

NATIONAL PROFESSORS COUNCIL
ROUND TABLE DISCUSSION: INDEPENDENCE OF THE JUDICIARY (UiTM)
10th June 2015

INDEPENDENCE OF THE JUDICIARY: MY PERSONAL EXPERIENCE

By

Tun Abdul Hamid Mohamad
(Former Chief Justice of Malaysia)

I am speaking from experience, not from perception or from books. I spent 21 years as an officer in the Judicial and Legal Service holding various posts, including Head of Prosecution. I spent 18 years in the Judiciary, making a total of 39 years. I presided in all courts in the country from the Magistrate's Court, Sessions Court, High Court, Court of Appeal to the Federal Court. I also presided the Special Court and sat as a Judge of the Syari'ah Court of Appeal. As a Judge of the Court of Appeal, I heard an appeal involving a Barisan Nasional Chief Minister of a State. The majority judgment which I wrote disqualified him from the post. As a Federal Court Judge, I presided the Federal Court hearing the appeal by Dato' Seri Anwar Ibrahim's first sodomy case. The majority judgment which I wrote acquitted and discharged him to the dislike of the ruling party and the Government. As Chief Justice, I presided the Special Court to hear a civil claim against the former yang DiPertuan Agong and reigning Ruler of a State. The unanimous judgment of the Court which I wrote ordered him to pay the plaintiff US1,000.000. (You can read all these judgments on my website).

Modesty aside, I think I can claim to be more qualified to speak from experience than anyone else in this hall, Dato' Mohamad Ariff Mohd Yusof included.

During the 21 years I was in the Judicial and Legal Service, including Head of Prosecution, no one interfered with my decision making.

What happened to me after I caused the Barisan National Chief Minister to be disqualified? In due course, I was promoted to be a Federal Court Judge.

What happened after the case involving the former yang DiPertuan Agong? First, he complied with the order and paid. Show me one country in which such a thing happens. Even the Queen of England is above the law. I attended a Conference of Constitutional Court Judges in Manila. A Constitutional Court Judge from a neighbouring country said, "*In my country even Ministers disregard the court order.*" In fact, at that conference, there was a Chief Justice of the Constitutional Court of a country without a court: his court had been abolished by the military in a coup-de-tat. Malaysians should learn to appreciate the position in their own country.

What happened to me after I acquitted and discharged Dato' Seri Anwar Ibrahim? Admittedly, the ruling party was not pleased. I was the most senior Federal Court Judge then. The posts of President of the Court of Appeal and Chief Judge (Malaya) were vacant. There was an attempt to bypass me. To me that is quite normal. It would be the same anywhere in the world. If I were to convict Dato' Sri Anwar and the Pakatan Rakyat were come to power immediately after that, do you think the

Pakatan Rakyat Government would make me Chief Justice? Your guess is as good or as bad as mine

In any event, after V K Lingam video tape was made public followed by the Commission of Inquiry, I was offered the job of President of the Court of Appeal and one month later, Chief Justice, backdated to the date of my appointment as President of the Court of Appeal.

When I retired I was appointed Chairman and member of various Committees and Commissions set up by the Government. Even in this condition, my views are still sought, occasionally.

In the 39 years of my career, never once did I receive a phone call or a note from, nor did anyone approach me on behalf of the Administration, Executives or politicians to direct, request, suggest or indicate that I should decide a case one way or the other. Yes, it is true that before I heard Dato' Seri Anwar Ibrahim's case, someone (not a Politician) did say to me *"If you do it right, one of the posts could be yours."* I replied, *"I don't know which way it will go. But I am prepared to retire as a Federal Court judge."* Later, I passed a remark, *"If anybody tries to influence me, I'll go up on the bench, declare it publicly and disqualify myself."* No one ever tried to influence me after that. I don't know about other judges.

You see, it all depends on you. It is the same as corruption. I'll tell you a true story. When I was a High Court Judge in Penang, I was hearing a civil suit involving a Chinese businessman from Singapore. He came to court with his colleague from Penang. My Chinese interpreter overheard their conversation. The Singaporean asked his Penang friend, *"Do you think this Judge can be bribed?"* The Penang man replied, *"This one, I don't think so."* You see they make their own assessment of the approachability of a Judge.

Now, I refer to Dato' Mohamad Arif. I knew that he stood for election on PAS ticket and lost. Yet, I recommended him for the post of Judicial Commissioner and it was accepted by the Government. Do you think the Pakatan Rakyat Government will appoint an UMNO man who had stood for election on Barisan Nasional ticket and lost, to be a Judge? Your guess is as good or as bad as mine. Dato' Arif was confirmed as a Judge and later promoted to the Court of Appeal. Frankly, I was quite disappointed with a few of his judgments. I could only hope that a higher court would reverse them. That is the system. Now, I would like him to tell us his experience: whether any politician or anybody in authority over him or representing the Administration had ever directed, suggested or indicated to him to decide a case in favour of the Government or whether he had ever received any threat, warning or reminder from any of them or whether anybody in authority had ever tried to interfere with his decision making?

Coming to all of you now. How many of you had had a personal experience of having a case in court in which you lost the case because the Judge or Judges were not independent? How many of you have read the full judgment of a controversial case before saying the court is not independent? I am quite sure that most people had already made up their minds as to what they want the result to be irrespective of the evidence adduced in court and the applicable law. If the result is in their favour, the

question of independence of the judiciary does not arise. If not and if the other party is the Government, the easiest excuse is that the Court is not independent. Yet, many people merely rely on what online newspapers and bloggers say. I'll tell you my personal experience. When I was offered the post of Chairman of a committee formed by the government, I said they would have to send a car to pick me up from my house for the meeting and send me back. An online newspaper reported, "*He asks for a car.*" (For your information, I made the same request to UiTM to come here today; in fact I even asked for an officer to assist me. Am I asking for another car plus a Personal Assistant?)

No one in Malaysian legal history has questioned the independence of the judiciary more than Dato' Seri Anwar Ibrahim, that too only when the court decides against him. Before me, on the first day of the appeal, he wanted me to disqualify myself, the real reason maybe because I come Permatang Tinggi Bakar Bata which is closer to Permatang Bertam, the kampung of Tun Abdullah Ahmad Badawi, the then Prime Minister than Cherok Tok Kun, his kampung. (Of course his lawyers tried to give some other reasons). When I refused his application, he stood up and criticised me and alleged that the court was not independent. When, at the end of the case, I acquitted him, he stood up and said, "*Thank you, My Lord. May God bless you.*" His lawyers stood up to make speeches to praise me. I told them to sit down because I knew that they would not make the same speeches if my judgment was against their client.

When he was acquitted by the High Court in the second sodomy case, he did not say the court was not independent. But when the Federal Court convicted him, the judiciary was not independent again. The mistake that the Federal Court Judges hearing the case made was that they walked out of the court giving the impression that they were running away. They should have straight away asked him to show cause why he should not be punished for contempt in the face of the court.

Quite often, people who criticise the independence of the Judiciary are themselves not "independent". To them the court is "independent" when it decides in their favour but "not independent" when it decides against them, especially if the opposite party is the Government? When the court bends backward or even rewrites the law under the pretext of interpretation, they call it "judicial creativity." If the court were to do that (I believe that has not happened in this country) I am sure they would say that the court had exceeded its jurisdiction! Independence of the judiciary is not one-sided. "*If separation of powers were to have any meaning, the three branches of the government must respect each other's jurisdiction. There should be no interference, no usurpation of powers either way.*" That is what I said in Karunairajah Rasiah v Punithambigai Ponniah (2004) 2 CLJ 321 (also available on my website), a Federal Court Judgment.

Appointment of Judges is always the prerogative of the Prime Minister or the President. In our case, we also have the Rulers Conference which is no rubber-stamping machine and the Judicial Appointments Commission. I was a member of the Judicial Appointments Commission for two terms after my retirement. Let me tell you that there is no politics there. Of course, the Prime Minister is not bound to follow the recommendation of the Commission. But, during my term, as far as I can

remember, there was not a case in which the Prime Minister rejected the recommendation of the Commission.

During my visit to the United States Court of Appeal, I asked whether the President had ever rejected a name recommended by a committee similar to our Judicial Appointments Commission. The answer was, *"The names have been approved by the President before they go to the committee."* (Perhaps the President of the United States is smarter in that sense.) Do not think that elected Judges are better. During the same visit to the United States, in answer to my question, we were told that most of the judges who had been charged for corruption were the elected judges. I asked the Judge briefing us, *"Suppose you were given the task of rewriting the Constitution of the United States, would you recommend that judges be elected?"* He replied, *"No way"*.

I will end with what Tun Mohd Suffian said to me in 1970's when I was a Deputy Registrar. He said, *"You know Hamid, when the Bar Council says we are pro-Government and the Government says we are anti-Government, it means that we are independent."*

The issue is not new.

Thank you.

tunabdulhamid@mail.com

<http://www.tunabdulhamid.my>

<https://www.tunabdulhamid.me>