

BR1M may not be 'bribery', but is unlawful

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I refer to your report, 'Giving out BR1M not bribery, says AG'.

In explaining the mechanism of a caretaker government in an interview with Bernama, attorney-general (AG) Abdul Gani Patail was quoted as saying: "This was in line with Article 40 of the federal constitution which provides that the Yang di-Pertuan Agong shall act in accordance with advice of the cabinet of ministers or under the authority of the cabinet.

"We also look at the case of Abdul Ghani Ali v Public Prosecutor (2001) where the Federal Court ruled that the word 'shall' in Article 43(1) of the federal constitution shows that the cabinet must exist at all times to advise the Yang di-Pertuan Agong though Parliament has been dissolved.

"There must be a government continuously, cannot be a gap. This is the court's decision. On this basis, there must be a government at all times, hence the establishment of a caretaker government." (emphasis is mine)

What Gani did here is to impress upon the public that the meaning of the word 'shall' in the federal constitution is 'must' or 'mandatory'.

Gani need not be duly worried. He can be rest assured that even school children know the meaning of the word 'shall' or 'may' in law.

In fact, citizens are very worried, having noticed that the AG has been consistently inconsistent with his interpretations of the law on different occasions for different people.

Article 43 alone contains nine clauses, excluding Article 43A and 43B. Each clause contains the word 'shall'. If Gani has looked at "shall" in Article 43(1), then he must have seen 'shall' in Article 43(6) also.

Article 43(6) states: 'Before a minister exercises the functions of his office he shall take and subscribe in the presence of the Yang di-Pertuan Agong the oath of office and allegiance and the oath of secrecy set out in the Sixth Schedule.'

This article simply means that the cabinet, which includes the prime minister, must take the oaths in the presence of the Agong, and must also administer the oaths set out in the Sixth Schedule of the federal constitution.

Should a minister miss any of these requirements, then he must be considered to have failed to abide by the mandatory requirements of Article 43(6) and hence loses his rights or legitimacy to exercise the functions of his office.

Najib did fulfill the first limb of Article 43(6) by taking the oath in the presence of the Agong at Istana Negara on April 3, 2009.

However he failed to fulfill the second part - he did not take nor subscribe to the oath of office and allegiance and the oath of secrecy as set out in the Sixth Schedule.

Najib did administer some oaths during the ceremony but they are different in structure and meaning from those set out in the Sixth Schedule and as such his oaths are not in accordance with the constitution.

To my understanding of Article 43(6), since Najib has failed or refused to adhere to a specific provision of the article, he is forbidden to exercise the functions of the office of the prime minister.

He cannot shift the blame of his own failures to others. Neither can he go for a witch hunt.

No right to disburse public funds

In explaining his understanding of a caretaker government, Gani reportedly said that it is not bribery for the BN caretaker government to give handouts like 1Malaysia People's Aid (BR1M), as this was approved in Budget 2013.

I agree with the AG only in as far as his interpretation that BR1M does not fall within the meaning of 'bribery'.

However, since Najib has failed or refused to adhere to the second part of Article 43(6), he has lost his rights or legitimacy to exercise the functions of the office of a prime minister.

Hence, he has no power or rights to table Budget 2013 in the first place. Accordingly, he has no authority to dispose of public funds under BR1M or aid by any other name.

Although Najib's actions in giving handouts like BR1M is not bribery as defined by the AG, the actions fall within the meaning of abuse of power or breach of trust as defined under the Penal Code.

Since there is no legal precedence on Article 43(6) to rely upon, citizens should urge the AG to explain his understanding of the word 'shall' in this article, just as he has in Article 43(1).

Being the person responsible to advise the Agong or the cabinet or any minister on such legal matters as stipulated in Article 145(2) of the federal constitution, the AG must state his position on the legitimacy of Najib exercising the functions of the prime minister.

This includes the legal implications of the contradictions in his using the name Mohammad Najib during the swearing-in ceremony, and Najib when he affirmed his affidavits.

Over to the AG.

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