The pretended power of dispensing with the law by regal authority as perceived in The tussle between the Sultan of Perak and the Mentri Besar

by
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No power, but only a discretion in the performance of two functions

By the *Laws of the Constitution of Perak*, the Ruler has a personal discretion in the performance of two functions, which is to say (i) the appointment of a Mentri Besar, (ii) the withholding of consent to a request for the dissolution of the Legislative Assembly; see Article XVIII, Clause (2) of the Constitution of Perak which says this:

> "(2) His Royal Highness may act in his discretion in the performance of the following functions (in addition to those in the performance of which he may act in his discretion under the Federal Constitution) that is to say -
>
> (a) the appointment of a Mentri Besar,
>
> (b) the withholding of consent to a request for the dissolution of the Legislative Assembly,"

The sequence of events

On February 4, 2009 Dato' Seri Mohammad Nizar Jamaluddin, the Mentri Besar, was granted an audience by His Royal Highness to request for his Royal Highness' consent to dissolve the Perak State Assembly.

On February 5, 2009 Dato' Seri Mohd Najib Razak, the Deputy Prime Minister of Malaysia also requested for an audience with His Royal Highness as the Perak Barisan Nasional chairman and consent was granted for him to present himself before his Royal Highness.

This is the account given in the Star, Friday 6 February 2009 on its Nation's page 3:

> "The four-page statement, signed by the sultan's private secretary, Col. Datuk Abdul Rahim Mohamad Nor, was issued at 2.15pm [5 Feb].
>
> It said Mohamad Nizar had an audience with the Sultan yesterday to seek the ruler's consent to dissolve the state assembly.
>
> Earlier in the day, Deputy Prime Minister Datuk Seri Najib Tun Razak, who is Perak Barisan chairman, had an audience with the sultan twice.

At the audience in the morning, he informed the ruler that Barisan and its supporters now had the majority in the state assembly. The statement said the sultan had summoned all the 31 assemblymen before him to verify the information.

. . .

'His Royal Highness had used his discretion under Article XVIII (2)(b) of the Perak Darul Ridzuan State Constitution and did not consent to the dissolution of the Perak State Assembly,' the statement added.

Mohamad Nizar was later summoned to an audience to be informed of the sultan's decision not to dissolve the state government. - Bernama"

Now what is wrong with that?

It is wrong because the Sultan saw Najib who is the Deputy Prime Minister (he is not even an assemblyman of the Perak legislative assembly) without Mohamad Nizar being present. Later he summoned Nizar to inform him of his, the sultan's, decision not to dissolve the state assembly. Let me explain why I say it is improper for him to do that.

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. It was only after the Ruler had seen Najib that he summoned Nizar to inform him that he had decided not to dissolve the legislative assembly. That was his undoing. It was a fatal error as it will affect his reputation and integrity. The general public might go away thinking he was biased.

This is not a case for judicial review where natural justice allows the person who is affected by the decision a right to be heard. That was not the case here because the person who was affected by the decision was also the person who had requested for it. This was a request by a Mentri Besar to his Sultan to dissolve the Legislative Assembly where, by the very fact of the application itself, he has admitted that he no longer commands the confidence of the majority in the Assembly. In other words, it is a request under Article XVI, Clause (6) of the Constitution of Perak. To such a request the Ruler has a personal discretion not to grant it under Article XVIII, Clause (2) (b). However, the personal discretion to grant or not to grant the request should be exercised without any suggestion or suspicion to any reasonable outsider that he was partial to one political party or a coalition of parties. In other words, it is about the appearance of impartiality - justice should not only be done, but should be seen to be done. In short, it is about apparent bias in the decision making process.

The right thing to do

The late Lord Denning in his book *The Discipline of Law* wrote, at page 8, ". . . now

that I am a Judge . . . The anxiety - to do right - remains". And in the present context, what is the right thing to do? Every judge, unless he is a bad judge, knows that the right thing to do is to apply the oft-repeated saying of Lord Chief Justice Hewart in *R. v. Sussex Justices, ex parte McCarthy*: "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done". As Lord Denning would have put it in *Metropolitan Properties Co. (FGC) Ltd v. Lannon* [1969] 1 Q.B. 577:

> "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 we know why the people of Perak and, I have also heard, even elsewhere in Malaysia have been saying harsh words of the Sultan - just go to the internet and you will find a host of harsh words spoken of him. It is the perception of the people that matters; and the confidence of the people is destroyed when they go away thinking that he was biased - that he had been influenced by Najib. 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 all that. His reputation for fairness and justice has been shattered when they go away thinking that 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 practise what he preaches.

However, that does not mean the Sultan's decision cannot stand - in the sense that it is a nullity and void. Why? Because, even though apparent bias was perceived, the decision was not made by the ruler sitting in a judicial capacity. He was merely exercising his discretionary power not to dissolve the Legislative Assembly under Article XVIIII, Clause (2) (b). *Metropolitan Properties v. Lannon* was a case where the decision maker was sitting in a judicial capacity. Lord Denning said in his judgment, "the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity". This should dispel any notion of wanting to ask the High Court to declare that the decison of the Sultan is null and void.

In any case, the Ruler was only exercising his prerogative (a prerogative is a discretionary power) under Article XVIII, Clause (2) (b). In *What Next in the Law*, Lord Denning wrote, at page 335:

> "**Lions under the throne!**
>
> It was Francis Bacon in his Essay, *Of Judicature*, who said:
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> > '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; being circumspect that they do not check or oppose any points of sovereignty.'
>
> 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 its power."

In the instant case, 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. Rightly or wrongly, the exercise of the Sultan's discretionary power could not be checked or opposed by the judges. This is "true enough if the Throne is occupied by a constitutional monarch as ours is", commented Lord Denning - similarly the Sultan of Perak is a constitutional monarch. But not so the Government of the day or any Government. When it comes to the executive government the judges are not to be lions under the government of the day or of any government. They must be independent of it and ready to check or oppose it if it should in any way misuse or abuse its power. So that when Freddie Laker wanted to put his "Skytrain" into the air, it was blocked by a minister who said he could stop it by virtue of his prerogative. The Courts rejected the minister's claim. This is what Lord Denning said in *Laker Airways v. Department of Trade* [1977] 2 All E.R. 182 at 194-195:

> "At several times in our history, the executive have claimed that a discretion given by the prerogative is unfettered: just as they have claimed that a discretion given by statute or by regulation is unfettered. On some occasions the judges have upheld these claims of the executive - notably in the *Ship Money* case, *R. v. Hampden* (1637) 3 State Tr. 826 and in one or two cases during the Second World War, and soon after it - but the judges have not done so of late. The two outstanding cases are *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997, and *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council* [1977] A.C. 1014, where the House of Lords have shown that when discretionary powers are entrusted to the executive by statute, the courts can examine the exercise of those powers to see that they are used properly, and not improperly or mistakenly. By "mistakenly" I mean under the influence of a misdirection in fact or in law. Likewise it seems to me that when discretionary powers are entrusted to the executive by the prerogative . . . the courts can examine the exercise of them so as to see that they are not used improperly or mistakenly."

And he concluded:

> "It is a serious matter for the courts to declare that a minister of the Crown has exceeded his powers. So serious that we think hard before doing it. But there comes a point when it has to be done. These courts have the authority - and I would add the duty - in a proper case, when called upon, to inquire into the exercising of a discretionary power by a minister or his department. If it is found that this power has been exercised improperly or mistakenly so as to infringe unjustly on the legitimate

> rights and interests of the subject, then these courts must so declare. They stand, as ever, between the executive and the subject, as Lord Atkin said in a famous passage, alert to see that any coercive action is justified in law. To which I would add: alert to see that a discretionary power is not exceeded or misused."

The courts declared that the Skytrain should fly despite the minister's objection.

If the courts of this country have applied the Skytrain case on discretionary powers entrusted to the executive by the prerogative, it becomes our common law. Otherwise, only 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. Since then we have a lot of case law already where discretionary powers are entrusted to the executive by statute. But not so when it comes to the prerogative. The Skytrain case was decided in 1977.

When the Mentri Besar ceases to command the confidence of the majority of the assembly

When the Mentri Besar "ceases to command the confidence of the majority of the members of the Legislative Assembly", then the Mentri Besar has two choices. First, he may request the Ruler to dissolve the Assembly for the purpose of a state election. Second, if his request is turned down by the Ruler, "he shall tender the resignation of the Executive Council". This is provided in Article XVI, Clause (6) which reads:

> "(6) If the Mentri Besar ceases to command the confidence of the majority of the members of the Legislative Assembly, then unless at his request His Royal Highness dissolves the Legislative Assembly, he shall tender the resignation of the Executive Council."

What Article XVI, Clause (6) means is this: if the Mentri Besar ceases to command the confidence of the majority of the Legislative Assembly, he shall tender the resignation of the Executive Council, unless the Ruler has, at the request of the Mentri Besar, dissolved the Legislative Assembly. This is clearly stated in Article XVI, Clause (6).

However, in the present case, the Mentri Besar Mohammad Nizar on February 4, had requested the Ruler to dissolve the Legislative Assembly, and the Ruler has informed him on February 5 that the Ruler has acted in his discretion to withhold his consent for the dissolution of the Assembly. That being the case, the Mentri Besar has no other choice but to tender the resignation of the Executive Council.

Under Article XVIII, Clause (2), paragraph (b), the Ruler has a personal discretion to withhold his consent to the Mentri Besar's request for the dissolution of the Legislative Assembly, viz.:

> "(2) His Royal Highness may act in his discretion in the performance of the following

functions (in addition to those in the performance of which he may act in his discretion under the Federal Constitution) that is to say -

(a) . . .

(b) the withholding of consent to a request for the dissolution of the Legislative Assembly,"

But the Ruler has acted unconstitutionally

Unfortunately, the Ruler, in the present case, has acted unconstitutionally when he sidestepped the constitutional provisions of Article XVI, Clause (6) of the Laws of the Constitution of Perak. This was what he did. In the media statement of the Sultan of Perak, which was signed by the Ruler's secretary, Col. Dato' Abd. Rahim Mohamad Nor as reported in the Star, Friday 6 February 2009, under Star Nation, at page 3, it says:

"YAB Datuk Seri Mohammad Nizar Jamaluddin was summoned to an audience with the Sultan to be informed of his Royal Highness's decision not to dissolve the State Assembly, and in accordance with the provisions of Article XVI (6) of the Perak Darul Ridzuan State Constitution, DYMM Paduka Seri Sultan of Perak ordered YAB Datuk Seri Mohammad Nizar Jamaluddin to resign from his post as Perak Mentri Besar together with the members of the state executive council with immediate effect.

If YAB Datuk Seri Mohammad Nizar Jamaluddin does not resign from his post as Perak Mentri Besar together with the state executive council members, then the posts of Mentri Besar and state ececutive councillors are regarded as vacant.

This statement is issued with the consent of Duli Yang Maha Mulia Paduka Seri Sultan of Perak Darul Ridzuan."

As we know the Sultan is a constitutional monarch who has no power to rule, except for a couple of discretionary powers mentioned in Article XVIII, Clause (2) which reads:

"(2) His Royal Highness may act in his discretion in the performance of the following functions (in addition to those in the performance of which he may act in his discretion under the Federal Constitution) that is to say -

(a) the appointment of a Mentri Besar,

(b) the withholding of consent to a request for the dissolution of the Legislative Assembly,"

So that, apart from the couple of matters mentioned in Article XVIII, Clause (2), the Sultan of Perak has no power to order Mohammad Nizar Jamaluddin "to resign from his post as Perak

Mentri Besar together with the members of the state executive council with immediate effect". Nor has he the power to declare that "the posts of Mentri Besar and state executive councillors are regarded as vacant".

Lord Denning wrote in *The Discipline of Law*, at page 103, "In 1611 when the King, 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." In the present case, the prerogative which the law allows the Sultan of Perak is found in the Laws of the Constitution of Perak and by it the Sultan is not the executive government. And the prerogative which the Constitution of Perak allows him are the couple of discretionary powers mentioned in Article XVIII, Clause (2) which are exercisable by him personally and not as the executive government. A prerogative is a discretionary power exercisable by the executive government, but in the Sultan's case it is execisable by him personally. In former times, the executive government was the King. In present day Perak, the executive government is the Executive Council of the Legislative Assembly.

In the present case, the Mentri Besar had acted under Article XVI, Clause (6) which permitted him to request the Ruler to dissolve the Legislative Assembly if he ceased to command the confidence of the majority of the members of the Legislative Assembly. In this case, the Ruler did turn down his request. Then the Mentri Besar has no choice but "to tender the resignation of the Executive Council". So, why did the Ruler, in the present case, depart from the provisions of Article XVI, Clause (6)? Under the provisions of Clause (6), he knew that the ball is now in the Mentri Besar's court and it was to be the Mentri Besar who should "tender the resignation of the Executive Council". Yet he chose to ignore these provisions of the Constitution of Perak.

The Ruler has defied the provisions of Article XVI, Clause (6) when he resorted to ordering the Mentri Besar to resign from his post when he has no power to do so. The Sultan knew, or he ought to have known, that under Article XVI, Clause (2) (a) the Mentri Besar is appointed by the Sultan from the members of the Legislative Assembly "who in his judgment is likely to command the confidence of the majority of the members of the Assembly". This is what Article XVI, Clause (2) (a) says:

> "(2) The Executive Council shall be appointed as follows, that is to say -
>
> > (a) His Royal Highness shall first appoint as Mentri Besar to preside over the Executive Council a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly;"

So that, when the Mentri Besar ceased "to command the confidence of the majority of the members of the Legislative Assembly", and this is borne out by his reguest to the Ruler for dissolution of the Assembly under Article XVI, Clause (6), the Ruler has the power to appoint another "who in his judgment is likely to command the confidence of the majority of

the members of the Assembly" under Article XVI, Clause (2) (a). It is a personal discretion of the Ruler to act on the appointment of a Mentri Besar; see Article XVIII, Clause (2), paragraph (a). Since the Ruler has the power to appoint another person as Mentri Besar in place of Mohammad Nizar Jamaluddin based on his judgment, there is, therefore, no need to order him to resign at all. This is no more than a pretended show of power when, in fact, there is no such power.

And if the Mentri Besar delays the tender of the resignation of the Executive Council as required by Article XVI, Clause (6), there is Clause (7) which provides:

> "(7) Subject to Clause (6) a member of the Executive Council other than the Mentri Besar shall hold office at His Royal Highness' pleasure, but any member of the Council may at any time resign his office."

This means that the Ruler can sack any member of the Executive Council or all of them at any time.

English history and the pretended power of dispensing with the law by regal authority

I think we can learn from the experience of history. In his book *What Next in the Law*, that great judge, the late Lord Denning wrote, pages 273-275:

> "King James II was a bad King. It was he who favoured the Roman Catholics and was bitterly opposed to the Protestants. It was he who dismissed the judges. It was he who sent Judge Jeffreys on that Bloody Assize. It was he who directed that the Seven Bishops should be prosecuted for seditious libel - when all they had done was to present a petition to the King himself. It was the acquittal of the Seven Bishops that forced the King to flee the realm.
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> It was a young barrister called John Somers who drew up a Declaration of Rights. Although very junior at the Bar, he had made a short speech of five minutes which led to the acquittal of the Seven Bishops. Immediately after that trial, he was entrusted with the task of preparing a Declaration of Rights - to which the new King William assented. This Declaration became the Bill of Rights 1689. It is not easy to lay your hand on any book which contains the full text of this great document. I will set out here a few of the principal clauses [for the present purpose I will only refer to clauses 1 and 2]:
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> > 'The Lords and Commons . . .
> >
> > **I.** . . . (as their ancestors in like case have usaually done) for the vindicating and asserting their ancient rights and liberties, declare:
> >
> > 1. That the pretended power of suspending laws, or the execution of

laws, by regal authority, without consent of parliament, is illegal.
2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.
8. . . .
9. . . .
10. . . .
11. . . .

II. . . . That William and Mary prince and princess of Orange be, and be declared, King and Queen of England . . .'

Macaulay [in his *History of England* vol. III, p. 1311] describes the importance of the Bill of Rights in these words:

> 'The Declaration of Right, though it made nothing law which had not been law before, contained the germ . . . of every good law which has been passed . . ., of every good law which may hereafter, in the course of ages, be found necessary to promote the public weal, and to satisfy the demands of public opinion.'

If we are to have a new Bill of Rights, will it too be the germ of the law which, in the complexities of modern society, maintains the rights and freedoms of the individual against the all-powerful bodies that stride about the place?"

I shall now return to the subject matter of this article. I have borrowed the title of it from the second clause of the Declaration of Rights as drafted by the young barrister John Somers who was entrusted with the task of preparing it shortly after he had secured the acquittal of the Seven Bishops. Clause 2 reads:

> "That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal."

The above quotation should serve as a fitting reminder that the laws of the land, more so the Constitution of the State of Perak, should not be sidestepped by the Ruler or, to quote from Lord Denning, by "the all-powerful bodies that stride about the place". If anyone thinks that he can dispense with the law or the execution of it, then this clause should remind him that the power for him to do so is only a pretended power. Article XVI, Clause (6) is what we are talking about here - the Mentri Besar should be allowed to tender the resignation of the Executive Council in due course of time without being hurried by regal authority exercising a pretended power. The laws of the Constitution of Perak should be administered even-handedly and not unequally by giving the impression to the general public that preferential treatment was shown to some persons. It is the appearance of impartiality that matters. It does not matter whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think that he did.

Substitute the phrase "by regal authority" for the phrase "by those in power" and we

have an axiomatic rendering which applies to today's modern society. The executive branch of any government, be it federal, state or local, cannot ignore the people's call for justice and fair play which throughout the ages have been "found necessary to promote the public weal, and to satisfy the demands of public opinion". The call of public opinion is a call to maintain "the rights and freedoms of the individual against the all-powerful bodies that stride about the place". The executive branch of any government can ignore the voice of public opinion at its peril. Unwillingness to heed the demands of public opinion can lose the mandate of the populace in the next election.

I think the writing is already on the wall. The demands of public opinion is a universal one. If the old order has been found wanting, it must give way to the new.

In writing this article, I have made a brief sojourn into the history of England because the Common Law as we know it today originated from the history of England. In case you do not know it already, the common law is not common sense but the experience of great judges who have formulated it in their judgments in the pursuit of justice. And the true meaning of justice is nothing more than fairplay and doing what is right. The concept becomes the common law through the application of the doctrine of precedent.