

The tilt of power

Mahathir moves to place parliament over courts

By Suhaini Aznam in Kuala Lumpur

Malaysia's power structure of checks and balances was heavily tilted in favour of the executive on 18 March when parliament passed amendments to the constitution to diminish the powers previously vested in the High Courts and subordinate courts — removing their right to interpret the law, leaving them simply to reach a verdict and mete out the appropriate punishment.

Prime Minister Datuk Seri Mahathir Mohamad tabled the amendments following several cases in which the courts have ruled against the government. Introducing the amendments, Mahathir said that at present the "limits between the judicial domain and that of the executive or legislative are unclear. There have been signs that matters which were deemed to be the sole powers of the executive have been assumed to be open to judicial interference."

The constitution as it stands starts with the statement that the judicial power of the federation "shall be vested in two High Courts of coordinate jurisdiction and status, namely a) the High Court in Malaya; and b) the High Court in Borneo; and in such inferior courts as may be provided by federal law."

What the amendments seek to do is substitute the words "The judicial power of the Federation shall be vested in" with simply "There shall be" two high courts.

It also seeks to replace the words "and in such inferior courts as may be provided by federal law" with the words "and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law."

Thus what the executive seeks to do is to remove the judicial powers of the courts — granted to the courts in the first place by the constitution — by amending the constitution itself. The executive, through laws made in parliament, will then confer on the courts their new and limited powers. Lawyers are still unsure, however, how the courts will actually operate.

Constitutional amendments require approval by a two-thirds majority in parliament and this — the 27 amendment to the 30-year-old constitution — was passed by 142 to 18 votes, after two days of debate. Seventeen MPs were absent, including seven opposition Democratic Action Party (DAP) MPs who are currently in detention under the Internal Security Act. Parliament also passed, through a simple voice vote, amendments to the Societies Act, 1966

(REVIEW, 24 Mar.) which will help Mahathir's newly reconstituted dominant Umno Baru party retain the assets of its deregistered predecessor and thwart court action by political rivals. Both amendments now merely await the certain endorsement of the Senate and the king's signature.

The constitutional amendments also enhance the attorney-general's powers, allowing him to determine the venue of cases — whether subordinate or High Court — in which he is bringing an action. This was clearly in response to Justice Zakaria Yatim's ruling in 1987 that it was unconstitutional for the public prosecutor to transfer a case from the Sessions Court to the High Court. (The case involved Datuk Yap Peng, charged with criminal breach of trust.) The pub-

lic prosecutor appealed to the Supreme Court, which dismissed the appeal.

Together, the two clauses threaten to weaken the judiciary, though the first is by far the more severe. Section 121 now provides a blanket ruling that judges and magistrates will no longer interpret the law. They need only decide whether or not a person is guilty, and then apply precise penalties as spelt out by the legislature. A new clause also specifies that these courts not hear matters over which the Islamic shariah court has jurisdiction. The Supreme Court, the highest court of appeal, is not mentioned in the amendments and is assumed to be exempt from them.

Mahathir had in fact hinted of plans to codify the law last December but at the time, no one understood how he proposed to go about it. On a piecemeal basis, amendments to several laws around that time — the Printing Press and Publications Act, the Official Se-

crets Act and the Police Act — spelt out mandatory jail sentences and raised minimum fines. More significantly, they also added the proviso that the relevant minister's decision was final.

The relationship between executive and judiciary has been an unhappy one this past year. A legislature weak in opposition and obedient to the dictates of the executive — with nearly one-third of its members having ministerial jobs — has not helped in maintaining the principles of separation of powers.

Two judges in particular have provoked Mahathir's wrath. Without naming names, Mahathir said that judges described as "fiercely independent" were "indirectly involved in opposition politics." Fierce independence was an attribute some newspapers bestowed on Justice Datuk Harun Hashim, the High Court judge who, until 1 January, had heard matters of judicial review.

Again without naming names, Mahathir indirectly rebuked Justice Peh Swee Chin of the Ipoh High Court, for having quoted in his judgment releasing DAP lawyer Karpal Singh on 9 March, that the factual error in his charge sheet reflected the home minister's "casual and cavalier attitude" as to amount to *mala fide* (bad faith). The phrase was actually from Karpal's defence, but Mahathir — who is the home minister — argued that it was "a serious matter that damages [the minister's] name."

"We have no wish to be judges," said Mahathir. His aim was just to have "judges apply the laws made by parliament and not make their own laws as is happening now." He recalled that one judge had ruled that a minister cannot disappoint an individual in his expectations to work for the full duration of his work permit, and thereafter to have it renewed — an obvious reference to the Supreme Court decision to overrule the Home Ministry's revocation of the work permits of two *Asian Wall Street Journal* correspondents in 1986, then expelling them. But apparently, Mahathir pointed out, a minister may be disappointed in his expectations.

Another judgment which obviously irritated Mahathir was the Supreme Court decision in August to allow an injunction to stop United Engineers Malaysia — a construction company indirectly controlled by the now-deregistered United Malays National Organisation — from signing a controversial contract with the government to build the \$3.4 billion north-south highway.

The amendments prompted strong reactions from the opposition and lawyers. "Making amendments to the constitution is a serious and sacred exercise," not to be carried out "in total disregard and contempt for the judiciary," said DAP acting secretary-general Lee Lam Thye.

As an arbiter in disputes between citizen and state, "the courts play a protective role in defending the rights and liberty of citizens against any interference of them by the legislative and the executive arms of the government," said outgoing Bar Council president Param Cumaraswamy. "Once the judicial power is removed from our courts, the road to dictatorship will be wide open."

Chandra Muzaffar, president of the public interest group Aliran — and himself among those detained last year but now free — said: "The judiciary will not be able to scrutinise executive action . . . The ordinary citizen will have no remedy." Recent events had shown that it was the willingness of a few judges to exercise the authority and power that the constitution bestowed upon them, that certain grave injustices have been rectified to some extent, he said.

The tug-of-war between executive and judiciary arises from what seem conflicting views of where ultimate authority lies. While the judges have always held to the supremacy of the constitution, Mahathir seems to prefer that parliament should be the ultimate power. He indicated as much when he made comparisons between the British Parliament "whose decisions were final, and where others had to accept such decisions without making contradicting interpretations" and Malaysia, where "the written constitution is dependant upon judicial discretion which sometimes changes and differs from one judge to the next." In his conclusion, he again asked: "If the British Parliament is supreme, what is wrong if in legislating laws in Malaysia, parliament is given the same right?"

This, however, was the extent to which he wished to extend the parallel. Mahathir wants the judiciary to be bound by written, federal law, without recourse to precedents in British law. British culture differs vastly from Malaysian culture. "Are their concepts of natural justice more important than our laws?" he demanded. "We accept democracy but we do not have to accept all that they [the British] deem democratic."

Two other important clauses in the amendments deal with immigration and land. In the first, foreigners arrested for immigration offences now need not be brought before a judge until they have been held for 14 days instead of 24 hours. This is thought to be aimed primarily at Indonesian migrant workers, with time often needed to establish their identity.

The second empowers the federal government to buy, at market value, any land belonging to the state governments for federal purposes. Should its use no longer be required, the federal government could then sell it to a third party, in line with the privatisation policy. **R**