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# Is the PM a public officer?

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**M**ANY were stupefied when a court handed out a ruling recently that a prime minister of the country is not a public officer. Is he a private officer then? This cannot be. What is he then?

This conundrum was posed in a case brought by the former prime minister (PM) and two others against the present PM: for acts committed in relation to a state investment fund which resulted in a loss to the tune of billions of ringgit. The action sought to make the PM accountable for these losses.

A public official can be held liable for abuse of public duty (called "misfeasance"). (See my Sun column of June 21, 2016.) You must prove that the public official committed an unlawful act or omission with intent to abuse his power - whether knowingly or recklessly; that he did not honestly believe that his act was lawful - regardless whether he benefited personally; and consequently there was a loss to an individual or loss of public property. This has been established by a long line of cases starting with the foundational UK 18th century case, *Ashby v White*, through to the Privy Council decision of *Dunlop v Woollahra Municipal Council* (1982) and our Federal Court in 2004 *Ng Kim Moi v PTD Negri Sembilan* (dissenting judgment).

The second ground was that the PM held his power in trust for the people as a fiduciary; and that he breached his duty as he did not act in the best interest of the people whose assets he was entrusted to manage.

The PM's lawyers applied to strike out the suit on the ground that it was plainly and obviously wrong. They succeeded and the High Court struck out the case. So, the issues raised in the suit will not be ventilated in a trial.

The High Court judge said that an essential

ingredient of the misfeasance and breach of fiduciary duty action was to show that the PM was a "public officer". The judge concluded that he was not such an officer based on his interpretation of the provisions of the Federal Constitution and the Interpretation Act 1967. His reasoning was linear and straightforward, almost mathematical.

Under the Interpretation Act "public office" is defined as an office in any of the public services. A public officer means a person lawfully holding, acting in or exercising the functions of a public service. And "public service" was as stated in an article of the Constitution.

This article lists the public services, such as the armed forces, judicial and legal service and many more. It then sets out a category of persons who do not comprise the public service. "Members of the administration in the Federation and State" are thus excluded. Yet another article states that a "member of the administration" includes a "minister" (which under the Interpretation Act includes the prime minister).

Plain and simple? Perhaps.

Interestingly, the judge was at pains to point out, almost apologetically it seems, that many may find it "most surprising and quite unpalatable to swallow" his ruling that the PM and minister of finance is not a public officer. But, he explained, he had to decide the case "on the law applicable no matter how unpopular the judge might become because of the decision". This is perhaps as a judge should be - a servant of the law.

Whether the judge is right or not will be determined by the higher judiciary. The former PM is appealing this decision.

Two points to ponder though. First, the constitutional provisions cited on the definition of public service starts off with "For the purposes of this Constitution ...". And it is quite clear that these provisions are to regulate the conduct of employees in these listed public

services. So, for example, it is stated in the same article that every person who is a member of the services holds office at the pleasure of the Yang di-Pertuan Agong. There are also other provisions relating to the secondment of officers of the public service; and for the dismissal and reduction in rank of recalcitrant officers in the public service. All of these provisions certainly would not apply to ministers and a prime minister and judges. That's why they are excluded. The question for the appeal court could well be: given this limitation, whether it is apposite to refer to these provisions of the Constitution to define a public officer - as referenced by the Interpretation Act.

Second, the Court of Appeal in a 2014 judgment referred to two Indian Supreme Court cases which held ministers liable for misfeasance for abuse of power: *LBCN Development Sdn Bhd v PTG, Selangor*. Courts in other jurisdictions, such as New Zealand, have also held ministers possibly liable for breach of duty of care: *Rowling v Takaro Properties*. Can these cases apply to this case - which is based on the law of tort not constitutional law?

The larger question remains. If ministers and a PM are neither public nor private officers, what are they?

In dealing with an analogous argument that a body could be a public authority for some purposes but not for others, a former Supreme Court judge, Eusoffee Abdoolcader, (in a different context) described this as:

*"(S)uch an extraordinary and schizophrenic state of affairs that it needs only to be stated to be rejected. It cannot but be repugnant to all accepted canons of construction and indeed to common sense to so construe a definition as to create as a consequence of its concept a sort of centaur - half man, half horse". (Merdeka University Berhad v Government of Malaysia) (1981).*

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