REPORT OF THE PANEL OF EMINENT PERSONS TO REVIEW THE 1988 JUDICIAL CRISIS IN MALAYSIA

26 JULY 2008

Commissioned by

Malaysian Bar
LAWASIA
International Bar Association's Human Rights Institute
Transparency International - Malaysia

REPORT OF

THE PANEL OF EMINENT PERSONS

TO

REVIEW THE 1988 JUDICIAL CRISIS

IN MALAYSIA

TWENTY SIXTH JULY TWO THOUSAND AND EIGHT

KUALA LUMPUR

COMPOSITION OF THE PANEL

1. **Hon'ble Mr. Justice (Retd.) J. S. Verma** **Chairman**
   formerly,
   Chief Justice of the Supreme Court of India,
   Chairman, National Human Rights Commission,
   Chief Justice of the High Courts of Madhya Pradesh & Rajasthan,
   and Acting Governor of Rajasthan.

2. **Hon'ble Mr. Justice (Retd.) Fakhruddin G. Ebrahim** **Member**
   formerly,
   Judge of the Supreme Court of Pakistan,
   Federal Law Minister, Attorney General,
   and Governor of Sindh Province.

3. **Dr. Ms. Asma Jahangir** **Member**
   Advocate of the Supreme Court of Pakistan,
   Chairperson, Human Rights Commission of Pakistan,
   UN Special Rapporteur, Magsaysay Award Winner.

4. **Tan Sri Dato' Dr. Abdul Aziz bin Abdul Rahman** **Member**
   Advocate & Solicitor of the High Court of Malaya,
   Partner, Messrs. Nik Saghir & Ismail,
   Advocates & Solicitors, Kuala Lumpur.

5. **Dr. Gordon Hughes** **Member**
   Former President of the Law Institute of Victoria,
   Law Council of Australia, LAWASIA,
   and Partner at Blake Dawson, Lawyers, Melbourne.

6. **Dato' W. S. W. (Bill) Davidson** **Member**
   Barrister-at-Law, Advocate & Solicitor of the High Court of Malaya,
   Senior Partner, Messrs. Azman Davidson & Co.,
   Advocates & Solicitors, Kuala Lumpur.

TERMS OF REFERENCE

WHEREAS a tribunal was appointed on 11th June 1988 ("the 1st Tribunal") pursuant to Article 125 (3) and (4) of the Federal Constitution to investigate and submit a report to the Yang di-Pertuan Agong on various allegations against the then Lord President of the Supreme Court of Malaysia, Tun Dato' Haji Mohamed Salleh bin Abas ("Tun Salleh Abas"); and

WHEREAS a further tribunal was appointed on 12th August 1988 ("the 2nd Tribunal") pursuant to Article 125 (3) and (4) of the Federal Constitution to investigate and submit a report to the Yang di-Pertuan Agong on various allegations against the then Judges of the Supreme Court of Malaysia, namely Tan Sri Wan Suleiman bin Pawan Teh ("Tan Sri Wan Suleiman"), Datuk George Edward Seah ("Datuk George Seah"), Tan Sri Dato' Haji Mohd. Azmi bin Dato Hj. Kamaruddin, Tan Sri Dato' Seri Eusoffe Abdoolcader and Tan Sri Dato' Wan Hamzah bin Hj. Mohd. Salleh; and

WHEREAS the 1st Tribunal by way of its report dated 7th July 1988, recommended to the Yang di-Pertuan Agong that Tun Salleh Abas be removed from office, both as a Judge and as the Lord President of the Supreme Court of Malaysia, and he was so removed; and

WHEREAS the 2nd Tribunal by way of its report dated 23rd September 1988, recommended to the Yang di-Pertuan Agong that Tan Sri Wan Suleiman and Datuk George Seah be removed from their offices as Judges of the Supreme Court of Malaysia, and they were so removed; and

WHEREAS the events leading up to and surrounding the appointment of the 1st and 2nd Tribunals, the events that took place during the deliberation of the 1st and 2nd Tribunals, and the recommendations of the 1st and 2nd Tribunals have resulted in intense public scrutiny and debate, as well as immense constitutional and practical implications on the administration of justice in Malaysia, and

WHEREAS there has been recent calls by the Bar Council, various non governmental organizations, and media, that the government take steps to cause a thorough and impartial re-examination of the above events to be carried out; and

WHEREAS the Government has rejected such calls

THEREFORE ON THE BASIS OF a need for proper, thorough and comprehensive understanding and record of the events, and not for the purpose of recrimination:

IT IS NOW DECIDED, that the Malaysian Bar Council, the International Bar Association, Lawasia and Transparency International—Malaysia do establish a Panel of Eminent Persons ("the Panel") to study, investigate, review and report on:

a. the events leading up to and surrounding the appointment of the 1st and 2nd Tribunals;
b. the composition and deliberations of the 1st and 2nd Tribunals;
c. the findings of the 1st and 2nd Tribunals;
d. the effect that these events have had on the administration of justice in Malaysia; and
e. any other matters related or incidental to the above.

The following are the Terms of Reference of the Panel:

I. To study and to review the findings and the reports of the 1st and 2nd Tribunals.

II. To consider the definition of judicial misbehaviour adopted by the Tribunals.

III. To consider whether the composition of the Tribunals, the process adopted by them and the conclusions arrived at, were justified or otherwise appropriate in the circumstances of the two cases.

IV. To adopt all necessary measures, including interviewing witnesses and other relevant persons, examining documents, and seeking further information for the purposes of arriving at a proper conclusion.

V. To present the report with such recommendations as the Panel deems appropriate, to the Malaysian Bar Council, the International Bar Association, Lawasia and Transparency International—Malaysia.

Ambiga Sreenevasan
President
Malaysian Bar

Mah Weng Kwai
President
Lawasia

Richard Yeoh
Executive Director
Transparency International (Malaysia)

Hj. Sulaiman Abdullah
Representative
International Bar Association

22 September 2007

REPORT OF THE PANEL

Introduction

1.1 The 1988 judicial crisis in Malaysia saw the removal of the Lord President, Tun Dato' Haji Mohamed Salleh bin Abas ("Tun Salleh") and two senior judges of the Supreme Court, Tan Sri Wan Suleiman bin Pawan Teh ("Tan Sri Wan Suleiman") and Datuk George Edward Seah ("Datuk George Seah"), on what the Bar Council of Malaysia and many others considered to be unsubstantiated charges treated as *'judicial misbehaviour'*. They perceived this action of the executive as an erosion of the independence of the judiciary and the rule of law in the country. A call by the Bar Council with support from the community for an impartial review did not find acceptance from the government.

1.2 With the twentieth anniversary of these events impending, the Bar Council took the decision to initiate the setting up of an independent 'Panel of Eminent Persons' to review these events of 1988. A joint committee comprising of the International Bar Association, LAWASIA, Transparency International—Malaysia and the Bar Council was constituted to oversee the entire project.

1.3 It was decided by the joint committee to request the Panel of Eminent Persons to consider all relevant issues relating to the removal of the Lord President and the two Supreme Court judges in 1988, and to present the joint committee with its report. The members were expected to convene at least two meetings in Malaysia as part of their deliberations.

1.4 Accordingly, after obtaining their consent, the Panel of Eminent Persons was constituted in August 2007, comprising the following:

1. **Hon'ble Mr. Justice (Retd.) J. S. Verma,** **Chairman**
formerly, Chief Justice of India,
Chairman, National Human Rights Commission,
Chief Justice of the High Courts of Madhya Pradesh & Rajasthan,
and Acting Governor of Rajasthan.

2. **Hon'ble Mr. Justice (Retd.) Fakhruddin G. Ebrahim**, **Member**
formerly, Judge of Supreme Court of Pakistan,
Federal Law Minister, Attorney General of Pakistan,
and Governor of Sindh Province.

3. **Dr. Ms. Asma Jahangir,** **Member**
Advocate, Supreme Court of Pakistan,
Chairperson, Human Rights Commission of Pakistan,
UN Special Rapporteur, and Magsaysay Award Winner.

4. **Tan Sri Dato' Dr. Abdul Aziz bin Abdul Rahman** **Member**
Advocate & Solicitor of the High Court of Malaya,
Partner, Messrs. Nik Saghir & Ismail,
Advocates & Solicitors, Kuala Lumpur, Malaysia.

5. **Dr. Gordon Hughes,** **Member**
Former President of Law Institute of Victoria,
Law Council of Australia, LAWASIA, and
Partner at Blake Dawson, Lawyers, Melbourne.

6. **Dato' W.S.W. (Bill) Davidson,** **Member**
Barrister-at-Law, Advocate & Solicitor of the High Court of Malaya,
Senior Partner, Messrs. Azman Davidson & Co.,
Advocates & Solicitors, Kuala Lumpur, Malaysia.

1.5 The first meeting of the Panel was convened in Kuala Lumpur on 21-22 September 2007 when the terms of reference were finalised, and in a preliminary meeting the Panel discussed the modalities and the procedure to be followed by it.

1.6 The task of the Panel according to the Terms of Reference, dated 22 September 2007 is as follows:

I. To study and to review the findings and the reports of the 1st and 2nd Tribunals.
II. To consider the definition of judicial misbehaviour adopted by the Tribunals.
III. To consider whether the composition of the Tribunals, the process adopted by them and the conclusions arrived at were justified or otherwise appropriate in the circumstances of the two cases.
IV. To adopt all necessary measures, including interviewing witnesses and other relevant persons, examining documents, and seeking further information for the purpose of arriving at a proper conclusion.
V. To present the report with such recommendations as the Panel deems appropriate, to the Malaysian Bar Council, the International Bar Association, Lawasia and Transparency International—Malaysia.

1.7 The members of the Panel decided to meet again in Kuala Lumpur on 11-12 April 2008, continuing their interaction meanwhile. In the second meeting all the issues were discussed threadbare and the relevant material was scrutinised. It was decided to prepare the report on that basis continuing the interaction throughout.

1.8 The Panel has prepared this report, accordingly. It has now met at Kuala Lumpur for the third time to finalise, sign and present it to the joint committee.

1.9 The detailed discussion and the conclusions arrived at, with the recommendations of the Panel follow hereafter. It is appropriate, that after this Introduction, the report proceeds with the narration of the background events that preceded the 1988 judicial crisis and the material facts relating to the relevant issues.

Events Leading to the First Tribunal

2.1 It is well known that on 8 August 1988 DYMM Yang di-Pertuan Agong[1] dismissed Tun Salleh as Lord President on the ground of judicial misbehaviour, acting upon the recommendation of a specially convened Tribunal ("the First Tribunal"). In order to properly analyse this decision, it is first necessary to review the background events leading to the establishment of the First Tribunal. It can be easily appreciated that this decision was the culmination of increasing tension between the Prime Minister and the Lord President, compounded by an assumption (albeit unfounded) that the judiciary was biased against the government, and a corresponding lack of appreciation by the government, in any event, of the fundamental importance of the independence of the judiciary. It can also be easily appreciated that the actions leading to the establishment of the First Tribunal were clouded by obvious conflicts of interest, together with indecent haste by the First Tribunal in concluding its proceedings and delivering its findings, and by the Prime Minister and DYMM Yang di-Pertuan Agong in acting upon them.

2.2 The decision of the Supreme Court dated 11 November 1986 in **JP Berthelsen v Director General of Immigration** reported in [1987] 1 MLJ 134 appears to have been the flash point of the conflict. JP Berthelsen was a staff correspondent of the Asian Wall Street Journal who had been granted an employment pass by the Malaysian Government for a period of two years. The Director General of Immigration required him to leave the country and served him with a notice of cancellation effective forthwith of his employment pass. The notice stated that he had contravened the Immigration Act and Regulations, had failed to comply with the conditions imposed on his employment pass and that his presence in the Federation was or would be prejudicial to the security of

[1] H. M. The King of Malaysia

the country. He was not given any opportunity to be heard. The Appellant applied for an order of certiorari to quash the cancellation of the employment pass but the Judge of first instance dismissed this application. The appeal was listed on 3 and 11 November 1986 for hearing in the Supreme Court before a quorum consisting of Tun Salleh Lord President, Mohamed Azmi and Abdoolcader SCJJ. The Supreme Court in a unanimous written judgment allowed the appeal and quashed the cancellation of the employment pass.

2.3 The Court found that this was a case where the rules of natural justice required that the applicant be given an opportunity to make representations.

2.4 The reasoning in this judgment was unexceptional and consistent with the settled principles of jurisprudence in a democratic polity. It may also be noted that this appears to be the only case in which Tun Salleh participated and found against the government during the relevant period.

2.5 At the time Dr. Mahathir was not only the Prime Minister but also the Minister of Home Affairs under which the immigration portfolio fell. It appears that this decision may have angered Dr. Mahathir and led him to attack the judiciary in an interview that was given to Time Magazine and reported in the 24 November 1986 edition of that magazine. The Prime Minister's comments were the following:

> "The judiciary says [to us], "Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation." If we disagree, the courts will say, "We will interpret your disagreement." If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to reinterpret it our way. If we find out that a court always throws us out on its own interpretation, if it interprets

contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish."

This comment is significant in revealing the Prime Minister's lack of appreciation of the role of the judiciary under the Constitution, and in consequence his frustration with an independent judiciary.

2.6 Dr. Mahathir's interview with Time Magazine led to an application being made by Lim Kit Siang to have Dr. Mahathir cited for contempt of Court. Harun Hashim J in the High Court concluded hearing of the application on 11 December 1986. Although he dismissed the application the Judge remarked that the Prime Minister was confused over the concept of the separation of powers and the need for an independent judiciary within the democratic system. The remarks very likely were not well received by the executive. Harun Hashim J's judgment is reported in [1987] 1 MLJ 383.

2.7 Another judgment of the Supreme Court rendered on 11 May 1987 in **Public Prosecutor** v **Dato' Yap Peng** reported in [1987] 2 MLJ 311 was seen in the prevailing environment as reinforcing the determination of the government to amend Article 121 of the Federal Constitution relating to the judicial power of the Federation. In that case the respondent was charged in the Sessions Court for criminal breach of trust for which he claimed trial. The Public Prosecutor acting under Section 418A of the Criminal Procedure Code required transfer of the case to the Kuala Lumpur High Court and issued a certificate to that effect. The respondent on being arraigned before the High Court challenged the constitutional validity of Section 418A ibid. on the ground that it infringed Article 121(1) of the Federal Constitution. The High Court upheld the respondent's challenge. The appeal to the Supreme Court was heard by a bench of five judges including Tun Salleh, and dismissed by a majority of 3 to 2 affirming the High Court's decision, which appeared consistent with

the general trend of law in the Commonwealth. However, Tun Salleh was one of the two dissenting judges in that decision. In his dissent, Tun Salleh took the view in the government's favour that the power of transfer of cases was not the exercise of judicial power because of which it did not infringe Article 121(1). The significance of Tun Salleh's view in this case is that it negatives the allegation made against him in the removal proceedings of anti-government bias during that period.

2.8 In June 1987, following the UMNO party election, in which Dr. Mahathir retained his presidency of UMNO by a wafer thin majority of 43 votes (761 to 718), supporters of his challenger filed a High Court suit seeking to annul the result of the election. A challenge to the legality of the election posed a direct threat to Dr. Mahathir's political career.

2.9 On 1 August 1987, Tun Salleh delivered a speech at the University of Malaya on the occasion of he being conferred an honorary doctorate of laws. This is the speech that subsequently became the subject of the first charge against him before the First Tribunal. The text of this speech is quoted in full as 'Document Three' at page 168 of the First Tribunal's report.

2.10 A short summary of the proceedings that were filed as **Lim Kit Siang v United Engineers (M) Berhad** (UEM) in the High Court may be appropriate as they generated a lot of political heat. In that case, the Plaintiff, a leader of the opposition in Parliament, filed proceedings in the Penang High Court for a declaration and injunctive relief to preventa contract between UEM and the Government of Malaysia for the construction and privatisation of the North South Highway from being signed and sought an interlocutory injunction on an urgent basis. This application was rejected by Edgar Joseph Jr. J (later chairman of the Second Tribunal) on the ground that the order sought was in substance an

injunction against the Government of Malaysia. His decision is reported in [1988] 1 MLJ 35.

2.11 Not long after this, on 25 August 1987 in Supreme Court Civil Appeal No. 363 of 1987, the Supreme Court allowed an interlocutory injunction in the appeal of the Plaintiff Lim Kit Siang to stop UEM from entering into the agreement with the Government of Malaysia. The quorum at the Supreme Court sitting was Tan Sri Lee Hun Hoe, Chief Justice (Borneo) (the third ranking member of the judiciary after Tun Salleh and Tan Sri Dato' Abdul Hamid Omar (Chief Justice (Malaya)) and later a member of the First Tribunal), Tan Sri Wan Suleiman and Tan Sri Wan Hamzah SCJJ (who were defendants in the Second Tribunal). There is a brief report of this decision in [1987] 2 CLJ 195.

2.12 Following this, an application was made by UEM, and in separate proceedings by the Government of Malaysia, to set aside the interlocutory injunction granted by the Supreme Court on the ground that it disclosed no reasonable cause of action. Both applications came up before VC George J who dismissed the applications on 5 October 1987 holding that the Plaintiff did have locus standi to bring the suit and that there were serious issues to be tried. This judgment is reported in [1988] 1 MLJ 50. The matter then went back again to the Supreme Court, this time before a bench of five judges, consisting of Tun Salleh Lord President, Tan Sri Dato' Abdul Hamid Omar Chief Justice (Malaya), George Seah, Hashim Yeop Sani and Abdoolcader SCJJ, who held by a majority of 3 to 2 that the Plaintiff Lim Kit Siang had no legal relationship with UEM and that the suit was not maintainable. The judgments delivered after conclusion of the hearing on 16 March 1988 are reported in [1988] 2 MLJ 12.

2.13 It is significant that Tun Salleh in this case found with the majority in favour of the Government of Malaysia, speaking out against the trend for

liberalizing the law on locus standi propounded by Lord Denning and others in the English Courts, and in similar jurisdictions governed by the rule of law. The dissenting judges were George Seah and Abdoolcader SCJJ, both of whom were later respondents in the Second Tribunal. Tun Salleh's judgment in this case could not be treated as anti-government.

2.14 On 5 September 1987, Harun Hashim J, then a High Court Judge, made a speech at a law seminar held at the National University of Malaysia (UKM) calling for improvements in the Federal Constitution. There was an immediate response from Dr. Mahathir who was reported in The Star newspaper as saying that certain judges were encroaching into other branches of Government and should remain neutral in politics. He also called on the Lord President to admonish the judges. Tun Salleh when asked to comment on this development was reported in the New Straits Times as declining comment, saying only *"the best thing to do was to keep quiet and let the matter rest."*

2.15 On 30 September 1987, HRH the Sultan of Perak, who had been Tun Salleh's immediate predecessor as Lord President before his accession to the Sultanate, delivered a speech at a book launch in the University of Malaya supporting the right of judges to comment on laws and the Federal Constitution outside the court room.

2.16 On 2 October 1987, in a speech by Dr. Mahathir in Kota Bharu, Kelantan, Dr. Mahathir likened the judiciary to another branch of service of the Government such as the Army and the Civil Service. This arguably reflected a lack of appreciation of the separation of powers, which treats the judiciary as one of the three organs of the State, separate from the executive and the guardian of the rule of law.

2.17 Following the judgment of VC George J in the UEM case on 5 October 1987, Tun Salleh was again asked by the New Straits Times to comment. He again suggested that the matter be put to rest.

2.18 The next significant event was the speech made by Dr. Mahathir in Parliament on the occasion of the second reading on 3 December 1987 of the Printing Presses and Publications (Amendment) Bill 1987. The Bill significantly strengthened the government's control over the Press, for example by specifically stating that "*no person shall be given an opportunity to be heard with regard to his application for a licence or permit or relating to the revocation or suspension of the licence or permit granted to him under this Act.*" The amending Act also made it clear that *"any decision of the Minister to refuse to grant or revoke or to suspend a licence or permit shall be final and shall not be called in question by any court on any ground whatsoever."*

2.19 This Bill emerged as an immediate response to the decision of Harun Hashim J in **Persatuan Aliran Kesedaran Negara v Minister of Home Affairs** in KL High Court Civil Appeal No. 32-53-87 dated 19 December 1987, [1988] 1 MLJ 440, where the judge held that the Minister's discretion to reject an application for a licence to publish a fortnightly magazine was subject to judicial review. It was held that the Minister had no good reasons in that case for rejecting the application. The Bill also reflected the Ministerial response to the Supreme Court's other decisions referred to earlier.

2.20 Not long after this, Tun Salleh delivered another speech at the University of Malaya on the occasion this time of the launch of HRH Sultan of Perak's book titled *'Law Justice and the Judiciary: Transnational Trends'*. This speech later became the subject of the second charge against him

before the First Tribunal. The text of this speech is quoted in full as 'Document Four' at page 173 of the First Tribunal's report.

2.21 On 4 February 1988 Harun Hashim J delivered his decision in the UMNO case, declaring that UMNO was an illegal organisation and dissolving UMNO. This proved to be a pyrrhic victory for the challengers because the Court did not give the challengers the declaratory relief sought and left the Prime Minister in power albeit without a party since he continued to enjoy the support of Parliament. On 19 February 1988, the challengers filed a notice against the High Court decision. Political tension was building up at that time as the political future of the Prime Minister was hanging in the balance and was dependant on the Supreme Court's ruling. This decision is reported in [1988] 2 MLJ 129.

2.22 On 9 March 1988, another decision unfavourable to the government was delivered in the case of **Karpal Singh v Ministry of Home Affairs** reported in [1988] 1 CLJ 197. This case involved another leading opposition figure, Karpal Singh, who had been detained without trial under the Internal Security Act, 1960. The case concerned an application by Karpal Singh for *habeas corpus*. The judge Peh Swee Chin J allowed the application for *habeas corpus* and ordered that Karpal Singh be released and discharged forthwith.

2.23 On 18 March 1988, Dr. Mahathir delivered another speech in Parliament while presenting a Bill to amend the Federal Constitution in which he again attacked the judiciary. The amendments made to Article 121 by the Constitution (Amendment) Act 1988 were also to have a major impact on the power and status of the judiciary and need to be explained. Dr. Mahathir's speech on this occasion included the following:

"... to achieve a balance the country needed a civil service and Judiciary which did not involve itself in politics…But unfortunately lately we find incidents where some members of the Judiciary are involved in politics…By possessing qualities termed as 'fiercely independent', these members are indirectly involved with 'opposition politics'. And to display that their independence is really 'fierce' they often bend over backwards to award decisions in favour of those challenging the Government."

A full report of this speech is published in the New Straits Times of 18 March 1988.

2.24 Prior to the amendment, the first article in Part IX of the Constitution under the heading of THE JUDICIARY reads as follows:

"121 (1) Subject to clause (2), the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status, namely:

(a) one in the States of Malaya, which shall be known as the High Court in Malaya ... ; and

(b) one in the states of Sabah and Sarawak, which shall be known as the High Court in Borneo ...;

And in such inferior Courts as may be provided by federal law."

2.25 Following the enactment of the amending Act, the relevant portions of the article read as follows:

"121 (1) There shall be two High Courts of Co-ordinate jurisdiction and status, namely:

(a) one in the States of Malaya, which shall be known as the High Court in Malaya ... ; and

(b) one in the states of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak ...;

and in such inferior Courts as may be provided by federal law; and the High Courts and inferior Courts shall have such jurisdiction and powers as may be conferred by or under Federal Law.

(1A) The courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts."

2.26 Dr. Rais Yatim (now Malaysia's Minister of Foreign Affairs) in his book *'Freedom under Executive Power'* at page 104 has commented on these amendments in the following terms:

"It is significant to note that this amendment was made during the currency of the judiciary crisis in 1988. The obvious intention on the part of the Government was to confine powers of the judiciary only to federal law as enacted by Parliament from time to time. In this way common law principles such as the rules of natural justice, which the Prime Minster criticised so intently as being inconsistent with the Malaysian way of life, may not be freely invoked by the courts."

2.27 These constitutional amendments fit into the general pattern of the executive's moves to reduce the role of the judiciary as the guardian of the rule of law. Ironically these amendments were made more or less the same time as Tun Salleh accepted the view of the Federal Government in the cases referred above.

2.28 Pursuant to the lead taken by Abdul Razak J, Tun Salleh called an urgent meeting of the Supreme Court judges and the High Court judges resident in Kuala Lumpur. This meeting was held on 25 March 1988. The meeting discussed the repeated attacks on the judiciary by the Prime Minister and what could be done to preserve the role and the independence of the judiciary. The consensus was that a letter should be sent to DYMM Yang di-Pertuan Agong expressing the concern of the judiciary at the wanton criticisms made against it. This meeting was attended among others by Tan Sri Dato' Abdul Hamid Omar who later chaired the First

Tribunal. Neither Tan Sri Dato' Abdul Hamid Omar nor any other attendee at the meeting expressed a dissenting view. It was agreed that Tun Salleh as head of the judiciary should send the letter, but a committee consisting of Tan Sri Azmi, Tan Sri Wan Hamzah (both of whom were defendants in the 2nd Tribunal) and Abdul Razak J were to assist in the drafting. Only one judge Tan Sri Hashim bin Haji Yeop Sani advised caution but did not appear to oppose the decision. Tan Sri Lee Hun Hoe who was later a member of the First Tribunal did not attend the meeting.

2.29 Accordingly, the letter was sent by Tun Salleh to DYMM Yang di-Pertuan Agong and also to the Rulers of the States on 26 March 1988. The English translation of this letter that was written in Bahasa Malaysia appears as Annexure 2 at page 112 of the Notes of Proceedings of the First Tribunal. The sending of this letter by Tun Salleh forms the subject matter of charge no. 4 against him.

2.30 Two days later on 28 March 1988, Tun Salleh left for an extensive overseas trip, which included medical treatment and a short pilgrimage in Mecca. He returned on 17 May 1988.

2.31 On 1 May 1988, the Prime Minister had an audience with DYMM Yang di-Pertuan Agong. In his letter of 5 May, the Prime Minster indicates that at the meeting on 1 May 1988, DYMM Yang di-Pertuan Agong commanded the Prime Minster to take action against Tun Salleh, conveying the impression that the Prime Minister was only obeying the DYMM Yang di-Pertuan Agong's command. The letter of 5 May 1988 is at page 113 of the report of the First Tribunal.

2.32 After his return from the overseas trip, on 23 May Tun Salleh took action in his capacity as Lord President to fix the UMNO appeal in the Supreme Court for 13 June 1988 and directed that it be heard with a quorum of nine

judges of the Supreme Court. In the past the Supreme Court had generally sat with a quorum of three, and on a few occasions with a quorum of five. There was no earlier occasion for the Supreme Court sitting with a quorum higher than five. At that time there were a total of ten Supreme Court judges, but one of these, (Harun Hashim SCJ) had been the trial judge in the UMNO case at the High Court stage and was clearly disqualified from sitting. Hence the direction for a nine-judge bench meant in effect that all qualified members of the Supreme Court would be required to sit.

2.33 With Dr. Mahathir's future hanging in the balance, it is easy to understand that the selection of judges to sit on this appeal could have been a matter of concern to Dr. Mahathir, and this was avoided by the full court hearing the case. A panel of three or five judges would have involved an element of selection, and this could have been perceived as tilting the balance one way or the other. Therefore, Tun Salleh's decision to have a nine-judge bench or the full court to hear the case could not be viewed as evidence of anti-UMNO or anti-Mahathir bias. Undoubtedly, it was the most appropriate direction that could have been given by Tun Salleh in the circumstances, to allay any apprehension of bias in the constitution of the bench. On the same day, Tun Salleh gave directions for the government's appeal in Karpal Singh's *habeas corpus* case to be fixed for 15 June. From this moment the events moved with lightening speed. It is fair to assume in the circumstances that Tun Salleh's direction to fix the date and quorum for the UMNO appeal triggered the acceleration.

2.34 On 25 May 1988, the Prime Minster wrote to DYMM Yang di-Pertuan Agong, stating that *"on the ground of the behaviour of [Tun Salleh] and other causes which clearly show that he is no longer able to discharge his functions as Lord President properly as set out in Annexure A he ought to be removed from office."* Annexure A to it contained the allegations which formed the first four charges before the First Tribunal, namely Tun

Salleh's speech on 1 August 1987, Tun Salleh's speech on 12 January 1988, the adjournment of the case of **Teoh Eng Huat v Kadhi Pasir Mas** involving the minor's choice of religion, and Tun Salleh's letter to His Majesty of 26 March 1988. The letter goes on to advise DYMM Yang di-Pertuan Agong to suspend Tun Salleh under Article 125(5) with effect from the very next day pending the establishment of a Tribunal under Article 125(3) of the Federal Constitution. The letter of 25 May 1988 from the Prime Minister to DYMM Yang di-Pertuan Agong is Annexure 4 at page 114 of the report of the First Tribunal.

2.35 On the same day, DYMM Yang di-Pertuan Agong replied to the Prime Minister's letter agreeing to the establishment of a Tribunal and ordering the suspension of Tun Salleh with effect from 26 May 1988. The letter states that the appointment of the Tribunal was made under Article 125(3) and the suspension ordered under Article 125(5) of the Federal Constitution. This letter of 25 May 1988 from the DYMM Yang di-Pertuan Agong to the Prime Minister is Annexure 5 at p.115 of the report of the First Tribunal.

The Prime Minister's advice to the DYMM Yang di-Pertuan Agong in his letter of 25 May 1988 to suspend Lord President Tun Salleh forthwith from 26 May 1988 under Article 125(5), immediately after the Lord President Tun Salleh's direction given on 23 May 1988 for the hearing of the UMNO case by the full court on 13 June 1988 resulting in his hasty suspension is strong evidence of mala fides.

2.36 On 27 May, Tun Salleh was asked to meet Dr. Mahathir who informed him of DYMM Yang di-Pertuan Agong's displeasure regarding Tun Salleh's letter and of his suspension from office and the setting up of the Tribunal. On the same day at 11.45 a.m. (whether before or after the

meeting with the Prime Minister is not clear) Tun Salleh received a formal letter notifying him of his suspension.

2.37 On the same day, Tan Sri Dato' Abdul Hamid Omar in the capacity of acting Lord President cancelled the empanelment of the UMNO and Karpal Singh appeal cases and vacated the dates. Tan Sri Dato' Abdul Hamid Omar lost no time in taking this step. This fact further confirms the above logical inference of mala fides.

2.38 On 28 May 1988, Tun Salleh wrote to the Prime Minister stating that *"to avoid embarrassment all round I have reconsidered the matter and I have decided that it is better in the national interest for me to retire immediately after taking all leave due to me; that is 96 days and the leave is to commence from today"*. (Annexure 6 at page 116 of the First Tribunal's report). The Prime Minister replied on the same day stating *"I have no objection for YAA Tun to take all leave due to you prior to your retirement.... With regard to your retirement from the post of Lord President, appropriate action will be taken in accordance with the procedure that is being practised ... ."* (Annexure 7 at page 117 of the First Tribunal's report).

2.39 However, Tun Salleh appeared to have second thoughts and on the next day, 29 May, he wrote again to the Prime Minister withdrawing his application for early retirement. In this letter (Annexure 8 at page 118 and 119 of the First Tribunal's report) Tun Salleh mentioned that during his meeting with the Prime Minister two days earlier, the Prime Minister had informed him that the acts which were considered objectionable were his letter to DYMM Yang di-Pertuan Agong and the Rulers, and that he had expressed partiality in the UMNO case. He then explained the reason for his change of mind in the matter of retirement.

2.40 This change of mind was later cited as the first limb of the fifth charge against Tun Salleh (see page 77 of the First Tribunal's report) on the basis that it demonstrated his inability to make a firm decision and therefore unfitness to be a judge. In fact Tun Salleh's change of mind, and his adoption of a tougher stance actually demonstrated his strength of character. At any rate, withdrawal of the offer of premature retirement prior to its effective date was in any event irrelevant in relation to the charge for removal as it carried no legal effect.

2.41 This letter also confirms that the Chief Secretary to the Government, Tan Sri Sallehuddin Muhammed, who was also a witness called before the Tribunal, was present at the meeting between the Prime Minister and Tun Salleh on 27 May. In giving evidence, Tan Sri Sallehuddin was non-committal as to whether the UMNO case was mentioned at the meeting, saying twice that he could not recall (see p. 191 and 192 of the First Tribunal's report). However the fact that Tun Salleh raised this matter in his letter of 29 May (merely two days after the meeting) and the fact that the Chief Secretary was unable to deny the assertion suggest that it must be true. However, for obvious reasons no charge was brought against Tun Salleh on account of alleged partiality in the UMNO case.

2.42 On the same day, 29 May 1988, Tun Salleh gave an interview to the BBC in which he said that he was being unjustly removed from office and claimed that one of the reasons was an accusation of partiality in regard to the UMNO case which was untrue. Report of the interview was carried in the Singapore Straits Times of 31 May 1988 (see Annexure 10 at page 123 of the First Tribunal's report). This interview was the subject of the second limb of the fifth charge brought against Tun Salleh before the First Tribunal (see page 78 of the First Tribunal's report).

2.43 On the same day Tun Salleh issued a press statement which was reported in the New Straits Times of 30 May 1988 (see Annexure 9 at page 120 of the First Tribunal's report). In this statement he explained the reason for the retraction of his letter for premature retirement. On the matter of his alleged bias in the UMNO case, he disclosed that he had given instructions for the appeal to be heard by a bench of nine Supreme Court judges.

2.44 On 3 and 4 June 1988, the New Straits Times contained two more articles reporting further statements by Tun Salleh, in which he had commented that the Tribunal should consist of persons of at least equal judicial standing, and that there should be an open hearing. These reports are at Appendices 3 & 4, Annexure 1 at pages 225 & 228 of the First Tribunal's report. The subject matter of these reports form the third and last limb of the fifth charge brought against Tun Salleh in the First Tribunal (see page 78 of the First Tribunal's report).

2.45 On 9 June 1988, the Prime Minister wrote again to DYMM Yang di-Pertuan Agong making representations for a tribunal to be established for the removal of Tun Salleh on the basis of particulars contained in the attached annexure. The annexure contained the particulars of these charges that later became the fifth charge before the First Tribunal. This letter is found at Annexure 13 at page 130 of the First Tribunal's report. On the same day DYMM Yang di-Pertuan Agong wrote agreeing to the allegations in the annexure being presented to the First Tribunal (Annexure 14 at page 131 of the First Tribunal's report).

2.46 On 11 June, the Prime Minister wrote to DYMM Yang di-Pertuan Agong giving the names of the six persons whom he proposed should constitute the Tribunal (Annexure 16 at page 132 of the First Tribunal's report). These six were:

1. Tan Sri Dato' Abdul Hamid Omar
   Chief Justice (Malaya) and acting Lord President…. Chairman

2. Tan Sri Datuk Lee Hun Hoe
   Chief Justice (Borneo). …. Member

3. Mr. Justice KAP Ranasinjhe
   Chief Justice, Sri Lanka. …. Member

4. Mr. Justice T.S. Sinnathuray
   Judge of High Court, Singapore. …. Member

5. Tan Sri Abdul Aziz bin Zain
   Retired judge of the Supreme Court. …. Member

6. Tan Sri Datuk Mohd Zahir bin Ismail
   Retired judge of the High Court of Malaya. …. Member

On the same day, DYMM Yang di-Pertuan Agong replied to the Prime Minister formally appointing the six persons nominated by the Prime Minister to constitute the First Tribunal.

2.47 On 14 June Tun Salleh was served with a copy of the charges against him, and on 17 June the Secretary to the First Tribunal wrote to Tun Salleh to notify him that the sittings would commence on 27 June 1988.

2.48 Of the six persons, objections were subsequently taken by Tun Salleh against the appointment of Tan Sri Dato' Abdul Hamid Omar, Tan Sri Abdul Aziz Zain and Tan Sri Datuk Mohd Zahir. These objections are set out in a letter dated 21 June 1988 (Annexure 17 at page 135 of the First Tribunal's report).

2.49 On 24 June 1988 there was a meeting of the Sultans of the various states in which they agreed to call Tun Salleh for a meeting at Istana Kelantan, Kuala Lumpur. This was apparently a consequence of the letter of 26 March 1988. (See Annexure 1 at page 112 of First Tribunal's report.) At this stage it is appropriate to notice the constitutional position.

2.50 The Conference of Rulers set up by Article 38 of the Fifth Schedule to the Federal Constitution consists of the heads of the thirteen states; nine of these are headed by hereditary Rulers or Sultans; and the other four are headed by Governors who are appointed by the Federal Government. The DYMM Yang di-Pertuan Agong is elected on a rotational basis from among the nine Sultans for a five-year period. The DYMM Yang di-Pertuan Agong at the relevant time was the Sultan of Johor. The Conference of Rulers itself does have a constitutional role, *inter alia* in the appointment of judges of the High Court and the Appellate Courts under Article 122B. Under that Article the judges are appointed:

> "by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister after consulting the Conference of Rulers."

It is true that the Conference of Rulers has no distinct role in the removal of these judges, yet their involvement in the appointment process does indicate that they are no strangers in the system.

2.51 It is easy to appreciate that the Sultans of the various States who had received copies of the letter of 26 March 1988 from Tun Salleh would have been concerned over the subsequent developments. This would explain why the Sultans had apparently met on their own initiative and agreed to call Tun Salleh in an attempt to find a solution to resolve the crisis. It would seem that DYMM Yang di-Pertuan Agong was present at that meeting, but had left before the arrival of Tun Salleh. On his arrival Tun Salleh was told that the Rulers had agreed that Tun Salleh's

suspension would be lifted and he would be reinstated as Lord President if Tun Salleh were to apologise to DYMM Yang di-Pertuan Agong, to which he then agreed. It is not unlikely that DYMM Yang di-Pertuan Agong could have been privy to this offer made by the Rulers before his departure to enable the Rulers to put this proposition to Tun Salleh.

2.52 Accordingly, Tun Salleh promptly responded to this gesture by going to Johor Bahru on 27 June 1988 to meet DYMM Yang di-Pertuan Agong. However prior information of this meeting had evidently reached the executive branch as Tun Salleh found that both the Attorney General and the Chief Secretary to the Government were already in attendance. DYMM Yang di-Pertuan Agong then informed Tun Salleh that the Tribunal would proceed, as there were other allegations against him in addition to the contents of the letter. Thus the attempt by the other Rulers to mediate in the matter was foiled.

2.53 Two days later on 29 June 1988, the First Tribunal commenced the hearing. The hearing was completed at 4.09 p.m. on 30 June 1988. The Report was subsequently delivered to DYMM Yang di-Pertuan Agong on 7 July 1988, and acting on it DYMM Yang di-Pertuan Agong removed Tun Salleh as Lord President.

Events Leading to The Second Tribunal

2.54 The shortcomings of the process surrounding the composition, deliberations and findings of the First Tribunal were subsequently compounded by a Second Tribunal ("the Second Tribunal") established to hear charges of misconduct against the five judges of the Supreme Court who comprised the quorum which granted a limited stay on 2 July 1988 restraining the First Tribunal from submitting its report until further order.

As with the First Tribunal, it is important to understand the events leading to the establishment of the Second Tribunal in order to fully appreciate its shortcomings.

2.55 On 21 June 1988, before the commencement of the hearing of the First Tribunal, Tun Salleh's solicitors had written to the Secretary of the First Tribunal stating their dissatisfaction with the composition of the First Tribunal. This letter is Annexure 17 at page 135 of the First Tribunal's report. The objections extended to:

(a) Tan Sri Abdul Hamid Omar on the ground that he was junior in rank and also on the ground of conflict of interest;

(b) Tan Sri Lee Hun Hoe on the ground that he was junior in rank;

(c) Tan Sri Mohd Zahir on the ground that his appointment was inappropriate under the doctrine of separation of powers in the light of his position as Speaker of the Dewan Rakyat;

(d) Tan Sri Abdul Aziz on the ground that his appointment was inappropriate in that he was presently in business and further held a practising certificate as an advocate and solicitor.

2.56 By the morning of 28 June 1988 there was no response to the letter from Tun Salleh's solicitors objecting to the composition of the Tribunal, and the First Tribunal was due to commence the hearing on 29 June 1988. Accordingly, Tun Salleh decided to file an application in the High Court for an order of Prohibition to restrain the First Tribunal from proceeding with the inquiry and delivering its report and recommendations. These proceedings were filed in the Kuala Lumpur High Court and fixed for hearing on 1 July 1988.

2.57 On 29 June 1988, Tun Salleh's counsel appeared before the First Tribunal to inform it of the filing of the High Court proceedings and to request a

postponement of the proceedings in the Tribunal pending the hearing of the High Court application. This request was refused, and the First Tribunal adjourned for the day stating that proceedings would continue, if necessary, in the absence of Tun Salleh.

2.58 On 30 June 1988, Tun Salleh's counsel again appeared before the First Tribunal to announce that Tun Salleh would not be appearing before the Tribunal. Tun Salleh's counsel would have been aware of the fact that the evidence and submissions before the First Tribunal were concluded by late afternoon on the same day and hence there was a real risk that the First Tribunal would conclude its business by issuing its report and recommendations soon thereafter, before any stay order could be obtained in the High Court proceedings.

2.59 On the following day, Friday 1 July when the High Court proceedings were due to commence Datuk George Seah left for Kota Bharu, Kelantan along with Dato' Harun Hashim for a scheduled sitting of the Supreme Court which was to commence on Saturday, 2 July 1988. The presiding judge for the Kota Bharu session was to be Tan Sri Wan Suleiman.

2.60 In the afternoon of the same day, Datuk George Seah in Kota Bharu received a phone call from Tan Sri Wan Suleiman requesting him to return to Kuala Lumpur in case there was a need for an urgent sitting of the Supreme Court and requested him to ask Dato' Harun Hashim to do likewise. Dato' Harun Hashim on being informed of this request and no doubt being in a dilemma then contacted the acting Lord President Tan Sri Dato' Abdul Hamid Omar, who directed him to remain in Kota Bharu and to tell Datuk George Seah also to remain and chair the Supreme Court session. Since Tan Sri Wan Suleiman had already decided to remain in Kuala Lumpur, there would have been only two Supreme Court judges

available in Kota Bharu if Datuk George Seah had stayed back when the quorum required was of three judges.

2.61 Datuk George Seah was at this stage faced with competing directions:

(a) from Tan Sri Wan Suleiman, to return to Kuala Lumpur immediately to stand by for a possible Supreme Court session; and

(b) from Tan Sri Abdul Hamid Omar, to remain in Kota Bharu and to chair the Supreme Court session in that town.

2.62 Faced with similar competing directions, Dato' Harun Hashim decided to remain in Kota Bharu, while Datuk George Seah decided to return to Kuala Lumpur.

2.63 Meanwhile the High Court proceedings commenced on the same day, 1 July, but did not proceed with the expected speed. In the morning, the presiding judge Ajaib Singh J. adjourned the case until the afternoon, and in the afternoon adjourned the matter at 3.45 p.m. to 2 July at 10 a.m. On 2 July the hearing resumed at 11.45 a.m. but at or around noon it was again adjourned to Monday, 4 July, indicating that the adjournment was to enable the Attorney General to clarify certain matters. At this stage, Tun Salleh's counsel made an oral application for a limited stay until 4 July, but this was refused (see paragraph 5.13 of the Second Tribunal's report).

2.64 When the High Court proceedings were adjourned at noon on Saturday, 2 July, Tun Salleh's counsel may well have been anxious and aware of the possibility that on or before Monday, 4 July, the First Tribunal would have made its report and recommendations to DYMM Yang di-Pertuan Agong, thus rendering the High Court proceedings infructuous.

2.65 After the adjournment of the High Court proceedings, Tun Salleh's counsel then proceeded directly to the chambers of Tan Sri Wan Suleiman, who purporting to act under Section 9(1) of the Courts of Judicature Act proceeded to convene a special sitting of the Supreme Court as a matter of urgency to consider Tun Salleh's prayer for an order to preserve the status quo. The relevant portion of Section 9(1) reads as follows:

> "Whenever during any period, owing to illness or absence from Malaysia or any other cause the Lord President is unable to exercise the powers or perform the duties of his office (including his functions under the Constitution) the powers shall be had and may be exercised and the duties shall be performed by the judge of the Supreme Court having precedence next after him who is present in Malaysia and able to act."

2.66 The special sitting of the Supreme Court with a quorum consisting of the five defendants at the Second Tribunal with Tan Sri Wan Suleiman presiding commenced at 12.50 p.m. and after a 30 minute hearing and a short adjournment for deliberation, unanimously granted the application for a limited stay restraining the First Tribunal only from submitting its report, recommendation and advice to DYMM Yang di-Pertuan Agong until further order (see paragraph 5.13 of the Second Tribunal's report).

2.67 After the order was made Tan Sri Wan Suleiman personally signed the order because the Chief Registrar had informed him that the registry staff had instructions from the acting Lord President Tan Sri Dato' Abdul Hamid Omar not to be involved in the proceedings. The seal was then affixed by a Senior Assistant Registrar Soo Ai Lin.

2.68 At this stage, the members of the First Tribunal were not restrained from continuing their deliberations but were restrained only from submitting their report and recommendations. The restraint was 'until further order'.

2.69 On 5 July the acting Lord President Tan Sri Dato' Abdul Hamid Omar had consultation with the Prime Minister Dr. Mahathir (see paragraph 1.1 of the Second Tribunal's report). Following the consultation, Tan Sri Dato' Abdul Hamid Omar referred to the Constitution and then made a written representation to DYMM Yang di-Pertuan Agong complaining of the gross misbehaviour of the five judges who made up the quorum for the hearing on 2 July, which in his opinion justified their removal from office. The representation was made pursuant to Article 125(3) of the Federal Constitution. The specific charges against the five Respondents were set out in Appendix A to Tan Sri Dato' Abdul Hamid Omar's letter (see paragraph 1.5 of the Second Tribunal's report). On the same day the Prime Minister wrote to DYMM Yang di-Pertuan Agong to state that he had no objection to the representation made by Tan Sri Dato' Abdul Hamid Omar.

2.70 On the same day, DYMM Yang di-Pertuan Agong recommended that another tribunal (the Second Tribunal) be established to inquire into that representation and to report to him in terms of Article 125(3). The letter also ordered the suspension from office of the five judges, who were the defendants before the Second Tribunal with effect from 6 July 1988 in terms of Article 125(5).

2.71 On 7 July, the First Tribunal submitted its report to DYMM Yang di-Pertuan Agong. At the time of delivery of the First Tribunal's report, the judicial order of the Supreme Court of 2 July was still in force. The suspension of the five judges with effect from 6 July did not alter that position and the legal effect of the judicial order.

2.72 On 14 July 1988 a motion was filed by the Attorney General on behalf of the members of the First Tribunal to set aside the Supreme Court order of

2 July 1988. Then on 22 July 1988, a differently constituted bench of five judges set aside the Supreme Court order of 2 July 1988.

2.73 The order made by the Supreme Court on 22 July 1988 appears as Annexure 5 at page cxxix of the Second Tribunal's report. The quorum for this sitting was:

Tan Sri Hashim Yeop Sani, SCJ
Dato' Harun Hashim, SCJ.
Dato' Mohd Yusoff bin Mohamed, High Court Judge (sitting as SCJ).
Dato' Gunn Chit Tuan, High Court Judge (sitting as SCJ).
Dato' Annuar Zainal Abidin, High Court Judge (sitting as SCJ).

2.74 It is obvious that out of the list of Supreme Court judges, only Tan Sri Hashim Yeop Sani and Dato' Harun Hashim were eligible to sit as six of the others had been suspended and the remaining two were respondents in the proceedings; hence the panel had to be made up by appointing the remaining three members from the ranks of the High Court judges.

2.75 On 8 August 1988 Tun Salleh received official notification of his removal from office by DYMM Yang di-Pertuan Agong. The delay of one month in acting on the recommendations is uncharacteristic, in the existing circumstances. It is likely that this may have been caused partly by doubts arising from the non-compliance with the Court order of 2 July 1988.

2.76 DYMM Yang di-Pertuan Agong by letter dated 12 August 1988 appointed the following six persons to constitute the Second Tribunal to inquire and report under Article 125(3) of the Federal Constitution on the conduct of the five judges who participated in the Supreme Court hearing of 2 July 1988. The six judges appointed were:

(1) The Honourable Tan Sri Hashim bin Haji Yeop Sani
Judge of the Supreme Court of Malaysia — Chairman

(2) The Honourable Justice Mark Damian Hugh Fernando
Judge of the Supreme Court of Sri Lanka — Member

(3) The Honourable Datuk Edgar Joseph Jr.
Judge of the High Court of Malaya — Member

(4) The Honourable Justice P. Coomaraswamy
Judge of the High Court of Singapore — Member

(5) The Honourable Datuk Haji Mohd Eusoff bin Chin
Judge of the High Court of Malaya — Member

(6) The Honourable Dato' Lamin bin Haji Mohd Yunus
Judge of the High Court of Malaya — Member

(see paragraph 1.4 and Exhibit P3 in the Second Tribunal's report).

2.77 The Second Tribunal commenced sitting on 29 August 1988. On that day, counsel for the five respondents asked the Chairman and the Tribunal members to consider whether the Chairman should be disqualified on the grounds of the appearance of bias because he had been a member of the bench of the Supreme Court which had set aside the earlier order of 2 July 1988. It became unnecessary for this matter to be considered as the Chairman indicated that he wished to be relieved of his position as Chairman and member of the Tribunal, after giving careful consideration to the submissions made and the authorities cited (see paragraphs 2.1 and 2.2 of the Second Tribunal's report).

2.78 The following day on 30 August 1988, the Second Tribunal made a statement at the sitting confirming that the Chairman wished to be relieved of both positions by DYMM Yang di-Pertuan Agong; and in the event that His Majesty did not wish to appoint a Chairman, then the remaining members would appoint a Chairman from among the other members. Later the Second Tribunal delivered a supplementary statement to say that,

in the event of DYMM Yang di-Pertuan Agong not wishing to appoint a chairman, Datuk Edgar Joseph Jr. would be the chairman.

2.79 Subsequently DYMM Yang di-Pertuan Agong consented to the withdrawal of the Chairman and to the appointment of Datuk Edgar Joseph Jr. as chairman in his place. The hearing then proceeded with the remaining five members forming the quorum.

2.80 On 23 September 1988, after taking evidence and hearing submissions, the Second Tribunal submitted its report to DYMM Yang di-Pertuan Agong. In its report, the Second Tribunal:

(a) acquitted all five Respondents of attending an unauthorised sitting of the Supreme Court on 2 July 1988 on grounds set out in the report. This was the only charge against three of the Respondents, Tan Sri Azmi, Tan Sri Eusoffe Abdoolcader and Tan Sri Wan Hamzah;

(b) found Tan Sri Wan Suleiman guilty of the charge of staying away from the Supreme Court sitting in Kota Bharu without reasonable cause; and the charge of directing Datuk George Seah and Dato' Harun Hashim to abandon their sitting without reasonable cause. All five Tribunal members found him guilty of misbehaviour but one undisclosed member dissented from the others on the matter of punishment, as he did not concur that the misbehaviour was so serious as to warrant removal from office;

(c) found Datuk George Seah guilty by a majority of four to one on the charge of wilfully refusing to attend the Kota Bharu session and defying the categorical direction of the acting Lord President to remain in Kota Bharu and chair the session. One of these four, dissenting from the other three, was of the view that the misbehaviour was not so serious as to justify

removal from office. The fifth member was of the view that the charge against Datuk George Seah was not proved.

2.81 In the end result, following the recommendations of the Second Tribunal, Tan Sri Wan Suleiman and Datuk George Seah were removed from office by DYMM Yang di-Pertuan Agong while the other three Respondents were acquitted and subsequently resumed their former positions. The dissenting views of one member (the one who dissented on the punishment in the case of Tan Sri Wan Suleiman and who found the charge against Datuk George Seah not proved) were expressed in a separate document, but no names have been disclosed.

Procedure adopted by the Panel for Review

3.1 The terms of reference to the Panel are:

> "to study and to review the findings and the reports of the 1st. and 2nd. Tribunals; to consider the definition of judicial misbehaviour adopted by the Tribunals; and to consider whether the composition of the Tribunals, the process adopted by them and the conclusions arrived at, were justified or otherwise appropriate in the circumstances of the two cases".

The terms of reference invited the Panel

> "to adopt all necessary measures, including interviewing witnesses and other relevant persons, examining documents, and seeking further information for the purposes of arriving at a proper conclusion".

3.2 In spite of the wide scope for the nature of review by the Panel, it has decided to confine itself only to the material that was available to the tribunals for the investigation and report by them. The Panel took the view that in fairness the review of the merits of the two reports must be made only on the material that was available to the tribunals and that was relied on by them. The Panel has, therefore, eschewed consideration of, or reliance on any subsequent event, material or statement by any one. No

person has been examined and no further information has been sought or relied on by the Panel for the performance of its task of review.

3.3 In short, the Panel has re-examined the issues involved on the basis of the materials referred to, and relied on by the two tribunals to conclude whether the findings and conclusions reached by them were justified and otherwise appropriate. With this clarificatory note we proceed with the task of review.

Meaning of Article 125 of the Federal Constitution

4.1 Article 125 of the Federal Constitution deals with the tenure of office and remuneration of judges of the Supreme Court. Clauses (1) to (5) alone are relevant for the present purpose, which at the material time read as under:

125(1) Subject to the provisions of clauses (2) to (5), a judge of the Supreme Court shall hold office until he attains the age of sixty-five years or such later time, not being later than six months after he attains the age, as the Yang di-Pertuan Agong may approve.

(2) A judge of the Supreme Court may at any time resign his office by writing under his hand addressed to the Yang di-Pertuan Agong but shall not be removed from office except in accordance with the following provisions of this Article.

(3) If the Prime Minister, or the Lord President after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a judge of the Supreme Court ought to be removed on the ground of misbehaviour or of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office, the Yang di-Pertuan Agong shall appoint a tribunal in accordance with clause (4) and refer the representation to it; and may on the recommendation of the tribunal remove the judge from office.

(4) The said tribunal shall consist of not less than five persons who hold or have held office as judge of the Supreme Court or a High Court or, if it appears to the Yang di-Pertuan Agong expedient to make such appointment, persons who hold or have held equivalent office in any part of the Commonwealth, and shall be presided over by the member first in the following order, namely, the Lord President of the Supreme Court,

the Chief Justices according to their precedence among themselves, and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of two members with appointments of the same date).

(5) Pending any reference and report under clause (3) the Yang di-Pertuan Agong may on the recommendation of the Prime Minister and, in the case of any other judge after consulting the Lord President, suspend a judge of the Supreme Court from the exercise of his functions.

4.2 Clauses (1) to (3) deal with termination of tenure of office. Clause (1) provides for termination on attaining the age of retirement; Clause (2) for termination by resignation of the judge in the prescribed manner; and Clause (3) for termination by removal on the ground of misbehaviour or of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office. Security of tenure of a Supreme Court judge during good behaviour is a constitutional guarantee.

4.3 The expression *'any other cause'* in Clause (3) must be interpreted in the context to mean and be confined only to the causes which render the judge unable to properly discharge the functions of his office. A direct nexus between the 'cause' and the stated 'effect' must be established to permit removal on this ground.

4.4 The specified grounds for removal are in consonance with the established norms of security of tenure of judges to secure the independence of the judiciary in the countries governed by the rule of law. These grounds must be strictly construed.

Concept of the Independence of the Judiciary

5.1 It is appropriate at this stage to refer to the *UN Basic Principles on the Independence of the Judiciary*, which were adopted by the UN Congress at Milan in August-September 1985 and endorsed by the UN General Assembly resolutions of 29 November 1985 and 13 December 1985. These principles were formulated to assist member States in their task of securing and promoting the independence of the judiciary. The corresponding provisions in the Federal Constitution of Malaysia reflect that assurance, and its provisions have to be so construed.

5.2 The provisions in the UN Basic Principles, relevant in the present context are:

Independence of the Judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

Conditions of Service and Tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
15. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Discipline, Suspension and Removal

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

The UN Basic Principles predate the removal of the Malaysian judges in 1988. The corresponding provisions in Article 125 must be interpreted in the same spirit.

5.3 The *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1997* have elaborated these principles. The origin of the Beijing Principles was in 1982 in the *'Tokyo Principles'* and the Asia Foundation's role in this behalf in 1984, which led to the first conference in Malaysia in August 1985, followed by bi-ennial conferences of the Chief Justices of the Asia-Pacific region culminating in Manila in 1997 where they were adopted. The Chief Justice of Malaysia is a signatory to the instrument. Malaysia was an active participant in the process, throughout. The Beijing Principles are based on the UN Charter, UDHR, ICESCR, ICCPR and the UN Basic Principles of the Independence of the Judiciary, all of which predate 1988.

5.4 The Beijing Principles are not a new formulation of the norms of the independence of the judiciary, but merely a restatement or code of the norms well established prior to 1988 in the Commonwealth and the Asia-Pacific region.

5.5 Reference to these instruments and the relevant provisions therein assist in interpreting the true meaning and scope of Article 125, and in determining whether there was any justification for framing the charges and concluding that any ground for removal was made out against the Lord President and/or the Supreme Court judges.

5.6 The Beijing Principles begin with emphasis on, and significance of, 'Independence of the Judiciary' in 'a free society observing the rule of law'. Relevant portions are:

Para 1. The judiciary is an institution of the highest value in every society.
Para 22. Judges should be subject to removal from office only for proved incapacity, conviction of crime, or conduct that makes the judge unfit to be a judge.
Para35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.
Para 38. Executive powers which may affect judges in their office, their remuneration or

> conditions or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

These are significant guidelines to determine judicial misbehaviour or inability indicating unfitness for the office of a judge.

5.7 Broadly stated, the permissible grounds for removal under Article 125 are incapacity to discharge the functions of the office, or 'judicial misbehaviour' indicating unfitness for the office of a judge. The meaning of 'judicial misbehaviour' needs consideration.

Meaning of Judicial Misbehaviour

6.1 The meaning of 'judicial misbehaviour' is pivotal to determining whether the allegations made against the Lord President and the Supreme Court judges constituted the ingredients of any valid charge for removal, and, if so, whether they were proved on the available material. It is settled that 'proved judicial misbehaviour' alone can justify removal under a provision like Article 125(3) consistent with the concept of the independence of the judiciary in a country governed by the rule of law.

6.2 The dictionary meaning of 'misbehave' is 'to behave ill or improperly'; and 'misbehaviour' is to be construed accordingly. Judicial misbehaviour must mean 'ill or improper behaviour in relation to the office of a judge'. In other words, it means any act of ill or improper behaviour of a judge which is inconsistent with judicial behaviour, rendering the person unfit to continue in the office of a judge. The meaning and scope of the expression is wide, but the act of alleged misbehaviour must have direct nexus with the office of a judge, eroding public confidence in the judiciary as the guardian of the rule of law. It must be conduct which showed the judge to be unfit for the office, or which tended to undermine the judge's authority or public confidence in his court.

6.3 In the common law, the concept of 'judicial misbehaviour' meant misbehaviour in relation to the performance of the duties of office, such as neglect or refusal to perform those duties, and conviction for infamous offences. Now the concept of 'judicial misbehaviour' must be viewed as extending to any conduct indicating unfitness for the office of a judge. The established grounds include misconduct involving moral turpitude, partisanship and partiality, and misconduct even in private life. In short, 'judicial misbehaviour' is not to be given a restricted meaning. It must be understood to extend to conduct of the judge in or beyond the execution of his judicial office, representing so serious a departure from standards of proper behaviour by the judge that it must be found to have destroyed public confidence in his or her ability to act under and pursuant to the Constitution. This test for removal of a judge on the ground of judicial misbehaviour is consistent with the constitutional guarantee of the independence of the judiciary.

The expression *'any other cause'* in Article 125(3) in the same context must be interpreted similarly, related to proper discharge of the duties as a judge.

6.4 Judges are expected to satisfy the highest standards of integrity and independence. It does not follow that if a judge lacks all the ideal qualities that s/he is unfit for the office. Nor is public confidence dependent on making decisions which have populist appeal – it is more important for the public to have confidence in the independence and integrity of the judge's decision-making process. Unquestionably, the government must have the ultimate right to remove a judge whose conduct falls below acceptable established standards, but this power must never be exercised lightly or exercised for ulterior motives.

6.5 The First Tribunal considered the expressions 'misbehaviour or any other cause' and proceeded to say:

"…a broad definition of the term 'misbehaviour' to mean unlawful conduct or immoral conduct such as bribery, corruption, acts done with improper motives relating to the office of a judge and which would affect the due administration of justice or which would shake the confidence of the public in a judge".

6.6 The Second Tribunal discussing this issue took the view that 'misbehaviour without proof of improper motive is not sufficient' is implicit in Article 125(3); and the formulation of 'misbehaviour' in **Re Murphy** (Australian Bar Review, 1986, Vol. 2, No.3) must be applied in the light of contemporary values and standards in Malaysia. It proceeded to hold that, "Incompetence is no ground for removal", lest it be used as a pretext to get rid of a perfectly competent judge; and,

"a mere mistake, whether of fact or law, or error of judgment is insufficient…it is only such errors as may be attributed to improper motives—dishonest, oppressive or corrupt motives, or partiality or malice—which amount to misbehaviour…a single isolated incident will not be regarded as enough to warrant…removal".

It concluded by referring to similar submissions of the Attorney General, both to the First Tribunal and to it, and said:

"From the foregoing, the nature of 'misbehaviour' and the moral or mental element necessary is clear" [1989] 1 MLJ, 14 April 1989 Reports pp. 393-456).

6.7 It is on the findings of the two tribunals, purporting to apply the above test, that the Lord President and the two Supreme Court judges were removed under Article 125(3).

Findings and Conclusions of the First and Second Tribunals

7.1 Applying the above test, the First Tribunal recorded its finding against Tun Salleh, Lord President as under:

> "…we are of the opinion, in the absence of any explanation made by or on behalf of the respondent, that the respondent has been guilty of not only 'misbehaviour', but also of misconduct which falls within the ambit of 'other cause', which renders him unfit to discharge properly the functions of his office, as Lord President of Malaysia, as set out in Article 125(3) of the Constitution" (at pp 106-7 of SCJ, Vol.1, Part 2-October 1988 in which the report is published).

7.2 Applying the above test, the Second Tribunal's conclusions by majority were that Charges 1 and 2 alone were established against YA Tan Sri Wan Suleiman; and Charge 1 alone was established against YA Datuk George Seah. The remaining charges against these two, and all the charges against the other three Supreme Court judges, were held not established.

7.3 The meaning and scope of 'misbehaviour' in Article 125(3) arrived at by the Second Tribunal after a detailed discussion is in conformity with the established view in the Commonwealth. The real question, therefore, is whether the two tribunals applied that meaning and test correctly for their conclusions, or whether their findings are inconsistent with the settled view on the meaning of 'judicial misbehaviour'?

7.4 This main question is considered below, along with the connected issues relating to legality of the constitution and composition of the tribunals, legality and propriety of the charges, legality of the procedure, legality and correctness of the findings of the tribunals, and consequently constitutional validity of the act of removal of Tun Salleh, Lord President and the two Supreme Court judges, YA Tan Sri Wan Suleiman and YA Datuk George Seah.

The First Tribunal—Issues for consideration

Constitution and Composition of the First Tribunal

8.1 The Prime Minister wrote to DYMM Yang di-Pertuan Agong making representation for a tribunal to be set up for the removal of Tun Salleh on the basis of the charges levelled, and on 11 June 1988 proposed the names of six persons to constitute the tribunal under Article 125(4), namely,

1. Tan Sri Dato' Abdul Hamid Omar, Chief Justice of Malaya & acting Lord President	Chairman
2. Tan Sri Datuk Lee Hun Hoe, Chief Justice of Borneo	Member
3. Mr. Justice KAP Ranasinhe, Chief Justice of Sri Lanka	Member
4. Mr. Justice TS Sinnathuray, Judge of High Court, Singapore	Member
5. Tan Sri Abdul Aziz bin Zain, Retd. Judge of the Federal Court	Member
6. Tan Sri Datuk Mohd. Zahir bin Ismail, Retd. Judge of the High Court	Member

The same day DYMM Yang di-Pertuan Agong replied to the Prime Minister formally appointing the six persons nominated by the Prime Minister to constitute the First Tribunal. Public announcement of this act was made on 13 June 1988.

8.2 On 14 June 1988 Tun Salleh was served a copy of the charges against him, and on 17 June the Secretary to the First Tribunal wrote to Tun Salleh notifying him that the sittings would commence on 27 June 1988.

8.3 On 21 June, the solicitor for Tun Salleh wrote to the Secretary objecting to the composition of the Tribunal, on the grounds, namely,

-the Chairman was lower in rank to Tun Salleh, and was present in the meeting of Kuala Lumpur judges, which resulted in the letter being sent to DYMM Yang di-Pertuan Agong.

-the appointments of Tan Sri Mohd. Zahir and Tan Sri Abdul Aziz were inappropriate on the grounds of separation of powers. Tan Sri Zahir had presided at the parliament hearing when the Prime Minister spoke about the judiciary; and Tan Sri Aziz was a businessman and had a practicing licence.

-Justice Sinnaduray was junior in rank.

8.4 On 29 June the Tribunal commenced hearing with the same composition rejecting the objections, and adjourned to continue the next day, 30 June. A request by Tun Salleh for an open hearing and permission to be represented by Mr. Anthony Lester, a distinguished Q.C. was also rejected, which led Tun Salleh to withdraw from the proceedings for lack of confidence in the Tribunal's credibility. The Tribunal proceeded with the hearing on 30 June and concluded it the same evening. The Tribunal submitted its report to DYMM Yang di-Pertuan Agong on 7 July 1988, and the official notification removing Tun Salleh was issued on 8 August 1988.

8.5 The entire proceedings were concluded with undue haste in a matter of grave concern for the national judiciary involving its head, and the rule of law. The first question is about the legality of the composition of the First Tribunal, which was specifically challenged by Tun Salleh.

8.6 Article 125(4) is a progressive provision enabling the composition of a fair and impartial tribunal, giving a wide range of choice to the appointing authority. This is to ensure elimination of the likelihood of even the slightest bias in any member of the Tribunal. Equivalent or higher status of the members of the Tribunal in keeping with the dignity of the judge

under inquiry is implicit in the provision. The choice, therefore, extends to persons in any other part of the Commonwealth. The wide range is evident from the expression *'persons who hold or have held equivalent office in any other part of the Commonwealth'*.

8.7 It is easy to visualize that there was ample choice to name five or six persons to constitute the Tribunal from among those who were holding or had held the office of Chief Justice or Judge of the Supreme Court or a High Court in other parts of the Commonwealth or were retired Lords President or Supreme Court or High Court judges of Malaysia, to exclude the suspicion of even the slightest bias in any member. This was the reasonable course, since the inquiry was against the Lord President, the head of the country's judiciary. Fairness demanded such a composition of the Tribunal, also for public confidence in its credibility. Unfortunately, the obvious course was not adopted of making a fair choice from the available long list of judges in recommending the names to DYMM Yang di-Pertuan Agong for constituting the First Tribunal comprised of persons against none of whom there could be any reasonable suspicion of bias.

8.8 Apart from the above, the findings and recommendation of the First Tribunal are vitiated also because of the apparent vice of 'bias' resulting from the participation of at least the Chairman, if not some other members. The defect is too obvious to have been missed even by a casual observer, much less by the distinguished Chairman and the concerned members of the Tribunal. It is unfortunate that the obvious was ignored in spite of the objections raised to this effect at the threshold by Tun Salleh.

8.9 The Chairman, Tan Sri Dato' Abdul Hamid Omar was next in seniority to Tun Salleh, and, therefore, the obvious direct beneficiary of an adverse finding leading to removal of Tun Salleh from the office of Lord President. This, in fact, was the actual result of the Tribunal's adverse

findings leading to the prompt removal of Tun Salleh. He was already made the acting Lord President while chairing the Tribunal. This direct personal interest of the Chairman was sufficient to disqualify him, and he should have recused himself, which he did not do despite specific objection to his inclusion. As a judge at that level he should have known and realised that it was his duty to recuse, as subsequently the Chairman of the Second Tribunal, Tan Sri Hashim bin Haji Yeop Sani, did in response to a less serious objection.

8.10 Another reason for the Chairman to recuse himself was that being present in the Kuala Lumpur judges' meeting on 25 March 1988, he was a witness to what transpired in that meeting, being a relevant fact for consideration by the Tribunal. He was an interested person for more than one reason and his participation as Chairman vitiated the entire proceedings and findings of the Tribunal.

Effect of Bias

9.1 A fair and impartial inquiry is envisaged as the basis for the removal of a judge under Article 125. To protect the integrity of the decision-making process, it must be ensured that the circumstances do not give rise to the appearance of any risk of bias. The rule against bias is to ensure that:

"justice should not only be done, but should manifestly and undoubtedly be seen to be done".

Similarly:

"The common law disqualifies a judge, magistrate or independent arbitrator from adjudicating whenever circumstances point to a risk that he would have a bias in relation to a party or issue before him".

9.2 The test of bias is well settled by a catena of decisions of the highest judicial authority in the Commonwealth. An educative discussion is in De Smith, Woolf and Jowell, *'Judicial Review of Administrative Action',* Sweet & Maxwell, Fifth Edn., 1995 at pp 525-527. Relying on earlier authorities, at page 527 the test summarised in *R v. Gough*, 1993 A.C. 646 is stated, thus:

> "Having carefully considered the authorities, it was held that direct pecuniary or proprietary interest always disqualified the decision-maker. Outside of that category, it was held that the correct test is whether, in the circumstances of the case, the court considers that there appeared to be a 'real danger of bias'. In such a case, the decision should not stand".

9.3 Similar is the summary based on a catena of precedents, including decisions of the Supreme Court of India, in the recently published *'Constitutional Law of India'* by Dr. Subhash C. Kashyap, Universal Law Publishing Co. (2008), Vol. 1 at pages 825, 829 & 830:

> **"Rule of law and natural justice:** The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice…The concept of natural justice has undergone a great deal of change in recent years. In the past it was thought that it included just two rules namely (1) no one shall be a judge in his own case (nemo debet esse judex in propria causa) and (2) no decision shall be given against a party without affording him a reasonable hearing (audi alteram partem). Very soon thereafter a third rule was envisaged and that is that quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably…It is now well settled law that even in administrative proceedings which involve civil consequences, the doctrine of natural justice will be applicable…".

> **"Doctrine of bias:** The principles governing the 'doctrine of bias' vis-à-vis judicial tribunals are well settled and they are: (i) no man shall be a judge in his own cause; (ii) justice should not only be done but manifestly and undoubtedly seen to be done. The two maxims yield the result that if a member of a judicial body is 'subject to a bias (whether financial or other) in favour of, or against, any party to a dispute or is in such a position that a bias must be assumed to exist, he ought not take part in the decision or sit on the

> tribunals', and that 'any direct pecuniary interest, however small, in the subject matter of inquiry will disqualify a judge, and any interest, though not pecuniary, will have the same effect, if it is sufficiently substantial to create a reasonable suspicion of bias'. The said principles are equally applicable to authorities, though they are not courts of justice or judicial tribunals, who have to act judicially in deciding the rights of others, i.e., authorities who are empowered to discharge quasi-judicial functions".

> "It is against all canons of justice to make a man judge in his own cause. It is difficult to prove the state of mind of a person. Therefore what we have to see is whether there is a reasonable ground for believing that he was likely to have been biased. In deciding the question of bias we have to take into consideration the human probabilities and the ordinary course of human conduct".

9.4 It may be added, that with a large range of choice under Article 125(4) in the present case, the doctrine of necessity had no application to justify the choice made for constituting the First Tribunal.

9.5 The inclusion of Tan Sri Dato' Abdul Hamid Omar as Chairman of the First Tribunal was alone sufficient to invalidate its constitution, and to vitiate the entire proceedings, its findings and recommendations on the ground of *'bias'*.

9.6 Article 125 clearly indicates that the tribunal envisaged is a 'judicial tribunal', comprised present and past judges only. It is implicit that a past judge is to be excluded if his present interests give rise to a 'real danger of bias'. The membership of at least two others, Tan Sri Mohd Zahir and Tan Sri Abdul Aziz, were questionable on the ground of a 'real danger of bias', as indicated above.

9.7 The charges against Tun Salleh included confrontation with the executive and the legislature. A parliamentarian who had presided in a session and permitted the Prime Minister to speak against the judiciary headed by Tun Salleh, in the context of the alleged confrontation, was disqualified as a

member of the Tribunal for institutional bias. Similarly a past judge who then had interests in business and a law practice suffered from similar disqualification to be a member of the Tribunal. The test of a *'real danger of bias'* is satisfied in the case of both, Tan Sri Mohd Zahir and Tan Sri Abdul Aziz.

9.8 The disqualification of the Chairman alone was sufficient to vitiate the entire proceedings, findings and recommendations of the Tribunal, and the disqualification of two other members makes it worse.

9.9 Accordingly, for this reason alone, the ultimate verdict and the consequent removal of Tun Salleh was not in accordance with Article 125 and it had no legal effect, being *non est*.

9.10 One other objection taken to the constitution of the First Tribunal was that the representation to initiate removal action was not by the Prime Minister as required by Article 125(3), but on a 'command' to him by DYMM Yang di-Pertuan Agong, which he obeyed and acted on. This is borne out from the Prime Minister's own assertion in his letter of 5 May 1988 which is Annexure 3 at page 113 of the First Tribunal's report. This, a seemingly innocuous fact, was in reality a fatal defect in the initiation of the removal proceedings and constitution of the First Tribunal resulting in its invalidity.

9.11 Article 125(3) clearly requires that the representation for initiating removal proceedings by constitution of a tribunal must emanate from the Prime Minister, on which the DYMM Yang di-Pertuan Agong acts if he accepts the representation; and after the tribunal holds the inquiry and recommends removal of the concerned judge, the DYMM Yang di-Pertuan Agong decides as the final authority to remove the judge. In this

case, the Prime Minister did not act on his own volition to make the representation, but in obedience to the command of the final authority for removal. In effect, the final authority, the DYMM Yang di-Pertuan Agong having decided to remove the Lord President, Tun Salleh, directed initiation of the prescribed procedure which was then a mere formality to comply with the 'command'. The defect was not formal, but substantial, and being in conflict with Article 125(3) it vitiated the entire procedure and act of removal, rendering it null and void.

9.12 Consideration of the other issues, hereafter, would reveal more illegalities to render the action of removal ineffective under the Constitution.

Procedure followed by the First Tribunal

10.1 As observed earlier, the hearing of the Tribunal was concluded with indecent haste in one day in a matter of great moment to observance of the rule of law in the country. Though expedition is desirable in such a matter, unusual haste can be disastrous for the end result. After the Chairman declined to recuse himself, the Tribunal refused the request for an open hearing and refused to accommodate the appearance of Mr. Anthony Lester, Q.C. for Tun Salleh in the inquiry, or time to await the result of the proceedings for stay in the High Court. No wonder, Tun Salleh then lacked confidence in the impartiality of the Tribunal and chose to withdraw from the proceedings.

10.2 Even in an *ex parte* proceeding, the Tribunal was not relieved of its duty to proceed judiciously. It had to examine, judiciously, whether a triable charge of 'judicial misbehaviour' was made out from the material before it; and, if so, it had to consider whether the acts attributed to Tun Salleh

were inconsistent with his duty as Lord President to preserve the role and the independence of the judiciary under the Constitution and to avoid the erosion of public confidence. The First Tribunal's report does not disclose the requisite awareness and consideration of this essential element, which was particularly significant in the background of events leading to initiation of the action against Tun Salleh.

10.3 Thus, the Tribunal reduced the probative value of its report by overlooking a very significant consideration. The necessary level of expertise was lacking in the Chairman and most members. The input of the requisite degree of expertise, experience and authority was necessary in the composition of the Tribunal to ensure a proper appreciation of the nature and kind of proof needed for the charges.

10.4 The duty of a judicial tribunal even in an *ex parte* proceeding is to reach a just and fair decision, and not to merely accept the *ipse dixit* of the accuser as gospel truth. The duty of the Tribunal is to apply the law correctly to proved facts and to determine whether the ingredients of the alleged offence or charge have been made out. The burden of explaining the charge does not shift to the accused, nor does such a duty arise until that stage is reached. Failure of the Tribunal to proceed in this manner and to place the burden correctly is the denial of the right under the Constitution to a fair and impartial inquiry. Repeated emphasis by the Tribunal on the absence of any explanation by Tun Salleh as a factor influencing its conclusions is an error of law resulting from placing the burden wrongly on Tun Salleh. This also was a defect in the present case.

10.5 Later discussion further discloses the perfunctory nature of the inquiry by the First Tribunal. A judicious scrutiny of the allegations forming the basis of the charges reveals that there was, in law, no triable charge made out for Tun Salleh to answer, and, therefore, his withdrawal from the

inquiry in the given circumstances had no adverse effect on him. The Tribunal's emphasis on the absence of any explanation by Tun Salleh for its conclusions is misplaced.

Findings and Conclusions of the First Tribunal

11.1 The background events are relevant to judge the acts of Tun Salleh, which are the basis of the charges framed against him. The duty of the judges, particularly the head of the judiciary to take steps to defend the role, status and the independence of the judiciary is also significant. These aspects relate to the ingredient of improper motive needed to constitute 'judicial misbehaviour'. Thus, the real issue is: whether, the acts attributed to Tun Salleh in the given background amounted to 'judicial misbehaviour', and were not done in the performance of his duty as the Lord President? An improper motive or mental element for the act is the gravamen of the charge to deny it the protection of the duty of the office.

11.2 In Shimon Shetreet's *'Judges on Trial',* 1976 Edn. at p. 347, under the heading 'Judicial Lobbying' the queries are:

> "Can judges take steps to defend judicial independence if they believe it to be assailed by the executive or the legislature? What means are acceptable for the purpose?…To what extent and how may a judge reply to charges made against him in Parliament?"

The author proceeds to give the answers at pp. 348-350, as under:

> "…if the executive fails to take a step necessary for the interests of the judges, the judges will make representation through the Lord Chancellor, pressing for an appropriate remedy".

In a bid to defend their salaries, judges were held justified to protest against the reduction,

> "in interviews with the Prime Minister and the Lord Chancellor and in a collective memorandum they argued that such reduction would interfere with the independence of the judiciary."

> "In the course of debates on the increase of judicial salaries in 1965, it was alleged that judges exerted pressure on the Lord Chancellor to take the necessary steps for increasing judicial salaries, and that the Lord Chancellor, in turn, exerted pressure on the government to pass the proposed increases unchanged."

11.3 It has been accepted that *'judges do not regard themselves excluded from taking action, publicly if need be, to defend their salaries'*. If it is permissible to the judges to protect their personal interest, why not a public stance to defend the role and the independence of their institution—judiciary under the Constitution?

Shimon Shetreet extrapolates this point. Law Lords were justified in strongly opposing *"legislation and other measures believed to be an executive encroachment upon the independence of the judges or the rule of law"*.

An instance cited is of Mr. Justice McCardie replying in a lecture at Middle Temple, to criticism of him in Parliament by the Prime Minister. McCardie J's reply did not elicit any critical comment. This was in 1934. Later, in 1973 Sir John Donaldson in a public speech defended a decision of his court for which he was attacked. This was criticised in Parliament, but the Prime Minister defended the judge saying *'he is entitled to put facts before the public'*, and he saw nothing wrong in the course adopted by the judge.

11.4 In none of these situations was there even a whisper by anyone to attribute 'judicial misbehaviour' to the concerned judge.

11.5 This was the settled position of the law on the subject in 1988 when the charges were levelled and the inquiry was made by the Tribunal. The duty of the Tribunal was to apply the settled law on the point. With due respect, the First Tribunal totally missed the real issues for decision and ignored the law applicable for the decision under Article 125. The result was a decision by it that is contrary to law and is unjustified.

11.6 The report of the First Tribunal commences with chapter 1 containing the narration of the constitution of the Tribunal, and proceeds in chapter 2 to narrate the 'Background Facts' beginning with the letter of 26 March 1988 by Tun Salleh to DYMM Yang di-Pertuan Agong and HRH the Rulers. It then mentions the Prime Minister's audience with DYMM Yang di-Pertuan Agong on 1 May 1988 leading to initiation of the action for constituting the Tribunal under Article 125(3) and (4) after consultation with the Attorney General. It is clear that the letter of 26 March 1988 was the flash point, and all other allegations forming the several charges were added to buttress the main charge based on this letter. In all, there were five charges, including one post-suspension of Tun Salleh based on certain statements to the media with a reference also to the withdrawn offer of his early retirement.

Merits of the Charges and findings

12.1 It is appropriate that the letter of 26 March 1988, which triggered the action for removal, is considered first. Following this is consideration of the other acts of Tun Salleh and the charges based on them.

Charge No. 4

12.2 The letter of 26 March 1988 was written by Tun Salleh as head of the judiciary to the Head of the State after a meeting of the Kuala Lumpur

judges the previous day in which it was decided that he send the letter expressing concern at the persistent attacks on, and criticism of, the judiciary by the Prime Minister. There was no dissent by any judge in the meeting wherein Tan Sri Dato' Abdul Hamid Omar, who later chaired the Tribunal, was also present. A committee of three judges nominated for the purpose assisted in drafting the letter. This was the care, caution and collective wisdom of the attending judges that finalised the draft of the letter. It is Annexure 2 at page 112 of the report of the Tribunal.

12.3 The question is, whether the contents of the letter or its address to DYMM Yang di-Pertuan Agong and HRH the Rulers can amount to an act of 'judicial misbehaviour'?

12.4 The letter at the outset says it is sent on behalf of all judges in order to express their feelings about the development in the relationship between the executive and the judiciary. It adds that the judiciary was disappointed by the comments and accusations by the Prime Minister against the judiciary, in and out of the Parliament. These facts are borne out from the narration of undisputed facts and events prior to the judge's meeting on 25 March 1988 called at the behest of Justice Abdul Razak, and the decision made in that meeting. An objective assessment of this part of the letter could not consider it objectionable. The letter ends with the hope *"that all those unfounded accusations will be stopped"*. It was a respectful prayer to the Head of the State to intervene and get the executive's tirade stopped against the judiciary. It was to protect the honour of the judiciary.

12.5 In between, the letter says that being judges they did not want to reply publicly to the executive's tirade against the judiciary, and it should be remembered that the judges have a duty *'to preserve, protect and defend the Constitution'*. It says that the accusations and comments have shamed and mentally disturbed the judges '*to the extent of being unable to*

discharge our functions orderly and properly', which really means that it would interfere with the discharge of their functions. The reason stated is the lack of appreciation of the judiciary's role under the Constitution by the people who would then look down upon the judiciary because of the executive's stance.

12.6 The inference that a copy of the letter to Their Royal Highnesses the Malay Rulers was likely to cause misunderstanding between the Rulers and the Prime Minister is misconceived. It did not have any such effect. The Rulers were also concerned with governance and their involvement could not be viewed as outside interference. In fact, it did have the positive effect of encouraging the Rulers to intervene in an attempt to defuse the crisis. The background events show that there was no untruth or distortion of any significant fact in the letter. Reference to *'all the judges'* was figurative and not literal, since the Lord President was the head entitled to speak for all the judges, and all Kuala Lumpur judges were in the meeting. Any hair splitting of the expression was a lame excuse to target the Lord President.

12.7 The respectful tenor and language of the letter had to be appreciated instead of attracting ire. It was clearly a bid to prevent escalation of the wanton attack by the executive led by the Prime Minister on the judiciary, which could adversely affect governance and credibility of the national institutions. It was an anguished plea to the Head of the State by the head of the judiciary at the behest of the agitated judges to calm them and to avoid any possible confrontation, reminding the executive through the Head of the State of the judiciary's position under the Constitution. This act of statesmanship of the Lord President should have been appreciated and not deprecated as 'judicial misbehaviour'.

12.8 The earlier discussion on the meaning of 'judicial misbehaviour' clearly shows that by no stretch of imagination could this letter of Tun Salleh come within its ambit to justify initiation of proceedings for his removal under Article125. By writing the letter, Tun Salleh was discharging his prime duty as the Lord President to prevent erosion of the role of, and the independence of, the judiciary.

12.9 It is indeed baffling and unfortunate that a judicial tribunal thought otherwise, and took a view contrary to the settled law on the point. In our view, somewhat ironically, Tun Salleh's failure to act in this manner in the prevailing situation would have been questionable as a failure of his duty.

12.10 We are not aware of any instance wherein a similar step taken by the head of the judiciary in a polity governed by the rule of law to protect the judiciary was even condemned, much less punished. The Tribunal also does not refer to any such precedent. The charge based on the letter dated 26 March 1988 is not sustainable. In fact, it does not constitute even a triable charge. Initiation of the action for removal on this basis was, to say the least, unfortunate for the judiciary and the nation.

Charge No. 5

13.1 Letters of 28 May 1988 and 29 May 1988 and certain statements by Tun Salleh to the media after his suspension are the basis of this charge. The issue is of the legal effect of these two letters and these statements to the media. These letters are considered first.

13.2 On 27 May 1988 Tun Salleh was asked to meet the Prime Minister who informed him of the displeasure of DYMM Yang di-Pertuan Agong with him for the letter of 26 March 1988, and of his suspension from office with the setting up of the Tribunal under Article 125. This abrupt action

after the lapse of two months from the letter was unusual and appears to be an after thought in view of the intervening events. The next day, on 28 May, Tun Salleh wrote the letter (Annexure 6 at page 116 of the First Tribunal's report) to the Prime Minister, as under:

> "To avoid embarrassment all round I have reconsidered the matter and I have decided that it is better in the interest for me to retire immediately after taking all leave due to me; that is 96 days and the leave is to commence from today".

The offer was to retire on expiry of the leave of 96 days commencing from 28 May 1988, the date of the letter.

13.3 The Prime Minister replied the same day, 28 May (Annexure 7 at page 117 of the First Tribunal's report) as under:

> "I have no objection for YAA Tun to take all leave due to you prior to your retirement; that is 96 days from today.
> With regard to your retirement from the post of the Lord President, appropriate action will be taken in accordance with the procedure that is being practiced".

13.4 However, before the effective date of retirement on expiry of 96 days from 28 May 1988, Tun Salleh had second thoughts, and on the very next day, 29 May he wrote the letter (Annexure 8 at page 118 of the First Tribunal's report) to the Prime Minister withdrawing his offer of early retirement. He wrote in it that his offer of early retirement was a response in shock on being informed abruptly the previous day of the action under Article 125, but on further reflection he had decided that his early retirement would be detrimental to national interest and could be misconstrued as some form of admission by him.
The relevant part of this letter is:

> "On careful reflection I have now come to the conclusion that it would be detrimental to the standing of the judiciary and quite adverse to the interest of the nation if I were to go on early retirement as this could be construed as some form of admission.

In the circumstances I withdraw my application for early retirement and to take all available leave as mentioned in my above mentioned letter".

13.5 The circumstances and the context in which Tun Salleh wrote both these letters indicate the response of a dignified constitutional functionary and not that of a fickle-minded judge. No legitimate inference of inability to function as a judge could be drawn from it, as alleged and accepted. A contrary view would yield the strange result that a judge cannot withdraw his offer to retire or resign before the effective date, even though it is permissible under the law. That would be in conflict with the law on the point.

13.6 For the legal effect of these two letters, Article125 (2) alone is relevant. It provides for only two modes of termination of the tenure: by resignation of the judge in the manner prescribed; or by removal in accordance with the following provisions of the Article.

13.7 The offer of early retirement could relate only to the first mode of termination. *Ex facie* it was ineffective as a resignation because it did not say so, and also did not satisfy any requirement of Article 125(2). It was not called a resignation; it was not addressed to the Yang di-Pertuan Agong as required by the provision; and it was withdrawn the very next day, prior to the effective date, 96 days later. Any of these facts is sufficient to neutralise the offer of early retirement in the letter of 28 May 1988. There is no other provision of the Constitution or the law to give it any jural effect. The withdrawn offer of early retirement by Tun Salleh had no relevance for any charge leveled against him. It was an extraneous circumstance that had to be excluded from consideration by the Tribunal.

13.8 The law is well settled on the issue of resignation of a judge under such a provision, which does not require acceptance by any one being entirely a

unilateral act of the judge who can also choose the effective date. It is open to the judge to withdraw the resignation prior to its effective date and to make it ineffective.

13.9 In the Constitution of India, the provision for termination of the tenure of a Supreme Court or High Court judge by resignation is similar:

> "a judge may, by writing under his hand addressed to the President, resign his office".

A High Court judge tendered his resignation from a future date, but withdrew it before the effective date. The validity of the act of withdrawal was considered and decided by the Supreme Court of India in *Union of India v Gopal Chandra Misra,* AIR 1978 SC 694. The withdrawal was found effective. It was held:

> "At any time before the deadline was reached the judge could change his mind and choose not to resign and withdraw the communication…"……
> "Before the arrival of the indicated future date, it was wholly inert, inoperative and ineffective, and could not, and in fact did not, cause any jural effect…"

13.10 Thus, the ineffective offer of early retirement by Tun Salleh was irrelevant and extraneous in the proceedings for removal before the tribunal. No reasonable view could treat it of any relevance in the proceeding.

13.11 The other part of the charge is based on the interview given by Tun Salleh to BBC on 29 May 1988 published also in the print media stating that he was being unjustly removed from office for bias in the UMNO cases. His statements insisting on his trial by peers of high standing, a speedy public hearing, and denial of untrue suggestions of bias were alleged to politicise the whole issue.

13.12 The Tribunal has held that there was no basis to justify Tun Salleh making these statements, and this act was inconsistent with the dignity of his office.

13.13 There can be no doubt that Tun Salleh had the right to defend himself in a fair trial by an impartial tribunal of high standing consistent with the status of his office as the Lord President. This is also implicit in Article 125(4). His demand of the same could not be faulted. The defect in the composition of the Tribunal for 'real danger of bias' has been indicated earlier in the case of the Chairman and the two members. The background events indicate a distinct link between the then prevailing environment and the genuine apprehension of Tun Salleh giving rise to the need for these demands. At any rate, it was not logical to treat these demands as acts of misbehaviour. The constitution of the Tribunal for removal was in the public knowledge. How could any objection be then taken to publicity of these genuine demands for a fair and impartial trial? It was misplaced as the subject of such a charge.

Charge No. 3

14.1 The basis of this charge is the adjournment *sine die* of CA No. 220 of 1986 - *Teoh Eng Huat v Kadhi Pasir Mas*[2] which was the appeal to the Supreme Court from the High Court decision involving the issue of a minor's choice of religion, alleged to have been done by Tun Salleh for improper considerations.

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[2] The judgment of Abdul Malek J in the High Court is contained in Annexure 26 of the report of the First Tribunal. The case concerned a 17-year-old Malaysian Chinese girl who was converted to Islam without parental consent in the State of Kelantan. The application was made by the girl's father for a declaration that he, as the father and lawful guardian, had the right to decide her religion, education and upbringing and for further consequential relief. It was not contended that this was a case of forced conversion. The judge while upholding the father's right to decide on her education and upbringing until she attained majority subject to the condition that it does not conflict with the principles of his daughter's own choice of religion, held that the plaintiff did not have a right to decide on his daughter's religion because she was at the time of her conversion a major according to Hukum Syara.

14.2 The Tribunal held that, *"the effect of this order was that the appellant could not proceed with his appeal, and therefore was unable to obtain the relief he sought".* It concludes that, viewed against the backdrop of views expressed by Tun Salleh, the *sine die* order was made upon improper considerations.

14.3 On the facts noted in the Tribunal's order, the conclusion is unsustainable. Reference to the document (Annexure 24 at p. 153 of the report), letter dated 23 July 1987 from the Counsel for the appellant to the Senior Registrar, Supreme Court is alone sufficient to negative the allegation and to vitiate the Tribunal's finding. The note on this document (Annexure 24 at page 153 of the First Tribunal's report) reads:

> "…In this letter Counsel for the appellant requested for a postponement of the hearing of the appeal pending an application for leave to be made under section 68(2) of the Courts of Judicature Act, 1964. The Lord President minuted a note on this letter addressed to the Chief Registrar requesting the Chief Registrar to adjourn the case *sine die*".

The Chief Registrar, Encik Haidar bin Mohd. Noor has proved this fact.

14.4 How the Lord President's act of allowing a prayer for adjournment of the appeal made by the Counsel for the appellant could cause prejudice to the appellant's right or interest is beyond comprehension. The prayer made was to adjourn the appeal and hear it only after an application to be made later had been decided. The date of filing the future application being uncertain, no fixed date for the hearing of this appeal could have been given by anyone. The only plausible course while granting the appellant's prayer for adjournment was to adjourn *sine die* the hearing of the pending appeal enabling the appellant to mention for hearing the appeal after the proposed application was filed and decided. This is what Tun Salleh did.

14.5 The action taken by Tun Salleh was a routine act in such a situation, familiar to all the judges. The imputation of any improper considerations for making such an order is frivolous. The charge was unsustainable.

Charge No. 1

15.1 This charge is based on the speech (Annexure A at page 168-172 of the First Tribunal's report) by Tun Salleh on 1 August 1987 in the University of Malaya, which, it is alleged was critical of the government displaying prejudice and bias against it. The particulars of the speech considered objectionable are quoted in the Tribunal's order.

15.2 The speech, like any document, is to be read as a whole and interpreted in the context in which it was made. This was an acceptance speech on conferment of a doctorate on Tun Salleh at a University Convocation. The audience was comprised essentially of young people, many of whom were graduating. It contained advice to the youth. So read, the inference drawn to frame the charge is unacceptable.

15.3 The emphasis in the speech is on nation building. Two strategies mentioned were: trustworthiness of the new generation or youth; and legal sanction, if need be for achieving trustworthiness. For this purpose, stress was laid on strengthening the machinery of justice. Elaborating this thought, the need for financial autonomy of the judiciary was stressed. In this context, the comparative greater importance of the judiciary *vis-a-vis* some ministries of social service was emphasised. The importance of the courts to uphold the rule of law enabling good governance was also emphasised in this context. In short, the theme of the speech was that the judiciary performs an essential or primary state function and should be given primacy over those performing the secondary or welfare functions in the polity. There was also exhortation to all the public functionaries to

work for public interest because the country is governed by the rule of law and justice embodied in the Constitution.

15.4 It is difficult to find any legitimate ground to criticise this speech, either for its content or for its effect on the audience.

15.5 An exhortation requiring government officers to work to promote public interest and to uphold the rule of law and the independence of the judiciary cannot be interpreted as displaying prejudice and bias against the government. It is safe to assume that the government also had the same perspective of public service and commitment to the rule of law.

15.6 It is significant that the speech though made on 1 August 1987 was not considered offensive for almost a year till May/June 1988 when the action for removal was initiated. It appears a clear after thought because of the intervening events leading to the judiciary's protest in the letter of 26 March 1988 against the executive's tirade.

15.7 This charge too was untenable.

Charge No. 2

16.1 The basis of this charge is another speech on 12 January 1988 (Annexure B at pages 173-177 of the First Tribunal's report) by Tun Salleh at a book launch which, it is alleged, discredited the government.

16.2 The allegations are in two parts. One is alleged to be a criticism of the government, and the other an attempt to restate the law along Islamic legal principles ignoring the plural character of the Malaysian society.

16.3 The Tribunal concluded that on a consideration of the speech, Tun Salleh had "conducted himself in a manner unbecoming of a judiciary in a country such as

Malaysia". The question is: whether, in making that speech, Tun Salleh's conduct was unbecoming of the judiciary and the office of Lord President? As stated earlier, the speech has to be read as a whole, and understood in the context in which it was made.

16.4 The occasion for the speech was the launch of the book—*'Law, Justice and the Judiciary: Transnational Trends'* by HRH the Sultan of Perak. The book is a collection of the papers and speeches at two international conferences attended by 97 judges, of whom 46 were Chief Justices. Apparently, no one at the book launch considered any part of the speech to be objectionable.

16.5 In the context of the theme of transnational trends, the speech stated: *"in a democratic system the judiciary plays a vital role as it is accepted as the acknowledged guardian of the Constitution"*. Obviously, this statement cannot be faulted. It then stressed the arduous task of the judiciary in any country to maintain neutrality and independence, adding, *"it also has to have regard for competing public interest such that the business of the government would not be unduly interrupted by litigations in which it is a party"*. There was specific mention of the need for the judiciary to ensure uninterrupted functioning of the government by drawing a proper balance.

16.6 Further, mention was made of the need for financial autonomy in the context that *'the judiciary is the weakest of all three branches of the government'*. Any serious student of law knows that the title of Alexander M. Bickel's book—*'The Least Dangerous Branch'* (1963) on this subject is borrowed from a statement of Alexander Hamilton in the 78th. Federalist, *'The Judges as Guardians of the Constitution'* wherein he described the judiciary as the least dangerous branch of the government because it has neither the *'sword'* nor the *'purse'*. This statement of Alexander Hamilton is quoted at the beginning of the book. Any offence

taken to a similar statement by Tun Salleh as criticism of the government sounds hilarious.

16.7 An observation in the speech that the court's prominent role as an agent of stability requires the judges to be trusted means that a credible judiciary is needed in a democracy. To say that the role of the court is as the interpreter of the Constitution is to state the obvious.

16.8 Then the speech proceeds with the observation that howsoever perfectly drafted a Constitution, the need for its interpretation always remains, and that is the function of the court. The later part of the speech relating to the other part of the charge is to be appreciated in this context. It must not be forgotten that the speech was on the theme of *'transnational trends'* and not confined to only one country, much less Malaysia alone.

16.9 The concluding part, then proceeds to say *"No better illustration can be found with regard to interpretation as being part and parcel of the law than the Islamic legal system"*. Reference to the Islamic legal system was in the context of the rules of interpretation of statutes, and nothing else. After referring to the rules of interpretation of Islamic law, he said: *"Therefore, no legal system can ever escape from the need for interpretation, be it a divine legal system or a secular system, for law is a concept clothed in language"*.

16.10 The speech ends with the observation that the occasion of the book launch is appropriate, because the book *'deals with the role of the court and the law in developing societies'*. There is nothing in it to offend the sentiments of a plural society or against the secular ethos. Even if one has a different view of the role of the court, the view expressed in the speeches consistent with the view in the Commonwealth cannot be termed improper or an act of misbehaviour.

16.11 With due respect, we are constrained to observe that only a bizarre interpretation of these speeches forsaking objectivity can project them as objectionable or as acts of 'judicial misbehaviour' unbecoming of a judge.

Conclusion

17.1 It does appear that the charge nos. 1, 2, 3, and 5 were added only to buttress the main charge no. 4 founded on the letter of 26 March 1988 sent in the prevailing charged atmosphere. Moreover, even the charge no. 4 is untenable for the reasons given. It is indeed incomprehensible how a judicial tribunal could accept these charges as proved.

17.2 As indicated, no cogent material was available even to frame a triable charge, and no *prima facie* case was made out in the proceedings before the Tribunal to require any explanation from Tun Salleh. Repeated emphasis by the Tribunal on the absence of any explanation by Tun Salleh due to his withdrawal from the proceedings on rejection of his objections is misplaced and contrary to law. There being no triable charge, and no *prima facie* case for Tun Salleh to answer, the First Tribunal should have rejected the charges and closed the removal proceedings without requiring any explanation from the Lord President Tun Salleh.

17.3 We are constrained to take the view that the end result of the removal proceedings tends to justify the objections raised by Tun Salleh and supports the view that his apprehension of not being afforded justice was genuine and based on substantial grounds.

In so far as the Lord President Tun Salleh is concerned, the events, which may be more appropriately described as an 'episode', started not with the letter dated 26 March 1988 addressed by the Lord President to DYMM the

Yang di Pertuan Agong and HRH the Rulers for that was only an accumulative justified response to (i) an interview given by the incumbent Prime Minister to Time magazine dated 24 November 1986; (ii) the speeches of the incumbent Prime Minister deriding the judiciary; (iii) the response from the incumbent Prime Minister to a speech delivered by Harun Hashim J, then a High Court Judge, at a law seminar held at the National University of Malaysia on 5 September 1987; (iv) the speech delivered by the incumbent Prime Minister on 2 October 1987 in Kota Bharu, Kelantan; (v) the speech made by the incumbent Prime Minister in Parliament on 3 December 1987 on the occasion of the second reading of the Printing Press and Publications (Amendment) Bill, 1987; and lastly (vi) the speech delivered by the incumbent Prime Minster on 18 March 1988 in Parliament while presenting a bill to amend Article 121 of the Federal Constitution.

It may at once be noticed that all the aforesaid statements and speeches by the incumbent Prime Minister were unmistakably a direct unabashed attack on the rule of law with intent to subdue, if not subvert, the independence of the judiciary.

In the above circumstances, having examined the proceedings of the First Tribunal, which found the Lord President Tun Salleh guilty of misbehaviour, etc. we are of the view that not only was the Lord President Tun Salleh totally innocent and none of the charges against him had any merit, but in fact, the Lord President Tun Salleh was performing his constitutional duty to uphold and protect the doctrine of separation of powers and the rule of law in the larger interest of the country. The conclusion is inevitable, that the removal of Lord President Tun Salleh was *non est*.

The Second Tribunal—Issues for consideration

18.1 The Second Tribunal was a sequel of the First Tribunal. It was set up for removal of five Supreme Court judges who had granted a limited stay on 2 July 1988 restraining the First Tribunal only from submitting its report to DYMM Yang di-Pertuan Agong pending the challenge to the legality of the First Tribunal by Tun Salleh. Notwithstanding the operation of the judicial stay order of 2 July 1988, which was vacated by a different bench only on 22 July 1988, the First Tribunal chaired by Tan Sri Dato' Abdul Hamid Omar (also the acting Lord President) submitted its report for removal of Tun Salleh to DYMM Yang di-Pertuan Agong on 7 July 1988; and in the meantime on 5 July, Tan Sri Dato' Abdul Hamid Omar as the acting Lord President after consultation with the Prime Minister represented to DYMM Yang di-Pertuan Agong for removal of these five Supreme Court judges on the ground of misbehaviour for the order of 2 July. This was accepted on the same day by DYMM Yang di-Pertuan Agong who directed constitution of the Second Tribunal and the suspension of these judges with effect from the next day, 6 July 1988. This is the genesis of the Second Tribunal.

18.2 The material facts are only a few. On rejection of Tun Salleh's objections by the First Tribunal, he made an application in the High Court on 28 June 1988 for an order to restrain the First Tribunal from holding the inquiry and giving its report. The First Tribunal refused an adjournment to await the outcome of the proceedings in the High Court and commenced the hearing on 29 June 1988. On 1 July, Ajaib Singh J partly heard the matter in the High Court and adjourned it to the next day when he again adjourned it to 4 July to facilitate the Attorney General's appearance, refusing to direct even maintenance of status quo meanwhile. The First Tribunal, meanwhile on 30 June continued the hearing and concluded it the same evening.

18.3 The urgency of a judicial stay order to restrain submission of the report by the First Tribunal was obvious, and the likelihood of approach to the Supreme Court was evident. Three Supreme Court judges, Tan Sri Wan Suleiman, Datuk George Seah and Dato' Harun Hashim were required by an earlier arrangement to constitute the quorum for a sitting of the Supreme Court at Kota Bharu, Kelantan on 2 July 1988. Datuk George Seah and Dato' Harun Hashim had, accordingly, left for Kota Bahru on the morning of 1 July. Tan Sri Wan Suleiman was the senior most judge of the Supreme Court after Tun Salleh, Tan Sri Dato' Abdul Hamid Omar and Tan Sri Lee Hun Hoe. The First Tribunal included Tan Sri Dato' Abdul Hamid Omar and Tan Sri Lee Hun Hoe, and it was inquiring into the conduct of Tun Salleh. Obviously, the senior most judge after these three had reason to believe that in the given situation he was required to deal with the matter in the Supreme Court relating to Tun Salleh's challenge, if the High Court did not grant the claimed relief. With foresight the person responsible for the hearing in the Supreme Court was required to prepare for such an eventuality. That person was Tan Sri Wan Suleiman.

18.4 In this situation Tan Sri Wan Suleiman decided that the importance of Tun Salleh's matter required hearing by at least five Supreme Court judges in Kuala Lumpur. This was not possible if the three named judges, including himself were to sit in Kota Bharu on 2 July. For this reason Tan Sri Wan Suleiman cancelled his trip to Kota Bharu on I July, and also telephoned Datuk George Seah later in the day to return to Kuala Lumpur with Dato' Harun Hashim. Datuk George Seah returned to Kuala Lumpur in the evening, but Dato' Harun Hashim contacted Tan Sri Dato' Abdul Hamid Omar and on his direction did not return to Kuala Lumpur.

18.5 On the High Court adjourning the case on 2 July to 4 July without directing even status quo, the counsel for Tun Salleh approached Tan Sri Wan Suleiman later on 2 July and prayed for an urgent hearing of the matter in the Supreme Court the same day. The urgency was obvious. Tan Sri Wan Suleiman, as the senior most judge present convened a special sitting the same day acting under Section 9(1) of the Courts of Judicature Act. The hearing was by a bench of five judges, namely, Tan Sri Wan Suleiman, Tan Sri Eusoffe Abdoolcader, Datuk George Seah, Tan Sri Azmi, and Tan Sri Wan Hamzah. This bench granted limited stay until further order.

18.6 The machinery for removal of these judges was set in motion immediately by the acting Lord President and Chairman of the First Tribunal, Tan Sri Dato' Abdul Hamid Omar for the hearing in the Supreme Court on 2 July to restrain this tribunal.

18.7 The Second Tribunal constituted on 12 August 1988 consisted of the following, namely:

1.	Tan Sri Hashim Yeop Sani, Judge of Supreme Court, Malaysia	Chairman
2.	Justice M. D. H. Fernando, Judge of Supreme Court, Sri Lanka	Member
3.	Datuk Edgar Joseph Jr., Judge of High Court, Malaya	Member
4.	Justice P. Coomaraswamy, Judge of High Court, Singapore	Member
5.	Datuk Haji Mohd. Eusoff Chin, Judge of High Court , Malaya	Member
6.	Dato, Lamin Mohd. Yunus, Judge of High Court, Malaya	Member

18.8 At the first sitting of the Tribunal on 29 August, an objection was taken to the inclusion of the Chairman, Tan Sri Hashim Yeop Sani on the ground of bias because he was a member of the bench which set aside on 22 July the 2 July limited stay order made by the five judges under inquiry. The Chairman, Tan Sri Hashim Yeop Sani recused himself from the Tribunal

for this reason, unlike the Chairman of the First Tribunal who was disqualified for many reasons but did not recuse himself. On 1 September, Datuk Edgar Joseph Jr. took over as the Chairman, without the addition of any other member. Except Justice Fernando of the Supreme Court of Sri Lanka, all the other four including the Chairman were High Court Judges, none was a Chief Justice, and yet they were to sit in judgment over five Supreme Court judges in relation to an administrative function of the Chief Justice or in his absence of the senior most judge of the court. It was a travesty of justice.

18.9 The report of the Second Tribunal is published in [1989] 1 MLJ at pages.393 to 520, 14 April 1989 & 28 April 1989 parts.

Merits of the Charges and Findings

19.1 The essence of the charges levelled against the five judges is the events of 1 and 2 July 1988 with cancellation of the sitting of the Supreme Court at Kota Bharu on 2 July, and the convening of a special sitting of the Supreme Court at Kuala Lumpur on 2 July 1988 in which the limited stay order was made by them.

19.2 The Tribunal has clearly held, that 'there was no conspiracy or prior agreement of any kind in regard to the order that was ultimately made on 2 July 1988'; and the allegation common to all five judges of lack of impartiality on their part was also unanimously rejected. These charges were rightly held not established. On these findings, three judges, namely, Tan Sri Mohd. Azmi, Tan Sri Eusoffe Abdoolcader and Tan Sri Wan Hamzah were wholly exonerated.

19.3 The two charges found proved against Tan Sri Wan Suleiman are: staying away from the Supreme Court sitting scheduled for 2 July 1988 at Kota Bharu without reasonable cause; and directing both Supreme Court judges,

Datuk George Seah and Dato Harun Hashim, to leave the same Supreme Court sitting without reasonable cause. The absence of reasonable cause is the crux of the matter for both charges.

19.4 The only charge found proved by majority against Datuk George Seah is his absence from the Kota Bharu sitting on 2 July 1988 without reasonable cause. It was accepted by the Tribunal that "he was faced with two conflicting directives: one from Tan Sri Wan Suleiman asking him to return to Kuala Lumpur as soon as possible to sit on a matter not yet before the court and the other from the Acting Lord President to remain in Kota Bharu". Thereafter, the Tribunal concludes, "there was no question but that the Acting Lord President's directive had overriding effect". However, the Tribunal also negatived any improper motive in this action of Datuk George Seah. It is strange that on these findings the majority recommended removal of Datuk George Seah, which was promptly effected.

19.5 Were the adverse findings, conclusions and the recommendation for removal of these two judges legally correct and justified? In our opinion, the obvious answer is an emphatic no.

Re: Datuk George Seah

20.1 After having rightly negatived the allegation of any improper motive in him, an essential ingredient of judicial misbehaviour was clearly absent. This alone was sufficient to reject the charge.

20.2 In addition, the finding of want of reasonable cause to stay back in Kota Bharu for the sitting on 2 July 1988 is against admitted facts. The Tribunal has noticed that his return was to comply with the direction of Tan Sri Wan Suleiman, the senior most judge involved in that situation. It was reasonable for him to assume that the acting Lord President, Tan Sri Dato' Abdul Hamid Omar, as the Chairman of the First Tribunal and his next

judge as a member of that Tribunal were disqualified and unable to give such a direction, making Tan Sri Wan Suleiman the effective authority to constitute benches and give direction for the sittings. This was at least a plausible and reasonable view to take in that situation. It was also an isolated instance without any improper motive. These facts alone were sufficient to exonerate Datuk George Seah. His act in the given situation could certainly not amount to misbehaviour.

Re: Tan Sri Wan Suleiman

21.1 After rejecting the allegation of any improper motive or conspiracy or agreement to favour Tun Salleh, and taking the view that a construction of Section 9(1) of the Courts of Judicature Act, 1964 other than the one made by it is not unreasonable, the logical course for the Tribunal was to reject both these charges instead of treating them as proved.

21.2 Section 9(1) of the Courts of Judicature Act, 1964 is as under:

> "Whenever during any period, owing to illness or absence from Malaysia or any other cause, the Lord President is unable to exercise the powers or perform the duties of his office (including his functions under the Constitution) the powers shall be had and may be exercised and the duties shall be performed by the judge of the Supreme Court having precedence next after him who is present in Malaysia and able to act".

21.3 On the construction of Section 9(1) ibid., the Tribunal formed the opinion that *'unable …owing to illness or absence from Malaysia or any other cause'* refers primarily to cause such as bodily infirmity or other physical causes which the Lord President cannot control; and it does not include disqualification for bias or interest. It noted that the Attorney General fairly conceded that two views were reasonably possible, and observed that there was no authoritative pronouncement of its meaning. It then concluded:

> "In these circumstances, while it is the definite view of this Tribunal that 'any other cause' does not include disqualification on the ground of interest or possible bias, and that this is certainly the better view, it is clear that the other view is not unreasonable".

21.4 Having reached this conclusion on the meaning of Section 9(1) that the 'other view is not unreasonable', the interpretation made by Tan Sri Wan Suleiman could not be excluded as an unreasonable view. At worst, the interpretation made by Tan Sri Wan Suleiman could only be a mistake of law, which is not judicial misbehaviour. On the view taken by him of the provision, his action of recalling the two judges from Kota Bharu, directing a special sitting at Kuala Lumpur by a bench of five judges and the order made by it on 2 July 1988 could not be faulted. His act could not amount to judicial misbehaviour even on the interpretation adopted by the Second Tribunal. Moreover, it was an isolated act without any improper motive, which too is a relevant factor to negative the charge according to the Tribunal itself.

21.5 Moreover, in our view the interpretation of Section 9(1) made by Tan Sri Wan Suleiman was correct and not the one accepted by the Tribunal as the better view. The expression *'any other cause'* in the provision must mean *'any cause whatsoever'*, in addition to those specified, because of which the Lord President is unable to perform the duty of his office at that time. This would include disqualification for bias or interest. The view accepted by the Tribunal as better conflicts with settled principles of jurisprudence. *Nemo debet esse judex in propria causa* (no one can be a judge in his own cause) is a maxim of the rule of law and natural justice. If the acting Lord President were to decide and not Tan Sri Wan Suleiman according to the Tribunal's interpretation of Section 9(1), this principle would be violated. The other view taken by Tan Sri Wan Suleiman was consistent with the settled principles. With respect, the Tribunal's interpretation of Section 9(1) is not correct.

21.6 The Second Tribunal enunciated the principles correctly but erred in applying them. It rightly held that 'proof beyond reasonable doubt is required to establish the allegations made in the representation against the five judges'. Contrary to this principle, it held the charges proved even after saying that the other view is not unreasonable and there was no proof of any improper motive, partiality or conspiracy to grant any undue favour. On the Tribunal's own view of the principles applicable and its findings in favour of the judges, the conclusion arrived at against the two judges was inconsistent. Misinterpretation of the meaning of Section 9(1) ibid. was another serious defect to vitiate its report and the recommendation of removal made therein.

Conclusion

22.1 The findings and the conclusions reached by the Second Tribunal also are unjustified and inappropriate, and so is its recommendation for the removal of the above named two judges. Glaring inconsistencies between enunciation of the legal principles and their application to the facts by the Second Tribunal is indeed incomprehensible. The consequent action of their removal under Article 125 is unconstitutional and, therefore, *non est.*

Answer to the terms of reference

23.1 On a review of the findings and the reports of the First and the Second Tribunals, and on consideration of the definition and meaning of 'judicial misbehaviour' as above, this Panel has arrived at the conclusion that the composition of the Tribunals, the process adopted by them, and the findings and conclusions arrived at against the Lord President, Tun Salleh, and the two Supreme Court judges, Tan Sri Wan Suleiman and Datuk George Seah, as well as their recommendation for removal of the Lord

President and the two judges, were not justified or otherwise appropriate in the circumstances of the two cases.

23.2 Accordingly, the removal of the Lord President, Tun Salleh, and the two Supreme Court judges, Tan Sri Wan Suleiman and Datuk George Seah from their offices was unconstitutional and *non est.*

Recommendations

24.1 There is considerable opinion, both inside and outside Malaysia, evidenced by comments of eminent jurists published in the law journals and media reports that the 1988 judicial crisis has impacted the Malaysian judiciary to erode its independence. This may, or may not, be the correct perception, but the likely adverse impact of the 1988 events on the perception of the community cannot be doubted.

24.2 This Panel, therefore, considers it appropriate to make a few recommendations for building public confidence in the rule of law and the independence of the judiciary in the country. An independent bar and bench are critical for Malaysia's political, economic and social progress. Without impugning the integrity of any individual judge the fact remains that the events of the 1988 judicial crisis have devalued public confidence in the judiciary as a whole. The reputation of the judiciary must be restored and the abuses of 1988 must not be allowed to recur. It is in this spirit, that this Panel comprised of persons drawn from the legal fraternity in the Asia-Pacific region has a few suggestions to make as its recommendations. These are:

1. It is desirable in the nation’s interest to redeem the people’s faith in the credibility of the judiciary and the rule of law, for which the wrong done to the Lord President, Tun Salleh and the two Supreme Court judges, Tan Sri Wan Suleiman and Datuk George Seah should be undone, as best and as early as possible.

An acknowledgement by the government of the mistake in removing these three judges in 1988 and making suitable amends would be an appropriate gesture to restore confidence in the independence of the judiciary. The Panel appreciates the reported recent statements and actions taken by the government in this regard.

2. The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1997 and The Bangalore Principles of Judicial Conduct, 2002 should be treated as the guidelines for the independence of the judiciary and judicial ccountability.

3. In the event of a similar situation arising in the future requiring invocation of Article 125(3), care must be taken in the composition of the future tribunal to ensure exclusion of any likely danger of bias.

   Care must also be taken to appoint members who are higher than, or at least equal in rank and hierarchy to the judge under inquiry in keeping with his dignity, if need be by appointing persons from any other part of the Commonwealth. This is the spirit of Article 125(4) of the Constitution that must be honoured.

   The procedure adopted by a future tribunal, unlike that of the First Tribunal, must ensure a full and fair opportunity to the concerned judge, to defend himself, including the right to be defended by a counsel of choice.

4. Separation of the judiciary from the executive is important for the independence of the judiciary. There should be no semblance of executive dominance in the career and future prospects of a judge following appointment.

   Tensions between the judiciary and the executive are not uncommon, particularly as the proactive role of the judiciary is seen to strengthen the spirit of the rule of law. The fine lines between the powers of executive and the judiciary must be maintained but not at the cost of depriving individuals or groups of their basic rights. In situations of rising tensions the judiciary could take appropriate preventive measures that will not in any way erode its dignity or independence.

   Universally recognized norms of natural justice and principles of fair trial demand that the procedure for removal of a judge must include (i) dissociation of the complainant

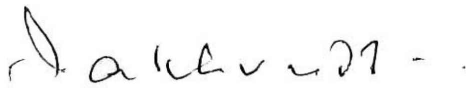
from the selection process for tribunal members; (ii) absence of perceived conflict of interest or bias in tribunal members; (iii) right to demand a public hearing; (iv) requirement of proof beyond reasonable doubt; and (v) suspension of the judge pending inquiry only in exceptional circumstances.

5. Independence of the judiciary and application of the rule of law are crucial for the advancement of all societies. The legal fraternity has a pivotal role in upholding these principles and it has an obligation to play an activist role in this regard.

24.3 These are a few broad recommendations of the Panel based on the established norms adopted by the countries governed by the rule of law, including those in the Asia-Pacific region. These will hopefully serve as a salutary reminder, given the need to outlive and redress the adverse impact of the 1988 judicial crisis.

The Panel having completed its assignment, the report is presented to the joint committee on this day, the twenty-sixth of July 2008.

(Justice J. S. Verma)
Chairman



(Justice Fakhruddin G. Ebrahim)
Member

(Dr. Ms. Asma Jahangir)
Member

(Tan Sri Dato' Dr. Abdul Aziz bin Abdul Rahman)
Member

(Dr. Gordon Hughes)
Member

(Dato' W. S. W. (Bill) Davidson)
Member