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The Hidden Story

By ©Datuk George Seah

The starting point of the crisis in the judiciary can be traced to the 1987 election of the President of UMNO, the dominant political party of the Barisan Nasional Malaysia.

In 1987 the then President of UMNO was Datuk Seri (now Tun) Dr Mahathir who was also the Prime Minister of Malaysia. The incumbent Seah: History will exonerate me for taking a stand received more than one hundred nominations from the UMNO branches for the Presidency of UMNO whereas his challenger Tengku Razaleigh, one of the three vice-Presidents of UMNO was nominated by slightly more than twenty branches of UMNO. The fact that the challenger in spite of receiving so few nominations had the audacity to mount a challenge came as a surprise to many pundits. However, when the secret ballots were counted, the result came as a shock to many, who had expected the incumbent to win by an overwhelming majority based purely on the great number of nominations he had received from the party's branches. Instead, Datuk Seri Dr Mahathir only won by a narrow margin of 43 votes.

An unlawful society

A civil suit was filed in the Kuala Lumpur High Court by eleven members of UMNO (referred to as the UMNO 11) seeking a number of reliefs including a declaration that the whole election of the 1987 office bearers at the UMNO General Assembly was unconstitutional, illegal and therefore null and void and of no effect.

The agreed facts listed 30 unapproved branches in four divisions and others. It seems to me that under the UMNO constitution each branch may elect up to a maximum of five delegates on the basis of one delegate for every 50 members. Each division may elect up to a maximum of 10 delegates on the basis of one delegate for every 500 members. This is on the assumption that the members of the division have paid up their annual subscriptions on or before 31 December of the previous year. A simple calculation would show that if the delegates from the 30 unapproved branches in 4 divisions had been excluded from the General Assembly, the outcome would have been very close due to the narrow margin of the votes between the winner and loser.

The High Court Judge, Dato Harun Hashim declared that UMNO was an unlawful society and the UMNO 11 "as members of UMNO, cannot acquire any right which is founded upon that which is unlawful. The Court will therefore not lend its aid to the reliefs sought by the Plaintiffs (UMNO 11). Having said that, I do not think it is necessary to deal with the other issues and I accordingly dismissed the Plaintiffs' claim".

It is clear that the High Court Judge purported to grant an Order which was not sought for either by the UMNO 11 or the Defendants. An appeal to the Supreme Court of Malaysia was lodged by UMNO 11. Tun Salleh Abas, the incumbent Lord President was suspended before the UMNO 11's appeal could be heard and disposed of.

Some 15 years later, after the recent death of Dato Harun on 30 September 2003, the following obituary appeared in the New Sunday Times, dated 5 October 2003 on page 10:

After Harun declared UMNO illegal, he only sought the Diarist's opinion on what was next. The Diarist speculated and also told Tun Salleh Abas what could happen in the event they persisted in their plan to have a full court hearing of the UMNO case. Tun Daim Zainuddin had intimated to the Diarist the Government's plan. They were simultaneously alarmed, sceptical and rather naive. The rest is history

Instructions given

When Tun Salleh Abas was the Lord President in 1987 the dates and places of the scheduled sittings of the Supreme Court of Malaysia for the year 1988 would have been finalized in the month of November 1987 and this information would have been published in The Malayan Law Journal in December 1987 or January 1988. Special sittings of the Supreme Court would be convened when the need arose at the request of the parties.

For the purpose of this article only the following sittings of the Supreme Court are relevant, namely 1988 ... 23 May 1988 (Ipoh); June 1988 (Borneo States) and 2 July 1988 (Kota Bharu).

The coram for the Ipoh sitting was made up of Tun Salleh Abas (presiding), myself and Tan Sri Hashim Sani. Although Tun Salleh Abas and I stayed in the same hotel, Tan Sri Hashim Yeop Sani decided to stay separately at Tambun Inn. At that point of time, nobody paid any particular attention to this.

In Ipoh Tun Salleh Abas finally made up his mind to appoint a panel of nine judges to hear the UMNO 11's appeal. Following this, the Senior Assistant Registrar (SAR) of the Supreme Court was given the undermentioned directions to convey to the Appellants' solicitors:

to prepare six additional Records of Appeal for the extra judges,

that the date had been fixed on 13 June 1988 for the hearing, and

to send out Notices for the Hearing of the Appeal to the parties' solicitors.

These instructions were given on 24 May 1988. On 27 May 1988 Tun Salleh Abas reported that he had been suspended from exercising his functions of High Office with retrospective effect from 26 May 1988.



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The Chief Justice of the High Court of Malaya, Tan Sri (now Tun) Abdul Hamid, was appointed Ag Lord President and, on assuming office, the acting Lord President vacated the 13 June 1988 hearing date.

Sent to Kota Bharu

I now come to the June 1988 sitting of the Supreme Court in the Borneo States (as they were then known). The coram for this session consisted of Tan Sri Lee Hun Hoe (presiding), Tan Sri Wan Suleiman and Tan Sri Mohd Azmi.

For personal reasons, Tan Sri Mohd Azmi was unable to make the trip and he asked me to take his place, which I accepted.

The next sitting of the Supreme Court was at Kota Bharu and the original members of the panel were Tun Salleh Abas, Tan Sri Wan Suleiman and Tan Sri Hashim Yeop Sani. When Tun Salleh Abas was suspended, Tan Sri Wan Suleiman became the presiding judge and Dato Harun made up the third member.

When I returned from the Borneo States there was a letter on my table from the Ag Lord President, Tan Sri Abdul Hamid asking me whether I was free to replace Tan Sri Hashim Yeop Sani, albeit both the Ag Lord President and Tan Sri Hashim Yeop Sani knew very well that I had just come back from another sitting of the Supreme Court at Kuching and Kota Kinabalu. At the material time the Judges of the Supreme Court who were free and available were:

Tan Sri Mohd Azmi;

Tan Sri Abdoolcader and

Tan Sri Wan Hamzah.

Why didn't the acting Lord President pick any one of them to replace Tan Sri Hashim Yeop Sani in Kota Bharu? In my view, it was plain that the acting Lord President wanted me out of Kuala Lumpur so that I could be with Tan Sri Wan Suleiman in Kota Bharu.

Part II : Something's brewing in KL

Tan Sri Wan Sulaiman wants me back in the capital, but Tan Sri Hamid Omar directs me to stay put in Kota Baru

In the previous part of this article I mentioned that it was during the scheduled sitting of the Supreme Court in Ipoh that the Lord President, Tun Salleh Abas, finally decided to appoint a panel of nine judges of the Supreme Court to hear the UMNO 11 appeal. The Senior Assistant Registrar of the Supreme Court was directed to notify the appellants' solicitors to:

Prepare additional records of appeal for the six extra judges

Inform the parties' solicitors that the appeal had been fixed for hearing on 13 June 1988 in Kuala Lumpur

These instructions were given in the presence of the late Tan Sri Hashim Yeop Sani and me.

We all know that a few days after this momentous decision, Tun Salleh Abas was suspended as Lord President of the Supreme Court and the appeal of UMNO 11 was not heard on 13 June 1988.

Back from Borneo; straight to Kota Baru

I also mentioned that when I returned from attending a sitting of the Supreme Court in the Borneo States in June 1988 I found a letter on my table of my chambers signed by the acting Lord President, Tan Sri Hamid Omar asking me whether I could take the place of Tan Sri Hashim Yeop Sani in the forthcoming scheduled Supreme Court sitting at Kota Baru. The acting Lord President knew that:

I had just returned from a sitting of the Supreme Court in Borneo (taking the place of Tan Sri Mohamed Azmi, who was unable to go for personal reasons),

I had completed a scheduled sitting of the Supreme Court in Ipoh in May 1988 with Tun Salleh Abas (presiding) and Tan Sri Hashim Yeop Sani, and I had also finished a scheduled sitting of the Supreme Court in Penang in February 1988 where the presiding Judge was Tan Sri Hamid Omar (Chief Justice of the High Court in Malaysia), Tan Sri Abdool-cader and me.

Why did the acting Lord President want me to go to Kota Baru and indirectly out of Kuala Lumpur when he was aware that I had been involved in sittings in the Supreme Court in February, May and June 1988 and when there were three other judges of the Supreme Court who were free and readily available, namely, Tan Sri Mohamed Azmi, Tan Sri Abdoolcader and Tan Sri Wan Hamzah?

The original coram was made up of the following: Tun Salleh Abas (presiding), Tan Sri Wan Sulai-man and Tan Sri Syed Agil.

When Tan Sri Syed Agil retired he was replaced by Tan Sri Hashim Yeop Sani. After Tun Salleh Abas was suspended, Tan Sri Wan Sulaiman became the presiding judge and the other members were Tan Sri Hashim Yeop Sani and Datuk Harun Hashim.

For some unknown reasons, Tan Sri Hashim Yeop Sani was unable to go to Kota Baru in July 1988 and the acting Lord President had asked me to take his place — notwithstanding that I had just returned from sitting in the Borneo States and three judges of the Supreme Court were available at that point in time.

Why did they want me out of KL?

I ventured to suggest why certain people wanted me out of Kuala Lumpur in July 1988 and the reason was contained in section 44 of the Courts of Judicature Act 1964, which reads:

Incidental directions and interim orders 44(1) In any proceeding pending before the Supreme Court any direction incidental thereto not involving the decision of the proceeding, any interim order to prevent injustice to the claims of parties pending the hearing of the proceeding, any order for security for costs,

and for the dismissal of a proceeding for default in furnishing security so ordered may at any time be made by a Judge of the Supreme Court. (2) Every application under subsection (1) shall be deemed to be a proceeding in the Supreme Court. (3) Every order so made may be discharged or varied by the Full Court.

During the time when I was a Judge of the Supreme Court from 1983 to 1988, I had occasions to invoke this provision by granting ex parte application for an interlocutory injunction on condition that Notice of Appeal be filed and by the applicant's solicitors the following day. Tan Sri Hashim Yeop Sani definitely knew of the interlocutory injunctions/orders made under this section. Furthermore, if Tan Sri Wan Sulaiman was to fly to Kota Baru to preside over the schedule sitting of the Supreme Court in July 1988 I would be the most senior judge of the Supreme Court in residence in Kuala Lumpur due to the absence on official duties of the undermentioned Judges, namely:

Tun Salleh Abas, President, under suspension

Tan Sri Hamid Omar, Chief Justice of the High Court in Malaya, and

Tan Sri Lee Hun Hoe, Chief Justice of the High Court in Borneo, on duty in the Tribunal to consider the charges against Tun Salleh Abas

Tan Sri Wan Sulaiman in Kota Baru

The practice at the time was for the senior judge of the Supreme Court to deal with urgent ex parte application made under the provisions of section 44 of the Courts of Judicature Act 1964.

PM Cannot Summon Top Judge To His Office

I will pause here to say a few words about the Supreme Court — the third pillar which supports the framework of government based on parliamentary democracy. The other pillars are Parliament and the Executive. Each of them has been assigned different functions, namely

Parliament (which is made up of MPs elected by the People) to enact laws

Executive (Cabinet) to govern the country, and

the Supreme Court (i) to decide the constitutionality and legality of laws passed by Parliament, (ii) to determine disputes between the Federation and state(s) or between state and state in the Federation, as well as (iii) disputes between Federation and people, between state and people and between people and people.

Each of the three pillars is accorded the same status and position and the question of supremacy does not arise, if one understands the concept of parliamentary democracy. What this mean in layman's terms is simply this:

That the Prime Minister has no power to direct the Lord President of the Supreme Court to come and see him in his office. If the Prime Minister of the Federation wishes to see the Lord President of the Supreme Court, he must find a neutral venue for the purpose. In short, the Lord President is not beholden or subservient to the Prime Minister.

I think it is convenient for me to touch on the position of Judges of the Supreme Court.

Judges of the Supreme Court are equal in status and the Lord President is merely the first among the ten members of the Supreme Court. What this means in practice is this:

The Lord President has no power to direct any Judge of the Supreme Court to do this or that without his consent; to construe otherwise would impinge on his independence, which is the cornerstone of the

impartiality of the Supreme Court.

This was accepted and recognised by the acting Lord President, Tan Sri Hamid Omar, when he sent me a letter (following my return after completing a session of the Supreme Court in the Borneo States) asking me whether I was free to replace Tan Sri Hashim Yeop Sani in the forthcoming sitting of the Supreme Court at Kota Baru in July 1988. I should point out that the acting Lord President did not direct me to replace Tan Sri Hashim Yeop Sani but asked whether I was free to do so. This is important because subsequent events would show that this accepted constitutional position of the Judges of the Supreme Court seems to have been disregarded.

Being a conscientious Judge of the Supreme Council, I informed the acting Lord President that I would be free to take the place of Tan Sri Hashim Yeop Sani albeit there were three other Judges available at that time, namely Tan Sri Mohamed Azmi, Tan Sri Abdool-cader and Tan Sri Wan Hamzah. Following my acceptance, the composition of the Kota Baru Supreme Court would consist of:

Tan Sri Wan Sulaiman (presiding)

Datuk George Seah and

Dato Harun (who had just been elevated from the High Court to the Supreme Court in 1988).

Conflicting requests

Dato Harun and I flew to Kota Baru in the morning and checked into our hotel. In the afternoon I received a telephone call from Tan Sri Wan Sulaiman telling me that he had decided to remain in Kuala Lumpur and asked me to return, if possible the same day. This means that the Kota Baru session of the Supreme Court would be cancelled. I informed Dato Harun about the contents of Tan Sri Wan Sulaiman's message and that I would be flying back to Kuala Lumpur the same afternoon if I could manage to get a seat in the plane. Dato Harun was non-committal. I then went out for a walk in Kota Baru town and to check with MAS office about the availability of seats to Kuala Lumpur.

When I returned to the hotel, the front-desk clerk informed me that Dato Harun would like to see me in his room. I went up and saw him. Dato Harun relayed a message from acting Lord President Tan Sri Hamid Omar directing me (i) to remain in Kota Baru and (ii) to take over from Tan Sri Wan Sulaiman as the presiding judge of the Supreme Court sitting. As there were only two judges of the Supreme Court in Kota Baru at that point of time, namely myself and Dato Harun, I listened in silence, having regard to the provisions of section 38(1) of the Courts of Judicature Act 1964 that

"Subject as hereinafter provided every proceeding in the Supreme Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Lord President may in any particular case determine ..."

I returned to Kuala Lumpur the same evening after notifying Dato Harun accordingly.

I will explain why I took this course of action in the next part of my article.

Part III: Drama in the capital

Dato Harun stays back in Kota Baru while Datuk George Seah flies back to Kuala Lumpur

In my previous article I said I would explain why I returned from Kota Baru to Kuala Lumpur. To have a better understanding I need to recapitulate the relevant facts:

Firstly, the original panel of the Kota Baru sitting of the Supreme Court consisted of Tun Salleh Abas (presiding); Tan Sri Wan Sulaiman and Tan Sri Hashim Yeop Sani.

After the suspension of the Lord President, Tun Salleh Abas, the new coram was made up of Tan Sri Wan Sulaiman (presiding), Tan Sri Hashim Yeop Sani and Dato Harun Hashim.

When Tan Sri Hashim Yeop Sani was unable to go to Kota Baru for personal reasons, the acting Lord President, Tan Sri Hamid, asked me — following my return from a sitting of the Supreme Court in the Borneo States when I agreed to

replace Tan Sri Mohamed Azmi — whether or not I was agreeable to taking the place of Tan Sri Hashim Yeop Sani. I agreed albeit there were three other Judges of the Supreme Court who were available at that point of time, namely Tan Sri Mohamed Azmi, Tan Sri Abdoolcader and Tan Sri Wan Hamzah. It was abundantly clear that somebody wanted me out of Kuala Lumpur although I did not see the point at that time.

When I was in Kota Baru with Dato Harun, I received the undermentioned messages:

From Tan Sri Wan Sulaiman: instructing me to return to Kuala Lumpur immediately, and

From Tan Sri Hamid, instructing me to remain and to take over as presiding judge of the Supreme Court, if Tan Sri Wan Sulaiman should fail to turn up in Kota Baru. This message was relayed to me by Dato Harun when I saw him in his hotel room.

Why I flew back to KL

After due consideration I preferred and accepted the suggestion of Tan Sri Wan Sulaiman to that of the Acting Lord President, Tan Sri Hamid, for the following reasons, namely:

1. I had agreed to replace Tan Sri Hashim Yeop Sani in the Kota Baru sitting of the Supreme Court and this was done with my express consent.
2. But I had never agreed to be the presiding judge of the Kota Baru Supreme Court in the absence of Tan Sri Wan Sulaiman.
 - a. Further, the acting LP, Tan Sri Hamid, had no power to direct me to be the presiding judge of the Kota Baru Supreme Court without my consent.
 - b. And if the acting LP had purportedly invoked section 38(2) of the Courts of Judicature Act 1964 and to dispense with my consent, with respect, it is my contention that this provision of the subsection did not apply in the context of this case.

In my opinion, the subsection can only apply if two conditions are satisfied, namely

- i. the coram must be presided by the LP and in his absence, the senior member of the Supreme Court shall preside;
- ii. this postulates that the senior member of the Supreme Court must agree to sit as a member of the Court in the first place, and with his consent.

Here, I must reiterate I was not a member of the original panel of the Supreme Court. Second, I was only requested to take the place of another member of the Court. Third, I did not consent at any stage to be the presiding judge of the Court. Lastly, in the absence of the presiding Judge, Tan Sri Wan Sulaiman, the other member in Kota Baru at that point of time was Dato Harun, and section 38(1) expressly stipulates that 'every proceeding in the Supreme Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the LP may in any particular case determine'.

In any case, at this juncture, there were only two Judges in Kota Baru and therefore Section 38(1) could not take effect.

Another reason was that as Chairman of the Tribunal set up to investigate the serious charges against suspendend LP Tun Salleh Abas, acting LP Tan Sri Hamid should not, in my opinion, have been concerned with proceedings in the Supreme Court of Malaysia that was scheduled to take place. It was very clear that these functions would be performed by the senior judge (namely Tan Sri Wan Sulaiman) in the then hierarchy of the Supreme Court under section 9(1) of the Court of Judicature Act 1964 and Article 131A of the Federal Constitution.

My view was later supported by four other members of the Supreme Court on 2 July 1988 and they were:

1. Tan Sri Wan Sulaiman,
2. Tan Sri Mohamed Azmi,
3. Tan Sri Abdoolcader and
4. Tan Sri Wan Hamzah.

Only the acting LP Tan Sri Hamid held a contrary minority view on the interpretation of section 9(1) of the Courts of Judicature Act 1964 and Article 131A of the Federal Constitution.

I alone flew back from Kota Baru to Kuala Lumpur in compliance with the suggestion of Tan Sri Wan Sulaiman, the most senior judge then, while Dato Harun remained in Kota Baru.

An Ajaib decision

Meanwhile, Tun Salleh Abas had filed a suit in the High Court at Kuala Lumpur challenging the constitutionality and legality of the Tribunal headed by Acting LP Tan Sri Hamid. Tun Salleh Abas also applied by way of an *ex parte* motion for an Order of Prohibition against the members of the Tribunal from proceeding or deliberating or exercising any function under Article 125 of the Federal Constitution and for other reliefs.

The application came before Dato Ajaib Singh, a judge of the High Court at Kuala Lumpur, on Saturday, 2 July 1988.

To prevent the impugned Tribunal from presenting its recommendations to the Yang di-Pertuan Agong, the counsel for Tun Salleh Abas, Raja Aziz Addruse, applied for an interim stay against the Tribunal till Monday, 4 July 1988 but this was refused by the learned Judge, Dato Ajaib Singh.

Urgent sitting

Tan Salleh Abas' counsel, Raja Aziz, immediately went to see Tan Sri Wan Sulaiman, the most senior Judge in residence in Kuala Lumpur. Tan Sri Wan Sulaiman convened a special sitting of the Supreme Court consisting of five Judges to hear the *ex parte* application on the grounds of grave urgency on Saturday, 2 July 1988, acting pursuant to section 9(1) of the Courts of Judicature Act 1964 and Article 131A of the Federal Constitution.

Counsel submitted that Tun Salleh Abas's Tribunal was in the final stage of finalising the Report to be submitted to the King. Hence the great urgency and this persuaded the five Judges of the Special Sitting of the Supreme Court to issue the Order of Prohibition immediately to prevent a grave injustice from being perpetuated.

After hearing the oral submissions of Counsel for Tun Salleh Abas, the five Judges of the Supreme Court consisting of

1. Tan Sri Wan Sulaiman (presiding)
2. Datuk George Seah
3. Tan Sri Mohamed Azmi
4. Tan Sri Abdoolcader and
5. Tan Sri Wan Hamzah

unanimously granted the Interlocutory Order prayed for.

In our unanimous opinion, the challenge on the legality and constitutionality of the Tun Salleh Abas' Tribunal should be determined first before any Report could be presented by the Tribunal to the King.

That the apex court could and would sit at short notice on grounds of grave urgency to prevent an injustice from taking place was recently demonstrated in the United Kingdom when the Court of Sessions in Edinburgh refused an application for an Interlocutory Injunction. Counsel immediately appealed to the House of Lords in London and the appeal was heard the very same day. Nobody had made any adverse comments on the procedure adopted by the appellant's solicitors.

Tan Sri Wan Sulaiman phones the deputy IGP

After the Interlocutory Order of the Supreme Court had been extracted and sealed, Tun Salleh Abas' solicitors proceeded to Parliament House to serve it on the Chairman of the Tribunal, acting LP Tan Sri Hamid. They, however, found the gate leading to Parliament House locked, thus effectively preventing them from serving the Interlocutory Order.

This obstacle was conveyed to Tan Sri Wan Sulaiman, who, after consulting with Tan Sri Abdoolcader, rang up the Deputy Inspector-General of Police. The Deputy IGP then directed the police constable who was stationed at the gate of Parliament House to open the gate to allow passage for Tun Salleh Abas' solicitors to effect service of the Court Order on the Chairman of Tun Salleh Abas' Tribunal. This was duly effected the same Saturday morning.

Five judges suspended!

Soon after, the five Judges of the Supreme Court who issued the Interim Order unanimously were suspended. This followed complaints made by acting LP Tan Sri Hamid to the Prime Minister, who in turn recommended to the Yang Di-Pertuan Agong to suspend the five Judges.

Incidentally, Tan Sri Hashim Yeop Sani was invited by Tan Sri Wan Sulaiman to be a member of the special sitting of the Supreme Court but Tan Sri Hashim replied that 'we will be staging a revolution'!

In my next article, I will touch on the charges against the five Judges of the Supreme Court and separate charges against Tan Sri Wan Sulaiman and myself.

Part IV

This Part will deal with the suspension of the five judges of the Supreme Court by the Yang Di-Pertuan Agong on the recommendation of the Prime Minister, Dato Seri Mahathir Mohamad following a complaint by the acting Lord President, Tan Sri Abdul Hamid.

The comments made here represent the personal views of the writer and are bona fide in the interest of justice.

Article 125(1) of the Federal Constitution provides that a Judge of the Supreme Court shall hold office until he attains the age of 65 years or such later time, not exceeding six months, as the Yang Di-Pertuan Agong may approve.

According to Article 125(2) a Judge of the Supreme Court may resign his office in writing under his hand addressed to the Yang Di-Pertuan Agong, but he shall not be removed from office except in accordance with the following provisions of the Article, namely:

(3) If the Prime Minister, or the Lord President after consulting the Prime Minister, represents to the Yang Di-Pertuan Agong that a Judge of the Supreme Court ought to be removed on the grounds of misbehaviour or of inability, from infirmity of body or mind or any other cause, to properly discharge the functions of his office, the Yang Di-Pertuan Agong shall appoint a tribunal in accordance with Clause 4 and refer the representation to it; and may on the recommendation of the tribunal remove the Judge from office.

(4) The said tribunal shall consist of not less than five persons who hold or have held office as judge of the Supreme Court, the Court of Appeal or a High Court, or, if it appears to the Yang Di-Pertuan Agong

expedient to make such appointment, persons who hold or have held equivalent office in any other part of the Commonwealth, and shall be presided over by the member first in the following order, namely the Lord President of the Supreme Court, the Chief Judges according to their precedence among themselves, and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of two members with appointments of the same date).

(5) Pending any reference and report under Clause 3 the Yang Di-Pertuan Agong may, on the recommendation of the Prime Minister and, in the case of any other judge, after consulting the Lord President, suspend a Judge of the Supreme Court from the exercise of his function.

PM cannot suspend highest court

It should be pointed out that Article 125 regulates the suspension and removal of a Judge of the Supreme Court. The Article does not provide for suspension and removal of more than one Judge of the Supreme Court. This is understandable because the Prime Minister has not been vested with power under the Federal Constitution to suspend the Supreme Court, which is the third pillar of a parliamentary democracy. Similarly, the King can remove the Prime Minister on constitutional grounds but, with great respect, has no power under the Federal Constitution to suspend Parliament. A fortiori, the Yang Di-Pertuan Agong has no vested power even under Article 150 of the Federal Constitution to suspend Parliament.

In my opinion, the subsequent suspension of the five Judges of the Supreme Court following the suspension of the incumbent Lord President, Tun Salleh Abas, was tantamount to the suspension of the Supreme Court. Nobody seems to have questioned the legality of the suspension of the five Judges of the Supreme Court at the material time and this constitutional point was not determined by the Tribunal set up to investigate the charges against the five Judges of the Supreme Court.

One of the charges relates to the interpretation of section 9(1) of the Courts of Judicature Act 1964 and Article 131A of the Federal Constitution.

All the five Judges of the Supreme Court were unanimous in their interpretation of section 9(1) of the 1964 Act in that the acting LP, Tan Sri Abdul Hamid, could not exercise the powers or perform the duties of his office (including his functions under the Constitution) by virtue of being appointed Chairman of the Tribunal set up under Article 125(4) of the Federal Constitution to investigate the charges against the incumbent LP, Tun Salleh Abas. A fortiori, the acting LP should distance himself from being involved, directly or indirectly, in any court proceedings brought by Tun Salleh Abas.

To hold otherwise, would rightly make a mockery of the independence and impartiality of the Judiciary, in the eyes of the general public. Acting LP Tan Sri Abdul Hamid seemed to think that he could continue to give directions pertaining to the civil suit filed by the suspended incumbent LP, Tun Salleh Abas, even while Tan Sri Abdul Hamid, was presiding over the Tribunal to investigate the charges against Tun Salleh Abas. The record would tend to show that the acting LP was keeping a keen eye on the development of the High Court application before Dato Ajaib Singh J when he was Chairman of the tribunal investigating Tun Salleh Abas.

Acting LP needed my consent

The charge against me was that I preferred to accept the direction of the presiding judge, Tan Sri Wan Sulaiman and return to Kuala Lumpur to that of acting LP Tan Sri Abdul Hamid, who directed me to remain in Kota Bharu and act as the new presiding judge, with Dato Harun as the third member. I was thus found guilty of ignoring the directive of the acting LP, Tan Sri Abdul Hamid.

I think in order to understand the charge, it is important to recapitulate the material background facts:

Firstly, I was not in the original coram of the Kota Bharu Supreme Court in July 1988 which consisted of: Tun Salleh Abas (Presiding), Tan Sri Wan Sulaiman and Tan Sri Hashim Yeop Sani.

Following the suspension of Tun Salleh Abas, the new coram was made up of: Tan Sri Wan Sulaiman (Presiding), Tan Sri Hashim Yeop Sani and Dato Harun Hashim (newly appointed from the High Court to the Supreme Court in 1988).

When Tan Sri Hashim Yeop Sani was unable to go to Kota Bharu, the acting LP asked whether I could

take Tan Sri Hashim Yeop Sani's place, as a member of the Supreme Court.

It should be remembered that I did not go to Kota Bharu to be the presiding judge of the Supreme Court. A fortiori, and with respect, the acting LP had no jurisdiction/power to direct me to be the presiding judge WITHOUT MY CONSENT. The acting LP cannot invoke the provisions of section 38(2) of the Courts of Judicature Act 1964 because the sub-section postulates that the incumbent Lord President was the presiding judge in a 3-member panel. In the absence of the LP, the senior member of the Court shall preside and the senior member must be deemed to know the provisions of Section 38(2) and must also be deemed to have consented.

Every member of the Supreme Court is of equal status and the LP is only the Head of the Court. As head, the LP has no power to direct another member of the Supreme Court to do anything without consent. When a coram of the Supreme Court is fixed, whether consisting of three, five, seven or nine judges, every member is deemed to have given his consent when he agrees to be a member of the panel.

Why I rejected the acting LP's requests

In this instance, I only agreed to fly to Kota Bharu to be a member of the coram to be presided over by Tan Sri Wan Sulaiman, a senior judge. When Tan Sri Wan Sulaiman failed to turn up, the acting LP cannot invoke section 38(2) of the 1964 Act because it did not apply. This subsection can only apply in the absence of the LP in that coram — only then the senior member of the court shall preside. The presiding judge of the Supreme Court carries a certain heavy responsibility and his consent must be sought before making the appointment.

I rejected the request of the acting LP to remain in Kota Bharu and act as the new presiding judge for the following reasons:

Firstly, I held and still hold the view that the acting LP had no constitutional power to direct me to be the presiding judge of the Kota Bharu sitting of the Supreme Court in July 1988 without my consent as I had only agreed to go there to take the place of Tan Sri Hashim Yeop Sani. I had never agreed to be the presiding judge with the most junior judge of the Supreme Court, Dato Harun and another junior High Court Judge to be appointed by the Acting LP, i.e. the resident Judge of the Kota Bharu High Court, in order to make up a 3-member panel.

Secondly, in my view, the laws of master and servant do not apply to judges of the Supreme Court and to hold otherwise, would impinge on the independence and impartiality of the Supreme Court Judges.

Thirdly, the Kota Bharu Supreme Court cannot sit in session because the two of us, Datuk Harun and myself, did not and could not constitute the coram under Section 38(1) of the Courts of Judicature Act 1964:

"Subject as hereinafter provided every proceeding in the Supreme Court shall be heard and disposed of by three Judges or such greater uneven number of Judges as the Lord President may in any particular case determine ...

Fourthly, I held — and still hold the view — that Tan Sri Wan Sulaiman's interpretation of section 9(1) of the Courts of Judicature Act 1964 was correct. Four other members of the Supreme Court — namely myself, Tan Sri Mohamed Azmi, Tan Sri Abdoolcader and Tan Sri Wan Hamzah — concurred with this view. All of them were later suspended.

Lastly, I think history will exonerate me for taking a stand and making the right decision in rejecting the request of the Acting LP to remain in Kota Bharu and preside over the sitting of the Supreme Court there without first obtaining my consent.

It is interesting to observe that during the whole episode, the acting LP did not at any time try to speak to Tan Sri Wan Sulaiman. All or almost all the requests had been directed to me in Kota Bharu.

History will be my judge

From a historical point of view I think I should mention:

- a. (i) A Judge of the Superior Court has never ever been dismissed from High Office on the grounds that he ignored the directions of the Chief Justice.

- ii. But I do remember a Chief Justice of England was executed when he failed to obey the orders of the King. In modern times a Chief Justice was reported to have disappeared when General Idi Amin became President of Uganda, following a military coup.

- b. I do not recall a Judge of the Supreme Court having been dismissed when his interpretations of the law differed from that of his Chief Justice.

- c. I do not recall the President of any country having ever acted to suspend the Supreme Court. This could only happen following a revolution.
 - i. I think King George III tried to suspend Parliament and lost his throne instead.

 - ii. After a coup d'etat, a military leader may suspend all forms of government arbitrarily and unlawfully.

Having said that, let me stress that history will be the judge whether or not I was guilty of misbehaviour as charged for faithfully discharging the functions of a Judge of the Supreme Court of Malaysia conscientiously and with the highest regard for the preservation of an independent Judiciary.

During critical and crucial times in the history of a nation, judges are expected to be the standard-bearers of justice. This is a moral obligation and under the circumstance they are expected to act positively and with a clear conscience.

The five of us who were embroiled in this difficult episode of the 1988 judicial crisis did not rally around the suspended LP but rather responded to the call of duty in the interest of justice.

No matter how facts are twisted, in the eyes of God, Truth will prevail from the 1988 Judicial Crisis.

Part V Colonels judging the generals?

Firstly, the aftermath of the suspension of the Lord President, Tun Salleh Abas, unfortunately prevented the learned judge from being the first LP to preside over a historic coram of nine judges of the Supreme Court to hear the long-awaited UMNO 11 appeal. Indirectly, the full bench of the Supreme Court was stopped from hearing and determining the validity and legality of the controversial 1987 UMNO Presidential election. The outcome of that decision would have decided who would have become the legitimate Prime Minister of Malaysia. By convention, the Yang Di-Pertuan Agong would invite the President of UMNO to form the Executive Branch of the Government. It is therefore clear to every member of UMNO that in order to be eligible to be Prime Minister of the Government of Malaysia, he had to be legitimately elected the President of the Party.

Two corams

Following the suspension of the LP, the UMNO 11 appeal was subsequently heard and disposed of by another panel of the Supreme Court consisting of both Supreme Court and High Court judges and presided over by Tan Sri Hamid Omar. The panel of judges comprised:

Tan Sri Hamid, acting LP and Chairman of the First Tribunal set up to investigate the charges against Tun Salleh.

Tan Sri Lee Hun Hoe

Tan Sri Hashim Yeop Sani

Datuk Mohamad Yusof

Datuk Gunn Chit Tuan

The appeal was dismissed on 9 August 1988, one day after Tun Salleh was officially removed from office. I will have something to say later about the High Court judges who were appointed to hear this UMNO 11 appeal.

The general public would be interested to know which of the two corams of the Supreme Court, should actually have heard and determined the UMNO 11 appeal, which would have indirectly decided the destiny of the country:

the one that was to be presided by the LP, Tun Salleh Abas, and made up of a full bench of nine judges of the Supreme Court, or

the second panel consisting of both the judges of the Supreme Court and High Court and presided over by Tan Sri Hamid?

Supreme Court suspended

The suspension of the five judges of the Supreme Court had effectively prevented/barred these Judges from hearing and determining the constitutionality, legality and validity of the Tribunal that was set up to investigate the charges brought against the incumbent LP, Tun Salleh Abas. If these Judges of the Supreme Court were to rule that the Tribunal investigating the LP had not been constitutionally, legally, validly and properly constituted — a high probability considering the fact that a majority of the members who made up the said Tribunal were not eligible and qualified to sit — the effect of such a Ruling would have been horrendous for the Government.

I have already touched on the constitutionality, legality and validity of the suspension of five Judges of the Supreme Court. I had pointed out that the Federal Constitution only provides for the suspension and removal of a Judge of the Supreme Court on the grounds of misbehaviour or of inability, from infirmity of body or mind or any other reason, properly to discharge the functions of his office. It is my considered opinion that the suspension of the five Supreme Court Judges, coupled with the suspension of the incumbent LP, Tun Salleh Abas — which amounted to 6 out of 10 members or 60 per cent of the Supreme Court — was tantamount to the suspension of the entire Supreme Court.

The Federal Constitution does not, directly or indirectly, contain any provision whatsoever for the suspension of the Supreme Court. It must be remembered that the Supreme Court is the third branch of the Government based on parliamentary democracy with its inherent rights. Britain's King George III tried to interfere with the Judiciary and was subsequently dethroned.

Some 20 days after the Supreme Court of five Judges issued an Interlocutory Order restraining the Tun Salleh Abas Tribunal from presenting its recommendations to the Yang Di Pertuan Agong — pending the hearing and disposal of the civil suit that had been filed in the Kuala Lumpur High Court challenging the constitutionality, legality and validity of the composition of the said Tribunal — another Supreme Court was hurriedly convened. This comprised two Judges of the Supreme Court, namely Tan Sri Hashim Yeop A Sani and Datuk Harun Hashim and three High Court Judges, (namely Dato Mohd Yusof, Anuar and Datuk Gunn Chit Tuan). This hurriedly assembled Supreme Court set aside the Interlocutory Order issued by the 5-member Supreme Court made up of

1. Tan Sri Wan Sulaiman (presiding),
2. Datuk George Seah,
3. Tan Sri Mohd Azmi,
4. Tan Sri Abdoolcader, and
5. Tan Sri Wan Hamzah.

“Staging a revolution”?

I will pause to recall that Tan Sri Wan Sulaiman invited Tan Sri Hashim Yeop Sani to be one of the members of the Supreme Court in the belief that there was strength in numbers. The latter declined, saying, “We would be staging a revolution” — a preposterous statement, according to the late Tan Sri Abdoolcader. Based on the number of Judges of the Supreme Court sitting in the two corams — five in the first Supreme Court and two in the second Supreme Court — it was clearly established there were five Judges who were of the unanimous opinion that Tan Sri Wan Sulaiman had the power to act under section 9(1) of the Courts of Judicature Act 1964 read with Article 131A of the Federal Constitution. In contrast only two Supreme Court Judges and three High Court Judges in Malaya were of the view that Tan Sri Wan Sulaiman did not have such power when he convened the Special Sitting of the Supreme Court on 2 July 1988, which issued the Interlocutory Order restraining the Tun Salleh Abas’s Tribunal from “submitting any recommendation report or advice” to His Majesty the Yang Di-Pertuan Agong.

It is now up to the general public to judge which panel of the Supreme Court was right in the legal interpretations of section 9(1) of the Courts of Judicature Act 1964 and the provisions of Article 131A of the Federal Constitution: the one presided by Tan Sri Wan Sulaiman or the one presided by Tan Sri Hashim Yeop Sani. It is up to the citizens of this nation to conclude which Supreme Court acted in the best interest of justice.

It is true that the second Tribunal which was set up to deal with the charges against the five Judges of the Supreme Court later ruled that Tan Sri Wan Sulaiman intentionally convened the 2 July 1988 sitting of the Supreme Court in contravention of sections 38(1) and 39(1) of the Courts of Judicature Act 1964 and without the permission or knowledge of the acting Lord President, Tan Sri Abdul Hamid. It also ruled that such conduct reflected an irresponsible and improper attitude and tarnished the image of the judiciary and it was unbecoming of a person holding the office of a Supreme Court Judge.



“Colonels” sitting in judgment

It is pertinent to point out that the majority judgment of the Tribunal was signed by Datuk Edgar Joseph Jr, Dato Mohd Eusoff Chin and Dato Lamin, all Judges of the High Court in Malaya.

There were 26 Judges of the High Court in Malaya in 1988 and according to the list of High Court in Malaya published by the MLJ Vol 1, it would appear that

Datuk Edgar Joseph Jr was ranked No. 13,

Dato Mohd Eusoff Chin ranked No. 14, and

Dato Lamin ranked No. 25

To use military jargon, young colonels were appointed to sit in judgment against generals. It is a very apt description of this sad episode in our judicial history. It was an episode which plunged the judiciary into depths of despair.

I think it needs to be pointed out that there were at least 10 Judges of the High Courts in Malaya and Borneo then who were more senior than the three Judges in the second Tribunal. Ranks were ignored and apparently bypassed with scant respect for justice.

I leave it to the general public to judge for themselves the rationale for such appointments to the second Tribunal. When seniority did not count, when merit was of no consequence, what then was the criteria?

High Court judges elevated

Unsurprisingly, all the High Court Judges who were involved in the UMNO 11 appeal, in the Tun Salleh Abas’ civil suit and the Interlocutory Order and those in the Second Tribunal set up to deal with the charges against the five Judges of the Supreme Court were eventually elevated to the Supreme Court. Three of them were later appointed Chief Justices of the High Court in Malaya.

The three Malaysian High Court Judges in the Second Tribunal who delivered the majority decision recommending the dismissal of Tan Sri Wan Sulaiman and Datuk George Seah were all appointed to the Supreme Court. One of them was subsequently appointed Chief Justice of the Federal Court (the Supreme Court of Malaya was later renamed the Federal Court) and another promoted as President of the Court of Appeal.

Even Dato Ajaib Singh, who first heard and refused a temporary stay in the High Court in Kuala Lumpur, was later elevated to the Supreme Court.

There is yet another matter that needs to be mentioned. There was even a very serious allegation by the acting Lord President in his representation to the Yang Di-Pertuan Agong that he was informed that the five Judges of the Supreme Court "took the Seal from the Supreme Court registry even though the office was closed and the officers had gone home". But the Tribunal held that the acting Lord President was without doubt misinformed about this preposterous matter. It is, however, pertinent to note that no disciplinary action was instituted against the officer who supplied him with this false information.

Time for a judicial commission

I come to the most important constitutional issue arising from the aftermath of the 1988 Judicial Crisis.

The Federal Constitution is modelled along the lines of a parliamentary democracy, and the government is made up of the

Executive,

Parliament, and

Judiciary.

Each branch holds equal status and each branch has been assigned specific functions to perform their respective duties. In terms of protocol, the Prime Minister is the first among equals followed by the Speaker of the House of Parliament and the Lord President of the Supreme Court (now known as the Chief Justice of the Federal Court of Malaysia).

Since the Prime Minister and the Chief Justice hold equal rank constitutionally but bearing in mind that the Prime Minister is only the first amongst the three equals (the other being the Speaker of Parliament) I think, it is illogical to vest in the Prime Minister alone, the sole power to recommend to the Agong the appointments of the Chief Justice, Judges of the Supreme Court and High Courts in Malaysia. This power to make such recommendations should rest with the Judicial Commission. This anomaly appears to have been recognised and accepted by the British government in recent years. As a consequence of this, the British government has enacted a law setting up a Judicial Commission with plenary powers to appoint Judges in the higher judiciary in England.

I think the first Commonwealth country to remove the power of appointments of the higher judiciary by the Prime Minister was Sri Lanka.

Serious consideration ought to be given to amending the Federal Constitution to transfer the power of appointments of Judges in the higher judiciary from the Prime Minister (as is the present practice) to an independent Judicial Commission to be set up by Parliament.

This is aimed at avoiding a repetition of the 1988 Judicial Crisis and to ensure that the appointments to the Supreme Court and the High Courts in Malaysia are transparent and fair.

Opposition leader should head commission

I think I should give my personal views on the composition of members of the proposed Judicial Commission.

In the first place, the Prime Minister must not be involved, directly or indirectly, in these appointments. It follows that I am not in favour of the Prime Minister being appointed Chairman of the Judicial Commission. A fortiori, I am also against the Prime Minister nominating a person to be Chairman of the Judicial Commission. In my view, the Chairman of

the Judicial Commission which is meant to be an independent and impartial body, should be the leader of the Opposition in Parliament, with the Chairman of the Bar Council of Malaysia, as his deputy.

As regards the other members of the Judicial Commission, the details can be worked out after hearing the views of the people of Malaysia, if the proposal is acceptable in principle.

If the Federal Constitution is to be amended to cater for this change, perhaps opportunities should be given to the people to put forward suggestions to amend the Constitution to prevent the Prime Minister from holding more than one portfolio in the Cabinet at any time. This would be in line with the principles of parliamentary democracy.

Experienced judges needed

I would like to take this opportunity to relate a conversation I had with the late Tan Sri Abdul Kadir, the former Attorney-General of the Federation of Malaysia.

When I was appointed a Judge of the High Court in Borneo in 1969 I was under 38 years of age. According to the Judges' Remuneration Act, I would be eligible to a Judge's pension after completing 15 years of service and the pension would be equivalent to one-half of the last drawn salary.

I told the late Tan Sri jokingly that after the year 1984 I would theoretically be working on half-pay. He replied: "George, that is true but we need experienced judges in the higher judiciary ... "

I recalled this conversation with the late Tan Sri Abdul Kadir when I was in Kota Baru, Kelantan, vacillating whether to obey Tan Sri Wan Sulaiman's request to return to Kuala Lumpur or the directive of the acting Lord President, Tan Sri Abdul Hamid, to stay put in Kota Baru. Yes, we need experienced judges in the higher judiciary who can think independently and remain upright without betraying their conscience or sacrificing justice for personal aggrandisement.

Tan Sri Abdoolcader furious

For the purpose of posterity I think I should mention that prior to the hearing by the Second Tribunal of the charges against the five suspended Judges of the Supreme Court of Malaysia, there was an attempt to ask all the Judges concerned to admit that they were wrong in convening and attending the special session of the Supreme Court of 2 July 1988 without the permission or the knowledge of the acting LP, Tan Sri Abdul Hamid, (in contravention of the provisions of sections 38(1) and 39(1) of the Courts of Judicature Act 1964) and that they should apologise to the acting LP.

This suggestion was unanimously shot down by all the five Judges (having regard to our judicial interpretations of section 9(1) of the 1964 Act read with Article 131A of the Federal Constitution). As a matter of fact, the late Tan Sri Abdoolcader was furious with such a preposterous idea as all the five Judges of the Supreme Court were of the same opinion that Tan Sri Wan Sulaiman had acted correctly and properly pursuant to section 9(1). When you have committed no wrong and your conduct is in keeping with the law, where is the justification for pleading guilty and apologising?

"Hamid had no right to give me any order"

I would like to end this series with a reference to the great and famous Socrates:

On one occasion, Socrates refused to obey orders that were given him because he believed that such obedience would involve him in doing what he thought to be wrong. In a very inspiring way he stood his ground, "I did not care a straw for death; but that I did care very much indeed about doing wrong".

Socrates believed fervently that if a man knew a thing was wrong he should not do it and that those who knew what was right should always do it.

The greatest misfortune that could befall a man was to do a wrong deliberately and the greatest crime a man could commit against his state was to break the laws knowingly.

Socrates was speaking about obeying orders. It is equally applicable to all the Judges of the Supreme Court who are of equal rank and status, and the LP or the acting LP, for that matter, is merely the first amongst equals.

Tan Sri Abdul Hamid, with great respect, had no right to give me any order without my consent, because to do so would

impinge on the independence of the Judges of the Supreme Court.

That was the concluding instalment of a 5-part series.



Comments

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