

The trial that broke the judiciary's back
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Before the powers-that-be rush into a second prosecution of Anwar Ibrahim for alleged sodomy arising from the recent complaint by Saiful Bukhari Azlan, it is critical for a dispassionate public debate to be conducted as to whether such a prosecution would serve the public interest.

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It would be convenient to begin with the impact of such criminal proceedings on the administration of justice.

The starting point is the previous prosecution of Anwar for sodomy in 1998 which imposed incredible strains on our legal system, and made Malaysia the laughing stock of the legal world.

It would be sufficient to remind ourselves of the conduct of the prosecution in the 1998 case, the unfair publicity given by the mass media, the denial of bail, the "irrelevant" rulings by the trial judge, the conduct of the trial itself, the amendment of the charges, the shameful parading of the mattress, the expungement of "inconvenient" evidence, the finding of guilty, the lengthy sentence, the appeal to the Court of Appeal, and finally the appeal to the Federal Court.

anwar ibrahim and mahathir argue fightThe leading personalities a decade ago were Prime Minister Dr Mahathir Mohamad, Chief Justice Eusoff Chin, Attorney-General Mokhtar Abdullah and Inspector-General of Police Rahim Noor. Lawyers and litigants would remember the darkest days of Malaysia's judiciary under Eusoff Chin in the late 1990s, symbolised by cases involving Anwar.

Because Anwar never received a fair trial in 1998, the entire proceedings were condemned as a sham by the Bar Council, international and local scholars and international bar organisations. The Malaysian judiciary reached its nadir during the Anwar trial.

After Eusoff's retirement in 2000, each of his successors, Mohamed Dzaiddin Abdullah, Ahmad Fairuz Sheikh Abdul Halim and Abdul Hamid Mohamad took corrective measures to improve the image of the judiciary. Each seemed to distance himself from the Eusoff Chin style of leadership, and each attempted to move the judiciary in the right direction.

Without doubt, their collective actions have succeeded slowly, but surely to enhance the status and reputation of the judiciary to the extent that the vast majority of the members of the 13,000 Malaysian Bar would concede that the judiciary in 2008 is in much better state than in 1998. Incremental steps have been taken, and the Bench is stronger for that.

Second trial will be a mistake

A second prosecution in 2008 would, in one stroke, undo all the good deeds carried out in recent years. A second trial will again demonstrate that the criminal court is not equipped to settle political scores, and should not be the forum to resolve political disputes.

It is not fair that a political problem affecting the executive, which is essentially non-justiciable, be trust upon the judiciary.

Any prosecution of Anwar in a sodomy charge would bring to focus the following elementary principles of criminal law: that he is innocent, until proven guilty; the relevant burden of establishing his guilt is beyond reasonable doubt; that burden always remains with the prosecution, and never shifts to the accused, thus, he can elect to remain silent and not cooperate with the prosecution by not voluntarily giving his DNA and the like; and he is entitled to be free on bail from charge to conviction.

Entrenched principles like that it is preferable that 99 "guilty" persons are let free than one "innocent" person should be convicted, are not just idealistic statements that students learn at law school. They form the bedrock of civilised criminal jurisprudence.

Because these are the hallmarks of any criminal prosecution in Malaysia, failure to adhere to them would immediately put public pressure on the credibility of the trial process, to the detriment of the judiciary, as the third branch of government.

anwar out from hospital 160708 01In other words, well established principles of criminal law should not be suspended during a second Anwar trial, as happened in the first trial.

It is instructive that since 1998, there have hardly been any sodomy charges against anyone. Does that indicate that no homosexual or lesbian activities have taken place in Malaysia in the past decade?

When the crime rate is shockingly high, becoming an issue during the March general election, and resulting in a widespread breakdown of law and order, is it not an absolute waste of limited police resources to focus attention on the sexual preferences of a 61-year-old man with neck and back pain.

This is wholly disproportionate, and not consistent with good law enforcement.

In mature legal systems, homosexuality has been decriminalised, partly because contemporary society no longer regards such behaviour as warranting a criminal law response, and partly because such offences are very difficult to prove on a criminal burden of proof since, in most cases, it is the word of one person (the victim) against the version presented by another (the accused), with the latter enjoying the advantage of being innocent until proven guilty.

In the present climate, a fair trial cannot be guaranteed to him. Thus, it can safely be stated that a prosecution of Anwar in 2008 would have drastic negative consequences to the administration of justice.

The political consequences

Again, the lessons of 1998 must be considered. Despite the protestations by Mahathir and his decreasing band of apologists, there are only a few Malaysians left who still do not believe that Anwar was removed in September 1998 as deputy prime minister, expelled from Umno and charged for sodomy because he was perceived by Mahathir as a rival.

mahathir kimma new office event 150708 03It was Mahathir's method of eliminating a serious contender to his office. By such extreme action, Mahathir achieved short-term gain by

remaining in office for a further five years.

But at what cost? Hence, any short-term gain that Mahathir personally secured was negated in the medium term, let alone in the long term, which only time can tell.

The harm inflicted on the major institutions of the state and the damage suffered by the entire nation by the extreme actions taken against Anwar a decade ago have been permanent and the scars would take generations to clear.

It would be equally impossible to find many Malaysians today who would believe that a second prosecution of Anwar has nothing to do with him as prime minister-in-waiting.

The undeniable facts are these: the March general election saw the opposition securing 51.3 percent of the popular vote in West Malaysia, with the Barisan Nasional securing 48.7 percent.

Of the 165 seats at stake in Peninsular Malaysia, the opposition won 81 seats while Barisan Nasional won 85. The ruling coalition's two-thirds majority was breached. The opposition is ruling five states, and won 10 out of 11 parliamentary seats in Kuala Lumpur.

The prospects for a two-party (or two coalitions of parties) system of government have never looked more promising. Umno is on a path of self-destruction, with Mahathir leading the charge that Prime Minister Abdullah Badawi should resign.

Abdullah's promise to retire by 2010 has received much criticism from Umno grassroots. Against this background, whether prudently or not, Anwar announced that he would lead a Pakatan Rakyat government by Sept 16 this year, the 45th anniversary of the formation of Malaysia.

A motion of no confidence was presented by the Sabah Progressive Party, which has yet to be debated, while a second motion presented by Pakatan was not accepted by the speaker of the Dewan Rakyat.

lambah pantai nomination day 240208 anwarAnwar then announced that he was ready to contest in a by-election. Finally, the opposition stalwart out-performed Ahmad Shabery Cheek in a much-watched televised debate. He was immediately arrested in a high-handed manner.

It therefore defies belief that the government can still repeatedly declare that politics is not involved in the Anwar sodomy case. They are insulting the intelligence of Malaysians by such arrant nonsense. The case is all about politics, and nothing but politics.

If Anwar were not a potential prime minister, and only an ordinary citizen, he would not face this prosecution. It is as simple, plain and obvious as that.

The economic consequences

The latest sodomy charge against Anwar could not have occurred at a worse time while the nation is facing economic turbulence of crisis proportions, and certainly the worst since the 1998 financial crisis.

While Malaysians are suffering from increasing costs of living issues, best exemplified by the recent huge fuel price hike, and ordinary life has become intolerable for millions, the politicians are playing their selfish and wholly irresponsible games.

The mismatch between the electorate's expectations of their political leaders and actual political governance (or the lack of it) is awesome.

In this context, for the nation to embark on a wholly unnecessary criminal prosecution of a potential prime minister would be political and economic suicide. That the market is spooked is best reflected by that barometer of public confidence and business sentiment, the stock exchange, which has declined by a quarter of its index points in the past four months for "political" reasons.

The market would plunge further if Anwar is prosecuted, already nervous Malaysian businessmen would not invest in Malaysia and foreign direct investments will go elsewhere.

Deeply divisive trial

The 1998 trial deeply divided Malaysians. In a typical family, one spouse may have initially supported the prosecution, while the other spouse was sympathetic to Anwar.

Although a second prosecution 10 years later may result in the vast majority of Malaysians being sympathetic to Anwar, a trial would nonetheless be deeply divisive at a time when the nation desperately needs healing and reconciliation.

For the sake of public harmony, a trial must be avoided at all costs. Malaysians must not be asked if Anwar is getting a fair trial in a criminal court.

Since Merdeka, Malaysia has placed much emphasis on world perception. Image building has very much been the cornerstone of our foreign policy. Malaysia was heavily criticised in the conduct of the first trial. It would be *déjà vu* the second time. The United States and Japan (hardly a pushy friend) have already queried Anwar's arrest.

The home minister has already met 98 foreign diplomats to explain the position of the government. It is entirely predictable that right thinking countries would protest in different ways if he is prosecuted. Malaysia would again take centre stage in CNN, BBC and Al Jazeera, and for all the wrong reasons.

That the attorney-general, in his capacity as public prosecutor, is not obliged to prosecute every "offender" for every alleged "crime" that may have been committed in Malaysia is demonstrated by the discretion vested in the office of the attorney-general under Article 145 of the Federal Constitution and Section 376 of the Criminal Procedure Code.

The attorney-general is perfectly entitled in the exercise of his prosecutorial discretion to take into account non-legal matters in the decision-making process.

Thus, he is not limited to merely asking: "Do I have a *prima facie* case to convict an accused for committing an offence?". Other factors may be relevant, and weighty.

The Malaysian position is similar to most Commonwealth nations. Indeed, in the United Kingdom, because the attorney-general is always a member of parliament, he is often required to explain to Parliament the reasons why he has decided not to prosecute a particular individual.

Numerous reasons have been given by the attorney-general in the United Kingdom for not

prosecuting. The category of reasons is never closed and it always depends on the particular circumstances of a particular case. Hence, the operative word is "discretion", rather than a "duty" or "obligation".

In the late 1990s after the British courts had refused to recognise the immunity of General Augusto Pinochet and ordered that he should stand trial in the United Kingdom for his crimes against humanity committed in the aftermath of the overthrow of the Allende regime in Chile, the British government announced that in the interests of British-Chilean relations and because of his age, it was not in the public interest for Pinochet to be tried in the United Kingdom.

He was allowed to return to Chile, where he lived for another 10 years.

It must further be appreciated that although constitutionally the prosecutorial decision is vested in the attorney-general, the political reality is that in important "high-profile" cases, the prime minister would have to give his sanction.

Indeed, no one would deny that during his 22-year term, the effective decision-maker for major prosecutions (or not to prosecute) was Prime Minister Mahathir, and not the four attorney-generals who served under him.

PM must decide

Philosopher George Santayana famously observed: "Those who cannot remember the past are condemned to repeat it."

History is replete with examples of leaders who refused to learn from past mistakes, and were doomed to repeat them. It would be a tragedy of ancient Greek proportions if our leaders do not learn the lessons from 1998.

It is abundantly clear that all the factors point in one direction: it is not in the public interest to subject the nation and its citizens to the trauma of a second trial.

The only factor in favour of a second trial is that certain politicians with a vested interest think that they may derive benefit. Whatever political benefit they may secure, would be very short term, and they may suffer electorally during the next general elections.

If Malaysia does not wish to descend to the level of Burma and Zimbabwe, both of which are also British colonies and enjoyed the rule of law and freedom for a few years after independence, a second prosecution must be avoided.

umno special briefing abdullah ahmad badawi announce resignation date 100708 05The attorney-general, having regard to his high-profile direct personal involvement in the first trial, should not personally take the decision. Likewise, the office of the attorney-general should be precluded, having regard to its previous conduct.

One hopes that taking these relevant considerations into account, Abdullah (photo) would act as a statesman by personally deciding the matter, that is, by declining to prosecute in the national interest.

Posterity would generously reward the prime minister if he took this decision because it is the right one to take in all the circumstances of the case.

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