

And

In the matter of remedies and reliefs under sections 41, 44, 50, 51 and 52 of the Specific Relief Act 1950

And

In the matter of Article 8 of the Federal Constitution

And

In the matter of an application for inter alia, declaration, *quo warranto* writ, injunction and damages

And

In the matter of the legal dispute between Dato' Seri Ir. Hj Mohammad Nizar bin Jamaluddin and Dato' Dr Zambry bin Abd Kadir in respect of the post of the Chief Minister of Perak Darul Ridzuan

BETWEEN

**DATO' SERI IR. HJ MOHAMMAD NIZAR
BIN JAMALUDDIN**

.... APPLICANT

AND

DATO' DR ZAMBRY BIN ABD KADIR

.... RESPONDENT

AND

ATTORNEY GENERAL OF MALAYSIA

.... INTERVENER

CORAM:

**RAUS SHARIF, J.C.A.
ZAINUN ALI, J.C.A.
AHMAD MAAROP, J.C.A.**

JUDGMENT OF ZAINUN ALI, JCA

The political convulsion that has gripped Perak since February 2009, has ripped apart notions of sanctity of the Constitution and the Rule of Law as we know them.

If only Dicey's warning of the danger of not paying "sufficient attention to the Law of the Constitution as it actually exists" had been heeded, this unfortunate crisis might have been averted.

As it were, the political situation worsened and came to a head when the Respondent filed his suit against the Appellant. In the end, it came down to the question of whether the Constitution governs the conduct of political parties or do the parties govern the conduct of the Constitution?

I believe it is important to indicate at the outset that the reality of any Constitution is in itself complex. I find that in hearing and deciding this appeal, this court, in attempting to

find the right legal answer, has to contend with a multitude of facets found in both the Perak and Federal Constitutions.

In this search, I find that the conservative legal scholarship no longer works. I have to transcend that method and approach both the Constitutions (Perak and Federal) against the historical background and framework of society. This would provide a clue to the actual repository of power and how they operate. It is only then would a proper understanding of the dynamics of public and private power be obtained.

In this judgment I will refer to His Royal Highness the Sultan of Perak as “His Royal Highness”, the Appellant as “Zambry” and the Respondent as “Nizar”. Further, unless otherwise stated, any reference to “Article” or “Articles” means “Article or Articles in the Laws of the Constitution of Perak” (“the Perak State Constitution”). I shall also refer the Perak State Legislative Assembly as “Legislative Assembly”.

I have had the advantage of reading in draft the judgment by my learned brothers Raus Sharif, JCA and Ahmad Maarop, JCA; I agree with their judgment and agree that this appeal be allowed and the judgment of the High Court

be set aside. However I would like to add a view of my own. This is therefore a supplementary judgment.

The facts of this appeal including the events leading up to Zambry's appointment as Menteri Besar have been comprehensively set out in the judgment of my learned brother Raus Sharif JCA. However, I will be recounting parts of them for the purpose of establishing certain facts deemed crucial in the instant appeal.

The Appeal

What we have before us is an appeal against the decision of the learned trial judge who allowed Nizar's application for judicial review on 11.5.2009. The learned trial judge allowed Nizar's application in respect of Prayers (1)(a), (b), (c) and (e) thereof.

Briefly the judgment of the High Court is that –

- (i) That the request for dissolution by Nizar was made pursuant to Article XXXVI(2) and not pursuant to Article XVI(6) of the Perak State Constitution;
- (ii) that in interpreting the provisions of the Perak State Constitution in particular Articles XVI(6) and XXXVI(2), the learned judge referred to the

decisions in **Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187** and **Public Prosecutor v Kok Wah Kuan [2008] 1 MLJ 1** and held that Article XVI(6) did not entitle the DYMM Sultan of Perak to decide that the position of the Menteri Besar was vacant;

- (iii) the learned judge was of the view that if Nizar is said to have lost the confidence of the majority of the members of the Legislative Assembly only they could determine the issue by a vote of no confidence in the Legislative Assembly;
- (iv) the learned judge preferred the decision in **Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli [1966] 2 MLJ 187** to that of **Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak & 8 Ors [1995] CLJ 184** and **Adegbenro v Akintola [1963] 2 WLR 63**;
- (v) that His Royal Highness was not entitled to interview the various members of the Legislative Assembly on 5.2.2009 to ascertain who commanded the majority in the Legislative

Assembly. That was a matter for the Legislative Assembly;

- (vi) that Nizar did not hold the office of Menteri Besar at the pleasure of the His Royal Highness and hence he could not be dismissed and the Press Statement of 5.2.2009 issued by the Private Secretary of His Royal Highness on the Sultan's behalf amounts to Nizar's dismissal;
- (vii) that on a true construction of the provisions of the Constitution that on the facts of this case, His Royal Highness was wrong in appointing Zambry as Menteri Besar as Nizar had not been dismissed and therefore Nizar was entitled to a *writ of quo warranto*;
- (viii) that Nizar's evidence is to be preferred to that of the evidence of the Perak State Legal Advisor as to what actually transpired on 4.2.2009 and 5.2.2009.

The position taken by Nizar had consistently been that *“Under Article XVI(7) and subject to Article XVI(6) the Menteri Besar does not hold office at His Royal Highness' pleasure, but hold office subject to the confidence of the members of the*

Legislation Assembly to whom the Menteri Besar is responsible. As such the Menteri Besar cannot be dismissed (or the office 'rendered' vacant) by His Royal Highness. The Menteri Besar may only be dismissed after a vote of no confidence passed against the Menteri Besar by the members of the Legislative Assembly. There is prevailing and strong precedent supporting this position."

Nizar contended that even if he had lost command of 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 only and that the above resignation does not include himself. The much disputed provision in the Perak State Constitution i.e. Article XVI(6) reads as follows:

“(6) If the Menteri 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.”

Nizar stated that nowhere in his letters of 4.2.2009 (Exhibit MNJ-5) and 5.2.2009 (Exhibit MNJ-6) to His Royal Highness, was it expressed that his request for dissolution was made pursuant to any particular provision of the Perak State Constitution.

The learned judge in his judgment was very much in accord with Nizar's view in that none of the above letters either explicitly or implicitly indicated under which particular provision of the Perak State Constitution was the request for dissolution made to His Royal Highness.

He went on to point out *that "the letter is a general request to His Royal Highness to exercise His Royal Highness's Royal Prerogative to dissolve the State Legislative Assembly in the light of the recent development in the political scene of Perak as deposed to in Nizar's affidavit in support."*

The learned judge then went on to discuss the two provisions relating to the request for both dissolution of the Legislative Assembly i.e. Articles XXXVI(1) & (2) of the Perak State Constitution. Article XXXVI(1) & (2) which read:-

"(1) His Royal Highness shall from time to time summon the Legislative Assembly and shall not

allow six months to elapse between the last sitting in one session and the date appointed for its first sitting in the next session.

- (2) His Royal Highness may prorogue or dissolve the Legislative Assembly.”

The learned trial judge observed that:-

“Article XXXVI(2) above is the general power given to His Royal Highness to prorogue or dissolve the Legislative Assembly. The Article is silent as to the time or reason for doing so. The power is exercised at the absolute discretion of His Royal Highness and may be executed at any time on the advice of the MB Perak.”

The learned judge went on to say that in the absence of reference to any specific provision of the Perak State Constitution by Nizar in his letter of MNJ-5 to His Royal Highness, requesting His Royal Highness’ consent for the dissolution of the Legislative Assembly, it would be reasonable to think that Nizar was appealing to His Royal Highness to exercise His Royal Highness’ Royal Prerogative under Article XXXVI(2) of the Perak State Constitution to dissolve the Legislative Assembly to overcome the ‘deadlock’ of having no

clear majority by either the PAKATAN or Barisan Nasional in the Legislative Assembly.

The learned judge based his reasoning above on the premise that Article XXXVI(2) is a general provision for dissolution of the Legislative Assembly. He went on to say that it is evident that Nizar's leadership of the government was never challenged on a vote of no confidence in the Legislative Assembly up to 4.2.2009.

The learned judge concluded that the request for dissolution by Nizar was never made pursuant to Article XVI(6) of the Perak State Constitution but under Article XXXVI(2); that it was clear from the language of Article XVI(6) that His Royal Highness was not entitled to decide that the position of the Menteri Besar was vacant.

From the above, three major issues could be indentified for this court's consideration. Each will be addressed accordingly.

The emerging issues as would be unfolded later in this judgment are replete with substantive constitutional importance, some of which make for novel points of law.

A brief outline of the essential features of the Federal Constitution will be useful. This is because much of what is found in the Federal Constitution are reflected in the State Constitution.

Inclined as is the Federal Constitution towards the Westminster structure, it has its own peculiarities. The Westminster model is not to be found in one document, but could be seen in bits and pieces in the Magna Carta, the Bill of Rights, the Act of Settlement and a series of Parliament Acts. Conversely, the Federal Constitution however is embodied in one document and gathers unto itself various sources of law some of which are implicit. The unique presence of the written law, shot through with informal and unwritten sources in the form of conventions, prerogatives, discretionary and residual powers as such, help ensure the continuation of constitutionalism and the rule of law. Thus the sources of law in our Constitution are several. Article 160(1) of the Federal Constitution says it all. *“Law includes written law, the common law, insofar as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof.”*

In declaring the Constitution supreme, Malaysia also opted for the Federal System. Though there is hefty power at

the centre, the various States retain their own Constitution and a measure of autonomy, including those found in the State List. By virtue of Part I of the Eighth Schedule of the Federal Constitution, all State Constitutions must contain certain 'essential provisions' found in the Federal Constitution.

A cursory glance at the Reports and Agreements made prior to establishing the Merdeka Constitution, would manifest that strong elements of compromise and understanding was the order of the day. Malaysia had chosen a federal polity primarily to preserve the sovereignty of the Malay Sultans in their respective States. The concept of Constitutional Monarchy with their concomitant limitations, as well as powers, privileges and prerogatives is still very much alive.

Quite simply, my reason for revisiting these fundamental ideas is to allow the concepts which the framers of our Constitution in their wisdom had formulated to be more transparent. In connection with the Federal and State Constitutions therefore, the concepts as sketched by Montesquieu in his separation of powers theory, as propounded earlier by John Locke, and the rule of law as drawn up by Dicey, need to be appraised once again with sincerity, in the context of the instant appeal. It is only then that the burgeoning issues identified herein could be

appreciated. It would also help to remember that our Constitution is based on the concept of the reasonable man.

FIRST ISSUE

THE FIRST ISSUE IS WHETHER THE REQUEST FOR THE DISSOLUTION OF THE LEGISLATIVE ASSEMBLY WAS MADE UNDER ARTICLE XXXVI(2) OR ARTICLE XVI(6).

The answer to this question is tied up with the issue of what were the facts and circumstances leading to Nizar's request made to His Royal Highness on 4.2.2009 and 5.2.2009, for the dissolution of the Legislative Assembly. It is Nizar's contention that in the light of events prior to his 'dismissal' the burden of proving that it was made under Article XVI(6) lies on Zambry. It is of course Nizar's case that Zambry had not overcome this burden cast on him.

Since this is a determinative issue, it is critical that the surrounding facts and circumstances culminating in the request being made by Nizar, are properly established. The establishment of this fact is more critical than one might think. It would reflect one way or the other why such request was made and the effect and consequence of the request being either withheld or granted.

The importance of establishing this fact, cannot be understated for it goes towards Zambry's interpretation of events. Zambry is of the view that if (a) the Menteri Besar ceases to command the confidence of the majority of members of the State Legislative Assembly and (b) His Royal Highness withholds his consent to dissolve the Legislative Assembly, then Nizar cannot remain in office. In that situation, he shall tender the resignation of the Executive Council (which Zambry argued, includes Nizar himself). (My emphasis).

It can safely be said that the beginning of the end for Nizar started on 1.2.2009 when the Speaker announced that two Assemblymen from Behrang and Changkat Jering had tendered their resignation as Assemblyman of their respective seats.

The two Assemblymen's response came fast and furious. Their withdrawal of the purported resignation came on the same day in separate letters to the Speaker, the Secretary of the State of Perak, the Perak State Legal Advisor, the Secretary of Legislative Assembly and the Director of the State of Perak. The duo also sent similar letters separately on the same day to His Royal Highness, with an additional paragraph. The said paragraph indicated that they have withdrawn their purported resignation and that

they are still very much Assemblymen in their respective constituencies and are performing their duties as such.

The two Assemblymen lodged separate police reports on 2.2.2009.

On 2.2.2009, Nizar had an audience with His Royal Highness, to inform His Royal Highness of the latest political development in Perak. As can be seen later, Nizar was steadfast in his evidence that at this audience, he was unaware of the withdrawal of resignation of the two Assemblymen. Is this credible? The unfolding events would throw light on this question.

The next day saw a flurry of activities. Firstly, the two Assemblymen wrote separate letters to the Speaker of the President of the PKR, to declare that they were disenchanted with the party; that they had no more confidence in PKR, culminating in their denouncing their membership in PKR with immediate effect; however they claimed that their leaving PKR does not operate as a resignation of their membership in the Legislative Assembly.

Before the effect of the above letters of the duo could sink in, on the same day i.e. 3.2.2009, the DAP

Assemblywoman from Jelapang Madam Hee Yit Foong purportedly resigned her post as a member of the Legislative Assembly. Similarly, her withdrawal from this position came swiftly in the same manner as happened in the case of the two Assemblymen. And true to form, Madam Hee sent a replica of the letters sent by her comrades (from Behrang and Changkat Jering) to the Speaker and the Secretary to the DAP, renouncing her membership with the DAP with immediate effect and that she has lost confidence in her political party (DAP).

More importantly, she reiterated that her departure from the party does not operate as a resignation of her membership in the Legislative Assembly.

Then the trio (The Assemblymen of Behrang, Changkat Jering and Jelapang, hereinafter referred to as “the Three ADUNs) caused separate letters to be sent to His Royal Highness, dated 3.2.2009 indicating that they have lost confidence in Nizar; that they will not support him as the Menteri Besar of Perak and that the Barisan Nasional alliance now has the support of the majority of the members of the Legislative Assembly.

The next day, 4.2.2009 was equally tumultuous. It began with the Election Commission declaring in a print media (The New Straits Time) their decision that it is established that the seats for the two States parliamentary seats, i.e. Behrang, Changkat Jering are not vacated. (Exhibit ZAK-16).

Some confusion over this document (Tab 31 of core bundle) arose. Perusing this exhibit "Exhibit ZAK-16", carefully, it would appear that it started off with the Speaker's letter to the Perak Election Commission director, Encik Ahmad Adli Abdullah which said:-

"...There was one letter saying they had resigned, and then came another letter from the same persons, which said they had not.

It is due to this doubt created over the validity of the first letter that the Election Commission cannot exercise its powers under Article 36(5) of the Perak State Constitution to establish a 'casual vacancy' for the two State seats."

From my understanding of this ambiguous reporting in the print media, what it means to say is that, it was the Speaker who 'ordained' that due to the questionable nature of

the first letter, it would be impossible for the Election Commission to establish that a 'casual vacancy' exists for the two State seats.

However, despite the Speaker's view, it was reported in the same report that Tan Sri Abdul Aziz Mohd Yusof the Chairman of the Election Commission, nevertheless ruled that:-

“It is hence declared that the seats will be retained by the two Assemblymen.”

Tan Sri Aziz was then reported to have said that while the Perak State Constitution allows an Assemblyman to resign by writing to the Speaker, who would then inform the Election Commission, no one else but the Election Commission could declare a seat vacant. (My emphasis).

Tan Sri Aziz went on to say that once the Election Commission gets a notice from the Speaker for a 'casual vacancy' the Election Commission has to establish whether the notice can be put into effect. Tan Sri was reported to have said that “... *As far as we are concerned, that is all there is to it. Our decision is made and we have ruled that the seats are not vacant*”. (My emphasis).

My labouing this point will not be in vain. Firstly the hazy and indeterminate reporting in the print media appears to have caused members of the public unnecessary confusion as to what is the exact political situation. Even Nizar would have us believe that he was not spared being confused in the sense that he was unbending in the belief that the Speaker had stated that the two States seats are vacated. Whether this is a legitimate claim or otherwise will be shown up.

Secondly it is crucial to determine that on the morning of 2.2.2009, what was the exact status with regards the two State seats of Behrang and Changkat Jering?

Obviously their exact status (whether there was 'casual vacancy' or not) would have a direct bearing on the consequent conduct of the main parties in this appeal. This neat point would indicate the circumstances which would provide the factual evidence needed to establish whether or not Zambry has failed or succeeded in proving the facts leading to his assertion that the request was made under Article XVI(6). Thus, the importance of establishing this fact has high intrinsic merit. I believe this is part of the 'trigger issue' as stated by Nizar's eminent lead counsel, Tn. Hj. Sulaiman Abdullah.

As a matter of interest, Article XXXVI(5) was amended in 1969 to give power to the Election Commission to establish the existence or otherwise of a 'casual vacancy' for any seat in the constituencies of Perak. Previous to this, the relevant Article was silent as to which authority was so empowered.

A quick reference to other State Constitutions would show that it is not in every State Constitution that the Election Commission prevails itself. For example, Article 55(5) of the Perlis State Constitution and Article 19(5) of the Malacca State Constitution are identical to the Perak State Constitution, in that a 'casual vacancy' is to be determined or established by the Election Commission. However Article 56(5) of the Negeri Sembilan State Constitution and Article 44(5) of the Terengganu State Constitution are silent as to which authority determines the question of 'casual vacancy'.

Undoubtedly the determination by the Election Commission as to whether a 'casual vacancy' is created or not is significant. As the Supreme Court decided in **Noordin Salleh v State Legislative Assembly in Kelantan [1993] 3 MLJ**, a defection by an Assemblyman to another political party does not have the effect of his seat in the Assembly being vacated. If a 'casual vacancy' is established by the Election

Commission, it would have the effect of a by-election being required to be held within 60 days.

Significantly, it is Nizar's position that regardless of the withdrawal of the resignation letter by the three ADUNs, the Speaker had determined that they had resigned and thereafter their seats in the Legislative Assembly are vacated, warranting a by-election. In this, Tn. Hj. Sulaiman's argument for Nizar is that the Speaker's decision on this issue prevails. How this assertion reconciles with the power of the Election Commission in Article XXXVI(5) was not made known to us by Tn. Hj. Sulaiman.

With the above background, on the 4.2.2009, Nizar dispatched a letter 'Exhibit MNJ-5' dated the same day to His Royal Highness, requesting for a dissolution of the Legislative Assembly.

This letter represents a simple request without more, for the dissolution of the Legislative Assembly. There was no indication as to why such dissolution was requested. There was no indication either, under which Article the request was made. The absence of a specific Article being expressed in this letter, became Nizar's trump card.

Although there was no indication from the equally eminent lead counsel for Zambry, Dato' Cecil Abraham, as to the sequence of events on 4.2.2009, I believe it would not be wrong for me to take judicial notice that Nizar would have had access to the newspapers on the morning of 4.2.2009. He would have then been apprised of the Election Commission's ruling on the non-vacancy of the State seats of Behrang and Changkat Jering in the morning. Thus it is reasonable to presume that Nizar's 'request' letter of MNJ-5 was dispatched to His Royal Highness soon after, i.e. in the earlier part of the day on 4.2.2009.

It was in evidence, as affirmed on 8.4.2009, in the affidavit of the Private Secretary to His Royal Highness, Dato' Kol. Abd Rahim b. Mohamad Nor, that on 4.2.2009 at about 12.00 noon, he received a missed call from Nizar. He returned the call. Nizar requested for an audience with His Royal Highness on an urgent basis. The Private Secretary informed Nizar that His Royal Highness has agreed to an audience on the same day at 5.00 pm.

On the very day itself i.e. 4.2.2009, the Private Secretary affirmed that at about 3.00 pm, His Royal Highness received the letters from the Three ADUNs which contained manifestations of their loss of confidence in Nizar; that they no

longer support him as the Menteri Besar of Perak; that although they have resigned from their respective political parties, they remain as independent State Legislative Assemblymen/woman for their respective constituencies and that they support the Barisan Nasional.

It was also affirmed by the Private Secretary that at about the same time, he received a letter addressed to His Royal Highness dated 3.2.2009 signed by 27 members of the Legislative Assembly stating inter alia, that they have lost confidence in Nizar as the Menteri Besar of Perak and that the Barisan Nasional and its supporters now has the command of a majority of the members of the Legislative Assembly.

According to the Private Secretary, Nizar then telephoned him the same afternoon at 3.20 pm (on 4.2.2009) and requested for the audience with His Royal Highness to be brought forward from 5.00 pm to a time earlier than 5.00 pm before the Deputy Prime Minister makes any live telecast announcement. According to the Private Secretary, before he could revert to Nizar, the latter arrived at Istana Kinta, barely thirty minutes later.

It was in evidence that the State Legal Advisor was requested by His Royal Highness to be present at this

audience. The audience Nizar had with His Royal Highness took place at 5.30 pm in the presence of the State Legal Advisor.

The evidence of the State Legal Advisor as to what transpired in the audience between His Royal Highness, Nizar and himself was much disputed by Nizar. Thus, in the light of conflicts in the affidavit evidence, both parties agreed to be cross-examined on their affidavits. Only then were we able to discern the facts, as it were.

According to the State Legal Advisor, His Royal Highness informed Nizar that he would need time to consider his request. Nizar then handed a copy of a draft Proclamation to the State Legal Advisor, to be signed by His Royal Highness should His Royal Highness grant his consent to the request for dissolution. This draft Proclamation came in for some serious dispute. Nizar relied on this draft Proclamation to stress that his request for dissolution was made pursuant to Article XXXVI(2) of the Perak State Constitution as clearly manifested he said, in the body of the said draft Proclamation. For purposes of general knowledge, this draft Proclamation is a standard document available in the office of the Menteri Besar.

For now, I would like to direct focus on the following issue. On 4.2.2009, what prompted Nizar to write the letter (Exhibit MNJ-5) to His Royal Highness requesting for the dissolution of Legislative Assembly? Is it open for him to say that at the time of writing MNJ-5, he was unaware, unconscious and uninformed and therefore oblivious to the damning letters sent by the Three ADUNs to the Speaker and leaders of the Pakatan Alliance?

Consider this. The fact of withdrawal of their resignation letters was made known on 1.2.2009 and 3.2.2009 respectively to the Speaker. The fact of their having left their respective political parties (PKR and DAP) were also made known by letters to the Speaker, the President of PKR and the Secretary to the DAP on the same day. Remember that it is Nizar's contention that, all he knew was that the Three ADUNs had resigned. He denied having known of the withdrawal of their resignation. Even assuming this highly unlikely situation can be accepted for a moment, what about the larger than life announcement made by the Election Commission on the morning of 4.2.2009?

Is it Nizar's contention that since the Election Commission announced the non vacancy of only two seats on 4.2.2009 then it does not mean that he had lost the majority

confidence, since he still had 29 seats? But in my view if such was Nizar's contention, it would still be untenable since the Speaker would have known on the previous day i.e. on 3.2.2009 that Madam Hee Yit Foong Assemblywoman from Jelapang had already withdrawn her resignation. Thus when Nizar wrote the 4.2.2009 letter MNJ-5 he would have known of having lost his majority. Hence the 'request' letter.

Or is Nizar deliberately ignoring this fact and let on that regardless of the withdrawal letters, since the Speaker himself had determined that the Three ADUNs had resigned and had therefore vacated their seats in the Legislative Assembly, that is then the end of the matter? In this, Nizar's contention is that the Speaker's decision on this issue prevails.

In the light of the clear powers of the Election Commission under Article XXXVI(5), it is my view that Nizar's posture above cannot be sustained.

On 5.2.2009, Nizar once again wrote to His Royal Highness a letter dated the same day, informing His Royal Highness of the latest political development in the State and once again requested His Royal Highness to dissolve the Legislative Assembly.

On the following morning at about 10.00 am, the then Deputy Prime Minister in his capacity as Chairman of the Perak Barisan Nasional had an audience with His Royal Highness. He presented His Royal Highness with a letter of support from 27 members of the Perak State aligned to Barisan Nasional and the support given by the Three ADUNs as well. The letter manifested the signatories' willingness to support any candidate nominated by the then Deputy Prime Minister as the next candidate for the post of Menteri Besar of Perak. Another Assemblyman from Bota, one Nasarudin also joined support for the Barisan Nasional.

At about 11.15 am, all 31 members were brought before His Royal Highness where all 31 members (which include the Three ADUNs and one Bota Assemblyman) pledged support for Barisan Nasional. The three ADUNs were separately interviewed by His Royal Highness. The Three ADUNs and the Bota Assemblyman signed letters pledging their support for Barisan Nasional and expressed that it was made voluntarily and without any coercion from any party.

On the 5.2.2009, His Royal Highness requested Nizar's presence at the Istana Kinta at 1.00 pm. Nizar was informed that his request for dissolution of the Legislative Assembly was refused; that His Royal Highness had exercised his

judgment and Royal Prerogative to so refuse his said request, in accordance with Article XVI(6) of the Perak State Constitution.

The outcome of this subsequently became the basis of Nizar's claim in this appeal. He refused to resign and sought declaration that he is the rightful Menteri Besar.

It is in the light of all these events that we are now invited to consider the critical question as to under which provision of the Perak State Constitution was the request for dissolution by Nizar made to His Royal Highness.

Going in reverse order, the fact of the resignation letters and subsequent withdrawals thereof by the two Assemblymen were made known to the Speaker on 1.2.2009 and on 3.2.2009 in respect of the Jelapang Assemblywoman. The fact of their having left their respective political parties were also disclosed to the respective leaders of their political parties on 3.2.2009.

It is certainly implausible for Nizar to say that as at 4.2.2009, he was unaware of the fact that he is left without the 'support' of the Assemblymen and one Assemblywoman.

Nizar's argument militates against the plain evidence staring him in the face. For one, we are supposed to believe that the Speaker and the key personalities in the respective political parties (DAP and PKR) known to be astute, however chose to withhold this vital information from Nizar.

If indeed they had so withheld the said information, was there any particular reason why Nizar is to be insulated from the stark reality of the party's increasingly fragile political position?

Surely it could not be Nizar's stand that the key personalities in his party were not privy to the facts, and are therefore unable to advise him of the political morass they now seemed to have sunk into?

In fact, Nizar's disclaimer to any knowledge as to the true situation as regards the position taken by the Three ADUNs, which had been conveyed to the Speaker and the key personalities in the political parties, cast aspersions on the integrity and professionalism of these personalities. This is not to mention of course, that an unenlightened Menteri Besar would surely not go down well with his public.

It is Nizar's contention that what impelled him to write his letter of MNJ-5 and seeking audience with His Royal Highness to request for dissolution on 4.2.2009 was to inform His Royal Highness of the resignations of the Three ADUNs since their seats had fallen vacant. Clearly on the facts, Nizar has no legal basis to assert that the Three ADUNs had resigned their seats. He was emphatic in his stand that in his audience with His Royal Highness on 4.2.2009, he had not stated, informed nor proposed to His Royal Highness that he had lost the majority confidence of the members in the Legislative Assembly. Thus he said, his request for dissolution was clearly made pursuant to Article XXXVI(2) and not pursuant to Article XVI(6).

The audience Nizar had with His Royal Highness on 4.2.2009 at 5.30 pm in the presence of the State Legal Advisor is pivotal to the subsequent turn of events.

It can safely be inferred that Nizar himself is an intelligent man. In fact I believe he is. He would be alert if not alerted, to the political dynamics existing then in the State of Perak. The information on the political situation would, without question be notified to him. His vigilance is displayed when he himself alerted His Royal Highness on the uneasy political events taking place in Perak as early as 2.2.2009. He would

have made a quick mental assessment of the effect of the depletion in the number of Assemblyman aligned to him in the Legislative Assembly. Why else then would Nizar sent a letter requesting for dissolution of the Legislative Assembly on 4.2.2009 to His Royal Highness? Was it merely for the purpose of informing His Royal Highness of the vacancy of the three seats resulting in a deadlock? This is because he had said that a 'deadlock' is by no means a loss of majority. In that context, it is not easy for this court to unquestioningly accept Nizar's answer given during his cross-examination.

With the rapid turn of events in the political landscape of Perak then, and without missing a beat, Nizar wrote a second 'request' letter dated 5.2.2009 to His Royal Highness. A similar request made within the next twenty four hours? Does not this indicate Nizar's state of mind?

If he can shrug off the allegation of having lost majority confidence in the first request, what then is his reason for requesting a dissolution of the Legislative Assembly for the second time? Putting it in another way, if he maintains that he still enjoys the majority confidence of members of the Legislative Assembly, what compelled him then to request for a dissolution?

First things first. Article XXXVI(2) is a general power to prorogue or dissolve the Legislative Assembly. The provision does not indicate when the request can be made or the reasons to be given for such request. It is exercised at His Royal Highness' discretion.

As captured aptly by the learned judge, “... *the letter is a general request to His Royal Highness to exercise His Royal Highness' Royal Prerogative to dissolve the State Legislative Assembly in the light of the recent development in the political scene of Perak as deposed to by Nizar.*” (My emphasis).

It is generally accepted that the Menteri Besar may choose the time for a general election within the 5 year life span of the Legislative Assembly at any time.

As could happen, when the Menteri Besar enjoys a healthy majority after a period of time at the helm of government he can seek dissolution of the Legislative Assembly to hold a snap election, merely to affirm his political strength. Or he can request for dissolution under Article XXXVI(2) when his term is nearing the 5 year limitation which in any event would be dissolved by operation of law. For whichever reason it may be, a request for dissolution of the Legislative Assembly under Article XXXVI(2) if granted by His

Royal Highness, would result in a fresh election pursuant to Article XXXVI(4). Thus a request made for dissolution of the Legislative Assembly under Article XXXVI(2) usually bears no dire consequences for the Menteri Besar.

The position is diametrically different if the request for dissolution of the Legislative Assembly is made under Article XVI(6) AND the consent of His Royal Highness is withheld. The Menteri Besar shall then have no option but to tender the resignation of the Executive Council. (My emphasis).

Thus the importance of determining this issue. The dynamics may of course be different if there is a dissension within the party. The Menteri Besar can then utilise the power of dissolution to protect his own interests against attempts within the party to dislodge him. Although the Ruler has a discretion to withhold consent to the Menteri Besar's request for dissolution, the Ruler normally accepts the Menteri Besar's advice and grants a dissolution when it is requested.

Thus the question is – in exercising his discretion to withhold consent on a request for dissolution what would be the circumstances in which the Ruler would withhold his consent?

It is clear that one of the factors influencing the Ruler's discretion to withhold consent is when the Chief Minister has lost the confidence of the majority in the Legislative Assembly and not otherwise. (See **Halsbury's Laws of Malaysia Volume 2 page 25**).

Convention has it that normally the Ruler accepts the advice of the Prime Minister and grants a dissolution when requested, unless there are reasons to refuse such request, such as when that advice was improperly given. Whilst the Prime Minister may request a dissolution at any time, the question whether the Ruler would accede to such request is a matter entirely within His Majesty's personal discretion, as acceded to by the learned judge.

Taken at its face value and as far as the circumstances indicate, there seems to be no reason (compelling or otherwise) for Nizar to make that request even if under Article XXXVI(2). Even if he can act alone in making the request, he must know that the consequence of this request (whether granted or withheld) would have an impact on his government. Thus it is highly unlikely that Nizar did not consult some, if not all of his colleagues in the party before requesting the dissolution. Or rather, is it because his party colleagues had conferred with him regarding the political tumult they are in,

that Nizar was compelled to request for the dissolution of the Legislative Assembly?

As had been suggested by one writer, Brian Thompson in his book 'Constitutional & Administrative Law' (3rd Edition) at page 114 that:-

“... it is unlikely that in making such request, the Prime Minister (in our case, the Menteri Besar), would not consult some colleagues. In addition a wide range of information must be considered in taking the decision to call for a general election. The Prime Minister (the Menteri Besar in our case) will want to know about the party's preparedness to wage an election campaign, and careful interpretation of the opinion polls will be required.”

I agree with the said writer. It is very likely that Nizar consulted his own party members, since the decision to request for dissolution is a political decision. A reasonable inference is that it is only when Nizar is completely informed of the true political position that Nizar realized the urgency of making a request for dissolution.

A look at the relevant provisions in the Perak State Constitution pertaining to requests for dissolution of the Legislative Assembly is pertinent. They are Article XXXVI(2) and Article XVI(6). Article XXXVI(2) states that:-

“(2) His Royal Highness may prorogue or dissolve the Legislative Assembly.”

The other provision is the one that lies at the very heart of this appeal, i.e. Article XVI(6). It reads:-

“(6) If the Menteri 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.”

A related provision is Article XVIII(2)(b) where His Royal Highness acts in his absolute discretion in the withholding of consent to a request for the dissolution of the Legislative Assembly.

As at 4.2.2009, it is reasonable to infer that Nizar was completely appraised of the political imbalance. Pakatan had 28 seats now from its former numerical 'superiority' of 31 seats.

Thus whether or not the Three ADUNs support the Barisan Nasional, the fact remains that Nizar no longer enjoy a majority position when Pakatan lost the three seats in the Legislative Assembly at the time when his letter of 4.2.2009 (MNJ-5) and subsequent audience at 5.30 pm on the same day and the same position obtaining on 5.2.2009 when he wrote his second 'request' letter. It should now become apparent to Nizar that all of a sudden, three is not a crowd.

Nizar contended that he has not lost his majority because there was merely a 'deadlock'. As Roget's Thesaurus indicates, a 'deadlock' means that both sides are even; that there is a stalemate; that both are 'neck to neck and if legalese be required, both sides rank *pari passu*, each with the other etc: Unless of course, 'deadlock' is a new principle of democracy. As I remember it, democracy goes by the principle of 'majority wins'. So there you have it. However subsequent events seem to fly in the face of this contention.

My view is strengthened by the position taken by Nizar himself the next day. On 5.2.2009 as alluded to earlier, without waiting for His Royal Highness' reply to his request, Nizar sent to His Royal Highness posthaste, another letter (dated 5.2.2009 i.e. Exhibit MNJ-6) requesting for the dissolution of the Legislative Assembly. However, in this letter, Nizar made reference to Article XVI(6) by quoting the entire Article.

The inclusion of Article XVI(6) in this letter including his brief view, is certainly intriguing. This can only mean and it is a reasonable inference to make, that that particular provision i.e. Article VI(6) was spoken of or mentioned previous to this letter being written. From the materials before me it appears to have been so mentioned on the evening of 4.2.2009 when Nizar had an audience with His Royal Highness at 5.30 pm in the presence of the State Legal Advisor.

This fact ties in with what was deposed to by the State Legal Advisor in his affidavit affirmed on 8.4.2009.

At paragraph 7(a) at page 109 the State Legal Advisor affirmed that:-

“The Applicant (Nizar) was requesting that the Legislative Assembly be dissolved pursuant to Article XVI(6) of the Undang-Undang Tubuh Kerajaan Negeri Perak (The Perak State Constitution) and proceeded to hand over a proclamation to be executed by DYMM Sultan of Perak assenting to the dissolution of the Legislative Assembly.”

The part of the above statement alleged by the State Legal Advisor to have been made by Nizar was said to have been made on the previous evening, i.e. on 4.2.2009 during Nizar’s audience with His Royal Highness in his presence at 5.30 pm at Istana Kinta.

In my view the above deposition is consistent with what was expressed in Nizar’s letter of 5.2.2009 where Article XVI(6) was mentioned. For otherwise the sudden reference to Article XVI(6) in the 5.2.2009 letter, would be viewed by anyone present in the meeting of the 4.2.2009, to have come out of nowhere, like a bolt from the blue.

In this regard, I find that the learned judge’s finding that the evidence given by the State Legal Advisor should be taken with a ‘pinch of salt’ and that he preferred the evidence given

by Nizar, to be against the weight of evidence apparent in this appeal. The learned judge had clearly failed to appreciate the facts and circumstances in this appeal and his findings of fact are clearly wrong.

In this connection this evidence given by the State Legal Advisor is crucial. It is a relevant fact since in my view it was not credibly challenged and in the context of this appeal, I find that the above deposition is to be accepted and admitted. In this, I would rely on Section 8 Evidence Act, 1950 which reads:-

“8 (1) Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

(2) the conduct of any party, or of any agent to any party, to any suit or proceeding in reference to that suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant if the conduct influences or is influenced by any fact in issue or relevant fact and

whether it was previous or subsequent thereto.”

In view of the above, it is my view that Nizar’s denial that his request for dissolution was made under Article XVI(6) stands on flimsy ground. In short, Nizar was unable to credibly dispute that he has not lost the support or confidence of a majority of members of the Legislative Assembly at the time he requested for dissolution of the Legislative Assembly. The sum of all these parts is that Nizar was well aware of his fragile political position.

In this connection, with respect, my view is that the learned judge had not properly appreciated the facts and circumstances and came to a wrong finding of fact and law. He had clearly misdirected himself when he concluded that in the absence of reference to any specific provision of the Perak State Constitution by Nizar in his letters of MNJ-5 and MNJ-6 to His Royal Highness in requesting His Royal Highness’ consent for the dissolution of the Legislative Assembly, it would be reasonable to think that Nizar was appealing to His Royal Highness to exercise His Royal Highness’ Royal Prerogative under Article XXXVI(2) of the Perak State Constitution to overcome the ‘deadlock’ of having no clear majority by either Pakatan or Barisan Nasional.

In addition, my view is that the presentation of (a) the draft Proclamation which Nizar himself admitted was not referred to and therefore not vetted by the State Legal Advisor; (b) the letters of 4.2.2009 and 5.2.2009 (Exhibit MNJ-5 and MNJ-6); (c) the media statement issued by the Palace on 6.2.2009, collectively constitute uncontroverted documentary evidence pointing to the inevitable fact that the request by Nizar for the dissolution of the Legislative Assembly was made under Article XVI(6) of the Perak State Constitution. In view of his clear loss of confidence of a majority of members of the Legislative Assembly, any attempt by Nizar to request for a dissolution of the Legislative Assembly points strongly to the inference that it was made under Article XVI(6).

At the end of it, it is my belief that from the surrounding facts and overwhelming circumstances as stated above, it is established that Nizar's request made to His Royal Highness for the dissolution of the Legislative Assembly was undoubtedly made under Article XVI(6) and not under Article XXXVI(2). From the established facts, this is clearly an irresistible inference.

The next question of whether or not the resignation of the Executive Council would include Nizar himself, is moot. In

fact it is the very pulse of the instant appeal and a raging debate on this point still palpitates the pages of many legal literature. However before discussing this issue, an issue closely related to the first, would have to be determined.

RELATED ISSUE

WHETHER HIS ROYAL HIGHNESS IS ENTITLED TO INTERVIEW VARIOUS MEMBERS OF THE LEGISLATIVE ASSEMBLY ON 5.2.2009 TO ASCERTAIN WHO COMMANDS THE MAJORITY IN THE LEGISLATIVE ASSEMBLY.

Quite one of the intensely debated issues in the instant appeal (at least in the public domain), relates to the question of whether His Royal Highness is entitled to interview various members of the Legislative Assembly on 5.2.2009 to ascertain who commands the majority therein.

Counsel for Nizar, Tn. Hj. Sulaiman was vigorous in his assertion that the provision of Article XVI(6) can only be triggered if it could factually be proven that the Menteri Besar has ceased to command the confidence of the Legislative Assembly. He said that this has to be established as a fact. This issue is interwoven with the question of the applicable test in the exercise of His Royal Highness' judgment in Article

XVI(6). It is Tn. Hj. Sulaiman's submission that the exercise of the personal judgment of His Royal Highness is excluded in the operation of Article XVI(6). In other words, Tn. Hj. Sulaiman contends that His Royal Highness is not vested with the power to make his own subjective judgment on this issue under this Article.

The learned judge agreed with Tn. Hj. Sulaiman's view and held that the subjective element operates only with regard to His Royal Highness' power under Article XVI(2) where His Royal Highness exercises His Majesty's own judgment as "to who in his judgment is likely to command the confidence of the majority". (This relates to the appointment of the Menteri Besar),

Thus from my understanding of Tn. Hj. Sulaiman's assertion, in the absence of these subjective elements in Article XVI(6), an objective test is called for in the operation of Article XVI(6).

In this regard, the learned judge found fault with the enquiries conducted by His Royal Highness. He found that His Majesty's finding need not necessarily result in His Majesty being entitled to form an opinion that Nizar had

ceased to command the confidence of the majority of the members of the Legislative Assembly.

This is what the learned judge said:-

“... In another word, one cannot say that because His Royal Highness has judged that the respondent is likely to command the confidence of the majority in the Legislative Assembly therefore the applicant ceases to command the confidence of the majority of members the Legislative Assembly. I would say that the personal opinion or judgment of His Royal Highness is irrelevant to the construction of Article XV(6).”

A blithe pronouncement such as the above, does nothing to mitigate my belief that the learned judge’s understanding and construction of the facts and the law in this appeal is erroneous.

I had said at the start that a fine-tuning of our understanding of the various dynamics inherent in our Constitution is a pre-requisite.

In this context, it is easy enough to say that His Royal Highness was entitled to exercise his Royal Prerogatives in conducting the said interview and enquiry of the other members of the Legislative Assembly. But it would not render such act of His Royal Highness any more legitimate in the eyes of the uninitiated.

They are very likely to observe that this unknown entity called the 'Royal Prerogative' is a convenient mode to legitimize an otherwise unconstitutional act.

Therefore the importance of a brief outline on the issue of Royal Prerogatives, including discretionary and residual powers would be helpful.

I believe that most lawyers dealing with matters relating to prerogatives would gravitate towards its meaning from the English position. Intertwined as it is with conventions, they can see that most conventions are derived from English constitutional practice, some of which are incorporated in the Federal Constitution itself. Examples are those conventions connected to the dissolution of Parliament or State Legislative Assembly and appointment of the Prime Minister. These discretionary and prerogative powers are enjoyed

exclusively by the Yang di-Pertuan Agong and the Rulers, respectively.

Thus, it might be instructive to make a quick run past the English Prerogative history, in order to understand ours. I will for this purpose, disregard the period before, but would start with the abolition of the Court of Star Chamber in England then.

Soon after its abolition, the Privy Council was established. Over the years the powers of the Privy Council gave legal form to certain decisions of the government, whilst the Cabinet exercised its policy-making functions of the executive.

The Monarch in all of these as Head of State and the government, is personified for Crown purposes. For both the Monarch and government to govern, powers are needed to able them to perform their constitutional functions. In any case, the rule of law requires that these powers are grounded in law and not outside of the system.

However the power of the Monarch and the Crown must either be derived from Acts of Parliament or they must be recognised as a matter of common law. Thus in the 17th

century, constitutional settlements and the powers of the Crown, were subject to laws and that there were no powers of the Crown which could not be taken away or controlled by statute. Once that is achieved, the courts then accepted that the Monarch and the Crown enjoyed certain powers, rights, immunities and privileges which were necessary for the maintenance of government. These powers were not shared with private citizens. The term prerogatives was used as a collective description of these matters. As Blackstone defined it:-

...The medieval King was both Head of the Kingdom and feudal Lord. He had powers accounted for by the need to preserve the realm against external enemies and an undefined residual power which he might use for the public good...".

(My emphasis)

As we shall see later, Blackstone's definition holds true too in this country.

Back in England again, the common lawyers informed the Stuart Kings that there were two types of prerogatives. Ordinary and Absolute prerogative.

The Ordinary prerogatives meant that royal functions could only be exercised in defined ways for a specific purpose. In this context, the King dispenses some of his administrative powers through the Ministers; his judicial functions through his judges.

The absolute prerogative powers are those which the King exercises in his discretion. They include powers of pardon, of giving honours, property and rights, franchise and treasure troves, of acts of state and a host of others, both internal and external matters. Of these the most important prerogative power is I believe, in relation to the Ruler's prerogative in the exercise of his executive authority.

If the English prerogative powers seem undefined, the position in this country appears to be the same. Before our Independence, the Crown Territories of Penang and Malacca received the English prerogatives at common law, which ceased upon Independence. However the executive and discretionary powers conferred on the Governors of Penang, Malacca, Sabah and Sarawak are defined by their respective Constitutions.

The nine Rulers in the Malay States are indigenous Rulers and enjoyed their own prerogatives all along.

Inasmuch as extra-constitutional prerogatives if any were carefully considered by the framers of our Constitution, being mindful of the maintenance of the separation of powers, it nevertheless allowed more than a modicum of prerogative and discretionary powers to the Rulers. It would be said that the tone of the negotiations and agreements prior to Independence was based largely on maintaining the balance of differing interests, yet compromising to a large extent to protect and preserve the indigenous rights of the Malay Rulers. An understanding of these fundamentals must be carefully read and understood.

Thus the traditional prerogatives of the Rulers remain and are buttressed by the Constitution of the respective States. In fact upon independence, our Constitution as drafted under the Chairmanship of Lord Reid, preserved and indeed enhanced the monarchy in Malaysia in several ways as seen in its provisions.

However, over the years, even with the guarantee of protection as provided for in Article 71, and the preservation of these rights in Article 181, some of these prerogative rights have been whittled away by amendments to the Federal Constitution.

As constitutional monarchs, the powers of the Yang di-Pertuan Agong and the State Rulers are defined in the respective Constitutions. Generally, the duty of the Yang di-Pertuan Agong is to act upon Ministerial advice. His powers are more circumscribed. The State Ruler's position is much the same, though it appears that they have more latitude in their respective States. Although in some, limitations are placed by way of conventions.

What is rarely displayed however, is the fact that the Yang di-Pertuan Agong and Rulers are seised with prerogative privileges and residual rights and powers. Some of which are expressed, others implied.

In this regard, His Royal Highness' Royal Prerogatives are drawn up in Article LXVII and Article X of the Perak State Constitution. Article X reads:-

“X. In amplification and not in derogation of the royal prerogatives hitherto possessed or exercised by the Sovereign the following royal prerogatives among others are vested in the Sovereign:

- (a) the Fountain of Honour;
- (b) the Fountain of Justice;

- (c) the Fountain of Mercy;
- (d) the Head of the Religion of the State;
- (e) the Protector of Malay Custom;
- (f) the Ultimate Owner of the Soil.”

As can be seen, the above prerogatives are not exhaustive. Thus what Maitland wrote in 1888 that there was ‘often great uncertainty as to the exact limits of the prerogative’ is still true today.

The State Constitutions of the rest of the other eight States of Johor, Negeri Sembilan, Selangor, Perlis, Kelantan, Pahang, Terengganu and Kedah ruled by their respective Rulers, bear the exact same provision as found in Article X of the Perak State Constitution.

It is then a matter of having an understanding of these metaphysics and how they operate. Unobtrusive as they may seem they are in fact omnipresent and their exercise may have far-reaching effect on the governance of the State.

It must be stressed that the Royal Prerogative, discretionary and residual powers do not repose in the royal personages in vain. It is best expressed by Viscount Radcliffe

in **Burmah Oil Co Ltd v Lord Advocate [1965] AC 75 page 113** where His Lordship observed:-

“... The essence of a prerogative power if one follows Locke’s thought, is not merely to administer the existing law – there is no need for any prerogative to execute the law – but to act for the public good where there is no law, or even to dispense with or override the law where the ultimate preservation of society is in question.” (My emphasis).

And similarly in the Malaysian context, it was observed by Lee Hun Hoe CJ (Borneo) in **Government of Malaysia v Mahan Singh [1975] 2 MLJ 155** that:-

“... The King is the first person in the nation – being superior to both Houses in dignity and the only branch of the Legislative that has a separate existence and is capable of performing any act at a time when Parliament is not in being.”

Following from that, it has to be said that, it is not at any time or any situation that this discretionary or prerogative

power can be invoked. The general acceptance is that it has to be exercised judiciously.

It is clear that the Crown has a right and duty to protect its realm and citizens in times of war and peace and can invoke its prerogative to that end. That should never be in question.

Back to the situation in Perak, the sequence of events must again be stated in clear terms. Firstly, it is not correct for the learned judge to observe that because His Royal Highness had judged that Zambry is likely to command the confidence of the majority members of the Legislative Assembly, therefore His Royal Highness then decides that Nizar had ceased to command the confidence of a majority of members of the Assembly. With respect, a convoluted approach as manifested, is not in order.

The learned judge went on to say that the personal judgment of His Royal Highness is irrelevant to the construction of Article XVI(6).

Clearly the proper construction to be given to Article XVI(6) underlaid as it is, with the inherent discretionary and

prerogative powers of His Royal Highness, I am afraid, was lost on the learned judge.

It bears testimony that on 4.2.2009 at 3.30 pm, His Royal Highness received identical letters from the Three ADUNs dated 3.2.2009. These letters stated that:-

- (a) the Three ADUNs have withdrawn their purported resignation;
- (b) they have left their respective political parties;
- (c) they are still members of the Legislative Assembly;
- (d) their seats have been declared not vacant by Election Commission;
- (e) they have expressed their loss of confidence in Nizar; and
- (f) they support Barisan Nasional;

In view of the facts and circumstances stated above, at the time when dissolution was requested by Nizar, His Royal Highness was cognisant of the existing political equilibrium. If it was not obvious to Nizar, it was patently obvious to His Royal Highness that Nizar had by then lost his majority. His Royal Highness need not determine Nizar's loss of majority in a circuitous way, by first enquiring whether the other members of the Legislative Assembly (31 of them) who now form the

majority support Zambry, and only then took cognisance of Nizar's loss of confidence as was suggested by the learned judge. (My emphasis).

The enquiry by His Royal Highness of the other members of the Assembly could well be this. It is not in evidence as to His Royal Highness' reason as to why he conducted the enquiry. It is likely that the enquiry was conducted merely to confirm certain facts. It is reasonable to infer too, that since His Royal Highness knew of Nizar's loss of majority as early as 4.2.2009 or even on 3.2.2009 His Royal Highness might have in mind to withhold his consent pursuant to Article XVI(6). If that was the case, is His Royal Highness precluded from exercising his prerogative in the manner he did?

Once again, what could be the cause of His Royal Highness' enquiry? Firstly it is probably to confirm what he already knew of Nizar's loss of majority; secondly, to confirm who is likely to command the confidence of the majority of members of the Legislative Assembly before appointing the next Menteri Besar. In any case, in both situations above, His Royal Highness was exercising his absolute discretion – the first under Article XVI(6) and the second under Article XVI(2).

His Royal Highness' act in exercising both would involve the exercise of his prerogative powers.

In this, even if His Royal Highness is precluded from employing his subjective state of mind for the operation of Article XVI(6) in determining the fact that Nizar had ceased to command the confidence of the Assembly, the establishment of this fact could be and was done objectively by His Royal Highness.

Objectively it was ascertained in His Royal Highness' enquiry and interview of the other members of the Legislative Assembly including the Three ADUNs, that Nizar had 28 seats, as opposed to Barisan Nasional's 31. If mathematical calculation alone is acceptable in determining the loss of majority (without having to go to the floor for an adverse vote) as indicated in **Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak & 8 Ors [1995] 1 CLJ** and **Adegbenro v Akintola [1963] 2 WLR 63**, then this factual denominator would be consistent with the objective assessment as specified by Nizar. (My emphasis).

However, before that issue is taken, we must not lose sight of this relevant question once again. What could be the

real purpose of His Royal Highness' enquiry conducted on 5.2.2009?

Consider this position. His Royal Highness received not one but two letters of request for the dissolution of the Legislative Assembly from Nizar.

The decision whether to grant or withhold his consent upon such request being made is an act of His Royal Highness' discretion. In this, unlike the clear provision of Article XVIII 2(a), His Royal Highness does not act on advice if His Royal Highness were to exercise his power under Article XVIII 2(b) i.e. whether to withhold consent on a request for the dissolution of the Legislative Assembly. However, without the benefit of advice of the Executive Council or a member thereof, His Royal Highness has therefore, to ascertain the facts himself prior to giving a decision on Nizar's request.

In this regard it might have been imprudent for His Royal Highness to make a decision without regard to the actual facts. For instance, if His Royal Highness were to find that the contents of the three letters from the Three ADUNs were insufficient in ascertaining Nizar's loss of majority, he can, in the exercise of his prerogative and discretion, seek

clarification of the facts contained in the letters from the Three ADUNs.

Therefore His Royal Highness had to assess the political position correctly. He would have to give a value judgment in respect of Nizar's request for dissolution. In that regard, it is completely within His Royal Highness' discretion and within the contemplation of the relevant Articles in the Perak State Constitution for His Royal Highness to make enquiries. In deciding whether or not to grant or withhold a request for dissolution, perhaps His Royal Highness might have to look into such factors as were suggested by A.W. Bradley and K.D. Ewing in their book 'Constitutional and Administrative Law' (13th Edition). These are:-

- “(i) If a general election would be detrimental to the national economy;
- (ii) if the monarch can rely on finding another member of the Parliament who could carry on his government for a reasonable period with a working majority;
- (iii) if the existing Parliament is still vital, viable and capable of doing its job.”

The authors indicated that the above factors are by no means exhaustive.

In 'Constitutional and Administrative Law' S.A. de Smith subscribed to the above view. At page 105, the author expressed inter alia, that:-

“... The Queen may properly refuse a Prime Minister’s request for a dissolution if she has substantial ground for believing that:-

- (i) That an alternative Government enjoying the confidence of a majority of the House of Commons can be formed without a General Election and
- (ii) that a General Election held at that time would be contrary to the national interest.”

Prof de Smith went on to say very interestingly that:

“Refusal might be still more readily justifiable if the rebels were known to be prepared to form a coalition government with an opposition party.

.....
.....
A fortiori, a Prime Minister who has actually been repudiated by his own parliamentary party in favour of one of his colleagues can claim no constitutional right at all to demand a dissolution. It is also possible to imagine a situation in which the fact that a General Election had been held only a short while previously might tip the balance against granting a request for a dissolution.”

The above passage fits in squarely with the Perak situation. His Royal Highness’ enquiry is nothing more than His Royal Highness’ exercise of his prerogative power, inasmuch the same way that that prerogative power could be exercised by the monarch in England.

In so doing, perhaps His Royal Highness acted in an abundance of caution to confirm what the actual facts were. His Royal Highness was circumspect and discerning as can only be expected. In conducting the said enquiry, the actual facts could easily be determined objectively by His Royal Highness. The element of subjectivity in His Royal Highness’ decision then does not arise.

Thus with respect, the finding of the learned judge that His Royal Highness was not entitled to interview the various members of the Legislative Assembly on 5.2.2009 in ascertaining who commands the majority in the Legislative Assembly was plainly wrong. The learned judge's erroneous finding indicates a misconception of why and how the dynamics of both law, prerogative and discretionary powers operate in this constitutional context. The learned judge had clearly misdirected himself in this regard.

At this point, one has to stop and ponder awhile. Taking the cue from what the learned judge had said in his judgment that His Royal Highness is not entitled to interview the other members of the Legislative Assembly what could the judge possibly mean, after admitting that he was under no doubt that His Royal Highness has absolute discretion with regard to the appointment of a Menteri Besar and to withhold consent to a request for the dissolution of the State Assembly? (My emphasis).

By the word "*not entitled*", a situation of having no right, no authority and no mandate is quickly envisaged. This indictment would be countermanded by the clear provision of Articles X, XVI(2) and XVIII(2)(b) of the Perak State

Constitution. Moreover in Article X, His Royal Highness is vested with the executive authority in the State of Perak. In much the same way as the Yang di-Pertuan Agong in Article 39(1) of the Federal Constitution. This executive power is accompanied by various discretionary powers.

One of the most critical executive powers of the Ruler is his constitutional duty to maintain peace and order for the public good. What exactly does this entail?

In the absence of any definition, perhaps that of Wade and Philips found in 'Constitutional and Administrator Law' page 43 may be of use. The author's opinion is that:-

“... Broadly speaking the executive function involves the continuing maintenance of a state's government. It emphasizes the whole corpus of authority to govern, other than that which is involved in the legislative functions of Parliament and the judicial functions of the courts. The general direction of policy includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare.... The executive function has therefore a residual character and is exercised by techniques ranging from the formation

of broad policy to the detailed management of routine services.”

Generally, the situation obtaining in the passage above may also obtain in Malaysia.

As extensive as the executive and discretionary powers are, as reposed in the Rulers, the Ruler’s wisdom is always called upon in the exercise of those powers.

In any given situation it is usual for the Ruler making any decision, to make a reasoned assessment of the situation as found in his State. The exercise of those powers in normal or abnormal situation would have a different bearing. An oft-quoted passage says that:-

“... under normal circumstances, it is taken for granted that the Yang di-Pertuan Agong (including the Ruler of State) would not withhold his consent to a request for dissolution of Parliament (or State Assembly). His role under such a situation is purely formal.”

The situation in Perak at the relevant time could be viewed as being bereft of normalcy. Not unless one views as

normal, the political tension, intense political pressure, suspense and shifting political loyalties and betrayals, as being routine and all in a day's work.

In this, the maturity and wisdom of the Ruler is incumbent. Thus, when His Royal Highness exercised his prerogative and discretionary powers in conducting the 5.2.2009 enquiry, it was obviously to contain a situation which had potential threat and danger to the existing calm and dignity of the State. A decision had to be made as soon as possible as to which route the State has to take, for its continued governance. In this, His Royal Highness' consciousness of the significance of the exercise of his prerogative powers and its limitations cannot be understated.

As eloquently suggested by **Halsbury's Law of Malaysia (Volume 2 page 46)**:-

“... In reality, the discretionary powers of the Agong may be termed ‘crisis’ powers, that is powers which come alive only when there is a constitutional impasse, but would otherwise lie dormant.”

In my view the above statement uncannily reflects the Perak situation. In the exercise of His Royal Highness'

powers and duty as Head of State, the said prerogative power which is latent and unobtrusive, can now be called upon to contain any imminent catastrophe.

As long as there is peace, no known or perceived constitutional impasse or any situation of that ilk, the Ruler is not likely to be confronted with any such obligation to exercise his prerogative. The exercise of this prerogative power is all the more critical if the normal government machinery breaks down. The Royal Prerogative in time of real or apprehended crisis differs in degree rather than kind from the general common law doctrine of necessity.

It is my view therefore that the prerogative and discretionary powers are not as antiquated as they might seem and are certainly far from being a relic of bygone days.

This situation is not any more different than that found in the Monarch's power in the United Kingdom. For example, after the collapse of Ramsay MacDonald's Labour Government in 1931, George V encouraged the formation of a National Government under MacDonald's leadership. Thus in such times, the Ruler's prompt and prudent decision is critical. In this, Dicey had stressed the presence of residual features of the prerogative within the realm. Though admittedly, the

Queen's prerogatives differ to some extent from that of Malaysian Constitutional monarchs, the principle of its application remains the same.

In such times as much as the Ruler is mindful of the limitation placed upon his prerogatives and the rakyat acknowledges that His Majesty is guided only by his prudence and wisdom and having only their interests at heart, then the expression "*The King is dead. Long live the King!*" would have meaning and gives comfort to his subjects, of the continuing peace, protection and tranquility afforded them by the Ruler. Taken in this light, the said enquiry was conducted in the best traditions of exercising His Royal Highness' executive and prerogative power. As can be discerned, the said enquiry was a 'fact-finding mission' to ascertain the facts, the existence of which should necessarily precede the exercise of His Royal Highness' prerogative powers under Article XVI(6).

In this, the element of objective assessment as opposed to a subjective one as demanded by Nizar under Article XVI(6) have been more than credibly met.

In any case His Royal Highness was exercising his prerogative powers which are discretionary under Article XVIII(2)(b). The decision thereof is non-justiciable (Council,

Civil Service Unions and Minister of the Civil Service [1984] All E.R. 956). That decision to withhold His Royal Highness' consent even given its plain and ordinary reading, predicated on the facts, is well within the realm of His Royal Highness' absolute power.

His Royal Highness' conduct of the enquiry was well within the parameters or ambit of Article XVI(6). In this connection, it is clear that His Royal Highness had acted constitutionally.

Thus having established the facts of the first and related issue, the parallel issue (or second issue) which had lately occupied so much space in our national psyche needs to be urgently addressed.

SECOND ISSUE

THE SECOND ISSUE IS WHETHER THE LEARNED JUDGE WAS RIGHT IN HOLDING THAT THERE MUST BE A MOTION OF NO CONFIDENCE AGAINST NIZAR PASSED IN THE LEGISLATIVE ASSEMBLY BEFORE HE CEASES TO COMMAND THE CONFIDENCE OF THE MAJORITY OF THE MEMBERS OF THE MEMBERS OF THE LEGISLATIVE ASSEMBLY.

The popular sentiment is that there must be a motion of no confidence taken on the floor of the Assembly before any

Chief Minister or Menteri Besar can be determined to have ceased command of the confidence of the majority.

I am aware that this is the 'trigger issue' as labelled by Nizar. However, the above issue as put by Nizar has some troubling aspects. My reasons will follow.

It is Nizar's contention that since a vote of no-confidence by a majority of the members of the Assembly had not been taken against him, it cannot be said that he has lost the majority confidence of the Legislative Assembly. Nizar also took the position that in the absence of such vote, his dismissal by His Royal Highness was unconstitutional. This 'trigger issue' being the pre-condition to Article XVI(6), that Nizar had ceased to command the confidence of the majority, had not been met. What Nizar meant was that his loss of majority can only be ascertained, by a vote of no confidence taken in the Legislative Assembly. And by no other means.

That this 'loss of confidence' issue is couched in peremptory terms, forces me to contemplate whether this is really a democratic principle. Whatever it is, it reflects an imperative. For ease of reference I shall hereafter refer to this issue as the 'loss of confidence' issue or 'imperative' whichever is applicable in the context herein.

With utmost respect, the ‘culprit’ is of course the much-vaunted case of **Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli [1966] 2 MLJ 187** which is considered to be the desired precedent of all time with regard to this issue. As far as I could remember, save for the cases of **Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak & 8 Ors [1995] 1 CLJ** and **Tun Datu Hj. Mustapha Datu Harun v Tun Datu Haji Mohamed Adnan Robert [1986] 2 MLJ** above, the ‘loss of confidence’ issue has not resurfaced since **Ningkan** was decided more than forty years ago. Nizar relied on **Ningkan’s** case to substantiate his claim. This was endorsed by the learned judge who decided that ‘loss of confidence’ of a majority of members can only be determined by a vote on the floor of the Legislative Assembly. He decided that that was the only test of such ‘loss of confidence’.

Is the learned judge correct in applying this test?

Given the importance placed on **Ningkan’s** case in this area of constitutional law, it is time to critically appraise the same.

The dismissal of Dato' Ningkan as the then Chief Minister of Sarawak, by the then Governor of Sarawak on 17th June 1966 triggered a chain of events of great constitutional importance. A brief account of the facts of the case are as follows:-

Dato' Ningkan received a letter on 16th June 1966 from the then Governor of the State calling upon him to tender his resignation on the ground that a majority of the members of the Council Negri (21 members) had represented by letters signed by them to the Governor that the Chief Minister had ceased to command their confidence. Dato' Ningkan's rebuttal was that there was no such indication in the proceedings of the Council Negri held just two days earlier, i.e. on 14th June 1966. (No motion of no confidence of the majority of its members was taken and there was no defeat of any Government bill).

Dato' Ningkan requested that a vote be taken in the Council Negri to test his political strength. He requested the Governor to convene the Council Negri for this purpose. Before that could happen, the Governor wrote a letter to Dato' Ningkan on 17th June 1966 notifying him that since he had refused to tender his resignation notwithstanding that he had lost the confidence of the majority of the members of the

Council via the 21 signatures, the Governor had no choice but to declare that he and the other members of the Supreme Council have ceased to hold their respective offices. The Governor informed him that a new Chief Minister, Penghulu Tawi Sli has been appointed to replace him (Dato' Ningkan).

In much the same approach taken by Nizar in this appeal, Dato' Ningkan then sought various declarations in Court, the main ones being the unconstitutionality of the Governor's action and the invalidity of his purported dismissal. He said that 21 members out of a total membership of 42 members did not constitute a majority. He added that the Governor had no power under Article 7(1) of the Sarawak Constitution to dismiss him and even if he had, it must be limited to the situation where the Chief Minister had ceased to command the confidence of the majority of the members of the Council Negri. Dato' Ningkan said that the lack of confidence expressed against him is to be determined only by an adverse vote on the Council floor. He said that this was not done in his case. In reply, the Governor said that he had a duty to dismiss the Chief Minister if there is refusal on his part to tender his resignation, after he had lost the confidence of the majority of members in the Council. The Governor went on to say that it is for him to make a personal assessment as to whether the element of loss of confidence of the majority of

members of the Council had been so satisfied. Dato' Ningkan was dismissed by the Governor. Dato' Ningkan filed a suit, challenging his dismissal.

Thus before Harley Ag CJ in the High Court, the one critical issue to be decided was, in what manner and by what method was the lack of confidence to be expressed; whether such lack of confidence could be assessed only by a vote of no confidence on the floor of the House?

The relevant Article [Article 7(1)] of the Sarawak Constitution reads:-

“Article 7 (1) If the Chief Minister ceases to command the confidence of a majority of the members of the Council Negri, then, unless at his request the Governor dissolves the Council Negri, the Chief Minister shall tender the resignation of the members of the Supreme Council.

(2) A Member of the Supreme Council may at any time resign his office by writing under his hand addressed to

the Governor, and a member of the Supreme Council other than the Chief Minister shall also vacate his office if his appointment there to is revoked by the Governor acting in accordance with the advice of the Chief Minister.

(3) Subject to Clauses (1) and (2), a member of Supreme Council other than the Chief Minister shall hold office at the Governor's pleasure."

It is Harley Ag CJ's view, that after considering the facts and circumstances in **Ningkan**, loss of confidence can only be measured by a vote taken by a majority of members on the floor of the Assembly. (My emphasis).

This is what His Lordship said:-

"... it seems to me that by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negri." (My emphasis).

Nothing more was expressed by His Lordship on this 'loss of confidence issue'. This is unfortunate. Although His Lordship produced an otherwise lucid judgment, the lack of analysis of the imperative of the 'loss of confidence issue' seems rather dismal. His Lordship's decision on this important constitutional point is therefore denuded of its ratio. His Lordship left the question open as to why he took that stand. In any case, a close scrutiny of **Ningkan** makes it possible to contemplate the reason as to why his Lordship decided the way he did. This will be explained shortly.

The judicial pronouncement made in **Ningkan** above was endorsed by the court in **Tun Datu Hj. Mustapha Datu Harun v Tun Datu Haji Mohamed Adnan Robert [1986] 2 MLJ**. The facts differed slightly from that in **Ningkan**. However on the occasion that Tan Chiaw Thong J. had to make an observation on the method of how assessment of loss of confidence of the majority is to be made, His Lordship observed that:-

“... Even more so, would this situation apply in the case of dismissal without a vote of no confidence from the House.” (My emphasis).

However, it was in the Nigerian case of **Adegbenro v Akintola [1963] 2 WLR 63** that a whole new perspective on this issue made its presence.

The Nigerian Federal Supreme Court earlier held that the Governor, in dismissing the Chief Minister, cannot constitutionally take account of anything in the matter of 'support' except in the record of votes actually given on the floor of the House. On appeal, the Privy Council in a reversal judgment speaking through Viscount Radcliffe observed that:-

“His Lordships in the Privy Council, were unable to find any indication either in the general scheme or in other specific provisions, which would enable them to say that the Governor is legally precluded from forming his opinion upon the basis of anything but votes formally given on the House.”

Locally, although the facts somewhat differed, a similar approach came close, on the heels of **Adegbenro**. This can be found in the observation of Abdul Kadir Sulaiman J, in **Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak & 8 Ors [1995] 1 CLJ** who quoted **Adegbenro's** case with approval.

Briefly, this case concerns a petition signed by a majority of the members of the State Legislative Assembly stating that they had lost confidence in the Chief Minister of Sabah. It was held by the learned judge in the High Court that a vote in the Assembly is not the only means to determine the loss of confidence of a majority of members of the Assembly in the Chief Minister. It depends on the facts and circumstances. According to the judge, other extraneous matters may provide sufficient evidence to establish the fact of the Chief Minister ceasing to command the confidence of the majority of the members of the Assembly for the purposes of the Constitution of Sabah.

His Lordship said in this case, referring to the construction of Article 7(1) of the Sabah State Constitution which is in pari materia with Article 7(1) of the Sarawak Constitution and Article XVI(6) of the Perak State Constitution that:-

“... The expression of ‘loss of confidence’ is not therefore, confined to a vote taken in the Assembly but depends on the circumstances which are capable of contributing sufficient evidence to indicate such lack of confidence.

After all there is nothing in the Constitution which can be construed as requiring that the test of confidence or the lack of it must be by way of a vote taken in the floor of the Council Negri.

Thus for the purposes of Article 7(1) of the Sabah State Constitution, other extraneous sources which are properly established, are capable of contributing evidence to indicate such lack of confidence.” (My emphasis).

Both the Privy Council in **Adegbenro** and Kadir Sulaiman J in **Amir Kahar** found that in the Constitution of West Nigeria and the Constitution of Sabah, there is nothing explicitly written in them, which can be construed as requiring that the test of confidence of the Chief Minister, or lack thereof must be assessed only by a vote of no confidence taken on the floor of the House.

The relevant provision in the Constitution of West Nigeria as found in **Adegbenro v Akintola** is Section 33(10) reads:-

“33(10) The Ministers of the Government of the Region shall hold office during the Governor’s pleasure provided that –

(a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly.” (My emphasis).

It was argued by Harley Ag CJ in **Ningkan’s** case that the words “*unless it appears to him*” in Article 33(10) of the Nigerian Constitution lends an element of subjectivity in the mind of the Governor when deciding the issue of dismissal of the Chief Minister. His Lordship said that this was not expressed in the Sarawak State Constitution. Nizar argued that the same could be said for the Perak State Constitution, where the personal judgment of the Ruler to dismiss is not expressed in the relevant Article. (My emphasis).

In **Adegbenro**, the Privy Council took the view that there was nothing either in the scheme or provisions of the Constitution which circumscribed the assessment of loss of confidence only to votes given on the floor of the House. Thus it was competent for the Governor to dismiss the Prime Minister upon receiving a letter signed by 66 out of a total of 124 members of the House of Assembly. The Privy Council

decision was primarily based on the language of Section 33(10) of the Constitution of Western Nigeria.

On this premise, the Privy Council held that the Prime Minister had been validly dismissed.

Of primary interest and importance is the observation of Viscount Radcliffe in Adegbenro where His Lordship observed:-

“... It is said too, that the ‘support’ that is to be considered is nothing else than the support in the proceeding of the House itself, and with this proposition also their Lordships are in agreement. They do not think however, that this is in itself a very pregnant observation. No doubt everything comes back in the end to the question what action the members of a party or a group or a combination are resolved to take in proceedings on the floor of the House; but in democratic politics speeches or writings outside the House, party meetings, speeches or activities inside the House short of actual voting are all capable of contributing evidence to indicate what action this or that member has decided to take when and if he is called upon to

vote in the House, and it appears to their Lordships somewhat unreal to try to draw and form dividing lines between votes and other demonstrations where the issue of ‘support’ is concerned.” (My emphasis).

In this, I do acknowledge that the Constitutional provision in the Constitution of West Nigeria empowers the Governor to make his judgment if ‘it appears to him’ the Chief Minister no longer commands the majority of members of the House of Assembly. It is left entirely to the Governor’s own assessment and there is no limitation as to the material and resources on which he is to base his judgment or the contacts to which he may resort for the purpose.

It is worth noting that in rejecting the decision of the Supreme Court of Nigeria which was distinguished in **Ningkan’s** case, the Privy Council clearly stated that there was no such limitation of gauging the loss of confidence only by taking a vote on the floor, found in the language of the Constitution. Secondly, it said that to impose such a limitation would tantamount to disregarding the reality of the political process. But that is the position in West Nigeria.

With respect in this country the stand taken in **Ningkan** that the assessment of loss of confidence is acceptable only by votes taken on the floor of the Assembly, was diluted by the dicta of Hj Abdul Kadir Sulaiman J, in **Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak & 8 Ors [1995] 1 CLJ 197**. In this case, His Lordship observed that:-

“... it is my judgment that to establish that a Chief Minister ceases to command the confidence of a majority of the members of the Assembly for purposes of Article 7(1) of the Sabah Constitution it need not necessarily be dependent upon the actual motion to be tabled in the State Legislative Assembly. It may be available from sources outside the Legislative Assembly depending on the circumstances of each case. In this case, based on the circumstances presented to it, the Court is satisfied that the resignation of Datuk Pairin as the Chief Minister on 17 March 1994 is a resignation pursuant to him ceasing to command such a confidence.” (My emphasis).

Referring again to **Ningkan's** case and examining the decision of Harley Ag CJ as against that in **Adegbenro** and

Amir Kahar, let us examine why the **Ningkan** decision was decided the way it was. With respect, I had earlier expressed reservation on Harley Ag CJ's decision in **Ningkan**. The following facts might shed some light.

In his anxiety to put **Adegbenro's** case at arm's length from **Ningkan's**, Harley Ag CJ made the observation that there are five distinguishing features in **Adegbenro**, not found in **Ningkan** and concluded that therefore the provisions in the West Nigerian Constitution are different from the provision in the Sarawak Constitution. Thus he said, it renders **Adegbenro's** principles inapplicable to Sarawak. The five distinguishing features are:-

- “(1) In the Nigerian case it was mathematically beyond question that more than half the House no longer supported the Premier.

- (2) The measurement in Nigeria was a measurement of ‘support’, not of ‘confidence’. The Sarawak Constitution is dated subsequent to the decision of **Adegbenro v Akintola**, and it does seem to me that the ‘confidence’ of a majority of members, being a term of art, may

imply reference to a vote such as a vote of confidence or a vote on a major issue.

- (3) In Nigeria it was not disputed that the Governor had express power to remove the Premier from office if he no longer commanded support.
- (4) In Nigeria the Governor had express power to assess the situation 'as it appeared to him'.
- (5) In Nigeria all ministers, including the Premier, held office 'during the Governor's pleasure'; although there was an important proviso to this.

All the above five points were peculiar to Nigeria, and not one of them applies to Sarawak. These distinguishing features force me in the present case to a conclusion converse to the Privy Council decision. It seems to me that by the provisions of the Sarawak Constitution, lack of confidence may be demonstrated only by a vote in Council Negri. Men who put their names to a 'Top Secret' letter may well hesitate to vote publicly in support of their private views." (Emphasis added).

Now, whilst one could accept the differences found in points (2) (3) (4) and (5) above, the first point seems inconsistent with His Lordship's general approach as regards Article 7(1) of the Sarawak Constitution. Harley Ag CJ in **Ningkan** had been steadfast in his observation that lack of confidence may be demonstrated only by a vote on the floor of the Council Negri.

As clearly expressed, in point (1), he concedes, unwittingly or otherwise, that the number of signatories (66 signatories) in Nigeria constituted a clear majority. Is Harley Ag CJ then saying that in **Ningkan**, if he was assured that if on a given day, there is a clear majority in any manner determined by the Council Negri that it no longer supports the Chief Minister, then he would have come to a different conclusion even if there was no vote of confidence passed in the Council Negri? (My emphasis).

That appears to me to be the position Harley Ag CJ seemed to take. After scrutinising the facts and circumstances in **Ningkan** the answer could be this.

Harley Ag CJ's seemingly inconsistent stand may well be due to the political reality found in Sarawak at that time. As succinctly put by Hj Abdul Kadir Sulaiman J in **Amir Kahar**:-

“... The hard fact in that case (referring to **Ningkan**) was that the alleged loss of confidence was highly suspect. There was a top secret representation made by persons outside the Council Negri which on the face of it did not disclose that the representors were the majority of members in the Council Negri. Also the fact represented was suspicious in the sense that the letter was not signed by all the persons listed in the letter and even in respect of those who signed, one of them was represented only by a ‘chop’. It was for that reason the learned judge said at page 193: *“Men who put their names to a ‘Top Secret’ letter may well hesitate to vote publicly in support of their private view.”*

Given the above, could it be because of these furtive elements existing in the then political scenario that Harley Ag CJ in **Ningkan** was intractable in his view that the loss of majority may only be determined by votes on the floor of the Council Negri? The political climate then was such that Harley Ag CJ himself observed that:-

“... The plaintiff (Ningkan) did not refuse to resign: he merely expressed doubts whether in fact he had ceased to command a majority and requested that the matter be put to the constitutional test.”

Given the volatility of Sarawak politics then, where underlying political tension was rife, with political parties like PESAKA, BERJASA and PANAS amongst others, entering the fray, it was little wonder that Dato' Ningkan himself was in a state of flux. Those keen to topple Dato' Ningkan avoided taking a motion of no confidence, as loyalties were fluid, and shifts of political allegiance were not unusual, given the hugely diverse native groups, each absorbed with their ancient antagonisms and rivalry. Thus it would be a risky venture to take a vote on the floor of Council Negri. Anything can happen. Instead they resorted to taking signatures of 'members', of which only 21 were obtained. Even those 21 signatures bore evidence of one of it being dubious.

However the matter worsened when it was learnt that the letter to the Governor containing the said 21 signatures came from Temenggong Jugah, who himself was not a member of the Council Negri. Thus it was not even certain whether

genuine members or outsiders had signed the letter, expressing loss of confidence against Dato' Ningkan.

The frenetic political situation could well be the reason for Harley Ag CJ's strict compliance with the 'convention' of ascertaining loss of confidence of the majority of the Assembly whereby only an adverse vote taken on the floor of the Council Negri would count, in determining loss of confidence.

However in my view it is Harley Ag CJ's first 'distinguishing feature' which cracked his armour. To express that it was mathematically beyond question that more than half of the House no longer supports the Premier represents a 'distinguishing feature' from the **Ningkan** case, greatly diluted the strength of **Ningkan** as authority for the proposition that the ONLY mode of establishing the fact that a Chief Minister ceases to command the confidence of the majority of the member of the Council Negri is by a motion taken on the floor of the Assembly.

In **Ningkan**, the 21 signatures were in themselves clearly not indicative of a majority since 21 out of 42 members could hardly amount to a majority. Thus Dato' Ningkan himself quite rightly argued that there was no loss of majority support against him as alleged.

Unlike **Ningkan's** case however, in Nizar's case, 31 out of 59 members of the Assembly pledged their support for Barisan Nasional. Their support was unequivocal. They were interviewed personally by His Royal Highness. They pledged their allegiance and support for Barisan Nasional before His Royal Highness. In this, there could hardly be a more empathic demonstration of majority support for Barisan Nasional.

As slender as was the loss of majority in Nizar's case, the defection of only three Assemblymen however had a devastating effect on the balance of power in the Legislative Assembly.

As any politician will know, there is nothing more painful than having to face loss of majority support in the House especially after a rousing and rivalrous campaign. This was the case when Neville Chamberlain the conservative Prime Minister in the United Kingdom whose normal majority of about 200 was reduced to 81. He resigned in 1940, upon realising that he had lost the confidence of his own party as well as that of the Labour Party. To some extent, such was the situation in Nizar's case.

There is another point I believe to be the reason, for Harley Ag CJ's approach when he subconsciously or otherwise, regarded a particular convention which is applied in Westminster and followed in some other Parliamentary systems of government, to be applicable in **Ningkan**. This is the issue before us now. That is, the 'convention' of taking a motion on the floor of Parliament or Assembly for a vote especially of any major issue which amongst others, include an adverse vote of confidence by a majority of members of Parliament or Assembly. That because this convention is generally observed in most parts where there is a Parliamentary system, its application was taken as a matter of course. Harley Ag CJ assumes that the convention applies in **Ningkan**. In my view, the argument is more interesting for the assumptions on which it rests than for any intrinsic merit, for it posits the idea that this convention is binding.

It would appear from the position taken by Harley Ag CJ that any departure from this convention is not only frowned upon. It is taken to be a breach. For such is the effect of conventions. Since even if conventions are said have no force of law, it is still regarded as binding and obligatory to those who apply or should apply them, and to those who expects them to be applied.

So in the **Ningkan** situation, it is hardly surprising that given the then political turmoil and covert politics, it is little wonder that Harley Ag CJ stood his ground. That the only way to determine the loss of majority confidence of members of the Council Negri was to take a vote on the floor of the Council Negri.

This convention is regarded by most, to be the litmus test. It is said to represent the best of democratic principles. The argument forwarded by Nizar too seems to be that this 'loss of confidence' issue is a convention.

Even Viscount Radcliffe in **Adegbenro** gave his unabashed approval to this convention where he said that –

“... 'support' that is to be considered, is nothing else than support in the proceedings of the House itself and with this proposition also their Lordship are in agreement.” (My emphasis).

However as clearly explained later, the Privy Council took the position that following a **British** precedent might not be practical in the circumstances of the case (**Adegbenro**). Especially if “... *the Governor's power of removal is not limited in such precise terms as would confine his judgment to be*

actual proceeding of the House, unless there are compulsive reasons to be found in the context of the Constitution...

To seal the fate of the **Ningkan** decision further so to speak, Harley Ag CJ was much taken with the view expressed by Dicey.

Harley Ag CJ quoted Dicey with approval. This is an extract of Dicey in the **Ningkan** decision:

“... the nation expects that a Minister who cannot retain the confidence of the House of Commons, shall give up his place, and no Premier even dreams of disappointing these expectations.

But the sanctions which constrains the boldest political adventurer to obey the fundamental principles of the constitution and the conventions in which these principles are expressed, is the fact that the breach of these principles and of these conventions will almost immediately bring the offenders into conflict with the Law of the Land.

... the one essential principle of the constitution is obedience by all persons to the

deliberately expressed will of the House of Commons in the first, and ultimately to the will of the nation as expressed through Parliament.

Of course therefore, a Minister or a Ministry must resign if the House passes a vote of want of confidence.”

Now, how would one interpret Harley Ag CJ's acceptance of the above opinion expressed by Dicey? Dicey was obviously speaking of the British Constitution (as Harley Ag CJ himself admitted). It must be remembered that in the United Kingdom, Parliament is supreme. So the will of the House of Commons is an imperative. Not so in this country. The Constitution is supreme.

In the above opinion Dicey argued that breach of convention would almost at once bring the violator into conflict with the law of the land. In my view Dicey's argument cannot be accepted as a general proposition because some breaches of conventions will not invite sanctions, but would result in political difficulties.

But in approving the jurisprudence as expressed above, Harley Ag CJ went on to say that:-

“... the same principles apply mutatis mutandis to the Constitution of Sarawak.”

As can be seen, Harley Ag CJ was much influenced by the obligatory imposition of this particular convention. Thus the imperative language used by Harley Ag CJ in **Ningkan** is to be expected.

It does not help of course, that Harley Ag CJ seemed to be influenced too, by the fear that the violators of conventions might be in conflict with the law of the land, as darkly warned by Dicey.

The question now is: How much weight should be given to the seemingly irreplaceable usage and binding effect of Harley Ag CJ's dictum? The next question is: What is the position of constitutional conventions in this country? The following question is: Is this particular 'English' convention (of voting on the floor of Assembly to gauge loss of a majority support or loss of confidence) a convention too, in this country? That, I believe is the crux of the matter.

In this, one has no choice but to look again to our heritage to get the answer. Taking up where I left off, it is

instructive to remember that a number of conventions practiced in Westminster have in fact been incorporated in the Federal Constitution.

When that happens, they can no longer be regarded as conventional practices but binding rules. An example is this. In England, it is a convention that the Queen acts on the advice of her Ministers. In Malaysia it is a rule of the Federal Constitution as provided for in Article 40.

It is true that not all the Westminster conventions that have been adopted in Malaysia. For if it were, some of those conventions would surely come in useful in the instant appeal.

For instance amongst others, it is a British convention that if the Prime Minister loses the confidence of members of the House and the Sovereign withholds dissolution, then he and his Ministers must resign, unless the Sovereign then dissolves Parliament. But this convention, I am afraid is, not embodied, codified or inserted in the Federal Constitution. At least not in express terms and more's the pity.

Naturally the next question arises: What is constitutional convention?

At the time when the former colonies obtained independence from Britain, they adapted many of the constitutional practices established by the English legal and constitutional system. Malaysia included.

However the framers of our constitution did not incorporate all of them. They incorporated only those which would accord with the practical reality, usage and custom of this country. Or what they believed to be so. But what of those incorporated ones?

This is where the problem starts, since some conventions are hard to pin down and define. But once they are accepted and followed, they might have obligatory effect. In my view, one of the more useful purposes of conventions is to define the parameters of constitutional discretion and the manner in which it is to be exercised. In short conventions help 'limit' the discretionary authority reposed in the government or sovereign.

In my view, the codification of some constitutional conventions such as those found in Articles XVIII(2)(a) and (b) of the Perak State Constitution, underscores the delicate decision-making process any Head of State would encounter when several discretionary powers (e.g. whether to dissolve

Parliament/Assembly or to withhold consent and to appoint Prime Minister on Cabinet), since it clearly involves the exercise of political judgment. As elegantly framed by the Supreme Court of Canada in reference **Re. Amendment of the Constitution of Canada [1982] 125 DLR (3d) 1, 84:-**

“... the main purpose of conventions is to ensure that the legal framework of the Constitution is operated in accordance with the prevailing constitutional value of the period.”

This underscore the point that “*even when the constitution specifically confers discretion on the Ruler, conventions may arise to regulate the same*”. (**Halsbury’s Lord of England Volume 2**).

A quick look at paragraph 29 of Nizar’s written submission is interesting. It reads:-

“29. In **Amir Kahar** the “extraneous sources” relied upon were not only evidenced by the petition of 30 Legislative Assembly members but also by the public admission of Pairin himself that he had lost confidence of the majority and then tendering his resignation. Under such circumstances, there

is little need for the Legislative Assembly to pass a vote of no confidence when the Chief Minister himself had publicly acknowledged that he had lost support of the majority and would resign, and indeed resigned. Assuming that Pairin had refused to resign as CM, the case would then have taken a different dimension. The situation and the circumstances of the present case are quite different from that of **Amir Kahar**. Here, taking Zambry's case at its best, there was a situation of potential deadlock: 28-28." (My emphasis).

In view of the above, is it Nizar's position that in the event the Chief Minister (in **Amir Kahar**) acknowledges and accepts his loss of majority and resigns, then how that loss of majority came about is irrelevant? There is no compulsion for an adverse vote to be taken on the Assembly floor?

Can it be true then that Nizar falters a little from his stand taken earlier? Does this indicate that the 'alternative means' or 'extraneous factors' in determining this 'loss of confidence' issues are acceptable after all? The above position taken and the unequivocal observations made by both the Privy Council in **Adegbenro** and Kadir Sulaiman J in **Amir Kahar** strengthens my believe that the measure of loss of confidence

in the majority is not exclusively limited to a vote taken on the floor of the Assembly.

Firstly, the learned judge was clearly wrong in construing that this specific mode is the only mode to be applied, and that in its absence Nizar's ouster is considered unconstitutional.

I agree with the decisions of both Adegbenro and Amir Kahar, that there are alternative means and extraneous ways of expressing lack of support.

Even if the decision in Amir Kahar is said to be obiter, its importance is not diminished, for it reflects the political realities of the day. Even if no subjective element and latitude is afforded the Governor as in Adegbenro (in his search for evidence of support of majority or lack of it) the exercise of prerogative and discretionary powers of the Ruler in Nizar's case, necessarily gives another dimension to this issue.

These fortifies my believe that the 'loss of confidence' issue has to be looked at again.

In view of these, the question arises. Is a motion taken on the floor of the Assembly/Parliament to determine loss of

confidence of a majority members a convention in this country? And therefore binding?

Quite apart from the notable absence of such express and imperative terms in the Federal Constitution, as well as in Article 7(1) of both Sabah and Sarawak Constitutions and Article XVI(6) of the Perak State Constitution, the authorities themselves do not reflect the existence of such a convention.

The lone 'precedent' in **Ningkan** (and to some extent in the **Datu Tun Mustapha case**), as opposed to the contrary view held in **Adegbenro** and **Amir Kahar**, could not possibly in my view, make the ruling on this 'loss of confidence' issue in **Ningkan** a convention which is obligatory and binding.

The very fact that a subsequent ruling departed from the **Ningkan** ruling defies its very status as a convention. The **Ningkan** phenomenon stands all by itself. In other words, a single swallow does not make a summer.

In view of the circumstances above, I disagree with the learned judge that the **Ningkan** decision is applicable in the instant appeal. In fact the **Amir Kahar** decision on the facts are more pertinent.

In **Amir Kahar** the language of Article 7(1) of The Sabah Constitution is in pari materia with Article XVI(6). Even if **Adegbenro** is said by Nizar to be distinguishable, in view of the dismissal being subject to the personal judgment of the Head of State, **Amir Kahar** does not bear that impediment.

In **Amir Kahar**, the said 30 members of the Council Negri expressed on the broadcast media that they no longer had confidence in Datuk Pairin. Though they requested the Governor to convene the Assembly to table a motion of no confidence, this was pre-empted by the resignation of Datuk Pairin. Datuk Pairin recognised the time honoured convention that when he loses the confidence of a majority of members of the Council Negri, the honourable thing to do is to tender his resignation. Due to defection of his PBS members to Barisan Nasional, the Barisan Nasional now had a majority. He tendered his resignation, paving the way for Barisan Nasional to form the next government.

In Nizar's case, the three ADUNs had left Pakatan. They pledged support for Barisan. This fact was told to Nizar. Even assuming for a moment that we agree with Nizar that he was unaware of their withdrawal of resignation, this fact was nevertheless told to him by His Royal Highness on 5.2.2009. Thus he knew. Just as Datuk Pairin had known. But what

happened? Why did Nizar request for dissolution? Nizar knew that he could not possibly muster enough support within that time to keep his 'ship' on an even keel.

It is baffling that if Nizar had indeed put such great store by the convention that the determination of loss of confidence could only be accepted through a motion taken on the floor of the Assembly, why was this course of action not taken?

If Nizar truly felt that he stood an even chance, if not a good chance of regaining support, he could have requested His Royal Highness for a convening of the Legislative Assembly which was then not sitting instead of requesting for a dissolution. In fact, as at 2.2.2009, he still had a majority of one, since the Assemblywoman from Jelapang had still not 'resigned'. He was still the Menteri Besar. He was still in the 'driving seat'. It is Nizar's case that the Speaker had requested His Royal Highness to convene the Legislative Assembly for this purpose. But the Speaker made this request on 6.2.2009. It was after Nizar had been informed that His Royal Highness had withheld his Majesty's consent to his request. But is the Speaker authorised to make such request? In that it lies within the province of the Menteri Besar? In any case, that request is of no effect and has no

legal basis after His Royal Highness had refused Nizar's request to dissolve the Legislative Assembly.

However, as the **Amir Kahar** decision had shown, the mode of expressing loss of confidence is not confined to a vote taken on the Assembly floor by a majority members of the Legislative Assembly. The similarity with **Amir Kahar's** case is not so much the mode of expressing loss of confidence by majority of members. (Which in my view is similar), but the fact that **both** Datuk Pairin and Nizar **knew** of the fact of their loss of confidence. The difference lies in the diametrically different paths taken by each of them, soon after knowing the fact.

In my view too, if Nizar were to cling on to the **Ningkan** decision and disregard **Adegbenro** and **Amir Kahar**, it would appear that such a construction as regards the 'loss of confidence' issue would have a negative effect on the current political realities.

Taking away for the moment the subjective element of the Governors' power in **Adegbenro**, is there impediment for the luminous pronouncement of the Privy Council in **Adegbenro**? Democratic politics being what they are, why would mature manifestations of the members' will not be allowed to be voiced, even if it is "*short of actual voting*"? (as

described in Adegbenro)? (As shown in the unequivocal support of a majority of members of the Legislative Assembly in Nizar's case before His Royal Highness).

For as long as the manifestations of their will are legitimate and are devoid of negative subjection why would that be disregarded?

In the same way, if the **Amir Kahar** decision is not taken by Nizar my view is that to exclude any other mode except by motions taken on the floor of the Assembly, would have 'cribbed, cabinned and confined' members of the Assembly in expressing their free will. They are after all, representatives of the people. Would not this negate the very concept of democracy that each of them stands for?

The position seems almost paradoxical. I am aware that there would be ferocious arguments that the will of the people is the electorate itself; that the supreme sovereignty of the people in making a choice is not to be negated.

But this is not negated by the Ruler's imposition of his will if circumstances demand it, because whatever his choice is, it appeals to the people to comprehend the entire dynamics of our constitutional make-up.

The third and final issue is the question of

WHETHER THE LEARNED JUDGE WAS RIGHT IN HOLDING THAT HIS ROYAL HIGHNESS THE SULTAN OF PERAK WAS WRONG IN APPOINTING ZAMBRY AS THE NEW MENTERI BESAR OF PERAK

As clearly shown, **Ningkan** is not good authority for the situation in Perak. Nizar refused to resign even after it was clear he lacks majority support and dissolution was withheld. In **Ningkan's** case, Dato' Ningkan had not refused to resign. He asked that the Assembly be convened to take a motion of no confidence. That never happened, since he was dismissed by the Governor.

It was argued in Nizar's case that by the express wordings in Article XVI(6), there is no power to dismiss him, a fortiori by virtue of the clear words in Article XVI(7) where he (Nizar) does not hold office at the pleasure of His Royal Highness.

In **Ningkan**, Harley Ag CJ said that he was not prepared to empower the Governor with the power of dismissal. He said that **Ningkan's** refusal to resign is not good enough reason for implying in the Sarawak Constitution, an enforcing power vested in some individual. Harley Ag CJ acknowledges that there is a lacuna here.

In fact, to really understand the jurisprudence of **Ningkan**, one would have to look further. The High Court decision in his favour did not end there. As they say, the show is not over till the fat lady sings.

And so she did. In **Ningkan's** case, in view of the constitutional impasse of having Datuk Ningkan stuck in the seat of the Chief Minister and the continuing political imbroglio, a State of Emergency was declared.

The matter even went right up to the Privy Council, taken by Datuk Ningkan on the point of the bona fides of the proclamation of the Emergency. Not on the point of the High Court decision. Which of course was not necessary since he had won. But because a good number of people were of the view that the Harley Ag CJ decision in **Ningkan** was in fact endorsed by the Privy Council, it is thus a precedent which is binding. That is certainly not true. The Privy Council made no comment on the Harley Ag CJ's decision. If at all, it made only an oblique reference to it.

During the emergency, the Governor was empowered to dismiss Datuk Ningkan which he did. The question is: Why is the need for Emergency? Is there a lacuna in the Sarawak Constitution?

In this, the Privy Council acknowledged that there was indeed a lacuna in the Sarawak Constitution. The Governor in Sarawak expressed that the right of dismissal ought to be given to him, as otherwise the Constitution would be unworkable.

Likewise in **Amir Kahar**, there is no express provision in the Sabah State Constitution for the Chief Minister to resign since only the Executive Council members hold office at the pleasure of the Ruler or Governor as the case may be.

The argument goes that since the provisions of the State Constitutions of Sarawak, Sabah and Perak show that the Chief Ministers of Sabah, Sarawak and Perak, unlike the other members of their Executive Councils, do not hold their office at the pleasure of the Head of State, the right to dismiss the Chief Ministers should be denied to the Heads of State of Sabah, Sarawak and Perak.

It is in that connection that Tan Chiaw Thong J in the **Kitingan Case No. 2** endorsed the views expressed by Harley Ag CJ in **Ningkan** that a legally appointed Chief Minister should only be dismissed in accordance with Article 7(1) of the Constitution after a vote of no confidence had been taken against him in the Legislative Assembly. Tan Chiaw Thong J

in the same case went on to say that in the absence of express provision in the Constitution giving any power of removal from office or dismissal, it showed that the Constitution did not intend that any such power should be given to the Head of State as otherwise it would have been expressly indicated.

Before we go any further this issue of whether the legal power of dismissal is justiciable or otherwise, have been ruled by the Supreme Court which endorsed Tan Chiaw Thong J's ruling that it is justiciable.

Given that there is indeed such lacunae, there is a genuine need for fully incorporating in explicit terms the issue of whether the right to appoint includes the right to dismiss (leaving aside the prerogative and discretionary powers exercisable by the Ruler). The lacunae exist, perhaps because such political or constitutional impasse was never contemplated. It might be of interest to note that Professor Jennings (who was one of the framers of our Constitution) in writing in the Cambridge Law Journal in November 1963, *inter alia* said that:-

“It may be noted that where as the Pakistan Constitution of 1956 used “he is satisfied” the

Malayan Constitution of 1957 did not. This seems curious, because in both cases the initial drafts were prepared by Mr. Justice Abdul Hamid and me. What happened, however, was that the initial drafts of the Malayan Constitution used the phrase “in his opinion”, but that it was dropped by the Reid Commission. I doubt if this was deliberate. I have not been able to check the manuscript versions, but it is quite likely that, in making another amendment desired by the Commission, we accidentally omitted “in his opinion”. What went on in Trinity Hall is, however, irrelevant to the interpretation of the Constitution, and if the Judicial Committee were asked by the Yang di-Pertuan Agong for an interpretation of the Malayan (or Malaysian) provision they might well say that the absence of “is satisfied that” or “it appears to him that”, or “in his opinion” makes all the difference. What can be said is that one of the draftsmen, at least, intended that the President of Pakistan and the Yang di-Pertuan Agong should have the same discretion as the Judicial Committee tried to give to the Governor of the Western Region of Nigeria.

The importance of the opinion perhaps lies in the reiteration of the doctrine that a Constitution must be interpreted strictly like a statute, and that an appeal to British practice is of limited value. Though it has been said that “we must always remember that it is a Constitution that we are interpreting”, it is usually wise to forget it, at least so long as the Privy Council controls the interpretation. This is not, however, a criticism of the particular opinion.”

In my view this seems to suggest that the non-inclusion was accidental.

Though the strict letter of the Constitution is to be observed as indicated by Jennings above, this merely goes to show that we might have regard to extraneous matters such as Jennings article above, in order to distill the original and true intent behind constitutional provisions as evident in the Federal Court decision in **East Union (Malaya) Sdn Bhd [1980] 1 MLJ.**

Such ‘gaps’ may once again be made a subject of litigation, even in the face of clear principles.

However in Nizar's situation, the exercise of His Royal Highness' prerogative had legally forfeited Nizar's right to remain the Menteri Besar. Even assuming that Nizar was correct in saying that he held office not at the Ruler's pleasure by virtue of Article XVI(7), consider this proposition.

On 17.3.2008, when he (Nizar) was appointed as the Menteri Besar, His Royal Highness exercised His Majesty's discretion under Article XVI(2) after considering who, in His Royal Highness's judgment is likely to command the confidence of the majority of the members of the Legislative Assembly.

Thus, Nizar was appointed on the collective strength of confidence of a majority of the members of Legislative Assembly. He was the Menteri Besar on their approbation, support and 'bounty', so to speak. Though there is no evidence that Nizar had even tendered the resignation of the Executive Council, what is the effect if he had? If under Article XVI(6), he has to tender their resignation on whose bounty and support does he now stand in the Legislative Assembly? Now that the 'corpus' of his very existence has gone? Nizar's claim should fail and is untenable since his 'substratum' has collapsed.

Constitutionally, it is against the very principles of constitutionalism and rule of law that Nizar should still hang on to his office by nothing but pure legalism. Even though our Constitution is continually evolving, various tugs and pulls at the seams of the Constitution should be minimised.

I am aware that this argument can go both ways – but it is implicit that the cardinal principles of democracy have to be balanced with the equally implicit understanding of the need to observe the most scrupulous constitutional decorum especially by those whose task it is to do so.

In that regard, Nizar's position as Menteri Besar was no longer tenable. The media announcement made by the Palace on 6.2.2009 was nothing but a mere declaration of the legal position. I need not say of course that the appointment of Zambry in the circumstances, was properly within His Royal Highness' prerogative powers pursuant to Article XVI(2) of the Perak State Constitution.

As I had indicated at the outset, only when a clear understanding of each other's constitutional rights and obligations in the entire constitutional conundrum is in place and due respect and observance given, would the metaphor of

checks and balances of Ships of State on an even keel etc. could be maintained.

Thus I share the view expressed by my learned brothers Raus Sharif, JCA and Ahmad Maarop JCA that in the context of this appeal, His Royal Highness had in the critical situation rightly exercised his constitutional powers as provided for under the Perak State Constitution solely for the best interests of his subjects. The decision being unanimous, the orders are as comprehensively set out in the judgment of my learned brother Raus Sharif, JCA.

Dated this 9th day of June 2009

(DATUK ZAINUN BINTI ALI)
Judge
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