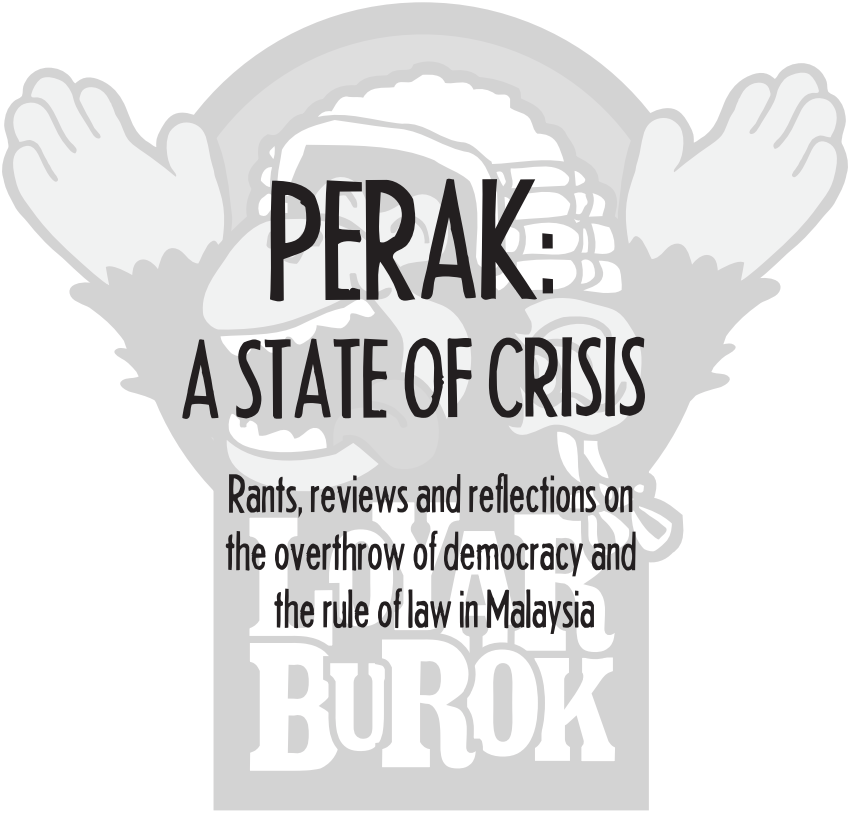
PERAK:
A STATE OF CRISIS

Edited by Audrey Quay







PERAK:
A STATE OF CRISIS

Rants, reviews and reflections on the overthrow of democracy and the rule of law in Malaysia

From Malaysia's leading blawg
www.LoyarBurok.com

Perak: A State Of Crisis

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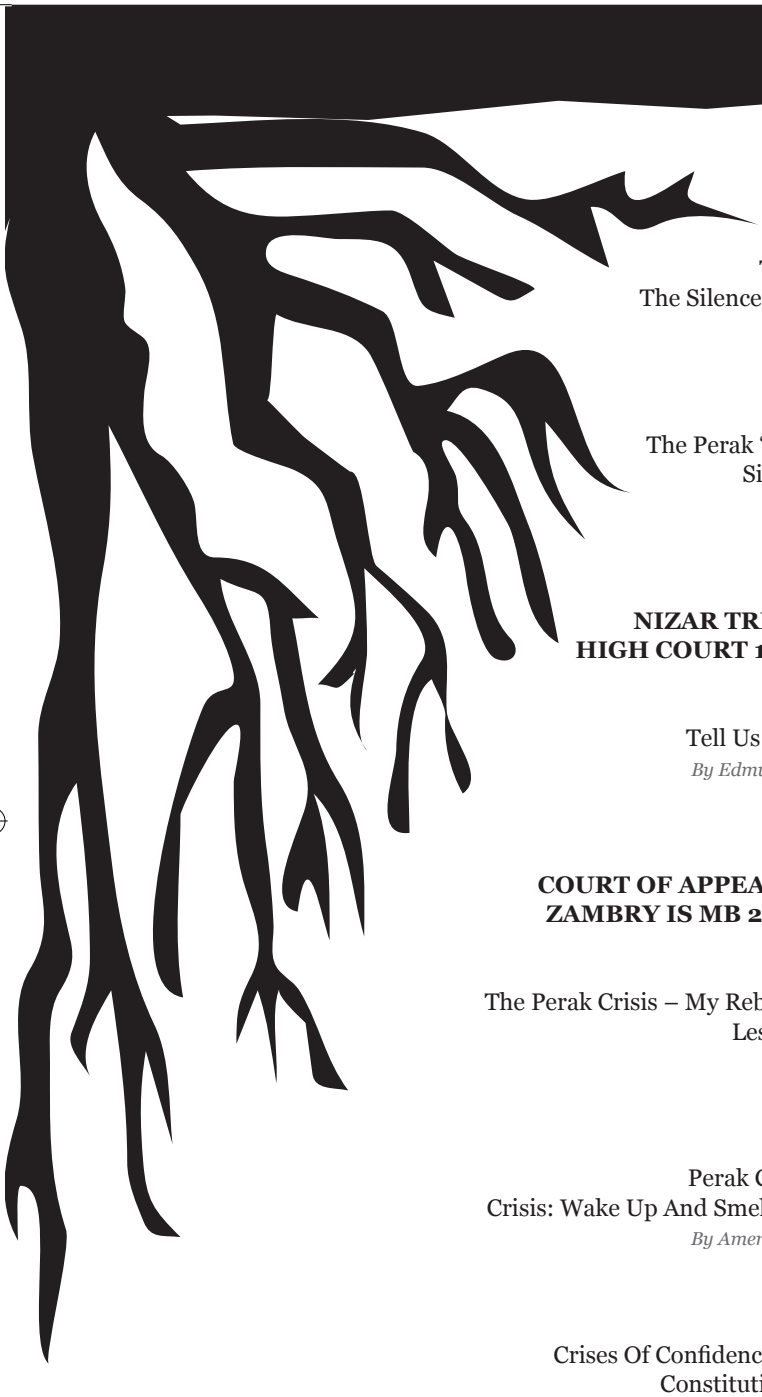
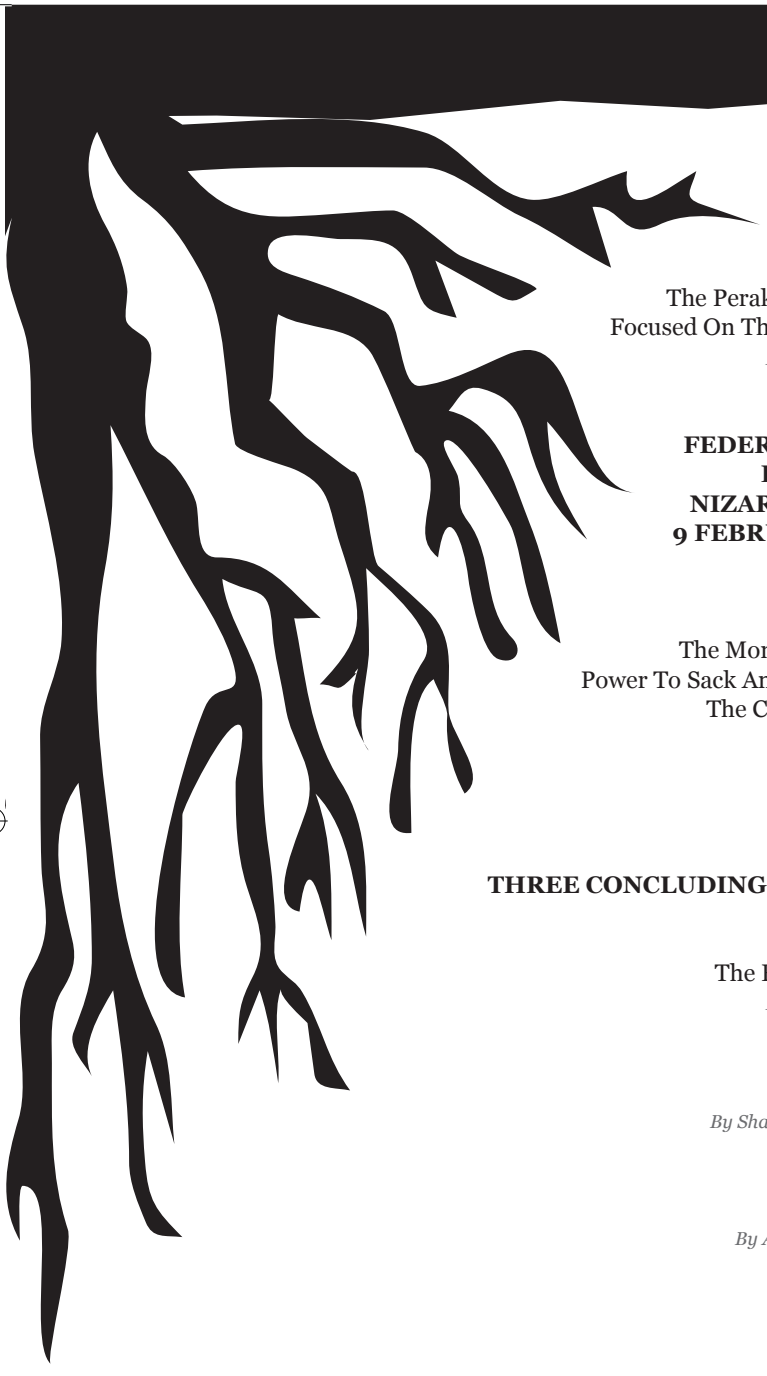
This book is dedicated to the voters of
Perak Darul Ridzuan

- and to all the ordinary folk of Malaysia,
wherever we find ourselves.

Bangkitlah.









Editor's Preface & Introduction

This is a book about Malaysia. One Malaysia, East and West. One nation for all Malaysians.

Here is an excerpt of a conversation overheard when I first undertook the task of producing this work: "Remember the Sarawak crisis with Stephen Kalong Ningkan? And how about what happened with Sabah in '85?" Pertinent questions for those interested in how modern Malaysia has developed since the full independence of our composite peoples, and its newly unified states. But when put to a majority of us born and bred here today, even in our age of widespread media dissemination, "Sarawak 1966" and "Sabah 1985" bear little meaning. Yet things might have been rather different if one had been more mindful of those incidents and their ensuing implications. Perhaps, however, there was too much smoke, too many mirrors waved in our faces then, and we were still developing as a young nation – growing up, growing wiser.

This book is not however, a critique on what has passed. It is a conscious reference point for where we are now, as a nation desiring true integration. For unity must not just be proclaimed, it must in reality be achieved.

It is clear that before this, a serious grasp of the circumstances with reference to East Malaysian politics was sorely lacking, especially in the Western Peninsula. These quite pivotal events certainly failed to make enough headway in our history books (or indeed any non-specialist archives of note) to have the kind of coinage attached to especially notorious episodes, those that at the drop of a couched phrase, the man-on-the-street recalls and speaks about with some sensible measure of awareness. Perhaps even enthusiastic opinion. And so, left credulous, history repeats itself and we scarcely experience a sense of *déjà vu*.

But we yearn for more in this new era. And indeed, there are less limitations existing today than ever before experienced by previous generations. Leadership is less characterised by self-serving tussles for short-term power gains. Conceptually at least, we have matured (with

far to go) in our understanding of what it means to live and grow in a heterogeneous society.

Better ideas of government and governance have captured the imaginations and ignited the passions of a whole crop of purportedly "ordinary" Malaysians. They have proved extraordinary through making large personal sacrifices – some by volunteering tirelessly to facilitate voter registrations amongst those living on the fringes, whilst others strive to educate citizens on their rights and responsibilities. A good number serve as election agents to support a clean democratic process. Still others, standing as candidates, have and will become representatives of their constituencies. Many hold our political leaders accountable in both our respective and collective communities, through a diverse range of expressions. Activists in a time where change is not just possible, it is feasible – we have in a sense, come of age.

Standing at the close of the first decade of the 21st century, it is presently our time. And in our time, the unresolved constitutional Rubicon is the Perak Crisis. It is, however, up to the citizens of Malaysia to decide what these watershed events mean for us, as we progress further into our shared future. Just like it was not just Sabah, not just Sarawak, it is not just Perak. It is Malaysia. When citizens were wounded in Ipoh as they turned out on 7 May 2009 to help keep watch over the fate of their State Government, the future of our entire union of states was also threatened.

To date, we have seen admirable, spirited responses, including the ones we have documented here. Responses towards how an unchecked Federal Government, a legally trained and constrained State monarch, and certain elements in our Judiciary devastated the faith of Malaysians in due process. We have heard outraged cries of protest, made some remonstrations. But 25 years, or a decade on from now, who will remember? Who will be reading and writing and talking about it?

Like me, many citizens today were not around to have taken notice of previous political machinations; for example, Stephen Kalong Ningkan's removal, regardless of how it would impact our nation, our Malaysia in the years to come. But that is also the point. Without providing the benefit of visible documentation – preferably contemporaneous – we who are living now would be remiss in our responsibility to pass on knowledge to future *anak bangsa* Malaysia.

This book is an attempt to capture the Perak Crisis in print, which we at *LoyarBurok* hope will serve as a focus point for how the *rakyat* choose to go forward together. In spite of our often tongue-in-cheek guises, we explicitly have the rule of law and rational, well-founded behaviour on our agenda. We rue with disappointment the judicial system's astounding neglect in providing the confidence that people so badly needed in a time of crisis, where equitable decisions and courageous conduct were starkly lacking from the highest echelons of our once esteemed Bench, our leaders. It has been assuring for us thus to see that so many Malaysians are beginning to recognise the constitutional violations and the grave injustice that took place between January 25th, 2009 and February 9th, 2010. And yet, it is far from over. Indeed, this drama continues to unfold before us.

It should be noted at the outset that the writers who have readily agreed to have their words produced in this publication did not sit down with pen, paper and word processor to court controversy. Nor is there any intention to stir up whirlwinds of unhelpful sentiment on issues of State (others have that dubious pleasure). The contributors to this book have, however, expressed their thoughts and feelings in an honest, passionate manner, in an attempt to provide an account of the events surrounding Perak's constitutional crisis. Some of these articles are matter of fact and serious, others more light-hearted, with the humour and wit that is characteristic of the authors. All of them are, whatever their style, purposeful. They may no doubt attract the charge that such revelations will sting some quarters. But if the featured commentaries in this book tolerably record the incidents that transpired in Perak, should they succeed in illuminating the string of events, courageous and disgraceful alike, that led to the removal of a democratically elected State Government – if it sets us all on guard to prevent hijackings of democracy from recurring – we have met our objective.

The intention is that this collection of articles (a number first published on our electronic domain at *www.LoyarBurok.com*), containing works both scholarly and colloquial, by political scientists, social commentators, academics and of course, lawyers, will help ensure that no similar neglect (as with Sabah and Sarawak) will repeat itself after Perak. The Perak debacle threatened the very idea of a democratic Malaysia, yet for a few, the memories are already fading (NB: buy this book!). Surely, the *rakyat*'s will cannot be brushed aside so easily, if we claim to function as a democracy. For should we as citizens fail to heed

the Perak Crisis as a bellwether of what is to come, we will eventually be lost to a much greater national crisis.

This is therefore neither the time for jaded resignation nor dismissive sighs of regret. Instead, we need to recognise the momentous potential before us as Malaysians, to produce genuinely non-partisan, collaborative efforts for the transformation of our nation. We, the people, are responsible for actively electing and acceding to what and whom we wish to govern us. So our call to you as a Malaysian, is that together with us at *LoyarBurok*, make a conspicuous effort in your lives, consider these issues in dialogues and public forums, debate them in our schools and institutes of learning, and yes, discuss them at length with your *machas* over a *teh tarik* at the local *mamak* stall. And act.

Despite the hot air that lawyers are wont to indulge in, we do advocate concrete measures as a necessary response, for one cannot rely on empty speeches and mere rhetoric. We call for a dedicated people to prove their love for the country. We remind you that often, when tilling the ground (as indeed many of us are doing), and lost in the earnest desire to see fruit, we fail to recall what the land looked like before it began to be cultivated. It takes hard work, concentrated and unrelenting over a necessary gestation period, like labour pains before rebirth. We must keep on keeping on if our vision of a true Malaysia is to endure.

It has been said that history is written by the winners, the dominant classes. But rather than "winners" and "losers", I would like to think that we are all in this together. The desire to live in a free, prosperous, civil society carries indivisible obligations to the common good. I believe this becomes more attainable when we foster strong minds amongst a people that think for themselves. Dispensing with the political intrigue, this is an appeal to the sense of justice and intelligent compassion that normally characterises us as a people – reject any shallow attempts at sowing vitriolic, divisive opinions amongst the general population. We ought not to be so readily swayed or sectarianised by dangerously myopic statements.

You see, even after the events have passed, there are ongoing repercussions for the *rakyat* in the statesmen's shadowplay. And we cannot sweep it under the carpet, hope, impossibly, that things will change without a paradigm shift in our ideas. For these issues are about justice and equity – matters which must be properly settled before we can achieve true

accord to form an authentic national identity. More importantly, it is about respect and long-sighted guardianship over a nation we have tied our hearts to. Where we are at present, as so clearly demonstrated in Perak by the unchecked, flagrant seizure of an elected State Assembly, is simply not good enough. Today, an unelected State Government rules against the will of its people. Surely, we can do better. We deserve better.

The fact that we have grown as a nation despite the setbacks of resource-draining corruption and rampant inequity is testament to the unique strength that lies in Malaysia, it is the gift of its communal children. We have most of us, mostly, taken care of each other. But it is time to unshackle further. To reject still-existing classism, discrimination, and oppression. If the people are to win, if Malaysia is to win, we must recognise this: that a Malaysia denied to some of us will ultimately become a Malaysia denied to all of us.

So now it is new battleground for today's generation of Malaysian sons and daughters. We have inherited the nation-building dreams of our predecessors. We have begun to rediscover the original intent of our founding fathers. We have started to believe that, by the grace of God, we ordinary but true Malaysians have the power and the will to reframe and reclaim our country's potential, and write the destiny of our people. For all of us.

I close by drawing attention to a compelling excerpt from the Universal Declaration Of Human Rights, as so beautifully translated into our national language:

Perkara 21

1. *Setiap orang berhak mengambil bahagian dalam kerajaan negaranya, secara langsung atau melalui wakil-wakil yang dipilih dengan bebas.*

2. *Setiap orang adalah berhak kepada peluang samarata kepada perkhidmatan awam dalam negaranya.*

3. *Kemahuan rakyat hendaklah menjadi asas kewibawaan kerajaan; kemahuan ini hendaklah dibuktikan melalui pilihanraya berkala yang sejati yang mana hendaklah diadakan secara sejagat dan samarata dan hendaklah diadakan secara undi sulit atau melalui acara pengundian bebas yang ketara.*[1]

1 *Perisytiharan Hak Asasi Manusia Sejagat* at http://www.ohchr.org (Source: Diffusion Multilingue des Droits de l'Homme, France)

In this book, we ask the question: have we indeed enjoyed these human rights in Perak? And even beyond this book, do we dare to reach for the full gamut of human rights? You decide.

I would however, add that when we step up to assert these ideals, there are more than just individual rights at stake. There are a host of shared responsibilities to be distributed. My personal desire is that we will have due regard to the need for shared long-term goals, and arrive at a reasoned understanding with all of the facts present. The great underlying goal is for ever-increasing awareness, participation in the course our country is heading, and for citizens to receive vital accountability from those whom we trust to steer it.

One final note:

I do hold out a constructive hope that, in spite of the discouraging overtones of the crisis, there will be some lessons to caution and convict us. Not least if more (and yet more) of us begin to sit up and take active interest, embracing a personal and corporate desire to be well versed as to the considerations required in order to build an egalitarian nation. And I grant that the grasp and reach of this book is by no means fully comprehensive of every happening to do with the issues at hand. We have not attempted to pretend we could capture completely exhaustive moments (for there were many) of what was initially termed the *MB v MB* tussle. In editing, and producing this book, I have however endeavoured to cover salient parts of the factual analysis and responses that were found useful in relation to the matters of government and complex, relevant issues of law concerned in the Perak Crisis.

Above all, our objective has been to promote and safeguard our Federation of States, and indeed, our much-beloved country. We will therefore not allow this story to go untold.

We, the people, will remember. We will prevail.

~Liberavi Animam Meam~

Audrey Quay Sook Lyn
Kuala Lumpur
3 December 2010

Foreword

Wan Saiful Wan Jan*

In 1966 in Sarawak, Malaysians saw how politicians used the State Constitution, State apparatus and even emergency powers to oust the incumbent Sarawak Chief Minister Stephen Kalong Ningkan. A similar situation arose in 1977 with the Kelantan Menteri Besar Mohamad Nasir.

In *Ningkan*'s case, the courts were called to intervene; while in Kelantan, the State Assembly was moved to pass a vote of no confidence against Nasir. In both cases, statewide emergencies were declared. And in both cases, the country became divided. But scour our library shelves and one would be hard-pressed to find a book that has a full, contemporary account of these two major events in our country's political evolution.

The subject matter of this book – the 2009 constitutional crisis in Perak – mirrors the crises in Sarawak and Kelantan. There is a clear need to document this episode which, just like the previous crises, shook the nation.

Written by well-known lawyers and academics, this book is a factual record and critical analysis of the Perak Crisis. It will help readers understand the complex web of legal, political, constitutional and governance issues that were in play. It is holistic, and yet accessible enough to be a guide on the subject matter for all Malaysians.

This book is unique. While the constitutional impasse was developing in 2009, we had commentators – ordinary *rakyat* – writing about the situation on the internet almost on a daily basis for the world to read. A huge repository of posts and articles, expressed in language of the shocked, disappointed, angered, frustrated and the like bombarded us. Malaysia's leading blawg – and a friend of IDEAS – *LoyarBurok* (and its charming writers) could not resist getting into the fray. We thus see in this book a first-of-its-kind expression using the new media in real-time to document a major constitutional crisis, and the responses the essays then elicited.

This book is timely. It brings into sharp focus the challenges faced by our constitutional institutions today – including the monarchy, the Government, the Legislature, the Judiciary and the Election Commission – in a drastically changed political landscape. It would seem that for the ordinary Malaysian, an internal struggle to validate the relevance of our institutions to modern society continues to be a challenge. The essays highlight the need for a radical improvement not just to our political system but also in the people involved in those institutions. Many weaknesses need to be rectified and many gaps must be filled.

The Perak Crisis can be seen as part of the on-going tussle between the more established Barisan Nasional coalition and the emerging Pakatan Rakyat coalition. But, what is important is that as the essays in this book indicate, the saga has produced an impetus for a democratic revival in Malaysia. Many people are not only becoming more aware about the roles and the importance of our democratic institutions, but they are also demanding that these institutions be made more accountable and more effective.

I still remember the evening of 7 May 2009, when my eldest daughter asked me why I shed tears while watching a YouTube video clip. She was too young to understand how significant that day was to our country's democracy, when the Perak Speaker was removed and replaced. In fact, I still have a framed picture of that fateful event, to remind myself of the day I regard as the darkest day in Malaysia's democracy.

It is my hope that we will learn from our own history and not be condemned to repeat mistakes that may have been made in 2009. "Perak: A State Of Crisis" is an important aid to that learning process and I commend the *LoyarBurok* team for their hard work in producing this important book.

* Wan Saiful Wan Jan is the Chief Executive of the Institute for Democracy and Economic Affairs (www.IDEAS.org.my), a think tank inspired by Tunku Abdul Rahman and dedicated to the principles of the rule of law, limited government, free markets and individual liberty.

About The Contributors

Amer Hamzah Arshad
After ingesting too many Rumpole of the Bailey books by John Mortimer, he overnight becomes the most promising criminal lawyer since Rumpole himself. Thinks it a disgrace to plead guilty. Has battled the forces of evil and mediocrity but would be eventually overturned on appeal because his arguments are too clever for his own good. His favourite drink is soya. He believes Slayer's "Reign in Blood" is one of the best metal albums ever.

Andrew Harding
One of the Commonwealth's foremost jurists on constitutional law, Professor Dr. Andrew Harding is the author of "Public Duties and Public Law" (OUP, 1989), "Law, Government And The Constitution In Malaysia" (MLJ, 1996) and "Comparative Law In The 21st Century" (Kluwer, 2002); and co-editor of "Preventive Detention And Security Law: A Comparative Survey" (Nijhoff, 1993) and "Constitutional Landmarks In Malaysia: The First 50 Years 1957-2007" (LexisNexis, 2007). Formerly Professor of Law, Head of the Law Department and Chair of the Centre of South East Asia Studies at SOAS, University of London. He is now based at the University of Victoria, Canada.

Art Harun
An award winning Islamic blog writer possessing an incisive and powerful intellect and a wicked sense of humour. So this automatically disqualifies him as the next Prime Minister, Chief Justice or Parliamentary Speaker of Malaysia, but he could not be arsed. Can you please buy this book and persuade him otherwise, please? Thanks.

Cheang Lek Choy
Cheang Lek Choy began his career as a banker but realised later that there is more fun in legal practice and set up Messrs. Lek Choy & Co. in Ipoh. He used to indulge in vigorous activities such as golf, fishing and starting his family (which comprises his wife and three children), but now limits himself to *tai chi* because of backache. He finds *LoyarBurokking* more fun than lawyering. That is why he has contributed to this book.

Deborah Loh

She has been a journalist for 13 years in television, print and online media. She has covered mainly politics, government and the environment, and as a pessimistic optimist, she finds that most issues in Malaysia are depressingly repetitive in nature. She last wrote full-time for *The Nut Graph* and still contributes to it occasionally. She hopes to work with younger people as she believes that is where future change lies.

Edmund Bon Tai Soon

This goldenboy of the Malaysian Bar became the ultimate rebel and challenged modern society with his rather tedious insistence on his virginity. We know, we don't believe him either, but accused are always entitled to the benefit of the doubt. Virtually pioneered human rights advocacy in Malaysia, does not like to comb his hair and likes to wear real "Bermuda" shorts. Please ask him to comb his hair. We'll give you a 5% discount if he does on your request.

Fahri Azzat

In his former life, he was a powerful warrior-priest during the early Incan civilisation with 14 wives, 34 children, 12 comely concubines and a whole bunch of slaves to do his bidding. Due to the slaughter and chaos he caused during his conquests, he was reincarnated as a lawyer now struggling to practice law in the absence of justice, most probably due to scoring low on his *karma* exams. A prolific contributor to *LoyarBurok*, it is ironic that none of his articles appear in this book.

Kevin YL Tan

Professor Kevin Tan has taught constitutional law for over 20 years. He currently holds Adjunct Professorships at the Faculty of Law, National University of Singapore and the S. Rajaratnam School of International Studies, Nanyang Technological University. He authored "An Introduction To Singapore's Constitution" and co-authored (with Thio Li-ann) the leading textbook "Constitutional Law In Malaysia And Singapore" widely used as standard reading material in universities.

NH Chan

Dato' NH Chan, a much respected former Court of Appeal Judge, is a gavel of justice that has no hesitation in pounding on Federal Court judges with wooden desks for heads. Retired from the Judiciary to become the People's Judge. Wrote the explosive "Judging The Judges", now in its 2nd edition as "How To Judge The Judges". We need more people like him. That's why you should buy this book and his book.

Shad Saleem Faruqi

Emeritus Professor Datuk Dr. Shad Saleem Faruqi is a Malaysian Senior Professor of Law with University Teknologi MARA and is widely respected for his views on constitutional law as well as for having a title longer than his name. Shad has produced numerous scholarly articles and several books, including "Human Rights, Globalisation And The Asian Economic Crisis", "Islam International Law And The War Against Terrorism", "Islam, Democracy And Development" and "Document Of Destiny: The Constitution Of The Federation Of Malaysia". He is also co-author of "Media Law & Regulation In Malaysia" that every self-respecting *LoyarBurokker* probably has not read but claims they have (unless they have then they will pretend ignorance and claim they haven't).

Shanmuga K

A gentleman who annoys a great deal of people by taking reasonable stands on issues and articulating them in a calm, temperate fashion that annoys them even further. Complains he should take less *pro bono* cases on inter-religious matters and do more fee paying work, but we don't believe him because he is such a nice guy. Koocheewoochee!

The Editor, Audrey Quay Sook Lyn

Used to slave for an international law firm, dishing out advice on how to minimise contributions to the Malaysian Treasury. Before being enticed away to the little red dot by a German investment bank to negotiate derivatives and other non-existent whatchamacallits, Lord Bobo convinced her she should perform national service through carrying out difficult projects for *LoyarBurok*. This is one of them. As none of the proceeds of this book will ever end up with her, she is remunerated with drinks at the Lake Club whenever she happily finds herself home.





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The Editor would like to thank the following who have made this book possible in its present form:

Bright Lights At Midnight, (especially Hana Abdul Aziz!)
for outstanding design and production, for their patience with a taxing editor-at-large, and dealing with a team of finicky *LoyarBurokkers*.

Jo-Lene Ong,
for unequalled assistance and tireless management of book production matters, and more so, for her friendship throughout the process.

Deborah Loh,
for putting together the first drafts of the timeline plus *dramatis personae* in the midst of a punishing work schedule and professional deadlines.

SS Bon,
for proofreading a challenging draft manuscript under onerous time limitations.

Seorang Anak Bangsa Malaysia,
whose pictures were so generously shared with us.

Anil Netto,
for his illuminating photographs of Ipoh during the crisis.

Faithful friends and family,
without which nothing of worth could be achieved in this short life afforded to us.

The Batek Bar @ Lake Club, (where it all started)
for providing a most inspiring work environment during times of ennui.

And last but never least,
the *LoyarBurok* team led by the inimitable Lord Bobo, for shared adventures and forays into the unknown jungle that is our judicial system. We will see us emerge from the wilderness yet.





Glossary

ADUN	Ahli Dewan Undangan Negeri (Member of the State Legislative Assembly)
BN	Barisan Nasional – a coalition of political parties made up of UMNO, MCA, MIC and others, has formed the Federal Government of Malaysia since its predecessor, the Alliance Party, won elections in 1955
DAP	Democratic Action Party
DUN / LA	Dewan Undangan Negeri (State Legislative Assembly, comprising 59 representative seats in the state of Perak)
EC	Election Commission
EXCO	Executive Council of a State Government
MACC	Malaysian Anti-Corruption Commission
MB	Menteri Besar (Chief Minister)
MIC	Malaysian Indian Congress
MP	Member of Parliament i.e. Dewan Rakyat, being the Lower House of the national Legislature of Malaysia consisting of 222 representatives elected from single-member constituencies
Pakatan / PR	Pakatan Rakyat – a coalition of political parties made up of DAP, PAS and PKR
PAS	Parti Islam Se-Malaysia
PKR	Parti Keadilan Rakyat
UMNO	United Malays National Organisation
YB	Yang Berhormat (a salutation for MPs)





Dramatis Personae

Election Commission,
rejects the Perak Speaker's decision to deem 3 seats vacant and refuses to call for fresh by-elections.

Sultan Azlan Shah, Ruler of Perak,
determines the Legislative Assembly's confidence in the Menteri Besar outside of a floor vote.

Jamaluddin Mohd Radzi,
PKR Assemblyperson for Behrang, elected in the 2008 March General Election, triggers the constitutional crisis by quitting the party but refusing to vacate his legislative seat.

Mohd Osman Mohd Jailu,
PKR Assemblyperson for Changkat Jering, elected in 2008, triggers the constitutional crisis by quitting the party but refusing to vacate his legislative seat.

Hee Yit Foong,
DAP Assemblyperson for Jelutong, elected in 2008, triggers the constitutional crisis by quitting the party but refusing to vacate her legislative seat.

Nasarudin Hashim,
UMNO Assemblyperson for Bota, elected in 2008, defects to become a PKR lawmaker but rejoins UMNO 11 days later.

V. Sivakumar,
elected Speaker of the Perak Legislative Assembly after the March 2008 General Election, removed as Speaker on 7 May 2009, DAP Assemblyperson for Tronoh.

Nizar Jamaluddin,
Perak Menteri Besar appointed after the March 2008 General Election, removed as Menteri Besar by Sultan Azlan Shah on 5 February 2009, PAS Assemblyperson for Pasir Panjang.

Zambry Abdul Kadir,
Perak Menteri Besar appointed on 6 February 2009, UMNO Assemblyperson for Pangkor.

R. Ganesan,
Speaker of the Perak Legislative Assembly elected by BN and BN-friendly Independent legislators on 7 May 2009, MIC Perak Secretary and former Assemblyperson.

Najib Razak,
Then Deputy and now Prime Minister of Malaysia, seen as the key facilitator of the legislators' defections to BN and in obtaining BN's majority in the Assembly.

Abdul Rahman Hashim,
State Secretary, acts to facilitate BN's hold on power in the Assembly, issues orders to prevent and delay Nizar and Pakatan Assemblypersons from entering the State Secretariat for work and subsequent legislative sittings.

Abdullah Antong Sabri,
Assembly Secretary, also acts to facilitate BN as the new State Government, he refuses to follow Speaker Sivakumar's order to issue notices for the 3 March legislative sitting, and deems the sitting illegal.

Perak Crisis Timeline

Deborah Loh

25 January 2009
Bota Assemblyperson, Nasarudin Hashim, purportedly quits UMNO to join PKR. With that, PR would have 32 lawmakers and BN 27.

30 - 31 January 2009
EXCOs Jamaluddin Mohd Radzi (Behrang) and Mohd Osman Mohd Jailu (Changkat Jering) are rumoured to quit PKR to become Independents. Both face graft charges over a land deal. They do not deny the rumours. PKR accuses Deputy Prime Minister Najib Razak of enticing them to join UMNO.

1 February 2009
Jamaluddin and Osman have been incommunicado for 5 days. Perak MB Nizar Jamaluddin intends to lodge missing person reports with police. Opposition Leader Anwar Ibrahim blames Najib for their "disappearance".

By now, a third PR Assemblyperson, DAP's Hee Yit Foong (Jelapang), has been absent from State functions, fuelling rumours she would quit too. In the afternoon, Prime Minister Abdullah Ahmad Badawi hints at Perak PKR EXCOs wanting to join BN.

In the evening, Speaker V. Sivakumar announces that Jamaluddin and Osman have resigned and vacated their seats. However, Jamaluddin emerges claiming he and Osman are Independent Assemblypersons. He claimed resignations letters were pre-signed "loyalty pledges" kept by PKR requiring its Perak Pakatan Assemblypersons who quit the party to automatically vacate their seats.

Separately, Hee denies her defection plans.

3 February 2009
Sivakumar notifies the Election Commission of two vacant seats but EC refuses to declare by-elections. Meanwhile, Hee is absent from a State function with HRH Sultan Azlan Shah.

4 February 2009
Jamaluddin, Osman and Hee inform Sivakumar they are Independent legislators. In the afternoon, they appear as BN-friendly Independents with Najib at a press conference in Putrajaya. Nasarudin is also present and has returned to UMNO. Both PR and BN now have 28 seats each in the 59-seat Assembly, but Najib declares that BN has the majority with the 3 Independents aligned to them.

In Ipoh, Nizar waits from 1pm until 3.50pm for an audience with Sultan Azlan Shah to request permission to dissolve the State Assembly and hold fresh elections. Nizar emerges from the Palace at 5.45pm.

5 February 2009
At 10am, Najib has an audience with Sultan Azlan Shah, leaving the meeting once and returning to the Palace with the 4 ex-PR legislators. At this meeting, Najib presents letters of support from 28 BN Assemblypersons and Jamaluddin, Osman and Hee, who aligned themselves to BN. The letters state that they will support whoever is named by Najib as MB of Perak. Their audience ends at 11.30am.

At 11.40am, PR files an application at the Ipoh High Court to declare the 3 seats vacant.

Sultan Azlan Shah meets Nizar at 12.50pm briefly; and issues a statement at 3pm. He deems Nizar to have lost the confidence of the State Assembly, and instructs the resignation of Nizar and all EXCOs, failing which those posts would be deemed vacant. State Secretary Abdul Rahman Hashim issues a letter instructing Nizar, EXCO members and aides to vacate their offices with immediate effect.

6 February 2009
A defiant Nizar clocks into work at 10am but is forced out 45 minutes later by the State Secretary. UMNO Assemblyperson Dr Zambry Abdul Kadir (Pangkor) is sworn in as Perak's new MB before Sultan Azlan Shah at 4pm. Outside the Palace, some 3,000 protesting citizens are engulfed in tear gas as police try to disperse them.

10 February 2009
6 new BN EXCOs are sworn in. Another attempt by Nizar and PR EXCOs to enter the State Secretariat building is foiled. Nizar says he will continue working as MB operating from the MB's official residence that he still occupies.

13 February 2009
Nizar v Zambry: Nizar files for judicial review at the KL High Court, seeking a declaration that he is the lawful MB and an injunction barring Zambry from discharging his duties as MB.

In Ipoh, DAP's Assemblyperson Wong Kah Ho (Canning) files a complaint with the Legislative Assembly's Privileges Committee against Zambry and BN EXCOs for unconstitutionally taking power and for contempt of the Assembly.

14 February 2009
The Privileges Committee chaired by Sivakumar summons Zambry and 6 BN EXCOs to an inquiry on 18 February.

18 February 2009
Nizar v Zambry: Case is mentioned before Mohamad Ariff Md Yusof JC, who discloses that he is an ex-PAS member and former adviser to Opposition parties on election cases. He fixes 23 February for hearing on his recusal.

In Ipoh, the Privileges Committee suspends Zambry from the Assembly for 18 months, and the 6 BN EXCOs for a year.

23 February 2009
Nizar v Zambry: Ariff JC hears arguments on whether he should be recused from hearing the case. He fixes 25 February for decision.

25 February 2009
Nizar v Zambry: Ariff JC decides to recuse himself from hearing the case.

27 February 2009
Sivakumar calls for an emergency State Assembly sitting on 3 March to debate two motions – a vote of confidence for Nizar as MB and to dissolve the Assembly for fresh elections.

1 March 2009
Sivakumar's notice for the 3 March emergency sitting is illegal, says Assembly Secretary Abdullah Antong Sabri.

2 March 2009
Closure of the State Secretariat building announced through an unsigned State Government circular. Police claim the emergency Assembly is illegal and set up roadblocks. Sivakumar suspends Abdullah Antong as Assembly Secretary, and appoints Mohd Misbahul Munir Masduki.

Zambry & 6 BN EXCOs v Sivakumar: Zambry and the 6 BN EXCOs file a legal action at the Ipoh High Court to nullify their suspensions by the Privileges Committee.

3 March 2009
Tree Assembly: Witnessed by a crowd of 300, Sivakumar holds the emergency session with only PR representatives in attendance under a tree not far from the State Assembly building. Two motions are passed unanimously and the meeting is adjourned.

Nizar v Zambry: Appellate and Special Powers Division Judge, Lau Bee Lan J hears Nizar's application for judicial review. Nizar is represented by a team of lawyers led by Sulaiman Abdullah, while Zambry is represented by Perak State Legal Adviser Ahmad Kamal Md Shahid. Sulaiman objects to Zambry's representation by Ahmad Kamal as Nizar's suit is against Zambry in his personal capacity.

Senior Federal Counsel Kamaluddin Md Said representing the Attorney General's Chambers (as Intervener), applies for the case to be transferred to the Federal Court because it involves constitutional questions. Lau J fixes a date for decision on whether to submit the case to the Federal Court directly.

Zambry & 6 BN EXCOs v Sivakumar: Ipoh High Court hears the application to nullify the suspensions of Zambry and the BN EXCOs. Their legal team is lead by UMNO lawyer Hafarizam Harun. Sivakumar's team is led by Tommy Thomas. But Ridwan Ibrahim JC rules that only the Perak State Legal Adviser, and not "private" lawyers, can represent the Speaker Sivakumar who is said to be part of the State Government.

Sivakumar's lawyers cite conflict of interest as Ahmad Kamal is representing Zambry in the *Nizar v Zambry* case. In chambers later, Ridwan JC grants Zambry and the 6 BN EXCOs a restraining order to stop Sivakumar from convening any "unlawful meetings".

5 March 2009

3 ADUNs v Sivakumar: Ridwan JC bars Sivakumar again from choosing his own lawyers, this time in the hearing of the suit by the 3 Independent ADUNs (Jamaluddin, Osman and Hee) against him for wrongly declaring their seats vacant.

6 March 2009

Nizar v Zambry: Lau J transfers the case to the Federal Court, and dismisses an application for a stay pending an appeal against the transfer by Nizar's lawyers.

Zambry & 6 BN EXCOs v Sivakumar: Sivakumar's lawyers apply to set aside the restraining order. His lawyers also file an appeal to the Court of Appeal against the decision preventing him from appointing them.

10 March 2009

Nizar v Zambry: Lau J formulates the questions to be referred to the Federal Court, which includes the issue of Zambry's appointment as MB.

Sivakumar v EC & 3 ADUNs: Sivakumar seeks to compel the EC to call by-elections in the seats held by the 3 Independent ADUNs. He files at the KL High Court a judicial review in his personal capacity to ensure he can appoint his own lawyers. 3 other PR Assemblypersons and 3 Perak voters file a similar application.

11 March 2009

3 ADUNs v Sivakumar: Sivakumar appears in person to argue his case. Ridwan JC rules again that Sivakumar must be represented by the State Legal Adviser. Sivakumar's lawyers lodge an appeal against the decision.

13 March 2009

Zambry & 6 BN EXCOs v Sivakumar and *3 ADUNs v Sivakumar*: The Court of Appeal allows Sivakumar to engage his own lawyers in the suits against him.

16 March 2009

3 ADUNs v Sivakumar: Ridwan JC takes Sivakumar's legal team by surprise when he abruptly refers the issue of whether the State Assembly Speaker or the EC rightfully declares a seat vacant to the Federal Court.

Nizar v Zambry: Nizar appeals to the Court of Appeal against Lau J's decision to transfer his case to the Federal Court. He tries to stay the Federal Court proceedings pending his appeal.

20 March 2009

Nizar v Zambry: Case is to be heard in the Federal Court after the Court of Appeal unanimously rejects Nizar's appeal against Lau J's decision to transfer.

23 March 2009

Federal Court returns *Nizar v Zambry* to the KL High Court and *3 ADUNs v Sivakumar* to the Ipoh High Court. The Federal Court judges are Alauddin Mohd Sheriff PCA, Arifin Zakaria CJM, Augustine Paul, Zulkefli Makinuddin FCJJ and James Foong JCA.

24 March 2009

Zambry & 6 BN EXCOs v Sivakumar and *3 ADUNs v Sivakumar:* Ridwan JC steps down from hearing both cases.

30 March 2009

3 ADUNs v Sivakumar: A new Judge, Balia Yusof Wahi J now hears this case in the Ipoh High Court. Sivakumar applies to strike out the suit.

1 April 2009

Nizar v Zambry: Lau J is replaced by Abdul Aziz Abdul Rahim J who will hear the case.

3 ADUNs v Sivakumar: Balia J dismisses Sivakumar's application to strike out the suit against him, deciding the Speaker has no immunity, and did not comply with House rules on accepting resignations. The application by 3 PR lawmakers and 3 Perak voters to intervene is dismissed on the grounds they have no *locus standi* to intervene.

3 April 2009

Nizar v Zambry: Aziz Rahim J grants leave to Nizar to challenge Zambry's appointment as MB. The Judge notes that an MB can vacate his post by resigning but Nizar did not do this.

9 April 2009

3 ADUNs v Sivakumar: Decision on the application of the 3 ADUNs directly to the Federal Court regarding which authority decides whether their seats are vacant. The Court rules that seat vacancies are determined by the EC, not the Speaker. The 3 BN-friendly ADUNs keep their seats. Judges on the Bench are Alauddin PCA, Arifin CJM, Nik Hashim, Augustine Paul FCJJ and Foong JCA.

14 April 2009

Zambry & 6 BN EXCOs v Sivakumar: The 7 Applicants pose questions of law to the Federal Court on interpretations of the Perak Constitution and Standing Orders of the Perak Legislature with regard to their suspensions. The Federal Court rules they have correctly used legal procedures to challenge their suspensions and hears their case the same day.

16 April 2009

Zambry & 6 BN EXCOs v Sivakumar: Federal Court unanimously lifts the suspensions imposed by the Privileges Committee on Zambry and the 6 BN EXCOs. Judges of the Court comprise Alauddin PCA, Arifin CJM, Nik Hashim, Augustine Paul and Makinuddin FCJJ.

17 April 2009

Assembly sitting is called for 7 May in a notice to all Assemblypersons by State Assembly Secretary Abdullah Antong, whom Sivakumar earlier suspended.

21 April 2009

Nizar v Zambry: Zambry applies for his case, currently in the High Court, to be sent directly to the apex Federal Court for a quick resolution to end the political impasse.

28 April 2009

Nizar v Zambry: Zambry's application for transfer to the Federal Court is rejected by Alauddin PCA, Arifin CJM, Ghazali Yusoff, Makinuddin and Foong FCJJ.

7 May 2009
Legislative Assembly sitting descends into chaos. Sivakumar, while seated in the Speaker's chair is forcibly dragged out of the hall after a stand-off since morning. BN-appointed Speaker R. Ganesan assumes the Chair. Regent of Perak Raja Nazrin thereafter enters to deliver his Royal Address to open the sitting. PR leaders hold a press conference claiming that the sitting and Ganesan's appointment are illegal.

11 May 2009
Nizar v Zambry: Aziz Rahim J rules that Nizar is the rightful MB at all material times. Referring to the Perak Constitution, he decides that a "no confidence" vote in the Assembly is the only way an MB may be removed.

12 May 2009
Nizar v Zambry: Court of Appeal Judge Ramly Mohd Ali JCA sitting alone grants Zambry a stay order against the High Court's decision on 11 May pending an appeal. Nizar is unable to seek the Perak Sultan's permission to dissolve the State Assembly.

13 May 2009
Nizar v Zambry: Nizar's lawyers urgently apply to set aside the Court of Appeal's stay order.

15 May 2009
Sivakumar v Ganesan: Sivakumar files an injunction against the BN Speaker at the Ipoh High Court. Sivakumar challenges Ganesan's election as Speaker, seeks to stop him (and his agents) from obstructing Sivakumar from performing his duties as Speaker, and from carrying out further abuse, assault and/or battery on Sivakumar.

22 May 2009
Nizar v Zambry: After 8 hours of submission from both parties and the Attorney General the day before, the Court of Appeal in a 5-minute oral judgment rules that the High Court was wrong to have declared Nizar as the MB. The Court is led by Raus Sharif, sitting with Zainun Ali and Ahmad Maarop JJCA.

19 June 2009
Nizar v Zambry: Nizar files for leave to appeal to the Federal Court.

9 July 2009
Nizar v Zambry: By consent of parties, the Federal Court grants leave to Nizar to appeal against the Court of Appeal's decision. The apex court comprises Alauddin PCA, Arifin CJM and Makinuddin FCJ.

12 August 2009
Sivakumar calls a meeting of the Legislative Assembly on 2 September to meet the State constitutional requirement for consecutive sittings to be held within 6 months following the last one on 3 March. Notices are sent to all Assemblypersons the following day.

26 August 2009
Sivakumar v State Secretary: At the Ipoh High Court, Sivakumar sues Abdul Rahman Hashim for exceeding his powers as a civil servant by interfering with the affairs of the Legislature.

1 September 2009
Sivakumar v State Secretary: Tarmizi Abd Rahman JC dismisses Sivakumar's application for an order to stop Abdul Rahman from interfering in the State Assembly sitting planned for the next day.

2 September 2009
Day of the Legislative Assembly sitting called by Sivakumar. All PR Assemblypersons are barred from entering the State Secretariat. Sivakumar changes the sitting's venue to Heritage Hotel nearby.

8 September 2009
Sivakumar v Ganesan: Ipoh High Court Judge Azahar Mohamed J strikes out with costs Sivakumar's suit against the BN Speaker on the grounds that the Court has no jurisdiction in legislative decisions.

12 October 2009
BN then calls for an Assembly sitting on 28 October to meet the 6 month deadline since the last 7 May sitting.

22 October 2009
Sivakumar v EC & 3 ADUNs: KL High Court Judge Lau J grants Sivakumar, the 3 PR lawmakers and 3 Perak voters leave to challenge the EC's decision not to hold by-elections in the seats of Jamaluddin, Osman and Hee. Lau J rejects the Attorney General's argument that the case is

academic due to the Federal Court's 9 April ruling that seat vacancies are determined by the EC.

28 October 2009
Assembly sitting called by BN starts at 10am with an empty Opposition bench. PR representatives allege they were deliberately delayed during screening procedures when entering the House. The sitting adjourns *sine die* at 12.15pm.

5 November 2009
Nizar v Zambry: Federal Court dismisses Nizar's application for a full bench to hear his appeal. The 5-member panel of Alauddin PCA, Arifin CJM, Makinuddin, Ghazali and Abdull Hamid Embong FCJJ hears the appeal for 6 hours and defers its decision.

12 November 2009
Sivakumar v State Secretary: Tarmizi JC strikes out Sivakumar's suit against Abdul Rahman.

9 February 2010
Nizar v Zambry: Federal Court dismisses Nizar's appeal. Zambry is unanimously declared the lawful Perak MB.

19 April 2010
Jelapang Assemblyperson Hee is awarded a "Datuk-ship" by Sultan Azlan Shah.

23 April 2010
BN-friendly Independents Jamaluddin and Osman are acquitted of corruption charges by the Ipoh Sessions Court without their defence being called.

22 June 2010
Sivakumar v Ganesan: Court of Appeal dismisses Sivakumar's appeal, holding that the courts cannot interfere with matters which happened in the Assembly: Ganesan's appointment is valid in law.

25 October 2010

Sivakumar v Ganesan: Federal Court dismisses Sivakumar's application for leave to appeal and the matter ends there. Judges Alauddin PCA, Hashim Yusoff and Ghazali FCJJ decided the case.

23 November 2010

Sivakumar v EC & 3 ADUNs: Case is heard before Aziah Ali J who fixes her decision for 14 January 2011.





Digest - Perak Crisis Cases

A summary of the key court cases that resulted from the Perak imbroglio.

I. Nizar v Zambry

Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener)

- High Court rules Nizar rightful MB: [2009] 5 MLJ 108; [2009] 1 LNS 316
- Court of Appeal reverses High Court and declares Zambry the MB: [2009] 5 MLJ 464; [2009] 5 CLJ 265
- Federal Court upholds Court of Appeal: [2010] 2 MLJ 285; [2010] 2 CLJ 925

Pakatan Rakyat, by a majority of 3 seats, wrested control of the Perak State Legislative Assembly in the State elections held on 8 March 2008 from the Barisan Nasional coalition that had governed the State since independence in 1957.

According to the Speaker, in early 2009, 3 PR members of the Assembly had resigned and vacated their seats. Nizar, the Perak Menteri Besar wrote to HRH Sultan Azlan Shah requesting a dissolution of the Assembly to pave the way for fresh elections.

HRH met with the 3 ADUNs (who said they had resigned from PR but denied they had resigned from the Assembly) and 28 other BN members of the Assembly. HRH refused Nizar's request for a dissolution and Nizar was required to tender his resignation immediately as MB together with his EXCO.

Nizar refused to resign on the ground that there had not been a vote of no confidence against him in the Assembly.

HRH's office then issued a media statement which among other things deemed that the office of the Perak Menteri Besar was vacated pursuant to Article 16(6) of the Perak State Constitution.

On 6 February 2009, Zambry was appointed as the MB of Perak by HRH.

Nizar applied to the High Court seeking an order that he was the rightful Perak MB.

The High Court found as a fact that the request for dissolution was not made under Article 16 of the Perak Constitution (which implied an admission of a loss of confidence in the MB by the members of the Assembly) but was instead made under Article 36(2) of the Perak Constitution (containing a general power to dissolve the Assembly).

The High Court ruled that only a vote of no confidence taken and passed in the Assembly itself could justify the operation of Article 16 and trigger the requirement for Nizar to resign. As Nizar had not resigned and no vote of no confidence was adopted, the Court declared Nizar the rightful Perak MB.

The Court of Appeal overturned this decision. It rejected the High Court's finding of fact and substituted its own finding that the request for dissolution was indeed made by Nizar under Article 16. It held that HRH was entitled to use other means (without going back to the Assembly for a no confidence vote) to ascertain how many members of the Assembly had confidence in Nizar, and declared that Zambry was the MB of Perak.

The Federal Court affirmed the Court of Appeal's decision.

Nizar v Zambry: Federal Court Questions Of Law And Answers

Question (1):
Whether, under Article 16(6) of the Perak Constitution, and in the circumstances that:

(i) the Menteri Besar of Perak wishes, and has advised for the dissolution of the Perak State Legislative Assembly; and
(ii) there was no dissolution of the Perak State Legislative Assembly; and
(iii) there was no motion of no confidence taken in and adopted by the Perak State Legislative Assembly against the Menteri Besar of Perak; and
(iv) there was no resignation by the Menteri Besar of Perak;

the post of the Menteri Besar of Perak may be and/or has been vacated?

Answer (1):
Affirmative.

Question (2):
Whether, under Article 16(6) of the Perak Constitution, the determination of the issue of confidence in the Menteri Besar of Perak has to be made by members of the Perak State Legislative Assembly in an Assembly meeting on a vote of no confidence, or by means other than by a vote of no confidence in the Perak State Legislative Assembly as to whether the Menteri Besar commands the confidence of the majority of the members of the Perak State Legislative Assembly?

Answer (2):
Under Article 16(6) the question of confidence in the Menteri Besar may be determined by means other than a vote of no confidence in the Legislative Assembly.

Question (3):
If the Menteri Besar refuses to tender the resignation of the Executive Council, whether under the Perak Constitution, a Menteri Besar may be dismissed from office or the Menteri Besar's post be deemed vacant or vacated?

Answer (3):
If the Menteri Besar refuses to tender the resignation of the Executive Council under Article 16(6), the Menteri Besar and the Executive Council members are deemed to have vacated their respective offices.

II. 3 ADUNs v Sivakumar

Jamaluddin bin Mohd Radzi & Ors v Sivakumar a/l Varatharaju Naidu (claimed as Yang Dipertua Dewan Negeri Perak Darul Ridzuan); Election Commission (Intervener)

- Federal Court (direct reference under Article 63): [2009] 4 MLJ 593; [2009] 4 CLJ 347

- High Court dismisses striking out application: [2009] MLJU 232; [2009] 3 CLJ 785

This case revolved around the purported resignations of the 3 ADUNs of Behrang, Changkat Jering and Jelapang who had left PR. The three denied they resigned, and disassociated themselves from pre-signed letters of resignations tendered by their political parties. However, the Speaker of the Perak Assembly, Sivakumar, held the letters valid and declared their seats vacant.

The Federal Court heard the matter by a direct reference to it under Article 63 of the Perak Constitution and ruled (though Nik Hashim FCJ) that the Speaker had no power to declare the seats vacant. That power was vested with the Election Commission only.

III. Zambry & 6 BN EXCOs v Sivakumar

YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu; Attorney General Malaysia (Intervener)

- Federal Court (direct reference under Article 63): [2009] 4 MLJ 24; [2009] 4 CLJ 253

This was another direct reference to the Federal Court under Article 63 of the Perak Constitution.

Zambry and 6 other BN EXCOs brought this case to challenge their suspension from the Perak Legislative Assembly by the Privileges Committee (chaired by the Speaker) for contempt. Zambry was suspended for 18 months and the other 6 BN EXCOs for a year.

The Federal Court (through Augustine Paul FCJ) ruled that the Committee had no power to suspend the ADUNs for contempt based on the particular allegations against them.

IV. Sivakumar v Ganesan

Sivakumar a/l Varatharaju Naidu v. Ganesan a/l Retanam

- High Court strikes out case: [2010] 7 MLJ 355; [2009] 1 LNS 979

Azahar Mohamed J in the Ipoh High Court decided that the Court cannot interfere with acts occurring in the Assembly, in particular the election of Ganesan as the new Speaker of the Perak Assembly. Accordingly, Sivakumar's suit was struck out.

The Court of Appeal and Federal Court have since affirmed the decision.

V. Sivakumar v State Secretary

Sivakumar a/l Varatharaju Naidu v. Abdul Rahman bin Hashim

- High Court strikes out case: Civil Suit No. (M3) 22 – 224 – 2009

Tarmizi Abd Rahman JC in the Ipoh High Court held that Sivakumar had no standing to file the suit against Perak State Secretary Abdul Rahman for abuse of power and interference in preventing him (Sivakumar) from entering the State Assembly's premises and discharging his duties as the Speaker.

VI. Sivakumar v EC & 3 ADUNs

Sivakumar a/l Varatharaju Naidu v Jamaluddin bin Mohd Radzi, Mohd Osman bin Mohd Jailu, Hee Yit Foong & Election Commission Malaysia

- Pending decision: Judicial Review Application No. R1-25-45-2009

Sivanesan a/l Achalingam, Tai Sing Ng, Chen Fook Chye, Ahmad Sabri bin Wahab, Abdul Latip bin Arifin & Foo Hon Wai v Jamaluddin bin Mohd Radzi, Mohd Osman bin Mohd Jailu, Hee Yit Foong & Election Commission Malaysia

- Pending decision: Judicial Review Application No. R1-25-44-2009

These two cases being heard together – one brought by the Speaker and another by 3 ADUNs and 3 individual voters in the 3 affected constituencies – challenges the decision of the Election Commission not to recognise the resignation letters of the 3 ADUNs who switched allegiance, and its decision not to call for by-elections for the seats of Behrang, Changkat Jering and Jelapang. The Speaker, Sivakumar, had accepted the resignation letters and declared the seats vacant.

Leave to apply for judicial review was granted by Lau J. The substantive judicial review was heard by Aziah Ali J on 23 November 2010 and her decision is due on 14 January 2011.

Who Were The Judges?

I. Nizar v Zambry

COURT	CASE NO.	JUDGE(S)	JUDGMENT
High Court	Judicial Review Application No. R6(R3)-25-25-2009	Abdul Aziz Abdul Rahim J	11 May 2009 reported in [2009] 5 MLJ 108 [2009] 1 LNS 316
Court of Appeal	Civil Appeal No. W-01-112-2009	Raus Sharif JCA Zainun Ali JCA Ahmad Maarop JCA	22 May 2009 reported in [2009] 5 MLJ 464 [2009] 5 CLJ 265
Federal Court	Civil Appeal No. 01-11-2009 (W)	Alauddin Sheriff PCA Arifin Zakaria CJM Zulkefli Makinuddin FCJ Mohd Ghazali Yusoff FCJ Abdull Hamid Embong FCJ	9 February 2010 reported in [2010] 2 MLJ 285 [2010] 2 CLJ 925

II. 3 ADUNs v Sivakumar

COURT	CASE NO.	JUDGE(S)	JUDGMENT
Federal Court	Notice of Motion No. 06-03-2009 (A)	Alauddin Sheriff PCA Arifin Zakaria CJM Nik Hashim FCJ Augustine Paul FCJ James Foong JCA	9 April 2009 reported in [2009] 4 MLJ 593 [2009] 4 CLJ 347

III. Zambry & 6 BN EXCOs v Sivakumar

COURT	CASE NO.	JUDGE(S)	JUDGMENT
Federal Court	Notice of Motion No. 06-04-2009 (A)	Alauddin Sheriff PCA Arifin Zakaria CJM Nik Hashim FCJ Augustine Paul FCJ Zulkefli Makinuddin FCJ	16 April 2009 reported in [2009] 4 MLJ 24 [2009] 4 CLJ 253

NB: If you look hard enough on *www.LoyarBurok.com* you can find the courts' judgments above!

Who Were The Lawyers?

For Nizar and Sivakumar

Collectively, members of the legal team who acted in various cases and capacities for Nizar and Sivakumar throughout the Perak Crisis were:

1. Sulaiman b. Abdullah
2. Tommy Thomas
3. Nga Hock Cheh
4. Philip Koh Tong Ngee
5. Ambiga Sreenevasan
6. Chan Kok Keong
7. Mohamad Asri b. Othman
8. Ranjit Singh s/o Harbinder Singh
9. Razlan Hadri b. Zulkifli
10. Mohamed Hanipa bin Maidin
11. Augustine a/l Anthony
12. Leong Cheok Keng
13. Mohammad Yunus bin Mohd @ Ahmad Ali
14. Edmund Bon Tai Soon
15. Yap Boon Hau
16. Amer Hamzah Arshad
17. Mahaletchumi Balakrishnan
18. Zulqarnain bin Lukman
19. Cheong Sek Kwan
20. Joanne Leong Pooi Yaen
21. Jason Tay Yew Chong
22. Grace Wong Phui Mun
23. Abigail Lim Ern Tze
24. Ngoi Evon

For Zambry, Jamaluddin, Osman, Hee and Ganesan

Collectively, Advocates and Solicitors who appeared for Zambry, Jamaluddin, Osman, Hee and Ganesan in the various cases before the courts (as reported) were:

1. Cecil Wilbert Mohanaraj Abraham
2. Mohamad Reza bin Abu Hassan
3. Faizul Hilmy bin Ahmad Zamri
4. Cheng Mai
5. Syed Faisal Al-Edros b. Syed Abdullah
6. Firoz Hussein bin Ahmad Jamaluddin
7. Abu Bakar As-Sidek bin Haji Mohd Sidek
8. Mohd Hafarizam Harun
9. Badrul Hishah bin Abd. Wahap
10. Rishwant Singh a/l Amarjeet Singh
11. Sunil Abraham
12. Shahir bin Ab Razak
13. Farah Shuhadah binti Razali





The Real Question On Perak*

Amer Hamzah Arshad

Historically, before the existence of Malaysia, the Malay States fell into the hands of the imperialists due to greed and power. It was about the power struggle amongst the royalty which eventually led to the colonisation of the States.

Pre-*Merdeka*, with the emergence of the insurgencies by the left, a "deal" was struck among (i) the capitalists, (ii) the royalty, (iii) the royalists and (iv) the imperialists, with the sole purpose of maintaining and guarding "their" positions and influence in Malaya. The collateral outcome of the "deal" was the independence of Malaya. It was a decision motivated by the need to protect and safeguard the vested interests of these actors. It was not about the *rakyat*. It has never been!

Fast forward 52 years after independence, we see how these same actors have again colluded to stage a modern day "coup" in the State of Perak. Again this was not done in the interests of the *rakyat*. Those who have heard about the true colours and the personality/ies of the various decision-maker(s) will not be surprised by the recent decision(s).

Ultimately, one important question that needs to be answered is, "what's in it for me?" That was the question that Pakatan Rakyat could not answer.

No doubt there are several legal and moral issues that have arisen from the Perak fiasco. But the real issue that irks the *rakyat* is the fact that the capitalists and the royalty have robbed the State Government from the *rakyat*.

Regarding the legality of the Sultan's decision to call for the resignation of the Menteri Besar, I am prepared to say that the decision is wrong in law. Based on the Perak Constitution, the MB does not hold office at the pleasure of the Sultan.

* First posted 7 February 2009. This post is dedicated to those who protested in defiance of the Sultan of Perak on 6 February 2009.

The only way the MB goes is by way of a no confidence motion in the Legislative Assembly. The Sultan cannot just ask the MB to vacate his office.

Article 16(6) of the Perak Constitution states that:

> *If the Mentri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.*

The questions then are: who decides whether the MB ceases to command the confidence of the majority of the members of the State LA? Should it be the Sultan or the State LA? How and where should such issues be decided?

The answers to these questions are obvious. Matters of grave importance that affect the interests of the State should be decided in the hall of the LA, and NOT along the corridors or halls of the Palace.

The next question then is: who holds the majority at the LA?

To answer this question, one must first ascertain the status of the 3 so-called "independent" members who tendered their resignations. There is a dispute in relation to their status as members of the LA. Their views therefore should not be taken into account until their status has been definitely resolved.

Against this background, how can anyone say that BN commands the majority?

Some have replied saying that since the Election Commission did not recognise the resignation letters of the three "independent" members, therefore they are still members of the LA.

This throws up the further question whether the EC has the power and jurisdiction to adjudicate on the status of the resignations.

From the legal perspective, the EC has exceeded its jurisdiction. There is nothing under the Election Commission Act 1957 and the Elections Act 1958 that confers power on the EC to adjudicate on such matters.

Consequently, the EC's decision on this matter is *ultra vires* and is of no effect. Unless the decision by the Speaker to declare the seats vacant is set aside or overturned by a court of law, the EC must accept the decision of the Speaker. However, we have witnessed how the EC has facilitated a "coup" by disregarding the Speaker's decision.

Leaving aside the legal questions – on desirability – in view that the current political scenario in Perak is fragile and uncertain, coupled with the fact that there is no guarantee there will not be any further and sudden defections that may affect the composition of the LA, the best decision to make is to have dissolved it.

Unfortunately, wisdom may not be the virtue of some.

Who will benefit from this episode? The "decision-makers"? Those who "orchestrated" the situation?

Unless the question of "what's in it for me?" is fully answered, then no one will receive the truth.

The State of Perak was robbed by the capitalists and the monarchy.

The fate of the State should not lie in the hands of allegedly corrupted politicians and a Sultan. It should be in the hands of the *rakyat*! Let the people of Perak decide the fate of their State through fresh elections.

For the record, I am not a monarchist or a royalist. I have little admiration for slogans such as *Daulat Tuanku* and the related mumbo-jumbo. Some may say that this article and the fact that I am doubting the wisdom of the Sultan of Perak may be construed as an act of *derhaka* (disloyalty). As far as I am concerned the issue of *menderhaka* does not arise.

And my reply is *derhaka terhadap siapa*? Can I *derhaka* towards an institution that I don't believe in? Can I *derhaka* towards an institution that ignores the will of the *rakyat*?

It is apt for us to remind ourselves of what Hang Jebat once said:

> *Jangan! Jangan sembah aku. Aku bukan gila disembah. Aku bukan sebagai Sultan Melaka yang mengagung-agungkan*

pangkat dan kebesarannya. Aku Jebat, rakyat biasa. Pangkat aku untuk kepentingan rakyat. Bergerak aku untuk membuat jasa kepada rakyat, dan aku rela mati untuk rakyat .. kerana aku mahu keadilan, keadilan. Keadilan!

The time is ripe for a revolution.

So are you game?

Salam revolusi!

Selected Comments

Dara Waheda
on 7 February, 2009 at 8:02 am

Amer, I really don't know why these people like to use the word "menderhaka" everytime. King is not God, if you can go defy and question God with macam-macam soalan, why should you be afraid of menderhaka towards Sultan? Such a shame.

cjfoo
on 7 February, 2009 at 10:02 am

"THEY" have lost their high moral ground to carry on their usual preaching of high morality, wisdom, neutrality, good governance, transparency, respect of our constitution and rules of law. Their integrity and high morality are down the drain forever. Talk one thing and do another. All their previous preaching was just hot air. What happened in Perak made a mockery of our Parliamentary democracy. Very, very sad indeed. Power lies in the hand of the people and it is we, the people that decide the government not "THEM". A Constitutional Monarch is just a figurehead and their role is just ceremonial! Nothing more and nothing less.

Lapsap
on 8 February, 2009 at 4:09 am

Agree with you that the seat of the MB cannot be vacated until a vote of no confidence is passed. However, I am minded that a person, who once held the office of Lord President, should be more cautious when making the decision.

topet
on 8 February, 2009 at 7:24 am

Way to go bro. I'm with you. This elevation of our raja nearing god is rubbish.

Ibrahim
on 8 February, 2009 at 11:07 am

'Derhaka' is only to God. Man are equal.

Naim
on 8 February, 2009 at 12:22 pm

The people in power always use the word "derhaka" if we go against them (despite their wrong doing). What about they "derhaka" to Rakyat for robbing Rakyat's right. Remember no power can exist without the subject. Give back the power to Rakyat to decide!





Bias, Public Perception And Recusal: Judicial Consistency At Last?*

Edmund Bon Tai Soon

One lesson we learned at law school was that the law must be certain. The law must apply and be applied across the board fairly. Lawyers should be able to make a good assessment of the case based on the prevailing law, and be able to advise their clients accordingly. Uncertainty in the interpretation and application of the law creates a sense of arbitrariness. When this happens, public confidence in the justice system will plunge.

We are seeing this happen in Malaysia. Ask any good lawyer today, and hear if this is true – Malaysian lawyers are not able to honestly and with certainty advise clients whether the legal arguments to be taken in court will result in the outcome according to legal textbooks or case precedents. And thus, lawyers have to ride our luck these days.

Take the question of recusal or disqualification of judges for perceived or actual bias. The question has not always received a consistent answer.

In *PP v Mohamed Ezam Mohd Nor*[1], Abdul Wahab Patail J recused himself because His Lordship's brother was the head of the prosecution service and signed the charge against the accused.

Here it seems that public perception was important, although the learned Judge said that as a matter of fact, His Lordship would not be biased.

In contrast, in *Mohamed Ezam Mohd Nor & Ors v Ketua Polis Negara*[2], the Federal Court decided that Augustine Paul J (as His Lordship then was) was correct not to have recused himself because there was no "real danger of bias" for His Lordship to hear the *Reformasi habeas corpus* applications despite His Lordship having earlier convicted Datuk Seri Anwar Ibrahim. In the High Court, Paul J said:

* First posted 2 March 2009
1 [2001] 8 CLJ 558
2 [2001] 4 CLJ 701

Just as it is improper for a judge to hear a case when there may be a reasonable perception of bias if he hears the case it is equally wrong for him to disqualify himself from hearing a case when there are no such grounds to do so. As a matter of fact it would be a gross dereliction for a judge to disqualify himself when there are no grounds. Accordingly, I dismissed the application.

Apparently, public perception wasn't that important in that instance. The Court held that there was insufficient evidence to establish a real danger of bias on the part of the Judge.

In *Bumicrystal Technology v Rowstead Systems Sdn Bhd*[3], Mohamed Apandi Ali JC (as His Lordship then was) refused to recuse himself even though one of the parties was owned by the PAS-led Government of Kelantan, and His Lordship was previously a legal adviser for UMNO and stood as an UMNO candidate in the General Elections in 1990[4].

When the learned JC made the decision, public perception didn't seem to feature prominently. And it appeared that past political association was not to be a disqualifying facet. Consequently the Court felt that no real danger of bias existed.

In the recent Raja Petra Kamaruddin appeal in the Federal Court[5], that Court too felt that public perception of bias would not disqualify Augustine Paul FCJ.

However, in the recent Perak *MB v MB* suit, the sitting judge, Mohamad Ariff bin Md. Yusof JC, gave greater weight to public perception and recused himself. His Lordship had previously advised PKR and PAS on several matters and stood on a PAS ticket in the General Elections of 2004. While recognising the constitutional oath of a Judge/JC and there being no allegation of partiality, the learned JC nevertheless held in His Lordship's judgment as follows:

I am of the view that any decision to recuse in the present circumstances is best rooted in first principles of justice. I had highlighted this point on the first mention date. The primary concern must be that justice must manifestly be seen to be done. Not just be done but, I stress manifestly so. The objective fact is my sitting has courted controversy, whether rightly or wrongly. That

3 [2004] 6 CLJ 85

4 I understand that this decision was subsequently reversed, and the matter heard before another judge.

5 (2009) 3 CLJ 513

counsel's conclusions can be so opposed, although applying the same principles, is an added testimony to this objective fact. This is where the valuable commentary in the authority cited by learned senior counsel for the applicant becomes highly relevant as the proper practice to be followed: "However, where the interest is more than minimal or when his association with a party, witness or counsel might give rise to the appearance of impropriety, of unfairness or bias, he will disqualify himself and not leave the matter dependent upon whether or not the parties will raise objections.": "Judges on Trial".

I think that this is a decision we can live with, and little can be said by way of critique. It is well-reasoned.

If only the Judiciary will now be consistent in the application of recusal principles to judicial and prosecutorial disqualifications.

Selected Comments

hawk
on 2 March, 2009 at 9:33 am

Mohamad Ariff JC had at the outset offered to recuse himself and proceeded to inform parties that he had acted previously for both PAS and BN.

I would have thought that for a judge to recuse himself, one or both parties must make an application for the judge to do so for fear of likelihood of bias. And if the judge subsequently recused himself on such an application, everybody would have understood it.

Assuming that neither party had objected to him hearing the case, notwithstanding his past associations with either party, why then should he offer to recuse himself? It would be seen as a dereliction of judicial duty.

The case assumes great importance because Perak is in a complete mess because of the takeover and the Government could not function. Pending the settlement of the suit, the least he could do is to maintain the status quo pre-the takeover by issuing an interim injunction.

In a parliamentary democracy, the actual ruler is the electorate, and the electorate's supremacy is manifested in the State Constitution. Apart from this written constitutional supremacy, we have next a Legislative supremacy which can amend

the constitution albeit with a 2/3 majority. Therefore the electorate's interest should be taken into primary consideration in this confusing state of affairs.

We really need tough minded judges who could make decisions, however unfavourable it may seem to either party, based purely on facts and law without regard to other extraneous factors.

M V Nathan
on 2 March, 2009 at 4:24 pm

Mr Bon I am with you on this score. These days I honestly think I am "riding" my luck. The law is so uncertain and the quality of certain judges have been down right "lacking"! Some days I just dread going to court mate!

art harun
on 2 March, 2009 at 9:40 pm

Dear Mr (Ms?) Hawk,

JC Ariff Yusof has a duty under the law to declare the facts which he declared and to ask the parties whether they would like him to recuse or otherwise. What he did was in accordance with established legal principles in respect of apparent bias and recusal (among others, the principles laid down in the Locobail and Pinochet cases). The disclosure made by him is required under the law and that was what he did. That was far from being a dereliction of his duty. In fact, it is commendable and should be the yardstick for judicial integrity in Malaysia and elsewhere.

On a different issue, JC Ariff had no choice other than to recuse himself. There was, in his judgment – and I agree with him – a real danger of bias in the form of an apparent bias. If you must know, when there is a real danger of bias, a Judge MUST recuse himself even though both parties do not ask him to do so. This is because under the law, apparent bias cannot be waived by the parties.

The oft repeated phrase "justice must not only be done but must also manifestly be seen to be done" demands such action.

Perak Speaker Can Appoint Private Lawyers*

Shanmuga K

The restriction in the Government Proceedings Act on "public officers" using private lawyers only with the permission of the Attorney General does not apply to the Speaker of the Legislative Assembly of Perak defending a suit brought against him in his capacity as Speaker. Thus, the Ipoh High Court decision to bar Tommy Thomas and others from acting for Speaker Sivakumar is, with respect, wrong.

It appears that Ipoh High Court's Judicial Commissioner Ridwan bin Ibrahim has this morning ruled that private lawyers cannot appear on behalf of the Speaker of the Perak State Assembly, Sivakumar, in the litigation against him brought by UMNO Assemblypersons because of the Government Proceedings Act 1956.

This decision is of particular interest to those concerned with the right of litigants to have an advocate to champion their cause in court without fear or favour. Regrettably, and with respect, it appears that this decision does not seem to be in line with the provisions of the Government Proceedings Act as read together with the Federal Constitution.

Section 24(3) of the Government Proceedings Act seems to suggest that the State Legal Adviser must retain advocates and solicitors in order to act on behalf of the "State Government" or "State officers" in "civil proceedings by or against the Government of a State or a State officer". This follows on from sections 24(1) and (2) which provide that law officers (meaning lawyers from the Attorney General's Chambers) "may" act on behalf of "public officers" who are sued by virtue of his office.

Thus, the law allows for the Attorney General's Chambers to act or to appoint private lawyers to act for cases against public officers.

* First posted 3 March 2009

The term "public officer" is not defined in the Government Proceedings Act. The Interpretation Act has the following definitions:

> *"public office" means an office in any of the public services;*
>
> *"public officer" means a person lawfully holding, acting in or exercising the functions of a public office;*
>
> *"public services" means the public services mentioned in Article 132(1) of the Federal Constitution;*

Article 132(1) of the Federal Constitution lists several public services such as the armed forces, the judicial and legal services, the police service and the general public service. In a nutshell, the public services are what is commonly called "Government service" or "civil service".

But Article 132(3)(b) is instructive. It categorically states that "the public service shall not be taken to comprise" the Speakers of Parliament and the Legislative Assemblies of the State. Hence, it appears that the restriction in the Government Proceedings Act on public officers using private lawyers only with the permission of the Attorney General does not apply to the Speaker of the Legislative Assembly of Perak defending a suit brought against him in his capacity as Speaker.

Thus, the Ipoh High Court decision to bar Tommy Thomas and others from acting for Speaker Sivakumar is, with respect, wrong.

Selected Comments

sleme
on 3 March, 2009 at 12:28 pm

Malaysia Boleh…Judicial Activism ala UMNO. Rumour has it that after barring Tommy and his team, the judge proceeded to hear the application without the presence of the State Legal Adviser. He also apparently granted the injunction. Can anyone verify this?

Dualties
on 3 March, 2009 at 12:54 pm

Shanmuga :

Bravo! Bravo! You have done your job well. The Rakyat is now well informed with your facts and research on the High Court Judge Ridwan bin Ibrahim. Shame on the judge who appears to be pro-executive BN. The might of the Rakyat is greater than the learned.

concerned student
on 3 March, 2009 at 2:06 pm

What is going on in our country? The whole system on the judiciary and the separation of power doctrine looks different from what we study in our Form 6 Pengajian Am. If they are going to go on with it, it will definitely affect the education system in the whole country. Now, so many questions have been brought up among the students. Who is more powerful? The Speaker or the Dewan Secretary? Who is the real MB of Perak? If the government do it, don't they realise that Dewan Rakyat Speaker will also be questioned as I have heard him barring opposition leaders from entering Parlimen sessions as well. I think the best way is to let our Rakyat to decide. Or else, we will be a joke for the British. Almost same laws and the separation of power doctrine is used but we seem to be confused with it and seem to love to mix it up all together. Even the police and judges seem to be biased to BN. We the Rakyat just plead for the Government (no matter from BN or Pakatan) to be fair and stop corruption. NOTE our country is in danger – economic crisis!! Is power that important until you can neglect the whole country? If Perak goes down, Malaysia will also go down as well!

Saiful Haq
on 3 March, 2009 at 2:42 pm

This is the problem when the stomach is allowed to rule the head. Vested interest has completely overshadowed considerations of morality, justice and fair play. UMNO/BN and their sychophants in the executive and judiciary are prepared to do everything, even ones that border on insanity, without shame and compunction so long as they can keep their jobs and their ill-gotten gains.

It is time for us and the down-trodden to say enough is enough and use whatever is left of democracy to bring them down from their pedestals before this country is completely ruined.

RAILCOOP
on 3 March, 2009 at 2:57 pm

Congratulations Shanmuga for a very fine and lucid summation of the 'case' for the People. We are aware that every antic will be brought up to stalemate the Speaker by use of brute force not compatible with decency and honour.

The episode strikes one as an unquenchable 'thirst' for power – certainly not for the good of the Rakyat by any stretch of imagination as seen during the last 30 or more years.

It is great to have people like you to defend the weak, the poor, the meek, the humble and the witless of this great Nation.

GhifariX
on 3 March, 2009 at 3:42 pm

Fellow citizens, fear not nor panic! It is merely the process we have seen from time immemorial; destitution of the powers of the day. Usually they start with trifle yet same evil intentions to subvert justice and in so doing violate the peoples, society, institutions and last but not least their own human dignity, it's like a tree before it topples down. This government is rotten, it is shedding its leaves and its bark. There's nothing glamorous about the elite and not even its benefactors dare sanctify themselves in hopping over to the masses with a single courageous act of redemption – God in His infinite mercy wouldn't allow them. It does make things a bit difficult but that's the process for a good bill of health. Let us sacrifice, let the Royals stay in their palaces and the police in their uniforms and the army in their barracks. That's the meaning of change. We shall overcome them as did the generations before us.

m
on 3 March, 2009 at 6:19 pm

This move is to stop the PR lawyers and say no one was there for the Speaker of the Legislative Assembly of Perak – Sivakumar. This is so silly. We should check if the BN lawyers were to be there. Then we can see how Ipoh High Court Judicial Commissioner Yang Arif Tuan Ridwan bin Ibrahim favors the BN. Such a clear cut abuse of one's position. Will not surprise me if he becomes CJ one day.

RTan
on 4 March, 2009 at 12:26 am

Shanmuga,

Your arguments are persuasive. But then how do you explain why the other officers listed under Art 132(3) have always been represented by the AG? For example:

(a) the office of any member of the administration in the Federation or a State; and
(c) the office of judge of the Federal Court, the Court of Appeal or a High Court.

Art 160 of the Federal Constitution defines "member of the administration" as, in relation to the Federation, a person holding office as Minister, Deputy Minister, Parliamentary Secretary or Political Secretary and, in relation to a State, a person holding a corresponding office in the State or holding office as member (other than an official member) of the Executive Council.

If that is the case, a minister and a judge are not "public officers" and cannot be represented by the AG.

K. Shanmuga
on 4 March, 2009 at 9:59 am

Thanks for all your comments. I would be slow to accuse the learned Judicial Commissioner of bias or being pro-BN, and think he made the decision in good faith but, respectfully, in error. It will be interesting to read his grounds.
In the case of Ministers, the GPA definition of officer includes them.

See section 2:
"'officer', in relation to a Government, includes a person in the permanent or temporary employment of such Government and accordingly (but without prejudice to the generality of the foregoing) includes a Minister of such Government."

In the case of a Judge, the application to cite Augustine Paul J (as the Federal Court Judge then was) for contempt is instructive. The AG applied to intervene to act as counsel for the Judge. Hashim Yusoff J (as the Federal Court Judge then was) conceded that a Judge was not a "public officer" within the meaning of the GPA, but nevertheless seems to have allowed the AG to act on general policy grounds since a Judge was a high office created under the Constitution. See *PP v Anwar Ibrahim* [2002] 2 MLJ 730.

Hansac
on 4 March, 2009 at 9:20 pm

Some things are very basic and lets have the facts out:

1) Majority has to be proven on the floor of the House.
2) Vote of no confidence, similarly, has to be on the Floor.
3) Ours is a constitutional monarchy. Like it or not, we Sabahans and Sarawakians do not have that kind of reverence for the Malay sultans, regardless of whether we are Malays (Sarawakian/Sabahan) or not. Therefore, all these derhaka pada raja thing are an alien concept to us, and shall remain alien, as we move towards the 21st century and beyond.
4) The police (and the MACC, and you and me) have no business in questioning a speaker of an assembly. Our responsibility as a democratic citizen is to vote. The police do not have any locus standi to question a member of Parliament or state assembly over things that are said in the august house, unless it is a seditious matter.

Yvonne Young
on 5 March, 2009 at 12:12 pm

I refer to the press statement released by the President of the Bar Council on 3-3-2009: http://www.malaysianbar.org.my/press_statements/press_release_let_the_people_decide.html.

I would like to point out her statement that, "the State Legal Advisor is clearly in a position of conflict. He and his department are presently acting for Dato' Zambry in the Kuala Lumpur High Court suit where Dato' Zambry's appointment is being challenged. How can he or his department now act for the Speaker against Dato' Zambry?"

The possible "conflict of position" is also debatable. The State Legal Advisor may argue that they can be fair and independent though it will be a mystery to many of us how they can achieve that.

So now, what option is available to the Speaker? None, in my view, the proceeding is meant to be against the Speaker in the first place.

The Tree Injunction – My Thoughts*

Art Harun

I shall call it the "Tree Injunction". Not because it was granted under a tree. But it was obviously aimed to stop the sitting of the Perak Legislative Assembly under a tree and any other similar type of "unlawful" assembly[1].

Mohd Hafarizam Harun, one of the lawyers acting on behalf of Perak Menteri Besar Zambry Abd Kadir and his 6 EXCO members, obtained the court order against Sivakumar on 3 March 2009.

Firstly, the question is whether Sivakumar should be represented by the State Legal Adviser. The Judicial Commissioner said he should and therefore "private lawyers" were banned from the hearing. At the risk of being pedantic, I have to say, first of all, there is no such thing as "private lawyers". There are Advocates and Solicitors. And on the side of the Government, there is the Federal Counsel or the State Legal Adviser who appears in civil cases, and the Deputy Public Prosecutor or the Attorney General himself (as the Public Prosecutor) who appears in criminal cases. On the issue whether Sivakumar must be represented by the State Legal Adviser, an opinion has been rendered[2]. I find myself in complete agreement with that opinion and I will not add anything to it.

Secondly, I am just puzzled and bewildered at the stand taken by Zambry, the person who the BN is saying is the legitimate MB. Now, if he is the legitimate MB, shouldn't he be represented also by the State Legal Adviser? If so, why is he represented by "private lawyers"? I don't understand this part.

Thirdly, I am even more puzzled and bewildered at the end result of the argument by Mohd Hafarizam on the first issue above. If what he said is correct, namely, that Sivakumar should be represented by the State

* First posted 6 March 2009

1 In the morning of 3 March 2009 (Tuesday), the Speaker, V. Sivakumar convened an emergency sitting of the Assembly under a tree. He was then served with an injunction obtained after the sitting barring him from convening any "unlawful meetings".

2 See Shanmuga K, "Perak Speaker Can Appoint Private Lawyers".

Legal Adviser, and consequently Zambry also has to be so represented, wouldn't there be a clear and obvious conflict of interest on the part of the State Legal Adviser in this matter? How can he act for both parties, who are advancing, quite clearly, directly opposing arguments in the matter?

Fourthly, when asked whether the Tree Injunction which he obtained would cover the Tree Assembly which went on the morning before the Tree Injunction was granted, Hafarizam was quoted by Malaysiakini[3] on 4 March 2009 as follows:

> *For Barisan Nasional's lawyers, the order[4] which bars the speaker from convening "any unlawful meeting" covers the emergency assembly sitting held under a tree[5] yesterday. .. Frankly, there is no time frame. So it should include the assembly held yesterday.*

Apparently, Mohd Hafarizam argued that the Speaker was served a notice of the court action on Monday while the sitting was held on Tuesday, and said, "[s]o it would appear that it covers the (Tuesday) morning (sitting)".

If indeed Hafarizam said what he was reported to have said above, with all due respect to him as a fellow practicing Advocate and Solicitor, I wish to say that that statement is to be laughed at as it is absurd! I don't know which book on injunctions Hafarizam reads and what obscure 16th century case law on injunctions he adopts – or case law of which country for that matter – but my 22 years of legal practice does not support what he says.

Let me explain why. An injunction, the type of which was obtained by Hafarizam, is an order to restrain a person from doing an act. Now, if the purpose is to restrain, it goes without saying that the act which is sought to be restrained has not been committed yet. How does one restrain an act which has already been committed? If Hafarizam wants to deal with an act which has been done, he should obtain a declaration that such act is illegal or unlawful or both. He could also obtain a further declaration that all resolutions passed at that Assembly are void and of no effect. The Tree Injunction does not operate to make illegal or unlawful the Assembly which took place before the Tree Injunction was granted. I would have thought that that position would be elementary.

3 http://www.malaysiakini.com/news/99580
4 http://www.malaysiakini.com/news/99534
5 http://www.malaysiakini.com/news/99411

Fifthly, I understand the Tree Injunction as saying:

> *It is hereby ordered that the 1st defendant, YB Encik V Sivakumar be restrained from convening any unlawful meetings purporting it to be a meeting of the Perak State LA.*

This begs the question, what are "unlawful meetings"? What if Sivakumar convenes an Assembly thinking, honestly and sincerely, and after legal advice, that the Assembly is not unlawful? Can he be committed for contempt for having breached the Tree Injunction? I don't think so. Because for him to be committed for contempt, he must be shown to have intended to breach the Tree Injunction.

Now, if he was under the impression, after considering legal advice that the Assembly he was convening was not unlawful, where is the intention to breach the injunction? And if any meeting convened by Sivakumar is unlawful on the face of it, why must he be restrained from convening such meeting in the first place? After all, that meeting is already unlawful and is of no effect whatsoever. Why bother?

I think the Tree Injunction is not valid and is liable to be set aside on appeal because it is vague. In legal jargon, that Tree Injunction lacks precision. In a case called *Lawrence David Ltd v Ashton*[6], the Court of Appeal in the UK was considering an injunction which sought to restrain a person from "disclosing to any person or making use of any confidential information or trade secret belonging to the Plaintiff".

The words underlined above were however not defined in any way in the injunction. One of the appeal judges said:

> *I have always understood it to be a cardinal rule that any injunction must be capable of being framed with sufficient precision so as to enable a person injuncted to know what it is he is to be prevented from doing. After all he is at risk of being committed for contempt if he breaks an order of the court. The inability of the Plaintiff to define, with any degree of precision, what they sought to call confidential information or trade secrets militates against an injunction of this nature. This is indeed a long recognised practice.*

6 [1991] 1 All ER 385

Similarly, in the Tree Injunction, what constitutes "unlawful meetings" is not defined at all, let alone with precision. And so I think the Tree Injunction is as dead as a tree in a desert!

Lastly, can a Speaker or his actions in the Assembly be questioned in court? In legal jargon, are his acts justiciable? The Bar Council says they are not. I agree. Otherwise, the Assembly would not be able to function as every decision of the Speaker would be brought to the court and opened to questioning.

Can you imagine the Speaker of our Parliament, Pandikar Ali, being sued each time he makes a ruling in Parliament? The courts might have to convene under a tree in such circumstances as there might not be enough courtrooms to hear the matters.

Selected Comments

jb
on 6 March, 2009 at 12:33 pm

It is obvious that the judiciary and police, amongst others, are doing the callings of the BN govt. The question is how do we outsmart them and also make those doubting citizens see these injustices.

Suresh
on 6 March, 2009 at 12:41 pm

You took the words right out of my mind. It looks like
1. The JC was trying to please everyone, by granting an injunction on an illegal sitting. Which has no effect whatsoever.
2. The UMNO loyar, in his interview with the press portrayed that the injunction was granted and the Speaker was wrong.
3. I think the Speaker should have notified the JC that he is responding the summon due to the respect for the Judiciary, although he is not obliged to respond as the courts have no say in his decisions as a Speaker that is within the Standing Orders.
4. And I think that The Speaker should object to the UMNO MB having "private" loyars as he must be represented by the State should also be represented by the state (although this means he accepts the UMNO MB as an MB). As up till now there is no recognition of the UMNO MB as an MB, only as an ADUN.
5. Form my point of view the Speaker is playing his game very well, hopefully he can out maneouver UMNO with all the tricks up their sleeves.

Amer Hamzah Arshad
on 6 March, 2009 at 9:12 pm

Art my friend, good one …I think you should give the Judicial Commissioner, the UMNO lawyers and the State Legal Adviser a crash course on the law of injunctions :)





Bangkitlah, Anak-Anak Malaysia*

Art Harun

Bangkitlah, anak-anak Malaysia.

Mari kita semua bangkit. Sudah terlalu lama kita semua tidur. Enak dan selesa dibuai janji-janji lemak merdu sekian hari dan masa. Itu semua mimpi-mimpi belaka wahai anak-anak Malaysia. Itu semua angkara tiupan jentera-jentera propaganda yang saban hari, saban jam dan minit, mencandui hidup kita dengan kata-kata kosong dan kiasan syair-syair yang sesungguhnya tiada makna. Masanya telah tiba untuk kita bangun. Untuk kita bangkit.

Anak-anak Malaysia, bangkitlah. Mari kita bangkit dan kita meniti kesedaran kita. Mari kita segera sedar. Masanya telah sampai untuk kita semua berdiri dan kita ukur alam nyata. Masanya telah tiba untuk kita bangun dan tuntut hak-hak kita. Kita tidak boleh lagi membiarkan hak-hak kita dipijak, disepak-sepak dan dipersendakan.

Bagaikan kita orang-orang bangsat yang terbiar dan tiada halatuju. Bagaikan kita orang-orang kurang akal yang boleh ditarik ke kiri dan kanan, ditekan ke depan dan belakang, digolek turun dan ditarik naik, disepak terajang dalam ruang-ruang kecil yang berlampu malap. Masanya telah tiba, anak-anak Malaysia, untuk kita bangkit dan kita tuntut hak-hak kita. Kita perlu bersuara. Hak-hak kita jangan dipersenda. Kita manusia. Punya perasaan, punya hak azali, punya taraf kemanusiaan. Kenapa kita harus berdiam diri apabila hak-hak kita dicabuli? Takutkah kita untuk menuntut dan membela apa yang kita punyai? Kenapa kita perlu menikus di penjuru, berbisik-bisik bagaikan tiada suara? Bangkit. Hari ini, saat ini, kita mesti bangkit dan tuntut hak-hak kita.

Anak-anak Malaysia. Mari kita tebang dan cantas segala prejudis bangsa dan agama. Mari kita bersatu. Negara ini luas terbentang. Tidak perlu kita hirau warna kulit kawan-kawan kita. Darah kita semuanya merah. Tidak perlu kita hirau kepercayaan masing-masing. Pada akhir

* First posted 20 April 2009

masa, kita semua diadili oleh Tuhan semesta. Bukan hak kita untuk mengadili sesama sendiri.

Luas terbentang tanah Malaysia ini. Mengapa kita perlu membina pagar tembok dan dinding di sekeliling kita sendiri hanya kerana kelainan warna dan kepercayaan?

Bangkit. Mari kita tebang dan cantas pohon-pohon prejudis bangsa dan agama. Mari kita seru dalam suara yang satu. Suara bangsa Malaysia, untuk Malaysia.

Bangkit. Mari kita peringatkan Kerajaan bahawa kuasa mereka adalah amanah dari kita semua. Amanah yang kita semua tuntut untuk dilaksanakan demi kebaikan Malaysia dan kita semua. Demi kebaikan umum. Bukannya untuk disalahgunakan untuk kebaikan dan kepentingan peribadi. Bahawa kita sebenarnya yang berkuasa. Bahawa mereka diletakkan di dalam kuasa oleh kita. Dan bahawa kita sebenarnya penentu. Tidak perlu kita berlutut dan bercium tangan menyembah ampun bagai hamba. Kita sebenarnya yang berkuasa. Bahawa kita mampu dan akan menarik balik amanah kita sekiranya ianya tidak dipenuhi dengan adil dan saksama. Mari kita peringatkan mereka.

Mari kita bangkit. Kita kerjakan tanahair ini untuk kepentingan semua. Mengapa perlu kita sangsi dan takutkan sesama sendiri? Tanahair ini hanya satu. Semua kita di sini dan tiada lain tempat yang boleh kita tuju. Di sini kita lahir. Dan di sini mungkin kita mati. Namun dalam masa di antara mula dan akhir itu, kita di sini. Mari kita usahakan bersama, majukan bersama dan nikmati bersama tanahair ini. Tanah ini juga yang akan kita tinggalkan kepada anak-anak kita, dan anak-anak mereka.

Mari kita bangkit dan kita pelihara tanah ini. Dan kita akhiri segala yang tidak bermanfaat. Kita akhiri semua lakonan dan gerak tari yang bagai candu dihulurkan kepada kita selama ini. Kita akhiri cerita-cerita dongeng dan cakap-cakap kosong. Kita buka topeng-topeng warna-warni agar kita nampak yang nyata. Agar kita nampak senyum sinis yang melihat kita dipersendakan.

Bangkitlah, anak-anak Malaysia.

The Wolf And The Silence Of The Lamb*

Art Harun

We have to admit: democracy is a flawed system within a bigger political pool consisting of systems which are even more flawed. That we live within a flawed system out of necessity or the lack of a better alternative – as all the other systems are thought to be worse – is disconcerting, to say the least.

The core of democracy is representation. It is a system of governance where the people are represented by representatives who are elected by the people. These representatives then form a government. The government then governs the people. A State is then formed, consisting of the government and the people it governs.

In theory therefore, the people are actually governing themselves. The representatives, who are elected by the people, are the voice of the people. The State therefore is the manifestation of the people's wishes and desires, expressed through the government which consists of the representatives chosen and elected by the people. Abraham Lincoln, in his famed Gettysburg address, thus aptly described this as "a government of the people, by the people and for the people".

Karl Marx had his utopia of a nation where the people work as one towards achieving a common desire. Where individualism and individualistic needs and objectives are suppressed all in the name of the one and only desire, namely the desire of the State, the one State, so to speak. Utopia is therefore not unlike an ant colony. Or a bee colony. But Marx forgets that the suppression of individualism and individualistic needs and objectives is a denial, and in fact is a transgression of liberty which the State is supposed to protect in the first place. How could liberty be protected by mass suppression?

* First posted 4 May 2009

The obvious flaw in Marx's theory of a utopian society makes democracy a very alluring alternative. If at all, it pushes to the fore the false notion that liberty is the product of democracy, when in fact democracy is just but one of the many (flawed) ways of protecting liberty. Liberty is not caused by democracy. It rather is the cause of democracy.

That brings us to some sobering thoughts. Can liberty be usurped by democracy? Is it possible for a democracy to destroy liberty itself? In that event, what will happen to democracy? Can it exist without liberty?

The obvious flaw in the theory of democracy, to my mind, is the emphasis it gives to the voice of the people who form the majority. I am of course mindful that the utilitarian principle by Jeremy Bentham posits that an act or policy which brings the most happiness to the greatest number of people would be a good act. Such act, being good, would jurisprudentially, at least, be legally justified. If we take that position to its logical conclusion, the Bosnian massacre would then be a good act. It could then be argued that it was an act of the elected Serbian Government which presumably had the support of the majority of the Serbian people. It could further be argued that the objective of that act was to establish a new territory and border thus giving the greatest happiness to the greatest number of people. Never mind the rights of the Bosnian minority. They were terrorised, tortured, raped and murdered – close to being annihilated – all in the name of sovereignty. Was that an acceptable act?

Herein lies the biggest weakness of democracy, namely, the trampling of minority rights, all in the name of democracy. Viewed from this perspective, democracy is no better than the law of the jungle, where the strong survive and the weak are obliterated. If the law of the jungle dictates the right to rule on physical strength, democracy dictates the same on the strength of numbers. The end result is the same, namely, the trampling of rights of the minority, i.e. the "weak".

Let's face it. The rise of the State to the extent of it overtaking democracy itself is a real threat. We have seen this over and over again. There will come a time, in many civilisations, where the State becomes the goal rather than the means to the people's dreams. The end result would be absolutism, where finally power centres onto a tiny little dot, namely a figurehead or a council of some sort. The cycle would then continue for a new and fresh struggle for liberty. When achieved, that liberty would again found a democracy. And a new State would be born.

In modern times however, the rise of the State and the taking over of the people's voices and rights, is much more refined in its operation. It is much more insidious. Democracy lulls people to sleep, especially when that democracy perceivably delivers what it promises, namely, the protection of liberty and materialism. Under this model, the sole, or at least the primary, objective of the State would be the maintenance of power within the ruling elite. With that objective, the State or the Government would go about "colonising" the minds of the people through State controlled mass media, spin and propaganda machines.

"A vote for us is a vote for a safer nation", for example.

It could have easily been "a vote for us is a vote for the nation".

But the word "safer" is insidiously crafted in that spin. The message is subliminally implanted. Soon the minds of the people would be colonised. It will be set. It is not safe to vote for somebody else. Power is maintained. Objective achieved. Liberty is supposedly protected, when it is in fact shaped, moulded and controlled.

The colonisation of the mind is but the most insidious and most debilitating form of repression. It is non-violent, at least not in a physical way. It operates below the surface. It attacks, invades and conquers the sub-conscious. And all this takes place in bright daylight, without realisation. Meanwhile, the achievements of modernisation, materialistic possession and physical development serve to opiate the masses into a deep sense of security. Soon the people are taken over by a serious addiction. An addiction to the way of life which has been planned, organised and served by the State.

"Another project by your benevolent Government", shouts the signboard.

Or "a vote for us would ensure political stability and development". Which is another way of saying "without us, there won't be any stability and development". Which means, you will lose whatever you are having now and you will be in trouble.

And the conclusion is, "you have no choice but to vote for us!"

Colonisation of the mind is then complete when the people get used to their everyday lives. A life courtesy of the ruling elite. Courtesy of

the State. And the people would then be lauded by the ruling elite for their wisdom in choosing a government who made it all possible. The people have, by this time, become a victim of their own liberty. They are entrapped and enslaved by the very liberty which they seek the State to protect. It is an irony that democracy could therefore be a premise to absolutism which ultimately ends with liberalised slavery.

Ibn Khaldun, in "Muqaddimah" observed that the communal spirit – *assabiya* – would band together people from different tribes into a political force. He however noted that as success was achieved and unbridled wealth and a good life followed, the people would lose their strength and their ability to fight. Even national security would be taken care of by foreigners as the people would not even want to be soldiers anymore. The leaders would be bathed in opulence, corruption and greed. The good life would soon consume the whole State and that State would soon crumble. It will then give way to a newer State controlled by another tribe or a group of tribes who were as hungry as the first tribe. The whole cycle would then repeat itself throughout history.

Closer to our time, Herbert Marcuse[1] would lament the fact that the materialistic world in the post-industrial era would soon reduce people into some kind of zombie. He would draw a portrait of a "comfortable, smooth, reasonable, democratic unfreedom" society where all the technological means provided by our civilisation to free the individual from toil and ignorance would be perversely used to enslave us. The result of all this would be the birth of a one dimensional man, a man who is a happy, enterprising creature who "cannot imagine a qualitatively different universe of discourse and action" than the one he inhabits. He takes his post-industrial world as a given, and seeks to thrive within its sturdy factual boundaries. The one dimensional man regards society's dazzling array of lifestyles and career options as examples of free choice, rather than what they truly are – false needs that confine his consciousness.

Finally, under the conditions of a mass society:

> *.. the multi-dimensional dynamic by which the individual attained and maintained his own balance between autonomy and heteronomy, freedom and repression, pleasure and pain, has given way to a one-dimensional static identification of the*

1 Marcuse, Herbert; "One Dimensional Man: Studies In The Ideology Of Advanced Industrial Society" (1964) Routledge & Kegan Paul, London

individual with the others and with the administered reality principle.

Be that as it may, democracy, with all its frailties and deformities, is still the best bet that we have. We must always bear in mind that democracy is not about the right to vote or to elect our representatives. It is about our wishes, desires and needs as members of a society. When we vote and elect, we are appointing a person in whom we would entrust such wishes, desires and needs. That is what democracy is all about.

Democracy can work and work well if, and only if:

- We maintain our awareness and are quick to remind our representatives of our rights and their duties.

- The system of checks and balances imbued in our democracy is well observed and is not destroyed. On this, it is disheartening to see that in our country, the courts have encroached into the Legislature's realm recently. It is of further concern that no less than our Federal Court had last year in *KWK* concluded that the doctrine of separation of powers is not part and parcel of our Constitution.

- We must divide and rule our so-called leaders. A strong Opposition is needed in the Legislature in order to provide an inherent check and balance mechanism in the Legislature.

- Our displeasure must be shown where it hurts the most, namely, at the ballot boxes. Once we are not happy with the performance of our elected representative, we must change him or her, regardless of the party he or she comes from.

- We must not support parties or characters. We must support whatever is good for us and for our society. We give credit wherever it is due. For example, the recent Cabinet decision on the child conversion issue must be lauded as it reflects progressive thinking.

Let's not allow the wolf, whom we have chosen to protect our lambs, to grow too big and ferocious, and have so much unbridled free rein that it starts eating the lambs it was supposed to protect in the first place.

We the *rakyat* are the shepherds. We decide.

Selected Comments

Professor Ari
on 4 May, 2009 at 12:41 pm

A good essay, Art. It deserves an "A". You can join my POL 303 classes anytime!

Fi-sha
on 4 May, 2009 at 1:48 pm

Dear Encik Art,

This is the way to go. I have to thank you for putting it together beautifully. Thank you for speaking our wishful mind…

The Perak 'May'hem – A Simplistic View*

Art Harun

Manchester United vs. Barcelona.

The best proponents of the beautiful game in the Champions League final. Just imagine. 65,000 spectators. 22 players on the field. One football.

The atmosphere in Rome is electric. Banners and flags. Trumpets and drums. Riot police and pitch marshals. All the trappings of a top notch game are there. Barcelona starts. Scores 5 goals in 5 minutes. Manchester United are stunned. Barcelona wins. But the crowd jeers. All 65,000 of them. What is wrong? Where is the trophy?

Oh yes. They forget. The referee had not even blown the starting whistle yet. In fact, Barcelona simply changes the referee when the original referee is still in control of the match.

Surely, the above scenario must be a nightmare, right?

Okay. Let us all come back to reality. To the real world. You all know what I am talking about. Yes. It is about the mayhem in Perak yesterday.

Lest I be accused of being partisan, allow me to state at the outset that I am not going to moralise the issue. Nor am I going to say who is right and who is wrong. For the purpose of this posting, I am just going to assume that the BN Assemblypersons together with the 3 independent Assemblypersons formed the majority at the Assembly. I am also going to accept the postulation that Zambry is the Menteri Besar of Perak. Consequently, I am going to assume that the PR Assemblypersons were the minority. And Nizar was not the Menteri Besar of Perak. I am also going to accept as a fact that the motions were filed properly and in accordance with the rules and procedures of the Assembly.

* First posted 8 May 2009

Now, the main question is whether Sivakumar's removal was valid or otherwise. The next question is whether Ganesan's appointment as the Speaker was valid or otherwise.

I promise I am going to keep this as simple as possible.

I was not there in person yesterday. Even if I had been there, I wouldn't have been allowed into the House. Although I must state that I am a little bit more than perplexed as to why Shafee Abdullah was allowed to be there. And I am even more perplexed that Lim Kit Siang, who had a valid invitation, was not allowed in. Anyway, I digress.

The fact is, I wasn't there. And I had to rely on live updates on the Internet. The updates that I followed yesterday were on Anil Netto's site[1]. And I have relied on his updates for this post. According to his updates, the following took place during the so-called Assembly:

10:01 Speaker Sivakumar is inside the Dewan now, making an announcement. All those who have not been invited are requested to leave the Dewan.

10:03 Speaker Siva is asking the seven suspended BN members to leave, if not, he warns the Dewan will not sit.

10:03 He is also asking the three defectors to leave.

10:04 He says their court cases have not yet been settled. The Dewan is in uproar.

10:05 Outside, police are rushing from the Democracy Tree, heading somewhere.

10:06 Pakatan ADUNs are thumping their tables in approval.

10:07 Further down the road, much earlier, some Angkatan Muda supporters are said to have been arrested.

10:08 But the BN reps are not moving out.

10:09 Sungai Siput MP Jeyakumar Devaraj leaves the Dewan.

1 http://anilnetto.com/democracy/live-7-may-in-ipoh/

10:10 The seating arrangements appear to have been changed, so the Pakatan ADUNs took the name plates and transferred it back to the original place.

10:11 The 10 BN ADUNs who put forward the motion to remove the Speaker have been ordered to leave the Dewan.

10:14 As long as the 10 suspended BN ADUNs are not leaving, the Speaker refuses to proceed.

10:18 The Dewan is in uproar.

10:21 Pandemonium breaks out in the Dewan.

10:21 Zambry has put up a proposal to remove the Speaker, and the BN ADUNs are taking a vote.

10:22 But the Speaker is rejecting the motion saying that those who have put up the motion had been ordered to leave the Dewan.

10:22 The Speaker has raised his voice.

10:23 "Keluar!" shouts the Speaker, who insist he won't continue proceedings until the 10 leave.

10:27 Siva says the Dewan is not able to convene.

10:28 He still insists the 10 should leave. "I am not suspended," says Siva. Those suspended are the BN ADUNs.

10:29 Siva is asking the security to do their job.

10:33 The assembly will not continue until the 10 leave.

10:36 Zambry has been ordered out.

10:39 The Dewan secretary Misbahul Munir, appointed by the Pakatan under the Democracy Tree, has left the building.

10:42 It's getting chaotic inside the Dewan.

10:43 A female BN ADUN is requesting security to remove the Speaker. They are saying that they have the 31 votes to remove the Speaker and they want the Deputy Speaker to take over.

10:47 But the Speaker had already left the House to escort the Raja Muda.

10:47 Now they appear to be blocking the Speaker from coming back.

10:48 I am trying to make sense of what's going on.

10:55 The Deputy Speaker, Hee, appears to have taken over proceedings. Sitting next to the Speaker, she says he has been suspended.

10:56 Siva doesn't have a mike. They have appointed Ganesan as the new Speaker. The Pakatan ADUNs are angry.

10:58 It's hardly a dignified sitting of the Assembly.

11:02 Ganesan appears to have been "sworn in" and gone through the motions. But Siva is still in his seat. Sorry, I am confused! One eye-witness observes, "It is like a circus here."

The law on meetings is clear and already established. In an Assembly, the Speaker acts as the "Chairman" of the House. He decides on the commencement of the Assembly. He maintains order and decorum. In short, he chairs the meeting. Pure and simple. In a football match, he is like the referee. This can't be any clearer.

Now. Was there an Assembly in Perak yesterday? Yes, there was. According to Zambry and the BN, of course. In actual fact and in law, no, there wasn't! You see, the Assembly was called. I am going to assume that the call for the Assembly was validly done.

The thing is this. The Speaker – Sivakumar, that is – had not started the meeting yet. At the outset, he was doing some "house cleaning". House cleaning is done in every meeting before the meeting commences. This is to ensure that the meeting goes on smoothly and validly.

What happened was Sivakumar had asked those whom he thought were not supposed to attend the Assembly to leave. Again, I am not going to say that he was right or wrong in doing that. But the fact is he had not called for the meeting to start. And the meeting had not started. Had it started, there would have been the customary prayers. And the Sultan or Raja Muda would have been invited to address the House. But these were not done. Of course they were not done. They were not done because the meeting had not started.

If the meeting had not started, how could Zambry move the House to vote for his motions? Clearly he could not do so. Because those motions were there to be moved during the Assembly and for the Assembly to vote on. But the Assembly had not started. So the question is, he was moving the motions before whom? Or what?

Hee said she was the Deputy Speaker. And that she had taken over. But excuse me. How could she take over when Sivakumar, the Speaker, was present and was not in any way incapacitated to conduct the Assembly? In fact, he had conduct of the Assembly, until he was forcibly removed from the House.

It is thus clear as daylight that Sivakumar was and is still the Speaker of the Assembly. He had not been removed by the Assembly. That is because there was no Assembly yesterday. As for Ganesan, he has been appointed a Speaker. As to the exact body of which he is supposed to be the Speaker, I do not know.

That is my simplistic view. It is just based on logic. And a bit of knowledge on the general law of meetings.

Which brings me to another thought. When Sivakumar, as the Speaker, ordered the 10 Assemblypersons to leave and they refused, Sivakumar then asked the security to do its job. My question is this: Why didn't the Sergeant-at-Arms at that point in time move to execute an order given by the Speaker to remove those Assemblypersons? It must be remembered that at that particular time (namely, when Sivakumar asked those Assemblypersons to leave), Sivakumar's authority as the Speaker was yet to be challenged. He was at that time undoubtedly the Speaker having conduct of the Assembly. Why didn't the Sergeant-at-Arms execute his valid order?

If we compare the Sergeant-at-Arms' action in forcibly removing Sivakumar later with his earlier reluctance to follow Sivakumar's order (when in fact at that particular time Sivakumar's authority as the Speaker had yet to be challenged), it reflects a certain degree of favouritism on his part. If so, that is quite unbecoming of him.

And so. Back to our football match. I think Manchester United will win 2-1. And they will win the EPL too. As for Liverpool, well, they can make a rap album featuring Rafa's rants as the single.

NIZAR TRIUMPHS IN HIGH COURT

11 May 2009

Tell Us Why, Please?*

Edmund Bon Tai Soon

> *We hope that Judges should endeavour to write their grounds of decision and take delight in this aspect of judicial work as a matter of personal pride and satisfaction and not as a burden. Failure on the part of Judges to write their grounds of decision will certainly undermine their authority to insist upon Magistrates and Presidents of Sessions Court to write theirs. If the practice of not writing grounds of judgment is widespread the system of administration of justice will tumble down.*
>
> per Salleh Abas LP in *Wong Chee Hong v Cathay Organisation (M) Sdn Bhd*[1]

As a matter of course, judges should write and give reasons/grounds for their decisions (usually known as *Alasan-Alasan Penghakiman*).

The courts have an obligation to explain how the decisions have been made or arrived at.

Litigants are entitled to understand why they had lost or won. After analysing the reasons/grounds, they may wish to file an appeal or to review the decision(s).

Lawyers and academics are interested in how the facts of the case were interpreted, and how the submission of counsel and the finer legal points were dealt with.

More importantly, and particularly in cases of public interest, the public must be able to read and examine for themselves the reasons/grounds to educate themselves and be mindful as to how the laws are applied in the country.

* First posted 14 May 2009

1 [1988] 1 CLJ (Rep) 298 at 300

The Perak Crisis has seen the Federal Court make several landmark rulings on constitutional points which have not previously been decided in the country[2]. Despite requests made to the Federal Court, no reasons/grounds of its decisions have been forthcoming (but instead have been refused in the Nizar section 84 instance). Lawyers for both sides do not know on what grounds, and why the matters were decided the way they have been decided. No further appeals or reviews may be advised because the reasons/grounds have not been supplied.

Contrast.

In the *Nizar v Zambry* matter in the High Court, Abdul Aziz Abdul Rahim J, the learned High Court Judge, had already written two *Alasan-Alasan Penghakiman* – first, on granting leave to commence judicial review proceedings on 3 April 2009 (16 pages) and second, on granting the orders sought by Nizar on 11 May 2009.

Judicial precedent plays an important role in the development and application of the law in Malaysia as it provides future guidance for the courts, legislature and government(s). Decisions of the highest court especially in matters of public interest and constitutional importance must be sufficiently explained and supported by cogent reasons/grounds. Decisions that are not properly reasoned may be critiqued, and those of sound judgment may be applauded.

Writing reasons/grounds would also assist all to better appreciate the decisions. It may serve as a useful buffer and repellent against unwarranted criticism or cynicism regarding the decisions, and thereby go some way towards shoring confidence in the Judiciary.

Selected Comments

Art Harun
on 14 May, 2009 at 6:24 pm

Despite requests made to the Federal Court, no reasons/grounds of its decisions have been forthcoming (but instead have been refused in the Nizar section 84 instance)." You mean they actually tell the lawyers that they are not going to provide grounds? Probably there is no ground to ground their decisions, that's the ground

2 See a summary of the cases at http://thenutgraph.com/nizar-applies-for-stay

of their refusal. No? Am I on good ground to ground my opinion on this? Owh…if not, does it mean I am grounded?

Fahri Azzat
on 4 May, 2009 at 1:48 pm

Isn't it ironic that those in the elite of the judiciary, who have successfully driven the Court of Appeal and High Courts to a sudden zeal for efficiency, are now failing to abide by their very own policies? Further, I think that reasons, no matter how brief, should be given all the way down to the Registrars (of all levels, Senior Assistant, Deputies, etc.) for whatever application made before them, unless of course for those rare instances when it is so plainly obvious. That lately many more of them are doing so these days is an encouraging sign.

I also don't know why there is this practice rearing its head every now and again in the higher courts of only writing judgments if the matter is appealed. Those judges that say this forget that the judgment is not for their inconvenience or merely for the eminent consideration of their superiors in the superior courts or a showy display of raw intellectual powers over a legal problem. These judges forget that their written judgment are for the litigants who submit to their jurisdiction and their wisdom, and seek a dispassionate, equitable and lawful reasoned decision. And surely to demonstrate this is to put it in writing. If not, how would they know that the decision was not merely a result of 'might as well flip a coin' as was so retorted to me from the bench once midway through my submission of the judicial exercise of a judge's discretion or as the Lingam videoclip (has everybody forgotten about that case already?) demonstrated, a well placed phone call.

I sometimes wonder myself, whether this whole efficiency overdrive going on in the courts is also to make us forget about what happened before to which not one person has been held accountable for and has seen no meaningful resolution. And now the difference in treatment in the courts of the stay in the applications filed by the different parties in the Nizar v Zambry tussle, has raised this Lingam-notion again – of a complicity of certain members of the judiciary obtaining favours from powerful businessmen and those in the UMNO elite. I still cannot believe after all that evidence, all the media coverage, all those testimonies that I thought would never see the light of day has come to nothing.

One cannot deny some measure of efficiency taking place in the judiciary. Things move faster. Timetables are stricter. Adjournments are scarcer. But the moral and ethical (and in some cases intellectual) deterioration that has taken place after Tun Suffian has not been addressed. Are those Lingam ties still there? Some of the judges implicated are still on the bench. No one knows. But he still appears in the appellate courts. Does he still have that level of influence? We don't know.

Will they ever understand that all we want to do is an honest day's work, feel good about doing it and then go get a life? And that we sincerely wish the same for them too?

MyBlog
on 15 May, 2009 at 8:48 am

I think the only way to achieve this is if it is mandatory and if not done within a certain period of time, then the judgments are reversed to status quo. You know if they are not compelled to provide the rationale for their judgments especially the highest court, there can be a lot of abuse by the judges and where is the check and balance?

As we have seen in the "correct correct correct" case, judges are also susceptible to inducements, after all they are human. How to review a judgment if a written version is not available? I go to the extent that if judges do not write judgments, then they should be suspended and should not hear new cases. The rationale here is that they are incompetent administratively and hence do not deserve to sit on the bench.

Pratamad
on 15 May, 2009 at 10:02 pm

I am no lawyer, but what Edmund has written not only makes sense, it is what I have known all along how the law should work. Now, if even the Federal Court is 'afraid' to write (justify) their judgements, I see this worse than A.Paul, and our time now is worse than 1998/1999. I am very concerned for Malaysia indeed!

Anonymous
on 19 May, 2009 at 3:29 pm

Of course the Federal Court will not furnish the written judgment. How to show "Because U-Must-Not-Object told me so".

COURT OF APPEAL DECIDES ZAMBRY IS MB

22 May 2009





The Perak Crisis – My Rebuttal To Lord Lester's Opinion*

Art Harun

Prologue

> *To adopt a literal approach would vest a certain level of absolute power in the Ruler where such power does not exist in the first place. Can we imagine a situation where the Ruler may decide mid-term to change an MB because he thinks that an MB does not command the confidence of the majority anymore?*

The above was part of my comment at Malik Imtiaz's blog, *Disquiet*, on his article, "Crisis In Trengganu? What Crisis?"[1] That comment was posted last year on 25 March 2008, when the whole nation was discussing the crisis in Terengganu and Perlis, where the Rulers in both states had refused to agree to appoint the candidate nominated by the leadership of the winning party as the Menteri Besar.

There was a populist school of thought then, that the Rulers were well within their power to do so. I took a different stand. I had always thought that the notion of "absolute power" resting in the Rulers is, with respect, misconceived. I ended my comment with a word of caution:

> *But let's not allow our emotion to colour our judgement by creating, or allowing to be created, a dangerous precedent, a precedent which we all may live to regret later.*

Fair enough, what I said above has now become true. His Royal Highness the Sultan of Perak has decided in mid-term to change the MB because HRH thinks that the previously appointed MB did not command the confidence of the majority anymore.

* First posted 27 May 2009

1 http://malikimtiaz.blogspot.com/2008/03/crisis-in-trengganu-what-crisis.html

Hafarizam Harun's Article

My learned friend, Hafarizam, is one of the counsel for Barisan Nasional in the Perak Crisis cases. After the decision of the Court of Appeal reversing the High Court's decision in *Nizar v Zambry*, he published his take on the issue on his blog. As he was one of the lead counsel in the case, and considering the fact that the Prime Minister had openly admitted that BN had been advised by Lord Lester QC, I would presume that Hafarizam's position on the issue echoes that of Lord Lester's.

Over the weekend, he had kindly invited me to link his article to my blog and I told him that I would post a reply. And so, here it is.

My Advice To Hafarizam's Attachment Student

But first, there is some house cleaning to do.

In "The Tree Injunction – An Opposite View From Someone"[2], I reproduced verbatim an e-mail which was sent to me from Hafarizam's office daring me to do the same. In that e-mail, I was labelled a lawyer who:

- is misguided;
- one track minded (yes, this is partly true because I am a keen track racer); and,
- lacks judicial appreciation.

I was also asked to read the case of *Stephen Kalong Ningkan* again. In addition, the writer also said that "it is useless to talk to a lawyer who 'confused' others". The icing on the cake is the accusation that my 22 years of legal practice just consists of an "Ali Baba partnership", whatever that may mean.

I am told by Hafarizam that the e-mail and the whole post was written by an attachment student at his firm who assisted Hafarizam in the Perak Crisis cases.

First of all, let me tell him or her that as a lawyer, I receive as hard a blow as I give. That is the nature of my job. It is within his or her right to disagree with me or my opinion. But the fact that he/she

2 http://art-harun.blogspot.com/2009/05/tree-injunction-opposite-view-from.html

disagrees with me on an issue does not mean that I am misguided or that I have confused others. It also does not mean that I lack judicial appreciation. It is after all a discourse. Although you are only a student, I have to respect your opinion despite the fact that I have more than 22 years of practice. The number of years in practice does not *ipso facto* mean that I am correct or more knowledgeable than you.

Secondly, please do not insult my partners by saying I have an "Ali Baba" practice. What do you mean? Does it mean that I maintain a practicing certificate and sold it to my non-Malay partners like those so-called Malay businessmen who sold APs or contracts? Or does it mean I get cases and "sub-contract" those cases to my non-Malay partners? For your information, I am briefed even by non-Malay lawyers. Your statement as such is an insult not only to my firm but many other firms with Malay partners.

Thirdly, please take your time whenever you are free to read the etiquette rules. Yes, there is such a thing. While doing your pupillage later, you even have to attend classes on it. In the legal profession, we do not insult fellow lawyers and we address them as our "learned friends" no matter how strong our disagreements are. As an attachment student, you have a long way to go. I am sure you will do well in the future and I wish you all the best.

Hafarizam's First Point – The Practice In Other Commonwealth Countries

I am reproducing verbatim the relevant part of what was said by Hafarizam[3]:

> *Today's decision by the Court of Appeal is another high-watermark case on Constitutional law in Malaysia. It not only proves the point that I have been trying to make all along, but has placed Malaysian Constitutional jurisprudence at par with other Commonwealth countries, to wit a few, Australia, Canada and England itself, that the constitutional logic of the Constitution of Perak and the democratic imperative upon which the Constitution of Perak is based on the following thesis ..*

3 I have re-paragraphed Hafarizam's post for ease of reference here.

The powers to grant a dissolution of Dewan Negeri Perak and to appoint the Mentri Besar and State Executive Council members are among the prerogatives of HRH the Sultan of Perak. Consensus amongst parliamentarians and commentators is that there are instances in which the Monarch may refuse to grant a dissolution, especially to a minority government. For example, when the minority Labour Government of Ramsay McDonald requested for a dissolution, Herbert Asquith (Prime Minister between 1908 and 1916) stated in The Times for 19 December 1923, which was quoted with approval in Marshall, Constitutional Conventions (1986), at 38: "The Crown is not bound to take the advice of a particular minister to put its subjects to tumult and turmoil of a series of general elections so long as it can find other ministers who are prepared to give it a trial. The notion that a Minister – a Minister who cannot command a majority on the House of Commons – is invested with the right to demand a dissolution is as subversive of constitutional usage as it would, in my opinion, be pernicious to the general and paramount interests of the nation at large."

In Canada, Governor General, Lord Byng, in 1926 refused to grant a dissolution to Prime Minister King after the latter's government had lost the support of members of other parties who provided its majority. There was no vote of confidence, but Prime Minister King immediately resigned. Mr Meighen, the opposition leader was invited to form a government (see Hogg, Constitutional Law of Canada, 5th ed, at 9 - 30). Thus, the lauds and cries for "Bubar Dewan" by fellow opposition members of "Pakatan Pembangkang" are not only pernicious but has created deep division amongst the people of Perak. In hindsight, if YB Dato' Seri Ir Nizar has conceeded defeat on 4 February 2009, the people of Perak would not have to pay the heavy price of confusion, humiliation and frustration the culmination of all was the the 7 May 2009 sitting.

It is ironic that Hafarizam referred to the Ramsay McDonald affair and the King-Byng crisis in his post. I say it is ironic because these two instances actually support my postulation that the practice in the Commonwealth is that the Ruler had always granted dissolution upon being requested and the Ruler had no absolute power to ask the Premier to resign. I however admit that in the King-Byng crisis, the Governor General, Lord Byng had refused to dissolve upon King's request. However, there were

extenuating and special circumstances in that case. I will touch on this later in this post.

A Proper Analysis Of The Related Precedents Cited:

(1) The Ramsay McDonald Affair

Allow me to first clear a misconception in Hafarizam's post, where he says:

> *.. the Monarch may refuse to grant a dissolution, especially to a minority government ..*

The Nizar-led Government in Perak is not a "minority Government". It is a coalition Government. There is quite an obvious difference there. A minority Government is a government consisting of a party with the single largest number of seats in the Assembly but that party's seats are less than the total seats held collectively by other parties in the Assembly. For instance, if DAP has 60 seats, while PKR has 30 seats and BN has 40 seats, a DAP Government would be a minority Government because its seats are less than the total seats held by PKR and the BN. However, in Perak, the situation is not such. There, PAS, DAP and PKR formed a coalition and the total number of seats in their coalition was higher than the seats held by BN. Thus, it was a coalition Government.

Secondly, Herbert Asquith could not have made the statement on 19 December 1923 in relation to Ramsay McDonald's request for a dissolution as quoted by Hafarizam because at that time, Ramsay McDonald wasn't even the Prime Minister yet!

The whole affair must be told in sufficient detail if we are to use this affair as a precedent.

McDonald became the Prime Minister in 1924 when he formed the minority Government. As the Conservatives had more seats, McDonald's Labour Party had to rely on the support of the Liberal Party. That made it difficult for McDonald to pass the necessary laws as his position was precarious from the start.

His position became untenable when he rejected the Attorney General's advice to prosecute John Ross Campbell under the Incitement to Mutiny Act 1797 at the behest of some Labour backbenchers. Arising from that, motions for censure were initiated. McDonald quickly resigned when the motions were amended to be one of no confidence in him. Had the motion been debated, McDonald would have lost. However, the day after the amendment, he asked for dissolution from the King.

And what did the King do? Even though McDonald's Government was only 9 months old, the King dissolved Parliament and called for a fresh election. The Conservatives won in the ensuing election and they formed the Government.

However, McDonald made a return in 1929 after the May 1929 election. Again, this time, he formed a minority Government as Labour only had 288 seats to the Conservatives' 260, with 59 seats to the Liberals. Again, he had to depend on the Liberals which undoubtedly made life very difficult for his Government yet again.

To cut a long story short, his second minority Government did not last as well. During the Great Depression, his Government did not have any answer to the economic problem. His own Cabinet was split on the issue of public expenditure. He then submitted his resignation.

The King however persuaded him to form a "National Government" (something akin to the much talked about "Unity Government" which was being proposed by PAS recently). Note however that at this time, McDonald had submitted his resignation. He, however, did not ask for dissolution. The King, on his own initiative, persuaded McDonald to form a National Government.

McDonald accepted that suggestion and formed a National Government, which was actually a coalition between all the parties in Parliament. This was viewed as a betrayal by his own Labour party. He even sacked some of his senior ministers from the Labour Party. Needless to say, in 1931, the Conservatives forced him to agree to a General Election.

Now, how does the Ramsay McDonald affair support Hafarizam's position? If at all, it supports my position that the Ruler (or in the UK then, the King) would dissolve Parliament upon being requested. It also supports my contention that the Ruler did not have the power to sack the

Premier. Never at any time did the King ask for McDonald's resignation although it was crystal clear that McDonald did not command the confidence of the majority on two occasions.

(2) The King-Byng Crisis

This crisis and its aftermath redefined the Canadian constitutional position regarding the independence of the Governor General in making decisions on his own (without having to consult the British Government).

This episode involved Prime Minister MacKenzie King and the then Governor General, Lord Byng. In September 1925, King requested a dissolution. Byng granted it. During the General Election which ensued, Arthur Meighen's Conservative Party won 115 seats to 100 for MacKenzie King's Liberals while the Progressive Party had 22 seats.

As the incumbent PM, King did not resign. He went to see Byng after the election and told Byng that he wanted to form a minority Government with the support of the Progressive Party. (The next thing which happened is very important and to my mind explained why Byng had later refused to dissolve Parliament upon being requested.) During that meeting, Byng had actually expressed his thoughts that perhaps King should resign and let Meighen form the Government as his party had the majority seats. In "Byng of Vimy: General And Governor General"[4], Byng was quoted to have said to King that he (King) ought not to ask for dissolution in the future unless Meighen was first given a chance to govern. King apparently tacitly agreed to this. King then went ahead to form a minority Government.

His Government was then involved in a corruption scandal. The Progressive Party's support was dwindling. King's Government lost two motions in Parliament and was about to face another no confidence motion. Against what was agreed previously, King asked for a dissolution. Byng refused it. King presented an Order-in-Council seeking a dissolution. Byng still refused dissolution. King then resigned. Byng appointed Meighen as the Prime Minister and asked him to form the Government, which he did.

Whatever was the motivation of Byng, he was heavily criticised for his refusal to dissolve. SA de Smith in his book, "Constitutional And Administrative Law"[5] viewed Byng as being in an "embarrassing"

4 Williams, Jeffery; University of Toronto Press (1992) at page 305
5 de Smith, SA; Penguin Books, Harmondsworth (1971)

situation. In fact, Byng's position became even more embarrassing when Meighen's Government only lasted for less than a week. Within a week of its formation, Meighen lost a vote of no confidence by one vote. Meighen quickly asked for a dissolution which Byng duly granted.

de Smith argued in his book the fact that Byng granted a dissolution to Meighen while refusing King's request for one would open Byng to allegations of bi-partisanship. That would taint the office of the Governor General, which was supposed to be above politics, especially partisan politics. In a speech in 1997, the Governor General of New Zealand, Sir Michael Hardie Boys expressed the opinion that Byng had been in error in not re-appointing King as Prime Minister on the defeat of Meighen in the vote of confidence.

Byng and Meighen were humiliated during the ensuing General Election. King went to town to criticise Byng's initial refusal to dissolve. The result was a victory with a clear majority for King, who was seen by the voters as a victim of Byng's indiscretion. Meighen was seen by the voters as the villain and he even lost his seat.

Central to Byng's refusal to dissolve at King's request was the tacit agreement that both of them had when King had insisted he should continue to be the Prime Minister even though Meighen was clearly the majority holder in the Parliament earlier.

This, needless for me to point out, was not the case in Perak. HRH the Sultan had appointed Nizar as the MB of a coalition Government with a majority. As far as information in the public domain is concerned, there was no understanding between the Sultan and Nizar that Nizar ought not to ask for a dissolution and in the event Nizar lost the necessary confidence, Zambry ought to have been given a chance like Meighen.

Furthermore, King was losing support from the Progressive Party, an integral part of his minority Government. Whereas Nizar did not lose any support from within his coalition, except for the 3 who had jumped ship. In addition, there was also, at the point in time where dissolution was requested by Nizar, uncertainty over the position of the 3 "Independent ADUNs" and their case was before the courts awaiting adjudication. Thus, even the loss of confidence was in doubt. Contrast this to the clear and certain loss of confidence in King's Government when the dissolution was requested by him.

If we superimpose the scenario in the King-Byng affair on the Perak Crisis, and considering the underlying disbelief of the people of Perak at what is happening, would it be too far-fetched for me to conclude that BN would be badly defeated if an election is called now? I would even venture to ask whether Zambry would be able to hang on to his seat. Meighen and the Conservative Party of course found out the hard way in the ensuing election.

With due respect, Hafarizam's reliance on the King-Byng crisis appears to be misplaced. It is clear that Byng was driven by a tacit understanding between him and King in not granting a dissolution. However, history proved beyond doubt that what he (Byng) did was not in accordance with the constitutional spirit.

History also, I am afraid, will judge HRH's refusal to dissolve the Perak Assembly.

Refusal To Dissolve – The Discretion Of The Sultan And The Role Of Constitutional Conventions

On the power to refuse dissolution, Hafarizam said:

> *The powers to grant a dissolution of Dewan Negeri Perak and to appoint the Mentri Besar and State Executive Council members are among the prerogatives of HRH the Sultan of Perak. Consensus amongst parliamentarians and commentators is that there are instances in which the Monarch may refuse to grant a dissolution, especially to a minority government.*

Hafarizam then went on to quote the McDonald and King-Byng affairs as examples. I have shown above that the two incidents do in fact support my position that the refusal to dissolve by HRH was uncalled for in the circumstances. I have also explained above that Hafarizam's position that the Perak Government is a minority one is not correct.

Article 18(2)(b) of the Perak State Constitution provides that HRH may act in his discretion in, amongst others, the withholding of consent to a request for dissolution of the Assembly.

However, it does not necessarily mean that HRH has absolute power in the matter. The question is, and has always been, how HRH should exercise that discretion, rather than whether HRH has absolute power or otherwise.

At this point, I must refer to a creature known as constitutional conventions. A Constitution is the mother of all laws. In jurisprudential terms, it is the *Grundnorm*. It is a living and breathing document. It is impossible for any Constitution to provide for each and every probability and possibility. Thus a Constitution may be as brief as the US Constitution or as long as the Indian one. It could also be unwritten as the British one. But what maintains the order of the state administration in matters where the Constitution is silent are the conventions, or accepted practices. It is when conventions are thrown out of the window that crises happen.

de Smith in the same book earlier cited, says that "law and convention are closely interlocked". Foremost of all, Ivor Jennings, in "The Law And The Constitution"[6], says that constitutional conventions "provide the flesh which clothes the dry bones of the law, they make the legal constitution work; they keep in touch with the growth of ideas".

de Smith summed up Dicey's position on adherence to conventions (in Dicey's "Introduction To The Study Of The Law Of The Constitution"[7] as follows:

> *Dicey contended that the sanction which constrains the boldest political adventurer to obey a convention he might feel inclined to break was his fear that breach would almost immediately bring him into conflict with the Courts and the law of the land.*

de Smith then concluded that "obedience to conventions was therefore buttressed by the sanctions of strict law".

He further explains that:

> *.. the sense of obligation and the fear of disagreeable consequences which tend to induce people to comply with conventions are broadly similar to the corresponding feelings which conduce to observance of the criminal law.*

6 Jennings, Ivor; University of London Press, London (1943)
7 Dicey, Albert Venn; MacMillan, London (1939)

Such is the importance of constitutional conventions that any breaches of, or departures from conventions, might bring untold consequences. The fear of these consequences drives the compliance with the conventions. In my humble view, and I say this with the greatest of respect to HRH the Sultan of Perak, the crisis in Perak was not caused by a lack of power. It was driven by a departure from conventions in the exercise of HRH's discretion.

What is the convention or accepted practice in relation to the refusal of dissolution under a Constitution which draws its form and substance from the common law and a Westminster-styled democracy, you may ask?

HRH the Sultan of Perak himself succinctly put it in his essay "The Role Of Constitutional Ruler", reproduced in "Constitutional Monarchy, Rule Of Law And Good Governance: Selected Essays and Speeches"[8]:

> *.. under normal circumstances, it is taken for granted that the Yang di-Pertuan Agong would not withhold his consent to a request for dissolution of Parliament. His role under such a situation is purely formal.*

It is also clear that the Premier has the power to request a dissolution at any time of his own choosing. Wade and Phillips, in "Constitutional Law" posits that "no sovereign could constitutionally refuse to grant a dissolution of Parliament at the time of his (the PM's) choice".

It is also of considerable interest to note de Smith's observation that:

> *.. some modern writers have argued that the usage of acceding to request has hardened into a binding convention never to refuse a request, or the power to refuse exists in theory but not in practice, or that the monarch is too remote from political realities or too likely to be swayed by conservative influence or prejudice or too vulnerable to criticism to exercise an independent discretion. Hence such a refusal would now be highly controversial, unless the request itself was manifestly improper; and this fact alone must make any attempt at definition highly tentative.*

8 Azlan Shah and Sinnadurai, Visu; Sweet & Maxwell Asia, Kuala Lumpur (2004)

Events in Perak in the past few months have elevated the above statement to a prophecy of sorts. Just look at the controversy surrounding the crisis. Just look at the public ridicule over the entire issue nowadays. None of this would have occurred had conventions been followed.

The Perak Crisis has morphed itself into a black hole which is sucking into it the whole administrative system of this country. Affected by the crisis are not only the 3 leaping ADUNs and the respective political personages who are jostling for power but also the various institutions which happen to be connected – by close proximity, usages or entanglement – to the crisis.

The Assembly is in shambles. Its Speakers are in doubt. The Royal House has been ridiculed, though I must hasten to add, mostly unwarranted. It has even been used during by-elections as shouts of *derhaka* were provoked and relished by some politicians. The independence of the MACC (in postponing the case against the leaping ADUNs), the police, the Attorney General's Chambers and even the courts have been questioned. The whole of Malaysia is in fact a laughing stock. That is the price which we, Malaysians, are paying for this truly unnecessary event.

Perhaps we should read more and ponder on the words of learned writers, whose words now have become nothing short of prophetic. Consider what de Smith said:

> *.. the burden thrust upon the Courts when they are called upon to determine whether prescribed rules have been complied with in a politically sensitive situation is liable to be excessive. Whatever the outcome, the prestige of the Judiciary will probably suffer. If the rules have been set down, they do not require the Courts to decide whether, for example, a Prime Minister has been validly dismissed. This is pre-eminently a question about the reins of power. If the constitutionality of such an act is disputed, the controversy is unlikely to be resolved by the pronouncement of a court.*

The above statement could have been written as a real-life commentary on what has been happening in Perak and in our courts recently. But that was written a good 36 years ago.

And that is the high price all of us pay when conventions are not followed. Hafarizam opines:

What it means, in layman's term is simply this, that YB Dato' Seri Ir Nizar should have resigned the day he met HRH the Sultan of Perak on 4th February 2009. His defiance on that day has dragged the constitutional crisis to where it was until the Court of Appeal decided today!

I beg to differ. As shown above, authorities, constitutional precedents and conventions have shown that, when faced with a no confidence vote, a Premier is entitled to seek dissolution. When sought, conventions dictate that the Ruler should not refuse dissolution. In the Perak case however, dissolution was inexplicably refused. The MB was asked to resign instead. And a new MB was appointed.

Nizar was just exercising his right as the incumbent MB to ask for a dissolution. That was his constitutional right. He did not cause the crisis. The crisis was caused by events taking place after he exercised his right as such.

Dismissal Of The MB

I have touched on this issue in my article "The Perak Crisis - An Unsolicited Legal Opinion"[9] and I would not repeat it here. Suffice to say that the notion that the Ruler has the power to dismiss the MB under circumstances where the MB has lost the confidence of the Assembly, without more, is misconceived. Conventions dictate that firstly, dissolution must be granted when requested.

This is in line with the fact that under the Perak Constitution, by Article 16(7), the MB does not hold office at the pleasure of HRH the Sultan. L A Sheridan, in his book "The British Commonwealth – The Development Of Its Laws And Constitutions", noted that:

.. in the temporal sphere of politics the Ruler has been since 1957 a constitutional Ruler .. a Ruler with limited powers .. and that the MB or Executive Council should not hold office at the pleasure of the Ruler or be ultimately responsible to him but should be responsible to a parliamentary assembly and should cease to hold office on ceasing to have confidence of that assembly.

9 http://art-harun.blogspot.com/2009/02/perak-crisis-unsolicited-legal-opinion.html

However, when the Constitution was framed, it makes the EXCO hold office at the pleasure of the Sultan but not the MB. And of course, when faced with a no confidence vote, the MB may request dissolution first. de Smith agrees with this when he says:

> *If a Government, having lost its majority .. were to insist on remaining in office instead of offering its resignation or advising a dissolution, the Queen would be justified, after the lapse of a reasonable period of time, in requesting the Prime Minister to advise her to dissolve Parliament and, if he were to refuse, in dismissing him and his Ministers.*

So, the exact methodology is this:

The first scenario:

1. the Premier loses majority
2. the Premier offers resignation – if this happens, the Queen appoints a new Premier and the matter ends there.

The second scenario:

1. the Premier loses majority
2. the Premier requests dissolution
3. the Queen dissolves Parliament
4. a General Election is called.

The third scenario:

1. the Premier loses majority
2. the Premier refuses to resign
3. the Premier refuses to advise dissolution
4. the Queen waits
5. after a reasonable period of time, the Queen invites the Premier to advise her to dissolve
6. the Premier refuses
7. the Queen sacks the Premier.

The Perak situation falls under the second scenario. Unfortunately, dissolution was not granted. (In any event, it has to be pointed out that the loss of majority was, at the time of the request for dissolution, not clearly established in the Perak Crisis).

From the above, it is clear that the power to dismiss is just a residual power. It is a power which is necessitated by events rather than a power which is naturally imbued in the Ruler's armoury of discretions or prerogatives. It would be wise to take heed of what de Smith later said:

> *A change of Prime Minister may be necessary because of the resignation, death or dismissal of the incumbent. The last possibility, dismissal, would arise only in highly exceptional circumstances and, one would suppose, in a near revolutionary situation.*

It is therefore clear that this residual power cannot be exercised by HRH without having explored the possibility of executing any other constitutional power. It is a power which, in my humble opinion, is to be exercised as a definite last resort and after having explored all other possible avenues. Since Victoria came to the throne, all vacancies of the PM's office have arisen through either death or resignation and never dismissal. de Smith pointed out that the last unambiguous dismissal of the Government took place in 1783! Even if the Queen were to dismiss the PM, de Smith posits that the new PM must be prepared to advise dissolution of the Parliament at the "earliest practicable moment".

It is therefore clear that the new PM (or in the Perak case, MB), appointed upon the dismissal of the previous one under this residual power, is not appointed to rule but to advise the Ruler to dissolve the Parliament (or in the Perak case, the Assembly) so that power can be returned to the people through an election process. That is the true spirit of the Constitution. The true spirit which has been forgotten or put aside due to political expediency and, possibly, greed.

That being the case, even on the assumption that Nizar had lost the majority's support and that HRH the Sultan was right in dismissing Nizar, Zambry's function is not to rule but to advise HRH the Sultan to dissolve at the "earliest practicable moment".

It is interesting to note that Mahathir Mohamad himself had thought that the Perak coup was wrongly done and handled. He then admitted that if an election is called in Perak, the BN would lose. It is therefore clear that the BN leadership is uncomfortably possessed of the knowledge that they would lose in an election, if it is called. Hence the refusal to advise dissolution of the Assembly.

Startlingly, de Smith had foreseen this situation when 36 years ago, he wrote:

> *She (the Queen) would also, it is submitted, be justified in dismissing her Ministers if they were purporting to subvert the democratic basis of the Constitution – for example, by prolonging the life of a Parliament in order to avoid defeat at a General Election ..*

In the circumstances, where the BN Government knows full well that they are going to lose in an election, if it is called, it is my humble view that the BN Government lacks the moral, and even legal, ground and standing to rule Perak. That is, with respect, an attempt to subvert the democratic basis of the Constitution by prolonging the life of the Assembly in order to avoid defeat in an election.

It is therefore submitted, with respect, that HRH the Sultan of Perak is now possessed with the residual power to invite Zambry to advise HRH to dissolve the Assembly. In the event he refuses, constitutional conventions would equip HRH with the power to dismiss the Government and appoint a new one just for the purpose of advising HRH to dissolve the Assembly.

The real power could then be returned to the people through the ballot box. I rest my case.

Selected Comments

Reader
on 27 May, 2009 at 6:31 pm

Art Harun, a well researched and reasoned piece. On its own merits, it rates an A+. Well done. This piece is an invaluable contribution to that work-in-process called Malaysia. A milestone addition indeed to navigate Malaysia through its constitutional crisis.

Robin 2 Hoots
on 27 May, 2009 at 7:27 pm

It's a mystery why they don't make you AG. Compared to what we now have (yes, what, not who), you are way up there. Maybe even CJ, after being AG. All the best.

Perak Constitutional Crisis: Wake Up And Smell The Carcass*

Amer Hamzah Arshad

As a Perakian, I will always remember 11 May 2009 as the day when justice and truth alighted for a moment in a Kuala Lumpur High Court. It was the day when, against all expectations, the High Court allowed Nizar's application for several declaratory orders, including an order declaring him the rightful Menteri Besar of Perak. The Judge delivered a reasoned and legally sound written judgment. It has been reported and analysed widely, so there is no need for me to do the same. What I would like to reflect on here is the aftermath of that decision.

On 12 May 2009, Zambry appealed the High Court decision to the Court of Appeal. He also filed an application for an interim stay of the High Court order pending the disposal of his appeal before the Court of Appeal. The purpose and intention of that interim stay application was to prevent Nizar from resuming his duties as the MB notwithstanding the decision of the Kuala Lumpur High Court. Zambry's *ex-parte* stay application, without any surprise, was allowed by the Court of Appeal, by a single judge.

Before discussing the Court of Appeal stay order, I think it necessary to comment on the speed with which Zambry's stay application was heard and thereafter, granted. Zambry filed his application for a stay of the Kuala Lumpur High Court decision on 12 May 2009. Amazingly, his application was scheduled to be heard at 11.30am on the same day, i.e. approximately 2 hours after the stay application was filed. In both my experience and that of many of my learned friends, an application is just not heard that quickly, ordinarily (or even exceptionally, with a certificate of urgency). None of us have ever heard of an application being filed, sealed, issued and fixed for hearing before a judge (be it at any level – Magistrates' all the way up to the Federal Court), heard

* First posted 3 June 2009

and the application allowed in less than 2½ hours. If the courts were ordinarily that efficient, I would have no cause for complaint. But it just doesn't happen that way usually.

This glaring efficiency would not have been so bad if it applied to the opposing party as well. However, when Nizar filed his application to set aside the *ex-parte* stay order he did not get the same efficient service. His application was filed on 13 May 2009, a day after the stay order was granted. Since Zambry's application was heard and disposed of with such efficiency, one would naturally think that Nizar's would receive the same treatment. After all, it is a fundamental rule of law that you treat like parties equally. Both of them are litigants and so both should be treated fairly and equally. But Nizar's application was fixed for 18 May 2009. To add insult to injury, on 15 May 2009, Nizar's solicitors were informed that the Court of Appeal had pushed the hearing date to 21 May 2009, which was the same day as the substantive appeal itself. This naturally resulted in Nizar's application becoming academic, or to call a spade a spade, useless. The present Chief Justice is fond of saying, justice delayed is justice denied. Well, this was precisely such an instance.

The difference in treatment between Zambry's and Nizar's applications are like heaven and hell. The delay on the part of the Court of Appeal to hear Nizar's setting aside application, deliberate or otherwise, also provokes one to wonder whether there were hidden hands hell-bent on preventing Nizar from continuing to perform his duties as MB despite the High Court decision which was made a day earlier?

Another curious issue is the exceptional instance of the granting of the stay order by a single Court of Appeal Judge, Ramly Ali JCA, who was elevated barely a month prior to his order. Furthermore, His Lordship's decision has been widely criticised in the legal fraternity as being surreal if not downright perverse for this simple reason: it is an established principle of law that declaratory orders cannot be stayed.

The nature of the orders made by the High Court in the present case is declaratory in nature. It must be understood that "declaratory orders" are different from orders which are "executory" in nature. "Declaratory orders", as the name suggests, merely declare:

(i) the true interpretation of the law or document; and
(ii) the legal position or rights between the parties.

The effect is that declaratory orders do not create or confer rights. Such an order merely pronounces the actual legal position and/or factual scenario in question. For example, you may seek a declaration that X is your son. If you are successful in your application, then the court will declare that X is your son. How do you stay an order like that? For argument's sake, let's say we do. Does that mean X is not your son if the opposing party gets a stay of the order and throughout the duration of the order? No. And that is why courts do not grant a stay order on declaratory orders. It is a nonsensical thing to do. Another distinctive feature of a declaratory order is that once it is pronounced by the court, the legal rights or legal positions vis-a-vis the parties are settled. No further legal steps or proceedings need to follow.

"Executory orders" on the other hand declare the right of the parties and then proceed to order the defendant to act in a particular way, e.g. to pay damages or money owed, and such orders can be enforced by execution proceedings if disobeyed.

In the present case, the orders made clearly did not create or confer any rights upon Nizar to be MB as he has always been the MB. Instead, the order merely indicates the position as it has always been i.e. that Nizar is the MB of Perak at all material times. The High Court order did not confer something which did not exist in the first place.

In view of the unique nature of declaratory orders as described above, where an appeal is lodged against a declaratory order, there can be no stay of proceedings, legally or sensibly. Now, even assuming for the briefest moment you can imagine, that the Court of Appeal Judge was correct in deciding he could grant the stay order, the next question the Judge should have asked himself is whether the stay order would achieve any legal and tangible purpose or whether it is an exercise in futility? Does the stay order confer power upon Zambry for him to perpetuate his misguided notion that he is the MB of Perak? Can the Court of Appeal grant a stay over a constitutional matter?

The short answer is no, especially in relation to constitutional disputes. The granting of a stay order over a constitutional matter is an exercise in futility. Even Fiji, a country which is far less developed than Malaysia, applied the principle correctly as can be seen in the case of *Registration Officer for the Suva City Fijian Urban Constituency v James Michael Ah*

Koy[1], where the Fiji Court of Appeal held:

> *Whilst the pending appeal undoubtedly involves a question of great public importance of a constitutional nature, the fact is that unless and until the Supreme Court overturns the Court of Appeal decision, that decision must stand and it binds the parties to the proceedings.*

and further on:

> *Orderly functioning of democracy depends on the relevant authorities taking cognisance of and giving effect to Court Orders be they executive or declaratory in nature. Unless a case is made out to the contrary (and the onus is on the Applicant to show that exceptional grounds exist) the successful party must be allowed to enjoy the fruits of his success.*

In the present case, since the High Court had declared that Nizar is the rightful MB of Perak, there is no procedure that empowers the court to stay or to invalidate that declaration pending the hearing of an appeal. Therefore, I would argue that the single Judge of the Court of Appeal erred in law in granting the stay order. Additionally, in granting the stay order, the judge had conferred upon Zambry the false impression that the latter is the MB when in law the High Court had already declared to him to be otherwise. It is akin to clothing Zambry with the "emperor's invisible new clothes" – which has caused him to act under the misguided belief that he has the authority of the MB, when in actual fact, he is parading himself in Perak "stark naked".

However, whatever I have written above is not a live issue anymore since the Court of Appeal has ruled in favour of Zambry. Some quarters claim that the Court of Appeal decision was good because it took into account and was guided by "national interest" considerations. What is clear to me is that such claims tend to leave out the word "Barisan" before that phrase. And if one were to analyse the aftermath of the Kuala Lumpur High Court decision, one cannot but smell the foul stench of the carcass of the Perak Constitution. I sincerely hope that the *rakyat* will wake up!!!

1 Fiji Court of Appeal Civil Appeal No. 23 of 1992

Selected Comments

Hoyohoyo
3 June, 2009 at 4:49 pm

Hi lawyers,

May I ask a layman question… Is it compulsory for the judges to write their grounds of judgment?

art harun
3 June, 2009 at 5:17 pm

….for grounds of judgments, the answer is NO. Judges are not obliged under the law to give grounds of judgments. But when a decision is appealed to a higher Court, the appealing party must include in his appeal papers the grounds of judgment, if such grounds are given by the Judge. Be that as it may, it is of course good practice to give grounds of judgments. Especially when a higher court, like the Court of Appeal, is reversing a decision from a lower Court, in particular, when the lower Court had given thorough grounds of Judgment.

Alfred Charles
3 June, 2009 at 7:23 pm

Judges are supposed to uphold and interpret the State Constitution of Perak. But what has happened is that the Court of Appeal was in all extraordinary haste to appoint Zambry as the MB of Perak and this is a stark revelation that the independence of the judiciary has been compromised and hence the spawning of tainted judgments. What a shame when the Court of Appeal can pronounce that the HRH Raja Azlan has the power to sack MB Nizar. Isn't the Sultan acting outside the province of the State Constitution? Time for the people to decide at the ballot box that a change of the government is absolutely essential before Malaysia becomes a 'failed' state.

robin hood
on 4 June, 2009 at 1:05 am

Aiyah, you people ah, don't you all know Ramly is famous for burgers meh? He can only flip the burger but flop the law.
please repeat fast fast –
flip the burger , flop the law
flip the burger , flop the law
flip the burger , flop the law

Mandom
on 4 June, 2009 at 1:34 pm

My dear learned friends,

Art and Amer, really appreciate what you guys are doing here. Dissecting a complicated matter to those who are less schooled in the jargons of the legal fraternities.

I am just wondering, if we can find a place where we can list all the different cases that have not gone through proper legal processes, and it the absence of a written judgment, write an 'unofficial' breakdown of what's right and what's wrong with the judgment, as what Amer has done here (and what the Honorable NH Chan has done previously in a few excellent articles).

Let all of us learn more about the correct legal proceedings, and let us highlight the errant ways of many of our current crop of judges. I'd be more than happy to enlist help of friends to translate them into English/Malay/Tamil/Chinese, etc. Let's educate the masses?

Just a thought. And, keep up the good work, fellow Malaysian brothers and sisters.

Cheers.

joanne
on 4 June, 2009 at 3:47 pm

great article!

thanks for a good insight to the law relating to declaratory orders and execution of stay.

for those of you who are still wondering when the written judgments are ready, do not worry; we have 'extraordinary' judges with 'extraordinary' abilities. I'm sure they will come up with something 'extraordinary'!

Crises Of Confidence And Perak's Constitutional Impasse*

Andrew Harding

In 1966 it was Sarawak, in 1985 it was Sabah, and in 2009 it is Perak. But the issue in these times of crisis in State Governments has been essentially the same: how are the so-called "Westminster-type constitutional conventions" relating to the appointment and tenure of Chief Ministers, and written into both Federal and State Constitutions in Malaysia, supposed to operate?

Crucially, in the present and intensely litigated impasse:

1. are matters arising outside the Legislature relevant in assessing whether a Menteri Besar still commands the confidence of a majority in the State Legislative Assembly; and,
2. can the Head of State appoint a new Menteri Besar if he judges that the existing Menteri Besar has lost that confidence and does not resign?

Abdul Aziz Abdul Rahim J in the High Court of Malaya sitting in Kuala Lumpur has ruled in *Dato' Seri Mohd Nizar Jamaluddin v Datuk Dr Zambry Abdul Kadir*[1] (11 May 2009) that under Perak's Constitution, a vote of no confidence must be passed in the Assembly before an MB is obliged to resign.

According to this decision Nizar remained MB of Perak. The High Court's decision was then overruled by the Court of Appeal on 22 May in favour of Zambry.

However, the grounds for the Court of Appeal's decision have not yet been released and the case is on appeal by Nizar to the Federal Court.

* First posted 7 June 2009

1 [2009] 5 MLJ 108

Article 16

The provisions which fell to be interpreted were as follows.

Article 16(2)(a), in the context of the appointment of the EXCO, states:

> *His Royal Highness shall first of all appoint as Menteri Besar to preside over the Executive Council a member of the Legislative Assembly who in his judgment is likely to command the confidence of a majority of members of the Assembly.*

Article 16(6) goes on to state:

> *If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, then he shall tender the resignation of the Executive Council.*

The Facts

The complex facts giving rise to the case were these. Nizar was appointed MB of Perak following the March 2008 elections as the Pakatan Rakyat coalition's choice for this office.

In Perak's 59-member Legislative Assembly, Pakatan held 31 seats, while the BN held 28 seats.

In February 2009, 3 Pakatan members of the Assembly (dubbed "the 3 ADUNs" in the litigation) announced their resignations from their respective parties, leaving the Assembly apparently deadlocked at 28-28. Nizar approached HRH the Sultan of Perak as the Head of State on 4 February 2009 for a dissolution of the Assembly "to resolve the deadlock" in the Assembly.

On the 5th, HRH refused the request, but prior to informing Nizar of his decision, he had met with 31 members of the Assembly at the Istana and satisfied himself that these 31 members supported Zambry as the MB. The 31 included the 3 ADUNs, who had apparently meanwhile indicated

that their resignations from the Assembly were withdrawn and they had transferred their support to Zambry.

HRH's Decision

Accordingly, HRH immediately following his refusal of a request for dissolution, informed Nizar that he no longer commanded the confidence of a majority of the members of the Assembly and asked for his resignation as MB. This was not forthcoming, but later, the office of HRH issued a press statement stating that the office of MB had fallen vacant. Zambry was subsequently appointed MB.

No Motion Of No Confidence

It is common ground that there had not been any motion of no confidence in Nizar as MB, nor had there been any event in the Assembly to indicate loss of confidence in him, for example defeat on an important bill; that at no point had or has Nizar resigned or been dismissed from the office of MB; and that Nizar has been prevented from acting as MB, for example by being evicted from his office.

Nizar asked the High Court, on judicial review, for orders having the effect of legally declaring him to be the MB of Perak. Nizar's claim was that only the Legislative Assembly had the power to decide that it had no confidence in him, and that there was no provision for the MB to be dismissed or for the office to fall vacant.

Zambry argued that the office of MB fell vacant when Nizar refused to resign and circumstances arising outside the Assembly were relevant to the issue of confidence.

The Ruling Of The High Court

The learned Judge in the High Court decided that:

i) the issue raised was justiciable;
ii) HRH exercises his discretion and may resort to any means

to satisfy himself and form his judgment as to who is likely to command the confidence of the majority of the Assembly under Article 16(2)(a), but this is not true of Article 16(6) where there is no judgment to be exercised by him;

iii) similarly HRH exercises discretion in deciding whether to refuse a request for a dissolution of the Assembly; but,

iv) the MB does not hold office at the pleasure of HRH nor can the MB be dismissed by him;

v) the office of MB cannot be deemed to be vacated under Article 16(6);

vi) the MB is responsible to the Assembly collectively with the EXCO; and,

vii) an MB cannot be appointed if there is already an MB who has not resigned against whom a vote of no confidence has not been passed.

Accordingly he held that Nizar still held the office of MB, and relief was granted in the terms of his application.

What Is "Loss Of Confidence"?

On the question of whether account can be taken under "loss of confidence" provisions (such as Perak's Article 16(6)) of matters arising outside the Legislature, the High Court was faced with apparently conflicting decisions in *Ningkan*[2] (Sarawak, 1964) on the one hand, and on the other hand *Amir Kahar*[3] (Sabah, 1995) and *Adegbenro v Akintola*[4] (Western Nigeria, 1963).

The Judge made fairly short work of the case law on this point, regarding Article 16(6) as plain, obvious and unambiguous.

The Constitution, he said, must be given a "liberal interpretation and not be construed in a narrow or pedantic sense"; nonetheless "the court is not at liberty to stretch or pervert its language for the purpose of supplying omission or correcting supposed errors".

Amir Kahar, he said, was correct on its facts but did not raise the issue in question, as the Chief Minister of Sabah in that case had in fact resigned and the only issue was as to the effect of his resignation with regard to

2 *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187
3 *Datuk (Datu) Amir Kahar Tun Datu Haji Mustapha v Tun Mohd Said Keruak & 8 Ors* [1995] 1 CLJ 184
4 *Adegbenro v Akintola* [1963] 3 All ER 544

the rest of the Cabinet; accordingly, the Court's views in that case on the issue of confidence were merely *obiter dicta* (incidental).

Further, in *Ningkan*, the Court had correctly distinguished the Privy Council's decision in *Adegbenro*, because both the facts and the applicable constitutional provisions were different.

He pointed out that the power in the Federal Constitution to remove the Prime Minister from office for lack of confidence had been originally indicated but did not finally appear in Article 43(3) of the Federal Constitution of 1957, which provision in this respect is obliged by Schedule 8 to be replicated in all the State Constitutions (in Perak, this is Article 16(6)).

Public Interest

Clearly the issues at stake in this case are of huge importance, and it is reasonable for the public to be intensely interested in the outcome and also the process and the reasoning. At the same it is critically important that the matter is assessed not from a party political point of view, but as a matter of broader public interest.

From this point of view the Judge's decision clearly has much merit. As he pointed out at the end of his 78-page judgment:

> *.. the genius in our Constitution is that we have chosen a system of government anchored on the principles and practices of constitutional monarchy and parliamentary democracy whereby the Yang di-Pertuan Agong and the Rulers' constitutional roles are set out in the Constitution and the people are given freedom to elect a government of their choice in a free election and with the elected government being made answerable to the elected legislature.*

Undoubtedly so.

Nonetheless it can be legitimately asked whether the position is tenable, that if the MB does not resign when there is lack of confidence in him, the MB cannot be dismissed and his office does not fall vacant. Surely, it can be argued, and indeed it was, that there must, finally, be a means

of making the MB go in this situation, otherwise the Constitution would become inoperable?

Is it not consistent with Parliamentary democracy, and also with constitutional monarchy, that ultimately the Head of State has the power to dismiss him? Of course, however such a right may only be exercised when the situation has become totally untenable, e.g. after a vote of no confidence where the MB nevertheless is obdurate in not resigning.

No Power To Dismiss

Interestingly enough, it was not part of Zambry's case that HRH did have a power to dismiss; rather it was argued merely that the office fell vacant when Nizar refused to resign.

There are two other alternative views about Article 16(6).

One, as the Judge appears to hold, is that neither of these positions applies and it is simply up to the MB, after a no confidence vote against him, to resign; in the final analysis this presumably means that the remedy is purely political rather than legal.

Alternatively, it could be argued that in a suitable case, a suitable applicant (a member of the Assembly or of the electorate) could obtain a *writ of mandamus* from the courts to compel the MB to resign.

But perhaps a better answer is that, important as this issue is, and much as it requires a definitive decision, it did not actually arise on the facts because there was simply no obligation on Nizar to resign in the absence of a no confidence vote in the Assembly.

The Issues In This Case

Let us then revisit the facts.

It is not made clear in the judgment but is clearly relevant, that at his audience with HRH on 4 February 2009, Nizar believed that the 3 ADUNs had merely resigned their seats. In fact the 3 seats had been

declared vacant by the Speaker who had notified the Election Commission accordingly.

It does not appear that HRH informed Nizar that this was not the case – that in fact the 3 ADUNs had withdrawn their resignations and transferred their support to Zambry. According to Nizar's understanding at the time HRH asked for his resignation, it was likely (but by no means certain) that he would have difficulty in maintaining a majority in the Assembly; and equally likely too that Zambry would have the same difficulty.

Given this understanding (albeit a false one as it turned out) it seems clear that Nizar was justified in asking for a dissolution, because only by a motion of confidence or by an election could the situation be resolved. Nizar had asked for a summoning of the Assembly, but there had been no response from HRH; and his request for a dissolution was denied. It is of course usual in Westminster-type constitutions to judge a Chief Minister's own assessment of his political viability by his willingness to test it on the floor of the Legislature. There is indeed no reason to suppose that he should not have the right to do so. There was in this case no obstacle, such as a threat of violence, to prevent the Assembly meeting. Clearly in a confused political environment the only definitive opinion is that of the Assembly. Members have the right to express their views, consider whether they are persuaded by anything they hear in the debate which would follow a motion of no confidence, and finally to cast their vote on the motion. Anything else is surely a denial of democratic process. When politicians are apt to change their minds at will, how do we know which way they will vote in advance, whatever they state their position to be?

Legislature And Not Ruler Who Decides Loss Of Confidence

Accordingly, the issue seems to become, who was empowered to make the judgment as to whether the MB still had the confidence of a majority? The Judge gave a correct answer to this question by saying it is the Legislature, not the Head of State.

That the conditions in Article 16(6) are stated as facts rather than judgments powerfully indicates an interpretation that no judgment

is involved, and that the MB ceasing to command the confidence of a majority is simply a matter for the Assembly's decision. Following the Assembly's decision the matter should of course be beyond doubt, but if lack of confidence was expressed in some other manner, for example by the failure of a money bill or other important measure, it would then be for the MB to consider his position on the basis of events in the Assembly. In short, he must know that he has lost the confidence of the majority before he is obliged to resign. Thus even on the view that the issue of confidence arises without the Assembly expressing its view, there must be some latitude to the MB to assess his position. And surely this is all the more true if he is not even in possession of all the facts? Must he not have an opportunity to check the facts and consult with his colleagues to ascertain whether he has or has not lost the confidence of the majority?

But as the Judge also said, it is in any event clear that the Head of State is not given the power under Article 16(6), as he is under Article 16(2)(a), to make a judgment as to matters of confidence.

Public Policy

We can conclude that public policy requires that the courts view these "constitutional conventions" in such a way as to implement the democratic principle by letting the people's representatives decide transparently and after a debate. Any other view not only renders the Legislature otiose, but also opens the door to further constitutional crises arising out of behind-doors deals and manipulation which could even engulf the Federal Government at some juncture as well as making a political football of Malaysia's ancient monarchies.

Hopefully the Federal Court will consider these issues seriously.

"The Sultan Has No Explicit Power To Dismiss An MB Under The Perak Constitution", The Sultan's Constitutional Powers: A Comment*

Kevin YL Tan

Introduction

HRH Sultan Azlan Shah's appointment of Dato' Dr Zambry bin Abdul Kadir as Perak's Menteri Besar on 6 February 2009 precipitated a constitutional crisis that culminated in the case now before the courts. The facts of the case are by now fairly well-known and merit only a brief recount.

Following nationwide general elections in March 2008, the Pakatan Rakyat won 31 seats in the 59-member Legislative Assembly and Dato' Seri Ir Mohammad Nizar bin Jamaluddin was appointed Menteri Besar of Perak. The Barisan Nasional held the remaining 28 seats. In February 2009, 3 PR members announced their resignations from the Assembly, leaving each party in control of 28 seats each.

On 4 February 2009, Nizar approached HRH to dissolve the Assembly to "resolve the deadlock". The next day, HRH met with 31 members of the Assembly, satisfied himself that they supported Zambry as MB, and then informed Nizar that his request for dissolution had been rejected. Amongst the 31 members present at this meeting were the 3 PR members who had earlier resigned. They apparently withdrew their resignations and transferred their support to Zambry. HRH then informed Nizar that he no longer commanded the confidence of the Assembly and asked him to tender the resignation of the Executive Council. Nizar did not comply, and the Sultan's office issued a press statement declaring the office of

* First posted 26 June 2009

MB vacant. Zambry was appointed the new MB since he commanded the confidence of the majority of Assembly members.

On 11 May 2009, the Kuala Lumpur High Court ruled that as there had been no vote of confidence on the floor of the Assembly, Nizar remained the rightful MB of Perak. Zambry appealed against this decision and on 22 May 2009, the Court of Appeal overturned the High Court decision and declared that Zambry had been rightfully appointed as MB. At the time of this article going to post, the Court of Appeal has yet to deliver the grounds for that decision. Even so, Nizar's lawyers filed an application for leave to appeal against the Court of Appeal decision 19 June 2009. This application is scheduled for hearing on 9 - 10 July 2009.

Issues Raised By The High Court Decision

As the High Court's decision is the only one available, this commentary relates to that judgment. The key issues in this case are whether HRH Sultan Azlan Shah:

a. could dismiss the EXCO when Nizar refused to tender the Council's resignation after the Sultan refused his request to dissolve the Assembly;
b. was constitutionally empowered to appoint Zambry the new MB when Nizar refused to tender the resignation of the EXCO; and,
c. had a discretion to determine if Nizar had lost the confidence of the majority of members of the Assembly in any other way than by a vote on the floor of the Assembly.

Ambit of Article 16(6)

The key to answering these questions is Article 16(6) of the Perak Constitution which provides:

> *If the Mentri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.*

The High Court Judge, Aziz Rahim J, adopted the "golden rule of interpretation" requiring a court to give the words of the Constitution a plain and ordinary reading if the words are unambiguous. Finding that Article 16(6) of the Perak Constitution "contains no ambiguity whatsoever", Aziz Rahim J held that the Sultan had no power to dismiss Nizar; neither was he allowed to deem the office of MB vacant when Nizar refused to resign. To do so, he added, would be to do "violence to the language" of Article 16(6).

The learned judge held that when Nizar requested HRH to dissolve the Legislative Assembly, he had not done so with "any reference to any provision in the Perak's State Constitution" and in the absence of reference to any specific provision in the Constitution, Nizar was thus requesting HRH to exercise his royal prerogative under Article 36(2) which gave HRH a general power to "prorogue or dissolve the Legislative Assembly".

The Textual Argument

A textual reading of Article 16(6) supports the High Court's interpretation of this key provision. Article 16 comes under the heading "The Executive Council" and the relevant provision is the 6th of its 8 sub-clauses. Though headings, sub-headings and marginal notes do not technically form part of the constitutional text, they help us understand the structure and organisation of the Constitution. On the face of it, Article 16 is clearly intended to deal specifically with matters relating to the Executive Council and not generalities.

A general request for the dissolution of the Assembly and the Sultan's discretion thereof is governed by Article 36(2) read with Article 16(2)(b). That means that the Sultan has a general power to dissolve the Legislative Assembly and may act in his discretion in withholding a request for dissolution. Such a general request for dissolution does not fall under Article 16(6) which is to be deployed in a very specific instance.

This is immediately discernible when we read it sequentially: a Menteri Besar who has already ceased to command the confidence of the majority of the members of the Legislative Assembly must tender the resignation of the Executive Council, but only if His Royal Highness exercises his

discretion to refuse to dissolve the Legislative Assembly upon that Menteri Besar's request for dissolution.

Following from this reading, it is clear that the determination as to whether and when the MB has *lost* the confidence of the majority of the members of the Assembly – as opposed to whether the MB was likely to command the confidence of the majority of Assembly members under Article 16(2) – is a matter for the Assembly itself. It is not an executive decision.

The Argument From History

Does history support the High Court's reading of Article 16(6)? Back in 1956, various representations were made to the Reid Commission on the status and powers of the Sultan and on his power to act. Back then, debates still raged over what necessary constitutional amendments were needed to be made to make the Sultans "constitutional rulers" and whether the MB should hold office at the Sultan's pleasure.

What is quite clear from the resulting deliberations is that the Commission was determined to ensure that:

a. the organisation of government in the States mirrored that of the Federation; and,
b. the Malay Rulers should no longer preside over their State Executive Councils and involve themselves in executive decision-making save in very limited instances.

These concerns led the Commission to set out the meaning of a "constitutional Ruler" in paragraph 177 of their Report:

> *.. a constitutional Ruler is a Ruler with limited powers, and the essential limitations are that the Ruler should be bound to accept and act on the advice of the Mentri Besar or Executive Council, and that the Mentri Besar or Executive Council should not hold office at the pleasure of the Ruler or be ultimately responsible to him but should be responsible to a parliamentary assembly and should cease to hold office on ceasing to have the confidence of that assembly.*

By the Commission's reckoning, there was no intention to give the constitutional Ruler a power to dismiss the MB or the EXCO at will. Further support can be gleaned from a memorandum on "The State Constitutions"[1] prepared by Sir Ivor Jennings – certainly the most important and influential member of the Commission – when he noted:

> *The Rulers will become constitutional monarchs and executive government must be placed under the control, direct or indirect, of the State Councils. It is assumed that the Ruler .. would appoint a Mentri Besar .. who would have, or hope to obtain, a majority in the State Council. .. It is assumed that the Ruler would have power, on the advice of the Mentri Besar, to dissolve the State Council, but that, like the Queen, he need not accept the advice. The Ruler would not be empowered to dissolve without advice, though, of course, he could always appoint a new Mentri Besar who was likely so to advise because he had no majority.*

Historical precedent is consonant with the High Court's reading of Article 16(6). The Sultan was entitled to refuse a request to dissolve the Assembly, be it a general request – for example when early elections are to be called or where the Assembly is sharply divided over a key policy or the budget – or a specific request under Article 16(6) after the MB has already lost the confidence of the majority of the Assembly.

Dismissal Of The Executive Council

Both the textual and historical arguments support the High Court's reading of Article 16(6). However, this does not resolve the question as to whether the Sultan was empowered to (a) declare the office of the MB and EXCO vacant; and (b) following from that declaration, proceed to appoint a new MB.

The Perak Constitution is not explicit on this point. What is clear is that the EXCO is appointed by the Sultan on the advice of the MB. Although Article 16(7) states that members of the EXCO hold their office at HRH's pleasure, Article 18 makes it patently clear that HRH may not dismiss them at a whim, but only upon the advice of the MB.

1 CO 889/2 page 156 dated 31 Aug 1956

This reading is borne out by the Reid Commission Report that stated at paragraph 181:

> *As the Executive Council is to be collectively responsible to the Legislative Assembly the appointment of its members must lie in the hands of the Mentri Besar and a new Mentri Besar must be free to appoint a new Executive Council in the same way as the Prime Minister appoints his Ministers. This result follows from our recommendation that members of the Executive Council should hold office at the pleasure of the Ruler because in appointing or terminating the appointment of a member of the Executive Council the Ruler must act on the advice of the Mentri Besar.*

So, what happens if an MB, who has lost the confidence of the majority of the Assembly, refuses to resign his position and that of the EXCO after the Sultan rejects that MB's request for a dissolution of the Assembly? This happened in Kelantan in 1977 when its MB, Mohamed Nasir refused to resign even though he had lost a formal vote of confidence in the Kelantan Assembly, was sacked by his own party and had his request for dissolution of the Assembly refused by the Sultan of Kelantan. The impasse led to the declaration of a state of emergency by the Federal Government that lasted 3 months, after which the Assembly was dissolved for fresh elections.

Alas, this single precedent is not particularly instructive. No legal solution was possible and ultimately, the situation was resolved politically by the Sultan dissolving the Assembly and allowing fresh elections to be called. Perhaps, all Rulers and Governors should, as a matter of course, accede to requests by their respective MBs to dissolve the Assembly for fresh elections to be called unless the Ruler has a premonition that a calamity might befall the State if he so acceded. That way, new mandates are quickly determined and the business of government can proceed once a new leadership is established. Indeed, the Sultan of Perak supported this view of a Ruler's powers when he was Lord President. In his 1982 essay, "The Role of Constitutional Rulers", he opined:

> *.. under normal circumstances, it is taken for granted that the Yang di-Pertuan Agong would not withhold his consent to a request for dissolution of Parliament. His role under such a situation is purely formal.*

This point was picked up by counsel for Nizar and cited with approval by the High Court.

The Sultan has no explicit power to dismiss an MB under the Perak Constitution. Indeed, neither is the Yang di-Pertuan Agong empowered to dismiss a Prime Minister under the Federal Constitution. Originally, the Reid Commission had prepared a draft Article 36(2) which, among other things, gave the Yang di-Pertuan Besar power to remove the Prime Minister from office. However, as the High Court duly noted, the words were changed when the present Article 43(4) was promulgated. This provision is almost word-for-word the same as Article 16(6) of the Perak Constitution save for the nomenclature used.

Conclusion

We return to the 3 questions posed at the start of this article. If, as the High Court rightly held, Nizar's request to dissolve the Legislative Assembly was made under general provisions rather than under Article 16(6), then HRH had no power either to declare the office of MB vacant nor to dismiss the members of the EXCO. And since HRH had no power to declare the office of MB vacant, he was correspondingly prevented from exercising his discretion under Article 16(2) to appoint Zambry as MB and to act on Zambry's advice to appoint members to the EXCO.

The third question posed – whether HRH had a discretion to determine if Nizar had lost the confidence of the majority of Legislative Assembly members – does not arise for consideration on the facts of this case. The question as to whether or not a show of confidence or support can be demonstrated in any way other than by a formal vote on the floor of the House is moot, since HRH is not being asked to exercise his discretion under Article 16(2) to determine support or confidence for the purposes of appointing a new MB.

Even if HRH was called upon to exercise his discretion on this matter, I would argue that the only way to determine confidence (or otherwise) in any individual as MB is to have a formal vote on the floor of the Assembly. This is especially crucial in a political system that is not constrained by anti-hopping laws, and which allows Assemblypersons to transfer loyalties at a drop of a hat. A formal vote will require formalities to be

met, membership of political parties to be ascertained and resignations or change of affiliations registered. Most importantly, it will provide for certainty.

One possible way to avoid future confusion over the Sultan's discretionary powers with respect to requests for a dissolution might be to require the MB to state clearly in his request for dissolution, whether he is doing so under the general provisions to which Article 36(2) applies or because he has lost the confidence of the majority of the Assembly members under Article 16(6). That way, there can be no issue of how the Sultan is to deploy his discretion. This can be done as a matter of constitutional practice and will not require a constitutional amendment.

In the meantime, the problem remains. Two men claim to be the rightful MB of Perak and two groups claim to be members of the EXCO. As scholars of constitutional law and keen observers of Malaysian politics, we anxiously await the written judgments of the Court of Appeal as eagerly as we await the wisdom of the Federal Court to find a legal solution to an essentially political issue.

Selected Comments

Nancyyong
on 26 June, 2009 at 2:38 pm

Our judiciary's integrity has already gone down the drain. The rakyat has lost trust in them. We have a bunch of judges who basically have no integrity and compassion towards the rakyat.

perak
on 26 June, 2009 at 3:26 pm

The Court of Appeal overturned the High Court decision and declared that Zambry had been rightfully appointed as MB BUT until now the Court of Appeal has yet to deliver the grounds for that decision. This is a clear indication that the Court of Appeal has difficulty to back up the decision with strong and valid legal grounds.

zztop
on 26 June, 2009 at 4:47 pm

Really sick of all the hu ha about the Perak state issues.

Just dissolve the Assembly and let the rakyat decide again through the ballots once and for all. No ifs and buts. Enough is enough. Come on BN/UMNO, have the guts and courage to face the rakyat.

MatTop
on 26 June, 2009 at 4:51 pm

Everyone knows that the Sultan has no power to dismiss his MB. You don't need any prominent jurist or lawyer to tell you that. Even Raja Azlan knows that.

Even the Court of Appeal knows that the Sultan can't remove the MB. Now they are at pains to find the flaws or the incorrectness in the decision of the High Court ruling. For a matter as important as the affairs of State, we would have thought that the CA judges would have displayed better judicial temperament and attitude than a High Court judge. The 3 kangaroos should have prepared the reasons why they thought the High Court judge was wrong before delivering their judgment. Now they can't write the judgment without making a big fool of themselves.

On the issue of dissolution of the State Assembly, when Raja Azlan was on the Bench, he wrote that an Agong or Sultan has no choice but to dissolve Parliament/ the Assembly on the advice of his PM/MB. That is taken for granted. Now because of Gamuda, he thinks otherwise. He does not act on the advice of his MB but on the advice of Najib.

Lawyer Lua
30 June, 2009 at 1:35 pm

According to Article 16(6), if the Ruler refuses to dissolve the Legislative Assembly, the said MB shall tender the resignation of the EXCO. But what if this MB just would not do the "tender", no matter how he is being forced? Do you want the Ruler to admit defeat and give this MB what he wants?

MatTop
on 1 July, 2009 at 2:35 pm

Lawyer Lua, that is a moot question. First the Assembly must pass a vote of no confidence against the MB. Then if the Sultan refuses to dissolve Assembly, MB shall tender the resignation of his Exco. No honourable MB would refuse to do so... In that case, any interested party then could get a court declaration/injunction on this issue of 'mandatory' resignation. Sultan should not get involved in politics or the problems created by politicians.

In Kelantan back in the 70's, when the State Assembly passed a vote of no confidence against the then MB Mohamad Yakob, he went to see the Sultan who refused to dissolve the Assembly.

Raja Azlan who was then a Federal Court Judge commented AND WROTE later that under normal circumstances it is taken for granted that Sultan should not refuse to dissolve Assembly, his role is purely formal. I think Raja Azlan is doing the opposite of what he had been preaching. He went to interview the 3 corrupted 'jumping-over' ADUNs.

Under the Perak Constitution, Raja Azlan should have summoned a special sitting of the Assembly and asked them to pass a vote of no confidence against the sitting MB instead of being personally involved in the matter. Now… he created a lot of headaches for constitutional lawyers and academicians.

Zambry's Illegal EXCO*

Cheang Lek Choy

Why is Zambry's EXCO illegal? Let us examine the late Tun Suffian's interpretation.

First, the context.

Did Nizar Tender The Resignation Of His EXCO?

Thus far, we have been asking the question whether the Sultan, His Royal Highness, may dismiss the Menteri Besar. The High Court has ruled that HRH does not have such power, alternatively, that the MB's post cannot be deemed to have been vacated. The Court of Appeal – one judge has yet to deliver her written grounds – has ruled that HRH has the power, alternatively, that the power to dismiss the MB is implicit upon the MB refusing to resign.

Thus far, the arguments have missed one very important issue. Indeed, it is the missing piece in the jigsaw puzzle. They are the words "shall tender the resignation of the Executive Council", i.e. the State Cabinet found in Article 16 of the Perak Constitution.

What Is Suffian's View Of Article 16(6)?

Perhaps, the most authoritative comment on Article 16(6) of the Perak Constitution should come from the late Tun Suffian, whose understanding of the Malaysian Constitution and mastery of the English language is second to none. Suffian was part of the team advising the Rulers at the Reid Commission hearings. At page 54 of his book, "An Introduction To The Constitution Of Malaysia" (2nd ed), Suffian writes:

> *When the Prime Minister who has lost the confidence of the majority tenders the resignation of the Cabinet and advises that Parliament be dissolved, the Yang di-Pertuan Agong may decide*

* First posted 3 July 2009

not to dissolve Parliament, but instead to invite another member of the House of Representatives, who in his judgment is likely to command the confidence of the majority of the members of the House, to form a government.

Suffian's interpretation is that the Yang di-Pertuan Agong may appoint a new PM:

(a) only when the PM has tendered his resignation; and,
(b) when the Yang di-Pertuan Agong refuses the request for dissolution.

As Nizar never tendered his resignation, the condition precedent to allow HRH to appoint another MB cannot arise. Equally, as Nizar did not tender his EXCO's resignation, Zambry cannot appoint a new EXCO. The Perak Constitution forbids this.

Quoting Suffian again:

In appointing the Prime Minister, the Yang di-Pertuan Agong also acts in his discretion .. Other ministers are appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister.

At page 55 of his book, Suffian continues:

Ministers other than the Prime Minister hold office at the pleasure of the Yang di-Pertuan Agong. This does not mean that the Yang di-Pertuan Agong may dismiss them at will. He may do so only on the Prime Minister's advice.

It would seem therefore that if HRH cannot dismiss the EXCO without advice, and as no such advice to dismiss has been given by Nizar, the present EXCO is invalidly and unconstitutionally holding office.

Although Suffian was writing about the Federal Constitution, his remarks are equally applicable to the Perak Constitution because the Federal and State Constitutions are identical. Article 43 (4) of the Federal Constitution and Article 16(6) of the Perak Constitution provide as follows:

If the Prime Minister (in this instance, Menteri Besar) ceases to command the confidence of the majority of the members of the House of Representatives, then, unless at his request the Yang di-Pertuan Agong (the Sultan) dissolves Parliament, the Prime Minister (the Menteri Besar) shall tender the resignation of the Cabinet (the EXCO).

In the media statement issued by HRH's private secretary released on 6 February 2009; both the MB's office and all EXCO positions would be deemed vacant if the MB and his EXCO refused to resign.

Limitations On Constitutional Monarchy

In a constitutional monarchy, HRH acts on the advice of the MB with regards to appointment and dismissal of EXCO members. Although the Perak Constitution says that EXCO members hold office at the pleasure of HRH, in practice they can do so only as long as they enjoy the confidence of the MB.

The Reid Commission Report must be read and understood by anyone interested in interpreting and understanding the Federal and State Constitutions. It states at paragraph 177:

In our opinion a constitutional Ruler is a Ruler with limited powers, and the essential limitations are that the Ruler should be bound to accept and act on the advice of the Menteri Besar or Executive Council, and that the Menteri Besar or Executive Council should not hold office at the pleasure of the Ruler or be ultimately responsible to him but should be responsible to a parliamentary assembly and should cease to hold office on ceasing to have the confidence of that assembly.

Professor Andrew Harding in his article, "Crises Of Confidence And Perak's Constitutional Impasse", was merely echoing the views of the drafters of the Perak Constitution when he said that "the conditions in Article 16(6) are stated as facts rather than judgments powerfully indicates an interpretation that no judgment is involved, and that the MB ceasing to command the confidence of a majority is simply a matter for the Assembly's decision".

Must Act Only On Advice

HRH can only act upon the advice of the MB in relation to his EXCO. Schedule 8, Part 1, paragraph 1A of the Federal Constitution (after the 1994 amendments) provides that whenever the Sultan is to act in accordance with advice, on advice, or after considering advice, the Sultan shall accept and act in accordance with such advice. In other words, HRH MUST act on advice.

Can HRH appoint a new EXCO if he has neither power to appoint nor to dismiss? The Perak Constitution allows only 10 persons to be appointed to the EXCO. It is only the MB who can advise HRH to dismiss the EXCO. As the MB himself neither resigned nor tendered the resignation of his EXCO, HRH cannot appoint another MB or new EXCO.

Can The Office Of EXCO Be Deemed Vacant?

There is a view that if the MB resigns, the EXCO will collapse with him. This was so decided by Kadir Sulaiman J in the case of *Datuk Amir Kahar v Tun Mohd Said Bin Keruak*[1]. But there was no reference to the new constitutional provision of 1994 that the Ruler must only act on advice. This case is distinguishable because the Chief Minister there resigned so the question of Nizar's EXCO being dissolved automatically does not arise.

But let us assume that the Federal Court dismisses Nizar's appeal. What is the position of the EXCO? It is submitted that the appointments of the EXCO by Zambry is still unconstitutional because the previous members of the EXCO have neither resigned nor been dismissed on Nizar's advice. Zambry will still have to advise HRH to dismiss the previous EXCO before appointing a new one and until that happens, all the acts and deeds of Zambry's EXCO are illegal and void.

As a result of the 1994 amendments, there is a constitutional conundrum in the making. Any Ruler who dismisses the MB is bereft of any power to dismiss the EXCO because he can only do so upon advice from the MB.

1 [1995] 1 CLJ 184

Selected Comments

Lawyer Lua
3 July, 2009 at 1:33 pm

Article 16(6) says …….the MB shall tender the resignation of THE EXECUTIVE COUNCIL (THE EXCO). THE EXCO here is a class with the MB and his Executive Councillors as members.

Just like THE CABINET is a class with the PM and his Ministers as members. When the PM tenders the resignation of THE CABINET, everyone is gone. When we understand that THE EXCO here is a class, the difficulty of Cheang is gone.

Mea Culpa
on 6 July, 2009 at 10:02 pm

Does this mean that elections are the only way out in Perak? Would anyone deal with an EXCO that may be later declared as illegal, voiding any commitments they may have entered into?

The status quo is nuts.





Part 1: Gobbledegook And Regurgitation Galore In The Two Written Judgments Of The Court Of Appeal In Zambry v Nizar*

NH Chan

Prologue

I shall start with an aside on the dictionary definition of the two words which feature in the title of this article.

"Gobbledegook" means unintelligible language.

"Regurgitate" means repeat information without understanding it. Regurgitation is the noun.

After you have read the article you should have an inkling of what I am trying to suggest with the words. You can then judge for yourself.

There Are Only Two Points That Really Matter In This Appeal: Clauses (2)(a) And (6) Of Article 16

Let us see if ordinary people like us can understand clauses (2)(a) and (6) of Article 16 of the Laws of the Constitution of Perak better than the judges of this Court of Appeal.

Clause 16(2)(a) reads:

> *His Royal Highness shall first appoint as Mentri Besar to preside over the Executive Council a member of the Legislative Assembly*

* First posted 7 July 2009

who in his judgment is likely to command the confidence of the majority of the members of the Assembly.

Clause 16(6) reads:

If the Mentri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

The language of these two clauses, clause (2)(a) and clause (6), is easy to understand. There is no ambiguity.

Clause (2)(a) is definitive. It is only in this clause that the Ruler has been given the discretion to appoint a Menteri Besar which is based on his judgment.

On the other hand, it is only in clause (6) where it is said that if the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly then he would be able to ask the Ruler to dissolve the Assembly. If the request for the dissolution of the Assembly is withheld by the Ruler (who has the discretion to do so under Article 18(2)(b)), the incumbent Menteri Besar has to tender the resignation of the Executive Council.

It is important to note that there is no provision for the incumbent Menteri Besar to resign. In fact, in the present case, the incumbent Menteri Besar Nizar had refused to resign even though he was ordered by the Ruler to do so. Of course, all of us know that the Ruler has no such power to order anyone to do anything. It was unconstitutional of the Ruler to do so.

While members of the Executive Council hold office at the pleasure of the Ruler, it is not so with the Menteri Besar.

Clause (7) of Article 16 states:

Subject to Clause (6) a member of the Executive Council other than the Mentri Besar shall hold office at His Royal Highness' pleasure.

That said, I return to the first part of clause (6) which I am going to discuss below.

The Proper Duty Of The Conjunction "If" Is To Introduce A Conditional Sentence

The operative word in clause (6) is the conjunction "if". I refer to Fowler's "Modern English Usage" (2nd ed) where it says:

> *if. To avoid possible ambiguity it may be prudent to confine if to its proper duty of introducing the protasis of a conditional sentence, and not to use it as a substitute for though or whether or (with not) to introduce a possible alternative.*

In case you do not know the meaning of the word "protasis", it means the clause that states the condition in a conditional sentence. In English the protasis is generally introduced by if or unless.

But don't trust Microsoft's word processor because it suggests the word "protasis" does not exist in the English language. Of course, Fowler is the authority on the usage of the English language (Churchill once wrote to the Director of Military Intelligence about the plans for the Normandy landings, "Why must you use intensive here? Intense is the right word. You should read Fowler's Modern English Usage on the use of the two words"). Or you may use a good dictionary, not a condensed one, and you will find the word.

The dictionary meaning of the conjunction "if" means "on condition that, whenever" or "supposing that, in the event that". In the present context, "if" is used to mean "on condition that, whenever".

So that clause (6) is to read like this:

> *On condition that "the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then", he can request the Ruler to dissolve the Assembly.*

This sentence means that "whenever" a Menteri Besar has ceased to command the confidence of the majority of the Assembly, he can request

the Ruler to dissolve the Assembly. As stated in Fowler, the proper duty of "if" is to confine the word to introducing the protasis of a conditional sentence. The condition in the sentence is that the Menteri Besar's loss of confidence in the Legislative Assembly has to be established first before the Menteri Besar can request the Sultan to dissolve the Assembly.

Therefore, it is only on the condition that a Menteri Besar has lost (ceased to command) the confidence of the majority of the Assembly before he can request the Ruler to dissolve the Assembly.

Definitely, it is not up to Nizar, the incumbent Menteri Besar, to say that he has lost the confidence of the Assembly. How could he be sure of that without a vote being taken at the Assembly? At best, Nizar could only be guessing. Obviously, the only way in which it could be shown with any degree of certainty that Nizar had lost the confidence of the majority of the members of the Assembly is to go to the Assembly itself for a vote to be taken.

But What Happens When An MB Had Lost A Formal Vote Of Confidence In The Assembly And Still Refused To Resign?

But then, one may ask the hypothetical question (because this is not the case here), what happens when a Menteri Besar knows by a vote being taken in the Legislative Assembly that he has lost the confidence of the majority of the Assembly? Can he refuse to resign? Professor Kevin YL Tan, in his earlier essay[1], tells us that:

> *This happened in Kelantan in 1977 when its MB, Mohamed Nasir refused to resign even though he had lost a formal vote of confidence in the Kelantan Assembly, was sacked by his own party and had his request for dissolution of the Assembly refused by the Sultan of Kelantan. The impasse led to the declaration of a state of emergency by the Federal Government that lasted 3 months, after which the Assembly was dissolved for fresh elections.*
>
> *Alas, this single precedent is not particularly instructive. No legal solution was possible and ultimately, the situation was resolved politically by the Sultan dissolving the Assembly and allowing fresh elections to be called. Perhaps, all Rulers and Governors*

1 See '"The Sultan Has No Explicit Power To Dismiss An MB Under The Perak Constitution", The Sultan's Constitutional Powers: A Comment'.

should, as a matter of course, accede to requests by their respective MBs to dissolve the Assembly for fresh elections to be called unless the Ruler has a premonition that a calamity might befall the state if he so acceded. That way, new mandates are quickly determined and the business of government can proceed once a new leadership is established. ..

The Sultan has no explicit power to dismiss an MB under the Perak Constitution. Indeed, neither is the Yang di-Pertuan Agong empowered to dismiss a Prime Minister under the Federal Constitution.

It Seems That Ordinary People Are Better Than These Judges Because They Could Understand What The Two Clauses Mean

Now that you are apprised of the meaning of the two clauses that really matter in the appeal, you should be in a better position than the appellate judges who have missed the points to come to their decision.

We all know that whenever there is a situation when there is no Menteri Besar, such as when the incumbent Menteri Besar dies or resigns or has been disqualified as an Assemblyperson (because Nizar is an Assemblyperson) or has been removed from office by the Assembly, then the Ruler "shall first appoint as Mentri Besar to preside over the Executive Council a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly": so says Article 16(2)(a). This is the only occasion in which a Ruler can use his "judgment" to select and appoint a Menteri Besar.

We also know that a Menteri Besar, once he has been appointed by the Sultan under clause (2)(a), cannot be removed by him. The Menteri Besar does not hold office at the Sultan's pleasure.

The Sultan has no power to dismiss the incumbent Menteri Besar, Nizar Jamaluddin, or to declare the office of Menteri Besar vacant, so says Article 16(7): "[s]ubject to Clause (6) a member of the Executive Council other than the Mentri Besar shall hold office at His Royal Highness' pleasure."

So that when Nizar refused to resign after the Sultan had declined to dissolve the Legislative Assembly, the Sultan had no power to dismiss him nor had he the power to appoint another Menteri Besar when Nizar was still the Menteri Besar, as he had not resigned his office.

So then, how are we to determine a loss of confidence in the Assembly? Certainly not by an outsider like us. Not even Nizar himself was in any position to say that he did not command the confidence of the majority of the Legislative Assembly. Only the Assembly can determine if Nizar has lost the confidence of the majority of its members.

Therefore, the reality of the situation is that Nizar was still the Menteri Besar when he refused to resign and the Sultan had no power to dismiss him or to deem the office of Menteri Besar vacant.

The Sultan has no discretion or power to appoint a second Menteri Besar when the incumbent is still in office. The Perak Constitution does not provide for two Menteri Besar.

Any decision of the courts otherwise is a perverse one because such a decision is not made according to the Laws of the Constitution of Perak. Don't you think all of you ordinary people are better judges than these recalcitrant judges of the Court of Appeal? At least (now that you are informed of the constitutional provisions), you know how to apply the relevant law which is applicable in the present case, whereas the judges don't seem to know how to do it.

Now That You Know The Law Which Applies, You Are In A Position To Judge The Two Judges

So far the Court of Appeal has issued two written judgments. Let us see if the judges who wrote them come up to your expectations.

Raus Sharif JCA who sat as the Chairperson of this Court of Appeal meandered through 43 tedious pages of his 48-page judgment before he came to the conclusion that Article 16(6) makes no reference to a motion of loss of confidence to be passed by the Legislative Assembly and therefore he concluded that the High Court Judge had erred in law. This is what Raus JCA said at page 43:

For the above reasons, I find that the learned judge had erred in law in concluding that the only manner in which the loss of confidence of the majority of members of the Legislative Assembly could only be ascertained by way of motion to be passed in the Legislative Assembly. Such a finding is contrary to the provisions of Article 16(6) of the Perak State Constitution which makes no reference to such a motion having to be tabled.

Remember my explanation above about the conjunction "if"? In the instant case the use of the conjunction "if" means "on condition that" or "whenever". So that the opening words of Article 16(6) should read, thus:

On condition that "the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then", he can request the Ruler to dissolve the Assembly.

In other words, the loss of confidence in the Legislative Assembly must be established first before the Menteri Besar can make his request to the Ruler for a dissolution of the Assembly. Obviously the only way to establish that Nizar has lost the confidence of the majority is to ask the members of the Assembly themselves. It would be incorrect to ask Nizar because he could only guess on his own popularity.

Undoubtedly, you must never ask the Ruler to determine the loss of confidence of a Menteri Besar in the Legislative Assembly as he has no power to determine the status of the Menteri Besar's popularity in the Assembly. And if the Court of Appeal was to confer such power on the Ruler, then it is a blatant refusal of the Court to administer justice according to the Laws of the Constitution of Perak.

Of course, in Article 36(2) the Sultan is given a general power "to prorogue or dissolve the Legislative Assembly".

Yet, the Judge has relied on the Ruler's determination that Nizar no longer commands the confidence of members of the Assembly. This is what Raus Sharif JCA said:

It is an undisputed fact that His Royal Highness interviewed the 3 independent members separately in order to ascertain whether they were really supporting Barisan Nasional. They informed

His Royal Highness that they no longer supported Nizar as the Menteri Besar. Instead they declared their support to Barisan Nasional. At the end of it, His Royal Highness was satisfied that with the 31 members of the Legislative Assembly supporting the Barisan Nasional, Nizar no longer command the confidence of the majority of the members of the Legislative Assembly.

This is a trashy piece of reasoning coming from an appellate judge. Raus Sharif JCA seems not to know that the Ruler is only a constitutional monarch with no prerogative power to do anything but that which the law allows him.

Plainly, the use of the conjunction "if" in clause (6) speaks volumes. The loss of confidence in the Menteri Besar by the Legislative Assembly must be established first before the Menteri Besar can make his request to the Sultan to dissolve the Assembly. In this case, Nizar requested the Sultan to dissolve the Legislative Assembly before it could be established that the Menteri Besar has lost the confidence of the majority in the Assembly.

Without doubt, it must not be left to interested parties – neither Nizar nor Zambry and his cohorts – to determine the loss of confidence of a Menteri Besar in the Legislature. Not even a constitutional monarch could determine the loss of confidence of a Menteri Besar in the Legislative Assembly because he has no power to do so. Not even the judges can confer on themselves a power which does not exist to determine the loss of confidence in the Legislative Assembly of a Menteri Besar, except by the Assembly itself. It would be unfair and unjust to do so.

The Judgment Of Ahmad Maarop JCA

Ahmad Maarop JCA arrived at the same conclusion as Raus Sharif JCA except that Ahmad Maarop JCA is more long-winded.

At the 42nd page of his convoluted 76-page judgment, Ahmad Maarop JCA said:

In conclusion, I hold that there is no mandatory and/or express requirement in the Perak State Constitution that provides that there must be a vote of no confidence passed in the Legislative Assembly

against Nizar before he ceased to command the confidence of the majority of the members of the Legislative Assembly. The fact that he ceased to command the confidence of the majority of the members of the Legislative Assembly under Article 16(6) could be established by other means. Thus, His Royal Highness was right in making enquiries to satisfy himself as to whether Nizar had in fact ceased to command the confidence of the majority of the members of the Legislative Assembly, in considering Nizar's request for the dissolution of the Legislative Assembly.

It took this Judge 42 pages to reach this conclusion.

At the recent launch of my book, "How To Judge The Judges"[2], on 29 June 2009, Gopal Sri Ram FCJ remarked:

But where a judgment is tainted with intellectual dishonesty there is nothing much you can do except to expose the fallacy of the grounds put forth to justify a conclusion already reached before hearing counsel.

Now let us expose the fallacy of the finding of this Judge.

The Judge said that whether Nizar had ceased to command the majority in the Assembly could be established by other means. One may ask, what other means could there be? He could only give one example. He said:

Thus, His Royal Highness was right in making enquiries to satisfy himself as to whether Nizar had in fact ceased to command the confidence of the majority of the members of the Legislative Assembly, in considering Nizar's request for the dissolution of the Legislative Assembly.

But, all of us know that the Sultan has no power to do anything except that which the law allows him.

As Professor Andrew Harding has correctly said in his essay, "Crises Of Confidence And Perak's Constitutional Impasse":

Accordingly, the issue seems to become, who was empowered to make the judgment as to whether the MB still had the confidence

2 Chan NH; Sweet & Maxwell Asia, Petaling Jaya (2nd ed, 2009)

of a majority? The Judge gave a correct answer to this question by saying it is the Legislature, not the Head of State. ..

But as the Judge also said, it is in any event clear that the Head of State is not given the power under Article 16(6), as he is under Article 16(2)(a), to make a judgment as to matters of confidence.

The judge in Professor Harding's essay is the much respected Aziz Rahim J of the High Court.

Conclusion

I trust I have exposed the fallacy of the grounds put forth by the two judges of the Court of Appeal. All of you (the ordinary people), who have been informed of the relevant provisions of the Laws of the Constitution of Perak by reading this article, know that there are only two clauses of Article 16 which apply to the points that really matter before the Court of Appeal. In clause (2)(a) the Head of State is empowered to make a judgment as to matters of confidence. Whereas in clause (6) he is not given the power to do so but the Legislature is.

Aziz Rahim J in the High Court gave the correct answer by saying it is the Legislature, not the Head of State, who is empowered to make the judgment as to whether the Menteri Besar still had the confidence of a majority. And, I trust, all of you would agree with him.

Raus Sharif and Ahmad Maarop JJCA are wrong. They are wrong because there is no empowering provision in Article 16(6). They did not apply the law as it stands. Indeed they have blatantly refused to apply the Laws of the Constitution of Perak. They should be ashamed of themselves for not administering justice according to law. The common people of this country can now judge them for who they are.

The full text of the two judgments can be found on the internet. If you have difficulty in finding the cases, try *www.LoyarBurok.com*. If you, as a layman, find the judgments unintelligible, then that is what the word "gobbledegook" means. On the other hand, if you find the lengthy judgments merely repeating information which is unnecessary to the two points that matter in the appeal, then that is precisely what "regurgitation" means. So now you can appreciate the title of this essay.

Selected Comments

jungleboy
on 8 July, 2009 at 11:13 am

After the judicial crisis during MM's time, the judiciary had gone from bad to worse. Judges (not all) chose to ignore the constitution but to interpret the law with unguided whim and fancy

MatTop
on 9 July, 2009 at 2:40 pm

I thought this is well settled lah. If the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then the MB has to tender the resignation of the Exco which of course includes the MB himself.

Assuming that the MB only tenders his resignation alone, then according to the Amir Kahar v Tun Said Keruak case, the rest of the Exco is deemed to have resigned.

The only issue is that the determination whether the MB ceases to command the confidence of the majority must be decided by the Leg Assy itself. It should not be decided privately in the compound of the Palace by the Sultan himself. He has no power to do that.

That is how a 'majority' or 'minority' government could be toppled; by a vote of confidence in the Legislative Assembly which is in accord with constitutional convention and practices all over the commonwealth.

Janetlee
on 9 July, 2009 at 9:14 pm

Dear Mr. NH Chan,

I think you could establish a finishing school for prospective Judges prior to their sitting on the bench. Just like lawyers undergoing Pupillage prior to admission as an Advocate & Solicitor to the High Court of Malaysia. That means there must be a Master assigned to a junior Judge for a period of 12 months and subject to the satisfaction of the Master to approve the junior judge going onto the bench for his/her 1st sitting.

What do you think, Honourable Mr. NH Chan?





Part 2: Gobbledegook And Regurgitation In The Written Judgments Of The Court Of Appeal In Zambry v Nizar: Postscript – Zainun Ali JCA's Judgment*

NH Chan

On 7 July 2009 I wrote an article under a similar title, published on the web with various news portals and LoyarBurok. At that time I only had the written judgments of two of the judges, Raus Sharif and Ahmad Maarop JJCA. I have just received the third judgment of Zainun Ali JCA. Below is my critique of the written judgment of Zainun Ali JCA.

The Points That Really Matter

As I have said before in the first part of this article, there are only two points that really matter in the appeal of the case in question. They involve the reading of two clauses in Article 16 of the Perak Constitution and an understanding of what the clauses mean. A very experienced judge, the late Lord Justice Salmon in a talk, "Some Thoughts On The Tradition Of The English Bar," which he gave to young members of the English Bar, said:

.. remember this, in few cases, however complex, is there usually more than one point that matters. Very seldom are there more than two and never, well hardly ever, more than three. Discover the points that really matter. Stick to them and discard the rest.

* First posted 10 July 2009

Actually, Salmon LJ was revealing to budding advocates the mind of a judge. The young advocates are informed, before they embark on their career, that a judge makes his decision by discovering the point that really matters or, exceptionally, the points that really matter. This revelation should place aspiring advocates on the right direction to becoming good advocates.

If a judge misses the point or points altogether, the whole decision becomes nothing but gobbledegook if it is unintelligible or a regurgitation of a lot of information on the facts and the law without understanding them. A decision which does not decide on any point that really matters is not a judgment at all. A decision which misses the point altogether is merely the extraneous ranting of an incompetent judge. At best, the legal principles described in the decision may be described as nothing more than *obiter dictum* or *dicta*; but if it is just to repeat known law (which is unconnected to any point in issue) as was done here in most of the judgment of Zainun Ali JCA, it is not even *dicta*. In truth, such a decision is useless because it cannot be cited as an authority as it is only regurgitating what is already known. But a decision that misses the point or points altogether is no authority on the issue or issues before the court. Because the decision did not decide on the issues or points that matter, such a decision is at best merely *obiter dicta* (the Latin phrase means "incidental").

Professor Andrew Harding in his essay, "Crises Of Confidence And Perak's Constitutional Impasse", gave an illustration of such a situation in *Amir Kahar* (Sabah, 1995) which the High Court Judge in the present case had distinguished. This is what Professor Harding wrote:

> *Amir Kahar, [the High Court judge] said, was correct on its facts but did not raise the issue in question, as the Chief Minister of Sabah in that case had in fact resigned and the only issue was as to the effect of his resignation with regard to the rest of the Cabinet; accordingly the Court's views in that case on the issue of confidence were merely obiter dicta (incidental).*

If a judgment decides on the points that really matter, the judgment which decides on those points is described as the *ratio decidendi* of the decision (this Latin phrase means "the reason for a decision").

The incidental part of a judgment which does not form the reason for the decision (the *ratio* of the judgment) is an *obiter dictum* (plural *obiter dicta*). This Latin phrase means "incidental". An *obiter dictum* is never cited as an authority for the proposition it states, although an intellectually dishonest judge would treat it as such, in the hope that the reader would take his word for it and not read the whole judgment that he has referred to in support of his proposition. Sometimes an *obiter dictum* has much persuasive value depending on the standing of the judge. Such *obiter dictum* may sometimes be adopted by a judge as his judgment in an appropriate case. Only the *ratio decidendi* of a judgment can be used as authority for the proposition that it states. But the remarks which are incidental to the decision are *obiter*.

Let Us Now Expose The Fallacy Of The Judgment Of Zainun Ali JCA

The judgment is 114 pages long – it is like using a blunderbuss to shoot at a target, scattering shots in all directions, and not hitting it. It is the longest of the three. Most of it has nothing to do with the two points that really matter in this appeal which we know are clauses (2)(a) and (6) of Article 16 of the Laws of the Constitution of Perak. And when she does come to the two points that are the real issues in the appeal she misses the points altogether by giving a wrong reason for them.

Here, from page 12 of her judgment, is an example of irrelevant writing. This is what she wrote:

> *Inclined as is the Federal Constitution towards the Westminster structure, it has its own peculiarities. The Westminster model is not to be found in one document, but could be seen in bits and pieces in the Magna Carta, the Bill of Rights, the Act of Settlement and a series of Parliament Acts. Conversely, the Federal Constitution however is embodied in one document and gathers unto itself various sources of law some of which are implicit. The unique presence of the written law, shot through with informal and unwritten sources in the form of conventions, prerogatives, discretionary and residual powers as such, help ensure the continuation of constitutionalism and the rule of law. Thus the sources of law in our Constitution are several. Article 160(1) of*

the Federal Constitution says it all. "Law includes written law, the common law, insofar as it is in operation in the Federation or any part thereof and any custom or usage having the force of law in the Federation or any part thereof".

I think I should stop here. Enough is enough. I don't think we, neither the reading public nor myself, can stomach any more balderdash. You can pretend to be erudite by regurgitating unconnected material of facts and jumble them up. You can even misread the history of England like not knowing the different periods in history between the feudalism of the barons and a despotic king in *Magna Carta* and the Act of Settlement which came about after King James II fled the realm and the ascension of William and Mary to the throne of England. Unless you can connect the leap from 13th century England to the Act of Settlement in 1701 some 400 years later, then everything that is said is nothing more than pretended erudition.

What Is The *Magna Carta*?

I shall start with the *Magna Carta* since she mentions it first. In order to understand the significance of the *Magna Carta* in English history, it is necessary to know the difference between feudalism and despotism. The Charter marked the first step in the resistance by the barons to the despotism of King John in the 13th century. As Trevelyan wrote in his "History Of England" at page 199:

For feudalism is the opposite of despotism .. The barons and knights were protected from the king by feudal law and custom. When [the King] claimed service, aids or reliefs on a scale larger than the custom allowed, they resisted him on point of feudal law.

Trevelyan tells us:

The resistance to royal despotism in the thirteenth century was successful because the feudal class, unlike the squires of later times, was still to some extent a warrior class .. they all had chain-armour and war-horses, some had gone on the Crusades, and many lived in a state of chronic skirmishing with their Welsh and Scottish neighbours. That is why the barons of Magna Carta .. were able to put up a fight against the King.

I shall now let Lord Denning take up the story in "The Family Story"[1] at page 229:

> *On May 5, 1215, many of the Barons openly rebelled against the King. They renounced their fealty [loyalty in feudal times] to him. .. On May 12 he [King John] ordered their estates to be seized. But the Barons marched towards London which, on May 17, opened its gates to them. This was decisive. The Barons, with the support of London, had the whip-hand. John had to sue for peace. .. At length a truce was arranged from June 10 to June 15.*

The first meeting at Runnymeade was on 10 June 1215. There were present King John, the Archbishop Stephen Langton and some baronial envoys. At this meeting the Barons presented their demands and the King submitted to them.

At page 230:

> *On June 15 the truce was due to expire. On that day the parties assembled in great numbers at Runnymede and agreement was reached on all points. The King and those present all solenmly swore to abide by the agreement. This day was regarded as so important that, when the Charter was afterwards drawn up, it was given the date, June 15.*

At the bottom of page 230 and at page 231:

> *The peace did not last long. In a couple of months the parties were again at war. The King looked for aid to Rome. .. August 24, 1215, Pope Innocent III purported to annul the Charter. .. he excommunicated the English Barons. .. But John's death on October 12, 1216, at Newark Castle, altered everything. Early in the reign of the young King Henry III the Great Charter was confirmed by his regents. In the years 1225 it was re-issued by the King himself under the Great Seal. Magna Carta then took its final form, word for word, as it stands today as the earliest enactment on the Statute Rolls of England.*
>
> *The Great Charter dealt with grievances of the time in a practical way. It gave legal redress for the wrongs of a feudal age. But it*

1 Butterworths (1981)

was expressed in language which has had its impact on future generations. It put into words the spirit of individual liberty which has influenced our people ever since. ..

We find set down in the thirty-ninth clause the guarantee of freedom under the law [all the clauses of the Magna Carta were in Latin; the translation is by Lord Denning]: (No free man shall be taken, imprisoned, disseized [deprived of feudal interest in land], outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land).

Immediately following, in the fortieth clause, is the guarantee of the impartial administration of justice [in Latin; Lord Denning gives the translation] (To no one will we sell, to no one will we deny or delay right or justice).

At pages 231 - 232:

The constitutional significance of Magna Carta is immense. It was thus measured by Bryce: "The Charter of 1215 was the starting point of the constitutional history of the English race, the first link in a long chain of constitutional instruments which have moulded men's minds and held together free governments not only in England, but whenever the English race has gone and the English tongue is spoken". When the colonists crossed the seas from England to countries the world over, they took with them the principles set down in the Charter. Those who went to Virginia took its very words. When they renounced their allegiance in 1776, they stated in their Declaration of Rights that "no man be deprived of his liberty, except by the law of the land or the judgment of his peers". Thence the provisions of the Charter found their place in the Constitution of the United States. There it is revered as much as here.

The Bill Of Rights 1688 And The Act Of Settlement 1701

For this Lord Denning has put it succinctly in "The Family Story" at page 192 - 193:

No member of the government, no member of Parliament, and no official of any government department, has any right whatever to direct or to influence or to interfere with the decisions of any of the judges. It is the sure knowledge of this that gives the people their confidence in the judges. .. The critical test which they must pass if they are to receive the confidence of the people is that they must be independent of the executive.

Why do the English people feel so strongly about this? It is because it is born in them. We know in our bones that it will not do for us to allow the executive to have any control over the judges: and we know it because our forefathers learnt it in their struggles with the kings of England – the kings who in the old days exercised the supreme executive power in the land. Ever since the Act of Settlement in 1701 it has been part of our constitution that a judge of the High Court cannot be removed except for misconduct. .. Secure from any fear of removal, the judges of England do their duty fearlessly, holding the scales even, not only between man and man, but also between man and the State. Every judge on his appointment takes an oath that he "will do justice to all manner of people according to the laws and customs of England, without fear or favour, affection or ill will". Never since 1701 has any judge failed to keep that oath.

The Houses of Parliament enjoy certain privileges. One of them is freedom of speech. Erskine May says: "What is said or done within the walls of Parliament cannot be enquired into in a court of law". The Bill of Rights 1688, Article 9 says:

That the freedom of speech, and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.

Now you know why I think Zainun Ali JCA does not understand what she is saying. If she does understand what she wrote, then she would not have decided the instant appeal in the way she did at the conclusion of her overlong judgment.

But What Has All This Got To Do With The Two Clauses In Article 16?

But the most important point of all, after 114 pages of mumbo-jumbo that she wrote, is this: *what has all this got to do with the two clauses of Article 16 of the Laws of the Constitution of Perak*?

The United Kingdom does not have a written Constitution and in order to understand it fully one should be well acquainted with the history of England; whereas Malaya and later Malaysia has a written Constitution which may be changed by a two-thirds majority in Parliament. But here in this appeal the Judge is, and should be dealing with, the two points that really matter, which are the two clauses of Article 16 of the Perak Constitution.

After having said that, I shall go straight to the points at issue. How did she answer them? It took her 114 pages of circuitous writing before she finally came to the wrong conclusion that:

> *His Royal Highness had .. rightly exercised his constitutional powers as provided for under the Perak State Constitution solely for the best interests of his subjects.*

I am stunned by her naivety. I am at a loss for words.

We all know that there is no provision in the Constitution of Perak which provides constitutional powers to the Sultan to act "solely for the best interests of his subjects". For this Judge to say that there is such a power when there is no provision in the Constitution of Perak for the Ruler to have such power is to mislead the uninformed public. A judge who misleads cannot be trusted. She has disgraced herself on the seat of justice.

Professor Andrew Harding took up 4 pages and Professor Kevin Tan took 5 pages to come to the correct conclusion. Sometimes I wonder where these recalcitrant judges read law. I have a theory. One way is to memorise all the lecture notes – when I was a student in London I heard that many of our students memorised the notes supplied by Gibson and Weldon and passed their examinations. They forget that LAW is a reading subject. Ever heard of the expression, we joined a university or

the Inns of Court to read law? You study mathematics or science but you read law.

After meandering for 114 pages she concluded:

> *Thus I share the view expressed by my learned brothers Raus Sharif JCA and Ahmad Maarop JCA that in the context of this appeal, His Royal Highness had in the critical situation rightly exercised his constitutional powers as provided for under the Perak State Constitution solely for the best interests of his subjects. This decision being unanimous, the orders are as comprehensively set out in the judgment of my learned brother Raus Sharif JCA.*

What I have said in my severe critique of Raus Sharif and Ahmad Maarop JJCA in the first part of this article applies, *mutatis mutandis* (allowing for the appropriate changes), to Zainun Ali JCA. Need I say more.

I am as much disgusted as most of you are of judges of such inane quality. In the present context, "learned" is a funny word. I know some of you may say that the word is only a title applied in referring to a member of the legal profession. It has no meaning. I hope so, otherwise it will mislead the public further.

Selected Comments

MatTop
on 10 July, 2009 at 11:06 pm

'Gobbledegook' and 'balderbash' are the words used to describe the Court of Appeal judgments. These are strong words and what it really means in plain language is that those judgments are pure and complete nonsense. The judges' attitude in hearing the appeal is this: "We decide first and overule the High Court judgment so that Zambry could regain the MBship. The reasons for our judgment, we will think about it later".

S. Y.
on 11 July, 2009 at 12:10 pm

Dear NH Chan, Please do not stop pointing out the wrong and enlighten us, the public.

shafeek taff
on 11 July, 2009 at 1:12 pm

Dear Saudara Chan, you give meaning and substance to the title of address (for want of a better phrase)- "Your Honour" which apparently the three stooges who sat on this case could not. They do not exhibit nor understand the concept of this as they in their person have no honour.

Unfortunately, the Malaysian Judiciary is slowly being populated by such men and women whose integrity, intelligence and courage are questionable. .. we, the citizens of this country will have to do something to save our beautiful country.

Lawyer Lua
on 11 July, 2009 at 2:00 pm

We all know the real cause. But we also have the duty to ensure that the confidence in the Judiciary is not destroyed. The Common Judge is the foundation of a civilised society. The Rule in Politics is self-preservation; but the Rule in Law is without-self.

The Loss Of Confidence: Who Decides?*

Kevin YL Tan

Introduction

By now, the events leading to the constitutional crisis in Perak are well known. A defection of 3 Pakatan Rakyat Assemblypersons led Dato' Seri Nizar Jamaluddin, the PR Menteri Besar, to request the Sultan to dissolve the Assembly, so that the numeric deadlock in the Legislative Assembly between supporters of PR and the BN could be resolved. Nizar's request was refused and HRH proceeded to appoint Dato' Dr. Zambry Abdul Kadir as the new MB for the State. Nizar applied to the High Court for a declaration that he remained MB of Perak. On 11 May 2009, the Kuala Lumpur High Court held that since there had been no vote of confidence on the floor of the Assembly, Nizar remained the rightful MB of Perak, and Zambry appealed to the Court of Appeal.

Dissolution Of The Legislative Assembly: Two Regimes

Raus Sharif JCA agreed with the High Court Judge, Aziz Rahim J, that there were two regimes under which a request for the dissolution of the Assembly could take place – a general request to dissolve under Article 36(2) and a specific request under Article 16(6) which reads:

> *If the Mentri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.*

Even though Aziz Rahim J and the judges in the Court of Appeal felt that Article 16(6) is clear and unambiguous, they arrived at diametrically opposed readings of this key provision.

* First posted 10 July 2009

Articles 16(6) And 36(2): A Plausible Reading

Article 16 comes under the heading "The Executive Council" and the relevant provision is the 6th of its 8 sub-clauses. Though headings, sub-headings and marginal notes do not technically form part of the constitutional text, they help us understand the structure and organisation of the Constitution. Article 16 is clearly intended to deal specifically with matters relating to the Executive Council and not generalities.

A general request to dissolve the Assembly and the Sultan's discretion thereof is governed by Article 36(2) read with Article 36(2)(b). That means that HRH has a general power to dissolve the Assembly and may act in his discretion in withholding a request for dissolution.

This general request for dissolution does not fall under Article 16(6) which must be read sequentially: an MB who has already ceased to command the confidence of the majority of the members of the Legislative Assembly must tender the resignation of the EXCO, but only if HRH exercises his discretion to refuse to dissolve the Assembly upon that MB's request for dissolution.

Whether the MB has lost the confidence of the majority of the members of the Assembly – as opposed to whether the MB was likely to command the confidence of the majority of Assembly members under Article 16(2) – is a matter for the Assembly and not HRH.

Loss Of Confidence: Who Decides?

Raus JCA's judgment assumes HRH's sole authority in determining if the MB had ceased to command the Assembly's confidence the moment the MB makes a request to dissolve the Assembly. There is something contradictory about this position. Who actually decides whether the request for dissolution is made under Article 16(6) or Article 36(2)? If the MB decides, then HRH has no role in determining if the MB has lost the Assembly's confidence.

Raus JCA took great issue with the High Court's findings of fact, holding that Aziz Rahim J "failed to properly and adequately appreciate the evidence adduced before him" (para 50). Raus JCA went on to state that the events "bear out the undisputed fact that Nizar's request for

dissolution was made because he lost the command and support of the house" (para 23). Nizar's request for dissolution was thus under Article 16(6) and not Article 36(2).

Even assuming that it is commonplace and acceptable for appellate courts to overturn the findings of fact by the court of first instance, this reading presents us with a conundrum. Does this mean that if an MB goes to HRH with a request for dissolution, HRH must decide – at that point – whether the MB before him is one who still has confidence of the Assembly? If he does, the dissolution proceeds under Article 36(2), and if he does not, it will proceed under Article 16(6). Assuming that this sounds logical – and it does not – then why did the Court of Appeal go to such lengths to controvert the High Court's findings of fact that the request had indeed been made by Nizar under Article 16(6) and not Article 36(2) as Nizar himself claimed?

Conclusion

Many questions remain unanswered and we hope that leave to appeal to the Federal Court will be granted so that this matter can be resolved authoritatively. My closing thoughts are these:

(a) The only way to determine confidence (or otherwise) of anyone as MB is to have a formal vote on the floor of the Assembly. This is especially crucial where the absence of anti-hopping laws allows Assemblypersons to transfer loyalties at a drop of a hat.

(b) MBs should be required to state clearly in requests for dissolution, whether this is being done under Article 16(6) or Article 36(2). That way, there can be no issue of how HRH is to deploy his discretion.





The Perak Crisis: Keep Focused On The Real Issues*

Kevin YL Tan

Burden Of Judgment For The Federal Court On The Text Of The Perak Constitution

In a few days the Federal Court will hear one of the most important constitutional appeals in recent times: *Dato' Seri Mohammad Nizar bin Jamaluddin v Dato' Dr Zambry bin Abd Kadir*. While many readers are familiar with the facts leading to this appeal, it is useful to recapitulate the key events.

The resignation of 3 Pakatan Rakyat Assemblypersons in February this year left the ruling Pakatan Government with control over 28 seats in the Legislative Assembly, the same number of seats controlled by the Opposition Barisan Nasional. This led the incumbent PR Menteri Besar of Perak, Dato' Seri Nizar Jamaluddin to request HRH Sultan Azlan Shah on 4 February 2009 to dissolve the Assembly so that this deadlock could be resolved. HRH took no immediate decision.

The following day, HRH met up with 31 members of the Assembly (including the 3 PR members who had earlier resigned), satisfied himself that all 31 of them supported Zambry as MB and proceeded to inform Nizar that he no longer commanded the Assembly's confidence. Nizar was then asked to tender the resignation of the Executive Council. When Nizar did not comply, HRH's office issued a press statement declaring the office of MB to be vacant. Zambry was later appointed the new MB of Perak since he commanded the confidence of the majority of Assembly members. Nizar applied to the High Court for a declaration that he remained Perak's MB.

* First posted 3 November 2009

On 11 May 2009, the Kuala Lumpur High Court ruled (per Aziz Rahim J) that since there had been no formal vote of confidence on the floor of the Legislative Assembly, Nizar remained the rightful MB of Perak. Zambry appealed.

The Court of Appeal unanimously reversed the High Court decision but it was some time before the 3 judgments were released. Two of them, those of Raus Sharif and Ahmad Maarop JJCA were released towards the end of June while that of Zainun Ali JCA was released in early July.

The 3 lengthy judgments come up to some 240 pages in all and a large number of issues were canvassed and discussed. I had previously commented on the correctness of the High Court decision and having already discussed the contradictions that arose from the judgments of Raus and Maarop JJCA, I feel it timely to revisit the most salient issues in this case.

The Sultan's Discretion To Dissolve The Legislative Assembly

Under the Perak Constitution, HRH's discretion with respect to the dissolution of the Assembly is found in two provisions. The first Article is Article 16(6) which provides:

> *If the Mentri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.*

The second is to be found in Article 36, the relevant parts of which reads:

> *(2) His Royal Highness may prorogue or dissolve the Legislative Assembly.*
> *(3) The Legislative Assembly unless sooner dissolved shall continue for five years from the date of its first sitting and shall then stand dissolved.*
> *(4) Whenever the Legislative Assembly is dissolved a general election shall be held within sixty days from the date of the dissolution and the new Legislative Assembly shall be summoned to meet on a date not later than ninety days from that date.*

Of particular interest to us is Article 36(2) which gives HRH the general power to "prorogue or dissolve" the Legislative Assembly. Article 18(2)(b) further provides that HRH "may act in his discretion" in "the withholding of consent to a request for the dissolution of the Legislative Assembly".

In the High Court, Aziz Rahim J made the following findings of fact:

(a) Nizar's request to HRH to dissolve the Legislative Assembly was not done "with reference to any provision in the Perak's State Constitution"; and,
(b) Nizar was thus requesting HRH to exercise his royal prerogative under Article 36(2), and not under Article 16(6).

As such, the learned Judge found no ambiguity in the wording of Article 16(6) and held that:

(a) HRH had no power to dismiss Nizar; and,
(b) HRH was not allowed to deem the office of MB vacant when Nizar did not resign.

To do so, he said, would be to do "violence to the language" of Article 16(6).

I previously argued that Aziz Rahim J was correct in his interpretation and added that the only logical way to read these various provisions is this:

(a) If the MB makes an unspecified request to HRH to dissolve the Legislative Assembly, that request falls under HRH's general power to dissolve the Legislative Assembly under Article 36(2) and he is free to exercise his discretion as he deems fit under Article 18(2)(b).
(b) If the MB determines that he has lost the confidence of the Legislative Assembly and would like fresh elections, he will make a request to HRH under Article 16(6). In that instance, if HRH refuses the request, the MB must tender the resignation of the Executive Council to enable HRH to appoint a new MB.

The Court Of Appeal Decision

It would take a full-blown academic article to critique the 3 judgments of the Court of Appeal; they are too long and often dwell on subjects that were not germane to the issues. Even so, a number of observations may be made.

First, unlike most appellate judges, the 3 Court of Appeal judges had no compunction about reversing the High Court's finding of facts. The High Court had found that the request for the dissolution of the Assembly was made under Article 36(2) and not Article 16(6), but this was doubted by the Court of Appeal. Raus Sharif JCA chastised Aziz Rahim J for failing "to properly and adequately appreciate the evidence adduced before him" and found that the events bore "out the undisputed fact that Nizar's request for dissolution was made because he lost the command and support of the House". This was how he found that Nizar's request for dissolution was made under Article 16(6) and not Article 36(2).

Zainun Ali JCA went to great lengths to demonstrate that Nizar must have known that he had already lost the confidence of the Assembly when he made his request to HRH to dissolve the Assembly. The language is almost condescending:

> *It can safely be inferred that Nizar himself is an intelligent man. In fact I believe he is. He would be alert, if not alerted, to the political dynamics existing then in the State of Perak. The information on the political situation would, without question, be notified to him. His vigilance is displayed when he himself alerted His Royal Highness on the uneasy political events taking place in Perak as early as 2 February 2009. He would have made a quick mental assessment of the effect of the depletion in the number of Assemblyman [sic] aligned to him in the Legislative Assembly. Why else then would Nizar sent [sic] a letter requesting for dissolution of the Legislative Assembly on 4 February 2009 to His Royal Highness?*

There is much more; in fact, about 40 pages worth. The learned Judge even went on a speculative spree, taking judicial notice of Nizar's access to the newspapers on the morning of 4 February and thereby suggesting that Nizar must have known that he had lost the confidence of the Assembly through the defection of the 3 Assemblypersons who had ostensibly resigned in February.

All this was done because of the troublesome "simple request without more, for the dissolution of the Legislative Assembly" that Nizar had sent to HRH. If the letter was a simple request and nothing more, some other evidence must direct the court as to which constitutional provision it was being made under: Article 36(2) or Article 16(6)?

One interesting observation made by Zainun Ali JCA was the fact that the draft Proclamation for the dissolution of the Legislative Assembly was "a standard document available in the office of the Menteri Besar". Contrary to what the learned Judge held, this seems all the more to suggest that the request was really a general "standard" request under Article 36(2) and not Article 16(6).

Ahmad Maarop JCA was less interested in the facts than in whether or not HRH could make a determination on whether the MB had ceased to command the confidence of the Assembly by means other than a formal vote on the Assembly floor. He simply took the view that the request for dissolution was made under Article 16(6) and proceeded on that basis. After examining the authorities, he preferred the approach of the Privy Council in *Adegbenro v Akintola* (on appeal from Western Nigeria) to that of the Malaysian High Court in *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli.*

The Issues: Once Again

It is easy to get lost in the morass of words and erstwhile authorities cited by the judges in the Court of Appeal such that we soon fail to see the real issues at hand. To recapitulate, the issues before the Federal Court are the same as those that were before the High Court: *what is the extent of the Sultan's discretionary power under the Perak State Constitution in relation to the dissolution of the Legislative Assembly and the appointment or removal of the Menteri Besar?* To answer this question, the following issues must be addressed:

(a) Who decides whether a request for the dissolution of the Assembly is made under Article 16(6) or Article 36(2) of the Perak State Constitution?
(b) How is loss of confidence of the majority of the Assembly to be determined?

The answer to the first question is clear – it is the Menteri Besar since it is he or she who makes the request. As I explained in my earlier comment (taking issue with one aspect of Raus Sharif JCA's judgment), any other reading of the Constitution would be problematic. If the MB makes an unspecified request, then HRH must accept that it is a request made under the general powers of dissolution under Article 36(2). In such a request, HRH is confronted with a very simple binary question: does he or does he not dissolve the Assembly? As Sultan Azlan Shah had himself argued, the Head of State should ordinarily accede to a request to dissolve the Legislature:

> *.. under normal circumstances, it is taken for granted that the Yang di-Pertuan Agong would not withhold his consent to a request for dissolution of Parliament. His role under such a situation is purely formal.*

There is no question of HRH making any kind of determination as to whether or not the MB still commanded the majority of the Assembly.

However, if a specific request to dissolve the Legislative Assembly is received under Article 16(6), with the MB stating that he has lost the confidence of the Assembly, then Article 16(6) kicks into operation, and if HRH should refuse to dissolve the Assembly – whether for fear of major political convulsions or unrest – the MB must tender the resignation of the Executive Council. There is no question of an MB going to HRH and asking HRH whether or not he (the MB) continues to enjoy the confidence of the majority in the Assembly when such a request for dissolution is being made. If a request is made under Article 16(6), the MB has already determined that he has lost the confidence of the House; and the only way he will truly know this is by way of a vote on the floor of the Assembly.

Conclusion

Much ink has been spilt on whether the decision in *Adegbenro v Akintola* (in which the Privy Council held that the Governor of Western Nigeria could determine the loss of confidence by means other than a formal vote in the House) is preferable and more suitable to Malaysia than its own home-grown progeny, *Stephen Kalong Ningkan* where *Adegbenro* was strenuously and convincingly distinguished.

Furthermore, all the Court of Appeal judges quote *Datuk Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Karuak & 8 Ors* as being both relevant and salient, especially since the Court appeared to have quoted *Adegbenro* with approval. This is disingenuous since the learned judges must know that in *Amir Kahar*, the Chief Minister Datuk Pairin Kitingan resigned on his own accord and the Governor was never called upon to exercise his discretion as to whether or not Kitingan had lost the confidence of the House.

While the academic community awaits the resolution of the *Adegbenro* versus *Ningkan* positions, we should not forget that this issue is really a supplementary one. The first question that needs to be addressed by the Federal Court begins with the plain words of the Perak State Constitution. The issues are simple, if we stay focused on them. This case is not about a Ruler's hereditary prerogative powers nor even of residual royal prerogatives. It is about how to make sense of 3 simple provisions in the Constitution and paying respect to evidence as adduced and not that which is deduced. If the High Court's findings of fact are upheld, the question of whether the Sultan can determine whether or not the MB has lost the confidence of the House by a means other than by a formal vote of the House may well remain moot; at least for this case.





FEDERAL COURT DISMISSES NIZAR'S APPEAL

9 February 2010





The Monarch Has No Power To Sack Any Member Of The Cabinet EXCO*

NH Chan

I have divided this primer to a monarch's powers into two sections. Underlined emphases are supplied for focus.

Section One deals with the appointment of the Prime Minister/ Menteri Besar and other Cabinet Ministers/Executive Councillors by a constitutional monarch.

Section Two will deal with the constitutional monarch's power to dismiss the Prime Minister/Menteri Besar or other Ministers/Executive Councillors.

Before I embark on the basic or known law on the dismissal of a Prime Minister/Menteri Besar and of the rest of the Cabinet Ministers/ Executive Councillors by a constitutional monarch, I should first explain the known law on how they are appointed by the monarch.

Section One
The Appointment Of The Prime Minister/Menteri Besar And The Cabinet/Executive Council

The Federal Constitution

Article 43(2) says:

> *(2) The Cabinet shall be appointed as follows, that is to say:*
>
> *(a) The Yang di-Pertuan Agong shall first appoint as Perdana Menteri (Prime Minister) to preside over the Cabinet a member of the House of Representatives <u>who</u>*

* First posted 22 March 2010

in his judgment is likely to command the confidence of the majority of the members of that House; and,

(b) *He shall on the advice of the Prime Minister appoint other Menteri (Ministers) from among the members of either House of Parliament.*

Article 43(2)(a) deals with the appointment of the Prime Minister by the Yang di-Pertuan Agong (King) who in his judgment is likely to command the confidence of the majority of the House of Representatives.

Article 43(2)(b) deals with the appointment of the other Ministers by the King on the advice of the Prime Minister.

The Laws Of The Constitution Of Perak

Now, compare Article 43(2) of the Federal Constitution with Article 16(2) of the Laws of the Constitution of Perak.

Article 16(2) says:

(2) The Executive Council shall be appointed as follows, that is to say:

(a) His Royal Highness shall first appoint as Mentri Besar to preside over the Executive Council a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly; and

(b) He shall on the advice of the Mentri Besar appoint not more than ten nor less than four other members from among the members of the Legislative Assembly;..

Article 16(2)(a) deals with the appointment of the Menteri Besar by the Sultan who in his judgment is likely to command the confidence of the majority of the Legislative Assembly.

Article 16(2)(b) deals with the appointment of the other Executive Councillors by the Sultan on the advice of the Menteri Besar.

You will notice the striking similarity between the Federal and the Perak State Constitutions on the appointment of the Prime Minister and the Menteri Besar, and the appointment of the other Ministers and Executive Councillors.

The King/Sultan Appoints The Prime Minister/Menteri Besar "Who In His Judgment" Is Likely To Command The Confidence Of The Majority Of The House Of Representatives/Legislative Assembly

The question here is, does the phrase "who in his judgment" confer on the constitutional monarch a discretion to appoint any person to the post of Prime Minister/Menteri Besar as he pleases?

Both Article 43(2)(a) of the Federal Constitution and Article 16(2)(a) of the Perak Constitution use the same wording, i.e. the King/Sultan shall appoint a Prime Minister/Menteri Besar to preside over the Cabinet/ Executive Council a member of the House of Representatives/Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the House/Assembly.

The phrase "who in his judgment" by itself means nothing more than "who in his opinion". It carries no further meaning than what is stated by Lord Diplock in *Teh Cheng Poh v Public Prosecutor*[1] where he explains the concept of a monarch in a constitutional monarchy. However, when it concerns the appointment of a Prime Minister or a Menteri Besar the phrase "who in his judgment" must be read together with Article 40(2) of the Federal Constitution:

> *(2) The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:*
>
> *(a) the appointment of a Prime Minister;*
> *(b) the withholding of consent to a request for the dissolution of Parliament;..*

1 [1979] 1 MLJ 50

Or in the Perak Constitution, Article 18(2):

> *(2) His Royal Highness may act in his discretion in the performance of the following functions .. that is to say:*
>
> *(a) the appointment of a Mentri Besar,*
> *(b) the withholding of consent to a request for the dissolution of the Legislative Assembly..*

The combination includes the phrase "may act in his discretion" and it means – according to the dictionary meaning of the word "discretion" – the King/Sultan has the freedom to decide what should be done in a particular situation, freedom or authority to make judgments and to act as one sees fit.

The King/Sultan, therefore, has the discretionary power to appoint any person to be Prime Minister/Menteri Besar as he pleases subject only to his own perception of the person most likely to command the confidence of the majority of the members of the House of Representatives/ Legislative Assembly.

But, it is necessary to point out that in the Perak case of *Nizar v Zambry*, the Sultan has no power to appoint Zambry as the Menteri Besar because Nizar was still the holder of the office. Only when the office is vacant would the Sultan be able to appoint another person to the office of Menteri Besar.

The unconstitutional appointment of Zambry to the post makes him an imposter. This is a blatantly unconstitutional exercise of a non-existent executive power by a pretentious constitutional monarch. Are we back to the days of the pretensions of King Charles I?

A constitutional monarch has no executive power except that which the law allows him. And the Constitution of Perak would only permit the Sultan to act in the performance of a few discretionary functions stated in Article 18(2). In relation to the office of Menteri Besar, clause (2)(a) applies.

Clause (2)(a) is clear enough. The Sultan only has the discretionary function to appoint a Menteri Besar. As long as Nizar is still in office

as Menteri Besar, the Sultan has no discretionary function to appoint another person. Therefore, the Sultan's appointment of Zambry is an unconstitutional exercise of a non-existent discretionary function to appoint a second Menteri Besar.

In reality, the Sultan has no executive power to sack the incumbent Menteri Besar Nizar.

The King/Sultan Shall On The Advice Of The Prime Minister/ Menteri Besar Appoint Other Ministers/Executive Councillors From Among The Members Of Either House Of Parliament/ The Executive Council

Article 43(2)(b) of the Federal Constitution and Article 16(2)(b) of the Perak Constitution have been reproduced above.

As you can see, in both the Federal and the Perak Constitutions, the King/Sultan appoints the Cabinet Ministers/Executive Councillors on the advice of the Prime Minister/Menteri Besar.

What Does "On The Advice Of" Mean?

It means the King/Sultan has to act on the order of the Prime Minister/ Menteri Besar. The constitutional monarch has no option. He must act as he is told. This is how Lord Diplock explains it in *Teh Cheng Poh*[2]:

> *Although this, like other powers under the Constitution, is conferred nominally upon the [King/Sultan] by virtue of his office .. and is expressed to be exercisable if he is satisfied of a particular matter, his functions are those of a constitutional monarch .. he does not exercise any of his functions under the Constitution on his own initiative but is required by Article [43(2)(b) or 16(2)(b) of the Federal and Perak Constitutions, respectively] to act in accordance with the advice of the [Prime Minister/Menteri Besar].*

So that the phrase "on the advice of" the Prime Minister/Menteri Besar means "on being told or notified" by the Prime Minister/Menteri Besar.

2 [1979] 1 MLJ 50 at 52

The King/Sultan does not act on his own initiative. He can only act as he is told or instructed or notified by the Prime Minister/Menteri Besar.

Section Two
Has The Constitutional Monarch Any Power To Dismiss The Prime Minister/Menteri Besar Or Any Member Of His Cabinet/ Executive Council?

In the case of the sacking of a Deputy Prime Minister and any other Minister, there is Article 43(5) of the Federal Constitution. In the case of the dismissal of a member of the Executive Council in Perak, there is Article 16(7) of the Perak Constitution.

Article 43(5) of the Federal Constitution states:

> *(5) Subject to Clause (4), Ministers other than the Prime Minister shall hold office during the pleasure of the Yang di-Pertuan Agong, unless the appointment of any Minister shall have been revoked by the Yang di-Pertuan Agong on the advice of the Prime Minister but any Minister may resign his office.*

This is what clause (5) of the Constitution means:

(i) All the Ministers (except the Prime Minister) hold office during the pleasure of the King.
(ii) Unless (it means "except when", "if not") the appointment is revoked by the King on the advice of the Prime Minister.
(iii) But a Minister may resign his office.

But What Do The Phrases That I Have Highlighted Above Really Mean?

(a) The phrase "during the pleasure of the King" means "I choose to, and therefore of course shall, do it or have it done" – an imperious statement of intention. The idiom is based on the definite special sense of pleasure with possessives (my, his, the King's, etc.), i.e. one's will, desire, choice, e.g. the accused was found guilty but insane and was ordered to be detained during Her Majesty's pleasure[3]. So that

3 Fowler's "Modern English Usage" (2nd ed revised by Sir Ernest Gowers, 1965) OUP

all Ministers, except the Prime Minister, hold office on the King's will, choice. And they will remain in office as such until,

(b) or unless the appointment is revoked by the King on the advice of the Prime Minister (the word "unless" means "until" or "except when" the appointment is revoked on the advice of the Prime Minister),

[So that (a) and (b) together mean that a Minister (other than the Prime Minister) shall remain in office until or except when the appointment is revoked by the King/Sultan on the advice of the Prime Minister.]

(c) or the Minister resigns his office.

One thing that we are sure of, the phrase "during the pleasure of" does not mean that the King can sack any Minister at will. The phrase "during the pleasure of" has a distinctive meaning – it means that he shall hold office as such Minister unless the appointment is revoked by the King on the advice of the Prime Minister. Effectively, the appointment of a Minister can only be revoked by the Prime Minister because the King has no option but to act as he is told (advised).

Articles 16(6) and (7) of the Perak Constitution state:

(6) If the Mentri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council.

(7) Subject to Clause (6) a member of the Executive Council other than the Mentri Besar shall hold office at His Royal Highness' pleasure, but any member of the Council may at any time resign his office.

Clause (7) means that a member of the Executive Council (except the Menteri Besar) holds office at the Sultan's pleasure which, as I have already explained, means that he stays in office as an Executive Councillor on the Sultan's will or choice.

The phrase "at the Sultan's pleasure" does not mean that the Sultan can sack an Executive Councillor at will. I have previously subscribed to the notion that the Sultan can sack an Executive Councillor at will but I now realise that I was wrong. Luckily what I have said previously was *obiter*.

However, unlike a Minister who can be sacked by the Prime Minister, neither the Menteri Besar nor the Sultan can sack an Executive Councillor. There is no provision for this in the Perak Constitution. However, under clause (7) "any member of the Council may at any time resign his office". Clause (6) of Article 16 only allows the Menteri Besar to "tender the resignation of the Executive Council" *en bloc*. So that even though an Executive Councillor can at any time resign his office, the Menteri Besar could not sack him.

However clause (6) will only apply when "the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly". But who is to say that? Certainly, it is not for the Sultan to say so. The Perak Constitution does not confer the Sultan with any power to determine that the Menteri Besar has lost the confidence of the majority of the Legislative Assembly. He is only a constitutional monarch with no additional power to make such a determination.

In reality, the Sultan's functions are those of a constitutional monarch and this means that he does not exercise any of his functions under the Constitution on his own initiative. He has to abide by the collective opinion or decision of the majority of the elected representatives in the Legislative Assembly.

So that until it has been established by the Legislative Assembly that the Menteri Besar no longer commands the confidence of the majority of the members of the Legislative Assembly, then only would the Menteri Besar be required to tender the resignation of the Executive Council *en bloc*. But if he doesn't do that, there is nothing the Sultan could do about it. He has no power whatsoever under the Constitution to sack the incumbent Menteri Besar.

However, there would be no need for the Menteri Besar to resign the Executive Council if the Sultan had acceded to the Menteri Besar's request to dissolve the Assembly.

But the Sultan can withhold his consent to dissolve the Legislative Assembly. This is provided in Article 18(2)(b) of the Perak Constitution reproduced above.

The Reality Is, Neither The King Nor The Sultan Has Any Power To Sack The Prime Minister/Menteri Besar

You can see at once that Article 43(5) does not apply to the Prime Minister; Article 43(5) exempts the Prime Minister from its application. There is no other provision in the Constitution where the King is empowered to sack the Prime Minister.

Nor is there any provision in the Perak Constitution where the Sultan has the power to sack the Menteri Besar. Article 16(6) of the Constitution of Perak, as I have explained above, does not empower the Sultan to command the Menteri Besar to vacate his office.

Selected Comments

ng ah ong
on 22 March, 2010 at 10:56 am

In this case, when Nizar approached the Sultan to dissolve the Assembly, the Sultan after meeting the 3 PR assemblypersons who turned BN friendly concluded that Nizar has lost the confidence of the Assembly, and should have dissolved the Aassembly. If this was done, then truly the power is in the hand of the people. This then is government by the people for the people.

American View
on 22 March, 2010 at 2:23 pm

The Constitutions are very clear – appointment of MB/PM involves Sultan/King but sacking/resignation is determined politically i.e. at the State Assembly or Parliament. To put it in layman's term – the front door is "guarded" by the Monarch but the back is none of the Monarch's business.

focussed08
on 22 March, 2010 at 11:57 pm

The law is very clear. The wordings used are non discretionary and non confusing and the operative word is "SHALL"

(a) The Yang di-Pertuan Agong SHALL first appoint as Perdana Menteri (Prime Minister)……
(b) He SHALL on the advice of the Prime Minister appoint….

When people holding positions of authority knowingly seek or choose to blatantly or ignorantly misinterpret the rule of law in order to achieve a certain outcome, they are guilty of perversion of justice.

When supposedly "honourable" persons presiding over the Court of Law of the Land knowingly, willingly and deviously distorts, misrepresents and misinterprets the rule of law in order to justify a certain required outcome, these devious judges are no less a terrorist against the nation's security than any terrorist that chooses to destroy the nation's democracy by violent means because the end results are the same in both cases – our national security is at risk!

Those who seeks to terrorise our democratic system of government through "legalised" unlawful acts against the nation's interest must be brought to justice no matter how high a position he holds.

History has shown that even Prime Ministers will be brought to face justice when they deviate against the nation's interest.

THREE
CONCLUDING
REMARKS

Editorial Note:

After the dust had settled on most of the Perak Crisis, we asked 3 leading constitutional law experts to give us, with the benefit of hindsight, their considered opinions on the matter.

Although of course, the ramifications will continue until satisfactorily resolved, we think it useful to have these as a counterpoint to the original blawgposts written for the internet, and which addressed specific points in time throughout the Crisis.

These 3 articles were especially commissioned as concluding remarks to the prior collection of writing found at *www.LoyarBurok.com*, and we must emphasise that none of the authors have perused either of the other two experts' thoughts. Their pieces are therefore independent closing arguments from a trio of eminent jurists.

Note that, just like in a court of law where a bench of judges may have differing views, so too, our experts may not converge on all points. We have asked them to speak their minds freely and they were kind enough to oblige us.

We invite our discerning readers to judge for themselves the arguments advanced.

Perak:
The Final Chapter

Kevin YL Tan

On 9 February 2010, the Federal Court gave its decision in *Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir*. More than 3 months had elapsed since the appeal was argued before the Court and many waited anxiously for the outcome. Those of us who followed the case closely were hoping to be struck by a thunderclap but instead heard a whisper of a whimper. In a unanimous 40-page judgment, the Federal Court – sitting as a bench of 5 – dismissed the former Perak Menteri Besar's appeal.

I have previously commented on the decisions of the High Court and the Court of Appeal and do not plan to cover old ground. The question before the Federal Court remained this: whether the Sultan was constitutionally empowered to refuse a request by the Menteri Besar to dissolve the Legislative Assembly? A corollary of this question is: whether HRH was constitutionally empowered to determine whether the MB – who had made the request to dissolve the Legislative Assembly – had lost the confidence of the majority of members in the Legislative Assembly in the absence of a formal vote on the floor of the Legislative Assembly? The Federal Court answered both questions in the affirmative.

The Request To Dissolve The Legislative Assembly

The Federal Court held that HRH's power to either dissolve or prorogue the LA is to be found in Article 36(2) of the Constitution and Article 16(6) is irrelevant in this context:

> *.. the power to dissolve the LA is vested by Article 36(2) no matter in what circumstances it was made .. This is the only provision touching on the dissolution of the LA. Article 16(6), in our view, does not provide for the dissolution of the LA as such, but merely*

provides that the MB may in the circumstances stated in Article 16(6) request HRH for the dissolution of the LA. It does not confer the power on HRH to dissolve the LA. So in the event HRH accedes to a request for the dissolution of the LA it has to be done under 36(2) and not under Article 16(6). As we see it Article 36(2) is a general power to dissolve the LA, but the circumstances under which the LA may be dissolved are varied, and one such circumstance is when there is a request by the MB to do so under Article 16(6) and HRH agrees to such a request. Other instances that we can think of, is where the Government of the day may request for the dissolution of the LA prior to the expiry of the five year term in order to get a fresh mandate from the electorate. It is important to note that in all cases, the decision whether or not to dissolve the LA is in the absolute discretion of HRH.

With this single passage, the Federal Court rendered irrelevant, arguments over whether Nizar's request to HRH to dissolve the LA on 4 February 2009 was made under Article 16(6) or Article 36(2). In other words, *any request to* dissolve the LA would be met by a Sultan with absolute discretion to decide whether or not the request will be granted.

The Sultan Decides If The Menteri Besar Has Lost The Confidence Of The Assembly

The Federal Court went on to hold that HRH had the power to determine whether the MB had lost the confidence of the majority of members in the LA and base his decision on any information outside the Assembly since:

.. there is nothing in Article 16(6) or in any other provisions of the State Constitution stipulating that the loss of confidence in the MB may only be established through a vote in the LA. As such, evidence of loss of confidence in the MB may be gathered from other extraneous sources provided, as stated in Akintola, they are properly established.

Based on these holdings, the Federal Court then proceeded to re-examine the facts as set out by the Court of Appeal, in particular that of Raus Sharif JCA, endorsed his recounting of the facts and proceeded to hold the HRH had been correct in appointing Zambry as the new MB.

Deciding On The Loss Of Confidence

Assuming that the Federal Court is correct in that only Article 36(2) confers on HRH the discretion to grant or refuse *any* request to dissolve the LA, we are still left with the question as to who determines if the MB has lost the confidence of the majority of members in the LA?

In my previous article "The Loss of Confidence: Who Decides?", I argued that under Article 16(6), HRH had no role in determining whether or not the MB had lost the confidence of the majority of the members in the LA, much less basing his decision on factors and information gleaned from outside the LA:

> *A general request to dissolve the Assembly and the Sultan's discretion thereof is governed by Article 36(2) read with Article 36(2)(b). That means that HRH the Sultan has a general power to dissolve the Assembly and may act in his discretion in withholding a request for dissolution.*
>
> *This general request for dissolution does not fall under Article 16(6) which must be read sequentially: an MB who has already ceased to command the confidence of the majority of the members of the Legislative Assembly must tender the resignation of the EXCO, but only if HRH exercises his discretion to refuse to dissolve the Assembly upon that MB's request for dissolution.*
>
> *Whether the MB has lost the confidence of the majority of the members of the Assembly – as opposed to whether the MB was likely to command the confidence of the majority of Assembly members under Article 16(2) – is a matter for the Assembly and not HRH.*

This argument is consonant with the Federal Court's understanding of Article 36(2) insofar as HRH has absolute discretion in determining *whether or not to grant the request for dissolution* of the LA. But from this point on, our views diverge. The Federal Court, as well as the High Court and Court of Appeal before it, proceeded on the assumption that HRH had a constitutional role in deciding whether or not an MB had lost the confidence of the LA. With respect, this is a misinterpretation of Article 16.

Consider the structure of Article 16. Article 16(2)(a) deals with the appointment of the MB by HRH and is worded as follows:

> *His Royal Highness shall first appoint as Mentri Besar to preside over the Executive Council a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly.*

The constitutional language deployed here is deliberate and unequivocal. HRH is expected to use his personal "judgment" in making his decision. Such language is absent in Article 16(6), just a few lines down. It simply says:

> *If the Mentri Besar ceases to command the confidence of the majority of the members of the LA, then, unless at his request His Royal Highness dissolves the LA, he shall tender the resignation of the Executive Council.*

Article 16(6) simply describes the occurrence of an event and what must follow. The trigger is pulled when the MB "ceases to command the confidence" of the LA, and should HRH refuse to dissolve the LA, the MB must tender the resignation of the EXCO. It does not call upon HRH to exercise an ounce of discretion here. The only discretion to be exercised is in deciding whether or not the LA should be dissolved when the MB presents his request.

The Case For Confidence By Vote, Not Discretion

And how will the MB know if he has lost the confidence of the LA? Through a vote on the floor of the LA, of course. Such an interpretation puts the task squarely on the shoulders of the legislative branch to ensure that the person leading the Cabinet is the one whom the majority of its members support.

In the Court of Appeal, Raus Sharif JCA opined that "to require the loss of confidence to be established only by voting in the Legislative Assembly would lead to absurdity as the Menteri Besar who may have lost support will not be too eager to summon it". This view, which was endorsed by the Federal Court, is erroneous because it is not the MB who summons

the LA into session. Article 36(1) requires HRH "from time to time" to summon the LA, and more importantly, HRH "shall not allow six months to elapse between the last sitting in one session and the date appointed for its first sitting in the next session".

By allowing HRH a free hand to determine if the MB has lost the confidence of his colleagues in the Assembly, the Federal Court is inviting more politicking around the throne. Take the 3 ADUNs for example. Suppose Nizar was somehow able to entice them back into the Pakatan fold just shortly after they went to the Palace with Najib Tun Razak, pledging their loyalty to BN. Will this then entitle Nizar to bring his separate delegation of 31 (with the 3 ADUNs) back up to the Palace and inform HRH that this time, he has control of the majority in the LA. If that happens, then what next? Quite clearly, the Constitution did not envisage such a role for HRH. His role is much simpler and clearer – decide if the request for dissolution should be granted, and if there are no extenuating circumstances to refuse the request, then let the electorate decide. HRH should be above politics and not be in the thick of it.

This reading of Article 16(6) is all the more compelling when we consider the fact that in Malaysia, there are no anti-hopping laws to prevent majorities in a Legislature to shift on a whim. Would-be defectors have nothing to lose and everything to gain by acting as the swing votes that determine which political party stays in power. Opportunists can happily switch sides as frequently as we change handkerchiefs and if the Federal Court is right, HRH will be caught in the middle of these machinations.

The Federal Court failed to consider these political realities when it limited its function to deciding whether the Privy Council's decision in *Adegbenro v Akintola* should be preferred over the High Court's decision in *Ningkan*. The usual platitudes – about how constitutions are *sui generis* and have to be interpreted in light of their local circumstances – were recited, but sadly never observed.

Final Observations

In my comment "The Perak Crisis: Keep Focused On The Real Issues", I could not help but note the willingness with which the Court of Appeal Judges were prepared to overturn a trial judge's findings of fact. The

recounting of facts went on for pages on end, and lamentably, the Federal Court did the same thing. Almost half the Federal Court's judgment was concerned with how the facts should be read. Did the 3 ADUNs actually resign or not? Did Nizar read the newspapers or not? The Federal Court castigated the High Court Judge for being perverse in refusing to believe the evidence of the State Legal Adviser and the documentary evidence before him even though they were not present at the trial.

Reading and re-reading the High Court judgment and those of Raus Sharif and Zainun Ali JJCA in particular, it is not at all obvious that Aziz Rahim J had erred, or if he did, erred to such an extent as to be regarded as "perverse". Two key witnesses were cross-examined – Nizar and the State Legal Adviser – and the trial judge (who had the benefit of direct observation of their body language and facial expressions) chose to believe Nizar. Unless Aziz Rahim J is openly accused of bias (which was never argued), then what he did was perfectly legitimate and professional. At least he did not make the mistake of taking judicial notice of a supposition of his own making, which the Court of Appeal did.

Appellate courts should really confine themselves to doing what they supposedly do best – deliberate on the law, interpret it well and ensure that it promotes the most equitable and just solution in the local context.

The 2009 Constitutional Turmoil In Perak: A Look Back

Shad Saleem Faruqi

In February 2009, political defections from the Pakatan Rakyat Government in the State of Perak reduced the then Government to a minority. The Menteri Besar advised dissolution of the Assembly. The Sultan, in the exercise of his undoubted constitutional power but contrary to constitutional convention, refused to act on the advice. Instead, the Sultan took the extra constitutional step of asking the MB to step down. The MB refused to comply and was promptly dismissed. This triggered a constitutional impasse of such magnitude that its after-effects are still being felt. The many engaging constitutional issues that were thrown up have not yet been fully resolved and may never get a full hearing. Several constitutional institutions (including the State's Sultan, the Election Commission, the Attorney General's office, the police, the Malaysian Anti-Corruption Commission, the State Assembly Speaker and the Secretary to the State Assembly) became embroiled in the controversies and had their good names sullied. Despite this damage, the root cause – the despicable phenomenon of party hopping – remains unaddressed.

Introduction

The 4 Perak Assemblypersons who slithered down the treacherous slope of defections in 2009 could not have anticipated the political and legal avalanche that they succeeded in triggering. The legal skirmishes over issues of procedure and substance have lasted more than a year and have opened up new legal frontiers where no Malaysian had up to now treaded.

Defections

As opposed to the stability of the American presidential system, governments in parliamentary democracies often rise and fall because of political defections. Unfortunately, the right to switch political parties in midstream, to disassociate and re-associate is part of the fundamental right to association under the Federal Constitution's Article 10(1)(c) and the decision in *Dewan Undangan Negeri Kelantan v Nordin Salleh*[1].

Article 10(2)(c) permits Parliament to restrict this freedom in the interests of security, public order and "morality". In the 1980s the Legislative Assemblies of Kelantan and Sabah passed anti-hopping laws to curb this right on the ground of morality.

However, in the *Nordin Salleh* case the Federal Court declared that the anti-hopping law was unconstitutional on two grounds. First, that the right to enact legislative restrictions under Article 10 is confined to Parliament and State Assemblies have no such power under Article 10. This means that the anti-defection law in Kelantan was passed by the wrong Legislature. Second – and this was most unconvincing – that the term "morality" does not cover political morality.

It is submitted that the act of party-hopping by an Assemblyperson after his election on a party ticket amounts to a fraud on the electorate. There are 3 possible ways of taming this turpitude. First, a constitutional amendment to Articles 10(1) and 48(6) by a bi-partisan two-thirds majority should be attempted. There are eminent legal models available in other Commonwealth countries like India. MPs and Assemblypersons who hop midstream should be required to vacate their seats and seek a fresh mandate from their constituency.

A second technique could be for Parliament to enact an ordinary anti-defection law and to enforce it immediately. If and when the law is challenged on the *Nordin Salleh* precedent, vigorous arguments could be proffered to invite the Federal Court to overrule its prior, indefensible ruling. One possible way of expediting the overruling of this unsatisfactory court decision is for the King to refer the issue to the Federal Court under Article 130 to seek an advisory opinion on the interpretation of the word "morality" in Article 10(2)(c).

1 [1992] 1 MLJ 343

A third way of enacting an anti-defection law would be to promulgate an Emergency Ordinance under Article 150. In the case of *Stephen Kalong Ningkan v Government of Malaysia*[2] the Privy Council ruled that "emergency" includes "collapse of civil government". Without doubt, defections bring about the collapse of civil government and an Emergency Ordinance would be legally, morally and politically justifiable.

Resignation Letters

The legality and enforceability of the un-dated/open-dated resignation letters from the two Pakatan Rakyat defectors is at the heart of the constitutional imbroglio in Perak. The Speaker of the Perak Assembly accepted the validity of the letters and issued a notice to the Election Commission that two seats had fallen vacant.

In favour of the Speaker's view it can be stated that in the UK it is part of the privileges of Parliament to determine questions relating to casual vacancies in the House. The decision of the House is generally regarded as final. Also, Article 35 of the Perak Constitution permits a member of the Assembly to resign his membership "by writing under his hand addressed to the Speaker".

The problem is that the two hoppers denied that they wrote to the Speaker. There is also a relevant judicial decision. In 1982, the validity of open-dated resignation letters was rejected by the Federal Court in the Sarawak case of *Datuk Ong Kee Hui v Sinyium Anak Mutit*[3]. In the light of this decision and the denial by the two defectors, the Election Commission had some basis to make up its own mind, and to declare that the seats had not fallen vacant.

Perhaps the safest thing was to have sought a quick Federal Court decision on the interpretation of the Perak Constitution. The Perak Constitution in Articles 63 - 64 admirably provides for such a course of action. Regrettably, the parties to the dispute and the Sultan did not adopt this course of action.

2 [1968] 1 MLJ 119
3 [1983] 1 MLJ 36

Finality Of The Speaker's Decision And Article 72(1)

The Speaker of the Perak State Assembly had accepted the "resignation letters" of the two former Pakatan Rakyat Assemblypersons and declared their seats vacant under Article 35 of the Perak Constitution. Soon after that the Privileges Committee of the Assembly suspended the new MB and the entire EXCO from the Assembly. The Speaker publicly announced that the suspended members would not be allowed to enter the Assembly or take part in its proceedings. These moves raised questions about the powers of the Speaker and the Committee of Privileges to suspend Assemblypersons. Pakatan Rakyat supporters argued vigorously that the Speaker's decisions were final and could not be reviewed in a court of law. There is considerable authority both for and against this proposition.

Article 72(1) of the Federal Constitution provides that "the validity of any proceedings in the Legislative Assembly of any State shall not be questioned in any court". To many commentators, Article 72(1) implies that all decisions by the Speaker and the Assembly are final and conclusive and the superior courts are totally disabled from reviewing or testing the legality of any business transacted in the Assembly or testing the validity of any decision made in the Assembly or in its Committees or by its officers. Support for this view comes from *Tun Datu Mustapha Datu Harun v Legislative Assembly of Sabah*[4], *Tun Datu Mustapha v Tun Datu Haji Mohamed Adnan Robert*[5] and *Fan Yew Teng v Government of Malaysia*[6]. Despite these rulings, it is submitted that the rule in Article 72(1) and 63(1) is not absolute. In a country with a supreme Constitution, courts cannot be ousted on questions of constitutionality.

Article 72(1) does not immunise Committee proceedings: It is noteworthy that the immunity from judicial proceedings in Article 72(1) is in relation to proceedings in the Assembly, not in relation to proceedings in Committees of the House. The difference in the phraseology of Article 72(1) on the one hand and Articles 72(2) and 72(5) on the other is deliberate. In 72(2) and 72(5) the words "the Legislative Assembly of any State or of any committee thereof" are utilised. See *Haji Salleh Jafaruddin v Datuk Celestine Ujang*[7]. The contrast with Article 63(1) is also telling. In relation to the Federal Parliament, the immunity from judicial proceedings extends to "any proceedings in either House of Parliament or any committee thereof". See also Article 63(2) where Committees of Parliament are covered.

4 [1986] 2 MLJ 388
5 [1986] 2 MLJ 391
6 [1976] 2 MLJ 262
7 [1986] 2 MLJ 412

Articles 63 and 72 were not meant to oust judicial review completely: Our courts have undoubted power of judicial review over many matters related to Parliamentary proceedings. English law on Parliamentary privileges should not be applied lock, stock and barrel in Malaysia because every Constitution is *sui generis*.

In the UK, the Parliament of the United Kingdom is legislatively supreme. The UK Parliament has or had vast privileges including determining election disputes; determining questions of internal procedure within the Houses; deciding on questions of vacancies and determining its internal composition by deciding whether a member was fit to serve. The UK Parliament was regarded as the High Court of Parliament and a court of record.

This is not so in Malaysia. In Malaysia, the Constitution is supreme. Parliament's legislative power is limited both substantively and procedurally. There are explicit provisions for judicial review and courts are entitled to examine both substantive and procedural issues. An Act of Parliament or a State Assembly Enactment can be declared unconstitutional. The idea that the Houses are the masters of their internal proceedings and procedures is not possible to accept in the Malaysian context because of explicit provisions relating to legislative procedure in Articles 66, 68, 159 and 161E. Qualifications and disqualifications for membership are prescribed by law. Election disputes are committed to an Election Court. If Parliament's core function (its law-making power) can be reviewed by the courts, it is not possible to argue that administrative or quasi-judicial measures of the Legislature must be totally immune from judicial scrutiny. See *Punjab v Sat Pal Dang*[8].

Under the Perak Constitution, Articles 64 - 65, there is power in the superior courts to interpret Perak's law of the Constitution. It is clear therefore that the superior courts' power of judicial review is an integral part of the Perak Constitution.

In the past, on the question of vacancy in the Sarawak Assembly, courts accepted jurisdiction to rule according to the law: *Datuk Ong Hee Kui*[9].

Even free speech in the Legislatures is subject to legal limitations by the Sedition Act. The English *Eliot's* case[10] on absolute freedom of speech in Parliament does not apply here: *Mark Koding v PP*[11]. Our legislatures

8 AIR 1969 SC 903
9 [1982] 1 MLJ 36
10 3 St. Tr. 294
11 [1982] 2 MLJ 120

are not supreme but limited by the Constitution substantively and procedurally.

The Speaker or the Committee on Privileges cannot usurp the functions of the Sultan: Even if it is argued that the Assembly is the master of its own procedure and is immune from judicial review under Article 72(1), this Article cannot be interpreted so broadly as to permit the Speaker or the Privileges Committee to incapacitate or indirectly dismiss a Menteri Besar duly appointed by the Sultan. To hold the MB and the EXCO in contempt of the House for accepting the appointments made by the Sultan is bizarre. It amounts, indirectly, to censuring the Sultan and to hold him in contempt of the Assembly.

Parliamentary privileges cannot trump all fundamental rights: In a country with a supreme Constitution and a chapter on fundamental rights, no authority can exercise its powers in derogation of constitutional powers and procedures. On constitutional issues courts cannot be ousted. It is part of the judicial oath to preserve, protect and defend the Constitution. Based on Indian and Australian precedents, Parliamentary privileges cannot be exercised in derogation of at least some fundamental rights: *Keshav Singh*[12], *Gunupati v Nafisul Hasan*[13] and *Egan v Willis & Cahill*[14]. A Malaysian precedent involving judicial review of a Parliamentary decision to punish an MP is *Gobind Deo v Yang di-Pertua Dewan Rakyat*[15].

Even in the UK, Parliamentary privileges are subject to judicial review: Ever since the English decisions in *Jay v Topham*[16] and *Stockdale v Hansard*[17], it is trite law that the existence and the extent of Parliamentary privileges is for the courts to determine and not for each House to decide for itself. On this basis, it should be open to our courts to determine whether the privilege jurisdiction of the Privileges Committee of the Perak Assembly can be exercised to dismiss the entire State Executive and thereby to frustrate the Sultan's exercise of power to appoint an MB.

Even on the question of exercise of Parliamentary privileges English constitutional law leaves the door open for some judicial scrutiny.

12 AIR 1965 SC 745
13 AIR 1954 SC 636
14 (1996) 40 NSWLR 650, CA
15 [2010] 2 MLJ 674
16 12 St Tr 821
17 (1839) 112 ER 112

In the case of the *Sheriffs of Middlesex*[18], involving an arrest on the order of the House, the House of Lords laid down that if in the return to the writ reasons are mentioned, the court can examine whether the facts stated fall into a known and recognised Parliamentary privilege. In Perak the order to commit the MB and the EXCO did mention facts. The MB was held in contempt for accepting the post of MB. It is submitted that such a capricious exercise of power would be reviewable. The position would be different if the Speaker had not stated any reasons.

Ouster clauses cannot exclude the courts if the decision is a nullity: On the *Anisminic* principle, an ouster clause protects decisions that are within jurisdiction but not determinations that are *ultra vires* and a nullity: *Anisminic v FCC*[19]. According to the critics of the former Perak Government the decisions of the Privileges Committee and the Speaker suffered from a number of defects:

(a) There was illegality or excess of power. In summoning the Assembly to session the Speaker was usurping the functions of the Sultan. Secondly, under the Standing Orders of the Assembly, the power to suspend for long periods belongs to the House, not to the Speaker (except to maintain internal order in the House). Third, the Privileges Committee is a recommendatory body and was usurping the functions of the adjudicatory body (the Assembly). The House has the power to override the Committee. In Perak the recommendations of the Privileges Committee were ultimately submitted to and approved by the Assembly under the tree. However, at their inception, the orders of the Speaker and the Committee to suspend 7 out of 59 Assemblypersons were beyond their powers. Fourth, the maximum period of suspension is prescribed by Standing Orders and was exceeded.

(b) There was irrationality or abuse of power in that the punishment that was meted out was based on frivolous grounds.

(c) There was procedural impropriety. First, there was violation of the rules about who could refer to the Committee of Privileges. Second, the determination of the Committee was not, at least initially, laid before the House before being implemented.

18 (1840) 113 ER 419
19 [1969] 2 AC 147

(d) The power of the Speaker's Chair was being employed to thwart the working of the Assembly, not to facilitate it. The Speaker was making legal rulings contrary to judicial decisions and contrary to Election Commission rulings. He was not confining himself to procedural issues in the Assembly but making rulings on the substantive constitutional rights of Assemblypersons. He was not ruling on issues before the Assembly but acting *suo motu* without the matter being raised on the floor. Similar practices in the States of Bengal, Punjab and Madras in India were condemned by the Indian courts as illegal and of no effect[20].

In sum the exclusion of 7 out of 59 Assemblypersons including the entire EXCO was questionable in law and could be reviewed despite the existence of Article 72(1). Note could be taken of a decision in Australia in which the court held as partly illegal a New South Wales Assembly order to suspend a Minister: *Egan v Willis and Cahill*[21].

Immunity of Mr. Speaker: As an officer of the House, Mr. Speaker and the members of the Committee are civilly and criminally immune for their official acts. But this does not exclude judicial review by way of declaration of their official acts.

Refusal To Dissolve Assembly

The refusal by the Sultan to pay heed to his MB's advice to dissolve the Assembly could be regarded as a violation of a Westminster democracy convention. However, in strict law, the Sultan is on safe ground. Under the Federal as well as State Constitutions, the Head of the State has an undoubted discretion, guided by his own wisdom and the broader interest of the State, to refuse a request for premature dissolution. We have instances in Kelantan in 1977 and in Sabah in 1994 when requests by the MB/CM for premature dissolution were politely turned down.

In the context of Perak, the right to refuse a premature dissolution is an undoubted constitutional discretion of the Sultan under Articles 18(2)(b) and 36(2) of the Perak Constitution. See also the Federal Constitution, 8th Schedule, Section 1(2)(b). Judicial authority in *Datuk Amir Kahar v Tun Mohd Said*[22] confirms the non-reviewability of this discretion.

20 See MP Jain, "Indian Constitutional Law", (3rd ed) page 158; *Punjab v Satpal Dang* AIR 1969 SC 903; *K A Mathialagan v The Government* AIR 1973 Mad 198; *K A Mathialagan v P Srinivasan* AIR 1973 Mad 371.

21 (1996) 40 NSWLR 650, CA

22 [1995] 1 MLJ 169

Even if it is argued that the Sultan was bound by constitutional convention to pay heed to the advice of the then beleaguered MB, it must be noted that constitutional conventions are not law. They are rules of political morality that are non-enforceable in a court: *Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al Haj*[23] and *Munusamy v PSC*[24]. But for a case where the judge relied on a constitutional convention, see *Tun Datu Haji Mustapha v Tun Datuk Haji Mohamed Adnan Robert*[25].

Confidence Of The Assembly

Having been apprised that Pakatan Rakyat had lost the confidence of the Assembly, the Sultan was faced with many difficult choices. First, he could have acceded to the MB's advice to dissolve the House and let the electorate determine who should lead the Government. This would have been the most democratic and politically non-controversial course. It would have preserved the indispensable quality of impartiality.

Second, the Sultan could have relied on Articles 63 - 64 of his State Constitution to seek the Federal Court's opinion on the validity of the hoppers' resignation letters and the question of vacancies. Pending the Federal Court decision the *status quo* could have been maintained and Nizar could have continued in a caretaker and temporary capacity. Minority governments are well known in Parliamentary democracies.

Third, the Sultan could have asked the antagonists to face the Assembly and prove their support in accordance with usual Parliamentary traditions. I am of the view that if an Assembly is in session, or can be quickly brought to session, it is right to determine the question of confidence and no one should usurp this power nor should factors outside the Assembly be taken into consideration in determining the question of confidence. There is a 1966 Sarawak judicial decision in *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2)*[26] that factors outside the Assembly are irrelevant and the Governor cannot dismiss a Chief Minister unless he is voted out by the Assembly.

A fourth course of action open to the Sultan was that if the Assembly was summoned and Mr. Speaker hindered any member from attending, the Sultan could have asked supporters of both sides to appear at his *Istana* for a head-count.

23 [1963] MLJ 355
24 [1964] MLJ 239
25 [1986] 2 MLJ 420
26 [1967] 1 MLJ 46

Unfortunately the Sultan adopted none of the above courses. He took it upon himself to shoulder the lonely burden of determining who commanded the confidence of the Assembly. He took pains to interview all 4 defectors and to hear out the MB and the Deputy Prime Minister, Dato' Seri Najib Razak more than once. The Sultan probably paid heed to the Election Commission decision that there were no vacancies. Undoubtedly he was also influenced by the Speaker's threat that the Speaker would not allow the defectors to enter the Assembly to participate in the confidence vote.

While a vote on the floor would have been the most constitutional of all solutions, it must be noted that different considerations may apply if the Assembly is under prorogation and the question of confidence cannot be determined on the floor of the House. Article 16(6) of the Perak Constitution is sufficiently flexible to permit more than one way of determining whether the MB has ceased to command the confidence of *the majority of the members* of the Assembly. Article 16(6) talks of the "confidence of the majority of the members of the Legislative Assembly" and not the confidence of the Assembly. This means that the action of members acting individually may count. It is not necessary that the members act in concert on the floor of the Assembly when the Assembly is in session.

Dismissal Of MB

The Constitution of Perak in Article 16(7) states that a member of the Executive Council other than the MB shall hold office at the Sultan's pleasure. This implies that an MB cannot be dismissed except by a vote of no confidence in the Assembly.

The problem is that Article 16(6) states that if an MB loses confidence then he has two choices. First, advise dissolution. Second, if that request is denied, then resign. There is a lacuna in the law. What if an MB loses the confidence of the Assembly, is denied dissolution, but refuses to step down? Can the Sultan dismiss him?

It is submitted that life is always larger than the law. There are always unchartered territories. If an MB has lost confidence, and is refused dissolution, and is still not prepared to walk away, a case can be made out for his dismissal, Article 16(7) notwithstanding.

Article 16(7) of the Constitution of Perak: This Article states that "[s]ubject to Clause (6) a member of the Executive Council other than the Menteri Besar shall hold office at His Royal Highness' pleasure." This provision is similar to Article 43(3) of the Federal Constitution relating to the Prime Minister. The words ("other than the Menteri Besar") in Article 16(7) imply that the Sultan has no power to dismiss an MB. An MB's cessation of office must come about in one of the following ways:

1. Death.
2. Resignation: Article 16(6) of the Perak Constitution provides that "(i)f the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council".
3. Vote of no confidence in the Assembly: In the Sarawak decision of *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli*[27], Harley Ag. CJ (Borneo) held that only when the Council Negeri had shown lack of confidence (and lack of approval) could the Governor's power to dismiss, if it exists, be exercised. Lack of confidence may be demonstrated only by a vote in the Council Negeri. Factors outside the Council Negeri are irrelevant. Similarly in India the Supreme Court in *S. R. Bommai v Union of India*[28] held that whenever a doubt arises whether a Minister has lost the confidence of the House, the only way of testing this is on the floor of the House. The assessment of the strength of the Minister is not a matter of private opinion of any individual, be he the Governor or the President.

Was there any justification for distinguishing Ningkan? It is arguable that the High Court decision in *Stephen Kalong Ningkan* could be distinguished for a number of reasons. Its facts were substantially different from the Perak situation in the following ways. In the *Ningkan* case, the Assembly was in session. In the Perak case, on the other hand, the Assembly was in prorogation and there was no way of determining the Assembly's confidence or loss of confidence. Therefore the Sultan had to rely on other ways to assess the situation.

In Sarawak on 14 June 1966, two days before the dismissal of *Ningkan* by the Governor, Bills were passed in the House without opposition. A

27 [1966] 2 MLJ 187
28 (1994) 3 SCC1

motion of no confidence was never introduced. No Government Bill was defeated. It appeared that *Ningkan* had the support of 21 members (out of a total of 42). His opponents did not constitute a simple majority. In Perak, on the other hand, 31 out of 59 Assemblypersons had expressed support for the Opposition Barisan.

In *Stephen Kalong Ningkan*, the embattled Ketua Menteri had disputed the loss of confidence and had, prior to his first dismissal, agreed to do the constitutional thing of facing the Assembly. But his request to convene the Assembly was turned down[29]. In Perak the former MB did not advise the Sultan to summon the Assembly to resolve the question of confidence. Instead his supporter, the Speaker of the Assembly, had threatened that if the Assembly were to meet, he would not allow the defectors to enter the Assembly to participate in the vote of confidence.

In *Stephen Kalong Ningkan* the Governor did not wait for the Ketua Menteri to exercise his (the Ketua Menteri's) undoubted constitutional right to advise dissolution. In Perak, the Sultan granted the MB the audience at which the MB's request for dissolution was received. The Sultan considered the request; and on arriving at his decision, summoned the MB to convey his (the Sultan's) discretionary decision to refuse dissolution.

It is also arguable that in *Ningkan* the learned Judge had misdirected himself in treating the words "the confidence of a majority of the members of the Council Negeri" in Article 7(1) of the Sarawak Constitution to mean "the confidence of the Council Negeri". The latter meaning implies that the Council Negeri must be in session and must be seized of the matter. This interpretation is undesirable and unworkable because under the laws of most States, e.g. Perak, Article 36(1), an Assembly can be in prorogation for a period up to 6 months. If one were to insist that the Assembly is the only arbiter of issues of confidence, then an MB whose support has evaporated, may cling on to power for up to 6 months simply by refusing to advise the Sultan/Governor to summon the Assembly to session. This is what happened in Sarawak in 1966 and necessitated the proclamation of an emergency under Article 150 of the Federal Constitution; the take-over of the Sarawak administration by the Federal Government and the amendment of the Sarawak Constitution by the Federal Parliament to enable the Governor to summon the Assembly to session without the advice of the Ketua Menteri.

29 See "Halsbury's Laws of Malaysia" (Vol 2,1999) page 59

The learned Judge in *Ningkan* had refused to follow the celebrated Privy Council decision in *Adegbenro v Akintola*[30] that had held that loss of confidence can be ascertained from factors other than a vote of no confidence on the Assembly floor and that there was no limitation to the consideration of factors outside the Assembly in determining the question of confidence. The learned Judge distinguished *Adegbenro* by adopting such strained and pedantic distinctions as the supposed distinction between "support" and "confidence". He opined: "The measurement in Nigeria was a measurement of 'support', not of 'confidence'". In the light of *Adegbenro v Akintola*, it seems that the words "confidence of a majority of the members of the assembly", are terms of art, not of science and may imply reference to many things: a clear-cut vote of no confidence on the floor of the House; an adverse vote on a major issue like the Budget or to factors outside the Assembly that conclusively prove loss of confidence of a majority of the members of the Assembly.

The *Ningkan* decision is in conflict with the more recent judgment from Sabah, *Datuk Amir Kahar v Tun Mohd Said*[31], in which the High Court ruled that factors other than a vote of no confidence can be taken note of in determining the question of confidence. This decision was treated as more persuasive by the Federal Court in *Nizar v Zambry*[32] which issued its judgment on 9 February 2010.

Article 16(6) does not require a vote of no-confidence: Article 16(6) of the Perak Constitution provides that "if the Menteri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly" then he has two options. First, he may advise dissolution. Second, if that request is denied, then "he shall tender the resignation of the Executive Council".

It must be noted that Article 16(6) of the Perak Constitution is open-ended about how it is to be determined whether the MB has ceased to command the confidence of the majority of the members of the Assembly. The language of Article 16(6) does not require that there must be a vote of no confidence in the Assembly. Article 16(6) talks of the "confidence of *the majority of the members* of the Legislative Assembly" and not the confidence of the Assembly. This means that the action of members acting individually may count. It is not necessary that the members act in concert on the floor of the Assembly when the Assembly is in session.

30 [1963] 3 WLR 63
31 [1995] 1 MLJ 169
32 [2010] 2 CLJ 925

It is submitted that the Sarawak case of *Ningkan* and the Indian case of *Bommai* are relevant only if the Assembly is in session. If the Assembly is under prolonged adjournment, prorogation or dissolution, then the Sultan and the Governor are entitled to take all factors within and outside the Assembly into consideration in determining the Parliamentary political position of the competing parties or coalitions.

Implied power to dismiss a Government: Constitutional law in many Commonwealth countries recognise that in extraordinary circumstances the Head of State has a reserve, residual, implied or prerogative power to dismiss a Government. A number of scenarios have been put forward:

- If the Prime Minister or State Chief Minister persists in illegal or unconstitutional conduct. For example when he loses the confidence of the House and neither secures dissolution nor resigns[33].

- In Tony Blackshield and George Williams, "Australian Constitutional Law And Theory"[34], the famous instance is documented when Prime Minister Gough Whitlam was dismissed in 1975 for failure to obtain supplies, bringing the Government to a standstill.

- Likewise, Labour Premier Lang in Australia was dismissed for illegally withholding payments of the State's debts[35].

- In India the Governor of West Bengal dismissed the Mukherjee Ministry on the extraneous information that it had lost its majority in the Legislative Assembly and the Chief Minister was not ready to summon the Assembly at an earlier date as suggested by him (the Governor). This view of the Governor was upheld by the Calcutta High Court in *Mahabir Prasad v Profulla Chandra*[36].

- In Uttar Pradesh in India in 1970, Governor Gopal Reddy dismissed Chief Minister Charan Singh because of the withdrawal of support of coalition partners which reduced the Government to a minority. The Governor took his action without waiting for the verdict of the Assembly which was scheduled to meet a few days later[37].

33 "Halsbury's Laws Of Malaysia" (Vol 2, 1999) page 60; Shad Saleem Faruqi, "Document Of Destiny, The Constitution Of The Federation Of Malaysia" (2008) page 443

34 4th ed (2006) page 554

35 ibid

36 AIR 1969 Cal 189

37 See Durga Das Basu, "Introduction To The Constitution Of India" (17th ed, 1995) page 228 and Dr J. A. Pandey, "Constitutional Law Of India" (Central Law Agency, 1992) page 351.

- In Kashmir in India, due to a split in the ruling party, 12 members of the Assembly joined the "real" National Conference and caused the ruling National Conference to be reduced to a minority. The 12 sent a signed letter to the Governor. The Governor summoned the Chief Minister to inform him of the letter and later invited the Opposition leader to form the Government and instructed him to prove his support on the floor of the House within a month[38].

It is submitted that Article 16(7) of Perak is qualified by Article 16(6). Article 16(6) of Perak imposes a clear legal obligation on the MB: if he loses the confidence of the majority of the members and also has his request for dissolution turned down, then he "shall tender the resignation of the Executive Council". No sanction is included if the MB fails to comply with his constitutional duty. There is, therefore, a lacuna in the law.

If an MB loses the confidence of the Assembly, and is denied dissolution, but refuses to step down, the Sultan need not wring his hands in despair at such blatant infraction of the Constitution. The Sultan need not allow the administration of the State to come to a grinding halt possibly up to 6 months – the period for which an Assembly can remain prorogued under Article 36(1) of the Perak Constitution. It is also notable that if an MB who has lost confidence is unwilling to face the Assembly, and is also unwilling to advise the Sultan to summon the Assembly, that would put the Sultan on the horns of a constitutional dilemma. Under Article 18(2) of the Perak Constitution, the summoning of the Assembly is not a discretionary power but is on advice. A recalcitrant MB can cause paralysis in government.

For this reason it is submitted that if an MB has lost confidence and is refused dissolution, but is unwilling to resign, then the Sultan would have a reserve, residual, implied and prerogative power to dismiss him, Article 16(7) notwithstanding. This implied power can also be derived from section 29 of the Interpretation and General Clauses Ordinance 1948 that has been incorporated into the 11th Schedule of the Federal Constitution and from section 47 of the Interpretation Acts 1948/1967 that the power to appoint includes the power to dismiss.

There was a stalemate in Perak in that the political realities had caused Nizar's coalition to lose some of its supporters. The Opposition was

38 ibid

claiming to have a clear majority. Any chance of the issue of confidence being fairly and decisively determined was being thwarted by the Speaker's ruling that the defectors had ceased to be members of the Assembly and that they would be prevented from entering the Assembly and voting on the issue of confidence. The MB also did not offer any assurances that he would ensure that all Assemblypersons would be allowed to participate in the proceedings and to vote freely.

For the above reasons, it is submitted that in the Perak situation the Sultan had the power and the duty to resolve the constitutional impasse. According to the Sultan's judgment, based on incontrovertible facts, the MB had lost the confidence of the majority of the members of the Assembly due to defections from the ranks. The MB's request for dissolution had been refused. The MB was asked to step aside. He refused contrary to Article 16(6) of the Perak Constitution. The possibility of all the members of the Assembly being summoned to determine the question of confidence was being thwarted by the Speaker. The Government had come to a standstill. The Sultan had no choice but to employ his reserve powers to dismiss the former MB and to put in place a government that, in his opinion, was likely to command the confidence of the Assembly.

Having said that it must also be noted that the procedure by which Nizar was removed raises issues of constitutional propriety. There was undue haste in dismissing the leader of a popularly elected coalition. Contrast this with the way the Heads of State in the UK and Australia behaved after the General Elections in 2010. With clear evidence that their caretaker Prime Ministers had failed to secure an outright majority, the Queen and the Governor General gave time to the caretaker Prime Ministers to try to form a coalition Government. In Perak the Assembly could have been summoned with all members present. If the Speaker prevented some members from attending, the Sultan could have invited both parties to bring their elected representatives to the *Istana* for a head-count. In the meantime a minority, caretaker Government headed by Nizar could have continued.

As a conclusion on the issue of dismissal, it is submitted that in exceptional circumstances the Sultan does have a residual power to dismiss. Further, the question who has confidence of the majority of the members of the Assembly need not be determined solely on the floor of the Assembly. I am inclined to agree with the Federal Court's reliance on

a quotation from Viscount Radcliffe in *Adegbenro* that:

> *.. there are many good arguments to discourage a Governor from exercising his power of removal except upon indisputable evidence of actual voting in the House but it is nonetheless impossible to say that situations cannot arise in which these arguments are outweighed by considerations which afford to the Governor the evidence he is to look for, even without the testimony of recorded vote.*

However, even in exceptional circumstances some procedural proprieties must be complied with. In the Perak situation, such proprieties were not complied with. The haste with which Nizar was dismissed was legal but constitutionally improper.

Appointment Of MB

This is a discretionary function. The Sultan has to appoint someone who, in his judgment, is likely to command the confidence of the State Assembly. Under Articles 12(1), 16(2)(a), 16(4) and 18(2)(a) of the Perak Constitution, the power of the Sultan to appoint an MB is a purely discretionary, non-justiciable power and is a constitutional replica of one of the oldest royal prerogatives. The words "who in his judgment" are clearly subjective. The words "[who] is likely to command the confidence of the majority of the members of the Assembly" leave the matter to the Sultan's personal wisdom and judgment.

What is most telling is that Article 16(4) states that in appointing an MB His Highness may in his discretion dispense with any provision in the Constitution of the State restricting his choice of a Menteri Besar if, in his opinion, it is necessary to do so in order to comply with the provisions of this Article. Article 16(4) implies that the power is non-reviewable. However the strictly legalistic position must be understood in the light of Westminster conventions. First, the discretion of the Sultan is a controlled and structured discretion. If there is a clear-cut leader with the requisite numbers, the discretion of the Ruler is merely nominal. Second, if there is an Assembly where no one has a clear majority (a "hung Assembly") then the Sultan has obvious personal discretion. In the Perak imbroglio, the question of numbers was a difficult one. It was not determined on the

floor of the Assembly by a vote of confidence or no confidence but by face to face, separate interviews with the actors involved. The Federal Court has determined that this manner of determination is permitted: *Nizar v Zambry*. Third, there is a difference between a fresh appointment after a General Election and a midstream appointment that requires the removal of one Chief Minister and the appointment of another. In the latter many considerations of constitutionalism and due process apply.

Issue Of Non-Justiciability

It has been submitted by some commentators that the Sultan's decision on whether the MB has ceased to command the confidence of the Assembly is a purely subjective, discretionary and non-justiciable power. Whether the MB had or had not ceased to command the confidence of a majority was a matter for the Sultan's personal assessment. It is humbly submitted that the weight of authority does not support this contention. The appointment and dismissal of a Menteri Besar are justiciable issues. However, in the context of Perak it is arguable that the Sultan's decision to remove the Plaintiff and to appoint the Respondent was neither irrational, capricious nor *mala fide* but was grounded on facts and relevant considerations.

The Sultan took note of the well-publicised fact that 4 Assemblypersons had defected from the Plaintiff's Government to the other side. The Plaintiff himself apprised the Sultan of this fact at his meeting with the Sultan at the *Istana*. The Sultan met the 4 defectors personally to ascertain where their loyalty lay. The Sultan granted two audiences to the Plaintiff and two to the leader of the opposing Barisan Nasional. The Sultan took note of the legal position on the right to defect. The right to switch parties in midstream is based on Article 10(1)(c) of the Federal Constitution which guarantees freedom of association.

The Sultan took note of the questionable validity of the open-dated resignation letters from the two Pakatan Rakyat defectors. The Speaker of the Perak Assembly accepted the validity of the letters and issued a notice to the Election Commission. However, the two hoppers denied that they wrote to the Speaker. The Sultan was also aware that the validity of open-dated resignation letters was rejected by the Federal Court in the case of *Datuk Ong Kee Hui v Sinyium Anak Mutit*[39] where

39 [1983] 1 MLJ 36

it was held that an agreement between an MP and his party to resign his seat at the will of his party's leadership is contrary to the Federal Constitution's Article 51.

The Sultan took note of the decision of the Election Commission that no seats had fallen vacant in the Perak Assembly. The Election Commission is an independent constitutional institution under Article 114 of the Federal Constitution and its determinations cannot be brushed aside by the Speaker of the Perak Assembly unless there is a court decision to invalidate the findings of the Election Commission.

On the question of who determines whether a seat has fallen vacant, it is noteworthy that the Perak Constitution in Article 36(5) specifically provides that "a casual vacancy shall be filled within sixty days from the date on which it is established by the Election Commission that there is a vacancy". Article 54(1) of the Federal Constitution likewise holds that vacancies in the Dewan Rakyat "shall be filled within sixty days from the date on which it is established by the Election Commission that there is a vacancy". The Elections Act 1958 likewise allocates the responsibility of establishing vacancies on the shoulders of the Election Commission.

In the light of the judicial decision in *Datuk Ong Kee Hui*, the denial by the two defectors and the decision of the Election Commission, the Sultan was eminently justified in presuming that there were no vacancies in the Assembly and that the defectors' seats were to be included in any calculation of the party's respective positions. The Sultan was also influenced by the Speaker's threat that the Speaker would not allow the defectors to enter the Assembly to participate in the confidence vote.

Judicial Handling Of The Disputes

The Judiciary has not come out of the Perak Crisis well. When the case first reached the courts, a Judicial Commissioner gave judgments that defy understanding. A number of issues caught our attention.

To have a Judicial Commissioner and not a senior High Court judge presiding over this novel constitutional case was indeed disappointing. Hearings were not in open court but in chambers. The Speaker of the Perak Assembly was declared to be a public servant despite convincing

legal arguments that he is exempted from such a definition by Article 132(3)(b) of the Federal Constitution. The Speaker was not allowed to be represented by "private" lawyers. He was not even allowed to represent himself! There was an unbelievable ruling that no conflict of interest existed in the State Legal Adviser representing the Speaker against the State Government!

These initial judicial missteps were fortunately corrected on appeal but they left a bad feeling and did no service to a hallowed institution whose resurgence we were all praying for. It is also noteworthy that there were disproportionate delays in hearing Nizar's applications but great speed in attending to Zambry's plaints. For instance, Nizar's dismissal took place in February 2009. His case was decided favourably by Justice Aziz Rahim on 11 May 2009. The very next day, a Court of Appeal Judge sitting alone granted a stay. On 22 May, the Court of Appeal overruled the High Court. The Federal Court affirmed the Court of Appeal's decision on 9 February 2010.

Treason

Opinions were expressed that the Pakatan Rakyat's acts of defying the Sultan and its threat to go to court for defence of its legal rights amount to treason and a ground for deprivation of citizenship of those involved. There are fundamental misunderstandings here.

From day one of *Merdeka*, the King and the Sultans were open to civil suit for their official actions: *Stephen Kalong Ningkan v Government of Malaysia*[40], *Teh Cheng Poh v Public Prosecutor*[41], and *Pengarah Pelajaran Wilayah Persekutuan & Ors v Loot Ting Yee*[42]. The Sovereigns were only immune personally. In 1993 even the personal immunity was taken away. In sum it is not a violation of the Constitution to resort to the courts to seek an authoritative opinion on one's rights and duties even against the acts of the Sovereign.

Where else does one go, what else does one do, if one has a claim?

40 [1968] 2 MLJ 238
41 [1979] 1 MLJ 50
42 [1982] 1 MLJ 68

The Perak Constitutional Crisis: An Epilogue

Andrew Harding

The contributors to *www.LoyarBurok.com* in their various ways (scholarly, satirical, whimsical, or polemical), and despite large differences in background and beliefs, Malaysian and non-Malaysians, lawyers and non-lawyers alike, have all taken a clear and consistent stand on the Perak Crisis. Their arguments have been sharp and highly cogent. They will resonate in constitutional and political discussions for a long time, especially when prerogative or reserve powers are debated.

While endorsing fully the position taken by all the contributors to the blawg, I want to advance some "savings" clauses which will enable us to see clearly why the Perak Crisis and the litigation are important.

The **first** saving is this: the fact that a book of this kind can appear – intelligent, forceful, measured, informative, and fearless – is a sign of changing times. No constitutional issue of this kind can expect in future to pass without a similar critical gaze being directed towards it.

Malaysia is fortunate to have – amongst its lawyers, scholars, journalists, politicians, bloggers, and ordinary citizens – people whose exploits and very existence give one hope that authoritarianism, political manipulation, and breaches of the rule of law, cannot flourish for long. But it also requires every citizen's vigilance to make sure that they do not. We have seen great public concern and even anger all across Malaysia about the Perak Crisis, and intense media interest in the issues it raises. The episode has been an education – I have learned much from it myself. This book stands as a record of events, and as a concerted refusal to accept defective legal argument.

Now, here is my **second** saving: the dispute in question was settled by judicial decision of the highest court. It was settled through the rational process of legal argument, not via force or pure political pressure. By using the word "settled" I am not of course saying that we the

contributors agree with what was decided, nor that what was decided should be the final word. Indeed we hope that the Federal Court will overrule its decision in a future case. What I am saying is merely that it could have been settled otherwise (and in many countries these issues are in fact settled otherwise).

We are of course forced by the lights of our own position, as advocates of the rule of law, to accept the decision as a legal fact even as we rail against the approach taken by the Court of Appeal and the Federal Court in disposing of the case. The day lawyers and litigants sit around and say there is no point in litigating such issues because they know the result already, is the day the rule of law goes out of the window. I for one hope fervently that that day will never dawn.

Challenged as it constantly is, and very egregiously so in this Perak case, the rule of law is still very much with us in essence (although admittedly it is challenged in its strict daily observance and the fullness of its understanding). The rule of law is truly something worth defending and it is being defended, as I say, very ably and in fact inspiringly. It is not easy to do this. Many people have difficulty understanding the expending of great efforts to defend a mere abstract principle whose worth cannot easily be calculated in economic or practical terms. It does not feature in their dreams; they even perhaps suspect hidden motives. Therefore much credit goes to those who have the belief, the aspiration, and the ability to defend the rule of law and constitutional government on behalf of the public interest. They have called a wide range of people and decisions to account in an unmistakeably trenchant way. This is good for the body politic.

In order, however, to maintain the rule of law, the Judiciary on its side has to be guided by it and it alone. I remain sure that by and large they are guided by it, and so offer us the expectation, or at least the realistic hope, of its continuance, without which the constant work to maintain and advance it would be in vain. The Perak case does not itself offer such hope, as this book strongly argues, but even so hope must not be diminished, and I do not think it is.

However, we have to be very clear, amidst a good deal of complex argument, about what exactly is at stake. The arguments over the proper interpretation of Perak's Constitution go beyond parochialism and beyond the kind of technical issues on which reasonable lawyers

and reasonable, informed, citizens may differ. They speak to the entire basis of the constitutional order which has been maintained in Malaysia over more than half a century, and on which stability, good governance, democracy, rights and the nature of the constitutional state depend. The principles at stake are:

i) that Malaysia is a constitutional monarchy in which the powers of the Rulers are circumscribed by both the text and our understanding of constitutional conventions;
ii) that the people through their representatives in the Legislature decide who forms their Government; and,
iii) that where there is a dispute, an independent Judiciary decides the issue according to law, wisely and impartially.

These principles have been threatened by the episode discussed in this book.

The contributors to the blawg have elaborated our reasons for so concluding. We have argued very persuasively that a proper construction of the Constitution of Perak requires that the issue of confidence in the MB is to be decided only in the Legislative Assembly on a substantive no confidence motion or its equivalent, and not outside it. We have argued that the Head of State has no power to dismiss the MB, no power to declare the office of MB vacant, and no power to appoint an MB when there is an MB in office. We have argued at length as to why the High Court was correct, and the two appellate courts were wrong, in their decisions. Issues have also been discussed regarding other aspects of the crisis, for example those surrounding the sacking of the Speaker of the Perak Legislative Assembly and his legal representation.

One further issue was crucial in the view of the judgments in the two higher courts, and this is the only point I wish to add to what has been said. The earlier comments on the case after the High Court decision (for example by myself and Kevin YL Tan) did not deal with this issue, which appeared to have been simply correctly decided by the trial judge as a question of fact. It was argued, and the Court of Appeal and the Federal Court have found, that the request for a dissolution was made under Article 16(6) (that is, on the assumption by the MB that he had lost the confidence of a majority) as opposed to the ordinary case of a request for a dissolution under Article 36(2). This finding has to be rejected.

Both Kevin and I were surprised that the appellate courts saw fit to substitute their own finding as to this issue of fact, which is of a kind where ordinarily the appellate court defers to the trial judge who actually heard the evidence and saw it being given. On the evidence it is indisputable in my view that there was no such assumption on Nizar's part that he had lost his majority. Nizar was not in possession of all the facts when he spoke with the Head of State, even if we were to assume (we do not) that it was true at the time that Nizar had lost his majority. Moreover it was precisely his case that the apparent "deadlock" had in any case to be resolved by the Assembly. This aspect of the case is crucial, and I raise it here in case anybody considers that the Federal Court's approach to these two provisions in effect side-steps all of the arguments that are advanced in this book.

Now of course we have to recognise that it is not easy for a court to engage with what we might see as purely political processes, and the Perak case was very "political" both in terms of its high public profile and controversial nature, and in terms of its party-political implications. The courts cannot allow themselves to be seen as politically biased in the party-political sense. Nor can the courts allow themselves to become a political football between large and powerful forces.

In the Perak case the issues were particularly difficult in the sense that a decision either way was likely to seem political, because each political party involved would either win or lose control of the Government of Perak. The stakes were indeed very high. It follows that whichever way the case went, careful and convincing reasons had to be given, and given without fear or favour. But the danger of seeming to make a "political" decision can never be a reason not to interfere with a practical outcome or *status quo*. Not only might failure to interfere be itself seen as political, but it is fundamentally the duty of the court to decide a case irrespective of the political consequences. It has to be guided by the larger long-term public interest as expressed in the Constitution, but not by the politics of the moment.

For these reasons the decision cannot be explained as a wise refusal by the courts to engage in making a "political" decision best taken elsewhere. The decision that was being sought by Nizar was one which would have placed the matter of his tenure as the Menteri Besar precisely "elsewhere" – I mean before the elected Assembly – to be debated and decided in a

transparent and democratic fashion in a place where everyone could see the arguments and reasons advanced and how individuals voted.

Nizar had asked initially for the Assembly to be called to resolve the matter. That request not being granted, he asked for a dissolution so that the people themselves could decide. But the decision that came down from the Federal Court on the contrary endorses the idea that the fate of the people's Government can be settled behind the scenes according to who-knows-what secret communications and extraneous considerations which would prevent the voter (or even, in this case, the MB himself) from understanding what had happened and why, and what attitude he or she should take towards the events and the standing of the Government.

So it is true that there are proper places for the making of political decisions; but Nizar's case, it is important to see, was not brought in an ambitious way to remove a lost political decision into the court, but rather to argue that the court should enable that political decision to be taken in the correct way and in the correct place. The court was being asked to facilitate a political process not to obstruct it. However, its decision in fact allowed the hijacking of that process. The point is not and never was that Nizar was entitled to stay in power in spite of lack of support; it was that he was constitutionally entitled to have the Assembly publicly debate and vote on the question of its confidence in him, and to consider the outcome (if the vote had gone against him) with respect to his choice whether to resign or ask for a dissolution.

This all brings me to my **third** (and it is my last) saving: ultimately the people will decide. In spite of the undemocratic nature of the change of government in Perak, it is still true, as Lincoln said, that while you can fool all of the people some of the time and some of the people all of the time, you can't fool all of the people all of the time. There is a lot that was hidden from view but the people saw enough to know that they did not like what they saw and were suspicious of what they were not seeing. There is no hiding place where anybody can avoid the fact that ultimately the electorate will decide the fate of Perak's Government. I wonder how any of the parties involved could disagree with that proposition. When they do so, they will of course take into account the events that have been discussed in this book and form their own view.

Looking ahead, the long term effects of the Federal Court's decision are not hard to discern in outline. It is now open day on undermining the position of any Chief Minister, and even the Prime Minister himself (the Federal Constitution and the State Constitutions being on all fours on this issue) outside of the Legislature, forcing the Head of State to act without a no confidence vote (he cannot now, in view of this case, simply insist on a vote) in exercising a power of dismissal of the Executive head which (this book argues very convincingly) he does not have. On this basis there is a real prospect of a constitutional crisis breaking out in any State at any time, or even at the Federal level, and even right after an election at which the voters have expressed a clear preference. One has an awful feeling that the chickens of Perak will be bound to come home to roost elsewhere; but hopefully it will only be at the roof of the court itself when it overrules its decision in a future case.

Finally, I have to say I was very moved and impressed by Chan Kok Keong, one of the lawyers for Nizar, when he told me how he and his colleagues on Nizar's legal team – Sulaiman Abdullah, Philip Koh, Ranjit Singh, Razlan Hadri, Leong Cheok Keng, Hanipa Maidin, Edmund Bon, Amer Hamzah and Zulqarnain Lukman – were given a standing ovation by the crowd as they left the courtroom after the Court of Appeal decision, which went against them. He said it was the proudest moment of his life. I think it was a proud moment for all the lawyers there, and the crowd too.

Chan Kok Keong is a lawyer who earns a living each day by working for his clients on every kind of legal matter, mundane and otherwise. I dare say he did not expect ever to be involved in a high profile constitutional and political case of this kind. But he, along with all the other members of his illustrious and assiduous multi-racial, multi-religious team, did what was needed when the call came, and did it very well.

The Perak case has touched many, many thousands of Malaysians. It will go down as a constitutional landmark. Not a landmark to be proud of; however, it is not the case but the reaction to the case which has defined this moment in Malaysian constitutional history. It is in such moments that justice becomes real.