
KEYNOTE SPEECH**LEGAL RESPONSE, RULE OF LAW AND JUDICIAL DEVELOPMENTS IN TIMES OF COVID-19 PANDEMIC: MALAYSIAN EXPERIENCE**

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Abstract

The unprecedented COVID-19 pandemic continues to take a severe economic toll and inflict considerable human suffering. Despite significant efforts coordinated at the international level by various organisations, the swift impact of the crisis has asymmetrically affected the global and local populations through continuous disruptions to daily life. Consequently, a number of COVID-19 related restrictions and security measures are introduced by governmental bodies to mitigate the short and long-term fallout of the pandemic. Accompanied by legal developments to enable and implement them, these authorities play an essential role in maintaining order and control to limit the impact of the outbreak. However, where governments respond with an expanded role and the compelling presence of law enforcement, the struggle to uphold the rule of law will be more apparent than ever. This speech explains whether these measures can be materialised without infringing our existing rights and rule of law within the global and the Malaysian context and canvasses the developments on the front of the judiciary to cater to the 'new norms' and order.

Keywords: COVID-19, Rule of Law, Judicial Developments, Malaysian Experience, Legal Response

بسم الله الرحمن الرحيم والحمد لله رب العالمين، والصلاة والسلام على أشرف الأنبياء والمرسلين
سيدنا محمد وعلى آله وصحبه أجمعين... والسلام عليكم ورحمة الله وبركاته

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- COVID -19 and the struggle with Fake news
- Conclusion

[SLIDE 3] Introduction: The Beginning of the COVID-19 Outbreak

Ever since its emergence from Wuhan, China, the COVID-19 pandemic has plagued Malaysia in several waves. The first took place between 24th January to 15th February 2020, with an initial record of 22 cases consisting mainly of infected individuals arriving from China. Less than a fortnight later, 27th February 2020 saw a second surge with an alarming increase in infections due to local community transmissions, with the highest being recorded at 277 cases.

Following the second wave, drastic and immediate action was taken by the Malaysian Government to limit the spread of the pandemic by declaring a Movement Control Order (MCO), to be in effect from 18th until 31st March 2020 under the *Prevention of Control of Infectious Disease 1988 [Act 342]*.

2020 Movement Control Order (Malay: *Perintah Kawalan Pergerakan Malaysia 2020*), commonly referred to as the MCO or PKP, is implemented as a preventive measure by the federal government of Malaysia in response to the COVID-19 pandemic in the country on 18 March 2020. The order was commonly referred to in local and international media as a "lockdown" or "partial lockdown.

Subsequently, physical movements were restricted through immediate closure of schools, universities and places of worship as well as the banning on international travel - all implemented with the aid of armed forces. All persons residing in Malaysia, citizen or not, were obliged to abide by this order. The only exceptions were made for those listed as essential services. (Prime Minister's Office, 2020).

[SLIDE 4] Global Restriction Imposed by the Governments- Advice from the World Health Organization (WHO)

- 2020 United States anti-lockdown protests
- In Argentina, the protest consisted mostly of small business owners demanding the local and national governments to be allowed to work, under a sanitary protocol.
- In Brazil, demand a "military intervention" into the handling of the coronavirus situation.
- In United Kingdom, a protest was held at Trafalgar Square, London 25 September, 2020 which witnessed the emergence of themes about the New World Order, anti-vaccines, anti-cooperation, anti-government, anti-monarchy and anti-lockdown.

[SLIDE 5] COVID-19 and The Affected Freedom

Freedom of movement and liberty are affected due to the restrictions imposed by the government

[SLIDES 6] Existing Laws In Malaysia: COVID-19 And The Administration Of Law

It is important to adopt measures to contain COVID-19, but it must be done in a manner that is protective of essential human rights (Lee and Mun, 2020).

Article 9 (1) of the Federal Constitution prohibits the banishment and freedom of movement , it states that no citizen shall be banished or excluded from the Federation.

However, in Article 9 (2) Subject to Clause (3) and to any law relating to the security of the Federation or any part thereof, public order, public health, or the punishment of offenders, every citizen has the right to move freely throughout the Federation and to reside in any part thereof.

To control the COVID 19- the government has the right to curb certain rights include certain right for the sake of public order and public health.

This is in line with the Prophet Muhammad s.a.w hadith. in the face of the current pandemic, Muslims should therefore pray for Allah's help and protection, and obey Allah, His Prophet, government instructions (authority) and the advice of those who know, namely health experts.

The Holy Prophet said, *"If you hear of an outbreak of plague in a land, do not enter it; but if the plague breaks out in a place while you are in it, do not leave that place"* (Bukhari, #5728).

He also said, "Do not graze a sick herd with a healthy one, [or, Do not put a sick patient with a healthy person]"

(Bukhari, #5771; Muslim, #2221).

[SLIDE 7] Existing Laws in Malaysia and COVID 19: the Administration of Law

Senior Defence Minister, Dato Seri Ismail Sabri Yaakob said those who flout the mandatory mask rule can be subject to prosecution under the Prevention and Control of Infectious Diseases Act 1988 that provide for a fine of up to RM1,000 (USD 250) close to the minimum monthly wage of RM1,100 or RM1,200. The law also imposes a penalty of six months' imprisonment, or both fine and jail. Ismail Sabri said the public can also wear hand-made masks that comply with the specifications provided by the World Health Organization (WHO).

[SLIDE 8] The Six Stages of Orders Introduced by The Malaysian Government

Third wave of COVID-19 in Malaysia, started early October, after Election in Sabah 26 September, 2020.

Given the uncertain nature of COVID-19, *Majlis Keselamatan Negara* (The National Security Council), chaired by the Prime Minister, together with his Ministers organises regulatory actions, risk assessment and risk communication to the public. The government also implemented proactive risk management, border control and travel bans, followed by economic and budgetary responses (The Ministry of Health,

2020). Such reflect rights-respecting mechanisms that seek to ensure that accurate, reliable and up-to-date information about the virus and the current situations across the country are communicated to the public in a transparent and timely manner.

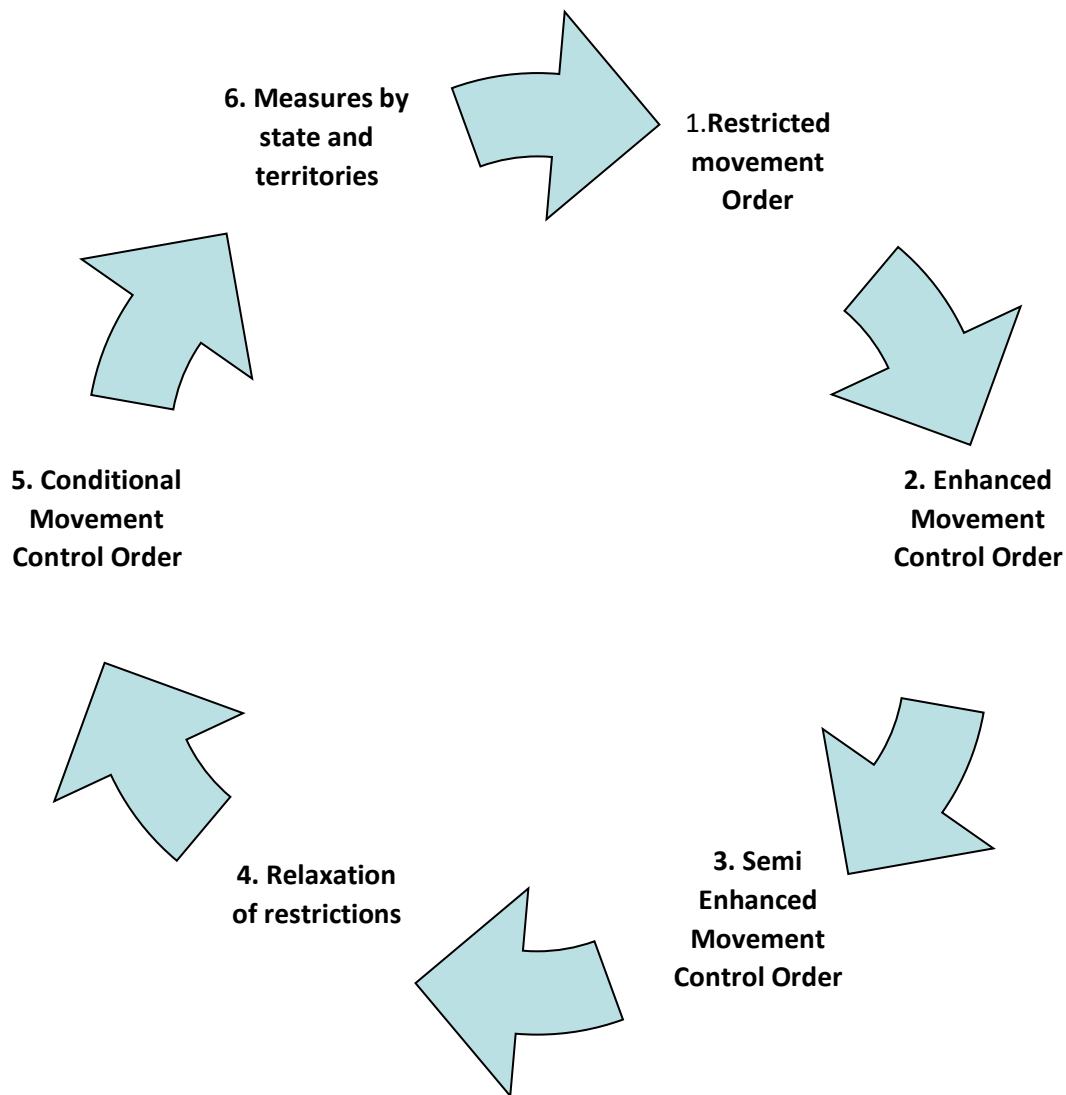


Figure 1: The Six stages of Orders by the Malaysian Government

Compared to the United States of America, United Kingdom and Italy, the introduction of movement control order has a high level of compliance by the Malaysians.

[SLIDE 9] Is it necessary to invoke the emergency power to control the spread of diseases?

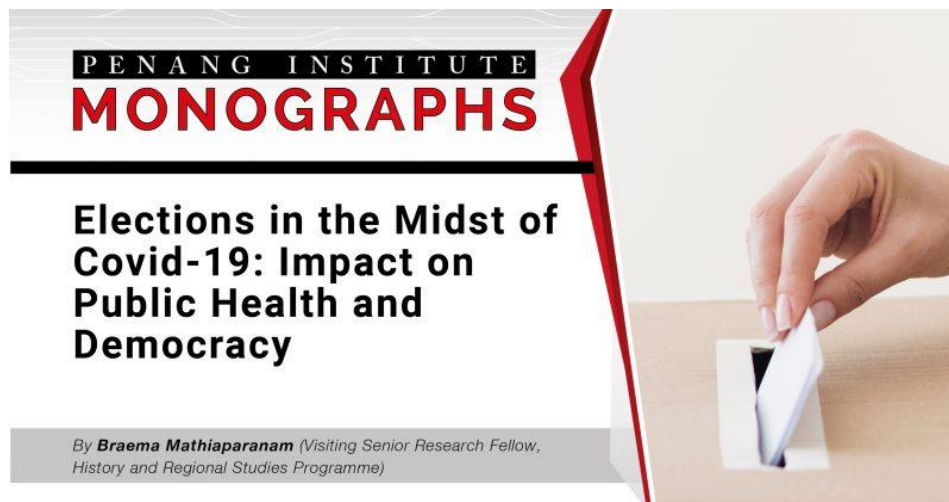
Currently, Malaysia is embarking the third wave of pandemic COVID-19 and the numbers of those affected are high. Is it necessary to invoke the emergency power to control the spread of diseases? Do we need to invoke emergency laws? Here, the issue of current political scenario in Malaysia, are we heading to General Election during this pandemic?

Under the Malaysian law, the Proclamation of Emergency can be announced, in accordance with Article 150 of the Federal Constitution,

...If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.

Instead of invoking Article 150 of the Federal Constitution, the national legal response has primarily been driven by an ordinary legislation, namely the *Prevention and Control of Infectious Diseases Act 1988 [Act 342] (PCIDA)*. The Director General of Health has been empowered to be in charge, including to pronounce new regulations and offences necessary to encounter the public threat.

[SLIDE 10] Election during Pandemic?



In a research entitled *Elections in the Midst of COVID-19: Impact on Public Health and Democracy* by Dr. Braema Mathiapparanam:

- COVID-19 has necessitated adjustments in electoral processes. There are lessons to be learned from various countries on the management of elections during such times.
- In order to hold elections during a pandemic, governments have had to implement safety measures for everyone,
- Political parties have turned to social media for political campaigning, increasing the public need for reliable and verifiable information that can be shared quickly, ethically and accurately.

- Emergency provisions unrelated to public health and which undermine fair and free electoral processes or place unnecessary restrictions on the mass media threaten constitutional principles and democracy.
- Based on the observations, almost all countries who have conducted elections during the pandemic, show an increase in infection during the incubation 14 days after the election. Clearly, fair and safe elections can be held during this pandemic as long as there is cooperation, proper preparations and effective communication between the government and the people.

Although the measures announced thus far have been implemented in a manner that appear to safeguard rule of law, the wide discretionary scope of power entrusted to the National Security Council, which derives its authority from the National Security Council Act 2016 (NSCA 2016) can raise legitimate concerns over the extent to which rule of law can be preserved and whether the concentration of power in the executive body could trump the tenet of separation of powers. If 'a national security area' is declared by the Prime Minister on the advice of the Council, then the Council is allowed to authorize security forces to conduct detention without warrant, seize property, and impose curfews at its discretion, noting that decisions made in pursuant to the authority grounded in NSCA 2016 are immune from judicial review.

[SLIDE 11] The State of Emergency- The Malaysian Experience

In the past, the declarations of the state of emergency in Malaysia took place inter alia, during the following crises:

- (a) The upsurge of the Malayan Communist Party (1948)
- (b) Conflict with Indonesia (1964)
- (c) Sarawak Constitutional Impasse (1966)
- (d) Ethnic riot (1969)
- (e) Kelantan (central and state relation crisis) (1977)

In the context of threat to the right to health, the United Nations Committee on Economic, Social and Cultural Rights links the right itself to the realization of other human rights:

The right to health is closely related to and dependent upon the realization of other human rights, as contained in the International Bill of Rights, including the rights to food, housing, work, education, human dignity, life, non-discrimination, equality, the prohibition against torture, privacy, access to information, and the freedoms of association, assembly and movement. These and other rights and freedoms address integral components of the right to health (Office of the High Commissioner for Human Rights, 2000)

Public health concerns linked to SARS and H1N1 that plagued the country emerged on a more manageable scale. The MCO introduced by the government as the current worldwide pandemic unfolded and now continues to outspread could herald tensions between public health interests and personal rights and freedom, threatening democratic principles such as rule of law.

Beyond the national sphere, authoritative guidance on government responses that limits human rights on the basis of public health or national emergency can be borrowed from the Siracusa Principle, adopted by the UN Economic and Social Council in 1984. The Principles underline safeguards that can guide states to ensure emergency declarations and measures are not simply a disguise or cloak for repressive actions and arbitrary power against any section of the population, including the minority and vulnerable groups (American Association for the International Commission of Jurists, 1984). Although Malaysia is not party to the International Covenant on Civil and Political Rights 1966, the following principles available under this instrument are useful to ensure those entrusted with the power to enforce public health measures adhere to our constitutional safeguards. Such measures and responses must be -

1. issued and implemented in accordance with the law;
2. targeted at a legitimate objective of general interest;
3. strictly required in a democratic society to meet the objective;
4. the least intrusive and restrictive available to reach the objective;
5. based on scientific evidence and neither arbitrary nor discriminatory in application; and
6. of limited period, respectful of human dignity, able to be reviewed

Quarantine and isolation are the most complex and controversial public health powers (Lawrence. O Gostin, 2020). During the time of uncertainty, the government has to take a firm decision after being informed and advised by the health experts.

[SLIDE 12] Commitment to the Rule of Law in the State of Emergency

I would like to highlight a dissenting judgment by Lord Atkin protested giving an uncontrolled power of imprisonment to the minister. He said,

‘In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.’

It leaves us with a question: Are a person’s fundamental rights lost during a pandemic?

Commitment to the Rule of Law in the State of Emergency

and the Rights of an Innocent Person

Liversidge v Anderson [1942] AC 206

In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.

Lord Atkin, Liversidge v Anderson [1942] AC 206 at 244

The words have only one meaning ... I know of only one authority which might justify the suggested method of construction: 'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean, neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master – that's all.'

Lord Atkin, Liversidge v Anderson [1942] AC 206 at 244-245




Figure 2: Commitment to the Rule of Law in the State of Emergency

[SLIDE 13] Rule of Law: Aspects relating to COVID-19

Rule of law is a historic ideal with appeals that remain rhetorically potent. Yet the precise meaning of ‘rule of law’ is perhaps less clear than before. Many invocations are entirely conclusory, and some are seen as mutually varied and shifting (Fallon, 1997). Within the Anglo-American traditions, the rule of law ideals has been contested, with the most famous exposition coming from a-turn-of the century

British lawyer, A.V. Dicey, who associated the rule of law with right-based-liberalism and judicial review of governmental action. (Fallon, 1997).

According to Dicey, the rule of law comprises three ideals:

- (a) law prevails over arbitrariness and discretionary power;
- (b) “every man ... is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals,” and
- (c) “the general principles of the constitution (as, for example, the right to liberty, or the right of public meeting) are ... the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts,” rather than the result of legislation.

Dicey’s thoughts on these three ideals purport to show that they guarantee that everyone is subject to rules rather than person. (Dicey, 1915).

[SLIDE 14] Rule of Law: Aspects relating to COVID-19

The Rule of Law should be given a wider meaning.

It is not under the sole responsibility of the authority. It is the responsibility of all.

Rule of law must not be appreciated only because of formalistic reasons, the meaning of the rule of law should be connected to peace, establishment of an environment that is conducive to liberty, less arbitrary, more predictable, more peremptory, and less coercive.

According to Fuller 1964, it is “a bond of reciprocity...a mutuality of constraint between the ruler and the ruled.”

[SLIDE 15] Bentham on Public Interest

At times like COVID-19, public interest is paramount.

English philosopher and founder of modern utilitarianism, Jeremy Bentham in commenting on public interest explained that:

“It is in vain to talk of the interest of the community, without understanding what is the interest of the individual. A thing is said to promote the interest, or to be for the interest, of an individual, when it tends to add to the sum total of his pleasures: or, what comes to the same thing, to diminish the sum total of his pains.”

In light of the aforementioned, MCO brings to light principles that can be compromised and undermined, such as:

- a) equality (e.g. the impact of confinement and fines on economically disadvantaged groups)
- b) access to justice (e.g. right to be heard, procedural technicalities)
- c) democracy and freedom (liberty, movement)
- d) accountability (e.g. omissions and negligence exposing individuals to grave health risk)

While the outbreak has affected everyone, not every impact is equal. In an effort to curb the spread of the virus, nations scale down their economic activity, leading the world into a recession. With disruptions in every sector, the economic standstill is driving the world into a recession with varying burden across different levels of income earners. It is found that those with lower income are most at risk due to social distancing measures and are more likely to be heavily damaged by the pandemic.

[SLIDE 16] Administering Justice and Upholding the Rule of Law

- Judges who are at the forefront of justice will have to put into practice the application of legal principles at its best- such as the principles of legality, proportionality, necessity, equality and non-discrimination.
- Proper application of rule of law will require both public interest and private fundamental human rights to be preserved.

[SLIDE 17] World Justice Project on Rule of Law Index

In determining the scope of rule of law in relation to the pandemic, I would like to highlight a recent survey by the *World Justice Project Rule of Law Index®*. This project covers 128 countries and jurisdictions, a survey of more than 130,000 households and 4,000 legal practitioners and experts to measure how the rule of law is experienced and perceived worldwide. The WJP conducted this by examining and outlining the following factors as representing the elements of Rule of law:

- the government powers
- open government
- fundamental rights
- absence of corruption
- order & security
- regulatory enforcement
- civil justice & criminal justice.

It was found that in all the aspects mentioned, there have been a decline in the appreciation of the rule of law.

[SLIDE 18] Malaysian Judiciary: The New Normal

Despite the fact that the electronic court system in Malaysia is not new, the judiciary has taken steps to amend the relevant laws such as the Court of Judicature Act 1964, Subordinate Courts Act 1948, Rules of the Federal Court 1995, Rules of Court of Appeal 1994 and Rules of Court 2012 to give effect to conduct online hearings.

Initiatives include the adoption of Civil/ Criminal Case Management by way of e-Review or video conferencing, e-mail and e-filing. (*The Star*, 2020).

SLIDE 19: Challenges Faced by the Malaysian Government

Among the legal challenges faced by the Malaysian government during the first RMO was:

- a) The Malaysian authorities have arrested hundreds of people for violating the Movement Control Order since mid-April. Violators are fined, jailed or sent to perform community service as part of their punishment.
- b) Fake News- The government has taken a strict approach in dealing with the virulent spread of fake news to curb panic among the Malaysian citizens. The police and the Malaysian Communications and Multimedia Commission (MCMC) have opened 270 investigation papers on cases of fake news

relating to the COVID-19 pandemic. The Senior Minister (Security Cluster) Datuk Seri Ismail Sabri Yaakob said of the total, 133 were still being investigated while 35 have been charged in court. (*The New Straits Time*, 2020)

- c) It has led to a decrease in the national crime rate by around 70%.
- d) A slight increase in domestic violence

[SLIDE 20] Conclusion

During this time of uncertainty in facing the pandemic of Covid-19, leadership, empathy and prompt respond are needed not only from the politicians and administrators but also from the legal fraternity in ensuring that rule of law is being upheld not only by the members of the society but also those who are responsible in governing the country.

Commitment to the Rule of Law in the State of Emergency

After having put my suggestion of invoking the Emergency Powers, let me end by toning it with a reminder of Lord Atkins *dicta* in *Liversidge v Anderson* [1941]

I would like to highlight a dissenting judgment by Lord Atkin protested giving an uncontrolled power of imprisonment to the minister. He said,

‘In England, amidst the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons, and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.’

It leaves us with a question: Are a person’s fundamental rights lost during a pandemic?

There is no easy answer to the pandemic that we are facing at the moment. In response to calamity, Islam teaches us to be patient in trials as Allah mentioned in the following verse:

“Who, when disaster strikes them, say, ‘Indeed we belong to Allah, and indeed to Him we will return’” (2:156).

[SLIDE 21]

Finally, as Muslims we must and keep on praying for what we are facing at the moment. Bismillahirrahmanirrahim, O Allah! I seek refuge in You from leukoderma, insanity, leprosy and evil diseases. Amin ya rabb

Thank you.

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