**DALAM MAHKAMAH PERSEKUTUAN MALAYSIA DI PUTRAJAYA**
**(BIDANGKUASA ASAL)**

**NOTIS USUL NO. 06-3-2009 (A)**

**ANTARA**

**1.JAMALUDDIN BIN MOHD RADZI**
**2.MOHD OSMAN BIN MOHD JAILU**
**3.HEE YIT FOONG … PEMOHON-PEMOHON**

**DAN**

**SIVAKUMAR A/L VARATHARAJU NAIDU**
**(Dituntut selaku Yang Dipertua**
**Dewan Negeri Perak Darul Ridzuan) … RESPONDEN**

**DAN**

**SURUHANJAYA PILIHAN RAYA … PENCELAH**

**(Dalam Mahkamah Tinggi di Ipoh**
**Saman Pemula : 24-237-2009 (MT4) )**

**CORAM**

**ALAUDDIN BIN DATO' MOHD SHERIFF PMR**
**ARIFIN BIN ZAKARIA HB (MALAYA)**
**NIK HASHIM BIN NIK AB. RAHMAN HMP**
**AUGUSTINE PAUL HMP**
**JAMES FOONG HMP**

**8 Jun 2009**

## Judgment of the Court

1. The matter before us raises an important question as to whether an application to determine the effect of any Article in the Perak Constitution may be made by way of a direct reference to the Federal Court by relying on Article LXIII ("Article 63") of the Perak Constitution. Article 63 reads as follows :

> "Without prejudice to any appellate or revisional jurisdiction of the Federal Court, where in any proceedings before another court, a question arises as to the effect of any Article in the Laws of the Constitution or any part thereof, the Federal Court may on the application of either party to the proceedings, determine that question and either dispose of the case or remit it to the other court to be disposed of in accordance with the determination".

2. It must be noted that the applicants, Jamaluddin Mohd Radzi, Mohd Osman Mohd Jailu and Hee Yit Foong, who had won the Perak State seats of N.59 Behrang, N.14 Changkat Jering and N31 Jelapang respectively in the 12th General Election, had purportedly resigned from their political parties in the Pakatan Rakyat coalition government and had given their support to the Barisan Nasional as Independents, causing the collapse of the Pakatan State Government.

3. In early February 2009, the respondent Speaker had received resignation letters pre-signed from the three applicants and had declared their seats vacant. However, the Election Commission refused to hold by-elections on the ground that there was an ambiguity as to whether the applicants had

resigned voluntarily. The three applicants then filed a suit against the respondent in the High Court at Ipoh praying for a declaration that they were still elected representatives. They then made this application to this Court by way of a direct reference by relying on Article 63. Hence the proceedings before us.

4. At the outset of the hearing, leading counsel for the respondent, Tuan Haji Sulaiman Abdullah, raised a preliminary objection on the basis that the Perak Constitution did not give authority to the Federal Court to hear the application. Essentially, he contended that the Perak Constitution, being a State law, could not be amended by the State Enactment No. 4 of 1996, which came into force on 28 March 1997 (which was passed after Merdeka Day), to amend the words "Supreme Court" to "Federal Court" to give jurisdiction on the Federal Court to hear the application. Such jurisdiction could only be given by Federal law. Learned counsel thus submitted that the matter had to be first heard and disposed of by the High Court and could only come to this Court through the Court of Appeal by way of an appeal. He, however, did not challenge the validity of Article 63.

5. In rebutting the respondent's contention, the learned Attorney-General, who was appearing for the Election Commission in his capacity as intervener, submitted that Article 63 was a pre-Merdeka law and thereby fell squarely within the meaning of federal law. It could be modified. The words "Supreme Court" were substituted with "Federal Court." The

amendment was only to show the change of name of the apex court. Learned counsel for the applicants, Encik Firoz Hussein, adopted the submission of the learned Attorney-General.

6. At the conclusion of the arguments of the parties, we, on the 8th and 9th April 2009, unanimously dismissed the preliminary objection with no order as to costs and held that the Court is seised with the jurisdiction to hear the application under Article 63. Here are our reasons.

7. Article 63 is a pre-Merdeka law which came into force **before 31st August 1957** vide G.N. 1413/1957 as indicated by its 'Citation and commencement' :

> "11. This Law may be as the First and Second Parts of the Laws of the Constitution of Perak (Fifth Amendment) Law, 1957, and shall, unless it is otherwise expressly provided herein, come into force immediately **before the 31st August, 1957**."
>
> (emphasis added)

8. Pre-Merdeka laws can never be declared as void. This was held in **Assa Singh v Menteri Besar, Johor (1969) 2 MLJ 30** where in dealing with a pre-Merdeka law i.e. Restricted Residence Enactment (Cap. 39), Ong Hock Thye CJ (Malaya) said at p 35 :

> "In the third place, I agree that, since article 4 speaks only of laws passed after Merdeka Day, the validity or otherwise of the pre-Merdeka Restricted Residence Enactment will have to be considered solely by reference to article 162. The point is summed up most admirably by the learned Solicitor-General as follows :
>
> > "As to post-Merdeka law, the Constitution is supreme and if any of

> that law is inconsistent with the provisions of the Constitution, to the extent of such inconsistency that law shall be void – Article 4(1). But as regards pre-Merdeka law, such law shall continue to be in force until repealed; in the meantime its continuity and enforceability is subject to modification, firstly, by a Legislative Act or Enactment or secondly, by process of judicial interpretation, the executive order of the Yang di-Pertuan Agong to modify the same having expired – Article 162(1) and (6). It must be noted that article 162 does not use the expression that the pre-Merdeka law shall be void to the extent of the inconsistency but, instead, it expressly states that the law shall continue to be in force."

9. The above passage was quoted with approval by Mohamed Azmi S.C.J. in the Supreme Court case of **Ramasamy a/l Shanmugam v State Government of Penang and Government of Malaysia (1986) 2 MLJ 188** in dealing with the Hindu Endowments Ordinance 1906 (Straits Settlement Cap. 175).

10. To determine the status of Article 63, the meaning of certain words need to be considered first. Article 160(2) of the Federal Constitution interprets the following words as follows :

> "**Existing law**" means any law in operation in the Federation or any part thereof **immediately before Merdeka Day**."
>
> "**Federal law**" means –
>
> (a) any **existing law** relating to a matter with respect to which Parliament has power to make laws, being a law

continued in operation under **Part XIII**; and

(b) any Act of Parliament : ”

“**Law**” includes **written law**, the common law in so far 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.

“**Written law**” includes this Constitution and the **Constitution of any State**.

11. In **Part XIII** of the Federal Constitution, Article 162 states :

“**Existing laws**

162. (1) Subject to the following provisions of this Article and Article 163, the **existing laws** shall, until repealed by the authority having power to do so under this Constitution, **continue in force on and after Merdeka Day**, with such modifications as may be made therein under this Article and **subject to any amendments made by** Federal or **State law**.

(2) …….
(3) …….
(4) …….
(5) …….
(6) …….
(7) In this Article “modification” includes amendment, adaptation and repeal.”

(emphasis added)

12. That being the case, it is clear that Article 63 of the Perak Constitution, being a pre-Merdeka written law, falls within the meaning of “federal law” and therefore, an “existing law” as defined in Article 160(2) of the Federal Constitution. Thus it continues in force on or after Merdeka Day subject to any amendments made by State Law. The subsequent amendment to Article 63 by the State Enactment No. 4 of 1996, in

substituting the words “Federal Court” for the words “Supreme Court” is in accord with Article 162(1) of the Federal Constitution which expressly allows for any amendments to be made to the existing law by State law. The purpose of the amendment was to change the name of “Supreme Court” to “Federal Court” in Article 63 so as to bring it into accord with the provisions of the Federal Constitution. Under Article 121(2)(c) of the Federal Constitution, the Federal Court shall have such other jurisdiction as may be conferred by Federal law. Article 63 is by definition a federal law and therefore, it is capable of conferring such jurisdiction on the Federal Court.

13. In **United Malacca Bhd v Pentadbir Tanah Daerah Alor Gajah and Other Applications (2003) 1 MLJ 465**, Haidar FCJ (as he then was) in delivering a separate judgment of the Federal Court said at p 483 :

> “Article 121(2)(b), inter alia, provides for the original jurisdiction of the Federal Court as is specified in art 128. Article 128(3) provides that the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, the High Court or a judge thereof shall be such as may be provided by federal law. The then Supreme Court in *Lye Thai Sang & Anor v Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166 in considering whether the court had the power to review appeals heard and disposed of by it, stated that ‘law’ referred to in cl 3 of art 128 is the CJA. In the circumstances, it is my view that art 121(2)(a) is an enabling provision. Quite apart from its original or consultative jurisdiction as is specified in arts 128 and 130 of the Constitution, art 121(2)(c) also provides for other jurisdictions as may be conferred by or under federal law. The word ‘other’ must, in my view, mean other jurisdiction than that provided by the CJA, that is, there may be legislation that

> may provide for jurisdiction to the Federal Court to hear an appeal direct from a decision of the High Court instead of via the Court of Appeal under the CJA. Such legislation that I can think of are :
>
> (a) s 49(1) of the LAA, until it was amended;
>
> (b) s 374 of the Criminal Procedure Code which relates to habeas corpus matters;
>
> (c) s 103E of the Legal Profession Act 1976 relating to a decision of the High Court in respect of disciplinary matters of the members of the Bar."

Thus, the Federal Court is rightly conferred with the necessary jurisdiction by Article 63 via Article 121(2)(c) of the Federal Constitution. Accordingly, we dismissed the preliminary objection and ordered that the application be heard on its merits.

14. The questions that the applicants wanted the Federal Court to determine are :

(1) Whether, on a true interpretation of Article XXXVI (5) ("Article 36(5)") of the Perak Constitution read together with section 12(3) of the Elections Act 1958, the Election Commission is the rightful entity which establishes if there is casual vacancy of the State Legislative Assembly seat;

(2) When a resignation of a member of the Perak State Legislative Assembly (the SLA) is disputed, is such resignation a resignation within the meaning as ascribed under Article 35 of the Perak Constitution.

15. Both the learned Attorney-General and Encik Firoz Hussein took the position that Article 36(5) of the Perak Constitution stated clearly that it is the Election Commission and not the respondent Speaker who determines whether there exists a casual vacancy.

16. However, learned counsel Encik Tommy Thomas, representing the respondent Speaker submitted that the Speaker's actions of accepting the resignation letters and declaring the three State seats vacant fall within his jurisdiction and therefore could not be challenged in Court and urged this Court not to answer the questions as the matters are non-justiciable. In support of the submission, Tuan Haji Sulaiman Abdullah added that the function of the Election Commission is to merely hold an election once a casual vacancy is established by the Speaker. Looking at the function of the Election Commission and the concept of the separation of powers, the Election Commission is not the body to establish the existence of a casual vacancy because the Election Commission, unlike the State Legislative Assembly, has no set procedures to decide on the vacancy.

17. The issue relating to question No. (1) is whether it is the Election Commission or the Speaker who has the right to establish if there is a casual vacancy of the State Legislative Assembly seats. To answer the question, we have to consider the provisions of Article 36(5) of the Perak Constitution and section 12(3) of the Elections Act 1958, and the meaning of the words "casual vacancy" and the word "establish".

18. Article 36(5) of the Perak Constitution states :

> "A casual vacancy shall be filled within sixty days from the date on which **it is established by the Election Commission that there is a vacancy** : "

Section 12(3) of the Elections Act 1958 reads :

> "In relation to a vacancy which is to be filled at a by-election, a writ shall be issued not earlier than four days and not later than ten days from the date on which **it is established by the Election Commission that there is a vacancy**."
>
> (emphasis added)

A "casual vacancy" is defined in Article 160(2) of the Federal Constitution to mean –

> "a vacancy arising in the House of Representatives or a Legislative Assembly otherwise than by a dissolution of Parliament or of the Assembly."

The word "establish" is defined in the Oxford Advanced Learner's Dictionary, 6th Edition to mean :

> "to discover or prove the facts of the situation; ascertain."

And the Shorter Oxford English Dictionary defines the word "establish" to mean :

> "to place beyond dispute; to prove."

19. In construing the Perak Constitution, the provisions of the other State Constitutions and the Federal Constitution need to be considered. By comparison, the State Constitutions of Kelantan (Article 46(5)), Malacca (Article 19(5)), Pahang (Article 26(5)), Penang (Article 19(5)), Perlis (Article 55(5)), Sarawak (Article 21(5)), and Kedah (Article 53(5)) contain provisions similar to Article 36(5) of the Perak Constitution which states that "A casual vacancy shall be filled within sixty

days from the date on which it is established by the Election Commission that there is a vacancy", whereas the Constitutions of the States of Johore (Article 23(5)), Negeri Sembilan (Article 56(5)), Selangor (Article 70(5)) and Terengganu (Article 44(5)) provide that "A casual vacancy shall be filled within sixty days from the date on which it occurs."

20. And for the State of Sabah, Article 21(5) of the Sabah Constitution provides :

> "Whenever the seat of an elected member has become vacant for any reason other than a dissolution, the vacancy shall within sixty days from the date on which it is established that there is a vacancy, be filled by election in accordance with the provisions of this Constitution."

21. Further, Article 54(1) of the Federal Constitution provides as follows :

> "(1) Save as provided under Clause 3 whenever there is a vacancy among members of the Senate or **a casual vacancy among members of the House of Representatives** such vacancy or **casual vacancy** shall be filled within sixty days from the date on which it is **established** by the President of the Senate that there is a vacancy or **by the Election Commission that there is a casual vacancy**, as the case may be, and an election shall be held or an appointment made accordingly…."
>
> (emphasis added)

22. It must be noted that the word 'establish' only appears in the Constitutions of Sabah, Kelantan, Malacca, Pahang, Penang, Perlis, Sarawak, Kedah and Perak and the Federal

Constitution. It is clear therefore that in the case of a casual vacancy of the State seats of these States, except Sabah, and of a seat in the House of Representatives, the Election Commission has been given the power to establish a casual vacancy. However, the Sabah Constitution is silent as to which entity has the responsibility for establishing the casual vacancy. The Constitutions of the States of Johore, Negeri Sembilan, Selangor and Terengganu have intentionally omitted the establishment by the Election Commission of a casual vacancy.

23. A further comparison with the Constitutions of the Republic of Singapore and India would show that the Perak Constitution and our Federal Constitution empower the Election Commission to establish the casual vacancy, as opposed to a seat being becoming vacant forthwith upon a resignation.

(i) Article 46 of the Constitution of the Republic of Singapore states :

> "(2) The seat of a Member of Parliament **shall become vacant** –
> (a) …..
> (b) …..
> (c) if, by writing under his hand addressed to the Speaker, he resigns his seat in Parliament."

(ii) Article 190 of the Constitution of India states:-

> "(3) If a member of House of the Legislature of a State –
> (a) …..
> (b) resigns his seat by writing under his hand addressed to the

> Speaker or the Chairman, as the case may be, and his resignation is accepted by the Speaker or the Chairman, as the case may be, his seat **shall thereupon become vacant** ….”
>
> (emphasis added)

24. These two Articles of the Constitutions of Singapore and India clearly state that a seat becomes vacant when a Member of Parliament and House of the Legislature of a State respectively writes to the Speaker informing him of the resignation. In contrast, Article 35 of the Perak Constitution merely states that a member of the State Legislative Assembly may resign his membership by writing under his hand addressed to the Speaker.

25. The phrase “shall become vacant” is also not part of Article 35 or Article 36(5) of the Perak Constitution. Therefore, the position in Perak is different from that of India and Singapore in that the seat shall not become vacant merely by the fact that a resignation letter is being handed to the Speaker.

26. The differences in the provisions of the above Constitutions clearly show that the maxim ***expressio unius est exclusio alterius*** (which means that the express mention of one thing implies the exclusion of another thing not so mentioned) applies in the construction of those Constitutions because as demonstrated earlier, some States such as Johore, Negeri Sembilan, Selangor and Terengganu have intentionally omitted to mention the establishment by the Election Commission of a casual vacancy in their Constitutions unlike

those of Kelantan, Malacca, Pahang, Penang, Perlis, Sarawak, Kedah, Perak Constitutions and the Federal Constitution, which intentionally mentioned that a casual vacancy shall be filled within sixty days from the date on which it is established by the Election Commission that there is a casual vacancy. (See **S. Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors (1982) CLJ (Rep) 314**).

27. In **Thankamma v Speaker, TC Assembly AIR 1952 166**, Article 190(3) of the Indian Constitution was considered. It provides that if a member resigns his seat and his resignation is accepted by the Speaker, his seat shall thereupon become vacant. Govinda Pillai J held :

> "…. This provision necessarily indicates that the letter of resignation must proceed from the member and that the resignation must relate to a membership held by the person who sends the same. The mere receipt by the Speaker of a letter of resignation purporting to be from a member will not cause that member's seat to become vacant. It is open to the Honourable Speaker to enquire whether that is a genuine letter or a forged letter, or one obtained by fraud or force is only a void document. The position taken, that the Honourable Speaker has no right to enquire into any matter relating to resignation cannot therefore be sustained. What is contemplated in the section is a resignation with the full consent of the writer of his or her own volition and not any letter of resignation. From the facts placed before me and the allegations not controverted by the opposite parties, I take it that the following facts are to be established."

28. Thus, by analogy, in the Perak Constitution, where the Election Commission may establish the vacancy (as opposed to

the Speaker under the Indian Constitution), the Election Commission has the right to enquire into any matter relating to the purported resignation. On a plain reading of Article 36(5) of the Perak Constitution read together with section 12(3) of the Elections Act 1958, it is the Election Commission that establishes the casual vacancy and not the Speaker. Moreover, under section 12(3) of the Elections Act 1958, the Election Commission would have to establish that a vacancy exists before issuing a writ of by-election (see **Clarence D Bongkos Malakun v The Returning Officer & Ors (1989) 2 MLJ 442 at p 445 E left**). The Speaker cannot therefore interfere with the constitutional duty of the Election Commission to establish whether there is a casual vacancy. The receipt by the Speaker of a letter of resignation purporting to be from an assemblyman will not cause that assemblyman's seat to become vacant. Under Article 35 of the Perak Constitution, the Speaker's role is limited to receiving the written resignation letter of the assemblyman and forwarding the same to the Election Commission which will then by its own procedure determine whether a casual vacancy has arisen or not. Once the casual vacancy is established, then it is the duty of the Election Commission to fill the vacancy by holding a by-election. With the clear provisions of the respective powers of the Election Commission and the Speaker, the fear of encroachment into the doctrine of separation of powers by one body into another does not arise.

29. With regard to Encik Tommy Thomas's earlier submission at paragraph 16, whilst we agree that it is within the Speaker's

right to accept the resignation letters, we do not agree with the Speaker's action of declaring the State seats vacant as it does not fall within his power to do so. The declaration of the vacancies of the seats by the Speaker could not be said to fall within the proceedings of the State Legislative Assembly as it did not involve and form part of the proceedings in the State Legislative Assembly. As such, the immunity from due process of the law as to the validity of any proceedings in the Assembly as guaranteed under Article 72(1) of the Federal Constitution did not apply in this case.

30. Regarding the meaning of the words "proceedings in the Assembly" in Article 72(1) of the Federal Constitution, reference may be made to the meaning ascribed to the terms "proceedings in Parliament" by the leading text on Parliamentary procedure in **Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, 23rd Edition 2004**, where it states at pp110-112 :

**"PROCEEDINGS IN PARLIAMENT"**

> The term "proceedings in Parliament" has received judicial attention (not all of it in the United Kingdom) but comprehensive lines of decision have not emerged and indeed it has been concluded that an exhaustive definition could not be achieved. Nevertheless, a broad description is not difficult to arrive at. The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is

debate, by which it reaches a decision. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substituted for speaking.

"….On a number of occasions, the House of Commons or a committee has endeavoured to elucidate this very broad understanding. The Select Committee on the Official Secrets Act in 1938-39 argued that "proceedings" covered both the asking of a question and the giving or written notice of the question, and includes everything said or done by a Member in the exercise of his functions as a Member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business. After considering the scope of the protection, the committee concluded:

> "cases may be easily imagined of communications between one Member and another or between a Member and a minister so closely related to some matter pending in or expected to be brought before the House that, although they do not take place in the Chamber or a committee room, they form part of the business of the House, as for example where a Member sends to a minister the draft of a question he is thinking of putting down, or shows it to another Member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed."

The conclusions of the committee were later agreed to by the House.

> In 1947, the House of Commons accepted the conclusion of its Committee of Privileges that "attendance of Members at a private party meeting held in the precincts … during the parliamentary session to discuss parliamentary matters … is attendance in their capacity as Members of Parliament".

And at page 188 the text continues:

> "….. In general, the judges have taken the view that when a matter is a proceeding of the House, beginning and terminating within its own walls, it is obviously outside the jurisdiction of the courts, though there may be an exception for criminal acts so far as they may be comprehended within the term proceedings in Parliament….."

31. Hence we unanimously ruled that the decision of the respondent Speaker declaring the three State seats of N.59 Behrang, N.14 Changkat Jering and N.31 Jelapang vacant was unlawful and therefore null and void as the decision was contrary to Article 36(5) of the Perak Constitution. Accordingly, our answer to question No. (1) is in the affirmative. Having answered the question we found that there is no necessity to answer question No.(2).

32. Consequently, the applicants applied to the Court to dispose of the case pending before the High Court at Ipoh vide Saman Pemula No. 34-237-09. We acceded to their application and made the following orders accordingly in terms of the prayers in that :

(a)

(i) Suatu perisytiharan bahawa plaintif pertama masih lagi dan merupakan Ahli Dewan

Undangan Negeri Perak Darul Ridzuan Kawasan Behrang (N.59);

(ii) Suatu perisytiharan bahawa plaintif kedua masih lagi dan merupakan Ahli Dewan Undangan Negeri Perak Darul Ridzuan Kawasan Changkat Jering (N.14);

(iii) Suatu perisytiharan bahawa plaintif ketiga masih lagi dan merupakan Ahli Dewan Undangan Negeri Perak Darul Ridzuan Kawasan Jelapang (N.31).

33. We made no order as to costs.

34. As this is my final written judgment before I retire on 1st July 2009, I take this opportunity to place on record my heartfelt appreciation to my learned colleagues and counsel for the excellent cooperation they have extended to me in the performance of my duty as a member of the Malaysian Judiciary.

8 June 2009

**(Tan Sri Dato' Bentara Istana Nik Hashim bin Nik Ab. Rahman)**
Judge
Federal Court
Malaysia

Counsel:

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|---|---|---|
| For the applicants | : | Firoz Hussein Ahmad Jamalludin, Datuk Mohd Hafarizam Harun, Syed Faisal Syed Abdullah, Abu Bakar As-Sidek Mohd Sidek, Cheng Mai, Badrul Hishah Abd Wahap, Mohd Reza Hassan, Shahir Ab Razak |
| Solicitors | : | Ong-Hanim & Badrul |
| For the respondent | : | Haji Sulaiman Abdullah, Tommy Thomas, Philip Koh, Chan Kok Keong, Ranjit Singh, Razlan Hadri Zulkifli, Edmund Bon Tai Soon, Amer Hamzah Arshad, Yap Boon Hau, Zulqarnain Lukman, Leong Cheok Keng. |
| Solicitors | : | Chan & Associates |
| For the intervener | : | Tan Sri Abdul Gani Patail, Tun Abd. Majid Tun Hamzah, Hajah Azizah Haji Nawawi, Amarjeet Singh, Dato' Kamaluddin Md Said, Siti Salwa Musa, Suzana Atan. |
| Solicitors | : | Attorney-General Chambers. |

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| Watching Brief for Kerajaan Negeri Perak | : | Dato' Ahmad Kamal Md Shahid<br>State Legal Advisor, Perak. |
| Watching Brief for Majlis Peguam Malaysia | : | Lim Kian Leong, Cheah Kit Yee |