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No. 13, 15 & 17, Leboh Pasar Besar,
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ATTN: MR. RAGUNATH KESAVAN

BY HAND

Dear Sir,

RE: PRESS RELEASE: SYARIAH COURTS MUST EMBRACE ALL LAWYERS 17TH JUNE 2010

Reference is made to your Press Release (PR) on the Malaysian Bar website dated the 17th of June 2010 and published at 1:29 p.m.

I read the above press release with much dismay for I believe there were many statements made that lacked erudition and is both inconsistent with the Federal Constitution (FC) and an affront to the intention of the founding fathers of this Federation.

High Court and Syariah Court

An express statement was made in the first paragraph of the PR that Malaysia has a dual legal structure i.e. a Syariah Law system and a Civil Law system. That is not entirely accurate.

Article 121(1) of the FC stipulates that there shall be two High Courts of co-ordinate jurisdiction and status i.e. the High Court of Malaya and the High Court of Sabah and Sarawak.

The Syariah Courts, on the other hand, are the creation of State Law and this is stipulated by reading Article 74(2) of the FC together with List II of the Ninth Schedule of the FC.

In fact, if one were to contemplate the basic structure of a Westminster Constitution, one would come to the realization that the 'doctrine of separation of powers' is entrenched within such constitutions. This is further evidenced by the fact that before the constitutional amendment by Act A704 in 10-06-1988, Article 121(1) read as follows:

> "*Subject to Clause (2) the* ***judicial power*** *of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status...*" [my emphasis]

As an adjunct, I'd also like to add that I see no reason why this amendment cannot be challenged for violating the basic structure of the FC. This proposition is also confirmed recently by the Federal Court in **Sivarasa Rasiah v Badan Peguam Malaysia & Anor [2010] 2 MLJ 333 @ Para 8** citing the seminal Indian Supreme Court case of **Kesavananda Bharati v State of Kerala, AIR 1973 SC 1461.**

There is ultimately no such thing as '*dual legal structure*' in Malaysia. There is only the judicial arm of the Federation being vested in the Civil Courts.

In the second paragraph of the PR, express assertion is made to highlight that it is the Federal Constitution that '*provides for and establishes the Syariah legal system*'. This is grossly inaccurate and I find it to great surprise that such a misunderstanding and misconstruction of the FC can come to be placed on the Malaysian Bar website for public consumption.

The constitution, organization and procedure of Syariah courts are State approved and they **only** have jurisdiction to deal with persons professing the religion of Islam and even then only on certain subject matters namely the personal laws of the Islamic religion and offences against the precepts of Islam.

Theoretically, the relevant State Legislative Assemblies could decide to abolish the Syariah Courts and such a measure would be constitutional. The Federal Parliament, on the other hand, cannot abolish the High Court(s) without a constitutional crisis at hand.

Conflict of Jurisdictions

Further, reference is made in the first paragraph of the PR to '*conflicts between the Syariah and civil law systems*'. This is a sophistic statement.

There are no conflicts between the Syariah jurisdiction and the Civil jurisdiction because of Article 121(1A) of the FC which ousts the jurisdiction of the High Court when a matter falls within the jurisdiction of the Syariah courts.

The cases which have come before the High Court involving apostates (persons no longer professing the religion of Islam) are matters of constitutional importance in that they concern Article 11 of the FC and thus belong to the jurisdiction of the High Court.

It must be emphasised that Article 121(1A) of the FC does not confer jurisdiction on the Syariah Courts to interpret the FC to the exclusion of the High Court (**Abdul Kahar Ahmad v. Kerajaan Negeri Selangor Darul Ehsan [2008] 4 CLJ 309, FC**).

It must also be fervently nailed into every Malaysian's head the vision our forefathers had for Malaysia. The Alliance Memorandum submitted to the Reid Commission in 1956 states that:

> "the religion of Malaya shall be Islam ... and **shall not imply that the state is not a secular state.**" [my emphasis]

All laws, including the Administration of Islamic Law (Federal Territories) Act 1993, are passed by a law making body after debates, executed by the relevant executive bodies and are interpreted by the High Court.

Thus, Malaysia is a secular state.

Discrimination against Non Muslim lawyers

In the second paragraph of the PR, Article 8(2) of the FC was alluded to in that there is a prohibition of discrimination against citizens on the ground only of religion. While this is true, one must consider the opening phrase of Article 8(2), that is:

> *"(2) **Except as expressly authorized by this Constitution**, there shall be no discrimination against citizens on the ground only of religion..."* [my emphasis]

Now, if one reads Article 8(2) together with List II, Item 1 of the Ninth Schedule of the FC, one would come to the very obvious conclusion that the FC permits the Syariah Court **only** to have jurisdiction over persons professing the religion of Islam. This disparate application of jurisdiction can be construed as '*discrimination authorized by the Constitution*'.

The relevance of this '*discrimination*' is noteworthy when it comes to contempt in the Syariah Court.

Section 229(1) and (2) of Syariah Court Civil Procedure (Federal Territories) Act 1998 is relevant as it stipulates:

> *(1)* ***The Court shall have the jurisdiction*** *to commence proceedings against any person for contempt of Court and may, in such proceedings,* ***make an order of committal for a period not exceeding six months or may impose a fine not exceeding two thousand ringgit.***
>
> *(2)* ***Where contempt is committed in the face of the Court****, it shall not be necessary for the Court to serve the notice to show cause but the Court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and* ***has the opportunity to be heard*** *in his own defence, and shall make a proper record of the proceedings.* [my emphasis]

This begs the important question that if a Non Muslim lawyer commits contempt in the face of the Court, how does the Syariah Court make an order against a person who is not professing the religion of Islam?

The reality of the matter is a Non Muslim lawyer will have complete immunity in the Syariah Court when it comes to an order of committal. This would make a complete mockery of the Syariah Courts and if an order is nonetheless made would result in the Syariah Court acting *ultra vires*.

It would also, more alarmingly, amount to an exercise of an Islamic Court's power over Non Muslims and this would be very ill advised both at the social and political level. It would, very inevitably, cause Non Muslim citizens (who aren't lawyers) to ask – "What's next?"

One would also be faced with a further constitutional dilemma i.e. how does one reconcile the immunity afforded to Non Muslim lawyers with the stipulation of Article 8(1) of the FC that '*All persons are* ***equal before the law***'?

Therefore, allowing Non Muslims to practice in the Syariah Courts would not be feasible and if considered in light of Article 8(1), would simply be unconstitutional.

Misgivings and Fears about the Syariah legal system

In finality, a statement is made in the last paragraph of the PR that '*Permitting all lawyers to practise in the Syariah courts will reduce any misgivings or fears about the Syariah legal system*'. This amounts to nothing more than an emotive appeal without any legal value or substance.

Such a statement almost seems to imply that Non Muslims are in some way affected by the Syariah Courts. That is not at all true. The truth of the matter is Non Muslims need not even concern themselves with the Syariah Court and vice versa.

It must be stressed that the founding fathers of our country were explicit in that this country shall remain to be a secular state and Article 3(1) of the Federal Constitution itself stipulates that:

> "Islam is the religion of the Federation; **but other religions may be practised in peace and harmony in any part of the Federation.**" [my emphasis]

One must also pay great heed to the words of the then Lord President Tun Salleh Abbas in the Supreme Court case of **Che Omar Bin Che Soh v. Public Prosecutor [1988] 2 MLJ 55** where it was held that 'Islam' in Article 3(1) of the Federal Constitution relates only to *rituals* and *ceremonies* performed within the Federation and that the law in Malaysia is secular law.

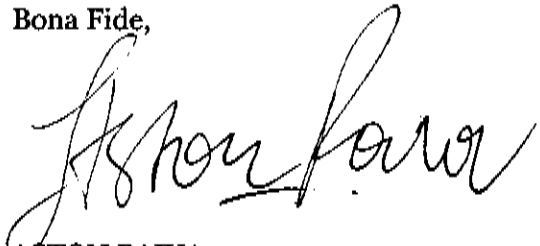
Conclusion

I can only contemplate that having spewed such misinformation to the public that it would be most prudent for the Bar Council to reconsider its position on this matter and if it is persuaded by my arguments, to issue a retraction of the statements made on the 17th of June 2010.

Let us also not forget that equality simply does not mean treating one class like another. Equality must exist substantively. If a particular arrangement has even an indirect possibility of perpetuating inequality, then it must be deconstructed.

It would also, as always, be most enlightening for the Bar Council to highlight the historical accounts and debates during the drafting of the Federal Constitution which expresses Malaysia's standing as a secular state operating under a constitutional democracy.

Bona Fide,



ASTON PAIVA

Advocate & Solicitor of the High Court of Malaya