

THE ROLE OF THE MALAYSIAN BAR - ITS STRUGGLES & ACHIEVEMENTS

By S. Balarajah



S. Balarajah

The Malaysian Bar is a body corporate created pursuant to s 41(1) of the Legal Profession Act 1976 ("the LPA"). It has perpetual succession with a common seal and with power subject to the LPA to sue and be sued in its corporate name and has power to acquire and dispose properties.

The Bar plays a multitude variety of roles. It promotes professional improvements of its members looks after members welfare its image, provides legal aid to the impecunious and stands up against abuse of power and encroachment into the lives liberty of the people of this country.

The Bar Council makes rulings and gives advice on certain questions relating to matters in practice the profession and etiquette.

It is a body to which you can turn to in the hour of your need.

The objects and powers of the body corporate Malaysian Bar are set out in s 42 of the LPA. It is noteworthy to note that s 42 (1) (a) reads:

"42 (1) (a) to uphold the cause justice without regard to its own interest or that of its members uninfluenced by fear or favour"

The functions of the Bar Council and Malaysian Bar are explained succinctly by Salleh Abas L.P. (as he then was) in the case of *Malaysian Bar and Anor vs Government of Malaysia* [1987] 2 MLJ 165. He said:

"All lawyers upon being admitted to practice as advocates & solicitors automatically become members of the first appellant (section 43 of the Act). The management of the affairs of the first appellant is entrusted to a Council, known as the Bar Council (section 47 of the Act) consisting of (a) a President, Vice-President (b) the Chairman of each State Bar Committee, and a member elected by each such Committee and (c) a specified A touch of history. In *"The law of Advocates & Solicitors in Singapore - West Malaysia"* by Tan Yock Lin it is said that the first statute enacted to control Advocates & Solicitors was Enactment 22 of 1914. This statute dealt comprehensively with governing the conduct and admission and enrolment of Advocates & Solicitors.

Prior to this enactment the Court Ordinance 1907 controlled the Bar. It empowered the Court to control the admission and suspension for misconduct for a term not exceeding 2 years or striking out the Advocates & Solicitor from the Rolls.

In *"The Law of the Straits Settlement - A Commentary"* Roland Braddel says that the Supreme Court by virtue of powers vested on it by the Courts Ordinance and regulates admission to the Roll, control of the Bar and striking off the Roll the privileges of Advocates & Solicitors, their remuneration by agreement and for conveyancing and non-contentious business, and the recovery and taxation of their costs.

The Advocates & Solicitors Ordinance 1947 ("the Ordinance") dealt exclusively with Advocates & Solicitors until the LPA came into force. The present law governing Advocates & Solicitors and the Malaysian Bar is the Legal Profession Act 1976 "the LPA".

The differences between the 2 enactments is that of the deprivation by the Executive/Legislature of the obligation and powers of the Bar to comment and make recommendations on legislations. In the Ordinance it is obligatory whereas in the LPA it is by invitation only.

Whereas s 45 (1) (c) of the Ordinance provided as follows:

"to examine and if it thinks fit to report upon carried legislation and any other legal matters submitted to it or to make recommendations to Government as to the desirability of introducing any legislations".

The LPA was originally enacted to read as follows s 42(1)(d) :

“the purpose of the Malaysian Bar shall be - (d) to advise the Government and the Courts where necessary in matters affecting legislation and the administration and practice of the law in Malaysia”.

This was later amended to read as follows:

S 42 (d) “where requested to do so to express its views on matters affecting legislation and the administration and practice of the law in Malaysia”.

By legislation the Executive has limited the role of the Council to examine and report on current legislation.

The Bar Council which is an elected statutory body seems to derive its authority to discharge of dispense its functions and powers from the Bar acting in the General meeting and by reason of the powers conferred upon by the LPA and hence it has the authority to represent the Bar.

In a paper at the 9th Malaysian Law Conference entitled *“Legal Profession: Its Responsibility And Contribution To Society”*, Dato’ Param Cumaraswamy made this observation :

“Bar Associations being the association of lawyers are the hubs of the legal profession. They carry out the objectives of the legal profession. They speak up for the legal profession. In addition to looking after the interest of the profession they have also the duty to protect public interest as against delinquent lawyers. Being the spokesmen for the legal profession they are expected to speak out against human rights violations and other injustices in society and call for law reforms”.

In a paper entitled *“Society-Justice Transparency and Good Governance For a Just Society Issues and Challenges”* delivered at the Catholic Lawyers Seminar in 2000 Chooi Mun Sou (Insaf Vol : 2000 xxvix(3)) enumerated the following legislation where the Government ought to have requested the Malaysian Bar for its views :

1. Internal Security Act 1960
2. Dangerous Drugs (Special Preventive Measures) Act 1985
3. Police Act 1967
4. Emergency (Public Order and Prevention of Crime) Ordinance 1969
5. Emergency (Essential Powers) Act 1979
6. Essential (Security Cases) Regulations 1975 made under section 2 of the Emergency (Essential Powers) Act
7. Official Secrets Act 1972
8. Sedition Act 1948
9. Printing Presses and Publications Act 1984
10. Universities and University Colleges Act 1971
11. Discipline of Staff Rules for UPM, UKM, UTM, UM made under section 16C of the UUCA 1971
12. The Societies Act 1966

But the views of the Bar were not sought perhaps for the sake of political expediency and fear of criticism and objections.

In an article entitled *“The Gradual Erosion of the Powers of the Bar Council in the Malaysian Bar”* (Insaf Vol. XXIV(3)) Yang Pei Keng lists 7 instances of erosion of the powers of the Bar by the Executive.

They are :

1. Restrictions on the membership of the Bar Council and the State Bar Committees - 7 year rule
2. Restricting the Bar Council and the State Bar Committee members to non-office bearers of any political party
3. Power to make rules is now subject to the approval of the Attorney General
4. The Bar Council is to advise the Government upon request only
5. Disciplinary Committee has been downgraded in position
6. Changes in the composition of the Qualifying Board
7. The transfer of disciplinary powers to the Disciplinary Board

The background to the falling out as it were between the Executive and the Bar came about in the year 1975.

“ESCAR” Essential Security Cases Regulation were introduced. The Bar was opposed to these laws as they were perceived to violate law and procedure as known to the legal community. It disregarded all known norms and had total disregard for basic human rights. There were to be hooded witnesses and Rules of evidence were immaterial.

The Bar passed a resolution prohibiting members from appearing in such cases. It was a mark of protest. The Bar was young and strong.

The Executive then turned of the Bar. It amended the LPA. It prohibited political office bearers and members of the Bar under 7 years seniority at the Bar from holding office in the Bar Council or State Bar Committees.

Amendments to the LPA are used by the Executive to clip the wings and nip the power independence and freedom of the Bar.

The Malaysian Bar took Court action against the amendment claiming that it breached Constitutional rights. See *Malaysian Bar and Anor vs Government of Malaysia* 1987 (2) MLJ Page 165. The Court held (Salleh Abas L.P. dissenting) that the proposed amendment which disqualifies lawyers under 7 years and others from being a member of the Bar Committee or Bar Council does not breach any fundamental rights or the Constitutional right of the Bar or its members.

The amendment to S.46 includes prohibition of any office bearer of a political party or a State Assemblyman or member of Parliament from holding office in the Bar Council or State Bar Committees - S.46A (2) 46A (3) of the LPA.

The Executive was of the view that the Bar Council’s stand on several issues then seemed politicized and hence used legislative powers to curb and restrict membership of the Council and the Committees.

But the law still stands today that a person holding political office or a member of the Bar with less than seven years at the Bar cannot hold office at the Council or in any State Bar Committees.

In 1986 the Vice-President of the Malaysian Bar was charged under the Sedition Act when the Bar issued and Appeal to the Pardons Board to reconsider a Petition for clemency for commutation of a death sentence on *Sim Kie Chon* an Essential (Security Cases) Regulations case. It was alleged by the Prosecution that the statement of the Vice-president had a seditious tendency.

In acquitting the Vice-President Mr Justice N.H. Chan held that the comments and appeal were directed at the Pardons Board and not the King. *Public Prosecutor vs Param Kumaraswamy* [1986] 1 MLJ 526.

In another case, the case of A-G, *Malaysia vs Manjeet Singh Dhillon* [1991] 1 MLJ 167 the Supreme Court by a majority found Manjeet Singh Dhillon, the then Secretary of the Malaysian Bar, guilty of contempt for affirming an affidavit on behalf of the Malaysian Bar.

The Bar’s relationship with the Government and the Judiciary generally and the Council’s relationship in particular became severely strained in 1988 after the sacking of Tun Salleh Abas. It became worse after it passed a vote of no confidence on the new Lord President Tun Hamid Omar appointed to take over from the sacked Tun Salleh. In the 1988 fiasco the highest judicial officer was suspended and later removed after an inquiry to see if he misbehaved and later on 2 Supreme Court judges were also removed from office. Those were said to be the darkest days of the Malaysian legal history.

The Bar carries out its legitimate activities per the legal provisions of the LPA. To target subdue and tame the Bar amendments to the LPA are made and threatened. Legislative changes could be and have been used to cause much difficulty and dilute the power influence and effectiveness of the Bar.

In fact the late Tan Sri Mohtar Abdullah who was the Attorney-General in 1996 said as follows :
 "... the Bar Council often forgets that it is a body corporate created by statute... It frequently speaks as if is a private law association, or an NGO, or an opposition political party. It does not understand, nor seek to understand the various sensitive issues facing the Government ... My Chambers are presently preparing a paper with recommendations to the Government to reform the legal profession and hopefully with proper medication a few minor surgeries implantations and transplantations here and there, the legal body will be cured of its many ills and live a long and healthy life, contributing to the well-being of our Nation!"

What causes grave concern to the common man is not the strength of power in the hands of the Executive but the sorry and slow erosion of respect and dilution of the powers of the judiciary, rulers and independent bodies like the Bar.

These dilution must be arrested the sooner the better. The great jurist Tun Suffian observed as follows :
 "Every government in the world swears belief in the independence of the judiciary but some governments work subtly to undermine it" (1987) 2 MLJ xxiii, xxiv

The major role and struggles of the Bar have been to stand up against what is perceives to be unjust laws voice concerns on human rights issues and stand up to defend the judiciary for it believes that without a strong Bar you cannot have an independent judiciary. And the Bar also fought all attempts that seeks to deprive it of its self-government and independence in upholding justice and managing itself.

The Bar has to uphold the Rule of Law and Independence of the judiciary at all times. The Bar President Haji Kuthubul Zaman issued a statement lately on the promotion of judges not based on seniority. He seeks justice for Judges.

The Bar stood up to defend the Judiciary. It won applause and admiration from the world over. It did so without fear or favour and without regard to any unpleasant consequences to itself.

The Bar must remain independent and be apolitical at all times.

- *S. Balarajah of The Middle Temple,
 London Barrister – At – Law.*

(From INSAF, The Journal of The Malaysian Bar, Vol. XXXIV, 2005 (Vol. 2))

— ♦ — ♦ — ♦ — ♦ — ♦ — ♦ —

BARRISTERS – AT – LAW **– A DYING BREED ?**

AS AT 31-12-2010

PRACTISING BARRISTERS

IN MALAYSIA



1. LINCOLN'S INN	- 1 200
2. MIDDLE TEMPLE	- 419
3. GRAYS INN	- 241
4. INNER TEMPLE	- 154

MALAYSIAN TOTAL: 2014



NOTE: POPULATION OF MALAYSIA 27.5 MILLION.
THEREFORE THERE ARE 0.0073% BARRISTERS !

(SOURCE BAR COUNCIL / PRAXIS)