

A mind-boggling decision by the judiciary
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MP SPEAKS | When the court of appeal via Justice Yaacob Md Sam held that the court took a judicial notice that Prime Minister Najib Razak did not commit any wrongdoing with regard to 1MDB, I was totally speechless. I sincerely believe that even the entire world would, by now, take judicial notice of the state of Malaysia - that is how bad the state of our country is.

Judicial notice is a legal term coined by the legal fraternity to refer to a well-known and undisputed fact. Thus, any fact falling under the realm of judicial notice requires no proof at all. Its truth is too obvious to be unduly ignored.

But, was the court right in holding that it took judicial notice that Najib did not commit any wrongdoing in respect of 1MDB simply because the learned Attorney General (AG) Mohamed Apandi Ali (*photo*) had made a decision halting any idea of prosecuting Najib. According to the learned judge, the finding by the AG, absolving Najib from any wrongdoing in 1MDB, was widely reported in public domain. Thus, the court was entitled to rely on this fact to derive its opinion on judicial notice.

With the greatest respect, I am of the considered view that the learned judge was plainly wrong. Yes, he could rely on the finding of the AG in not prosecuting Najib for any criminal offence relating to the 1MDB scandal as a basis for judicial notice. I don't think any Malaysian, and for that matter, not even Petaling Jaya Utara MP Tony Pua and his lawyer would have disputed such a notorious fact.

However, the judge's ruling on judicial notice should have ended there namely the learned AG did not want to proffer any criminal charge against Najib. Period.

Unfortunately, the learned judge went the extra mile. He held that the decision by the AG in not charging Najib for any criminal offence signifies that Najib did not commit any wrongdoing with regard to 1MDB.

Herein, with due respect, lies the manifest error. The learned judge should have realised that the decision of the learned AG in not prosecuting Najib could have been motivated by multiple reasons.

One of such reasons may indeed be that Najib did not commit any wrongdoing. But that reason should have never been concluded as the sole reason in this case. After all, Najib did acknowledge recently that 1MDB was problematic.

Anyhow, whenever any decision by the learned AG is open to several interpretations, it definitely does not qualify to be termed as judicial notice. What more if the decision is riddled with controversies.

Be that as it may, such a decision by the learned AG should have never been concluded as only one single fact, i.e Najib did not commit any wrongdoing in relation to 1MDB.

The court also opined that the decision of the learned AG in not making a prosecutorial decision against Najib in relation to 1MDB was also within the framework of Article 145 of the Federal Constitution. That very Article confers to the AG the power and discretion either to prosecute or not to prosecute any person for any criminal offence.

If one looks at Article 145 (3) of the Federal Constitution, one will definitely notice the word "may" has been deliberately used. It indicates the intention of the framers of our supreme law.

In my view, the word "may" simply means the discretion of the AG under the said Article is not absolute. Even in Singapore, the court there did not agree with the proposition that the AG is empowered with absolute power in a criminal enterprise.

After all absolute discretion is a contradiction in terms. As rightly pointed out by Lord Acton "power corrupts and absolute power corrupts absolutely."

With the greatest respect to the Court of Appeal, its abovesaid decision is only capable of being called one name only - mind-boggling.

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