The Judicial Power and Constitutional Government – Convergence and Divergence in the Australian and Malaysian Experience*

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Introductory Remarks

Tun Mohamed Suffian, described by Tun Mohamed Dzaiddin as "a person of unshakable principles",[1] made an outstanding contribution to his nation. He occupied with distinction the office of Lord President (now "Chief Justice") of the Federal Court from 1974 to 1982. As the leader of the "least dangerous" branch of government,[2] he guided the Malaysian judiciary along a path of rigorous judicial integrity and independence.

In a *Reference* held at the Federal Court on 16 March 2001 in honour of Tun Suffian, the then Attorney-General of Malaysia, Dato' Seri Ainum bt Mohd Saaid, made the following succinct and apt comments pivotal to any assessment of Tun Suffian's role in the shaping of the Malaysian polity:

> One of his main concerns was the place of the judiciary within the constitutional framework. In various forums and in several ways, he spoke about the need for an independent judiciary. He regarded this independence as a cornerstone of our constitutional arrangement.

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[1] *In Memory of Tun Mohamed Suffian* (Petaling Jaya: Sweet & Maxwell Asia, 2001) at p 23.

[2] Hamilton, A, "*The Federalist* No. 78" in Cooke, JE (ed), *The Federalist* (Middletown, Conn, 1961) at p 522.

> He also believed deeply in the importance of the role of law in our lives. He often called for a commitment to the rule of law which he regarded as a requirement fundamental for the existence of a true democracy.[3]

Consistent with Tun Suffian's philosophy, I have chosen for the theme of my lecture the role of the judicial power in the shaping of constitutional government. I will draw on the Australian experience to show the convergence and divergence in the operation of aspects of the judicial power in Australia and Malaysia.

Separation of Powers

It is axiomatic that we should never forget the past in order to shape a better future. On 31 August 1957, in Merdeka Stadium at Kuala Lumpur, Tunku Abdul Rahman, the first Prime Minister of the Federation of Malaya (later, Malaysia), proclaimed that the federation "shall be forever a sovereign democratic and independent State founded upon the principle of liberty and justice and ever seeking the welfare and happiness of its people and the maintenance of a just peace among all nations".[4] Two other features of that "Proclamation of Independence" should be noted: first, the proclamation was effected "with the concurrence and approval of Their Highnesses the Rulers of the Malay States"; secondly, he was proclaiming and declaring "on behalf of the people".[5]

Reflecting on that moment in 1957, it can be seen that Tunku Abdul Rahman was setting out a grand vision of a vibrant democracy, with liberty and justice as its guiding principles. The mandate for that proclamation was the will of the people, that is, a democracy based on popular sovereignty. The fundamental importance of the Malay Rulers in the creation of a new independent nation was obvious.

The constitutional scheme of the *Merdeka* Constitution clearly embraced a separation of powers within the Westminster context.

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[3] *Supra*, n 1 at p 34.

[4] Tunku Abdul Rahman, "Proclamation of Independence", *Malayan Constitutional Documents* (Kuala Lumpur: The Government Printer, 1959) at p 17.

[5] *Ibid.*

There was a firm demarcation between, on the one hand, the judicial power, and, on the other, the legislative and the executive powers. The framers of the Constitution were eminent jurists[6] who were undoubtedly conversant with the famous words of Montesquieu:

> [T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[7]

Montesquieu went on to state:

> There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.[8]

Writing in the Federalist No. 78, Alexander Hamilton after noting the wielding of the sword by the executive and the control of the purse by the legislature, made this oft-quoted observation:

> [T]he judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society . . . It may truly be said to have neither Force nor Will but merely judgment . . . [T]he judiciary is beyond comparison the weakest of the three departments of power.[9]

The description of the judiciary as the "weakest" or the "least dangerous" branch of government belies the importance of the judiciary in promoting constitutional government, for reposed in the judiciary is the judicial power.

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[6] The Independent Constitutional Commission was chaired by Lord Reid (United Kingdom) and also comprised Sir Ivor Jennings (United Kingdom), Sir William McKell (Australia), B Malik (India) and Justice Abdul Hamid (Pakistan). The Canadian nominee withdrew at the last moment on medical grounds.

[7] Montesquieu, C, *The Spirit of the Laws*, Book XI.

[8] *Ibid.*

[9] *Supra*, n 2 at p 523.

The Judicial Power

The classic definition of "judicial power" was provided by Chief Justice Griffith of the High Court of Australia in *Huddart Parker v Moorehead*[10] and was expressed as follows: "the power which every sovereign authority must of necessity have to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property."[11] This definition was endorsed by Zakaria Yatim J and referred to by Hashim Yeop A Sani SCJ (dissenting) in the Malaysian case of *Public Prosecutor v Dato' Yap Peng.*[12]

Written constitutions generally provide for the vesting of the judicial power in the judicial arm of government. For instance, the Australian Constitution in section 71 of Chapter III expressly provides for the vesting of the judicial power of the Commonwealth in the High Court of Australia, in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction.[13] The federal legislative power is vested in a Federal Parliament by virtue of section 1 in Chapter I of the Constitution; the executive power is vested in the Queen and is exercisable by the Governor-General by virtue of section 61 in Chapter II of the Constitution. The architecture of the constitutional framework led Sir Owen Dixon, regarded as Australia's pre-eminent jurist and a former Chief Justice of the High Court of Australia, to conclude:

> If you knew nothing of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chapters I, II and III

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[10] (1909) 8 CLR 330.

[11] *Ibid,* at p 357.

[12] [1987] 2 MLJ 311 at p 313 per Zakaria Yatim J (High Court), and at p 328 per Hashim Yeop A Sani SCJ (Supreme Court).

[13] Australian Constitution, s 71.

> and the form and content of ss. 1, 61 and 71. It would be difficult to treat it as a mere draftsman's arrangement.[14]

The equivalent strength of the "logical inferences" can be felt when perusing the structure of the Malaysian Constitution prior to 1988. Art 39 vests the "executive authority of the Federation" in the King and is exercisable by him or by the Cabinet or any Minister authorised by the Cabinet. The exercise of legislative power by Parliament is prescribed by Art 66(1). Article 121 of the Malaysian Constitution, prior to 1988, declared that "the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status . . . and in such inferior courts as may be provided by federal law". In 1988, Art 121 was amended by the Constitution (Amendment) Act 1988[15] so that it currently states that "[t]here shall be two High Courts of co-ordinate jurisdiction and status . . . and such inferior courts as may be provided by federal law ...". The amended Article went on to state that "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law".

Sultan Azlan Shah has clearly detected troubling ramifications with this amended Article,[16] remarking:

> The precise reason for this amendment remains unclear. But the consequences may be severe. With this amendment, it would appear that the judicial power is no longer vested in the courts, and more importantly, the High Courts have been stripped of their inherent jurisdiction. Their powers are now only to be derived from any federal law that may be passed by Parliament.

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[14] *R v Kirby; exparte Boilermakers' Society of Australia* (1954) 94 CLR 254 at p 275.

[15] Act A704.

[16] See Sultan Azlan Shah, "The Role of Constitutional Rulers and the Judiciary *Revisited*" in Sinnadurai, V (ed), *Constitutional Monarchy, Rule of Law and Good Governance* (Kuala Lumpur: Professional Law Books, 2004) at p 385.

The effect of this change may have far-reaching consequences on the separation of powers doctrine under the Federal Constitution.[17]

Sultan Azlan Shah also drew attention to the concerns highlighted in a report by the International Commission of Jurists.[18] That report pointed out that by making the jurisdiction and powers of the High Courts dependent upon federal law meant there could be no "constitutionally entrenched original jurisdiction".[19] It was thus observed by the Commission:

> This undermines the separation of powers and presents a subtle form of influence over the exercise of judicial power. This makes the operation of the High Court dependent upon the legislature and is a threat to the structural independence of the judiciary.[20]

In an important book published in 1995, Datuk Rais Yatim saw the amendment to Art 121 as a response to certain judicial decisions which had incurred the displeasure of the government.[21] Another catalyst for this move, according to Datuk Rais Yatim, was the judiciary crisis of 1988 which had led to the dismissal of the Lord President (Tun Salleh Abas) and two senior members of the Supreme Court (now renamed the Federal Court). In tandem with the reconfiguration of Art 121 was an amendment which sought to enlarge the power of the Attorney-General "to determine the court in which he could institute proceedings or to which he could transfer such proceedings".[22] This latter amendment negated the thrust of the decision in *Dato' Yap Peng* – a decision which enhanced the standing of the judiciary but which led to the subsequent erosion of the judicial power.

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[17] *Ibid,* at p 403. *Cf* Harding, A, *Law, Government and the Constitution of Malaysia* (Kuala Lumpur: Malayan Law Journal, 1996) at p 136 and cited in Wu, MA, "Judiciary at the Crossroads" in Wu, MA (ed), *Public Law in Contemporary Malaysia* (Petaling Jaya: Longman, 1999) 76 at p 91.

[18] *Ibid.*

[19] *Report on Malaysia, International Commission of Jurists,* 13 August 2001 as cited in Sultan Azlan Shah, *supra,* n 16 at p 403.

[20] *Ibid.*

[21] Rais Yatim, *Freedom Under Executive Power in Malaysia: A Study of Executive Supremacy* (Kuala Lumpur: Endowment Sdn Bhd, 1995) at p 100.

[22] *Ibid,* at p 102.

The concerns over the amended Art 121 were shared by many other commentators. Professor Wu, describing the amendment as amounting to a "*coup de grace*",[23] said:

> The co-equal status of the judiciary with the other branches as enshrined in the original Constitution has been de-emphasised or perhaps "downgraded", a direction not contemplated by framers of the Constitution.[24]

It is ironical to note that Art 121 is still headed "Judicial power of the Federation", and yet, nowhere in the provisions of that Article is there any explicit reference to the investiture of the judicial power. This inelegant drafting to effect the constitutional amendment gives the impression of the judicial power existing more as a mirage than a reality. It skews the fine balance of the constitutional structure whereby legislative, executive and judicial powers were assigned to the Parliament, the executive and the judiciary. It is imperative for such a constitutional balance to be restored for this balance underlines a subscription to a separation of powers, and hence to the notion of rule of law. To effect that restoration, the constitutional amendment should be modelled on the provisions of Art 121 of the 1957 *Merdeka* Constitution to read: "The judicial power of the Federation shall be vested in a Federal Court, Court of Appeal, the High Courts and such inferior courts as may be provided by federal law."

Judicial Independence

Constitutional government embodies the notion of the rule of law. There are certain fundamental requirements to ensure the existence of that notion. According to Professor Joseph Raz, they include the following: (1) the independence of the judiciary must be guaranteed; (2) the principles of natural justice must be observed if the law is to be able to guide action; and (3) the courts should have the power to examine

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[23] Wu, MA, *The Malaysian Legal System*, (Petaling Jaya: Longman, 2nd ed, 1999) at p 58.

[24] *Ibid*, at p 59.

the actions of the other branches of government in order to determine whether they conform with the law. Professor SA de Smith viewed "effective legal guarantees of basic civil liberties enforced by an independent judiciary" [25] as one of the essentials of constitutionalism.

The exercise of the judicial power in a country "founded upon the principles of liberty and justice" therefore requires the existence of an independent judiciary. A number of provisions were inserted by the framers into the Constitution to maintain judicial independence. Removal of a judge can only be effected following a recommendation by a tribunal that a judge should be removed on the ground of a breach of the code of ethics or on the ground of inability, from infirmity of body or mind or any other cause, to properly discharge the functions of the judge's office. Subject to the removal procedures, judges hold office till the age of 66. Judicial remuneration cannot be varied to the disadvantage of a judge during his or her term of office. A constitutional prohibition is placed upon the discussion in either House of Parliament of the conduct of a judge of the Federal Court, Court of Appeal or High Court, except on a substantive motion of which notice has been given by not less than one-quarter of the total number of members of that House. Thus, the Malaysian Constitution does contain the safeguards of judicial tenure and remuneration which are normally found in most democratic constitutions which accord significant protection to the judicial power and the constitutional sentinels which wield that power.

Why, it may be asked, is judicial independence so crucial for the attainment of constitutional government? First of all, Art 4(1) of the Malaysian Constitution proclaims the Constitution to be the "supreme law" of the Federation and that a law which is inconsistent with the Constitution "shall, to the extent of the inconsistency, be void". It makes sense that there must be a neutral or impartial umpire to ensure the supremacy of the Constitution. The judiciary was envisaged by the framers of the Constitution to perform that role. It exercises the potent power of judicial review: it can declare invalid legislation enacted by

[25] SA de Smith, "Constitutionalism in the Commonwealth Today" (1962) 4 *Malaya Law Review* 205 at p 205.

the Federal Parliament or the legislature of a State on the ground that the Federal Parliament or State legislature lacks power to make such laws. Because the Constitution embodies fundamental liberties, the protection of such liberties, subject to express constitutional caveats, is entrusted to the judiciary. In asserting the essentiality of judicial independence, Dr Woodrow Wilson explained the important role of the judicial forum in the preservation of individual liberty and governmental integrity:

> There the individual may assert his rights; there the government must accept definition of its authority. There the individual may challenge the legality of governmental action and have it judged by the test of fundamental principles, and that test the government must abide; there the government can check the too aggressive self-assertion of the individual and establish its power upon lines which all can comprehend and heed.[26]

To carry out its role as a constitutional bulwark effectively, the judiciary must be able to sustain public confidence in its impartiality. As Lord Taylor of Gosforth said: "Public confidence in the fairness of the justice system depends crucially on the judges being believed to be impartial, free from bias and from extraneous influence".[27] Judicial independence, as Chief Justice Antonio Lamer of Canada pointed out, is not an end in itself; it is vital for "the maintenance of public confidence in the impartiality of the judiciary".[28] That confidence is displayed when a losing party accepts a decision of a judicial officer. There is ready acceptance when a decision is rendered by a judicial officer "who has obviously conducted a hearing fairly, found the facts honestly, applied the principle of the law genuinely believed to apply, and given reasons for the decision which show that this process was followed".[29]

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[26] Wilson, W, *Constitutional Government in the United States* (New York: Columbia University Press, 1908) at p 142.

[27] Lord Taylor of Gosforth, "The Independence of the Judiciary in a Democracy" (1995) 4 *Asia Pacific Law Review* 1 at p 2.

[28] Lamer, A, "The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change" (1996) 45 *University of New Brunswick Law Journal* 3 at p 7.

[29] McGarvie, RE, "The Foundations of Judicial Independence in a Modern Democracy" (1991) 1 *Journal of Judicial Administration* 3 at p 6.

Judicial Independence – Attacks on the Courts

Considering that Malaysia achieved its independence less than 50 years ago, the period of public disquiet over the judiciary by comparison is a fairly prolonged one. A number of episodes have occurred which have generated concerns about the standing of the judiciary.[30] A former Lord President, Sultan Azlan Shah, was aggrieved to hear of various allegations made against the judiciary. He wrote:

> Since Independence, the early judges had always cherished the notion of an independent judiciary and had built the judiciary as a strong and independent organ of government. The public had full confidence in the judiciary and accepted any decision then made without any question. Unfortunately, the same does not appear to be the case in recent years.[31]

Since the expression of this view by Sultan Azlan Shah, the upholding of the *Anwar* appeal case by the Federal Court[32] which led to the quashing of his convictions pertaining to sexual misconduct has removed the international spotlight from the Malaysian judiciary and has given it the opportunity to work towards a full restoration of public confidence in its integrity, impartiality and independence.

The travails facing the Malaysian judiciary are not peculiar to Malaysia. Around the world, the judicial organ is coming under increasing scrutiny. There have been attempts, even in the established democracies, to erode judicial independence, albeit not on the scale and of the intensity manifested in the 1988 removal of Lord President Tun Salleh and two senior Supreme Court justices. I will touch on some of these attempts to highlight the need for constant vigilance in protecting the judiciary. It is also useful to consider some of the reforms which have been proposed or are occurring in other countries which seek to strengthen the foundations of judicial independence.

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[30] See Wu, *supra*, n 17 at pp 76-106.

[31] See Sultan Azlan Shah, *supra*, n 16 at p 400.

[32] *Dato' Seri Anwar bin Ibrahim v Public Prosecutor and Another Appeal* [2004] 3 MLJ 405 (Federal Court), *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2000] 2 MLJ 486 (Court of Appeal).

In 1992, the High Court of Australia rendered judgment in a landmark case, *Mabo v Queensland (No 2).*[33] In essence, the Court acknowledged the recognition by the common law of Australia of "a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands".[34] In 1996, the Court in another case, *Wik Peoples v Queensland,*[35] by a 4-3 decision rejected the notion that the grant of a pastoral lease would necessarily result in the extinguishment of native title. In between these two decisions a bitter debate took place. The then Deputy Prime Minister (Mr Tim Fischer) was reported to have criticised the Court for its delay in handing down its judgment in *Wik.* Following the judgment in *Wik*, the Court was denounced by those who were opposed to the Court's judgment. A current member of the High Court, Justice Michael Kirby, collated the abusive terms hurled at the Court: "a historic pack of dills", "an embarrassment", "bogus", "pusillanimous and evasive", a "pathetic . . . self-appointed [group of] Kings and Queens", "feral judges", "a professional labor cartel".[36]

Sir Gerard Brennan, the then Chief Justice of the High Court, wrote a letter to the Deputy Prime Minister saying, *inter alia:*

> You will the more readily appreciate that attacks of the kind that you have made, emanating from a Deputy Prime Minister, are damaging to this Court. You will appreciate that public confidence in the constitutional institutions of Government is critical to the stability of our society. By a convention which is based on sound practice, judges do not (and certainly should not) publicly attack the members of the political branches of government, and the members of the political branches of government do not (and certainly should not) attack the judges except on a substantive motion in the Parliament.[37]

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[33] (1992) 175 CLR 1.

[34] *Ibid* at p 15.

[35] (1996) 187 CLR 1.

[36] Kirby, M, "Attacks on Judges – A Universal Phenomenon" (1998) 72 *Australian Law Journal* 599 at p 601.

[37] Campbell, E, and Lee, HP, *The Australian Judiciary* (Cambridge University Press, 2001) at p 57.

The Chief Justice added that the convention "does not restrict criticism of Court judgments" and asked the Deputy Prime Minister to consider "whether the making of attacks on the performance by this Court of its constitutional functions is conducive to good government, even if an attack can gain some temporary political advantage".[38]

In his letter of reply, the Deputy Prime Minister said, among other things:

> My comments were made against the background of incorrect advice I had received which predicted that the *Wik* decision would not be handed down by the High Court until calendar year 1997.[39]

He also noted the Chief Justice's comment that "Court judgments may be criticised as a separate matter from judicial integrity and devotion to duty".[40] No calls were made for the resignation of the Chief Justice or for his removal for having written the letter to the Deputy Prime Minister.

It is not necessary for me to traverse the misfortune that befell Tun Salleh Abas following his letter written to the King after a meeting of Kuala Lumpur judges. The convulsion which emanated from that letter led to the greatest judiciary crisis in Malaysia.[41] A difference from the Australian episode is that Tun Salleh Abas's letter was addressed to the King and copied to each of the Malay Rulers and was subsequently listed as one of five main charges levelled at Tun Salleh Abas. The fourth charge, stated, *inter alia:*

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[38] *Ibid.*

[39] *Ibid.*

[40] *Ibid,* at p 58.

[41] See Harding, A, "The 1988 Constitutional Crisis in Malaysia" (1990) 39 *International and Comparative Law Quarterly* 54; Hickling, RH, "The Malaysian Judiciary in Crisis" (1989) *Public Law* 20; Lee, HP, *Constitutional Conflicts in Contemporary Malaysia* (Kuala Lumpur: Oxford University Press, 1995) at pp 43-85; Trindade, FA, "The Removal of the Malaysian Judges" (1990) 106 *Law Quarterly Review* 51.

> His Majesty [the King] interpreted what you wrote in that letter as intending to influence Their Royal Highnesses the Malay Rulers and His Majesty [the King] to take some form of action against the [Prime Minister]. Your action is therefore likely to give rise to misunderstanding between the rulers and the [Prime Minister] and could adversely affect the good relations between the Malay Rulers and the Government. Such an action has rendered you unfit to continue in the office of Lord President.[42]

A painful lesson of the Tun Salleh Abas affair is that in Malaysia a Chief Justice, by writing a letter of complaint on behalf of his judicial brethren can find a heavy toll being exacted for adopting that course of action. The Australian experience does not have the equivalent of a peculiarly Malaysian form of "poison letter", the *surat layang*, so, I will not comment on the consequences of writing such a letter.[43]

Judges, by convention, do not respond to criticisms of their decisions, "even if they believe the criticisms to be unfair, ill informed or quite unfounded".[44] However, when a person embarks on a campaign to denigrate the court as a whole, that person, no matter how exalted a position he or she occupies, may be seen to "incite disaffection against the administration of justice". This would constitute the offence of "sedition". It is not likely that a prosecution would be initiated by the Attorney-General if the person committing the offence is the head or deputy head of government. However, in Australia, on 3 June 2002, the Full Court of the Federal Court of Australia responded to certain comments made by the then Minister for Immigration, Multicultural and Indigenous Affairs, who was at that time a party to certain appeals before the Court. Chief Justice Michael Black addressed the Solicitor-General in court:

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[42] See Tun Salleh Abas with Das, K, *May Day for Justice* (Kuala Lumpur: Magnus Books, 1989) at p 175.

[43] See Wu, *supra*, n 17 at pp 101-106.

[44] Campbell, E, and Lee, HP, "Criticism of judges and freedom of expression" (2003) 8 *Media & Arts Law Review* 77 at p 87.

> You would of course know Mr Solicitor that the Court is not amenable to external pressure from Ministers or from anyone else whomsoever, but we are concerned that members of the public might see the Minister's statements as an attempt to bring pressure on the Court in relation to these appeals to which he is a party.[45]

Black CJ added:

> We are also concerned that members of the public might see the Court as amenable to such pressures, including pressure upon it in relation to the issues that are before us today.[46]

He afforded the Minister an opportunity to respond in case the Court had misinterpreted his comments or in case they had been reported incorrectly. The whiff of a possibility of a contempt of court response had a salutary effect. The Minister expressed his regrets that his statements might be misinterpreted by members of the public and through the Solicitor-General assured the Court that they were not intended to apply pressure upon the Court. This Australian episode indicates that the judiciary is not necessarily the "weakest" branch of government.

Security of Tenure of Judges

In order for the judicial power to be exercised in a manner compatible with constitutional government it is a self-evident proposition that the sentinels of this power should be guaranteed security of tenure. When the judicial power is exercised against the State there should be no possibility of retaliation against the judge concerned. The citizen who is challenging an abuse of power by the State must be assured that the adjudication is effected in an impartial and independent manner. The public's confidence in the impartiality and independence of the judges is secured by ensuring that judges cannot simply be removed according to the whims and fancies of the government of the day.

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[45] *Ibid,* at p 88.

[46] *Ibid.*

Constitutional government requires entrenched protection of judges by providing them with security of tenure, which is manifested in different forms. In general, some constitutions have opted for a tribunal system for removing judges; others have opted for the parliamentary removal process. Security of tenure is one way of ensuring a judge's fidelity to his or her oath of office. In Malaysia, judges, upon their appointment, swear that they will faithfully discharge their judicial duties, bear true faith and allegiance to Malaysia, and will preserve, protect and defend the Constitution.[47] Judges of the High Court of Australia take the following oath:

> I do swear that I will bear true allegiance to her Majesty . . . that I will well and truly serve her in the office of Justice of the High Court of Australia and that I will do right to all manner of people according to law without fear or favour, affection or ill will . . . [48]

Although the phraseology is different, the Malaysian judicial oath (or affirmation) of office also connotes the promise to "do right to all manner of people according to law without fear or favour, affection or ill-will". Upon taking the oath of office, the Malaysian judge, like all judges of the common law world, has tapped into a proud judicial tradition of independence, impartiality and integrity, which stretches back to the time when a courageous Coke CJ responded to an angry and all powerful King James I of England with a famous line: "[T]he King should not be under man, but under God and the Laws [sic]".[49]

Sir Gerard Brennan, in his swearing in speech as Chief Justice of the High Court of Australia, explained the rich meaning and significance of the judicial oath:

> It precludes partisanship for a cause, however worthy in the eyes of a protagonist that cause may be. It forbids any judge to regard himself or herself as a representative of a section of society. It forbids partiality and, most importantly, it commands independence from any

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[47] See "Forms of Oaths and Affirmations" in the Malaysian Constitution, Sixth Schedule.

[48] High Court of Australia Act 1979 (Cth), s 11 and Schedule.

[49] See Bowen, CD, *The Lion and the Throne* (Boston, 1956) at pp 304-305.

> influence that might improperly tilt the scale of justice. When the case is heard, the judge must decide it in the lonely room of his or her own conscience but in accordance with law. That is the way in which right is done without fear or favour, affection or ill-will . . . [50]

In Malaysia, the removal mechanism is embodied in Art 125 of the Constitution. The *Merdeka* Constitution adopted the tribunal removal system, contrary to the recommendation of the Reid Constitutional Commission which had recommended the parliamentary removal system.[51] The following steps are required by Art 125:

- there is a representation made to the King by the Prime Minister or by the Chief Justice after consulting the Prime Minister;
- the removal must pertain to a breach of the prescribed code of ethics or inability, from infirmity of body or mind or any other cause, properly to discharge the judicial functions;
- a tribunal is appointed by the King and the representation is referred to it; and
- the tribunal makes a recommendation and the King may on the recommendation remove the judge.

The Constitution also specifies the composition of the tribunal. It shall consist of "not less than five persons who hold or have held office as judge of the Federal Court, the Court of Appeal or a High Court". Furthermore, if it appears to the King expedient to do so, the King may appoint persons "who hold or have held equivalent office in any other part of the Commonwealth". The Constitution also prescribes the order of precedence among the tribunal members.

Art 125 provides for a more elaborate mechanism than countries which adopted the parliamentary removal mechanism. The Australian Constitution states simply that the judges of the High Court of Australia and of other courts created by the Australian Parliament "shall not be removed except by the Governor-General in Council, on an address

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[50] (1995) 183 CLR ix, at p x.

[51] Federation of Malaya Constitutional Commission, 1956-1957 Report at para 125.

from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity".[52]

Tun Salleh Abas, following his dismissal from office, has lamented the inefficacy of the tribunal system in ensuring a fair process for judicial removal. The report of the tribunal has been described as "the most despicable document in modern history".[53] In reflecting on the way his demise was brought about, Tun Salleh Abas expressed the view that removal by an address of Parliament was a preferred mode provided there was also a free press. If the Malaysian Constitution were to be reformed should the tribunal system be replaced by the removal mechanism such as that which is found in the Australian Constitution?

The record of the operation of the parliamentary removal mechanism at both national and state level in the Australian federation is a mixed one. When for the first time in Australian legal history an attempt was made to remove a justice of the High Court of Australia, a conspectus of the protracted proceedings would not engender the same degree of confidence in the parliamentary removal system as possessed by Tun Salleh Abas. The "Murphy Affair" involved the steps that were taken under the Australian Constitution to determine whether Justice Lionel Murphy of the High Court should be removed from office.[54] The saga was sparked by allegations that Murphy J had sought, through the Chief Stipendiary Magistrate (Clarrie Briese) of the State of New South Wales, to influence the due and ordinary course of justice in relation to committal proceedings against a Sydney solicitor by the name of Morgan Ryan, who was charged with criminal conspiracy. These allegations arose when a newspaper published a series

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[52] Australian Constitution, s 72 (ii).

[53] Robertson, G, "Justice Hangs in the Balance" *The Observer*, 28 August 1988 at p 22.

[54] Campbell and Lee, *supra*, n 37 at pp 102-103; Lindell, G, "The Murphy Affair in Retrospect" in Lee, HP, and Winterton, G (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) at pp 280-311.

of articles based on telephone conversations of Ryan, which were taped illegally by the New South Wales police.[55]

Prior to his appointment as a justice of the High Court, Murphy had a colourful political career. He was a Queen's Counsel. He was elected a Senator of the Australian Parliament in 1962 and subsequently became the leader of the Australian Labor Party Opposition in that House in 1967. When the Australian Labor Party came to power in 1972 he became the federal Attorney-General and Minister for Customs and Excise. His appointment to the High Court in 1975 generated controversy. Speculation at that time was that the judicial appointment was a means taken by the Prime Minister (Gough Whitlam) to remove a potential leadership challenger, although such a view has also been rejected by other commentators.[56] According to Dr Jenny Hocking, the author of a biography on Murphy J, members of the Victorian Bar Council called a meeting to debate whether to put a motion deploring Murphy's appointment. Dr Hocking said: "Those seeking to put this motion were in a small minority, only 64 of the 300 barristers present voted to proceed, and the motion was never voted upon".[57]

Given Murphy's political background, it was inevitable that the affair developed a politicised dimension which helped to explain the protracted nature of the proceedings taken against Murphy. Because of the publicity generated by the media reporting of the illegal telephone intercepts, the then federal Attorney-General (Senator Gareth Evans) sought a report from the Australian Federal Police on whether

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[55] Professor Lindell wrote:

> The transcripts of the telephone conversations between Murphy J and Ryan contained discussions of illegal casinos, blackmail, a real estate development in central Sydney, the possibility of Murphy J supporting the reappointment of a person to a State statutory authority, and interference with police investigations in New South Wales.

See Lindell, *ibid*, n 54 at pp 282-283.

[56] See Campbell and Lee, *supra*, n 37 at pp 77-78.

[57] Hocking, J, *Lionel Murphy – A Political Biography* (Cambridge University Press, 1997) at p 226.

the contents of the tapes disclosed the commission of any federal offences. He also requested the then Director of Public Prosecutions designate (Ian Temby QC) to furnish an opinion on the scope of section 72(ii) of the Australian Constitution. "Misbehaviour" in that section was construed narrowly by Mr Temby, who then concluded that even if the material was authentic, it could not support a conclusion that there was "misbehaviour". Confronted by mounting pressure for further investigation into the matter, the Attorney-General announced that a task force would be formed. Following the tabling of an opinion by the then Solicitor-General (Gavan Griffith QC) on the meaning of "misbehaviour", the Senate passed a resolution for the appointment of a committee to inquire into the various allegations against Murphy J. As the Government did not command a majority in the Senate, a committee was formed on 18 March 1984, despite the government's opposition. Because of the inconclusive finding of the first committee, a second committee was established on 6 September 1984. This time the committee comprised four Senators who were assisted by two former Superior Court judges. In a report published on 31 October 1984, a majority of the committee found that Murphy's actions amounted to "misbehaviour". After a trial in the Supreme Court of New South Wales pursuant to Ian Temby's decision to prosecute, Murphy was convicted upon the charge of attempting to pervert the course of justice in relation to the committal proceedings against Ryan and was sentenced to imprisonment for 18 months with a minimum of 10 months. The New South Wales Court of Criminal Appeal quashed the conviction on 28 November 1985, and ordered a re-trial. On 28 April 1986, Murphy was acquitted at the re-trial. Despite this, the Australian Parliament passed legislation for the establishment of a Parliamentary Commission of Inquiry to examine all outstanding allegations against Murphy and to determine whether there had been "misbehaviour" on his part that warranted his removal from the High Court. The Commission was subsequently terminated by legislation when it was revealed that Murphy had terminal cancer. Murphy died on 21 October 1986.

The protracted proceedings against Justice Murphy raised concerns about the efficacy of the parliamentary removal mechanism. It was observed by a respected Australian jurist:

> When, on the first occasion of modern time in the country, the machinery designed in an earlier era to determine whether a judge ought to be removed, was put into operation in the case of Mr Justice Murphy, it was found quite inadequate to cope with the conditions of today. In a contested case, with political undertones, the traditional parliamentary procedures were unable in any satisfactory way to ascertain what had occurred or whether what had occurred could warrant removal. It was a good illustration of a system which apparently worked in earlier times, but is ineffective in the conditions of today.[58]

Tun Salleh Abas, in reflecting on his experience, said:

> Looking back at our recent Malaysian experience, I am convinced more than ever, that removal by a Parliamentary address provides a better safeguard for judges despite being an apparent anachronism, provided that there is a reasonably free press. Parliamentary proceedings are held in public and these constitute some measure of protection for the judges.[59]

Professor F A Trindade remarked that Art 125 "needs to be looked at again by those concerned with constitutional matters in Malaysia".[60]

The streams of proceedings to effect the removal of a judge in Malaysia and Australia have flowed in divergent channels, but they have converged on one conclusion, namely, that no removal mechanism will be fully effective in ensuring a fair or speedy determination if the matter is clouded with political undertones. I have expressed the following view elsewhere:

> In the end, no matter what system is adopted, the safeguards are only effective as long as those who constitute the checks and balances

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[58] McGarvie, RE, "The Foundations of Judicial Independence in a Modern Democracy", paper delivered at the Australian Bar Association Conference, Darwin, 8 July 1990 at p 12.

[59] Tun Salleh Abas, *The Role of the Independent Judiciary*, (Kuala Lumpur: Promarketing Publications, 1989) at pp 46-47.

[60] Trindade, *supra*, n 41 at p 85.

> want them to work. The framers of the Constitution did not make a mistake in opting for the removal mechanism in Article 125; their mistake lay in the assumption that the executive arm of government would subscribe to the rule of law. Safeguards require the co-operation of human beings; it is very difficult to safeguard completely against the "frailty and weakness of human nature".[61]

A possible reform which should be contemplated is to amalgamate both the tribunal and the parliamentary removal procedures. Art 125 could be amended to alter the role of the tribunal from one which decides whether there was misbehaviour to one which determines the facts and for Parliament, in the light of the established facts, to decide whether they amount sufficiently to constitute one of the stated grounds to justify removal. In light of Parliament's determination, the King would then remove the judge. In the Australian context such a reform was recommended by the Australian Constitutional Commission in its *Final Report*:

> An address for removal of a Justice shall not be made unless a Judicial Tribunal, requested by a Minister of State for the Commonwealth to inquire into an allegation of misbehaviour by or of incapacity of the Justice, has reported that the facts found by it could amount to misbehaviour or incapacity warranting removal . . . The address of each House of Parliament must be based on facts found by the Tribunal . . . [62]

Judicial Appointments

The following observation made in the context of the New Zealand experience is equally apt for Malaysia and Australia: "Judicial appointments do . . . remain within the gift of the government of the day".[63] In considering the government's prerogative to appoint judges to fill judicial vacancies, Professor Enid Campbell and I in our book, *The Australian Judiciary*, said:

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[61] Lee, *supra*, n 41 at p 76.

[62] Constitutional Commission, *Final Report*. (Canberra: AGPS, 1988) at p 402.

[63] Stockley, AP, "Judicial Independence: The New Zealand Experience" (1997) 3 *Australian Journal of Legal History* 145 at p 149.

> In appointing judges, a government owes a duty to the people . . . to ensure appointees of the highest calibre. Judicial independence can also be subverted by the appointment of persons who do not possess an outstanding level of professional ability, intellectual capacity and experience and integrity, and who cannot shake off a sense of gratitude to the appointing authority. It is not in the interests of the . . . people to have their judicial tribunals reduced to timorous institutions.[64]

In Australia, in relation to the appointment of High Court justices, there is only a statutory requirement for the federal Attorney-General to consult the Attorneys-General of the States.[65] Consultation outside this statutory requirement depends on the person holding the office of federal Attorney-General. A former Chief Justice of the High Court of Australia, Sir Harry Gibbs, said:

> There is no formal procedure for consultation between the executive and the judiciary or the legal profession. However in practice it is not uncommon for an Attorney-General to consult with the Chief Justice or with other members of the profession with regard to a prospective appointment, but sometimes an appointment may be made without consultation and sometimes advice may be received but ignored.[66]

However, a free press and a vocal legal profession can ensure that the power of judicial appointment is not blatantly abused. In 1913, the federal Attorney-General (WM Hughes) wanted to appoint Mr AB Piddington to the High Court. Mr Piddington received the following cable from an intermediary of the Attorney-General while he was travelling overseas: "Confidential and important to know your views Commonwealth versus State Rights. Very Urgent". Mr Piddington cabled back the following reply: "In sympathy with supremacy of Commonwealth Powers". Mr Piddington then accepted the appoint-

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[64] See Campbell and Lee, *supra*, n 37 at p 95.

[65] High Court of Australia Act 1979 (Cth), s 6.

[66] Gibbs, H, "The Appointment and Removal of Judges" (1987) 17 *Federal Law Review* 141 at pp 143 -144.

ment as a High Court judge on "condition that it was realised he had complete independence of mind on all constitutional questions".[67] Upon his return to Australia, he found his appointment had been gazetted. He also faced a hostile reception from Sydney and Melbourne barristers. Professor Geoffrey Sawer explained:

> Meetings of barristers in Sydney and Melbourne passed resolutions objecting to the appointment on the ground that Piddington by political associations and temperament was unfitted for the position. Proceeding to Sydney, Piddington asked the advice of Sir William Cullen, Chief Justice of New South Wales, and Sir Edmund Barton, as to whether the exchange of cables placed him in a compromising position. They advised him that the proviso to his acceptance made his position completely unexceptionable, but nevertheless Piddington decided to resign the position and did so without sitting on the Bench. In 1922, when Piddington opposed Hughes at the federal general election, these events were re-hashed and there was much newspaper dispute as to whether Hughes had acted improperly, and as to why Piddington had resigned. It seemed probable Piddington's resignation was induced not only by his scruples concerning the exchange of cables, but also by the hostile reception from the legal profession in Melbourne and Sydney.[68]

Professor Sawer concluded that Hughes' inquiries were improper.

The Malaysian constitutional provisions are different. They spell out a constitutional requirement for the Prime Minister to effect consultation before tendering advice to the King. In constitutional theory, the King makes the appointment. In reality, the King is circumscribed by the constitutional requirement to accept and act in accordance with the advice. That this compliance with advice is a mandatory requirement is made clear by the Court of Appeal in *Re Dato' Seri Anwar bin Ibrahim.*[69] In noting the judicial interpretation of the Court of Appeal, Dato' Param Cumaraswamy, the former UN Special Rapporteur on the Independence of Judges and Lawyers, said: "From these

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[67] Sawer, G, *Australian Federal Politics and Law 1901-1929* (Melbourne University Press, 1956) at p 105.

[68] *Ibid,* at pp 105-106.

[69] *Supra,* n 32.

interpretations it is clear that the choice of judicial appointments is not that of the King. The choice, ultimately, is that of the Prime Minister".[70]

According to Art 122B(1), the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and the other judges of these courts shall be appointed by the King "acting on the advice of the Prime Minister, after consulting the Conference of Rulers". Furthermore, the Prime Minister has to consult the Chief Justice regarding these appointments except in the appointment of Chief Justice of the Federal Court. In the case of the Chief Judge of a High Court, the Prime Minister "shall consult the Chief Judge of each of the High Courts and, if the appointment is to the High Court in Sabah and Sarawak, the Chief Minister of each of the States of Sabah and Sarawak". Appointments of judges to the Federal Court, the Court of Appeal and a High Court, other than the heads of these courts, require consultation with their respective heads.

In his judgment in *Re Dato' Seri Anwar bin Ibrahim*, Lamin PCA construed the requirement of consultation specified in Art 122B(1) as consultation between the King and the Conference of Rulers. In stating that the word "consult" does not mean "consent", he added "[I]n the matter of the appointment of judges, when the [King] consults the Conference of Rulers, he does not seek its "consent". He merely consults."[71] He further said that the King "may consider the advice or opinion" given by the Conference of Rulers "but he is not bound by it". Sultan Azlan Shah, after referring to this interpretation by Lamin PCA, cogently explained the reality of constitutional practice. Sultan Azlan Shah wrote:

> [T]he statements made by Lamin PCA in this case seem to suggest that the Conference of Rulers gives its advice directly (and only) to the [King], and not to the Prime Minister. In practice, this is not the

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[70] Cumaraswamy, P, "Judicial Independence: In Search of Public Trust" (2003) XXXII No. 4 *INSAF* 55 at p 67.

[71] *In the matter of an oral application by Dato' Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal* [2002] 2 MLJ 481 (Court of Appeal) at p 484.

> case. The Prime Minister submits the names of the candidates to the Conference of Rulers. The Conference then submits its views to the Prime Minister before he tenders his advice to the [King]. Therefore, the views of the Conference are, strictly speaking, given to the Prime Minister. It is then for him to consider these views before he makes the final recommendation to the [King]. Only when such a procedure is followed can the Conference of Rulers play an effective role in the "advising" process.[72]

Sultan Azlan Shah added:

> To suggest that their advice is given directly to the [King] will render this entire constitutional process meaningless, since when the Prime Minister submits the name to the [King], the [King] is duty-bound, under Art 40 (1A), to accept the advice of the Prime Minister.[73]

This description by Sultan Azlan Shah of the consultation process is clearly correct, not only from his authoritative insider perspective of the constitutional practice, but also based on the terms and context of Art 122B(1).

The efficacy of the consultation process employed in every judicial appointment in Malaysia cannot be readily determined. At most, one can share the sentiments of Sultan Azlan Shah, the great advocate of the Rule of Law, when he said:

> [I]t is generally accepted as good practice that whenever an appointing body receives from another independent and respected body an adverse report on a candidate, such advice should be given serious consideration. In most cases, the advice will provide sufficient and compelling reasons as to why the candidate should not be appointed to the post. If this procedure were complied with, the appointing authority will be in a position to avoid any accusations of bias or favouritism. This mechanism, thus, protects the appointing authority from any allegations of impropriety ...[74]

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[72] Sultan Azlan Shah, *supra*, n 16 at pp 397-398.

[73] *Ibid*, at p 398.

[74] *Ibid*, at 397.

Sultan Azlan Shah finds that it is generally difficult "to rationalise why a Prime Minister would not want to consider, or even abide by the views of nine Rulers and four Governors who constitute the Conference of Rulers", adding:

> These are independent persons, with vast experiences, and with no vested interest in the nominated candidates. Their duty is to fulfil their constitutional role in ensuring that only the best and most suited candidates are selected for the posts.[75]

It is of interest to note that under the original recommendations of the Reid Constitutional Commission it was recommended that the power to appoint the Chief Justice should be vested in the King and that other judges should be appointed by the King after consultation with the Chief Justice.[76] The report of the Reid Commission was considered by a Working Committee and this recommendation was revised. Art 122 of the *Merdeka* Constitution thus provided:

> (3) In appointing the Chief Justice the [King] may act in his discretion, but after consulting the Conference of Rulers and considering the advice of the Prime Minister; and in appointing the other judges of the Supreme Court he shall, after consulting the Conference of Rulers, act on the recommendation of the Judicial and Legal Service Commission.
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> (4) Before acting, in accordance with Clause (3), on the recommendation of the Judicial and Legal Service Commission the [King] shall consider the advice of the Prime Minister and may once refer the recommendation back to the Commission in order that it may be reconsidered.

The White Paper ("Federation of Malaya Constitutional Proposals 1957") explained:

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[75] *Ibid.*

[76] Federation of Malaya Constitutional Commission, 1956-1957 Report, Chapter XII ("Summary of Recommendations") at paras 54-55.

> The revised proposals are designed to maintain the independence of the Judiciary from the executive and legislative authorities.[77]

Could it be that the architects of the *Merdeka* Constitution were more far-sighted than realised?

Within three years of the attainment of Independence, the power of appointing the Chief Justice and other judges was transferred to the Prime Minister by virtue of the *Constitution (Amendment) Act* 1960.[78] That amendment Act also abolished the Judicial and Legal Service Commission and transferred the power of appointing persons to sit on a tribunal to consider the removal of a judge from the Commission to the King. Pending the outcome of the report by the tribunal, the King had, prior to the 1960 amendment Act, the power to suspend the judge from the exercise of his functions. After the enactment of the amendment Act, this suspension power was transferred to the Prime Minister.

The Government defended the amendments by pointing to the system practised in the UK and the countries which practise parliamentary democracy.[79] It gave in Parliament an assurance that it was not the intention of the government to bring "political influence" into the appointment of judges. In my analysis of this amendment in 1976, I wrote:

> Despite this assurance, sober thought must be given to the fact that avenues have been provided whereby an unscrupulous party coming into power could deal a sad blow to the independence of the Judiciary.[80]

In Australia, there have been, from time to time, calls for the current mode of judicial appointment to be reformed. The proposal

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[77] Federation of Malaya Constitutional Proposals 1957 at para 31.

[78] Act 10 of 1960.

[79] *Parliamentary Debate* (Dewan Ra'ayat), 22 April 1960 at col 309.

[80] Lee, HP, "Constitutional Amendments in Malaysia" (1976) 18 *Malaya Law Review* 59 at p 80.

which has attracted the most attention is the idea of a judicial commission which performs an advisory role, rather than an appointing role. This idea was supported in 1994 by the Australian Law Reform Commission. The Commission said:

> This model has the advantage of a high degree of independence from the political process, and can therefore enhance the independence and impartiality of the judiciary. An advisory commission also offers the best chance of achieving greater diversity on the bench. It has the advantage of providing a forum for increased consultation within the community about who should be appointed as judges.[81]

The idea of a judicial commission has not found favour, so far, with the federal and most State governments in Australia.[82] On this score I suspect that there is a convergence with the stand of the Malaysian government.

Conclusion

The Honourable Marilyn Warren, the current Chief Justice of the Supreme Court of Victoria, in a public lecture, said:

> Governments do not wish to be told, to be reminded that their political will does not always prevail. They do not like to be told that the courts stand as the last line of defence between the government and the citizen.[83]

More than half a century ago, a courageous judge by the name of Lord Atkin in the famous case of *Liversidge v Anderson*[84] wrote the following stirring words:

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[81] *Equality Before the Law: Women's Equality*, Australian Law Reform Commission, Report No 69, Pt II, 202 at para 9.41.

[82] See comments by Justice Ronald Sackville, Federal Court of Australia in "The 7.30 Report", 24 March 2005, available at http://www.abc.net.au/7.30/content/2005/s1331447.htm.

[83] Warren, M, "What Separation of Powers?", 12th Lucinda Lecture delivered at Monash University, Australia, 21 September 2004.

[84] [1942] AC 206.

> It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified in law.[85]

It is thus inevitable that there will be times when tensions will arise between the executive and legislative arms of government and the judiciary. However, this should not obscure the understanding that the undermining of public confidence in the judiciary is detrimental to the attainment of Tunku Abdul Rahman's grand vision of a nation founded on liberty and justice. A respected, independent and impartial judiciary diverts conflicts and riots in the streets to resolution by logic and reason in the calm atmosphere of the courts. An independent judiciary may be the least dangerous branch of government but there is an obligation on every citizen to ensure that it does not become an endangered branch.

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[85] *Ibid*, at p 244.

Protection of Expressions of Folklore/ Traditional Cultural Expressions: To What Extent is Copyright Law the Solution?*

*Kuek Chee Ying***

Introduction

Folklore[1] forms an integral part of the cultural heritage of a nation and it is an essential means of social identity, particularly for a developing country or certain communities. In recent decades, there has been an increase in the commercial exploitation or appropriation of expressions of folklore (hereinafter referred to as "EoF") or traditional cultural expressions (hereinafter referred to as "TCEs")[2] by entrepreneurs who have no connection whatsoever with the communities to which the EoF/TCEs belong. In most cases, the communities who were the custodians or preservers of the EoF/TCEs do not enjoy the economic benefit or share the returns from such unauthorised exploitation by persons not belonging to the communities. Sometimes, very little respect or regard was shown to the custodians of the EoF/TCEs in the commercialisation process in that the EoF/TCEs were used in ways

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[1] The word "folklore" is defined in the *Oxford Advanced Learner's Dictionary* to mean "traditions, stories, customs, etc. of a community".

[2] The terms "expressions of folklore" and "traditional cultural expressions" are used as interchangeable synonyms by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore and this is reflected in their working documents, for instance WIPO/GRTKF/IC/5/3, WIPO/GRTKF/IC/6/3 and WIPO/GRTKF/IC/7/4.