PLEASE RETURN "JUDICIAL POWER" TO THE COURTS

By

The three branches of the Government are the Executive, Legislature and the Judiciary. The 1957 Constitution recognized them and vested the respective powers to each of them.

Thus, Article 39 provides:

*"39. The **executive** authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable….by him or by the Cabinet or any Minister…"*

Article 44 provides:

*"44. The **legislative** authority of the Federation shall be vested in a Parliament, which shall consist of the Yang di-Pertuan Agong and two Majlis (Houses of Parliament) to be known as the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives)."*

Article 121 provides (as amended after formation of Malaysia and secession of Singapore):

*"121(1). "Subject to Clause (2) the **judicial** power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status, namely—*

(a) one in the States of Malaya, which shall be known as the High Court in Malaya…; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak…."

Of the three, the first two last until today. However the words "*"Subject to Clause (2) the **judicial** power of the Federation shall be vested in"* in Article 121(1) had been substituted with the words *"There shall be"* by Act A704, section 8, in force from 10 06 1988.

That Article now simply reads:

***"121.** (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely—*

***(a)…**…"*

However, the words *"Judicial power of the Federation*" remain as the title to the Article.

As for the reason for the amendment, in this short article, suffice to say that beginning in the 1970s, the courts started introducing judicial review into the country's legal system, at

first, mainly in applications to quash the awards of the Industrial Court and later spread to executive actions. (See "Should the Industrial Court not be allowed to be what it was intended to be?" (04 03 2008) http://www.tunabdulhamid.my).

At that time, the Prime Minister was Tun Dr Mahathir Mohamad and the Attorney General was Tan Sri Abu Talib Othman. They were not happy with "the judges giving themselves power of judicial review."

They tried to halt the development by amending the relevant law. One example is section 33B (1) of the Industrial Relations Act 1967:

> "33B (1) Subject to this Act and the provisions of section 33A, an award, decision or order of the Court under this Act [including the decision of the Court whether to grant or not to grant an application under section 33A(1)] **shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court."**

However, their attempts failed. Finally, they must have thought that the effective way to halt the development was to remove the blanket "judicial power" from the courts and reemphasized that the courts' powers are as provided by federal law. Hence the amendment.

So, until today, going by the constitutional provisions, the judiciary is the only branch which is not "vested" with the power it is supposed to discharge.

Again, in this short article, I shall not discuss the cases decided on the amendment, except to say that in recent judgments, the Federal Court ruled that the amendment was unconstitutional on the ground that it violated two basic features of the Federal Constitution, namely, the doctrine of Separation of Powers and the Independence of the Judiciary. (See Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case (2017) 3 MLJ 561 and Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals (2018) MLJ 545)

In the first place, that amendment should not have been made. Now, like it or not, the Federal Court has declared it unconstitutional. Judicial review is now firmly entrenched as part of our administrative law even though, in my view, it had gone a bit too far so much so that, at times, it is treated almost like an appeal under the guise of judicial review just as constitutional interpretation is (mis)used to rewrite the Constitution. (See "Not for Judges to Rewrite the Constitution" (12 06 2017) http://www.tunabdulhamid.my).

The 1988 amendment had achieved nothing (a proposition I am unable to accept) but it is the law now. Tun Dr. Mahathir is now back as a reformed Prime Minister. Tan Sri Abu Talib has been recruited to assist the new government. From their statements, Tun Dr Mahathir, since he became Prime Minister and Tan Sri Abu Talib, when he was Chairman of SUHAKAM, both seem to have changed their views and are undoing what they did before. So, it should not be difficult for them to undo what they did 31 years ago with

regard to Article 121(1). They need only put back the words they had removed. It is like doing a small plastic surgery on the face and it looks good again.

If they do so, I am sure they would be seen as being magnanimous to admit the mistake they made three decades earlier. Or, at least, they are reasonable enough to change their minds given the change of circumstances. In any event, there is nothing to lose anymore.

I think the fact that PH government does not have a two-thirds majority is not an unsurmountable problem. Properly explained, I believe that even opposition parties will support it. It will be a good test of the maturity of our politicians.

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