



**ISTANA ISKANDARIAH
KUALA KANGSAR**

**KEYNOTE ADDRESS
BY
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**AT THE
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*“RAISING THE BAR
BY PRESERVING AND FURTHERING
THE RULE OF LAW”*

Ladies and gentlemen:

1. It gives me great pleasure to give the keynote address at this year’s International Malaysia Law Conference, and I would like to congratulate the Malaysian Bar for coming up with the very apt conference theme of, “Raising the Bar: Innovate, Integrate and Emulate.” This theme encapsulates a constant striving not only to uphold, but also to strengthen and improve the rule of law. This is a vital aspiration, now, perhaps, more than ever before.

2. It is, I believe, no exaggeration to say that ours is an era of considerable political uncertainty – even crisis – on a global scale. Many countries today maintain the outward semblance of democracy and the rule of law, while at the same time rolling them back and undermining their key institutions. In the 2018 Freedom in the World Report, published by Freedom House, its president, Michael Abramowitz, reports:



“Democracy is in crisis. The values it embodies – particularly the right to choose leaders in free and fair elections, freedom of the press, and the rule of law – are under assault and in retreat globally.”¹

3. Freedom House’s findings are that 71 countries experienced net declines in political and civil rights in 2017, compared to only 35 that registered net gains. This was, moreover, the 12th consecutive year in which global freedom experienced decline. I am hopeful that Malaysia, on the other hand, will be one country that registers net gains in next year’s report. Even so, national improvements are of limited consolation when the prevailing global trend is downwards. Recent reports by the respected International Commission of Jurists (or ICJ) also speak of the growing encroachments on civil liberties, marginalization and scapegoating of certain religious or ethnic groups, and the wielding of authoritarian power, often behind a façade of democracy. The ICJ have voiced concerns about executive interference with judicial independence in several countries, an action which directly undermines the rule of law. In the face of these escalating threats, it is more important than ever that we develop effective strategies to strengthen the rule of law against corruption and abuses of power, for generations to come.

4. As members of the professional legal fraternity, you will no doubt be very familiar with various definitions and debates surrounding the concept of the rule of law. Permit me, however, to briefly outline my understanding of the

¹ Michael J. Abramowitz, *Freedom in the World 2018: Democracy in Crisis* (Washington, DC: Freedom House, 2018), p. 1.



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notion as the basis of this address. The rule of law requires the effective separation of powers among the various branches of government - the executive, legislature and judiciary. This separation allows for a truly independent judiciary that is not only learned and wise, but also principled and courageous. It should also ensure that all persons, including governments, are held accountable to the law, no matter how powerful or wealthy they may be. As my late father, His Royal Highness Sultan Azlan Shah, famously wrote in a landmark judgement:

“Every citizen, irrespective of his official or social status, is under the same responsibility for every act done without legal justification. This equality of all in the eyes of the law minimizes tyranny.”²

The rule of law is thus inextricably connected to the protection of fundamental human rights and preservation of human dignity, as it prevents corrupt public officials from using their power to persecute or discriminate against particular groups or individuals. Ultimately, the acid test of the robustness of the rule of law in any society is the fate of the ordinary citizen, someone with limited means and without political power. Where the rule of law prevails, every citizen should have proper access to the law, and be fully protected by it. But where the rule of law exists in name alone, there will inevitably be victims and victimizers.

² Raja Azlan Shah, *Public Prosecutor v Tengku Mahmood Iskandar & Anor*, [1973] 1MLJ 128 (ACRJ, Johore Bahru, 3 January 1973). Reproduced in VisuSinnadurai (ed.), *His Royal Highness Sultan Azlan Shah: A Tribute* (Kuala Lumpur: RNS Publications), p. 5.



5. Restoring the rule of law is always a far greater challenge than destroying it. It is not a task that can be undertaken with small steps, cynical compromises and half-hearted measures. It is not sufficient, moreover, to tackle only the individuals most directly responsible for the breakdown of the rule of law. Institutions and processes must also be fundamentally reformed and strengthened, in order to safeguard against relapse. This endeavour is likely to meet with fierce resistance, especially in settings where the networks and cultures of corruption and abuse of power have penetrated deep into the fabric of society, becoming almost de facto norms. The necessary institutional reforms may have to take place in the midst of such entrenched interests and determined pushback by those affected. In the rest of my speech, I would like to share with you four ideas about what these deeper reforms should entail.

6. First, a separation of powers must be implemented as completely and effectively as possible within the limits of governing systems. In parliamentary democracies such as Malaysia, control over the executive branch is the direct result of commanding a majority in the legislature. This fusion is said by some scholars of constitutional theory to make parliamentary democracies inconsistent with the principle of separation of powers. There is, however, growing evidence to suggest that parliament can and does influence executive decision-making in practice, with far more formal and informal contestation of power than might appear to be the case in theory.³

³See, Richard Albert, "Presidential Values in Parliamentary Democracies", *International Journal of Constitutional Law*, 8:2 (2010); also, Meg Russell and Philip Cowley, "The Policy Power of the Westminster Parliament: The 'Parliamentary State' and the Empirical Evidence", *Governance* 29:1 (2016).



7. The formation of bipartisan select parliamentary committees, for example, is a common practice in the Commonwealth. But the reports of such committees are not always given sufficient attention by the executive, a shortcoming that should be addressed. Easier parliamentary procedures should also be established to ensure free, conscience and secret voting on matters of overriding national interest. Members of the legislature owe their first allegiance to the nation itself, as set out in their oaths of office. In this country, their responsibility is to “bear true faith and allegiance to Malaysia and to preserve, protect and defend its Constitution.”⁴ For countries with bicameral parliaments, greater effort should be made to ensure the effective participation of their Upper Houses, particularly where their roles have been reduced to mere formalism. So although some influencing of the legislature by the executive may be unavoidable, the separation of powers within government must be consistently maintained through these and other means.

8. A second important aspect, closely related to the separation of powers, is judicial independence. We must constantly aspire to and work towards the highest standards of judicial independence. We must indeed raise the bar in this singularly important matter. Judicial independence is especially important in parliamentary systems, where the executive and the legislature are to some extent fused. Judicial oversight and review of constitutional and administrative law and practice on matters of national and public interest are essential, to ensure that these comply with the spirit and substance of the law.

⁴*The Federal Constitution of Malaysia*, schedule 6.



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9. In keeping with human nature, even the fairest-minded of judges may be influenced and swayed by their own worldviews and personal predispositions. The judiciary should therefore be drawn from as diverse a range of gender, ethnic and cultural backgrounds as possible, to ensure the equitable administration of justice. In Malaysia, the Federal Constitution requires the Conference of Rulers to be consulted on the appointment of the Chief Justice and other senior Judges. The responsibility of choosing judges of quality and character is an onerous one, and this consultation should not be treated as merely procedural and taken lightly. It is also important for judges to have guaranteed security of tenure, so that they are able to conduct their work shielded from undue intimidation and fear.

10. As a third important step, countries should accede to and ratify existing international instruments, and ensure closer national compliance with them. Countries that have already acceded to these instruments should make greater efforts to reduce reservations and derogations from them, so as to give greater force to the international legal norms that they enshrine. They are the gold standard to which all nations must aspire.

11. Aspiration cannot remain as mere rhetoric however. It should also not be used as a convenient cloak for the continued curtailment of rights, or at worst, for abuse of its citizens by the State. Aspiration must rather be matched by sincere and strenuous endeavor to undertake the reforms that are necessary to achieve closer compliance with universal human rights and norms.



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12. The recent change of government here in Malaysia has given fresh impetus to efforts to strengthen the rule of law in the country. Laws that are deemed restrictive of individual liberties are being reviewed. Efforts are underway to remove undue constraints on the media. Steps are being taken to remedy and revitalise the core institutions of democracy and good governance, including the Elections Commission, parliament, the judiciary, the regulatory and enforcement agencies and the anti-corruption commission. We look forward to all these important initiatives reaching full fruition. The people of Malaysia and the country deserve no less.

13. I have no doubt that as we remedy the deficiencies in our laws, rectify weaknesses in their implementation, and reform our institutions, it will also become easier for Malaysia to accede to the international human rights instruments that it is not yet party to. Indeed, Malaysia has much to catch up with in this area. Out of 13 United Nations human rights treaties and protocols, for example, it has so far signed on to just five, which relate mainly to women, children, and disabled persons. Malaysia has yet to accede even to the 1984 United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment (UNCAT) and Optional Protocol.

14. If there is one international instrument to which all countries should voluntarily accede to out of a sense of enlightened national interest, and on which countries should intensively cooperate, it is the 2003 UN Convention Against Corruption (UNCAC). The UNCAC, which Malaysia signed in 2003 and ratified in 2008, is aimed at the prevention, investigation and prosecution of corruption, and the freezing, seizure, confiscation, and return of its



proceeds. This international convention does have its limitations, but it is an essential element of international legal structures, which is supplemented by bilateral mutual legal assistance agreements. Only through such means can the ability of the executive to delay or stymie investigations into corrupt practices, in which they themselves may be implicated, be minimized.

15. In line with this, countries should adopt a much more open and deeply cooperative stance with their counterparts, especially in matters of international prosecutorial and judicial cooperation. All countries today exist in a highly interdependent political, social and economic world. For the most part, reciprocal agreements do exist on extradition and mutual legal assistance in criminal and civil matters. These tend to be interpreted strictly and narrowly by some governments however, and few countries have adopted a freer and more open system in practice. Given the increasingly borderless nature of criminality, it seems to me that countries should work towards implementing more flexible and open procedures in order to maximize the potential of achieving justice.

16. The fourth and final measure that I want to touch on concerns the success and longevity of the reforms I have outlined. For these to be sustainable, countries must work towards developing a 'whole-of-society' approach to the rule of law. For too long, we have left the fight to jurists, to the legal fraternity more broadly, such as those gathered here today, and to the activists of civil society, often at great personal sacrifice. Large segments of the adult and voting population have excused themselves from responsibility, on the grounds that they lack sufficient knowledge about the law, in order to get on with their personal lives. But the rule of law and the administration of justice are far too



important to be left to a select few. A ‘whole-of-society’ approach recognizes the crucial roles played by all stakeholders, individually and collectively, through civil society organizations, academia, the media and other channels, and also strategically coordinates them in meaningful ways.

17. Citizens need to recognize that democracy without the strong rule of law is merely demagoguery by another name. Voters must understand that their responsibility to democracy and the rule of law does not end at the ballot box. Voter education tends to focus on the holding of free and fair elections and little else. But a healthy and functioning democracy is not just one that gives voice to different constituencies at election time, as noisy and fractious as this process may be. Rather, it is one in which the law creates a boundary beyond which none, no matter how powerful, may trespass without penalty. Citizens must grasp that a robust rule of law means that they cannot pick and choose amongst judicial decisions, supporting only those which favour their own interests, and rejecting the very concept of the rule of law when it goes against them. A ‘whole-of-society’ approach, in contrast, requires that all develop an innate respect for the rule of law and for legal institutions, even when individual rulings contravene their own interests.

18. I have, I hope, emphasized the unparalleled importance of upholding the rule of law, in order to maintain a society that is peaceful, orderly, safe and just for all of its citizens. This is why the Rule of Law or “Kedaulatan Undang-Undang” is one of the five key tenets of our *Rukunegara* here in Malaysia. This point serves to highlight the great significance of the Malaysian Bar, and also the enormous potential of events such as today’s conference, which brings together so many of the finest legal minds, practitioners, experts and scholars to



share knowledge and to exchange ideas relating to the preservation and furtherance of the rule of law. Those of you gathered in this room this morning are, I know, already well aware of the importance of such discussions and the actions that follow from them. As the legal fraternity, you are the ones at the forefront of this struggle.

19. In closing, then, I would like to share an anecdote that I hope can inspire all of us to remain committed to the rule of law, its furtherance and its protection, even in the face of opposition and adversity. It is an anecdote which reminds us just how old this struggle is. The Honourable Michael Kirby, a noted Australian High Court judge, tells the story of when Sir Edward Coke, an eminent 17th century English jurist and the Lord Chief Justice of England and Wales, fell to his knees in fear as he reminded his Ruler, King James I, that his King too was “subject to God and the law”. This was an act which took tremendous courage, especially in those days, and was not without its consequences. Sir Edward Coke was transferred and then dismissed from the King’s Bench, but he later returned as a leading opposition parliamentarian, and played a role in the 17th century re-shaping of the British Magna Carta. He was always committed to upholding the rule of law in the face of potential tyranny, and his determined adherence serves as an example to the rest of us. As Justice Michael Kirby puts it in his retelling of the story, “We have modern Kings. Happily we also have modern Cokes”.⁵ My final message today, then, would be to encourage all of us, wherever possible, to act as these ‘modern Cokes’, to be brave and principled in our commitment to the rule of law, to uphold it and

⁵Michael Kirby, “Foreward”, in Tun Mohamed Salleh Abbas and K. Das, *May Day for Justice: The Lord President's Version* (Kuala Lumpur: Magnus Books, 1989), p. 3.



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protect it, and to remain strong in the face of those who would rather subvert or ignore it. I have no doubt that I stand, today, in a room of ‘modern Cokes’, and this, I believe, is something that should give us reason to be more optimistic about our global future.

Thank you.