

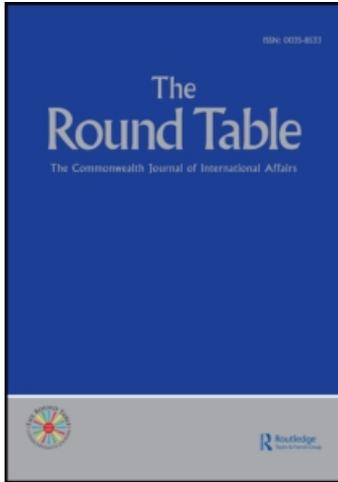
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WHEN IS A RESIGNATION NOT A RESIGNATION? A CRISIS OF CONFIDENCE IN SABAH

ANDREW HARDING

The constitutional crisis in the Malaysian state of Sabah in March 1994, in which the recently elected PBS government was unseated by defections from the governing party to the opposition, was a defeat for constitutional democracy. However, the ensuing litigation concerning the effect of the resignation of the Chief Minister on the tenure of Cabinet members represents a further step in the development of judicial control over the operation of conventions in the Westminster-model constitutions of the Commonwealth. Political instability in states such as Sabah is best contained by the enactment of an anti-party-hopping statute.

THE MALAYSIAN STATE OF SABAH has featured in the news reports recently as the tropical paradise to which Nick Leeson went to ground before the collapse of Barings Bank became known. What is perhaps not widely known is that Sabah, far from being merely a quiet land of beach resorts, has proved the most politically unstable part of Malaysia over many years, evidenced by successive constitutional crises and ensuing litigation.

The latest manifestation of these tendencies contains some features different from its forebears. In 1967, 1976 and 1985, a change of government was achieved by the electorate.¹ In 1994, however, the change of government occurred *in spite of* the clearest expression of intention by the electorate. Also 1994 saw the installation in office in Sabah, for the first time, of the Barisan Nasional (BN), the ruling coalition at the federal level, indicating that the nine-year cycle of governmental change may be at an end. This article concerns litigation arising out of the 1994 constitutional crisis, and its contribution to the evolving law relating to judicial review of constitutional conventions, and in particular the assessment of confidence in the Chief Minister. This important area of constitutional law was already considerably advanced by the decision of the High Court of Borneo in *Tun Mustapha* (1985);² which asserted judicial review of the appointment of a Chief Minister, and another decision of the same court in relation to Sarawak in 1966.³

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On 18–19 February 1994 state elections were held pursuant to the State Constitution. PBS, under Datuk Joseph Pairin Kitingan, won 25 of the 48 seats in the State Legislative Assembly, exactly the number it won in 1985 when it first took office. The BN under Tan Sri Haji Sakaran Dandai, took 23 seats. After a rather unseemly delay, during which Pairin remained in his car, parked outside the *Yang di-Pertua Negeri's* (Governor's) residence for two days, Pairin was appointed the Chief Minister, and shortly afterwards his Cabinet also received their appointments.

Under the Constitution of Sabah, there is provision⁴ for the nomination of a further six members of the Assembly by the Governor on government advice, making 54 in all. The previous constitutional crisis of 1985 actually resolved in the negative the question of whether these appointments could constitutionally be made in such a fashion as to elevate a party without a majority into one with a majority.⁵ On that occasion Tun Mustapha and Harris Salleh, old opponents, joined forces in an extraordinary attempted constitutional coup, when they intimidated the Governor into appointing Tun Mustapha Chief Minister. This appointment was quickly revoked and followed by the appointment of Pairin as Chief Minister. Tun Mustapha's legal challenge to his *de facto* dismissal and Pairin's appointment was resoundingly rejected by the High Court, in a decision which established for the first time judicial review of the appointment of a Chief Minister.⁶

PBS under Pairin was returned with large majorities in 1986 and 1990, but ruled under the constant threat of being undermined from the centre, especially after PBS joined the BN and then deserted it on the eve of the 1990 federal elections. Immediately on Pairin's resumption of office in March 1994, moves began to unseat him and reverse the result of the election.

On 13 March he learned of the defection of three PBS assemblymen, which turned his majority into a minority of 22 to 26; attempting to forestall what seemed inevitable, he requested that same day a further dissolution of the Assembly. This, it turned out, was refused by the Governor, and yet Pairin, in an extraordinary show of bravado or a last desperate gamble, turned up to the Assembly holding a document which he claimed was the Governor's grant of a dissolution. The validity of this document, actually an undated letter signed two years previously, was quickly denied by the Governor. On 16 March Pairin learned of a petition to the Governor, signed by 30 members of the Assembly (a clear majority on any calculation), saying they had no confidence in him and demanding his resignation. Pairin's position became untenable, and on 17 March 1994, less than one month after taking office, he resigned, without there having been any vote or motion of no confidence in him or the State Government in the Assembly. By this time he commanded only 21 votes in the Assembly, as against 27 for the BN. Sakaran was appointed Chief Minister the same day and a new Cabinet was installed on 24 March.

Then, in what has become almost a tradition of *ex post facto* constitutional litigation, a member of the Pairin Cabinet, Datuk Amir Kahar Tun Mustapha (son of Tun Mustapha), who had been Deputy Chief Minister, brought an action against the Governor and the new Chief Minister and seven other members of the new Cabinet, for declarations to the effect that Pairin's resignation was personal to him, as there had been no vote of no confidence in the Assembly.

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The last point raises the thorny question of what kind of evidence a Head of State must look at in deciding whether a Chief Minister has lost the confidence of a majority of the members of the legislature; must such evidence be confined to proceedings in the Assembly, or can it include evidence of matters outside the Assembly? This question has arisen previously in two famous cases: *Adegbenro v Akintola* (Western Nigeria, 1963⁷), and *Stephen Kalong Ningkan* (Sarawak, 1966⁸). In the former case the Privy Council held that the Governor could take into account occurrences outside the legislature in deciding whether to dismiss the Premier on grounds of lack of support. In the latter case the High Court of Borneo, overturning the purported dismissal of the Chief Minister of Sarawak, distinguished *Adegbenro* in holding that the Governor could not have regard to a petition signed by members of the legislature, but must consider only occurrences in the legislature. The general position and its implications for Westminster-model constitutions have remained in doubt for the past 30 years, but some light has now been shed on this issue by the High Court of Sabah and Sarawak.⁹ In *Kahar Mustapha* the Judge, Kadir Sulaiman J., dealt with the issue of how confidence is to be judged, even though, in the *Adegbenro* and *Ningkan* sense, this was not material to the outcome of the case, which involved *resignation* rather than *dismissal*, and in doing so cast some doubt on the received wisdom in this important area of constitutional law and convention.

Under Sabah's fairly typical Westminster-style Constitution, there are a number of relevant provisions:

Article 6(3) requires the Governor to 'appoint as Chief Minister a member of the Legislative Assembly who in his judgment is likely to command the confidence of a majority of the members of the Assembly'.

Article 6(7) states that for the purposes of Article 6(3), 'where a political party has won a majority of the elected seats of the Legislative Assembly in a general election, the leader of such political party, who is a member of the Legislative Assembly, shall be the member of the Legislative Assembly who is likely to command the confidence of the majority of the members of the Assembly'.¹⁰

Resignation is provided for by Articles 7(1) and (2). Under Article 7(1) 'If the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, then, unless at his request the [Governor] dissolves the Assembly, the Chief Minister shall tender the resignation of the members of the Cabinet'. Under Article 7(2) 'A member of the Cabinet may at any time resign his office by writing under his hand addressed to the [Governor], and a member of the Cabinet other than the Chief Minister shall also vacate his office if his appointment thereto is revoked by the [Governor] acting in accordance with the advice of the Chief Minister'.

Essentially the issue was whether Pairin had resigned under Article 7(1) on behalf of the whole Cabinet, or whether he had resigned under Article 7(2), which apparently allows a Chief Minister to resign personally without involving the other members of the Cabinet. The issue was regarded by the Judge as sufficiently moot that, in earlier proceedings to have the case struck out,¹¹ he had held the issue justiciable and the case arguable. Relying on the landmark decisions of the High Court of Borneo and the Malaysian Supreme Court in *Tun Mustapha*, the courts, he held, can review the conditions for the exercise of

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conventional, discretionary powers by the Head of State, although they cannot review the exercise of the powers as such.

Pairin stated in his affidavit that his resignation was intended to be personal to himself, and not to affect the position of his Cabinet colleagues. His press statement announcing his resignation, which in the circumstances was remarkably generous and statesmanlike, had in fact acknowledged that '[b]y convention, the Chief Minister will have to resign if the ruling party no longer has the majority support of the Assemblymen'. The statement also offered congratulations to the new BN Chief Minister and his government, but did not mention the Cabinet specifically.

Pairin's statements after his resignation, however, cast doubt on the apparent clarity of his press statement. For example: '[t]he act of tendering my resignation may have been interpreted to have meant that the whole Cabinet must resign. That was my interpretation and that of some others too but many others interpreted it in a different light ... I am now in doubt'.

The Judge began by rejecting the notion that there is any difference between 'confidence' and 'support', a distinction which was crucial to the decision in *Ningkan's* case, in which the term 'confidence' was held to be a term of art referring to voting in the legislature, whereas the term 'support' in the Constitution of Western Nigeria indicated a discretion on the part of the Governor to take account of a wider set of circumstances. In fact he had little difficulty with the principal issue in the case, holding that:

... once a Chief Minister in fact knows that he has lost the confidence of a majority of the members of the Assembly, he should not wait for a vote of confidence to be formally tabled in the Assembly but should immediately take the honourable way out by tendering the resignation of his Cabinet. Under the circumstances, if the Chief Minister refuses or does not tender the resignation of the members of the Cabinet which includes himself, or if he tenders the resignation of himself alone, the fact remains that the Cabinet is dissolved on account of him losing the confidence of a majority of the members of the Assembly and it is not necessary, therefore, for the *Yang di-Pertua Negeri* as a last resort to remove the Chief Minister and the other members of his Cabinet. This is not only the effect of Article 7(1) of the Constitution but it is the established convention.

It seems difficult to entertain any doubt that this position is correct. The Chief Minister is the lynchpin of the entire government, and his resignation brings down the government, not just himself, regardless of how it is expressed, provided at least that it is a resignation arising out of a lack of confidence in him.

The learned Judge then went on to consider what evidence the Governor may take into account in judging the matter of confidence. His remarks are interesting, especially as they appear to reinstate the general applicability of the Privy Council's decision in *Adegbenro*, at the expense of the decision in *Ningkan*. He addressed the reasons why the Judge in *Ningkan* distinguished *Adegbenro*. These were, so far as relevant here, as follows.

First, in *Adegbenro* it was mathematically beyond question that more than half of the legislature no longer supported the Premier, whereas in *Ningkan* the

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petition only purported to be signed by exactly half the members, and in the case of one signatory only a 'chop' appeared. In *Kahar Mustapha* there was no such doubt.

Second, the Constitution of Western Nigeria referred to 'support', whereas the Constitution of Sarawak referred to 'confidence'. The Judge rejected this distinction, pointing out that the meaning of 'to command the confidence of a majority of the members' must have the same meaning wherever it appears.

The confinement of the meaning of words such as 'support' or 'confidence' to the operation of politics on the floor of the legislature is in fact problematic, because, if advice to summon the legislature is not forthcoming—and a Chief Minister who may have lost support will no be eager to summon it—there will be no opportunity for the politics of the legislature to come into operation, and a stalemate will result. To this extent, the *Ningkan* decision is unfortunate, and a service is done by *Kahar Mustapha* in casting doubt on its reasoning, if not its result.

It is, however, also true that politicians may well be unwilling to vote in the legislature in the manner indicated in a private letter to the Head of State. The only way of dealing with such situations is for the Head of State to keep in mind the nature of, and the available opportunities for, the expression of lack of confidence. The extent of judicial review, although widened by recent case law, is still limited, leaving the Head of State a wide discretion to exercise. As Kadir Sulaiman J. said in *Kahar Mustapha*, 'it can be through the knowledge of the Chief Minister himself from the surrounding circumstances or it can be through the actual voting in the Assembly by its members. The lists are [*sic*] not by any means exhaustive'.

What the case does not address is the circumstances in which Article 7(2) can be said to apply rather than Article 7(1). Where confidence in the Chief Minister is in question, Article 7(1) must apply. In the present instance the Chief Minister had actually asked for a dissolution and been refused one, a fact which was, curiously, not highlighted in the litigation, but one which would appear to conclude the matter as one of evidence and constitutional logic: the Chief Minister could not afterwards claim to have resigned merely on his own behalf when he had previously sought a dissolution. The judging of confidence in such a case is problematic. It is not necessarily true, as was held in *Kahar Mustapha*, that the term 'confidence' must have the same meaning in all the constitutional provisions where it occurs: for example, a motion of no confidence clearly refers to events in the legislature, but a dismissal or resignation on grounds of lack of confidence may not do so, and an appointment on grounds of commanding the confidence of a majority cannot in any case do so, as the legislature has, by definition, not yet met.

Thus although 'confidence' carries the same kinds of connotation in the different contexts in which it is in question, its precise meaning differs because it fails to be assessed by different actors in different situations. A Chief Minister's assessment of confidence with regard to resignation may be different from that of the Head of State assessing the same matter with a view to his dismissal.

There are, however, some wider lessons to be drawn from the crisis and the litigation.

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First, the courts in the Commonwealth have been gradually establishing judicial review of conventional powers, particularly those of the Head of State, and *Kahar Mustapha* consolidates this process and takes an important stage further. The abuse of conventions, whether written into the Constitution or not, can and should be prevented by the courts. This is not a usurpation of democratic processes, but an *entrenchment of them*.

Second, the result of the Sabah crisis is hardly a triumph for constitutional government as the 1985 crisis undoubtedly was. The electorate was cheated of its verdict by political manipulation behind the scenes. However, in such cases there is little in constitutional law to assist, unless it be the party-hopping or floor-crossing statute, which has the effect of depriving a member of her seat if she ceases to be a member of the party for which she stood in the election. Such a provision was tried in Sabah, but the Malaysian Supreme Court recently ruled unconstitutional a similar provision enacted into the Constitution of Kelantan. The reasoning was that such a provision infringes the fundamental constitutional right of freedom of association.¹²

Thus the PBS members who transferred their allegiance did not lose their seats in the Assembly. The events in Sabah show the value of such party-hopping statutes: they provide an element of political stability and accountability which in the developing countries of the Commonwealth has often proved lacking. It is not unknown for Sabah assemblymen to cross the floor for M\$1 million. In Pakistan the Prime Minister once bussed all her MPs to a mountain hideaway and kept them prisoner to prevent them defecting. An effective party-hopping statute in this instance would have given the electorate in each of the relevant constituencies the right to endorse or reject the actions of the elected member. This would make a member think twice before defecting to the ranks of a party actually defeated in the election. It is likely that the electorate would take a dim view of being treated with such disdain.

Finally, to return to the main theme of this article, and to answer to the question raised in the title, an appropriate answer might be 'never'. That is to say that a resignation of a Chief Minister on grounds of lack of confidence or support is *always* a resignation of the entire Cabinet. Any other conclusion defies the deep logic of constitutional convention.

Notes and references

- 1 One strange feature of Sabah's history has been the nine-year cycle of political change. Each of the last three parties to take power has held office for nine years, before being bundled out amid allegations of corruption: USNO (United Sabah National Organisation) under Tun Mustapha (1967–76); Berjaya under Harris Salleh (1976–85); and PBS (Parti Bersatu Sabah, United Sabah Party) under Joseph Pairin Kitingan (1985–94).
- 2 See below, ref 6.
- 3 *Ningkan's case*; see below, ref 8.
- 4 Constitution of Sabah (1989 ed), Kota Kinabalu, Government Printer, Article 14(1).
- 5 Constitution of Sabah, Article 6(7).
- 6 *Tun Mustapha Harun v Tun Adnan Robert & Another* (1987), *LRC (Const)*, 16; (1987), 1 *MLJ*, 471, 484; for discussion, see A. J. Harding, 'Turbulence in the land

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- below the wind: Sabah's constitutional crisis of 1984/5' (1991), XXIX *JCCP*, 86.
- 7 (1963), *AC*, 614; (1963), 3 *WLR*, 63, *PC*.
- 8 *Stephen Kalong Ningkan v Tun Haji Openg & Tawi Sli* (1966), 2 *MLJ*, 187.
- 9 *Datuk Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohamed Said bin Keruak, Yang di-Pertua Negeri Sabah & 8 Others*, OS No K.24-63 of 1994, 24 November 1994, High Court of Sabah and Sarawak at Kota Kinabalu, unreported at the time of writing. Reports will appear in the *Malayan Law Journal* and the *Law Reports of the Commonwealth* for 1994. The judgment on the application to strike out the action, before the same judge on 10 October 1994, is reported under the same name at (1955), *CLJ*, 1.
- 10 This provision appeared by way of amendment after the 1985 crisis; see above.
- 11 See ref 9.
- 12 *Noordin Salleh* (1992), 1 *MLJ*, 697; and see Federal Constitution of Malaysia (1993 ed), Kuala Lumpur, Government Printer, Article 10(1)(c).