

2

The tussle in Perak between the Sultan and the Mentri Besar

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This is a concise version of my article

The correct picture of what happened in Perak

It all started on 4 February 2009 when the then Metri Besar Dato' Seri Mohammad Nizar Jamaluddin requested the Sultan of Perak to dissolve the legislative assembly. He could only do so if he did not "command the confidence of the majority of the members of the Legislative Assembly" states Article XVI, Clause (6) of the Constitution of Perak. On February 5, the Ruler turned down the Mentri Besar's request which he could do under Article XVIII, Clause (2) (b). The clause says that the Ruler "may act in his discretion . . . [in] the withholding of consent to a request for the dissolution of the Legislative Assembly". Since the Ruler had rejected the Mentri Besar's request, the M.B. "shall tender the resignation of the Executive Council", states Clause (6) of Article XVI. But this the M.B. refused to do.

Now Article XVI, Clause (2) (a) gives the Sultan the discretionary power to appoint a Mentri Besar "who in his judgment is likely to command the confidence of the majority of the Assembly" to replace Nizar who had already admitted that he no longer had the support of the majority of the assembly. This means that the appointment of the new Mentri Besar Zambray Abdul Kadir was a proper exercise of the Sultan's "judgment" to appoint another Mentri Besar to replace Nizar who had admitted that he did not command the confidence of the majority of the assembly. However, the 10 exco members whose resignation should have been tendered by Nizar are still in office. There is Clause (7) of Article XVI which states that "the Executive Council other than the Mentri Besar shall hold office at His Royal Highness's pleasure". But the Sultan had forgotten to sack the Executive Council of the former Mentri Besar Nizar under Clause (7). The result is, the new Barisan Nasional Mentri Besar Dato' Zambray now has an exco of 10 opposition members. Since Article XVI, Clause (2) (b) limits the number of exco members to not more than 10 in the assembly, the new Mentri Besar's 6 new appointees to the exco have exceeded the quota and, therefore, their appointments are invalid.

But then what did the Sultan do that was wrong?

You may now ask, why is there so much bad talk about the Sultan of Perak? Some very harsh words were spoken of him - just go to the internet and you will see all the harsh things said about the ruler. But what did he do that is wrong? It is wrong because the Sultan saw Najib (who is the Deputy Prime Minister and the head of Barisan Nasional in Perak) without Nizar being present. Najib is not even an assemblyman of the Perak legislature - under Article XVI, Clause (2) all appointees of the Executive Council which includes the Mentri Besar must be members of the legislative assembly. The Perak Constitution does not constrain the Sultan to consult anyone or to follow his advice - therefore it was unnecessary for Najib to see him. It was only after he had seen Najib, that the Sultan summoned Nizar to inform him of his decision that he had decided not to dissolve the legislative assembly. As a former Lord President, who was then the highest judge in the country, the Sultan should know that it is improper to see an interested party alone without the other side being present before announcing his decision. That was his undoing. It was a fatal error on his part as it will affect his reputation and integrity. The general public might go away thinking he was biased. The personal discretion of the ruler to grant or not to grant the request should be exercised by him

without any suggestion or suspicion to any reasonable outsider that he was partial to one political party or a coalition of parties. This is about the appearance of impartiality - that justice should not only be done, but should be seen to be done. To put it shortly, it is about apparent bias in the decision making process. Every judge knows, unless he is bad judge, of this famous saying of Lord Chief Justice Hewart. In another famous passage, Lord Denning said in the case of *Metropolitan Properties v. Lannon* in 1969: "The court will not inquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right minded people go away thinking: 'The judge was biased'." Now you know why the people of Perak and elsewhere in Malaysia have been saying harsh things about the Sultan. It is very sad that Sultan Azlan Shah, who have been held in high esteem both internationally and by the populace, have, in a careless moment, lost his reputation for fairness and justice. It was shattered when the people go away thinking he had been influenced by Najib or that he has favoured Barisan Nasional. It does not matter whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think that he did. The die is cast and we cannot put the clock back. Hereafter, there may be many who will no longer believe in his speeches on good governance and the integrity of the judiciary. Their impression is that he does not practice what he preaches.

Can the courts do anything about it?

However, despite what I said, this does not mean that the Sultan's decision cannot stand - in the sense that it is a nullity and void. The courts would not declare it to be a nullity. Why? Because even though apparent bias was perceived, the exercise of the Sultan's discretionary powers could not be checked or opposed by the judges. He could only lose his reputation. The Sultan was merely exercising his discretionary power by virtue of his prerogative under Article XVIII, Clause (2) (b) when he decided not to dissolve the assembly. The common law of England that was in force on 7 April 1956 is embodied into the common law of West Malaysia by virtue of section 3(1) of the Civil Law Act 1956. Francis Bacon said in his *Essay, Of Judicature*, "Let judges also remember that Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; . . . that they do not check or oppose any points of sovereignty". To which Lord Denning adds his comment, "True enough if the Throne is occupied by a constitutional monarch as ours is. But the judges are not to be lions under the Government of the day - or of any Government. They are and must be independent of the executive government - ready to check or oppose it if it should in any way misuse or abuse power". Similarly, like the Queen of England, the Sultan of Perak is a constitutional monarch who has no power to rule, except for a couple of discretionary powers mentioned in Article XVIII, Clause (2) which are (a) the appointment of a Menteri Besar and (b) the withholding of consent to a request for the dissolution of the legislative assembly. These are exercisable by him personally and not as the executive government. As such the common law supports the view that a constitutional monarch could not be checked or opposed by the judges. In former times, the executive government was the King. In present day Perak, the executive government is in the Executive Council of the state assembly and not the Sultan. English decisions after 1956 supports what Denning said that judges must be independent of the executive government - ready to check or oppose it if it should in any way misuse or abuse power. These later decisions, i.e. after 1956, will be the common law of this country if they are applied by our courts.

It is unconstitutional for the Sultan to order Nizar

Apart from the couple of matters mentioned in Article XVIII, Clause (2) which are (a) the appointment of a Mentri Besar, and (b) the withholding of consent to a request for the dissolution of the legislative assembly, the Sultan of Perak has no power to order Nizar "to resign from his post as Mentri Besar together with the members of the state executive council with immediate effect". Also he has no power to declare "the posts of Mentri Besar and state executive councillors" vacant. In 1611 when the King of England, as the executive government, sought to govern by making proclamations, Sir Edward Coke declared that "the King hath no prerogative, but that which the law of the land allows him": see the Proclamations Case (1611) 12 Co. Rep. 74, 76. The prerogative which the law of the Constitution of Perak allows the Sultan are the discretionary powers mentioned in Article XVIII, Clause (2). So that when the Sultan had refused the request of the Mentri Besar to dissolve the assembly, the Sultan should have waited for the next step under the provisions of Clause (6) of Article XVI which was for the M.B. to tender the resignation of the executive council. Yet he chose to defy Clause (6) of the constitution of his own state by sidestepping its provisions. This was an unconstitutional show of pretended power - I call this a pretended power because it is a power which he never had at all.