians, irrespective of their racial, religious or cultural origins” and it is “in line with the government’s objective to ensure that human rights issues do not continue to be played up by groups providing a cynical or inaccurate picture”.<sup>19</sup> This probably led to some commentators observing that SUHAKAM was

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<sup>16</sup>See for instance Human Rights Commission of Malaysia (SUHAKAM), *Inquiry 2/2000: Inquiry on its Own Motion into the November 5<sup>th</sup> Incident at the KESAS Highway*, nd., np. <https://www.suhakam.org.my/wp-content/uploads/2013/11/Inquiry-On-Its-Own-Motion-Into-The-November-5th-Incident-At-The-Kesas-Highway.pdf> (Accessed 3rd August 2023).

<sup>17</sup>SUHAKAM, *Report of the National Inquiry into the Land Rights of Indigenous Peoples*, Kuala Lumpur: SUHAKAM, 2013.

<sup>18</sup>Official Portal Human Rights Commission of Malaysia <https://www.suhakam.org.my/about-suhakam/> (Accessed on 28th September, 2020).

<sup>19</sup>“Activists Laud Rights Body, but Doubt Sincerity”, *Inter Press Service*, 10<sup>th</sup> April 1999, <https://www.ipsnews.net/1999/04/weekly-selection-malaysia-activists-laud-rights-body-but-doubt-sincerity/> (Accessed 3<sup>rd</sup> August, 2023).

established during the political turmoil in Malaysia which may suggest the objective of the setting up of SUHAKAM was in part to dampen the criticism against the government on its human rights record.<sup>20</sup>

However, interestingly, the suggestion that SUHAKAM was established to counter the narrative of human rights abuses by the government arising from the political crisis in 1997 was refuted by its Vice-Chairman, Tan Sri Harun M. Hashim.<sup>21</sup> He explained the idea of SUHAKAM in 1995 when Malaysia was the Chairman of the United Nations Commission on Human Rights (UNCHR). Nonetheless, according to him, as in any process of the government, the idea took years to materialise. This also explains the reason SUHAKAM was situated under the Ministry of Foreign Affairs since the United Nations (related to UNCHR) is under that ministry.

## CONTEMPT OF COURT BY SCANDALISING THE COURT

The contribution of Tan Sri Harun M. Hashim as the Vice-Chairman of SUHAKAM was after his retirement from the judiciary. In discharging his duties as a judge, Tan Sri Harun M. Hashim has presided over cases involving fundamental liberties. His decisions reflect his disposition as being fearless.<sup>22</sup> Sometimes, his distinctive judgments ended up as a dissenting judgment. One of the areas of human rights that he has presided upon is freedom of speech, in particular, contempt of court.

Contempt of court may refer to civil contempt when a person fails or refuses to carry out a court order. Such a person will be

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<sup>20</sup> See Garry Rodan, "Accountability and Authoritarianism: Human Rights in Malaysia and Singapore" (2009) 39:2 *Journal of Contemporary Asia* 180; A Whiting, "Situating SUHAKAM: Human Rights Debates and Malaysia's National Human Rights Commission" (2003) 39:1 *Stanford Journal of International Law* 59; L Thio, "Panacea, Placebo, or Pawn: The Teething Problems of the Human Rights Commission of Malaysia (SUHAKAM)" (2009) 40:4 *George Washington International Law Review* 1271.

<sup>21</sup> Harun Hashim, "Assessment of Human Rights in Malaysia and the Role of SUHAKAM in Promoting and Protecting Human Rights" a speech in *SUHAKAM: After One Year*, ERA Consumer Malaysia, 5 May 2001.

<sup>22</sup> Najibah Md Zin & Khadijah Mohd Najid, "The Life of Tan Sri Harun M. Hashim: A Memoir" (2023) 31:1 *IJUM Law Journal* 39.

compelled by the court to carry out the order even under the threat of imprisonment. Another type of contempt is interference with the proceeding of the court or contempt on the face of the court. This may involve making threats or actions that may affect the peaceful court proceeding.<sup>23</sup>

Another type of contempt is scandalising the court. It refers to publications “which contain attacks upon the judges in their judicial capacity or which tend to bring into contempt the administration of justice generally”,<sup>24</sup> or publications that went beyond “reasonable courtesy and good faith” and “clearly intended to bring the court into disrepute”.<sup>25</sup>

Under such law, a newspaper may be held in contempt for publishing a letter providing a misleading report of a case that implied the court permitted the prosecution to conduct an unfair prosecution and caused a miscarriage of justice.<sup>26</sup> Letters written by an advocate to judges and the Bar Council alleging that the Supreme Court is unjust and biased, and failed to review its own decision in a case conducted by him may also be contemptuous.<sup>27</sup> The courts emphasise the need to protect the dignity and integrity of the courts in maintaining the confidence of the public in the courts.

The problematic part of such contempt of court is its restriction of the ability to criticise the judgment of the courts. This may invite criticism that such restrictions contravene the guarantee of free speech under Article 10 of the Federal Constitution. On the other hand, Article 126 of the Federal Constitution and Section 13 of the Court of Judicature Act, 1964, provide for the protection of the dignity and integrity of the courts. A proper balance must then be struck between Freedom of Speech and the need to protect the dignity and integrity of the superior courts.

This invites the question of the ability of the common man to question the elite, namely the judges. Should the judges as unelected officers shield themselves from criticism of their decisions which affect

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<sup>23</sup> A Vijayalakshmi Venugopal, *Casebook on Contempt of Court in Malaysia*, Kuala Lumpur: Sweet & Maxwell, 2014.

<sup>24</sup> *Public Prosecutor v SRN Palaniappan & Ors* [1949] MLJ 246, at 248.

<sup>25</sup> *Attorney-General v Arthur Lee Meng Kuang* [1987] 1 MLJ 206, at 209.

<sup>26</sup> *Public Prosecutor v The Straits Times Press Ltd* [1949] MLJ 81.

<sup>27</sup> *Attorney General & Ors v Arthur Lee Meng Kuang* [1987] 1 MLJ 206.

the life and livelihood of everyone? Considering the validity of the need for free speech, the courts allow criticism against itself but it must be within the limits of reasonable courtesy and good faith. However, the benchmark set by the courts produced different results in different cases.

In this regard, Tan Sri Harun M. Hashim took a somewhat different approach. This could be seen in his handling of the case *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad*.<sup>28</sup> The applicant in this case applied for leave for an order of committal for contempt of court allegedly committed by the respondent, the then Prime Minister of Malaysia. The respondent in an interview with *Time* magazine said to the effect that the judiciary could take away the legislative power of Parliament by interpreting laws passed by Parliament contrary to the intention of Parliament. The applicant argued that the words uttered show disrespect, disrepute and offend the court's dignity. The words also challenged the authority of the judiciary and the doctrine of separation of powers. Additionally, the words threatened and intimidated the judiciary.

Harun J (as he then was) in the High Court took the time to untangle the misunderstanding of the Prime Minister regarding the role of the judiciary and the legislature. Rather than rebuking the Prime Minister, Harun J concluded that the statement of the Prime Minister was caused by his confusion on the doctrine of the separation of power. He reminded that the Court should not be "over-sensitive to criticism".<sup>29</sup> The Court found that the statement was a statement of the desperation of a Prime Minister on the shortcomings of the lawmakers in translating policies into law. The Supreme Court whose judgment was delivered by Tun Salleh Abbas LP agreed with the High Court. The Supreme Court arrived at the same conclusion that the statement was caused by the misunderstanding of the concept of separation of powers and that the courts should not be "overly hypersensitive" and "overact impetuously".<sup>30</sup>

The High Court and the Supreme Court in *Lim Kit Siang v Dato Seri Dr. Mahathir Mohamad*<sup>31</sup> showed more understanding and

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<sup>28</sup> [1987] 1 MLJ 383, HC; 386, SC.

<sup>29</sup> [1987] 1 MLJ 383, at 386.

<sup>30</sup> [1987] 1 MLJ 386, at 387.

<sup>31</sup> [1987] 1 MLJ 383, HC; 386, SC.

indulgence to the outburst of interested parties against the decisions or roles played by the courts. A similar approach could not be seen in subsequent decisions such as *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered v SM Idris and Attorney General, Malaysia v Manjeet Singh Dhillon*.<sup>32</sup> In *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered v SM Idris*, the Supreme Court had earlier delivered a judgment where farmers had been forcibly removed after they failed to move out after the expiry of a notice to quit.<sup>33</sup> A group of people from a housing developer company who had entered into an agreement with the registered proprietors came to the land and demolished the vegetable plots of the farmers.

The Supreme Court decided that the registered proprietors and the housing developer were entitled to exercise the common law remedy of self-help. Thus, they were only liable for damages to the crops, and they were not liable for trespass. On the following day, SM Idris, the first respondent in the earlier action issued a press statement entitled “Supreme Court decision may lead to lawlessness” in his capacity as the president of the Consumers’ Association of Penang. The Court found that although the language used might have been intemperate, it did not amount to contempt.<sup>34</sup>

That did not end the matter for the other respondents in that case. Two lawyers made speeches on the same matter that the Court found to have exceeded reasonable courtesy and good faith.<sup>35</sup> The Court

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<sup>32</sup> *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v SM Idris & Anor* [1990] 1 MLJ 273, SC; *Attorney General, Malaysia v Manjeet Singh Dhillon* [1991] 1 MLJ 167, SC.

<sup>33</sup> *Trustees of Leong San Tong Khoo Kongsi (Penang) Registered & Ors v Poh Swee Siang* [1987] 2 MLJ 611.

<sup>34</sup> [1990] 1 MLJ 273, at 275.

<sup>35</sup> Among the content of the first respondent’s speech:

Mr Poh bila dia tengok bulldozer, dia ingat boleh pergi mahkamah dapat keadilan. *Dia mimpi dia boleh dapat keadilan daripada mahkamah*. Dia pergi ambil ‘order’ tahan sama dia developer jangan masuk. Bicara-bicara bukan satu bulan, 11 bulan bicara. Banyak saksi keluar. Hakim kasi dia RM300,000 mula-mula. It Farlim tidak puashati, *dia ‘appeal’*. *Appeal itu tiga hakim dengar; bukan dia mahu kasi lebih, dia potong sampai RM20,000. Dan dia cakap, dia cakap, dalam Malaysia tuan tanah bila dia sudah kasi notis, dia boleh pergi sendiri tak payah pergi court. Tak tahu apa pasal kita ada court? Tak tahu apa pasal kita bayar gaji kasi hakim-hakim.* (Emphasis is the Court’s.)

observed that the statement as a blatant insinuation made by them had scandalised the Supreme Court and brought it into disrepute.

The next case that we have alluded to earlier is *Attorney General, Malaysia v Manjeet Singh Dhillon*.<sup>36</sup> In this case, the then Attorney General - Abu Talib Othman – applied to commit the respondent to prison for alleged contempt of court. It arose out of an affidavit affirmed by the respondent – as the President of the Malaysian Bar – in support of an application for leave for an order of committal to prison of the then Lord President – Tun Dato Abdul Hamid Omar – for alleged contempt of the Supreme Court. This event related to the action of dismissing the previous Lord President – Tun Mohamed Salleh Abbas. The Bar Council objected to the appointment of the then Tan Sri Dato Abdul Hamid Omar – the then Acting Lord President - as the Chairman of a tribunal that considered the dismissal of Tun Salleh Abbas since Tan Sri Dato Abdul Hamid Omar was the logical successor and therefore there was the likelihood of bias.<sup>37</sup>

Harun Hashim SCJ in delivering the dissenting judgment decided that the respondent was not guilty of contempt of court. According to him, the allegation that the Acting Lord President abused his official powers was false because of what the Acting Lord President did in prohibiting a special sitting of the Supreme Court to hear an application from Tun Salleh Abbas - to stop the submission of the report of the tribunal hearing his dismissal as the Lord President to the Yang di-Pertuan Agong - was within his power. Nevertheless, although the statement in the affidavit may be said to be defamatory, it is not contemptuous since the action complained of was not a judicial function but an administrative function of the Acting Lord President. Harun Hashim SCJ held that “mere abuse of a judge, however defamatory, is not a contempt of court. The abuse must relate to the performance of a judicial duty by the judge for it to be a criminal contempt of court. The offence alleged against the respondent has not been proved”.<sup>38</sup> Additionally, the publication of the statement was very limited since the affidavit was only disclosed within the proceeding of the court.

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<sup>36</sup> [1991] 1 MLJ 167, SC.

<sup>37</sup> *Ibid.*, at 170.

<sup>38</sup> [1991] 1 MLJ 167

The test of contempt by scandalising the court has been reaffirmed by the Federal Court in *PCP Construction Sdn Bhd*.<sup>39</sup> The test to be applied, according to the Federal Court, is “whether, having regard to the facts and the context of the publication, the impugned statements pose a real risk of undermining public confidence in the administration of justice?”.<sup>40</sup> The Court emphasised that the contempt power is not “to protect the dignity of individual judges personally”, but “to ensure that public confidence in the Judiciary, the third arm of government”.<sup>41</sup> This is essential since the Federal Constitution guarantees the freedom of speech under Article 10 of the Federal Constitution while recognising the importance of protecting the dignity and integrity of the courts under Article 126 of the Federal Constitution. Thus, a statement which constitutes a fair criticism is not contemptuous.

The court again emphasised the importance of free speech in an application to commit for contempt under the *sub judice* rule.<sup>42</sup> The High Court regards the discussion of the rate of water tariff to be a matter of public interest and should be expected to be in wider public discourse.

Although the number of cases on scandalising the court post-*Attorney General, Malaysia v Manjeet Singh Dhillon* is not numerous for a general trend to be surmised, we could see the indication that the courts took explicit notice of the guarantee of the freedom of speech and expression under the Federal Constitution in elaborating the contempt power. Nevertheless, the law of contempt of court still exists in Malaysia and remains under common law albeit its constitutionally problematic nature. However, some countries have taken the decision to abolish this type of common law contempt of court. The United

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<sup>39</sup>*PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration, intervener)* [2019] 4 MLJ 747, FC.

<sup>40</sup>*PCP Construction Sdn Bhd v Leap Modulation Sdn Bhd (Asian International Arbitration, intervener)* [2019] 4 MLJ 747, at 769.

<sup>41</sup> See also *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor* [2021] 2 MLJ 652, FC.

<sup>42</sup> *Syarikat Bekalan Air Selangor Sdn Bhd v Fadha Nur bt Ahmad Kamar & Anor* [2012] 7 MLJ 657.

Kingdom has abolished it under the Crime and Courts Act 2013 and New Zealand under the Contempt of Court Act 2019.<sup>43</sup>

## CROSSING THE FLOOR

The Constitution provides the foundation and framework for government. In a Parliamentary democracy such as Malaysia, the government is put into power through periodical elections at the federal and state levels. Parliament, as the federal legislative authority, is constituted by the Yang di-Pertuan Agong and two Houses – the Senate and the House of Representatives.<sup>44</sup> The Senate consists of indirectly elected members and appointed members.<sup>45</sup> The House of Representatives consists of 222 members elected through the process of periodical national elections conducted by the Election Commission.<sup>46</sup> The Prime Minister is appointed by the Yang di-Pertuan Agong from members of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of the House of Representatives, and the Ministers may be appointed from members of either House.<sup>47</sup>

The electoral process in Malaysia as in most democratic countries is dependent on affiliation with political parties. Political parties, as things stand, are essential in the decision-making of the voters and are the main actors in the electoral system. Political parties have been prominent in the single-member district plurality or First-Past-The-Post election system in Malaysia since the first general election in 1955 to elect members for the Federal Legislative Council under the Federation of Malaya Agreement.<sup>48</sup>

Almost all elected members of the House of Representatives and the State Legislative Assembly are affiliated with a political party, bar a few as independent. In such an electoral system, their political

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<sup>43</sup> Crime and Courts Act 2013 (United Kingdom), section 33(1); Contempt of Court Act 2019 (New Zealand), section 26(5).

<sup>44</sup> Federal Constitution, Article 44.

<sup>45</sup> Federal Constitution, Article 45.

<sup>46</sup> Federal Constitution, Articles 46 and 113; Election Commission Act 1957; Elections Act 1958; Election Offences Act 1954.

<sup>47</sup> Federal Constitution, Article 43(2).

<sup>48</sup> Francis G. Carnell, “The Malayan Elections” (1955) 28:4 *Pacific Affairs* 315.

affiliation is the “likely even a driving, if not determinative, cause of their electoral success” or, one may add, failure.<sup>49</sup> In this context that it is considered as the incident of floor crossing. Floor crossing refers to changes of party affiliation made by an elected member of the legislature in the middle of the legislative session. The issue in such a move is whether the elected representative has stayed true to the trust given by the voters.

If we consider that the members have been elected based on political affiliation, then the act of changing their political alliances is a betrayal of trust given by the voters who voted with the hope the elected representatives would carry out the manifesto of the political party, more so if such defection or shifting of alliances causes the collapse of the government or provides the path for the rival political party to form a government.

On the other hand, with regard to fundamental liberties, floor crossing may fall under freedom of association. A person is free to join a lawful association such as a political party, or to leave such an association, as guaranteed under the Federal Constitution which provides that “all citizens have the right to form associations”.<sup>50</sup>

Such problems exist in other democratic countries such as India, Canada and New Zealand.<sup>51</sup> Some countries try to resolve the problem by prohibiting party hopping. Singapore for instance provides that the seat of a member of Parliament becomes vacant if the member ceases to be a member or is expelled or resigns from the party that he stood in the election.<sup>52</sup>

Historically in Malaysia, the issue was raised in *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* where Tan Sri Harun M. Hashim constituted the five judges in the appellate panel.<sup>53</sup> In this

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<sup>49</sup> Brendan Roziere, “Reconsidering Bill 4 - The Legislative Assembly Amendment Act (Member Changing Parties): Finding a Balanced Approach to Floor Crossing in Manitoba” (2019) 42:1 *Manitoba LJ* 73.

<sup>50</sup> Federal Constitution, Article 10(1)(c).

<sup>51</sup> See for instance Tendekani E Malebeswa, “Floor Crossing and Elective Office: Freedom of Choice or Betrayal of Trust? - The Case of Botswana” (2020) 28 *University of Botswana Law Journal* 81.

<sup>52</sup> Singapore Constitution, Article 46(2)(b).

<sup>53</sup> *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697, SC.

case, the state of Kelantan amended the state constitution by inserting Article XXXIA that provides if a member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or ceases to be a member of the political party, the seat of that person is considered vacant.<sup>54</sup> The case presented before them involved two elected representatives by the name of Nordin Salleh and Wan Najib Wan Mohamed who were elected to the State Legislative Assembly and then resigned from their party *Semangat 46* to join UMNO (United Malays National Organisation). Both of them contested in the ensuing by-elections as candidates of *Barisan Nasional* and lost. The Supreme Court concluded that the state constitutional amendment was contrary to the freedom of association guaranteed by the Federal Constitution and therefore void.

The Kelantan State constitutional amendment was instigated by the political crisis following the challenge mounted by Tengku Razaleigh Hamzah against Tun Dr Mahathir Mohamad (he was then Datuk Seri Dr Mahathir Mohamad) for the post of the President of UMNO during the UMNO Annual General Assembly on 24 April 1987 which Tun Mahathir Mohamad was declared the winner. Dissatisfied with the result, the faction of Tengku Razaleigh Hamzah brought the matter of the validity of the election before the court and questioned the irregularity of the election since a few of the branches of the party that participated in the Annual General Meeting were not registered and thus unlawful according to the Societies Act 1966.<sup>55</sup>

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<sup>54</sup> The amending enactment is Laws of the Constitution of Kelantan (First Part)(Amendment) Enactment 1991 which inserted a new Article XXX1A: XXXIA. Vacation of seat due to resignation, etc., from political party.

- (1) If any member of the Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative and his seat shall become vacant.
- (2) For the purpose of Clause (1), the Legislative Assembly shall determine whether a seat has become vacant or as to when a seat becomes vacant and the determination of the Assembly shall be final and shall not be questioned in any Court on any grounds whatsoever.

<sup>55</sup> *Mohd Noor bin Othman & Ors v Mohd Yusof Jaafar & Ors* [1988] 2 MLJ 129.

It is interesting to note that the debacle in Nordin Salleh is consequential from the decision of Tan Sri Harun M. Hashim declaring UMNO on 4<sup>th</sup> February 1988 as unlawful and causing different factions of the unlawful UMNO to form new parties namely *UMNO (Baru)* and *Semangat 46*. In buttressing the opposing claims on which party is the 'true' successor of the unlawful UMNO, there was a shifting of allegiances of members of the two political parties. To prevent such defection, the Kelantan State Legislative Assembly decided to amend the state constitution.

Another change of hearts of elected representatives could be seen in the *Sheraton Move* where eleven members of from political party PKR (*Parti Keadilan Rakyat*) (including Azmin Ali, the former vice-president of PKR) which is a member of the coalition of *Pakatan Harapan* that form the first non-Barisan *Nasional* government of Malaysia (which governed continuously for sixty years from the Independence in 1957) declared their shift of alliance and formed an independent bloc. *Bersatu*, another coalition partner of *Pakatan Harapan*, withdrew from the coalition. This, among others, led to the collapse of the government of *Pakatan Harapan* in February 2020. There were instances of party hopping that caused changes of government prior to the *Sheraton Move*, but it only caused changes of government at the State level such as in Sabah in 1994 and in Perak in 2009.<sup>56</sup>

There were other defections in different political parties that happened during this tumultuous time. The period between 2018 (14<sup>th</sup> General Election) and 2022 (15<sup>th</sup> General Election) saw the appointment of four Prime Ministers by the same Yang di-Pertuan Agong (who constitutionally reigns for five years) because of shifting supports of individual members of Parliament or *en bloc* members of political parties.

As a result of this debacle, Parliament in 2022 amended the Federal Constitution to lessen the instability of the government without an outright majority and consisting of a coalition of political parties – formed in pre or post-elections. The amendment, as Article 49A, provides that a member of the House of Representatives ceases to be a member of that House and his seat becomes vacant if he was elected as a member of a political party resigns as a member or ceases to be a

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<sup>56</sup> See for instance Sheila Ramalingam, “Stop the Hop!” [2022] 2 MLJ cccxv.

member of the political party; or being elected as an independent, he joins a political party. However, the seat is not vacant if the political party is dissolved, he resigned as a member of the political party to be a Speaker of the House or he was expelled from his party.<sup>57</sup> The amending Act also inserted section 7A under the Eighth Schedule to the Federal Constitution to the effect of requiring similar provisions to be inserted in the State Constitutions.

Considering the absence of a two-thirds majority held by the government, the successful amendment of the Federal Constitution shows that the support for the amendment was not only from the members of the coalition forming the government but also from the opposition. The exceptions provided under Article 49A also show the balancing act done in ensuring party discipline and the freedom of association by members and preventing abuse of the principle of party discipline to silence any dissent within the party rank.

## **THE RELIGION OF A CHILD IN A PLURAL SOCIETY**

Another major case in which Tan Sri Harun M. Hashim was involved as a member of the appellate panel is *Teoh Eng Huat*.<sup>58</sup> This case involved issues of freedom of religion, in particular the religion of a minor. Issues of religion are close to the hearts of many in Malaysia, more so in cases involving children and young people. In Malaysia, there are many cases law where the change of religion of a minor are disputed. Most of these cases involved the conversion of a parent to the religion of Islam. Parents who went their separate ways in their marriage and in their faith, also disputing the faith of their children. The sensitivity of the issue is more pronounced in multi-religious and multi-racial societies and more severe in terms of controversy in identity politics.

In *Teoh Eng Huat*, a father discovered that his daughter who was almost 18 years old had converted to Islam. The appellant brought an action in the Kota Bahru High Court seeking a declaration that he, as the lawful father and guardian, has the right to decide the religion, education and upbringing of his infant daughter. The High Court pronounced that the daughter has the right to choose her own religion

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<sup>57</sup> Constitutional (Amendment)(No 3) Act 2022.

<sup>58</sup> *Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300, SC.

if she chooses it in her own free will considering Articles 11 and 12 of the Federal Constitution and the Guardianship of Infants Act 1961.<sup>59</sup> The father's right to decide the religion is subject to the right to choose of her own free will.

The appellant appealed to the Supreme Court. In the meantime, the girl had reached the age of majority. The Supreme Court disagreed with the conclusion of the High Court. The Court proclaimed that a non-Muslim parent has the right to decide the religion of a minor. The Supreme Court added that in "the wider interest of the nation, no infant shall have the automatic right to receive instruction relating to any other religion than his own without the permission of the parent or guardian".<sup>60</sup> However, no specific declaration was made on the status of the daughter since she had attained the age of majority.

The case of *Teoh Eng Huat* better known as the case of *Susie Teoh* (the name of the daughter), in which Tan Sri Harun M. Hashim is a member of the appellate panel at the Supreme Court, becomes a *locus classicus* on the determination of the religion of a non-Muslim minor. The case established that the minor, however so of sound mind and of maturity does not have the capacity to decide on his or her own religion. His or her religion is determined by the parent or guardian.

The religion of non-Muslim minors becomes again the subject of contention in a broken marriage where one of the parents changed his or her religion and not being followed by the other spouse. Now the question becomes whether the determination of religion of a non-Muslim minor is determined by a parent or both parents.

The proposition for the mere need of a parent is arguable since the Federal Constitution states in singular that the religion of a minor "shall be decided by his parent or guardian".<sup>61</sup> This issue was not in question in *Teoh Eng Huat* since the focus was on the capacity of a non-Muslim minor to change her religion on her own. *Subashini a/p Rajasingam v Saravanan a/l Thangathoray* considered the very point of whether to read the word "parent" as singular or plural.<sup>62</sup> The Federal Court decided that since the word "parent" in the singular is

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<sup>59</sup>*Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1986] 2 MLJ 228.

<sup>60</sup>*Teoh Eng Huat v Kadhi, Pasir Mas & Anor* [1990] 2 MLJ 300, SC.

<sup>61</sup>Federal Constitution, Article 12(4).

<sup>62</sup>In *Subashini a/p Rajasingam v Saravanan a/l Thangathoray and other Appeals* [2008] 2 MLJ 147, FC.

used under Article 12(4) of the Federal Constitution, either parent has the right to convert their child to Islam.

A later case on the change of religion of minors is the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak*.<sup>63</sup> The Federal Court considered the relevant observation in *Subashini* as *obiter*. The Court considered that reading the Eleventh Schedule of the Federal Constitution together with Article 160(1) means that the word “parent” has to be read as “parents”.<sup>64</sup> Although the Malay translation of the Federal Constitution of “parent” states “*ibu atau bapanya*”, the Malay translation could not be considered authoritative under Article 160B of the Federal Constitution since no evidence of the necessary prescription as required under Article 160B was issued.<sup>65</sup> Applying those principles, the Federal Court proclaimed that the certificate of conversion issued by the Registrar of Converts for the purported conversion of three children was void since, among others, the mother of the children did not consent to such conversion.<sup>66</sup>

Such decisions in questioning the conversion of children to Islam bring into mind the unfortunate saga of *In re Maria Huberdina Hertogh* or the case of *Natrah* where an infant who was brought up as a Muslim was ordered by the Court to be with her Christian father and was brought to the Netherlands against her wishes.<sup>67</sup> The case caused a riot in Singapore in 1950. One may take comfort in the fact that in the case of *Natrah*, in contrast to existing situations, perhaps the sensitivity and hurtful feelings were compounded by the perception

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<sup>63</sup> *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors* [2018] 1 MLJ 545, FC.

<sup>64</sup> The relevant provision under the Eleventh Schedule provides that “words in the singular include the plural”.

<sup>65</sup> Article 160B provides: Where this Constitution has been translated into the national language, *the Yang di-Pertuan Agong may prescribe such national language text to be authoritative*, and thereafter if there is any conflict or disagreeing between such national language text and the English language text of this Constitution, the national language text shall prevail over the English language text. (Emphasis added)

<sup>66</sup> The authority of the Registrar of Muallaf (Converts) is derived from sections 96, 100, 101, and 106 of the Administration of the Religion of Islam (Perak) Enactment 2004.

<sup>67</sup> *In re Maria Huberdina Hertogh* [1951] 17 MLJ 164, CA.

that the colonial powers were continuing bullying and riding roughshod over all things sacred felt by the indigenous masses.<sup>68</sup>

## CONCLUDING REMARKS

The parties of the Federation of Malaya Agreement in 1955 and the later agreement of 1963 recognised the importance of the traditional elements and the necessary framework for the coming together of different entities under the umbrella of a federation. The commission entrusted to draft the Federal Constitution appreciated the necessity of fundamental liberties to be embedded in the Constitution.

Then, it is left for the judges, such as Tan Sri Harun M. Hashim, to give life to the provision of the Constitution. The Constitution being a living document requires construction suitable to the evolving needs of the society. Examples of these evolving needs could be seen in setting limits to the freedom of association of members of Parliament and State Legislative Assemblies. For others, such as the law on contempt of court, it remains to be seen how the law would be developed by the judges or would the legislature intervene. Tan Sri Harun M. Hashim contribution is a lasting legacy in the development of the law, not only for his steadfastness, integrity and independence; his pronouncement of the law will be continued to be cited and debated within the courts and outside the courts.

## ACKNOWLEDGEMENT

The completion of this article is made possible by the help of research assistants under the research grant entitled *Contribution of Tan Sri Harun M. Hashim in the Legal Development in Malaysia* (HAREG20-011-0011).

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<sup>68</sup> See for instance Tom Eames Hughes, *Tangled Worlds: The Story of Maria Hertogh*, Singapore: Institute of Southeast Asian, 1980; Fatini Yaacob, *Natrah: In the Name of Love*, Kuala Lumpur: Institute Terjemahan Negara Malaysia & UTM Johor, 2011.