Judiciary's emasculation: Mahathir or the AG?
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A Bernama news report dated June 27 quoted Chief Justice Tun Abdul Hamid Mohamad as saying that the move by the government to amend Article 121 (1) of the Federal Constitution, restoring power to the judiciary, which was taken away in 1988, was an "interesting development". I agree.
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He further added that, "It shows that an amendment made in anger as a reaction to a decision of the court can last (only) for one generation." He also remarked that just as water tends to find "its own level", the country is now finding its way back "to the original provision".

Whilst it is not my intention to question what the learned Chief Justice said last week, I am still wondering "whose anger" led to the amendment of Article 121(1) two decades ago?

To put the question bluntly, who was angry enough to want that important provision amended? Was it the Prime Minister (as most people seemed to believe) or was it the Public Prosecutor (which is what I believe). After you read the chronology of events which I have summarised below, form your own judgment, based on the known facts, not on bias or emotion.

Chronology of events leading to the decision

In Public Prosecutor v Dato Yap Peng [1987] 2 MLJ 311, the accused was charged with criminal breach of trust in the Kuala Lumpur Sessions Court on Dec 19, 1986. When the case was mentioned on Dec 29, the DPP tendered a certificate issued by the Public Prosecutor under section 418A of the Criminal Procedure Code (CPC) requiring the case to be transferred to the High Court.

When the accused was subsequently charged in the High Court on Jan 6, his counsel argued that the transfer was unconstitutional and that section 418A violated Articles 121(1) and 5(1) of the federal constitution.

At the High Court, the learned trial judge, Zakaria Yatim J, held that section 418A is unconstitutional because it contravenes Article 121(1). He held that the power to transfer cases is an exercise of judicial power. Aggrieved by that decision, the Public Prosecutor appealed to the Supreme Court.

At the conclusion of the appeal, the Supreme Court held by a majority decision of 3:2 (Abdoolcader SCJ, Lee Hun Hoe CJ Borneo and Mohamed Azmi SCJ, with Hashim Yeop A Sani SCJ and Salleh Abas LP dissenting) that section 418A of the CPC is unconstitutional.

Abdoolcader SC described section 418A of the CPC as "both a legislative and executive intromission into the judicial power of the Federation. It is a legislative incursion to facilitate executive incursion ..."

Mohamed Azmi SCJ said "Section 418A clearly confers judicial power on a body which is not a court and as such, it is an interference of judicial power of the Federation as enshrined in

Article 121 of the Constitution".

Lee Hun Hoe CJ Borneo did not deliver a separate judgment; he merely endorsed and agreed entirely with Abdoolcader's judgment.

Hashim Yeop A Sani SCJ (who delivered his own dissenting judgment) said "Section 418A has been examined by the courts in this country on a number of occasions …" He said the Federal Court in Datuk Haji Harun bin Haji Idris v Public Prosecutor [1976] 2 MLJ 116 had agreed with his judgment in Public Prosecutor v Su Liang Yu [1976] 2 MLJ 128 that section 418A of the CPC "is procedural and merely a vehicle for the Attorney-General (or Public Prosecutor) to exercise his powers under Article 145(3) of the Constitution".

Salleh Abas LP (who also delivered his own dissenting judgment) said "I cannot see how this power … could be regarded as an encroachment upon the judicial power of the court. In my view, it is neither a judicial power nor an encroachment upon that power."

In summary, two judges of the Supreme Court regarded section 418A of the CPC as unconstitutional (with the third judge merely concurring), whilst two other judges (including the Lord President himself) said that section 418A is merely procedural and certainly cannot be regarded as an encroachment.

Public Prosecutor wears two hats

Be that as it may, that Supreme Court decision in 1987 has never been questioned or overruled by the highest court in the land (the Federal Court).

The lesson we get from that decision is that section 418A (the power of the Public Prosecutor to transfer a case from the subordinate court to the High Court) is unconstitutional because it is against Article 121(1) of the Constitution, which provides that "judicial power of the Federation shall be vested in two High Courts."

Since the Federal Constitution guarantees that "judicial power is vested in the High Courts" the action of the Public Prosecutor under section 418A is therefore constitutionally wrong. It is wrong because, in the Supreme Court's majority judgment, the act of transferring a case from the Subordinate Courts to the High Court is an exercise of judicial power.

It was after this inglorious defeat in court in Dato Yap Peng's case that Article 121(1) was amended. The offending words in Clause (1) of Article 121 had to go. Its repeal means that the Public Prosecutor can thereafter freely transfer any case from the Subordinate Courts to the High Court without question or challenge.

It should never be forgotten that the Public Prosecutor actually wears two hats (or songkok, if you prefer) under the law. As the Attorney-General, he had amended the CPC in 1976 to facilitate the transfer of cases before the Subordinate Courts to the High Court.

Before the 1976 amendment, as Public Prosecutor, he had to apply (and obtain the order) of the Subordinate Court to have a case (which is then pending before the Subordinate Court) to be transferred to the High Court. After the 1976 amendment, he merely had to furnish his DPP with his certificate and the Subordinate Court must transfer ("shall transfer") such a certified case to the High Court.

As stated earlier, such transfers were regarded by Hashim Yeop A Sani SCJ (in his dissenting

minority judgment) as merely procedural in nature; it was not encroachment into judicial power. Salleh Abas (the Lord President) also regarded such transfers by the Public Prosecutor as not an encroachment to judicial power.

However, since the Supreme Court struck down section 418A of the CPC in Dato Yap Peng's case as contravening Article 121(1) of the Federal Constitution, the Public Prosector (wearing the hat of Attorney-General) chose to overcome his defeat in court in the usual manner, in the same way as had been done so many times in the past – that is, via legislative amendment. Article 121(1), the hurdle to such exercise of Public Prosecutor's power, had to go.

Having considered the chronology of events as I had indicated above, can we honestly say that this entire episode has the imprint of any "interference or influence" by the prime minister of the day? I don't think so. To my mind, the 1988 amendment was the sole legislative initiative of the Public Prosecutor in his dual role as the Attorney-General.

He might be in error, but he was acting, as he deemed fit, under Article 145(3) of the Constitution. That provision reads as follows: "The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence, other than proceedings before the Syariah Court, a native court or a court-martial."

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