

FEDERAL COURT ENCROACHING JURISDICTION OF PARLIAMENT: COMMENTS AND RESPONSE

By

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Comment 1

“Sir, I’m no lawyer and is just an ordinary Malaysian.

However, I am aware of politics in other parts of the world and know that without checks and balances in running the country it can lead to a very dangerous situation.

Remember Egypt? After the Islamic Brotherhood took power via democratic elections, they tried to change the constitution to form a theocratic government with power entrenched with the religious authorities (themselves of course!!) forever (NO more elections; see the hypocrisy). It took a military coup to restore democracy.

And in Turkey, the authoritarian Erdogan changed the Parliamentary system to a Presidential system so that he can remain in power.

Wouldn't your idea pose a risk that Malaysia, in future, may divert from the Westminster parliamentary system to being ruled, for example, by dictators and extremists.

Please enlighten me.”

Response

First, you talk about check and balance. Check and balance are provided by the Constitution. That is why the three branches of the government are given different functions. But, one branch cannot encroach the jurisdiction of the other in the name of check and balance.

That is exactly what happened in the case of Kesavananda Bharati v State of Kerala. Just because seven judges of the Indian Supreme Court thought that the members of Parliament could not be trusted to act responsibly, does it give them the power to effectively amend the Constitution which is the function of Parliament? The court was encroaching the jurisdiction of Parliament. That is why I posed the question:

If members of Parliament or the Executives think that Judges are corrupt, does that give them the power to transfer cases in court to be decided by them?

Next, you refer to Egypt. My reply is based purely on the facts I had read (I hope, I remember them correctly) and what is stated by you. Like it or not, the Islamic Brotherhood was voted into power by the majority of the voters. If they follow the

procedure laid down by the constitution in amending, which includes the repeal and substitution of the Constitution, they are doing something perfectly Constitutional. If you do not like it, your remedy is in the ballot box. If you cannot garner a majority to change the government, you simply have to live with it. That is what democracy is all about.

The army has no legal power whatsoever to wrestle the power of governing the country from an elected government, even if you like it.

But, if the elected government abolishes election and there is no way for the people to exercise their right to choose their government, through an election, then there is a constitutional crisis and we cannot expect a constitutional remedy anymore. That is when street demonstrations, *coup de tat* or even civil war come into play. The constitution is not working anymore.

But, we are not talking about such a situation. We are talking about a situation where the constitution is still functioning. Just because a few judges do not trust that Parliament will make sensible laws, does that give power to the court to take for itself the power of Parliament to amend the constitution? Is the reverse justifiable?

We may look at the situation in other countries. But for us, the answer is in Article 159.

With regard to Turkey, it is perfectly valid for a government to change from one form of democratic government to another, provided the procedure is followed. Politicians will always do whatever they can to remain in power. The remedy is in the ballot box.

You fear rule by dictators. With this judgment we are already ruled by a few unelected dictators: judges. We now have dictatorship of the judges.

Comment 2.

“In Semenyih Jaya, the court has done some shifting towards human rights jurisprudence. I give you two examples that are usually given. First, what if the Parliament were to amend the Constitution to abolish the election altogether and prolong its life forever? Secondly, what if the Parliament were to abolish the courts altogether?”

So, the basic structure principle is a kind of shield to prevent such abuses happening.

Have you thought about it?”

Response

I have answered the two examples given by you.

So, what the court is doing is to pre-empt the Parliament. Just because judges fear that Parliament may, in the future, in the eyes of the court, act irresponsibly in amending the constitution, the court, unconstitutionally, encroaches the jurisdiction of Parliament to “amend” the constitution by saying that some provisions cannot be amended at all by

Parliament, when the constitution clearly says that the power to amend the constitution lies in the Parliament and it does not say that certain parts of the constitution cannot be amended by Parliament. To put it crudely, just because you fear that A might kill B in the future, you kill A first. That is the Indian Supreme Court logic that we have imported into this country.

Comment 3:

“Tun Hamid, the ex CJ, cannot be right.

Kesavananda Bharati was an Indian case. It is world famous and has received the approbation of the top jurists the world over. It decided that Parliament cannot fiddle with, or whittle down basic rights entrenched in the Constitution.

Now, this ex CJ says, “I object to the introduction of the basic structure principle invented by judges of the Indian Supreme Court on ground of principle and nothing else.”

What do you think?”

Response:

It is not a legal argument that because it is an Indian case, (even if you are an Indian) and because it is world famous and has received the approbation of the top jurists the world over, (even if it is true) that it must be right.

We are concerned with Article 159 on the Federal (Malaysian) Constitution. Where does it say that court may decide which provision of the Constitution cannot be amended by Parliament?

Can the court rewrite the Constitution because it fears Parliament may abuse its powers? In other words, it is legally correct for the court to abuse its power first because it fears Parliament might abuse its powers in future?

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