



Do the States in Malaysia have the Right to Defy the Conditional MOVEMENT CONTROL ORDER IMPLEMENTED BY THE FEDERAL GOVERNMENT?

In the United States of America, President Trump had issued the Guidelines on Opening Up America Again with the view to propose a phased approach for individual states to re-open for business. The Trump administration had previously wanted 1 May 2020 as a possible date to reopen the nation but this was rejected by certain states whose governors felt it was too soon to do so. In response to the Guidelines, some governors took the stand that they will decide when it is appropriate for businesses to go back normal and emphasised that such a decision was for the individual states to make.

In Malaysia, the power to make laws with respect to public health is shared between the Parliament at the federal level and the Legislative Assembly at the state level. However, if there is a conflict between the federal and state laws, the federal law would prevail over the state law according to Article 75 of the Federal Constitution. While this is completely different from the United States of America, an interesting situation is nevertheless brewing after several states in Malaysia have come out strongly expressing their reservations and plain disagreements with the implementation of the conditional movement control order (CMCO) from 4 May 2020 as announced by the Prime Minister Tan Sri Muhyiddin Yassin during the Labour Day speech on 1 May 2020.

To recap, the federal government of Malaysia implemented a movement control order (MCO) beginning from 18 March 2020 under the Prevention and Control of Infectious Diseases Act 1988 after declaring all states and federal territories as infected local areas in order to prevent the spread of Covid-19 diseases. Essentially, the MCO imposes a general movement restriction on people except for certain permitted purposes, for examples, to provide essential services or to purchase food or daily necessities. The MCO has been extended 3 times and is scheduled to end on 12 May 2020.

Shortly after the announcement of the CMCO, the Prevention and Control of Infectious Diseases (Measures within Infected Local Areas) (No. 5) Regulations 2020 was gazetted on 3 May 2020. Under these regulations, which have effect from 4 May 2020 to 12 May 2020, the provision of the general movement restriction found in all previous regulations made under the MCO from 18 March 2020 to 3 May 2020 have now been removed. The control of movement from one

place to another place within any local infected area is only restricted insofar as entry into or exit from a place that is subject to an enhanced movement control order is concerned. The movement from one local infected area to another local infected area for work purposes is also permitted. Almost all businesses except those involved in prohibited activities listed under the schedule of the regulations, such as barbershops, beauty salons, night market or bazaars, are allowed to resume operations.

The Prime Minister explained that the decision for the CMCO is driven by the devastating economic fallout as pandemic controls have put the Malaysian economy into comatose like what is happening everywhere else. While seeking to protect lives, the Prime Minister seeks to protect livelihoods as well. Unemployment statistics will soar uncontrollably soon as businesses, in particular, small and medium enterprises, run out of cash and capital to continue to keep workers on payroll. While money is not everything, poverty kills too and avoiding a point where the country tips over a cliff is crucial.

The announcement of the CMCO implementation which allows for the reopening of businesses came as a surprise and brought upon negative responses from certain quarters of the public on grounds of public health and safety. Some critics argue that there should be a soft landing exit strategy when removing the general movement restriction under the MCO. The Sarawak government was among the earliest to refuse to follow the CMCO, followed suit by Sabah, Negeri Sembilan, Kedah, Pahang, Kelantan, and Penang. Some states like Penang, Perak and Selangor chose to take different approaches by ‘modifying’ the CMCO, introducing steps for a more gradual reopening and implementing additional conditions.

Although the states’ efforts to defer or modify the implementation of the CMCO are laudable, the CMCO is invoked under the federal law. If businesses want to commence operations on 4 May 2020, the state governments can do little to stop them. Legally speaking, the CMCO implemented by the federal government should prevail over the announcements or decisions made by representatives of the state governments. On the other hand, what was effectively achieved by the regulations is the removal of the general movement restriction imposed during the MCO, and thus businesses are not prevented from resuming operations. To begin with, neither the MCO nor the CMCO has expressly ordered the shutting down or reopening of businesses. The local authorities administered by state governments may still impose conditions on businesses including restriction of operating hours or suspension of operations. It may be argued that this is not necessarily a contravention of the CMCO per se.

Consequently, unless there are legal justifications for the state governments to disallow businesses from reopening on 4 May 2020, the next question is whether companies could take legal action against the state governments for loss of business due to the state government’s refusal to follow the CMCO.

In the United States of America, there have been attempts by businesses in suing over Covid-19 shutdowns, including a law suit by Chulmerich Bells, a small business that makes handcrafted handbells and chimes in Hatfield, Pennsylvania. There has yet to be an outcome from the action. In Malaysia, by virtue of sections 4 and 5 of the Government Proceed-

ings Act 1956, the general public is allowed to take action against the government, federal or state, through a court proceeding. The government may be held liable in tort for any wrongful act done or any neglect or default committed by any public officer. Over the years, a number of individuals have taken action against the government and some have succeeded. Suing the government over loss of business due to a pandemic however remains unprecedented in Malaysia but this state of affairs could soon turn.

Nevertheless, the Senior Minister for Security and Minister of Defence, Datuk Seri Ismail Sabri Yaakob clarified yesterday that the country's respective states will not be forced to adopt the CMCO in its entirety and are allowed to make adjustments according to their needs. He added that any adjustment must be within the general guidelines released by Putrajaya. Despite this, another Senior Minister for Economy and the Minister of International Trade and Industry, Datuk Seri Azmin Ali later urged all state governments to comply with the CMCO and said that any failure to do so will expose the state governments to possible lawsuits from the affected industries. This brings added uncertainty to the discussion – will the federal government amend its regulations to accommodate the state governments or will the federal government insist that the state governments must implement the CMCO? What will the affected industries do in view of the clear conflict between the federal and state governments in allowing the reopening of businesses?



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