

An act of class
Malaysiakini.com
Apr 24, 2008
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During the cataclysmic events of 1988 while the tribunal was sitting in judgment over Salleh Abas, a story going around among lawyers was that when Salleh was appointed Lord President of the Supreme Court over Wan Suleiman Pawanteh (who was his senior in civil service) he had gone to see Wan Suleiman and ask for his forgiveness.
MCPX

bar council judiciary dinner 170408 salleh abas interviewedA few months later after Wan Suleiman, George Seah, Azmi Kamaruddin, Wan Hamzah Mohamed Salleh and Eusoffe Abdoolcader had themselves been subject to disciplinary proceedings by another tribunal and Wan Suleiman and George Seah dismissed, for failing to attend a Supreme Court sitting in Kota Bahru and instead staying back in Kuala Lumpur to hear the appeal by Salleh to quash the sitting of the tribunal against him, I met Wan Suleiman one Sunday morning in Lake gardens.

I asked him if the story was true. He said that not only did Salleh come to his chambers when he had been informed of his appointment but he also kissed his (Wan Suleiman's) hand and asked for forgiveness for taking that which should have gone to Wan Suleiman.

Justice Wan Suleiman told me that Salleh's action was part of Malay culture and that Salleh was a true and fine gentleman.

Although Wan Suleiman passed away some years ago, his actions together with the other four judges in not attending the Supreme Court sitting in Kota Bahru, so that they would be around to hear the appeal by Salleh to quash the sitting of the tribunal (which had publicly announced it was going to sit through the weekend and come to a decision) was an act of courage and distinction.

That action by the five, was reflective of a class of judges that Malaysia has not seen for a long time. These exceptional judges were men of honour and committed to upholding justice. They epitomized Alan Paton's statement,

“ There is only one way in which one can endure man's inhumanity to man and that is to try in one's own life to exemplify man's humanity to man.”

Those tumultuous days

As a young lawyer during those tumultuous days, I remember the anxiety and distress I and countless other lawyers felt, with each new development in the 1988 judicial crisis.

We packed the courts and stood outside for hours when we were denied entry, while justice Ajaib Singh kept postponing his decision to quash the tribunal sitting on the charges against Salleh.

My buddy and I, reeling with shock when we heard about the circular, that the five judges had been suspended, drove to Salleh's house in Jalan Conlay to inform him of the development. Puan Sri, seated us and fed us goring pisang while we waited for him to

complete his prayers. When he emerged, he calmed us and said he already had the circular.

Our anxiety and terror resurfaced again and again during those tumultuous days as we personally saw other brave judges in small discussion groups in deserted court rooms.

We lawyers found strength and comfort in the judges who took a stand for truth and justice.

The ex-gratia payment

bar council judiciary dinner 170408 salleh abas gani patail zaid ibrahimThe Prime Minister's announcement on April 17, 2008 that the government in making the goodwill ex-gratia payments to the six outstanding judges did not presume to equate their contributions, pain and loss with mere currency but with a heartfelt and sincere gesture to mend what has been, is balm to the soul.

He also announced the setting up of a Judicial Appointment Commission. He said that while the constitutional prerogative of the Prime Minister to put forward names to the Yang Di-Pertuan Agong will remain, the Commission will help to evaluate and vet candidates in a systematic and credible manner for the PM based on clearly defined criteria.

If the sacrifices of the six judges in 1988 are to be recognized and made meaningful, the Judicial Appointment Commission must reflect a truly independent process of judicial appointment.

The UK post the recommendations of the Peach Report in 1999, set up an independent Judicial Appointment Commission. Pursuant to the Constitutional Reform Act 2005 the Judicial Appointments Commission was set up on April 1st 2006. The independence of the UK Commission is secured by, in the words of former Lord Chancellor, Lord Falconer,

"The new body will ensure that politicians will no longer be responsible for the selection of judges."

Why do we have to ensure that politicians are not responsible for the selection of judges?

This is because politicians often rely on the concept of parliamentary sovereignty to change and repeal laws.

Parliamentary sovereignty is a concept in constitutional law which is applied in some Parliamentary democracies where the legislative body is deemed to have absolute sovereignty over all other government institutions including the executive and the judiciary.

Parliamentary sovereignty contrasts with most ideas of judicial review where the court can overturn laws deemed unconstitutional.

In recent years the concept of parliamentary sovereignty has been modified in the UK. The modification relies on the principle that no political institution should be in a position to suppress basic liberties.

As Tom Ginsberg notes in his article "The Rise and fall of Parliamentary sovereignty", once the obstacles to popular power like the monarchy and the church were overcome, theoretically there was no justification to limit the sole legitimate source of power namely the people's will.

The executive versus the judiciary

The courts' role within the rule of law is exercising judicial review over executive action. It ensures that government itself abides by the laws created. By providing that only the courts can exercise judicial power, government officials are precluded from deciding if they have acted illegally.

In countries with a strong executive, especially where the executive does not understand that it is the Courts function under the rule of law to exercise judicial review, there will always be tensions between the executive and the judiciary when the judiciary exercises judicial review

In Malaysia our previous Prime Minister Dr Mahathir Mohamad the first non legally trained prime minister Malaysia ever had, articulated his reliance on parliamentary sovereignty when he said in a Time magazine interview in 1986,

“The judiciary says although you passed a law with certain things in mind, we think your mind is wrong and we want to give it our interpretation. If we disagree the courts say, ‘we will interpret your disagreement.’ If we go along we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way and we have no means to interpret it our way. If we find that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we have to find a way to producing a law that will have to be interpreted according to our wish.”

judiciary forum lingam tape 171107 salleh abbas palace of justicThe subsequent judicial crisis in 1988 which resulted in the sacking of Salleh, Justice Wan Suleiman, Justice George Seah and the disciplining of Justice Azmi, Justice Wan Hamzah and Justice Eusoffe, is compelling reason to ensure that for the appointment of judges to be truly independent in Malaysia, it should not be in the hands of politicians.

Although the federal constitution gives the Prime Minister the prerogative to suggest names to the Yang Di Pertuan Agong, that Article can be amended and left to the judicial appointments commission.

While the incumbent Barisan Nasional government, post the 2008 elections no longer has the two-thirds majority required to make constitutional amendments, it is not an impossible task.

I am confident the opposition parties will support such an amendment, so that the Malaysian judiciary will never again suffer the question of dubious political appointments.

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