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Seminar on Local Government in Malaysia: The Search for New Directions

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***Local government acts:
their relevance***

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Local Government Acts – Their Relevance

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Introduction

Thirteen States and three Federal Territories make up the federation of Malaysia. There are three tiers of government: federal, state and local; each with its own jurisdiction to pass laws.

Acts of Parliament are laws legislated by Parliament. They tend to affect the country as a whole. Matters under which the Parliament has jurisdiction are listed in List 1¹ of the Ninth Schedule in the Federal Constitution (*the Constitution*). It is also called the Federal List and the areas it covers include external affairs; defence of the Federation; internal security; civil and criminal law and procedure; the administration of justice and much more.

State Assemblies pass State Enactments. These enactments affect the States that pass the laws,² not the Federation as a whole. Under List II³ of the Ninth Schedule, the State List enables State Assemblies to legislate on Islamic law; local government including local administration and local government elections; services of a local character like burial and cremation grounds; and a few others.

Local authorities make by-laws⁴ which have to be confirmed by the State Assemblies.⁵ These by-laws are “for matters that are necessary or desirable for the maintenance of health, safety or well-being of the inhabitants or for the good order and government of the local authority”. They regulate, for example, the licensing and exhibition of advertisements; the establishment, regulation and management of parks; and the regulation and licensing of places of entertainment.⁶

The last step before all those laws and by-laws can be enforced is to be published in the government Gazette.

Apart from those formal structures, judges also make laws when they pass judgements on cases. Malaysia follows the common law system which subscribes to the doctrine of

¹ Article 74(1) of the Constitution

² Article 73 of the Constitution: “In exercising the legislative powers conferred on it by this Constitution -
(a) Parliament may make laws for the whole or any part of the Federation and laws having effect outside as well as within the Federation;
(b) the Legislature of a State may make laws for the whole or any part of that State.”

³ Article 74(2) of the Constitution

⁴ Section 102, the LGA.

⁵ Section 103, the LGA.

⁶ Section 102, the LGA.

precedent. This means lower courts are generally bound to follow the decisions of the higher courts.⁷ This is one of the key reasons why an independent judiciary is of utmost importance.

When *fatwas* are issued, then passed by the State Assemblies and gazetted, they also become law.⁸ However, these laws affect Muslims only. Muslims who breach *fatwas* would be liable for committing an offence.⁹

The issue of what laws can be legislated or amended by State Assemblies has come into close scrutiny after the results of the general elections on 8th March 2008. For the first time since independence, five states are now under the control of the Pakatan Rakyat. The Pakatan Rakyat had made election promises related to important issue of governance. They are, among others, the need for freedom of information and to reinstate local council elections. Progress in these two key areas will enable more transparency, accountability and participation by the *Rakyat*.

For this morning's discussion, I will focus on Acts which affect local government and in particular, those which are relevant to the issue of local council elections.

A brief history of local authorities in West Malaysia

In the 1950s and 1960s, local councillors were democratically elected. There were 373 local authorities with over 3,000 elected representatives out of 4,223 local councillors.¹⁰ The first city council elections were held in Georgetown, Penang on 1st December 1951.

After independence, the most prominent local councils apart from Kuala Lumpur, were Penang, Ipoh and Melaka. The Georgetown City Council of Penang was the richest local authority, with annual revenue twice that of the State of Penang. An interesting feature of the local councils at that time was that the largest councils were consistently under the control of parties in opposition to the Government.¹¹

⁷ *stare decisis et non quia movere* – to stand by and adhere to decisions, and not disturb what is settled

⁸ See for example, Section 34(3), Administration of Islamic Law (Federal Territories) Act 1993: "Upon publication in the Gazette, a fatwa shall be binding on every Muslim resident in the Federal Territories as a dictate of his religion it shall be his religious duty to abide by and uphold the fatwa..."

⁹ See for example, Section 4(1), Syariah Criminal Offences (Federal Territories) Act 1997: "Any person who teaches or expounds in any place... any doctrine or performs any ceremony or act relating to the religion of Islam shall, if such doctrine or ceremony or act is contrary to any... fatwa for the time being in force in the Federal Territories, be guilty of an offence and shall upon conviction be liable to a fine not exceeding five thousand ringgit or to whipping not exceeding six strokes or to any combination thereof."

¹⁰ Saravanamuttu, J. (2000) "Act of Betrayal: The Snuffing Out of Local Democracy in Malaysia". Online <http://www.aliran.com/oldsite/monthly/2000/04h.html> pp.1-5, Malaysia.

¹¹ Saravanamuttu, *op. cit.* at pp. 2-3

In the 1950s and early 1960s, many allegations of maladministration and malpractices of local government came to the fore, resulting in the June 1965 Royal Commission of Enquiry to Investigate into The Workings of Local Authorities in West Malaysia (*the Royal Commission*). Among others, the Royal Commission Report published in December 1968 recommended that every State Capital in West Malaysia should be administered by a local authority, consisting of elected representatives. This should also be extended to all local authorities outside State Capitals.¹²

A Cabinet Committee, headed by Hassan bin Mohd Noh, the Secretary General of the Ministry of Technology, Research and Local Government, was set up to study the implications of the Royal Commission Report (*the Cabinet Committee*). The Cabinet Committee published its report dated 4th June 1971 (*the Cabinet Committee Report*), which included the report dated January 1971 from the Development Administration Unit (DAU) of the Prime Minister's Department (*the DAU Report*).

However, the DAU Report, which appeared to be much influenced by the May 13, 1969 incident, was not in favour of the recommendations of the Royal Commission. Its key conclusions were that the system recommended by the Royal Commission¹³ :

- (i) will not facilitate the accomplishment of the objectives of national unity and socio-economic development of West Malaysia. It was inconsistent with the basic objectives of the Second Malaysia Plan and the New Economic Policy.
- (ii) was structurally complicated and costly. There would be an over democratisation and over-government at the local government level. The system would complicate decision-making process while failing to provide solutions to the existing problems of maladministration and malpractices.
- (iii) would result in more than 100 units of separate local authorities, controlled by different political parties. This would add to the problems of vertical intergovernmental relationship, which would lead to further political and administrative fragmentation. This would adversely affect the process of national development.
- (iv) would bring about a disequilibrium in the fragile inter-ethnic, politico-economic power structure. This will add to instability and disunity.
- (v) would lead to the establishment of a local government system controlled by oligarchic elites. That system will allow the 'haves' to dominate, control and exploit the 'have-nots'.

¹² The Royal Commission Report, *ibid.* pp.105-106

¹³ The Cabinet Committee Report, *ibid.* Appendix A, The New Local Government System for West Malaysia : Problems and Implications, Bahagian Kemajuan Pentadbiran, Jabatan Perdana Menteri, Kuala Lumpur, January 1971, pp 42-44.

The conclusions in the DAU Report eventually led to the abolishment of local council elections. After a period of suspending local government elections, the LGA was passed. Section 15(1) of the LGA states that:

“Notwithstanding anything to the contrary contained in any written law, all provisions relating to local government elections shall cease to have force or effect.”

Can State Governments reinstate local government elections without the LGA being amended?¹⁴

Item 4 of List II of the Ninth Schedule to the Constitution that provides that local government outside the Federal Territories of Kuala Lumpur, Labuan and Putrajaya may deal with the:

“(a) Local administration; municipal corporations; local, town and rural board and other local authorities; local government services, local rates, local government elections...”

However, the matter of Federal-State arrangement is not so clear cut as Article 76 of the Constitution provides for Parliament to have the power to legislate for States under certain circumstances:

“(1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:

(a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member; or

(b) for the purpose of promoting uniformity of the laws of two or more States; or

(c) if so requested by the Legislative Assembly of any State.

(2) No law shall be made in pursuance of paragraph (a) of Clause (1) with respect to any matters of Islamic law or the custom of the Malays or to any matters of native law or custom in the States of Sabah and Sarawak and no Bill for a law under that paragraph shall be introduced into either House of Parliament until the Government of any State concerned has been consulted.

(3) Subject to Clause (4), a law made in pursuance of paragraph (b) or paragraph (c) of Clause (1) shall not come into operation in any State until it has been adopted by a law made by the Legislature of that State, and shall then be deemed to be a State law and not a federal law, and may accordingly be amended or repealed by a law made by that Legislature.

(4) Parliament may, for the purpose only of ensuring uniformity of law and policy, make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land,

¹⁴ Much of this section is extracted from an unpublished article. Khoo, A.C.H. (2008) “Bringing Back Local Council Elections.”

easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government; and Clauses (1)(b) and (3) shall not apply to any law relating to any such matter.”

This means that Parliament, for the purpose stated in Article 76(4) of the Constitution, may make laws with respect to local government. This would then include local government elections – something provided for under the State List (List II) as well. If that happens, then regardless of the provision of Article 76(3) of the Constitution, there will be no requirement for State Assemblies to pass the law first for it to have effect in the States.

So can the entire of Article 76(3) of the Federal Constitution be avoided by virtue of Article 76(4) of the Constitution?

What is the effect of Article 76(3) which reads “and shall then be deemed to be a State law and not a federal law, and may accordingly be amended or repealed by a law made by that Legislature”?

Is such a law passed pursuant to Article 76(4) of the Federal Constitution still considered State law? If so, then it “may accordingly be amended or repealed by a law made by that Legislature”, or is it now purely a Federal law?

This issue of the working of Article 76(4) of the Constitution can be seen in the preamble to the LGA. It reads:

“An Act to revise and consolidate the laws relating to local government. WHEREAS it is expedient for the purpose only of ensuring uniformity of law and policy to make a law with respect to local government: Now, THEREFORE, pursuant to the provisions of Clause (4) of Article 76 of the Constitution BE IT ENACTED, by the Seri Paduka Baginda Yang di-Pertuan Agong with the advice and consent of the Dewan Negara and Dewan Rakyat in Parliament assembled, and by the authority of the same, as follows.”

This shows the drafters of the LGA clearly intended to take advantage of this “by-pass” provision.

After the Emergency (Suspension of Local Government Elections) Regulations, 1965 and the Emergency (Suspension of Local Government Elections) (Amendment) Regulations, 1965 had been passed, Parliament in 1973 repealed those two regulations and put in place the Local Government (Temporary Provisions) Act 1973.

The Local Government (Temporary Provisions) Act 1973 was also passed pursuant to Article 76(4) of the Constitution. Section 3 provides:

“(1) Notwithstanding anything to the contrary contained in any law and for so long as this Act is in operation, all provisions in any law relating to local government elections shall cease to have force or effect.”

In addition, there are also the implications of Articles 80 and 81 of the Constitution to consider.

Article 80 of the Constitution states:

“(1) Subject to the following provisions of this Article the executive authority of the Federation extends to all matters with respect to which Parliament may make laws, and the executive authority of a State to all matters with respect to which the Legislature of that State may make laws.

(2) The executive authority of the Federation does not extend to any matter enumerated in the State List, except in so far as is provided in Articles 93 to 95, nor to any matter enumerated in the Concurrent List, except in so far as may be provided by federal or State law; and so far as federal or State law confers executive authority on the Federation with respect to any matter enumerated in the Concurrent List it may do so to the exclusion of the executive authority of the State.

(3) So far as a law made under Clause (4) of Article 76 makes provisions for conferring executive authority on the Federation it shall not operate in any State unless approved by resolution of the Legislative Assembly of that State.

....”

This means there is a need to consider if the Local Government (Temporary Provisions) Act 1973 and the Local Government Act 1976 in any way conferred executive authority that belonged to the State on the Federation. If that is so, was there a need to have been a resolution of the Legislative assembly of that State to that effect under Article 76(3) of the Constitution?

This has to be balanced with the provision in Article 81 of the Constitution:

“The executive authority of every State shall be so exercised—

- (a) as to ensure compliance with any federal law applying to that State; and
- (b) as not to impede or prejudice the exercise of the executive authority of the Federation.”

The Constitution also provides in Articles 94 on the “Federal powers in respect of State subjects”:

“(3) Nothing in this Constitution shall prevent the Federal Government from establishing Ministries or Departments of Government to exercise the functions of the Federal Government under Article 93 and this Article in relation to matters within the legislative authority of a State, and such matters may include soil conservation, local government and town and country planning.”

In summing up the constitutional position, Article 76(4) of the Constitution provides that “Parliament may, for the purpose only of ensuring uniformity of law and policy, make laws with respect to....local government”.

Article 95A of the Constitution established a National Council for Local Government:

“(1) There shall be a National Council for Local Government consisting of a Minister as Chairman, one representative from each of the States, who shall be appointed by the Ruler or Yang di-Pertua Negeri, and such number of representatives of the Federal Government as that Government may appoint but, subject to Clause (5) of Article 95E, the number of representatives of the Federal Government shall not exceed ten.

...

(5) It shall be the duty of the National Council for Local Government to formulate from time to time in consultation with the Federal Government and the State Governments a national policy for the promotion, development and control of local government throughout the Federation and for the administration of any laws relating thereto; and the Federal and State Governments shall follow the policy so formulated.

(6) It shall also be the duty of the Federal Government and the Government of any State to consult the National Council for Local Government in respect of any proposed legislation dealing with local government and it shall be the duty of the National Council for Local Government to advise those Governments on any such matter.

(7) The Federal Government or the Government of any State may consult the National Council for Local Government in respect of any other matter relating to local government, and it shall be the duty of the National Council for Local Government to advise that Government on any such matter.”

Does this mean that when State Governments enact legislation in respect of local government (which would include local government elections), those States would still be subject to policy considerations at a Federal level?

On 1 June 1960 the Local Government Elections Act 1960 came into force (except for Kuala Lumpur which was bound by different Acts).

Section 5 of the Local Government Elections Act 1960 provides for the election of members of Town and Rural Boards as follows:-

“(1) Notwithstanding anything to the contrary contained in any written law which relates to Town Boards or Rural Boards in force in any State, the State Authority may, after consultation with the Election Commission in respect of the boundaries of the local area and the number of Councillors to be elected to the Town Council, Town Board or Rural Board having jurisdiction in such area, by order published in the *Gazette* of the State direct that the whole or a majority of the members of a Town Council, Town Board or Rural Board established in the State under any such written law shall be elected instead of appointed or nominated by the State Authority; and where any such order is made in respect of a Town Board or Rural Board such Board shall thereupon be called a Town Council, District Council or Rural District Council, as the case may be, and every member thereof shall be styled a Councillor.”

Section 5A of the Local Government Elections Act 1960 states:

“(1) Notwithstanding anything to the contrary contained in the provisions of any written law which relates to Local Councils in force in any State, the State Authority may, after consultation with the Election Commission in respect of the boundaries of the local area and the number of Councillors to be elected to the Local Council having jurisdiction in such area, by order published in the *Gazette* of the State direct that the whole or a majority of the members of a Local Council shall be elected under this Act.”

Both sections 5 and 5A of the Local Government Elections Act 1960 begin with the phrase “Notwithstanding anything to the contrary contained in any written law which relates to Town Boards or Rural Boards in force in any State” and “Notwithstanding anything to the contrary contained in the provisions of any written law which relates to Local Councils in force in any State” respectively.

On 3 September 1964, the Government declared a state of emergency pursuant to Article 150 of the Federal Constitution (L.N. 271/64). Subsequently with Parliament’s approval, on 18 September 1964 the Emergency (Essential Powers) Act 1964 came into force. Pursuant to this Emergency (Essential Powers) Act 1964, Parliament passed the Emergency (Suspension of Local Government Elections) Regulations, 1965 and the Emergency (Suspension of Local Government Elections) (Amendment) Regulations, 1965.

Although local government elections were suspended from 1965 onwards, the Government continued to amend the Local Government Elections Act 1960 from time to time. Those amendments were subsequently incorporated in the Local Government Elections (Amendment) Act 1971 (in effect from 30 April 1971).

The Local Government Elections Act 1960 was revised up to 1 September 1991 pursuant to the Revision of Laws Act 1968. The revised edition came into force on 16 September 1991. The Local Government Elections Act 1960 was never repealed.

Is there a conflict between the express wording of the Local Government Elections Act 1960 and the LGA?¹⁵

Sections 5 and 5A of the Local Government Elections Act 1960 have been set out above. Section 15 of the LGA states:

“(1) Notwithstanding anything to the contrary contained in any written law, all provisions relating to local government election shall cease to have force or effect.”

Both the Local Government (Temporary Provisions) Act 1973 and the LGA contain “opt out” provisions. Section 1 of the Local Government (Temporary Provisions) Act 1973 provides:

¹⁵ The LGA replaced the Local Government (Temporary Provisions) Act 1973 with effect from 1 January 1977

“... ”

(3) In any notification made under subsection (2) the State Authority may suspend the operation of this Act in respect of any part or parts of the State.”

Section 1 of the LGA provides:

“... ”

(2) This Act shall come into force in a State on such date as the State Authority may, after consultation with the Minister, appoint in relation to that State by a notification in the *Gazette* and the State Authority may, after consultation with the Minister, appoint different dates for the coming into force of different provisions of this Act and may bring all or any of the provisions thereof into force either in the whole State or in such part or parts of the State as may be specified in the notification.

....

(4) The State Authority may, notwithstanding the provisions of subsection (2), by notification in the *Gazette* exempt any area within any local authority area from all or any of the provisions of the Act or from any by-laws.

....”

The question now is: Can these “opt out” provisions be applied prospectively?

Conclusion

It can be argued that the Local Government Elections Act 1960 and the LGA ought to be read in a way that gives harmony to the development of legislative intent.

This would mean putting aside the fact that all three of Section 5 and 5A of the Local Government Elections Act 1973 and Section 15 of the LGA are stated to operate notwithstanding any other written law to the contrary.

So if the chronology of legislative intent is followed, it would lead to the conclusion that local government elections may only be brought back via legislation at the Federal level.

This would appear to be the case even though local government issues are within the purview of State Governments. The ‘encroachment’ of Federal law has been permitted to supercede and govern in this area as can be seen in Article 95A of the Federal Constitution.

So how shall the “opt in” provisions contained in the Local Government Elections Act 1960 be viewed? If local government elections have been done away with, why is the Local Government Elections Act 1960 still law? Why is it that as late as 1991 it was still being the subject of legislative revision?

This could lead us to conclude that the Local Government Elections Act 1960 is still good law. Therefore, it is possible to posit the view that while local government elections may

have been suspended for a time, the possibility for its return exists and lies in the hands of State Governments.

After all, even with Article 95A of the Constitution, the “opt out” provisions are so clearly provided for in the LGA. Are such “opt out” provisions meant to cover only aspects of the Local Government Act 1976 other than local government elections? Surely the exercise of such “opt out” provisions must be available for as long as the Act remains in force, and not merely at the commencement of the legislation.

The authority in relation to local government has not been given over to the Federal Government pursuant to Article 80(3) of the Federal Constitution.

The proper reading of Article 76(3) and (4) of the Constitution should be that there is no requirement for the legislature of any State to have to first adopt a law to give effect to such a law, as such a law is very much still a State law and not a Federal law. This is the discretion afforded to the State Governments, and by virtue of the power to exercise that discretion which has been retained by the State Governments.

Would any unilateral action by State Governments in this regard would be contrary to the provisions of Article 95A of the Constitution?

The preferred view should be that the provision of the exercise of the right by a State Government to exclude any area within a local authority from the provisions of the LGA must have been considered, contemplated and ultimately permitted by the National Council on Local Government.

The question of non-compliance with any Federal law applying to the State or any impediment or prejudice to the exercise of the executive authority of the Federation should not arise. The exercise of such an “opt out” was within the legislators’ contemplation and it must be well within the rights of any State Government to exercise that discretion.

All that remains is for those states under Pakatan Rakyat to seize the day, and fulfill their elections promises of bringing back local council elections.