

IS THE KING A CAPTIVE OF THE PRIME MINISTER?

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(Malaysia Outlook) – Dr. Mahathir's allegations that the Yang Di Pertuan Agung (YDPA) being held prisoner to the Prime Minister of Malaysia Najib Razak is mischievous, irresponsible and an untenable claim without proper legal or factual foundation.

The Federal constitution (Constitution) of Malaysia is clear that although all of government including the prime minister, all its other arms including the judiciary and legislature are referred to as 'YDPA's' by appointment, by the convention, ultimate power in all things constitutional, executive and government resides with parliament and not with the YDPA. The YDPA's role remains largely ceremonial and there is nothing in the Constitution that gives him any power or authority to dismiss a prime minister. The YDPA executes all his duties and functions on the advice of his prime minister (and his ministers) from whom he receives his counsel. Parliament remains sovereign.

As an example of how parliamentary sovereignty works (and overrides other powers including that of the king and constitution), in 1914 during the first world war the sitting Parliament in the UK instead of dissolving itself passed an Act extending its own life. There are many more examples where parliament's power trumps that of the monarch or anyone other arm of government and the constitution.

At any rate, Bagehot's famous statement on the limited rights of the monarch remains relevant today in Malaysia as it always has is in the UK. The powers of the monarch are as he put it, limited to 'consult, to encourage and to warn'.

In the context of the Constitution government is elected by the people but appointed by the YDPA (ministers and prime ministers) providing "they command the confidence of the majority of the House".

The Constitution including Article 43(4) the only relevant Article on this point in contention is silent on the question of removal. It instead makes reference to a situation where the prime minister '*ceases to command the confidence of the majority of the House of Representatives*' as far as his claim to the office is concerned. It makes no reference implied or express to any power therein in the YDPA to remove the prime minister even in such a situation where the prime ceases to command the confidence of the majority in the House. In fact there is no power or authority in the YDPA to remove a prime minister.

The YDPA has limited discretionary powers in appointment of a prime minister as he is only nominal head of executive government. The convention that the YDPA must always act on the advise of his government has always been followed in Malaysia, although constitutionally the prime minister has the power to act without consulting the YDPA.

In practice and by convention, it is the YDPA who holds office at the pleasure of parliament and it's the prime minister and not the other way round as is suggested by some. Parliament is sovereign. Parliament can make or unmake a King or a Queen: and as *Blackstone* reminds us:

“Parliament has sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws concerning matters of all possible denominations ecclesiastical or temporal, civil, military, maritime or criminal. This being the place where that absolute despotic power, which must in all Governments reside somewhere, is entrusted by the Constitution of those kingdoms”.

The YDPA may be removed or his powers (as is the case with the Sultans) curtailed by the prime minister who holds sway over all of government. But these are exclusive powers of parliament through government held by the prime minister of the day to exercise. And the conditions that go with such extreme contingencies as a sacking of a prime minister will not likely arise because the government like any other mature government has alternatives to dealing with extreme situations which are not often the subject of public discussion.

There was a close call however in the 1980's and Dr. Mahathir exercised it against the then YDPA and can't claim ignorance of the Constitutional powers of the prime minister against any threat from any YDPA.

Dr. Mahathir's allegations brings the YDPA, the person and his office, into disrepute. It is something Dr. Mahathir ought to know from his 2 decades in the highest office as prime minister. During his tenure in that office Dr. Mahathir had to deal with recalcitrant rulers knowing full well where that power lies. That power remains with the prime minister and his parliament to this day.

When Umno was declared illegal, the YDPA then did not sack the government if such a constitutional power did indeed exist in his hands. This is because Dr. Mahathir “continued to command the confidence of the majority of the House” and the YDPA had to bow to that constitutional demand.

The YDPA like everyone else is bound by the Constitution. And the person with a grip on that Constitution is the prime minister of the day as head of parliament, the government and the legislature.

Dr. Mahathir's petition (as he calls it) lacks legal standing, enforceability and has no legal effect in any sense. Regardless of who the petition is presented to and for what purpose it was created, it remains a document of questionable legality and mandate.

Many of the 'signatories' on the Mahathir document have claimed they never lent their names or signatures to the 'petition'. Many more claim they were misled as to its contents. The YDPA acting on the counsel of his advisors did the right thing by refusing to dignify Dr. Mahathir's unlawful unconstitutional request.

Under what legal or constitutional power, authority, mandate or precedent Dr. Mahathir acted in creating his petition is not known. Dr. Mahathir has no constitutional standing to 'advise' or approach the YDPA in this respect. He is not a minister of the crown and has no standing.

In the context of the Constitution it is clear that the YDPA has no powers or authority the YDPA can call on if he were to constitutionally remove his prime minister.

The difficulty for constitutional courts and judges in Malaysia interpreting the Constitution on such matters arises from the fact that unlike most other constitutions, there are no known principles or codified rules for judges to resort to when dealing with matters of constitutional law. As a result Malaysian judges are compelled to draw from examples and precedents in the commonwealth particularly those of Britain and India when having to deal with problems relating to the interpretation of the Constitution. And that too comes with its own set of attendant problems. India is a republic and has no monarchy. Britain on the other hand relies heavily on its constitutional conventions than it does on any piece of legislation in this respect.

The history of Constitutional interpretation in Malaysia's courts is riddled with inconsistencies and general confusion.

In extreme situations the YDPA may be called upon to suspend the normal functions of government or to remove government during an insurrection, war, civil war, emergency, insanity or incapacity of the prime minister. In the Malaysian context these contingencies, the threshold for the YDPA's intervention is a lot higher than it is thought to be by some.

The circumstances that triggered the sacking in 1975 of the Whitlam government of Australia were dire and exceptional. There are no parallels with the Malaysian system and its constitution. And the kind of monarchy and parliamentary system of government Malaysia enjoys is not identical in many ways to that of Australia's.

Prime Minister Whitlam's actions that triggered the sacking by his governor general in 1975 by some academics and commentators an action akin to that of a coup. Whitlam's actions were not only unconstitutional they *were* downright illegal and constituted a threat to national security.

The last sacking of a government in the UK (and its prime minister in the UK occurred during the reign of William IV.

As head of parliament which is sovereign and the only legislative body with a lawful mandate and capacity to make and unmake laws, parliament under the prime minister may dethrone the YDPA, disentitle the rulers and extend the life of parliament or suspend it altogether. These are but some of the powers of the government.

The reigning YDPA of Malaysia DYMM Sultan Abdul Halim is a man of wisdom, a good temperament and experience in the office he holds today as YDPA. No other reigning Sultan can claim that level of experience he has having now served two terms in the office of YDPA. The YDPA's refusal to accede to Dr. Mahathir's request supported by that petition was a sound decision.

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