Court vs State: The Battle of 198

BY **PARAM CUMARASWAMY**

IT WAS always thought that removing a judge under our Constitution was virtually impossible. It was thought that the procedure laid out in Article 125 of the Constitution was cumbersome though such procedure was designed to protect judicial independence. No one even dreamt that within a space of 4 1/2 months three senior Supreme Court judges could be dismissed under that same procedure. It took Tun Dr Mahathir Mohamad, the then prime minister, to show Malaysians how simple such operations were and how speedily they could be carried out.

In tracing the sequence to this whole saga we need to go back to the Supreme Court's decision in *John Berthelson vs. Minister of Home Affairs* delivered on Nov 3, 1986. The relationship between the Executive and the Judiciary began to show signs of strains from the date of that decision. In that case the Supreme Court quashed the decision of the Comptroller of Immigration in revoking a work permit of a foreign correspondent prematurely without giving him a right to show cause, a breach of the rules of natural justice.

Following that decision the prime minister went on record in an interview in *Time* magazine to say the following which clearly showed the kind of Judiciary he wanted: "The Judiciary says (to us) 'Although you passed a law with a certain thing in mind, we think that your mind is wrong and we want to give our interpretation.'

"If we disagree, the courts will 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. If we find out that a court always throws us out on its interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish".

That startling statement of the prime minister appearing in an international periodical triggered the Leader of the Opposition Mr Lim Kit Siang, to cite the prime minister for contempt. The case was heard by Justice Harun Hashim. On dismissing the application Harun made the following remarks:

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Lim Kit Siang appealed to the Supreme Court. The Bench was presided by Tun Salleh Abas, the Lord President. In dismissing the Appeal the Supreme Court observed as follows:

"Viewed objectively and dispassionately and in proper perspective the excerpt complained of appears to be an articulation of the Executive's frustration in not being able to achieve its objects in matters where the intervention of the courts has been sought to some avail, and the way the position is expressed, perhaps somewhat injudiciously in that it may not inconceivably well be open to misconstructions, does not amount to an attack on the courts as to constitute a contempt, but only stems, in our view, from a misconception of the role of the courts."

All those remarks of Harun and the Lord President infuriated the prime minister.

Thereafter there were few more applications for judicial review of ministerial decisions before the courts, some being allowed and the ministerial decisions struck down. Among them was the application by Aliran to review the Minister's refusal to grant a licence to print their monthly periodical in Bahasa Malaysia. Harun who heard the application directed the Minister to reconsider the application and grant the licence. Another was the injunction

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against the award of tender to UEM over the North South Highway project on grounds of allegation of corruption.

The prime minister went on record protesting that the courts were encroaching into the powers of the Executive. He felt that this branch of the administrative law which he referred to as "unwritten law" would interfere and retard government's efforts in developing the nation. He asserted that ministerial decisions made in the exercise of discretions given under the statutes should not be interfered with by the Judiciary. Whether such decisions were exercised correctly and in accordance with the law is for the people ultimately to decide at the ballot boxes.

In another case the constitutionality of a provision in the Criminal Procedure Code enabling the attorney-general to have a case transferred from the lower court to the High Court was challenged as being violative of the judicial power vested on the courts under Article 121 of the Constitution. The Supreme Court by a majority struck down the provision in the Code.

In August 1987 Malaysians commemorated the 30th Anniversary of their independence. Two major seminars were held in Kuala Lumpur – one organised by Aliran and the other by the Law Faculty of the University of Malaya, officiated by Tunku Abdul Rahman and HRH Sultan Raja Azlan Shah respectively.

Both seminars concluded with a call for a review of the Constitution in the light of experiences over the 30 years for the purpose of improving it. The conclusions of the seminar received wide publicity. The prime minister blew his top. He publicly said that "these so called intellectuals wanted to change the Constitution for their benefit using former leaders and the press".

In another episode Harun after opening a student's seminar spoke to the press and suggested an amendment to the Constitution over the composition of the Senate. That remark sparked off a series of attacks by the prime minister accusing the Judiciary for involving itself in politics.

By this time the prime minister was encountering problems within Umno. Dissident members of the party who could not get satisfactory redress within the party procedures took their grievances to court. In one application Harun declared Umno unlawful. The prime minister's political position was at stake.

As a result of the nationwide sweep of detentions under the notorious Internal Security Act 1967 in October 1987, habeas corpus applications became necessary. Among the several of such applications, Karpal Singh's application was a sore point for the prime minister, as the High Court Judge in Ipoh allowed the application. Karpal's freedom was shortlived. Soon after being released by the court he was re-arrested and detained again under the ISA.

In December 1987 when the prime minister moved the amendments to the Printing Presses and Publications Act and the Police Act, he made scathing attacks on the Judiciary again. Thereafter in March 1988 when he moved in Parliament amendments to Article 121 of the Constitution, he made further virulent allegations against the courts and in particular against two judges.

Moreover, those amendments were moved and passed by the Dewan Rakyat in lightning speed when 10% of the Malaysian electorates were not represented in the House. Those members were detained under the ISA.

Those statements not only were contemptuous but the attacks on the conduct of two judges violated Article 127

of the Constitution. Yet no action was taken against him under Parliamentary procedures.

The amendment to Article 121 of the Constitution removed the judicial power from the courts, undermining a basic fabric of the Constitution i.e. the doctrine of separation of powers in the government.

Up to September 1987, Salleh as Lord President was patient amidst these open, blatant and wild attacks on the Judiciary. He had gone on record to that effect when he said in September 1987 "I do not wish to comment. I think the best thing to do now is to keep quiet and let the matter rest."

But when he noticed that the attacks became more intense and repetitive it became a concern to him as head of the Judiciary. It was then that he went public in defence of the Judiciary in response to the prime minister's allegations. The forums at which he spoke were legal or academic.

Following the prime minister's speech in March 1988 when he moved the Constitutional Amendment Bill, several judges expressed concern. Salleh called a conference of judges on March 25, 1988. Because of short notice it was not possible to call the outstation judges. The meeting was attended by 20 judges, including the Chief Justice of Malaya, Tan Sri Hamid Omar. The meeting discussed the various options opened to them to deal with the prime minister's criticisms.

It was agreed that a letter be written to the Yang di-Pertuan Agong with copies to the State Rulers expressing their concerns over the prime minister's remarks which they felt undermined public confidence in the judiciary. That was carried out and the letter sent.

On March 28, 1988 Salleh left for overseas. Before he left he gave instructions that sensitive appeals like the Umno II and Karpal's should not be fixed until he returned. He returned on May 17, 1988.

On his return he sat at a Supreme Court sitting in Ipoh. There in Ipoh, after discussing with the other judges fixed the Umno II appeal for June 13, 1988. Because of its implications on the nation he decided that the case ought to be heard by a full Bench of nine judges. He also fixed Karpal's habeas corpus appeal for June 15, 1988 before a quorum of five judges, the same quorum who heard the UEM appeal.

Both these appeals were of great interest to the prime minister. They were no doubt of great public interest too then.

The outcome of the Umno II appeal had far reaching consequences to his own political position. He would have been in a quandary if the appeal was allowed, as he had already formed a new party – Umno Baru after Harun declared Umno unlawful. From his speeches over the previous one year it was apparent that he feared the independence of the judges. Often he referred to it as too "fiercely independent".

The fear of these two cases being heard by a quorum as empanelled by Salleh was evidenced by the fact that on the very day Salleh received his letter of suspension, the two dates were vacated at the instructions of Hamid who became the Acting Lord President.

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– Justice Harun Hashim

As to the events which led to the suspension of the five valiant judges who went to the rescue to dispense justice which appeared to have been denied to Salleh are now well known. Their action will remain the highest watermark of judicial independence in Malaysia.

In January 1990 the Societies Act 1966 was amended to provide provisions applicable to political parties only. Among them is an ouster clause ousting access to courts to challenge, appeal against review or quash any decision of a political party on the interpretation of its Constitution or regulations or any matter relating to the affairs of the same party.

In conclusion, this entire saga in 1988 startled everyone and stunned the nation and the legal community overseas. But from the sequence of events traced above it was apparent that the prime minister was bent on producing a law that had to be interpreted according to the wishes of the Executive as he said in the *Time* magazine interview.

That he knew he could only achieve through a Judiciary made to his measure. The prime minister was heard repeatedly justifying his actions on ground that he acted strictly within the letter of the Constitution. He obviously failed to address his mind to the spirit of the Constitution.

The anguish and the agony the six courageous judges went through during those few months and in particular the three who were later dismissed were compensated by the respect they all commanded and continue to command from all those who believe in the independence of the Judiciary as a prerequisite for a democratic state. Indeed those six personified judicial independence.

Any review of the findings and recommendations of the two tribunals which were set up under Article 125 of the Constitution must be independent and credible. What is the process available? Under existing laws only a Royal Commission is feasible.

Even then who could be approached to sit in this Commission? Can the present sitting judges or even the senior retired judges be called upon to sit? Many of them, at least the senior ones, were there in the system in 1988 and may find it embarrassing to sit in such a Commission. At the height of the crisis, a leading Indian advocate described the Malaysian Judiciary then as being in a "collision course within".

The less senior ones would be too junior to adjudicate in this process. Can Chief Justices or senior judges from the Commonwealth be invited to sit in the Commission?

Even if there is political will to set up a Royal Commission and such a Commission is set up with appropriate competent judges appointed, could such a Commission be able to compel appearance for examination under oath the main actors in the saga, including Mahathir, Hamid and the then Attorney-General, Tan Sri Abu Talib Othman? Would not they all claim immunity from appearance and examination under existing laws, as they all held high public office then?

One other option is for the Commission to examine the reports of the two tribunals and advice on whether the findings and recommendations were in accordance with internationally and nationally recognised norms of justice. This process, however, will not establish the truth and culpability.

In the final analysis the Malaysian public will have to leave it to the conscience of those responsible. They will be made accountable to their Maker sooner or later for the severe damage they did to the Temple of Justice in Malaysia.

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