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Current Judicial Trends and the Rules of Justice

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EDITORIAL

It is significant that this issue of *Insaf* has been published almost contemporaneously with the appointment of Tan Sri Dato' Sri Ahmad Fairuz bin Dato' Sheikh Abdul Halim as Chief Justice of Malaysia. The Chief Justice has much on his plate. He is the first chief justice of the new millennium (Tan Sri Dzaiddin spanned the divide between old and new) and as such, is responsible for not only taking stock of where and how things lie but also for laying the right foundations. There is much to think about and much to address.

The Colloquium on Current Judicial Trends and the Rule of Justice was held on 21 September 2002 as a response to calls by members of the Bar for steps to be taken in light of then recent events directly relevant to the administration of justice and the role of the Judiciary. Papers were presented by eminent speakers from not only Malaysia on numerous issues connected with the theme of judicial trends.

Ideas and suggestions are only as effective as the extent to which they take root and flourish. The poor turnout at the Colloquium, in both numbers and representation, made this virtually impossible. We had hoped to see more members of the Bar there. We had hoped to see members of the Judiciary. In view of this, it was decided to make these ideas and suggestions readily available in a publication of *Insaf*.

While the events that catalysed the holding of the Colloquium may have faded away, their significance and the underlying issues remain. They have not as yet been fully addressed. Amongst other things, the need for a transparent and objective based mechanism for the appointment of judges is apparent; the implications of key Federal Court judgments on civil liberties are still worrying; the conduct of judges and methods to deal with the same remain relevant. There is much to consider and action is needed, not only by those who lead, at the Bar and in the Judiciary, but by those who constitute their respective membership.

To this end, it is hoped that the papers originally presented at the Colloquium and reproduced in this edition will inspire and guide.

The Journal of the Malaysian Bar

WHO JUDGES THE JUDGES?

THE HON. JUSTICE ALEX CHERNOV[1]

Introduction

I am honoured to have been asked by the Malaysian Bar, with which I have had a long and happy association, to give the keynote address at this Colloquium on the topic of who judges the judges[2]. I do so, however, with some apprehension. When a judge delivers reasons for judgment there is always the healthy concern that others, particularly the Bar, the academics, fellow judges, not to mention the appellate court, may pore over the chosen words and subject the reasoning and conclusions to critical analysis. I say 'healthy' because I think this feeling of apprehension, however minor, is conducive to the production of better judgments. It is like having a police car driving immediately behind you on the road; it is rare that in those circumstances, the speed limit is exceeded. The situation is perhaps well illustrated in the brochure that was produced for the English Civil Service to remind it that the decisions of its members may be reviewed by the courts – it has on its cover a picture of a prototype civil servant wearing a bowler hat with a little judge sitting on one of his shoulders, looking over it.

But speaking *not* ex cathedra produces a far greater danger for the speaking judge. As Professor Campbell has reminded me in her recent article in the Australian Law Journal, 'Judges' Freedom of Speech'[3], when judges speak or write ex-judicially they enjoy no greater freedom of speech than the other members of the public. Extra judicial statements made by them, says Professor Campbell, expose them to the risk of being sued for defamation, of being proceeded against for contempt of court or being prosecuted for some criminal offence. There are other dangers facing a serving judge who speaks publicly

[1] Judge of Appeal, Supreme Court of Victoria, Australia.
[2] I would like to acknowledge the considerable assistance provided to me by Santo De Pasquale, a research officer of the Court of Appeal, in researching the background to this paper.
[3] (2002) 76 ALJ 499.

outside the confines of proceedings which are starkly articulated in Professor Campbell's informative article and of which I am very mindful. But the inhibitions do not end there. Because I am a guest in this jurisdiction, there is yet another gloss on the restraint to which I am subject in terms of what I might say and that restraint is based on courtesy and respect for the practice and accepted conduct of my host jurisdiction. Hence, one may well ask, what am I doing here speaking on this topic on the assumption that judges should be judged in respect of their behaviour when there may be judges who do not believe that they should be reviewed outside the appellate process? Without seeking to answer this rhetorical question, one thing that could be said about such restraints is that they may be productive of a dull paper. I hope that is not so in this case, but then you will be judging this judge on that issue!

Judging judges' conduct

We are not concerned today with the consideration of the most common form of judicial accountability, the appellate process. Rather, we are concerned to analyse who judges the behaviour of a judicial officer, for the purpose of determining if it has fallen below acceptable standards and if so, who determines what consequences should follow. From a practical point of view, the two questions are virtually inseparable. It is convenient to mention at this point that I have not included in the parameters of this paper, an analysis of who oversees the behaviour of officers of administrative tribunals or of the existing complaints procedure in relation to them. Whilst I am making qualifications, may I also make the obvious point that I can only speak from the Australian perspective and more particularly, from that of my jurisdiction, namely, the State of Victoria. You will not be surprised to hear that I do not know enough about the Malaysian Constitution or its other relevant laws and practices to be able to speak meaningfully about my subject in the context of this jurisdiction. I hope, however, that the Australian experience in this area will be of interest and relevance to those of you who are concerned with judicial conduct.

The importance of analysing the question of who judges the judges has been highlighted by the former Chief Justice of the High Court of Australia,

Sir Harry Gibbs who said that the question 'seeks to resolve fundamental issues regarding the position of the judiciary in a parliamentary democracy which attempts to live under the rule of the law'[4]. The topic has attracted considerable interest throughout the common law world in recent times. Twenty five years ago, or even 15 years ago, there was, to my knowledge, very little public debate on this issue, but interest in it has been gathering pace, particularly during the past decade or so. Some idea of the amount that has been written in this area recently in Australia can be gleaned from the material included in the List of Sources for this paper, which is attached. In a sense, this is hardly surprising given that the general population is better informed about the legal process than it was 10 or 15 years ago. At the very least, the current generation seems to question more than did their parents, most institutions in our community and the courts have not been excluded from that analysis. As with the growing use of freedom of information legislation and the public analysis of the workings of executive government, there has been a growth in public awareness and discussion of most facets of judicial activity, including analysis of court judgments and the conduct of judges on and off the bench. That there is increasing scrutiny of judges is, therefore, hardly surprising and, as long as it is informed scrutiny, it should be welcomed.

I believe that in Australia there is a growing sense that judges should be more accountable for their conduct on and off the bench. The community expects them to behave properly and the judge who strays can expect to be caught up in the glare of publicity and receive public condemnation[5]. The tarnishing of the judicial office through misconduct is not readily tolerated by the community and, it would seem, the opportunity to point out publicly a fault in those who sit in judgment on others is rarely missed. Unfortunately, sometimes the criticism borders on being self righteous and unduly harsh and at other times it is ill-informed. But exposure to that may be the price one has to pay for holding a public office.

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[4] (1987) Law Institute Journal 814.

[5] An example is the judge who has been apprehended for driving a motor car with a blood alcohol count exceeding the prescribed limit.

Critical importance of judicial independence

It should be said at the outset that any system that judges the conduct of judges must be predicated upon the continued existence of judicial independence, that is to say, the independence of the judiciary as a separate, but essential part of government, and the independence of each judicial officer to hear and decide cases according to law. Judicial independence is a fundamental pre-requisite to the operation of the rule of law, which itself is a foundation stone of democratic society. It is in this context, therefore, that the question of who judges the judges must be analysed. A necessary consequence of judicial independence in our system is that judges cannot be formally punished for their misconduct; they can only be removed from office and only by parliament if it concludes that proved misbehaviour of the judge warrants such action. The suggestion is sometimes made by those desperate to find a way to discipline judges for misconduct that the Chief Justice should simply not assign cases to the offending judge, at least for a period. This might bring about the desired result in some instances, but ordinarily, such action is not without its problems. It may be doubted whether such action would be a proper exercise of power and it might be said that it impinges on judicial independence.

Categories of complaints

In discussing the complaints system relating to judicial behaviour, it is necessary to bear in mind the distinction between serious complaints, namely, those which, if made out, may lead to the effective dismissal of the judicial officer by parliament on the one hand, and, on the other hand, lower level complaints which involve claims of judicial misconduct which does not sensibly call for the removal of the judge from office. The latter conduct includes off the bench behaviour which, by community standards, renders the judge unfit to hold office, but it also consists of unacceptable behaviour in court, such as rudeness to witnesses and counsel, prejudice against certain categories of litigants and witnesses, the use of intemperate or otherwise inappropriate language and personal denigration of others, including fellow judges. We have all experienced or witnessed such conduct or have heard of it being inflicted on others. But it

should be acknowledged that on many occasions, it is found that the offence caused by the judge's misconduct was unintentional and, although that does not condone the behaviour, it does make it easier to stop it through sensible discussion.

Australian overview

By way of overview, it can be said that the Australian judiciary has enjoyed a tranquil history in terms of attacks on the behaviour of its members: there have been very few serious complaints and, since Federation, only one judge has been removed from office for misbehaviour although, as I will explain later, relatively recently, there have been moves to have a number of judges dismissed from office for misbehaviour. Furthermore, although during the period since Federation there has been a greater number of lower level complaints about judges' behaviour, as best one can determine, the number of such complaints has been small when one bears in mind the large number of cases that have been brought to court during this period, in many of which the judges' conduct must have caused emotional and other upsets to litigants, witnesses and practitioners. But even if one accepts that the number of such complaints has been relatively small, the limited exposure to such complaints nevertheless raises the important questions whether judges are sufficiently judged and whether the process by which complaints against them are investigated and determined is appropriate.

Analysis of the system

It is appropriate to begin the consideration of these matters by analysing first the security of tenure enjoyed by Australian judicial officers and the circumstances in which they can be removed from office or otherwise dealt with for misconduct. This will involve the consideration of who oversees the judges, the complaint procedure and whether any defect in the system could be met by appropriate change.

Tenure

The security of tenure of Victorian judges is based on the English Act of Settlement of 1701. It will be recalled that, prior to that legislation, judges in England could be dismissed at the King's pleasure, which was the fate of some judges at the time of Charles II and James II. The growing dissatisfaction about judges being subservient to the Crown eventually led to parliament enacting the Act of Settlement which gave tenure to judges 'during good behaviour', provided for the prevention of their removal from office otherwise than upon an address of both Houses of Parliament and importantly, provided for the payment of judicial salaries from public revenue.

In Victoria, s 77(1) of the Constitution Act 1975, which is based on the Act of Settlement, relevantly provides that judges of the Supreme Court shall hold office 'during their good behaviour' but the Governor may remove 'any such judge upon the address of [both Houses of Parliament]'. Like provision is made for County Court judges by the legislation governing that court[6]. A magistrate, on the other hand, may be removed from office by the Governor in Council only where the Supreme Court determines on the application of the Attorney-General that proper cause exists for removal on the grounds of guilt of an indictable offence, mental or physical incapacity, incompetence or neglect of duty or unlawful or improper conduct in office[7].

At the Federal level, judicial tenure is entrenched in the Commonwealth Constitution. Section 72(ii) of the Constitution provides that Federal judges '[s]hall not be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity'.

In New South Wales, judges of all courts and magistrates are entitled to remain in office during ability and good behaviour. The Judicial Officers Act 1986 of that State established what Sir Harry Gibbs described as an 'elaborate

[6] Victorian County Court Act 1958, s 11.
[7] See s 11 of the Magistrates' Court Act 1989.

system for the making of and dealing with, complaints' against all judicial officers (and, I believe, against members of the State Administrative Appeals Tribunal). Although I will deal later with the workings of the Commission, it is convenient to note at this point that, as I understand it, the New South Wales parliament does not consider whether a judge should be removed from judicial office unless the Conduct Division of the Commission[8] has first found that the alleged judicial misconduct has been made out and that the impugned behaviour could justify the judge's removal from office.

Greater protection of tenure under Commonwealth Constitution

The prevailing view amongst leading constitutional lawyers seems to be that the Federal judges are better protected against arbitrary removal from office than their Victorian counterparts because, under the Victorian Constitution, it is at least arguable that parliament has the power effectively to remove a judge for any reason it chooses, and the Executive might be entitled to remove a judge, without an address, on the ground of misbehaviour. Under the Commonwealth Constitution, on the other hand, only parliament can effectively remove a sitting judge from office and then only on one or both of the grounds set out in s 72(ii). It should be said, however, that, as best I can tell, convention requires that a judge of the Supreme Court not be removed for alleged misbehaviour without an appropriate address of both Houses of Parliament. There is also doubt as to whether parliament can remove a judicial officer for reasons other than misbehaviour. Nevertheless, whilst the possibility of arbitrary removal of Victorian judges remains, it would be prudent to adopt the suggestion (to which I will refer in more detail later) that s 77 of the Victorian Constitution be amended so as to bring it into line with the corresponding provision of the Commonwealth Constitution.

[8] The Division is made up of three judicial members.

Meaning of 'misbehaviour'

In terms of both the Commonwealth and the Victorian Constitutions, what is meant by 'good behaviour' or 'proved misbehaviour' is far from certain as is demonstrated by the lack of consensus on the issue that became apparent during the investigations of certain alleged misbehaviour of the late Justice Murphy of the High Court of Australia[9]. It is appropriate to give a brief background to the Murphy case. It began when a metropolitan newspaper published a series of articles in late 1983 which dealt with the telephone conversations of Morgan Ryan, a Sydney solicitor, who was a friend of his Honour and who was the subject of committal proceedings which were conducted by the Chief Stipendiary Magistrate of New South Wales. These conversations were taped illegally by the police and it was alleged that one of the voices on the tape was that of Justice Murphy. It was suggested that the contents of the tapes disclosed the commission of offences. It was also alleged that his Honour had sought, through the Chief Stipendiary Magistrate, to influence the due and ordinary course of justice in relation to the committal proceedings against Ryan. The investigations by the Attorney-General and the Federal Police ensued and, in 1984, two Senate committees were established, one in March, and when its deliberations proved to be inconclusive, another was set up in September. The second committee was assisted by two retired judges[10]. The majority of the second committee reported in October 1984 that, in its view, Justice Murphy had attempted to influence the course of justice in relation to the proceedings against Ryan and that this amounted to 'misbehaviour' for the purposes of s 72(ii) of the Constitution. In July 1985, his Honour was tried and convicted of attempting to pervert the course of justice in relation to the committal proceedings against Ryan. But the conviction was quashed on appeal and the judge was acquitted at the re-trial in Apri1 1986.

[9] See Enid Campbell and HP Lee, *The Australian Judiciary*, chapter 5.
[10] John Wickham QC and Xavier Connor QC.

Notwithstanding the acquittal, the Commonwealth parliament formed another Commission of Inquiry[11] to examine, inter alia, whether his Honour's conduct amounted to misbehaviour for the purposes of s 72(ii) of the Constitution. The Commission was terminated when it was learned that the judge was terminally ill with cancer, although it filed its report as to the matters it had considered to that point in time.

In the course of all these investigations into the conduct of Justice Murphy, a number of different interpretations were put forward as to the meaning of 'misbehaviour' in the Constitution. A narrow meaning was given to that provision by the then Solicitor General and Director of Public Prosecutions. In essence, the Solicitor General was of the view that the term was limited to behaviour pertaining to:

(a) judicial office, including non-attendance, neglect of or refusal to perform duties; and
(b) the commission of such an offence against the general law of such a quality as to indicate that the incumbent is unfit to exercise that office.

Mr C W Pincus QC, then a leading silk (who later became a judge, first of the Federal Court of Australia and then the Queensland Court of Appeal), on the other hand, advised that it was for parliament to decide whether any conduct alleged against a judge constituted misbehaviour sufficient to justify removal from office. There was no technical meaning of misbehaviour, he said, and, in particular, it was not necessary, in order for the jurisdiction under s 72 to be enlivened, that an offence be proved.

The Commission of Inquiry (the third 'committee') in its report to parliament in 1986 rejected the argument that 'misbehaviour' denoted only misconduct in office and conviction for an infamous offence. Sir George Lush said that the term was used in its ordinary meaning and was not restricted to misconduct in office or to conduct of a criminal nature. He went on to say that

[11] The Committee was constituted by two retired judges, Sir George Hermann Lush and Sir Richard Blackburn and by the Honourable Andrew Wells QC.

misbehaviour included misconduct, even if it was engaged in outside the judicial office, if it would be judged 'by the standards of the time to throw doubt on [the judge's] suitability to continue in office or to undermine [the judge's] authority as a judge or the standing of [his or her court]'. Sir Richard Blackburn considered that 'misbehaviour' meant any misconduct by the judge which was morally wrong and which demonstrated his or her unfitness for office. The third member of the Commission, the Hon. Andrew Wells QC, was of the view that the term 'misbehaviour' extended to judicial conduct in or beyond the execution of judicial office that represented so serious a departure from standards of proper behaviour by a judge that 'it must be found to have destroyed public confidence that he will continue to do his duty under and pursuant to the Constitution'.

It seems, therefore, that 'misbehaviour' in s 72(ii) of the Australian Constitution (and probably, the meaning of failure to be of 'good behaviour' for the purposes of s 77 of the Victorian Constitution) should be given a broad meaning so as to include misconduct by the judge which, according to prevailing standards, would tend to impair public confidence in his or her suitability to hold office or in the standing of the court[12]. Be that as it may, I doubt whether this issue will be resolved by a strict legal analysis. The relevant question for parliament is akin to 'a jury question' in the sense that it is ultimately for parliament to determine whether the alleged misconduct has been made out and whether it amounts to relevant 'misbehaviour'. Thus, the concept is essentially of a political, and not of a legal, nature.

Machinery for receiving, dealing with complaints against judges

So far as I can tell, save for New South Wales, there is no State in Australia that has a formal body to which complaints concerning judicial behaviour can be directed; nor is there in any other State a formal or structured arrangement pursuant to which such complaints are investigated and, where appropriate,

[12] See also the 1988 Report of the Constitutional Commission, Vol 1, p 403.

put before parliament for its consideration. In most Australian jurisdictions, certainly in Victoria, the procedure for receiving and handling complaints is of an ad hoc nature. Usually, a lower level complaint against a judicial officer is made or is passed to the head of the relevant jurisdiction who then investigates it and deals with the outcome as he or she deems appropriate. The serious complaints are usually dealt with by the Attorney-General who decides whether there is sufficient evidence to establish the impugned behaviour and whether it is of such seriousness as may warrant the removal of the judicial officer.

In New South Wales, as I have already mentioned, a formal complaints handling mechanism in respect of judicial officers was put in place in 1987 in the form of the Judicial Commission which is modelled on a like Californian body. It is charged with the function of receiving and investigating complaints, but it has no adjudicative or disciplinary role in relation to them. The Commission is a 10 member body consisting of the chief judicial officers of the six New South Wales courts, a legal practitioner and three persons appointed by the Minister after consultation with the Chief Justice. It is an independent organisation which employs its own Chief Executive Officer and any person, including the Attorney, may make a complaint to it concerning the behaviour of a judicial officer. The Commission conducts a preliminary investigation of all complaints filed with it and, depending on its findings, either dismisses them as frivolous, trivial or vexatious or classifies them as serious or minor complaints. Those which are classified as 'serious', are complaints which, if substantiated, could justify parliamentary consideration of removal. Complaints of that calibre must be referred to the Conduct Division of the Commission, which consists of a panel of three judicial officers. 'Minor' complaints are usually referred to the relevant head of jurisdiction or to the Conduct Division.

Removal of judicial officers

I now turn to examine briefly the Australian experience of the so-called serious complaints about judicial misconduct. It will be recalled that, at the Federal level, a judge can only be removed on the grounds stated in s 72(ii) of the Australian Constitution and I shall assume for present purposes that a like

provision prevails under the Victorian Constitution. So far as I have been able to ascertain, no attempt has been made in Australia since Federation to remove a judge on the ground that he or she is unfit to hold office due to mental or physical incapacity. Moreover, this potential basis for removal has been rendered even less relevant since the introduction of legislation at Federal and State levels requiring judges to retire, in most jurisdictions, at the age of 70[13].

The other ground of removal, namely, 'misbehaviour' has been invoked, or has been sought to be invoked, but only on very few occasions. To my knowledge, as I have mentioned, there has only been one case since Federation where a judge has been removed from office. But it should be said for completeness that in colonial times, some of the new settlers, including judges, were of spirited disposition and a number of the more colourful judges of that time lost their office. To give a few examples, the very first judge who arrived in the colony of New South Wales, Geoffrey Hart Bent, maintained a long 'vendetta' with the civil authorities and was ultimately recalled. The first judge of the Supreme Court of South Australia, John Jeffcott, was removed from office after he killed a fellow Irishman in a duel. The first Supreme Court judge sent to Melbourne, John Walpole Willis, had the distinction of being 'removed' from judicial office twice, first while he served as a judge in Canada, although he was then reinstated by the Privy Council, and secondly, from the bench in Melbourne in 1843 for misbehaviour, including abrasiveness to counsel, litigants and witnesses[14].

Turning now to the more current experience in this area, not long after the Murphy case, a judge of the Supreme Court of Queensland was removed from office at the behest of parliament in 1989. As I have said, he was the first judge in Australia since Federation to be dismissed. The investigation into his conduct arose out of relevant disclosures that were made during the

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[13] Most States have provisions that retired judges may, if so certified by the Chief Justice and the Attorney-General, continue to serve as reserve judges until the age of 75.

[14] See Justice Kirby, *Abolition of Courts and Non-Reappointment of Judicial Officers* (1995) Australian Bar Review 181 at 184.

Fitzgerald Inquiry into corruption in Queensland. The three retired judges[15] who were appointed by parliament to be the Commission of Inquiry into his Honour's activities, found that he was not 'a fit and proper person to continue in office as a Judge of the Supreme Court of Queensland'. Broadly, they considered 'that he had given false evidence to a defamation hearing, made and maintained allegations that the Attorney-General, the Chief Justice and Tony Fitzgerald had conspired against him, and made false statements, false claims and arranged 'sham' transactions to his own taxation advantage'[16]. The single chamber of the Queensland parliament removed him from office (notwithstanding his urges to the contrary).

In the late 1990's there was an unsuccessful attempt to remove from office a judge of the Supreme Court of New South Wales on the ground that he was unfit to hold office given his failure to deliver judgments in several cases within an acceptable period. Delay in handing down judgments is a sin of which many judges, including myself, are guilty, but in the case of that judge, there were 29 complaints against him, all of which alleged undue delay in giving judgment and in three such cases the delay was said to range between 30 and 36 months. One proceeding that was heard by his Honour involved approximately 350 women who suffered infertility allegedly as a result of using a chemical manufactured by the defendant company. There were considerable interlocutory delays and ultimately 10 'test' cases were selected and sent for trial which was to be heard by the judge in question. The hearing of the proceeding eventually commenced in January 1996 and finished on Christmas eve of 1997. Judgment in the case, however, was not given until February 1999.

In the meantime, the Judicial Commission had been considering complaints against the judge in relation to that and the other cases. Two of its three members found the complaints substantiated and considered that the misconduct could justify parliamentary consideration of the judge's removal from office. In his defence, the judge claimed that his delay in handing down judgments was

[15] The Rt Hon Sir Harry Talbot Gibbs, the Hon Sir George Hermann Lush and the Hon Michael Manifold Helsham.

[16] Phil Dickie, *The Road to Fitzgerald and Beyond*, St Lucia, University of Queensland Press, 1989, 277.

referable to his clinical depression, and argued that he had recovered as a result of treatment and was able to perform his judicial duties. Consequently, he said that he should not be removed from office. The matter eventually came before parliament in 1998 and, after an address by his Honour, the dismissal motion failed pursuant to a conscience vote.

At that point in time the judge had still not delivered his decision in the case to which I have just referred. As has already been indicated, he did so in February 1999, and immediately thereafter he resigned his commission. The unsuccessful litigants appealed and after approximately five days of the appeal hearing, the parties agreed that the decision should be set aside and the matter be sent back for re-trial. In the end, no doubt in order to avoid all that would be involved in a re-trial, the case was settled. It is obvious that the circumstances of the case imposed considerable unfairness on the parties and brought the administration of justice in that State into disrepute.

It is convenient to mention at this point that a protocol is in place at the Victorian Supreme Court (and, no doubt, in other jurisdictions in Australia) which requires that, ordinarily, judgments should be handed down within approximately three months of the completion of the hearing of a case. I believe that, notwithstanding the relentless pressure of judicial work, this requirement, which is supervised by the Chief Justice and heads of the Divisions of the Court, has been adhered to.

A case which illustrates the role of the Attorney-General in determining whether a complaint against a judge is sufficiently serious concerned the alleged misconduct by a then recently appointed High Court judge while he was at the Bar. The call for a parliamentary investigation into the alleged misconduct was made by the President of the Law Council of Australia approximately six months after the judge was appointed to the bench in 1998. It was prompted by the decision in *White Industries (Qld) Pty Ltd v Flower & Hart*[17] in which the primary judge made comments about his Honour's role in that case

[17] (1998) 156 ALR 169.

as a barrister. The saga began when White Industries, a construction company, sued for money allegedly due to it in relation to a construction contract. Flower & Hart acted as solicitors for the defendant which, through that firm, filed a counterclaim alleging, inter alia, fraudulent misrepresentation on the part of White Industries, thereby effectively dragging out the proceeding. Eventually, White Industries recovered judgment against the defendant which, by that time, was insolvent so that White Industries did not recover its costs from it. Hence, it brought proceedings against the defendant's former solicitors, Flower & Hart, for its costs on the basis, inter alia, that they had participated in an abuse of process in baselessly alleging fraud against White Industries.

The trial judge in the costs action effectively held that Flower & Hart had pleaded fraud for the defendant simply to frustrate and delay White Industries' claim to recover moneys from the defendant and that such conduct constituted an abuse of process. He ordered them to pay White Industries' costs of the proceeding against the defendant on an indemnity basis. The judge went on to say, that the High Court judge, when acting for the defendant as a barrister, although he did not appear at the trial, had 'acquiesced' and 'approved' of the delaying tactics adopted by the law firm. It was essentially this aspect of the judgment, the whole of which was upheld on appeal, that resulted, as I have said, in a call for a parliamentary inquiry into the conduct of the High Court judge although it was unclear as to what outcome such an inquiry could have achieved. I mention for completeness that, although the High Court judge, then still a barrister, appeared as a witness in the costs case, he was not a party to that proceeding.

The Commonwealth Attorney-General, the Honourable Daryl Williams QC refused to recommend an inquiry. He considered that any inquiry would inappropriately endanger the independence of the judiciary, damage the standing of the courts and do harm to the individual judge. The Attorney took into account in arriving at his decision that there is a range of views among eminent constitutional lawyers as to the meaning of 'proved misbehaviour' in s 72 of the Constitution implying that it was not clear that if any misconduct was established, it would amount to 'proved misbehaviour'. Moreover, said the Attorney, the events in question took place 12 years before the judge was

appointed and did not relate to the discharge of judicial functions. In my view, there is a real doubt whether the proposed inquiry would have served any useful purpose.

A more recent, and somewhat worrying, case involved the endeavour to dismiss the Chief Magistrate in Victoria for alleged misconduct. For some time prior to October 2000, it was public knowledge that a number of magistrates and others were critical of his behaviour that was related to his office. In October, a significant body of magistrates alleged that he engaged in misconduct which involved excessive drinking during working hours, sexually harassing female magistrates, defying a ban on smoking in the court building and engaging in crude and abusive behaviour principally towards fellow magistrates. The matter attracted considerable media attention and it was alleged that the Attorney had sought to have the Chief Magistrate resign from office. The matter came to a head when a special meeting of magistrates, held late in October 2000, passed a no confidence motion in him. Notwithstanding this, the Chief Magistrate at first refused to resign. It appeared, however, that the Attorney would take proceedings to have him removed from office and again, after considerable publicity which did no credit to the administration of justice in this State, the Chief Magistrate resigned on 30 October 2000. He did so without any of the allegations against him having been tested or established and without there having been any transparency in the process by which he was effectively hounded out of office. But the point has been made that it was his choice to resign and that he must have favoured that course in preference to a likely examination of his conduct in open court.

Yet another recent case where steps had commenced or were about to be taken for the removal of a judicial officer, concerned a judge of the Victorian County Court. Before his appointment, his Honour was an eminent silk practising in the criminal law at the Victorian Bar and who, at one stage of his career, held the office of Chief Justice of Vanuatu. After he became embroiled in a dispute with the government of that island on the question of judicial independence, he returned to practice. His appointment to the County Court, not very long thereafter, was generally received with acclamation. But the judge was, as he himself said, incompetent in administering his own affairs,

perhaps like most practitioners. In his case, however, he had failed during a period while at the Bar, to lodge taxation returns and had effectively disregarded reminder notices from the Australian Taxation Office ('ATO') which also warned of possible prosecution unless the matter was rectified. His Honour, somewhat surprisingly, did not tell the Attorney of this before he accepted the offer of appointment. The matter came to public attention after his Honour's appointment, shortly before the ATO issued prosecution proceedings against him in the Magistrates' Court. Not surprisingly, the circumstances of the case received considerable publicity which, in my view, was detrimental to the judiciary generally and to the administration of justice in our State. At the hearing of the prosecution, the judge's counsel told the magistrate that if his Honour was convicted, he would be compelled to resign his office. As things transpired, the magistrate did not record a conviction against him, but the ATO successfully appealed to the County Court[18] which duly convicted the judge of the offence with which he was charged. Notwithstanding that he was thus convicted and despite what he had told the lower court as to what he would be compelled to do if convicted, the judge refused to resign and the Attorney took preliminary steps to have the matter of his dismissal from office considered by parliament. He sought advice as to the appropriate procedure to be adopted in that regard from the highly respected former Chief Justice of South Australia, but before the matter progressed much further, the judge resigned from office. Regrettably, he died not long thereafter.

This case and the attempt to oust the Chief Magistrate were sad episodes in the administration of justice in Victoria. Given the character of media reporting on these issues and the manner in which the events were played out, it would not be surprising if they reflected adversely upon the perceived standing of the judiciary and that of the administration of justice generally. Nevertheless, if this did occur, I believe that it was only of short duration and the standing of our judiciary remains high.

[18] An interstate County Court judge, who had no relevant connection with the judge in question, was commissioned to hear the appeal.

Lower level complaints experience

I now turn to deal with the less serious allegations of misconduct that have been brought from time to time against judicial officers. In Victoria, for example, the number of such complaints has been small and most of them seem to have come from disgruntled litigants. Due to the informal nature of the complaints system, however, statistical data relating to such complaints is limited. The records of the Victorian Department of Justice for the year 2000, for example, show that only two complaints were made in relation to Supreme Court judges, four about County Court judges and 12 in respect of the Magistrates' Court.

The New South Wales experience is interesting and telling. The Judicial Commission in that State publishes an annual report and in respect of the year 2000 – 2001 it shows that the most common complaint came from disgruntled litigants who alleged, amongst other things, bias on the part of the judicial officer, failure to be provided with a fair hearing and inappropriate comments and remarks by the judge in the context of the case. The Commission noted that 'frequently, complaints of this kind are made in apparent substitution for appeals to a higher court'. Not surprisingly, it stressed the 'important difference between making a wrong, or supposedly wrong decision and engaging in judicial misconduct'. Perhaps the most telling aspect of the Commission's report for present purposes is that it records that in that year, it received 87 complaints, 83 of which were examined and dismissed as frivolous and four were deemed 'minor' and referred to the relevant head of the jurisdiction[19].

As to other jurisdictions in Australia, I have no reason to think that their experience in this regard is different from that of Victoria and New South Wales. But not withstanding that, the fact remains that it is usually only the head of jurisdiction that is called upon to assess whether the member of his or her court has transgressed as alleged[20]. Such a procedure is not without problems

[19] See Judicial Commission of New South Wales Annual Report, 2000-2001 at 21.

[20] Even in New South Wales, it seems that, although the Commission makes a preliminary assessment, where a possible prima facie case has been made out, it is the head of jurisdiction who then usually deals with the matter.

which include the following. First, there are the difficulties of transparency and the degree of effectiveness of such an investigation and secondly, the head has no power formally to sanction his or her colleague – the head is only the 'first amongst equals'. But as against that, there is the real question whether in the Australian context there is a more appropriate way of dealing with such complaints consistently with the preservation of judicial independence and in any event, the issue must be kept in perspective.

Let me put this in perspective, however, and give an example of how a complaint about the alleged wrongful behaviour by a Victorian Supreme Court judge was recently dealt with, although I do not mean to imply that all complaints are processed in this way. The complaint arose in the context of a case which concerned an application for an urgent injunction to restrain a trade union and its relevant members from taking allegedly unlawful industrial action against the plaintiff company. Notwithstanding that the dispute was settled, the union complained in a letter to the Attorney-General that, at the hearing, the judge was critical of union officials not swearing the relevant affidavits as to what they claimed had transpired. More particularly, the union alleged that the judge said that usually a female law clerk swore affidavits on the union's behalf from knowledge and belief and that he considered such affidavit material to be 'worthless'. Thus, the union claimed that the judge had derided it in an inappropriate way and that he had made inappropriate gender biased comments in the course of criticising the union's material. The Attorney referred the letter of complaint to the Chief Justice, essentially for information. It is important to note that no action was sought by the Attorney from the Chief Justice. The judge in question denied the allegations and asserted that he simply described certain affidavits as carrying little weight when opposed to eye-witness evidence, such affidavits having been sworn in the previous two cases by young women who recounted what others told them as to the material events. After considering the material, including an affidavit from an independent source that supported the judge's version of events, (there being no transcript of the short proceeding), the Chief Justice was not prepared to conclude that the judge used the words alleged or that he referred to gender in an inappropriate way and thus, effectively did not uphold the complaint. The Chief Justice made his investigation of the complaint (which had received notoriety) and his conclusion public by way of

a letter to the editor of a major Australian newspaper. He obviously also made his conclusions known to the trade union, but it is important to note that the Chief Justice did not make a report of his investigation to the Attorney and, in his letter to the editor, observed that no such report was requested of him.

Removal by non-reappointment

I note for completeness that there is another, and now not uncommon, way in which governments effectively remove certain judicial officers of lower courts and tribunals in the course of abolishing and replacing them with new bodies. Let me give two examples. In 1982, the New South Wales government abolished the Courts of Petty Session and established Local Courts. The transitional procedure established a mechanism by which each of the magistrates of the abolished court could apply for appointment to the new one, and all but six were appointed to the new body. Unbeknown to them, however, the Chief Magistrate had written to the Attorney-General urging 'strong reasons' for their non-appointment. The letter listed their alleged disqualifying disabilities, but the magistrates in question were never confronted with the allegations. One of them brought a proceeding in court alleging that there had been a wrongful failure to consider him for re-appointment. He argued, inter alia, that he was entitled to be considered on his own merits as a judicial officer and not in competition with the merits of applicants who were not themselves former magistrates. The argument was upheld by the New South Wales Court of Appeal, but overturned by the High Court[21]. Mason, CJ reasoned[22]:

> 'The case fails because it would require the Court to compel the Attorney-General to depart from the method of appointing judicial officers which conforms to the relevant statutory provision, is within the discretionary power of the Executive and is calculated to advance the administration of justice.'

[21] *Attorney-GeneraI (NSW) v Quin* (1990) 170 CLR 1.
[22] At 24.

In Victoria, the Accident Compensation Act 1985 established the Accident Compensation Tribunal. Its members, although not appointed as judges of any court, enjoyed the rank, status and precedence of a judge of the County Court. Thus, for example, in the relevant context, they were addressed as 'your Honour'. The legislation provided that they were to hold office during good behaviour and until attaining the age of 70 years and that they could be removed from office only by the Governor on the address of both Houses of Parliament. A change of government produced the Accident Compensation (WorkCover) Act 1992. The legislation made significant changes to the compensation entitlements of injured workers. It also abolished the Tribunal but made no provision for the continued existence of the office of its judges. Some of them were re-appointed to other equivalent positions, but a number of them were not re-appointed and were thus effectively removed from office without proof of misbehaviour or without an address of both Houses of Parliament[23].

Notwithstanding this, the view was put forward in a widely circulating newspaper[24]:

> 'The mistake is to think of them as courts. Their job is administrative: quasi judicial at best... It is necessary to give them real authority to demonstrate that they are not merely creatures of the Executive, and to attract decent talent. Understandable but wrong. Judicial status and the independence which goes with it must be jealously reserved to the occupants of truly judicial office – the judges of our courts ...'

The problem with this opinion, I think, is that it disregards the fact that the government had put the members of the Tribunal forward to the public as judges: it gave them all the trappings of judicial office and, no doubt, did that for the purpose of legitimising the Tribunal and more readily gaining public acceptance of its decisions. In those circumstances, it would have been appro-

[23] All or nearly all of them brought a proceeding against the State of Victoria alleging, inter alia, breach of contract. Eventually, the action was settled.
[24] *The Age* newspaper, 2 December 1992, p 18.

priate for the government to have re-appointed *all* members to comparable positions.

To put the matter into perspective, however, the disbandment of the bodies referred to earlier was prompted by the respective governments' decisions to introduce what was considered to be appropriate changes to the institutions, but the opportunity was also taken not to re-appoint certain members seemingly because of their perceived inadequacies in office or some other unexplained reason. Such moves struck at judicial independence notwithstanding that the abolition of the tribunals may not have been motivated by the desire on the part of the governments to remove the judicial officers in question. The procedure has, as I have said, caused justifiable concern and, at least in the case of the Victorian situation, has attracted the attention of the United Nations rapporteur on judicial independence, Dato' Param Cumaraswamy.

Assessment of the Australian experience

I now want to consider what can be learned from the Australian experience for present purposes? Looking first at the allegations of serious misbehaviour by judges, it seems plain enough that parliament is the final judge on that issue. Given the Australian constitutional position and the recognition of the need to preserve judicial independence, it has not been suggested that any other body should or could be the final decision maker in respect of so serious an issue. The gloss on this position that exists in New South Wales where the parliament does not consider the question of removal until a judicial committee has first determined that the alleged conduct is capable of amounting to relevant misbehaviour, does not really alter the fact that it is parliament that ultimately judges the judges in respect of the alleged serious misbehaviour. I note that there is no evidence that there has been any attempt to abuse parliament's power in this regard and any consideration of the matter to date has been undertaken with great caution and deference to the judiciary and with the apparent recognition of the important role it plays in the community, and of the need to preserve judicial independence. As will become apparent, although

parliament is the final judge of judges in respect of serious misconduct by them, there are others who oversee their conduct, including the judges themselves, the Bar and the media.

Turning now to the more frequent allegations of 'minor' judicial misconduct, it is plain that the head of jurisdiction plays an important role in judging, albeit informally, his or her colleagues. But in my view, the Australian experience is that it is not only the head of jurisdiction who judges the judges. The judges themselves play an essential role in that process, albeit indirectly and informally, as do the profession and the media. There is little doubt that during the last quarter of a century or so, there has been an accelerating trend in Australia and, no doubt, elsewhere, in the assessment by the judiciary of its own conduct in light of actual or potential complaints. Significant steps have been taken by the judges to raise awareness amongst themselves of the standard of conduct that is expected of a judge both on and off the bench. The establishment of the Australia Institute of Judicial Administration and its work in that regard has been of considerable significance. It has published papers and held seminars and conferences on judicial education, including matters of conduct. More recently, it has published on behalf of the Council of Chief Justices a 'Guide to Judicial Conduct' which is, I think, likely to be effectively adopted by judicial officers. Not surprisingly, The Guide is not a code of judicial conduct, but it is a very helpful set of guidelines for judicial officers as to the best approach to adopt to various situations on and off the bench. Various jurisdictions have also addressed these matters as has the Australian Judicial Conference, a body of which the majority of Australian judicial officers are members. The proliferation of writings, particularly by judges, concerning the standard of behaviour expected of the judiciary is now available to every judicial officer on the computer. Similarly, the emphasis on judicial education through 'judges' schools' has emphasised amongst other things, the need for appropriate judicial behaviour. Moreover, the appropriate behaviour by senior judges serves as a role model for their more junior colleagues as to how properly to behave both in and outside the court.

The profession also plays a very significant role in judging the behaviour of judges, particularly on the bench and there have been occasions when

complaints have been made by the Bar to heads of jurisdiction about inappropriate judicial conduct in court. Usually the matter is resolved by the complaint being brought to the judge's attention and, more often than not, it comes down to the judge not having realised that his or her impugned behaviour was or was perceived to be below acceptable standards. It should be emphasised that the judges rely on the Bar in that regard and expect it to bring to their notice, in the appropriate manner, properly particularised complaints about judicial conduct. That judges should conduct themselves in accordance with the appropriate standard is a matter of justifiable public interest and the Bar is well placed, and arguably has a duty, to bring any perceived relevant judicial misconduct to the notice of the head of the jurisdiction, although it goes without saying that it should do so responsibly.

Although often not sufficiently acknowledged, the media has had a considerable influence in publicising and analysing the circumstances surrounding the alleged misconduct of judges. This has certainly occurred in relation to the cases which I have mentioned where there was the possibility that steps would be taken to remove the serving judicial officer. In each case, the media brought the public spotlight on the judiciary and effectively compelled it to reflect on the standard of judicial conduct. The media has also played an important role in judging the judges in respect of conduct which would not warrant removal from office. Thus, for example, a judge's careless remarks that may be gender inappropriate or otherwise offensive are almost guaranteed to receive not insignificant publicity, notwithstanding that no offence or other impropriety was intended by the remarks. Although some of the media criticism is ill-informed, much of it serves as a reminder to the bench that carelessly formulated remarks can and often do cause offence, albeit unintentionally.

The role of the media in judging the judges is not very different from that played by the judge's family and friends, particularly the young generation which is, in many respects, articulate and discerning and not backward in expressing its views on issues that pertain to judicial behaviour on the bench.

Thus, putting aside parliament for present purposes, the judges are essentially judged by a range of 'stakeholders', more particularly by the judges

themselves, the media, the profession and those with whom they closely associate. History shows that in Australia, this system of checks and balances seems to have worked relatively well and has ensured that judicial conduct on and off the bench has been kept within acceptable parameters.

Changes

Having said that, however, it must be acknowledged that, like nearly all things devised by humans, the present system of judging judges is far from perfect. I have already mentioned the concern that there is inadequate transparency in the investigative and decision making processes when a complaint is made about judicial conduct to the head of the court. This perception of inadequacy remains notwithstanding that the concern must be viewed in the context of the constitutional position in Australia, the need to preserve judicial independence and the relatively small number of complaints.

Another unresolved difficulty and one to which I have adverted earlier in the paper, is that there is no clear concept or appropriate definition of the behaviour that warrants the removal of a judicial officer from office. Perhaps more importantly, there is no satisfactory process in place in jurisdictions like Victoria for dealing with any proposed dismissal of a judicial officer by parliament.

Clearly, these are not the only problems or inadequacies in the present system. Consequently, one should not be complacent about the current process of judging the judges but be prepared to review it from time to time to see if a more acceptable one can be devised which is not merely advanced for the sake of change and which will not jeopardise the maintenance of judicial independence.

In that context, it is useful to refer to the discussion paper of Professor Peter Sallmann, Crown Counsel for the State of Victoria, concerning 'The Judicial Conduct and Complaints System in Victoria'. It is interesting to note that Professor Sallmann does not suggest that a Judicial Commission like that

in New South Wales be established in Victoria to deal with lower level complaints against judges. His view that this is unwarranted is based essentially on the conclusion that it has not been demonstrated that the present manner of dealing with such issues in Victoria has created problems that justify new procedural machinery. It might be said that such a conclusion is not surprising, given the experience of the New South Wales Commission to which reference has already been made.

There are, however, some interesting alternatives or variations to the present system of dealing with the lower level complaints that are put forward for consideration in Professor Sallmann's report. For example, he refers to the suggestion of a retired judge that an improvement to the present system would be the appointment of a highly respected retired judge as the court's 'complaints officer'. Any complaints made either to the Attorney-General or to the court directly would be referred to this person for investigation and report to the chief judicial officer. Under the proposed system the results of any investigation would be communicated to the complainants and there would be some mention in the annual report of the number of complaints filed, what in general they were about and how they were handled.

As to complaints that may call for the removal of the judge from office, Professor Sallmann recognises a number of inadequacies in the present system which he highlights, such as the lack of formulation in Victoria of a process which is to be followed where it is sought to have parliament consider whether to dismiss the judge and the lack of sufficient definition as to what constitutes relevant misbehaviour. He puts forward for consideration the adoption in Victoria of an aspect of the New South Wales model, namely, before parliament considers the removal of a judge from office, a judicial committee should first determine that the impugned conduct occurred and is capable of amounting to misbehaviour warranting removal. It is to be noted that this suggestion has been put forward not because it is perceived that parliament should not be the final judge on such an important issue, or because the present system fails adequately to recognise relevant misbehaviour of judges, but rather because such a prima facie assessment of the alleged misconduct would strengthen the independence of the judiciary. It seems that this suggestion has the support

of eminent constitutional jurists including the Honourable Richard McGarvie AC, the former Victorian Supreme Court judge and Governor of Victoria and a member of the Judicial Advisory Committee of the Constitutional Commission. The proposal also coincides with like views of the Australian Constitutional Commission and the Australian Law Reform Commission.

On the other hand, it might be said that even if parliament agreed to this suggestion, there is no proven need to have such a committee determine if there is, in effect, a prima facie case for serious misconduct made out against a judge in question. It is not as though there is any evidence that parliament has been asked in the past to consider removing a serving judge on the basis of a frivolous complaint. Moreover, it may be doubted whether the views of such a committee would be of material assistance to parliament particularly where its report may consist of majority and minority views, as was the case relating to the New South Wales Supreme Court judge to whom I have earlier referred. Parliament, like a jury, it may be said, can determine for itself whether the impugned conduct has been made out and whether it constituted relevant misbehaviour. Most importantly, it may be argued, interposing a judicial committee to sit in judgment on a fellow judge for the purpose of determining if a 'prima facie' case for dismissal has been established, is not consistent with judicial independence.

On balance, I think there is probably much to be said for Professor Sallmann's suggestion that there be established a committee of eminent retired judicial officers to review serious complaints with a view to determining if they can be made out and if so, whether they are capable of amounting to relevant misconduct warranting dismissal from judicial office. One of the advantages of such a procedure would be that it would depoliticise the issue by taking it out of the hands of the Attorney. The utility of the proposal was anticipated by the Queensland parliament which, as I have mentioned, appointed a Judicial Committee to advise it on relevant matters concerning the removal of the Supreme Court judge in question. The absence of such machinery also compelled the Victorian Attorney-General to seek advice as to the course to be followed in relation to the County Court judge. And, as I have said, the proposal has the support of a number of leading constitutional lawyers.

Another of Professor Sallmann's suggestions that I think should be viewed favourably is that, in light of the doubt that exists as to the extent to which the Victorian Constitution affords Victorian judges sufficient security of tenure when compared with the Commonwealth position, the Victorian Constitution be amended to reflect s 72(ii) of the Commonwealth Constitution.

Conclusion

My present view is first, the current system in Australia of judging judges appropriately balances the need to ensure that a proper watch is maintained on the propriety of judicial behaviour on the one hand and the need to make sure that this process does not unduly interfere with judicial independence on the other. Secondly, I am confident that judges in Australia will continue to be mindful of their power and responsibility and will continue to keep in the forefront of their minds, essentially through judicial education to which I have adverted and the close contact with one another, the need to observe appropriate judicial standards and to continue to work towards providing a benchmark in that regard.

At the end of the day, it seems to me, the essential question becomes, should the judges, along with other 'stakeholders', continue to be trusted to judge the judges in relation to the lower level complaints. In my view, the answer is yes, at least for the immediate future. I say this for a number of reasons, which include the fact that the relevant conduct of all but a very small number of judges to date has been unimpeachable and there is no reason to think that the situation will alter for the worse. Moreover, there is the growing role played by the judges in judicial education which encompasses the standard of conduct that is to be expected of the judiciary. Furthermore, the judges always sit in open court and the state of the Bar and the media is such that one can remain confident in their ability and preparedness to highlight any failure by a judge to adhere to the required standard of behaviour that might come to their notice. We are fortunate that we do not have difficulties concerning judicial behaviour that prevail in some other countries, but that is no reason for complacency. As presently advised, I do not see a likelihood of any significant

change taking place in the prevailing Australian circumstances that might call for a material modification to the system by which judges are judged. Nevertheless, just as the price of liberty is eternal vigilance, so the price of having a judiciary that adheres to proper standards of conduct is the regular review of the system to ensure that it functions effectively and fosters the maintenance of judicial conduct at the required standard.

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'JUSTICE IS NOT A CLOISTERED VIRTUE': ARE JUDICIAL CRITICISMS INTER SE PERMISSIBLE?

DATO' PARAM CUMARASWAMY*

The principle of separation of powers in government is the bedrock of a democratic state based on the rule of law. The judicial power is one of the three powers of such government. It is pursuant to this power that justice is dispensed in disputes not only between citizens and citizens but also between citizens and the government and its agencies. Hence the need to vest this judicial power in a mechanism independent of the legislative and executive powers of the government with adequate guarantees to insulate it from political and other influence in order to secure its independence and impartiality.

The guarantees include the judges' security of tenure – ie they cannot be removed except for conduct deemed by law as conduct unfit for office. Even then it must be by a special mechanism provided by law; the provision for an age of retirement; their salaries, cannot be reduced; under the common law system they are vested with the power of contempt of court; they enjoy immunity from legal process for anything said or done in the discharge of their duties as judges.

All these guarantees are provided and entrenched to protect the independence and impartiality of judges and the independence and integrity of the courts. It is founded on public policy. With regard to immunity, Lord Denning said:

> 'The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he be able to do his duty with complete independence and free from fear!'[1]

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* UN Special Rapporteur on the Independence of Judges and Lawyers.

[1] *Sirros v Moore* (1975) l QB 118 at 132.

On this same principle in 1827, Lord Tenterden CJ said:

> 'This freedom from action and question at the suit of an individual is given by the law to the judges not so much for their own sake as for the sake of the public, and for the advancement of justice, that being free from actions, they may be free in thought and independent in judgment, as all who are to administer justice ought to be.'[2]

It is the presence of an independent judiciary in a democratic government which distinguishes that system from a totalitarian one.

Accountability and transparency are the very essence of democracy. In a democracy not one single public institution or for that matter even a private institution dealing with the public is exempt from accountability. Hence the judicial arm of the government too is accountable. However, judicial accountability is not the same as the accountability of the executive or the legislature or any other public institution. This is because of the independence and impartiality expected of the judicial organ.

Judges are accountable to the extent of deciding the cases before them expeditiously in public (unless for special reasons), fairly and delivering their judgments promptly and giving reasons for their decisions; their judgments are subject to scrutiny by the appellate courts. No doubt legal scholars and even the public including the media may comment on the judgment. If they misconduct they are subject to discipline by the mechanism provided under the law. Beyond these parameters they should not be accountable for their judgments to any others. Judicial accountability stretched too far can seriously harm judicial independence.

The judicial function is absolutely unique. In a recent judgment the Supreme Court of Canada had this to say:

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[2] *Garnett v Ferrand* (1827) 6 B&C 611.

'Our society assigns important powers and responsibilities to the members of its judiciary. Apart from the traditional role of an arbiter which settles disputes and adjudicates between the rights of the parties, judges are also responsible for preserving the balance of constitutional powers between the two levels of government in our federal state. Furthermore, following the enactment of the *Canadian Charter*, they have become one of the foremost defenders of individual freedoms and human rights and guardians of the values it embodies: *Beauregard, supra, at p 70, and Reference re Remuneration of Judges of the Provincial Court, supra,* at para. 124. Accordingly, from the point of view of the individual who appears before them, judges are first and foremost the ones who state the law, grant the person rights or impose obligations on him or her.

Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect for the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.

The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.'[3]

[3] *Moreau-Berube v New Brunswick* (Judicial Council) (2002) SCC 11. File No. 28206.

However, it must be stressed that the constitutional role of a judge is to decide on disputes before him or her fairly and deliver his or her judgment in accordance with the law and the evidence presented before him or her. It is not his or her role to make disparaging remarks about lawyers, parties and witnesses appearing before him or her or sending signals to society at large in intimidating and threatening terms and thereby undermining other basic freedoms like freedom of expression. When a judge resorts to such a conduct he or she loses his or her judicial decorum and eventually his or her insulation from the guarantees for judicial independence. He or she opens the door for public criticism of his or her conduct and brings disrepute to the institution. That could lead to loss of confidence in the system of justice in general. Respect for the judiciary cannot be extracted by invoking coercive powers except in extreme cases. The judiciary must earn its respect by its own performance and conduct.

No doubt judges too have freedom of expression. The UN Basic Principles on the Independence of Judges and lawyers require judges to exercise their freedom of expression 'in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary'. Similarly the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region states that judges are entitled to freedom of expression 'to the extent consistent with their duties as members of the judiciary'. It follows that judges do not have a carte blanche to say all and sundry both in the adjudicating process or even in their extra judicial capacities. Particularly in the adjudicating process they must be circumspect with their words to maintain their objectivity and impartiality.

Let me give a few illustrations. In 1996 a Superior Court Judge of Quebec in Canada in dealing with the sentencing of the accused woman found guilty of second degree murder in the death of her husband berated a jury and made insensitive remarks about women and Jews. The remarks were:

> 'When women ascend the scale of virtues, they reach higher than men... but…when they decide to degrade themselves, they sink to depths to which even the vilest men could not sink'. He also said

'even Nazis did not eliminate millions of Jews in a painful or bloody manner, they did in the gas chamber without suffering'.

Those remarks caused an enormous controversy in Quebec. Many including the media called for the removal of the judge. Women's rights associations went in an uproar. The judge did not resign. The matter went before the Canadian Judicial Council.

By a majority of four to one, the Inquiry Committee of the Council found the judge unfit for office. They went on to say that the judge undermined public confidence in him and strongly contributed to destroying public confidence in the judicial system. This recommendation went before the full Judicial Council headed by the Chief Justice. By a majority of 22 to seven the Council recommended to the Minister to move Parliament for the removal of the judge. The judge eventually resigned[4].

In another very recent case again in Canada a judge of the New Brunswick Provincial Court was removed for derogatory comments about the residents of a particular district while presiding over a sentencing hearing. The majority of the disciplinary panel found her comments incorrect, useless, insensitive, insulting, derogatory, aggressive and inappropriate. That they were made by a judge made them even more inappropriate and aggressive. The Supreme Court of Canada upheld the finding. Soon after the judge made those comments she apologised to the residents in open court during the proceedings of an unrelated matter. The apology did not mitigate the damage done[5].

In December last year the New South Wales Court of Appeal delivered a judgment criticising the conduct of a District Court Judge as having fallen 'far too short of acceptable judicial behaviour' and might lead to an apprehension of bias[6]. The appeal judges added that her conduct was disturbing 'comments totally unnecessary'. That the judge 'made little to maintain the proper decorum

[4] The Bienvanne Inquiry, Canadian Judicial Council Annual Report 1996-97, p 30.
[5] *Moreau-Berube v New Brunswick* (Judicial Council).
[6] *Damjanovic v Sharpe Hume & Co* (2002) NSWCA 407.

of either the court of herself'. They described one of her statements as 'disgraceful and totally unjudicial'. In an opinion column and Australian daily which reported this case, the author in conclusion asked 'How on earth do people like the judge concerned get appointed to courts in this country?' It is not known whether any disciplinary action was taken against that judge.

In South Africa in October 1999 in sentencing a 54 year old man to seven years imprisonment in the Cape Town Court for raping his 16 year old daughter, the judge said that while raping his daughter was 'morally reprehensible' the act was 'confined' to his daughter and that therefore the man did not pose a threat to society. He further said that the girl had a good chance of recovery. In a country where it is said that there is a rape committed every 36 seconds and where the law provides a minimum sentence of life imprisonment unless there are mitigating circumstances these pronouncements unleashed a wave of anger in women's rights groups. The prosecutor instantly filed a notice of appeal. In the aftermath newspapers reported that a Parliamentary Committee had summoned the judge to appear and explain himself over the sentence. This began a counter-protest from judicial circles as such action by Parliament would amount to encroachment into judicial independence. The wisdom of the Minister of Justice in a public statement quelled the situation. He said, inter alia:

> 'In terms of our constitution, the judiciary is independent from both the legislative and the executive. The principle of separation of powers and the independence is strongly entrenched in our constitution.'
>
> 'The judiciary as an organ of State had to be accountable in its actions, but this did not mean that judges should appear before a parliamentary committee to explain their judgments.'

These are just a few recent instances where judges have been taken to task by either disciplinary tribunals, appellate courts and the public when they abuse their judicial power. They undermine public confidence in the justice system.

Let me now say a few words about the propriety of one judge attacking another publicly within the same jurisdiction. The case of *Justice R K Nathan*

v Justice Gopal Sri Ram is an obvious case in point. The principles applicable to judicial freedom of expression would equally apply in such situations. That anything expressed should not adversely affect the dignity of their office as judges and the institutional independence of the judiciary. However, there is a further consideration. Appellate judges in the course of exercising their appellate jurisdiction in reviewing judgment of courts below do comment on the conduct of the judicial officer in the court below, where necessary, in addition to adjudicating on the correctness of the judgment. This is perfectly legitimate so long as, again, the comments and expressions do not offend the dignity of the judicial office.

Many of you will recall the case of *Liversidge v Anderson*[7] and the famous dissent of Lord Atkin. A comment he made in that dissent led Lord Maugham who presided at the hearing to write that controversial letter to the Times of London. Lord Maugham said:

> 'Lord Atkin, in his dissentient speech, stated that he had listened "to arguments which might have been addressed acceptably to the Court of King's Bench in the time of Charles 1". Counsel, according to the traditions of the Bar, cannot reply to so grave an animated version as this. I think it only fair to the Attorney General and Mr Valentine Holmes who appeared for the respondents, to say that I presided at the hearing and listened to every word of their arguments and that I did not hear from them or anyone else, anything which could justify such a remark'.

That letter triggered off a controversy. Feelings ran high. Lord Atkin's Inn Grays Inn in a telegram read 'Grays Inn prays your Lordship to answer Lord Maugahm's letter in Times'. That letter met with universal disapproval in the press. Lord Davies put the following question in the House of Lords legislative chamber:

[7] (1942) AC 206

> 'Whether they considered it to be in accordance with the high traditions of the judiciary and in the public interest that Law Lords should criticize each other through the medium of a newspaper'.

Lord Atkin refused to respond. Neither did he address the House of Lords. Lord Maugham did. As he was already then a retired judge no action was taken against him. There was no doubt that the conduct of Lord Maugham was severely criticised by all quarters[8].

Earlier in 1903 the Privy Council delivered its advice on an appeal from the Court of Appeal of New Zealand. It was a matter related to the Treaty of Waitangi. In the course of their advice the Privy Council deplored the Court of Appeal's lack of independence and subservience to the Executive. They were rather unusual remarks. This resulted in the Court of Appeal in New Zealand in an adjourned session presided by the Chief Justice to address these remarks of the Privy Council in defence of the integrity, dignity and independence of the judges who sat in the Court of Appeal. This was a collective action taken by the judges and the Bar of New Zealand to address those rather unusual remarks[9]. One cannot fault the judiciary and the Bar for that course of action in those circumstances.

There used to be instances in the Indian Supreme Court when judges took swipes at one another in their written judgments.

In the case of Justice R K Nathan and Justice Gopal Sri Ram the question to ask simply is whether the contents of the five pages he wrote about Justice Gopal Sri Ram and added on to a judgment in an unrelated case was proper and if improper whether his conduct was detrimental to the dignity of the office of a judge and the institutional independence of the judiciary. Or put in another way was his conduct an abuse of the immunity he enjoys as a judge from proceedings for anything said or done? As the expressions in those five pages

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[8] Lord Atkin by Geoffry Lewis, p 132.

[9] *Wallis & Others v Solicitor General* (Protest of Bench and Bar) 25 Apri1 1903 (1840-1932) NZ PCC APP 730.

had no relevance to the appeal before him in a personal injury case did he act within his jurisdiction or within his judicial power? Or even put it in another way did he abuse the insulations he is clothed with for the protection of his judicial independence? Another matter of concern is whether Justice R K Nathan was in contempt of the Court of Appeal. Certain words expressed in those five pages were intemperate in language, threatening and intimidating. He should know better in the light of the several contempt cases he tried. The ex-tempore judgment delivered by Justice Gopal Sri Ram was in effect the judgment of the Court of Appeal. It was ironic that it was an appeal from a decision of Justice R K Nathan on a contempt of court finding by him against a lawyer. The conduct of Justice R K Nathan and the procedure he adopted in that case, as set out in the subsequent written judgment of the Court of Appeal, could itself constitute a separate ground of complaint for misconduct. As said earlier it is common for appellate judges to comment on conduct of judges in courts below when reviewing their judgments which are on appeal before them. The New South Wales case I referred to earlier is a case in point.

Finally, it must be drawn home that with all the insulations judges have including immunity for whatever said or done they are not immune from the disciplinary process for misconduct. In the case of Justice R K Nathan, the final question to ask is whether he has been in breach of the Judicial Code of Ethics? Under Article 125 of the Constitution such a breach could result in removal. Looking at the expressions in the five pages they were in several aspects personal in nature. Could he be in breach of Rule 3(1)(C) of the Judges Code of Ethics which provides:

> ‘a judge shall not conduct himself in any manner likely to cause a reasonable suspicion that he has allowed his private interest to come into conflict with his judicial duties so as to impair his usefulness as a judge or he has used his judicial position for his personal advantage.’

These questions will continue to be asked. This is not the forum where they can be answered. Judges too are entitled to due process. The ramifications of this incident, which was given wide publicity in the media, on the institutional independence of the Malaysian judiciary can be far reaching. Its impact on the

judicial hierarchy within the Malaysian system of justice can also be far reaching. Can judges in the courts below be allowed to attack in such manner judges of the appellate courts for comments made during the appellate adjudicative process and get away with it? What is its effect on the public confidence in the system of justice?

This raises once again the need for a separate mechanism to receive complaints against judges. Though Malaysia has a constitutionally entrenched code of ethics for judges, breach of which could result in removal, yet there is not a mechanism to receive complaints, investigate and make appropriate recommendations to the competent authority. Further, the present constitutional procedure, access to which is very restricted, provide only for removal of a judge. But there is no procedure to deal with misconduct falling short of the sanction of removal. A code of ethics without an effective monitoring and enforcement mechanism will remain simply a set of pious platitudes. The Code of Ethics itself needs review.

In South Africa due to considerable public pressure the judges themselves drafted a legislation to provide for a complaints mechanism. In New Zealand after a complaint I investigated a couple of years ago and made my findings calling for a more formal judicial complaints procedure it now appears that the Attorney General has set up a committee headed by a former Prime Minister, Geoffrey Palmer, to consider and advise whether such a mechanism would be consistent with judicial independence. I have in my reports advised that such mechanisms are not inimical to judicial independence. In fact it will enhance and strengthen public confidence in the integrity and independence of the judiciary.

As stated earlier, all the insulations judges are provided with to protect their judicial independence and impartiality are founded on public policy. Public policy can change with times. The discerning public has high expectations of the judiciary. If judges by their performance and conduct do not meet those expectations the insulations will slowly but surely be whittled away, again, on grounds of public policy.

Finally, good judges do not fear public scrutiny of their performance and conduct. What they fear is the presence of bad judges amidst them in the system. Gross misconduct of one single judge remaining in the system without action being taken can tarnish the image of the entire institution including the image of individual judges in the system. It may be for this reason that the American Bar Association in its Model Code of Judicial Conduct (1990) has the following rule:

> '3(D)(1) A judge who receives information indicating a substantial likelihood that another judge has committed a violation of this code should take appropriate action. A judge having knowledge that another judge has committed a violation of this Code that raises a substantial question as to the other judge's fitness for office shall inform the appropriate authority.'

JUDICIAL APPOINTMENTS: WHO HAS THE LAST SAY

RAJA AZIZ ADDRUSE*

The Judiciary

When Malaya (as it then was) attained its independence in 1957, it inherited from the British a judiciary that was highly respected. It continued to enjoy that reputation even after it was Malayanised and after Malaysia was formed in 1963.

The judiciary became known to many parts of the world after this country hosted the Commonwealth Magistrates Conference in 1976. That Conference and other international law conferences which our judges frequently attended helped to foster close ties between Malaysian judges and judges from many parts of the world. Through their participation in these conferences and the knowledge gained from exchanging ideas with their foreign counterparts, Malaysian judges kept abreast of the latest development in the law.

Though generally regarded as conservative the judiciary had a reputation for independence and impartiality. Judges were looked up to as persons who were fair and just. The public held them in high esteem. There was never any accusation or suggestion made that any of them was corrupt or in any way dishonest, or had been improperly influenced in giving a decision. As with any other judiciary, judges made errors in their judgments; but judgments were carefully scrutinised on appeal to the Federal Court (then the intermediate appellate court). A party who still felt aggrieved could, subject to leave (if required) being obtained, appeal further to the Privy Council which was the final appellate tribunal. But such was the care taken by the Federal Court in dealing with the appeals that came before it that fewer and fewer litigants were appealing against its decisions to the Privy Council. When the yearly number

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consistently became so few, it was decided to discontinue appeals to the Privy Council. This was done in stages – at first in respect of criminal matters, a while later, in respect of constitutional law matters[1], and, finally, in respect of all other matters. With the abolition of appeals to the Privy Council, the Federal Court became the final court of appeal and was renamed as the Supreme Court[2].

The events of 1988

The reputation of the judiciary, built up over the years, was severely tarnished by the events of 1988.

In May that year, the Prime Minister made representations to the Yang di-Pertuan Agong that the then Lord President, Tun Mohd Salleh Abas, had committed various acts of judicial misbehaviour, thereby invoking the procedure provided under Art 125 of the Federal Constitution[3]. The charges leveled against Tun Salleh were generally regarded as politically motivated and tenuous. For some months prior to making the representations, the Prime Minister had, by his statements made in and outside Parliament, heavily criticised the judiciary and judges for various reasons. He was particularly incensed that the judiciary was construing laws in a manner not acceptable to him. By way of an example, he had, the year before, in moving a Bill to amend the Printing Presses and Publications Act 1984, condemned the judiciary in very strong terms, saying *that the amendments became more important because of* ***the inclination of certain sectors to use unwritten laws to obstruct the functions of the Government****; that* ***there were interested parties*** *who said that the purpose of any law made by Parliament had nothing whatsoever to do with the enforcement of the law; that the Act was being amended because the Government which*

[1] Courts of Judicature (Amendment) Act 1976 (Act A328), w.e.f. 1 August 1978.
[2] Constitution (Amendment) Act 1983 (Act A566), w.e.f. 13 May 1983.
[3] Art 125(3) 'If the Prime Minister …represents to the Yang di-Pertuan Agong that a judge of the Federal Court ought to be removed on the ground of misbehaviour….. the Yang di-Pertuan Agong shall appoint a tribunal … and refer the representation to it; and may on the recommendation of the tribunal remove the judge from office.'

represented the people was of the opinion that ***it was dangerous for the administration of the nation that the laws be interpreted according to the discretion of two or three people****.*

As required by Art 125, a tribunal to investigate the alleged misbehaviour was appointed by the Yang di-Pertuan Agong. The composition of the tribunal left grave doubts as to its independence and impartiality. The members were Tun Hamid Omar, then the Chief Justice of Malaya (as chairman); the then Chief Justice of Borneo; a judge who had retired some years earlier and who had been on the Federal Court Bench for just about one year; the Speaker of the Dewan Rakyat; the then Chief Justice of Sri Lanka and a serving judge from Singapore. The first two members mentioned were serving judges. Why the third member mentioned (the retired judge) was appointed in preference to retired Lords President of the Federal Court and other retired judges who had been on the Federal Court Bench for much longer periods, was a question the answer to which seemed obvious. Why the Speaker of the Dewan Rakyat, who was a politician, was appointed to be a member of a tribunal to investigate into alleged misconduct of the senior-most member of the Malaysian judiciary was another interesting question.

Then there was the question of the appointment of Tun Hamid as a member and as chairman of the tribunal. The Bar Council considered it to be highly improper. He clearly had a personal interest in the outcome of the tribunal's investigation because he stood to succeed Tun Salleh if he was dismissed by the tribunal. But Tun Hamid refused the Council's request that he resigned the appointment. He gave as his reason that he was obliged to obey the command of the Yang di-Pertuan Agong and was under a duty to accept the appointment[4].

His subsequent involvement in the suspension of the five judges of the Supreme Court, who had granted Tun Salleh an interim order to restrain the tribunal from submitting its report to the Yang di-Pertuan Agong, cast further

[4] 'I accepted my position in the tribunal because I was appointed under the Constitution. It was in fact a command by the King …. no subject will dare disobey the [the King]' – per Tun Hamid Omar in an interview published in Judicial Misconduct by Peter Aldridge Williams QC [1990], at p 216.

doubt on his ability to be impartial and fair in the investigation into Tun Salleh's alleged misbehaviour: the interim order had to be applied for in the face of the inordinate delay on the part of a judge of the High Court to come to a decision on Tun Salleh's application for leave to apply for an order of prohibition against the tribunal and its members. Although a party to the proceedings in the High Court and the Supreme Court, Tun Hamid insisted that he, and not the next most senior judge of the Supreme Court, had the right to empanel the judges of the Supreme Court to hear the application. What Tun Hamid was insisting on seemed to most lawyers to be at odds with established principles: he was seeking to be a judge in his own cause. But that did not seem to concern him.

Be that as it may, the five judges were suspended from office following his representations to the Yang di-Pertuan Agong that the five judges had convened an illegal sitting of the Supreme Court[5]. The Yang di-Pertuan Agong constituted another tribunal under Art 125 to investigate into the alleged misbehaviour of the five judges. The composition of the second tribunal, too, left much to be desired. As with the first tribunal, the retired Lord Presidents and retired Federal Court judges who could have been appointed, were not chosen. The Malaysian judges chosen (there were four out of the six members of the tribunal appointed), were comparatively junior judges. The most senior of the four voluntarily recused himself from the tribunal for possible bias on objection taken by the suspended judges. Looking at the way the Malaysian members of the tribunal were chosen, the independence and impartiality of the second tribunal was also suspect.

Those who followed the events of 1988 closely, or were in some way involved in the defence of Tun Salleh or the five judges, had a good idea of what was to befall the judiciary in the years to come. Tun Hamid's open disregard of principles designed to ensure fairplay and fairness and the way Tun Salleh and the five judges were dealt with was bound to erode confidence in the judiciary and in those Malaysian members of the tribunals who were serving judges.

[5] Federal Constitution, Art 125(5).

Almost immediately after the five Supreme Court judges were suspended, the Malaysian Bar passed a resolution calling for Tun Hamid's removal from being a judge or for him not to be appointed the next Lord President of the Supreme Court in the event of Tun Salleh's dismissal. The stand taken by the Bar was later proved justified when the report of the Tun Salleh tribunal showed how it had failed to observe acceptable standards of proof in conducting its investigation. Its report was widely condemned. The Lawyers Committee for Human Rights, an organisation based in New York which sent its representatives to Malaysia on a fact-finding mission into the events of 1988, said:

> 'The Tribunal admitted that its recommendation might have been different had Salleh agreed to appear, an alarming admission given the severity of the charges and the Tribunal's purported role as a fact-finding, not a prosecutorial, body.'[6]

Writing in the London Observer, Geoffrey Robertson, QC, said:

> 'In a matter of such gravity, to acknowledge that the man found guilty of misbehaviour may well be innocent is an approach which exhibits a deplorable disregard for proper legal standards of proof.'[7]

Tun Salleh was dismissed from office. So were two of the five suspended judges.

The Judiciary after 1988

As was expected, the vacancy created by the dismissal of Tun Salleh was filled by Tun Hamid. With his appointment, the judiciary was seen no longer to be independent. Respected judges who had expressed their concern over the action taken against Tun Salleh were either transferred out of Kuala Lumpur or were sidelined. Seniority and merit were no longer the essential factors to be taken

[6] *Malaysia: Assault on the Judiciary* by the Lawyers Committee for Human Rights.
[7] *The Observer*, 28 August 1988.

into account for promoting High Court judges to the Supreme Court. Many judges were promoted over others who were more senior to them, and more deserving.

While appointments from the Judicial and Legal Service were still based on seniority and merit, those from the Bar were selected by the new Lord President in exercise of his absolute discretion. Stung by the resolution passed by the Bar censuring him, the Lord President no longer consulted the chairman of the Bar Council or other senior members of the Bar on the suitability of candidates he proposed to recommend for appointment. To overcome the stricter standards which members of the Bar had to meet for appointment to the High Court Bench, the Federal Constitution was amended in 1994 to allow for the appointment of judicial commissioners 'with power to perform such functions of a judge of the High Court as appear to him to require to be performed ...'[8]. Normally appointed on contract for an initial term of two years, a judicial commissioner would thereafter be recommended for appointment as a judge of the High Court if found to have served satisfactorily. The recommendation to the Prime Minister would be made by the Lord President; and it was he who had to be satisfied.

No one knows what the criteria adopted are. Given that he is a judge 'on trial' during his 'probation' period, and without any security of tenure, the ability of a judicial commissioner to be independent and not to be influenced by personal consideration in making judicial decisions, is questionable. Most of the judges who were appointed after 1994 (after the amendment to the Constitution) came to the High Court Bench through this indirect route.

But the deterioration in the judiciary had been noticed much earlier. Soon after being appointed, the new Lord President set dates for the Supreme Court to hear cases which were regarded as 'sensitive' politically. The coram would comprise himself and two or four other judges who were aligned to him. The three suspended judges of the Supreme Court who had been exonerated by the second tribunal and who were more senior and had greater experience as Supreme

[8] Federal Constitution, Art 122AB, in force from 24 June 1994.

Court judges were left out. The outcome of those cases was predictable. In a highly political matter, the minority judgment of the Supreme Court of India was adopted to justify the court's decision when the judgments of the Indian judges who made up the majority were better-reasoned[9].

Beginning with only cases involving a political element, the courts' lack of impartiality was seen to gradually infect other cases as well. Certain parties seemed invariably to get their way in the courts. Rumours of certain judges having close associations with litigants began to surface.

The already tarnished image of the judiciary became worse after Tun Eusoff Chin succeeded Tun Hamid as Chief Justice of Malaysia[10], upon the latter's retirement. Unsuited for the post, Tun Eusoff gave full reign to his favourite judges to do as they liked. During his leadership, plaintiffs in defamation cases were allowed to specify the amount of damages they expected to get – in one case totaling to more than one hundred million Malaysian Ringgit. Judges did not seem to consider this new practice repugnant to the right to free speech and press freedom. Having plaintiffs state the amounts they claimed would, so it was held, enable defendants to know the limit of their liability, a somewhat shocking legal proposition even to a layman. This practice had a knock-on effect: it became the fashion of the time for any claim for damages (not necessarily for defamation) to specify 'mega' amounts. In a few claims for defamation, damages of one million Malaysian Ringgit were actually awarded, based purely on the judge's subjective view that the plaintiffs had been put to 'odium, ridicule and contempt', as if reciting that phrase, without more, justified the exorbitant awards. When it became so obvious that things had got out of control, the minister of government in charge of law felt compelled to speak out publicly against the award of these 'mega' sums. But that did little to improve the situation, due to his having somewhat resiled from the stand he had taken, which was apparent from his later conciliatory statements.

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[9] *Dewan Undangan Negeri Kelantan v Nordin bin Salleh* [1992] 1 MLJ 697, SC.

[10] The new title given to the post of the Lord President after the establishment of the Court of Appeal in 1994. The Court of Appeal is an intermediate appellate court to which appeals from the High Court are first directed.

Some of the judges of the High Court became a law unto themselves. Lawyers appearing in court ran a real risk of being committed for contempt for the slightest perceived disrespect. The chairman of the Bar Council at the time was warned in open court that he would be committed for contempt of court if counsel appearing for the Council did not withdraw an authority which had been cited in support of an application made to the judge to recuse himself from hearing a matter: the matter concerned a proposed extraordinary general meeting of the Malaysian Bar to discuss the improper conduct of the Chief Justice, Tun Eusoff, which a member of the Bar had sought to restrain. In spite of his having decided against the Council and the Malaysian Bar on another matter involving almost similar issues and the same parties, the judge refused to disqualify himself from hearing the matter.

The law was being used to empower some judges to act with impunity. The High Court restrained the Malaysian Bar from proceeding to hold the two extraordinary general meetings mentioned, holding that discussing the allegations would subject the members of the Bar attending to prosecution for sedition or to committal for contempt of court, and that the Bar Council was acting *ultra vires* the Legal Profession Act 1976 in convening the meetings. An appeal against one of the decisions to the Court of Appeal was dismissed on the ground that the conduct of judges could not be discussed except in Parliament or in relation to an investigation by a tribunal appointed under Art 125 of the Constitution. An application for leave made to the Federal Court, to appeal further to that court, was dismissed as being without merit, notwithstanding the important constitutional issues raised, including the novel principle enunciated by the Court of Appeal. It would seem that the Chief Justice was being shielded from public scrutiny by some of his judges in the High Court who were normally assigned to hear them. The courts were being used to stop the Bar discussing the acts of impropriety alleged against the Chief Justice.

During the period Tun Eusoff was the Chief Justice, some High Court judges would insist that cases fixed for hearing before them took priority over cases fixed for hearing on the same dates before the Court of Appeal or the Federal Court. It was for counsel involved to apply for the matter in the appellate

court to be adjourned. Some judges reigned supreme: they were allowed to do so.

A fact-finding mission[11] which came to Malaysia to examine the relationship between the Executive, the Bar Council and the Judiciary, found that while there was no complaint about the independence of the judiciary in the vast majority of cases which came before the courts, there were, in cases considered to be of political or economic importance to the Executive, serious concerns that the Judiciary was not independent, and that this perception was also held by members of the general public. In its report[12] the mission urged the government to recognise the independent constitutional position of the judiciary and not to interfere with this independence in any way. It referred to the defamation proceedings instituted against Dato Param Cumaraswamy, the UN Special Rapporteur on the Independence of Judges and Lawyers, and called on the Malaysian government and courts to heed the opinion of the International Court of Justice by affirming the immunity of the Special Rapporteur. It found the awards of damages in defamation cases to be of such magnitude as to be a means of stifling free speech and expression. It further cited the use of contempt proceeding against lawyers practising their profession as a serious obstacle to their ability to render their services freely. The report made the following, among other, recommendations:

- that the government should recognise the independent constitutional position of the judiciary and not interfere with this independence in any way;
- that the Judiciary should act and be seen to act with complete independence from the Executive;
- that the choice of judges in high profile cases be carefully considered;

[11] The mission comprised representatives of the International Bar Association, the Centre for the Independence of Judges and Lawyers of the International Commission of Jurists, the Commonwealth Lawyers' Association and the Union Internationale des Avocats.
[12] *Justice in Jeopardy: Malaysia 2000.*

- that the Executive should refrain from speaking publicly about a trial before judgment has been delivered.

The government's immediate and expected reaction was to refute the findings of the fact-finding committee. But it was impossible to deny what was true: repeated denials could not make what was true false. What the report said was true and that had eventually to be acknowledged. The current Chief Justice, after coming into office, admitted that the judiciary was at its lowest ebb, a fact which everyone had known for quite some time.

Appointments: Who has the last say?

The procedure for appointing judges had remained the same as when this country gained its independence. The amendments which have been made to the relevant provisions of the Federal Constitution from time to time have been in the nature of modifications necessitated by the creation of Malaysia in 1963, by the separation of Singapore from Malaysia in 1965 and lastly by the creation of the Court of Appeal. Essentially, a person is eligible for appointment as a judge of the Federal Court, the Court of Appeal and any of the High Courts (of Malaya or Borneo) if he is a citizen and has for the ten years preceding his appointment been an advocate of those courts, or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another[13].

All judges are appointed by the Yang di-Pertuan Agong acting on the advice of the Prime Minister[14]. Before tendering his advice on the appointment of judges other than the Chief Justice, the Prime Minister is required to consult the Chief Justice[15]. For the appointment of the Chief Judge of a High Court (of Malaya and of Borneo), and of judges of the Court of Appeal and of each of the High Courts, the Prime Minister has also to consult the respective heads of

[13] Federal Constitution, Art 123.
[14] Ibid, Art 122B(1).
[15] Ibid, Art 122B(2).

those courts[16]. The Prime Minister is, however, not obliged to consult anyone when advising on the appointment of the Chief Justice.

Until the events of 1988, the procedure worked well. Previously the Prime Minister's advice on the appointment of judges other than the Lord President was given after consulting the Lord President. He would be the best person to know, from observation, which senior member of the Bar was suitable for appointment. As Lord President, Tun Mohamed Suffian made it a practice to himself consult the chairman of the Bar Council and very senior members of the Bar to sound them on proposed appointments. In one or two cases, the persons thought suitable were not recommended after the Lord President was informed of pending disciplinary proceedings against them. The informal consultation gave a certain measure of assurance that only persons of good character who had the respect of the Bar and whom the Lord President considered competent and suitable would be appointed as judges. In practice the Prime Minister accepted the recommendation of the Lord President and would advise the Yang di-Pertuan Agong accordingly.

The very same procedure was used after Tun Salleh was dismissed in 1988 – but for a very different purpose. The practice of informally consulting the Bar Council was discontinued, possibly because many of the persons sought to be appointed would not have been considered to be suitable by the Bar: many did not have the seniority or experience. But their appointment was nevertheless recommended by the Lord President, not as judges but as judicial commissioners. Even when subsequently confirmed as judges, they lacked the stature of judges appointed directly to the High Court.

If public confidence in the judiciary is to be restored, the practice of appointing judicial commissioners should be discontinued. Although empowered to perform the functions of a High Court judge, judicial commissioners do not have the security of tenure necessary to ensure their independence. Courts of other jurisdictions have struck down decisions made by acting or temporary

[16] Ibid, Art 122B(4); but see Art 122B(3) for appointment of a Chief Judge of the High Court.

judges precisely on that ground. The appointment of judicial commissioners is not consistent with the requirement of an independent judiciary.

From the experience gained since 1988, the procedure for appointing judges as provided by Art 122 is clearly no longer appropriate. The authority which tenders the advice to the Yang di-Pertuan Agong has to be one which is independent of the Executive, and impartial. The establishment of a Commission to recommend appointments may be the answer. The Commission should have among its members the Chief Justice of the Federal Court, the Attorney-General and representatives of the judiciary and the Bar. Including two members of the public would promote transparency. How and by whom the two members of the public are to be chosen will be a problem, but not an insurmountable one if the desired objective is to have the judiciary back on even keel and regain public confidence.

It is premature to go into details regarding the sort of quality, level of experience and competency which a person should have to be eligible for appointment. A number of countries have laid down their requirements for judicial appointment. These can be used as the basis for laying down our own standards.

SESSIONS REPORT ON 'JUDICIAL APPOINTMENTS: WHO SHOULD HAVE THE SAY?'

by Lim Cheow Wee*

Speaker: YM Raja Aziz Addruse

Panellists : The Hon Mr Justice Alex Chernov
Dato' Param Cumaraswamy
YM Raja Aziz Addruse

Chairman : Tan Sri Dato' Azmi Kamaruddin

Introduction

The session started at 11.00 am with the Chairman's speech on the illustrious career of the Speaker, YM Raja Aziz Addruse.

The Chairman commented that the topic of appointment of judges should include the area of selection of judges.

He further noted that our Constitution does not provide any mechanism for such selection.

Speech

The Speaker raises the question as to why we need to raise the issue of appointment of judges 45 years after independence.

He went on to speak on the history of the judiciary which was inherited from the British system. It used to be the case that the judiciary was highly respected.

Essentially, a judge is appointed by the Yang DiPertuan Agong after the recommendation of the Prime Minister in consultation with the Chief Justice of Malaya.

The Speaker opined that our judges command respect by their counterparts in other countries through their participation in international law conferences.

Similarly the public held the judiciary in high esteem.

It was no surprise that the practice of appealing to the Privy Council (PC) was discontinued as the performance of the Federal Court was such that fewer cases were appealed to the PC.

In 1988, in what was termed as the Executive assault on the judiciary left a black mark in the history of our judiciary .The Speaker stated that the assault started long before the 1988 event took place. The Speaker then read an excerpt from his paper on page 2 on the speech made by the PM in moving a Bill to amend the Printing and Publications Act 1984.

The Speaker then elaborated on the events of May 1988 where the PM under Article 125 of the Federal Constitution made a representation to the Yang DiPertuan Agong to dismiss the Lord President on the ground of misbehaviour.

A Tribunal was set up comprising of the Speaker of the Lower House, the Chief Justice (as Chairman of the Tribunal) who was next in line in the hierarchy in the event the LP was dismissed, CJ of Borneo, a retired judge, the Chief Justice of Sri Lanka and a judge from Singapore.

The Bar Council sent a delegation to see Tun Hamid Omar to request him to decline the appointment but Tun Hamid refused on the ground that it was a Royal command.

Five Judges who had granted an interim order to restrain the Tribunal from submitting the report to the King were subsequently suspended.

The public began to question the integrity of Tun Hamid.

The Speaker then read an excerpt from page 5 of his report on the observation made by the Lawyers Committee for Human Rights and also comments by Geoffrey Robertson, QC.

More questionable events took place after the appointment of Tun Hamid viz two 'sensitive' cases were fixed early for disposal.

Tun Hamid also stopped the practice of consulting senior members of the Bar on suitability of candidates for appointment to the Bench.

A new practice was adopted where certain members were appointed as Judicial Commissioners solely on the discretion of the new LP.

The Speaker further commented that the practice of holding Counsels in contempt of court became rampant which led Tun Suffian to lament that the condition of the judiciary is such that he is afraid to appear before the judges especially if he is innocent.

The Judiciary was certainly seen to be at its lowest ebb when the new LP took over.

The Bar Council on the other hand could not discuss such issues because there would be a member of the Bar who would apply for an injunction to stop such meetings on the basis that it would be seditious.

The Court of Appeal in one of the cases even opined that the only way to discuss the conduct of the judges is in the Parliament.

***What is then to be done*?**

The procedure of appointment which was suitable prior to 1988 is now no more applicable.

The Speaker proposed the set up of a Judicial Service Commission comprising members who are impartial. However he warned that it all depends on the political will of the present government because without its support it will serve no useful purpose.

(The speech ended at 11.50 am.) The Chairman then invited the floor to address the panellists.

Ms Chew Swee Yoke from the KL Bar commented that the attendance at this colloquium reflects the moral fatigue experienced by the Bar. She queried as to whether there can be a check and balance by foreign judiciary.

Justice Alex replied that the appointment of QC for instance has always been an absolute mystery and no one is happy with how selection is done sometimes. However he cautioned that foreign judiciary is always slow and reluctant to interfere in other jurisdictions.

Mr Ngan Siong Hing from the Perak Bar then commented that the local judiciary has gone backwards. He asked 'how do we make the judges realise that they are human being as well'

Dato' Param replied that the trend in more jurisdiction is towards transparency and gave the example of Philippines where there is an independent mechanism to appoint judges. He was of the view that it is a reasonably good system. This is also done in Quebec but there the AG has too much say. He stated that the international standard for selection must be an objective one. In England there is a proposal to set up a Performance Commission to evaluate judges' performance. Judges are expected to have the highest quality and they are to set the highest standard of how people in a society should behave between themselves.

Ms Angie Ng from KL Bar then added that the public's attitude towards what is going on in the judiciary is sad.

The Chairman interjected by saying that judges are human beings too. He was most concerned if a judge does not listen or refuse Counsels to submit in court.

Justice Alex then stated that it is the duty of the Bar to persistently and consistently pursue a satisfactory system of selection of judges.

Mr Yeo Yang Poh from the Johor Bar likened going to the court like going to a tennis game. He feels that the Bar must take a practical step, ie by making the environment better which will eventually improve the judicial temperament. He suggested that we should set up a system where observers are sent to sit in the courts in all states. He further supported Ms Chew's proposal that international measures should be implemented.

Ms Chew Swee Yoke then voiced that a lot of unhappiness amongst the judges in the recent elevation. She questioned as to how does the mechanism really work. She disagreed with Justice Alex's view that a foreign country should not interfere in another country's appointment.

The Chairman reiterated his view that one must make sure that the No. 1 judge is suitable and the rest will follow suit.

Dato' Param then added that at a meeting of the Bar two years ago, the conduct of a particular judge was discussed and he had proposed that lawyers submit their report on judges which they had encountered in their daily attendances at court. The Bar then should prepare a dossier and submit the same to the CJ.

The talk ended at 12.45 pm with words of thanks to the Speaker and panellists.

THE IMPORTANCE OF JUDICIAL REVIEW

DR VENKAT IYER*

Introduction

When Professor Bernard Schwartz published his book, *Law and the Executive in Britain: A Comparative Study* in 1949, an English reviewer noted that American administrative law was so much more developed than the British that there was little for the American lawyer to learn from the British experience – except to be on guard against a weakening of judicial control[1]. This was shortly after the House of Lords' famous – or infamous, depending on one's point of view – judgment in *Liversidge v Anderson*, which had led one English High Court judge to observe that, contrary to Bacon's famous aphorism that judges were lions under the throne, 'the House of Lords has reduced us to mice squeaking under a chair in the Home Office'[2].

But by the time Professor Schwartz had published another study of English administrative law, *Lions Over the Throne* in 1987, the situation had changed dramatically, so much so that in Professor Schwartz's view, 'Americans now have more to learn from the English system than vice versa"[3]. This change was hailed by English judges too, with Lord Diplock observing in 1982 that the upsurge in judicial activism was 'that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime'[4].

In retrospect, it is amazing how much change was brought in about a relatively short space of time by judges acting without any written constitutional

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[1] Harry Street, Book Review, (1950) 59 *Yale Law Journal* 590 at 593.

[2] Justice Wintringham Stable, quoted in *The Economist*, 11 August 1984, p 14.

[3] Schwartz, *Lions Over the Throne*, New York: New York University Press, 1987, at 2.

[4] *R. v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617 at 641.

foundation. In the area of natural justice, for example, as Professor William Wade has noted, British judges were able – following the House of Lords' landmark judgment in *Ridge v Baldwin* – to provide 'a base on which to build a kind of code of fair administrative procedure, comparable to [the American concept of] "due process of law" '[5].

The increasing importance attached to judicial review by English judges was explained, extra-judicially, by Lord Browne-Wilkinson a few years ago in striking language. Noting that judicial review had become 'one of the most socially important and legally fertile areas of the law', he said:

> 'Its social importance is self-evident. Growth in executive interference in the lives of individuals, inevitable in a modern state, has exposed us all to the risk that executive power may be exercised in an unbridled or abusive manner. If, as some thought, the common law had proved so senile and impotent that it could not develop to meet this change in society, the rule of law would not have regulated administrative action. Governments are not notorious for introducing legislation which limits their own powers. Happily, the common law has proved to be fertile not impotent.'[6]

Need for judicial assertiveness

Just how far a judge should go in his exercise of the judicial review function has, quite clearly, occupied centre-stage in the frequent debates on judicial review. The tension between those who favour moderation and those who believe in a more activist stance has been palpable. In his powerful dissent in *New York v United States*[7], Justice Douglas of the US Supreme Court underlined the need for judicial assertiveness as follows: 'Unless we make the requirements

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[5] Wade, *Administrative Law*, Oxford: Oxford University Press, 5th ed, 1982.
[6] Lord Browne-Wilkinson, Foreword to Supperstone & Goudie, *Judicial Review*, London: Butterworths, 1992.
[7] 342 US 882, 884 (1951).

for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty'.

Similar sentiments have been expressed by judges on this side of the Atlantic as well[8], highlighting the indispensability of judicial review to the rule of law. Arguably, the high point of judicial activism in England in recent years was the House of Lords' decision in *Anisminic*[9], with which, of course, you are all familiar. The effect of that judgment was best summed up by Wade as follows: '(It) is tantamount to saying that judicial review is a constitutional fundamental which even the sovereign parliament cannot abolish'[10].

Probably predicting the uproar which followed *Anisminic,* one of the judges, Lord Wilberforce, was at pains to squash the criticism that *Anisminic* represented a crusade by the judiciary against Parliament. 'The courts, when they decide that a "decision" is a "nullity", are not disregarding the preclusive clause … they are carrying out the intention of the legislature, and it would be a misdescription to state it in terms of a struggle between the courts and the executive'[11].

This has of course not stopped ministerial criticisms of the judges when they are seen to be too interventionist. Not so long ago, for example, a former Home Secretary, Michael Howard, complained that although judicial review had 'started as a valuable exercise in limiting arbitrary exercise of ministerial powers', it had, following its expansion over the years by activist judges, 'begun to substitute government by unelected judges for government by elected ministers'[12].

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[8] See, eg the remarks of Lord Justice Farwell in *R v Shoreditch Assessment Committee, ex p Morgan* [1910] 2 KB 859 at 880.
[9] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
[10] Wade, *Administrative Law*, supra note 5, at 606.
[11] *Anisminic,* supra note 9, at 208.
[12] *The Times* (London), 1 Dec 2001.

Judicial review in England has indeed expanded quite considerably in recent years, not only, as Michael Beloff has noted, 'within traditional, but into new areas, eg the exercise of prerogative powers, the contractual activities of statutory bodies with a public dimension, and the "public law" functions of bodies without a statutory or prerogative basis'[13]. An example of the current reach of judicial review can be seen from the fact that the courts are now prepared to entertain claims based on legitimate expectations not only of a procedural nature but also of a substantive character. In *Coughlan*[14], for instance, the Court of Appeal held that where a local health authority had promised a disabled person that specially adapted accommodation provided to her would be her 'home for life', it could not subsequently decide to move her into another kind of accommodation.

In recent years, English judges have taken a particularly activist approach in judicial review cases involving civil liberties. This is not only because of the United Kingdom's accession to the European Convention on Human Rights, though that is a factor which cannot be ignored – especially now that the Convention is part of British domestic law. As far back as 1987, the House of Lords ruled that administrative decisions involving fundamental rights would call for 'the most anxious scrutiny' of judges[15] – a view which has informed many subsequent decisions[16].

By and large, the government has taken these developments in its stride. Indeed, a few years ago it even published a small booklet entitled *The Judge over Your Shoulder* to assist civil servants cope with the increasing demands of judicial review.

And how has the judiciary justified this more activist approach on its part? By arguing, as one of the Court of Appeal judges, Lord Justice Keene,

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[13] Michael Beloff, 'Judicial Review – Is it Going Too Far?' in (2002) 10:2 *The Commonwealth Lawyer* 15, at 15-16.
[14] *R. v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.
[15] *Bugdaycay v Home Secretary* [1987] 1 All ER 940 (per Lord Bridge of Harwich).
[16] See, eg *R. v Home Secretary, ex p Brind* [1991] 1 AC 696.

did in a lecture recently, that 'it is the classic task of the courts in a democracy to protect the rights of the individual citizen, sometimes against the majority ...The fact is that a modern liberal democracy is not only about government according to the wishes of the majority. It is also based on certain fundamental human rights, which are not automatically protected by majority rule'[17].

Dangers of judicial 'excessivism'

Unsurprisingly, judicial activism has not been entirely free of controversy. Strong concern has been expressed by many a commentator about the dangers of judges overreaching themselves and trespassing into the territory of elected government. The problem, of course, is depressingly familiar: where does the province of the courts end and that of the elected representatives begin?

Some years ago, Lord Justice Laws tried to offer a solution by drawing a distinction between 'positive rights' and 'negative rights', and suggesting that it is the job of judges to ensure that negative rights are respected, while positive rights are 'the stuff of political debate' for which constitutional responsibility rests on the shoulders of elected politicians. By negative rights he meant 'the means by which man's individual sovereignty is translated into law', ie protection of the individual's autonomy from capricious interference. By positive rights, he meant 'choices between education, health, defence, and many other goals argued with all the rancour and asperity of party politics between honourable people, whose perceptions of how the morality of aspirations may be fulfilled honestly and (save at the extremes) reasonably differ ...'[18]

The learned judge expanded on those views a year later by adding the following reflections:

[17] Lord Justice Keene, 'Lions or Squeaking Mice?', lecture delivered at the Institute of Advanced Legal Studies, University of London, 12 June 2002.
[18] John Laws, 'The Constitution: Morals and Rights', [1996] *Public Law* 622.

> 'Manifestly it could not be suggested that the courts could arrogate to themselves new prerogatives of their own: the judges cannot cause motorways to be built or taxes to be imposed. The judges must of course adjudicate upon issues placed before them in legal proceedings; their function is necessarily, therefore, reactive and not proactive. Equally, nothing in the approach I have set out should be taken to suggest that the judges are free, in dealing with the decisions of subordinate bodies, to follow mere whim or inclination.'[19]

To this one might add, if regard is had to the reality in some jurisdictions, that judges should not act on the basis of a desire to curry favour with politicians either, but then in bringing this factor into the equation we are straying into the rather risky territory of human behaviour, about which, alas, there is only so much that the law can do.

There is certainly much that can be learnt from the experience of jurisdictions where judicial activism has passed into what one writer has called judicial 'excessivism'[20]. India stands out as a prime example of this unfortunate development. There, courts have assumed competence over an amazing array of public activity: they have given directions as to the width of a road giving access to a building[21], asked a State to pass legislation to prevent ragging of college students[22], revoked the limit that had been put on the expenditure on drugs in a mental hospital[23], laid down guidelines for inter-country adoption of children[24], prescribed the qualifications for drivers of buses belonging to or hired by educational institutions[25], and so on.

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[19] John [13] Michael Beloff, 'Judicial Review – Is it Going Too Far?' in (2002) 10:2 *The Commonwealth Lawyer* 15, at 15-16.
[14] *R. v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.
[15] *Bugdaycay v Home Secretary* [1987] 1 All ER 940 (per Lord Bridge of Harwich).
[16] See, eg *R. v Home Secretary, ex p Brind* [1991] 1 AC 696.[8] See, eg the remarks of Lord Justice Farwell in *R v Shoreditch Assessment Committee, ex p Morgan* [1910] 2 KB 859 at 880.
[9] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
[10] Wade, *Administrative Law*, supra note 5, at 606.
[11] *Anisminic*, supra note 9, at 208.
[12] *The Times* (London), 1 Dec 2001.

[13] Michael Beloff, 'Judicial Review – Is it Going Too Far?' in (2002) 10:2 *The Commonwealth Lawyer* 15, at 15-16.
[14] *R. v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.
[15] *Bugdaycay v Home Secretary* [1987] 1 All ER 940 (per Lord Bridge of Harwich).

Commenting on this runaway development of judicial review, Lord Bingham noted that any non-Indian lawyer would be struck by 'the court's active acceptance of responsibility for the pursuit of objects well outside the bounds of conventional litigation'[26]. Others have put it much less charitably. The author of one recent study on the subject, Professor S P Sathe, concluded that 'the court has encroached upon the sphere allotted to the legislature ... and made populist declarations of rights'[27] – rights, that is, which Parliament, in its wisdom, chose not to legislate upon.

India is by no means the only country where this has happened. One may also question some of the recent orders of the South African courts which fall little short of judicial legislation. I am thinking particularly of cases such as *Grootboom*[28](in which the Constitutional Court ordered the government to provide housing to homeless people despite the relevant constitutional provision making the right to housing subject to resources being available), or *Minister for Health v Treatment Action Campaign*[29] (where the court ruled that the state was obliged to provide all pregnant women the anti-retroviral drug, nevirapine, regardless of the huge costs involved and despite the right to health care also being qualified by a 'subject to the availability of resources' clause).

Such interventionism certainly has a superficial appeal, because, as one commentator noted, 'the cause of the dispossessed and the disadvantaged is a compelling one', but it is worth remembering that equally, 'neither the justice of their cause nor the past jurisprudence of the courts warrants assigning the third branch of government ultimate power over the purse'[30]. In the long-term an excessive zeal in interfering in matters of high policy can only lead to a serious questioning of judicial legitimacy.

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[26] Tom Bingham, *The Business of Judging*, Oxford: Oxford University Press, 2000, at 123.
[27] S P Sathe, supra note 19, at 159.
[28] *Govt of the Republic of South Africa & Ors v Grootboom* & *Ors* (2000) 11 BCLR 1169 (CC). See also earlier judgment of the High Court in this case, *Grootboom v Oostenberg Municipalily* (2000) 3 BCLR 277 (C).
[29] Judgment dated 5 July 2002, accessible at < *www.tac.org.za*>.
[30] David Beatty, 'The Last Generation: When Rights Lose Their Meaning' in D Beatty (ed), *Human Rights and Judicial Review*, Dordrecht: Martinus Nijhoff, 1994, at 352.

Conclusion

When all is said and done, the fact remains that judicial review has proved to be a very useful and very effective instrument of democratic constitutionalism in many jurisdictions. It has often made up for legislative inaction or served as a bulwark against an overbearing executive. But it would be unwise for any society to rely exclusively on the capacity of the courts to protect it from all the evils of our time. As the author of one of the earlier books on judicial review pertinently noted:

> 'In the end, the preservation of national minimum standards of constitutional liberties and the Rule of Law generally must rest on public opinion and on political action expressed through the ordinary political processes; and no amount of judicial liberalism can be expected to fill the gap in constitutional law created by a combination of weak or timorous executive-legislative authority and an apathetic and indifferent, or downright intolerant, general public.'[31]

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[31] Edward McWhinney, *Judicial Review*, Toronto: University of Toronto Press, 1969, at 262.

'LIFE' UNDER ARTICLE 5: WHAT SHOULD IT BE?

DATO' DR CYRUS V DAS*

Article 5(1)
No person shall be deprived of his life or personal liberty save in accordance with law.

Article 8(1)
All persons are equal before the law and entitled to the equal protection of the law.

A clear distinction must be made between a written constitution on the one hand and the principle of constitutionalism on the other. The first like any written document falls to be interpreted according to the fashion chosen by the interpreter. The second is an ideal and a goal. It embodies the very concept of the rule of law that ensures that all persons are subject to law and equal protection of the law. In this respect the written constitution becomes the *grundnorm* or basic law to which all legislative and executive action are subject.

It was the clear intention of our constitution framers that the Federal Constitution should be the *grundnorm* of the land. Thus Art 4 was enacted to declare that the Federal Constitution is the supreme law of the Federation and all laws passed thereafter which are inconsistent with it shall to the extent of the inconsistency be void.

However, the question is to what extent has performance matched promise? Is the Federal Constitution today a living dynamic document that guarantees the rule of law to all persons and affords them the fundamental liberties guaranteed by it?

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As Professor Jain observed 'a country may have a constitution but not necessarily constitutionalism'[1].

The dynamism of a constitution ultimately revolves around the interpretation given to its provisions. As Chief Justice Hughes of the US Supreme Court observed a long time ago 'we are under a constitution but the constitution is what the Judges say it is'[2].

It is therefore left to the Judges when interpreting the Constitution to strike the right balance between the State and the individual and to ensure individual rights are not sacrificed at the mighty altar of the State.

It comes down ultimately to a consideration of the principles that animate the interpretation of the fundamental rights provisions of a written constitution.

The age-old contest has been between the literalist and pedantic approach on the one side and the generous liberal approach on the other. This challenge had engaged the attention of nearly all the courts of the Commonwealth at some time or the other.

In the new Commonwealth, development and greater awareness of legal rights had brought with it a higher expectation of the constitution as a charter protecting life and liberty in all its manifestations.

For example in India, with its unique record of constitutional development through case law, there was a 30-year span between *Gopalan* [1950][3] and *Maneka Gandhi* [1978][4]. *Gopalan* had propounded the narrow lexicographic approach in intepretating fundamental rights provisions of the Indian Constitution. It held the field for three decades. It was jettisoned by the Indian Supreme Court in *Maneka Gandhi's* case which took the dynamic approach

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[1] See M P Jain, *Indian Constitution Law*, 4th Edn, 2001, at p 836.
[2] Ibid, at p 834.
[3] *A K. Gopalan v Madras* [1950] SCR 88.
[4] *Maneka Gandhi v Union of India* AIR 1978 SC 597.

that rights must be given an expansive interpretation, and that the State should be denied arbitrary power[5].

In this regard it is significant to note the radical change in the attitude of the Privy Council towards the construction of constitutions and constitutional instruments. It underwent a sea-change from the position taken in the colonial era to the approach after independence.

In two significant decisions, the Privy Council stipulated the proper approach to be taken in the interpretation of the fundamental rights provisions of a written constitution based on the Westminster model. First, in *Hinds v The Queen*[6], the Privy Council decried the approach of interpreting a constitutional instrument by applying the canons of construction applicable to ordinary legislation. Later in *Minister of Home Affairs v Fisher*[7], Lord Diplock propounded the theory that a written constitution based on the Westminster model was a 'document *sui generis* calling for principles of interpretation of its own' and said further that it called 'for a generous interpretation avoiding the austerity of tabulated legalism, suitable to be given to individuals the full measure of the fundamental rights and freedoms'.

It was a classic pronouncement that has since been adopted and applied by nearly all Commonwealth courts concerned with interpretation of a Westminster style constitution.

The Malaysian Constitution is a Westminster constitution.

It is in this regard that the recent decision of the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*[8], delivered in May 2002, (hereinafter referred to as 'the *Sugumar Balakrishnan case*') should be seen as

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[5] See generally T R Andhyarujina and J B Dadachanji in *Supreme But Not Infallible: Essays In Honour Of The Supreme Court of India*, Oxford, 2000 at pp 193 et seq and pp 465 et seq respectively.
[6] [1976] 3 AER 356.
[7] [1979] 3 AER 21 at 25.
[8] [2002] 3 MLJ at 72.

a setback in the development of constitutional rights and personal liberty in Malaysia. It is not the immediate decision (that denied the litigant the right to practiSe his profession in Sabah without immigration interference) that is of concern. It is the interpretative approach and the broader pronouncements as regards the constitutional rights afforded by Art 5, and thereby Art 8, that is seen as a throw-back to the constitutional thinking of the yesteryears.

Generally, from the constitutional perspective, the areas of concern are as follows:

(1) the narrow interpretation given to the words 'life and personal liberty' in Art 5;

(2) the reading of Arts 5 and 8 as having a separate existence; and

(3) the reading of the word 'law' in the phrase 'save in accordance with law' under Art 5 as any law duly passed by Parliament.

In the result the Federal Court overruled a developing jurisprudence in the Court of Appeal of a rights-based interpretation of the Constitution contained in a trilogy of cases namely, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidik & Anor*[9], *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*[10] and *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor*[11].

The genesis was in *Tan Tek Seng's* case. It was concerned with procedural fairness and the constitutional rights of a civil servant facing dismissal. G Sri Ram JCA speaking for the Court of Appeal posited that 'life' under Art 5 meant more than mere existence. He said:

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[9] [1996] 1 MLJ 261.
[10] [1996] 1 MLJ 481. The decision had previously received a short endorsement without comment by the *Federal Court in R. Ramachandran v lndustrial Court of Malaysia* [1997] 1 MLJ 145 at 195.
[11] [1998] 3 MLJ 289.

> 'They (Judges) should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression "life" in art 5(1) is given a broad and liberal meaning.
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> Adopting the approach that commends itself to me, I have reached the conclusion that the expression "life" appearing in Art 5(1) does not refer to mere existence. It incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life. Of these are the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members. It includes the right to live in a reasonably healthy and pollution free environment. For the purposes of this case, it encompasses the right to continue in public service subject to removal for good cause by resort to a fair procedure.'[12]

This approach was path-breaking in the Malaysian context, but it was common place in countries with an advanced state of constitutional development.

For example in the United States, it had been the position since 1887 in *Munn v Illinois* 94 US 113, 142 when Field J said 'life' meant more than mere animal existence and extends to all those faculties by which life is enjoyed.

The Indian Supreme Court adopted this thinking in a series of cases which saw its full exposition in the landmark case of *Maneka Gandhi*, supra, which propounded the co-relation between Art 14 (our Art 8) and Art 21 (our Art 5)[13] and later in the case of *Frances Coralie v Union of India*[14]. For example, in *Frances Coralie's case*, Bhagwati J speaking for the Indian Supreme Court expressly adopted the American reasoning:

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[12] At p 288. See adoption of principle in *Hong Leong Equipment*, supra, at p 510 and *Sugumar Balakrishnan*, supra, at p 305.
[13] The Indian provision however reads 'except according to procedure established by law'.
[14] AIR 1981 SC 746 at 752-753.

> 'Now what is the true scope and ambit of the right to life guaranteed under this Article? …. the attempt of the court should always be to expand the reach and ambit of the fundamental right rather than to attenuate its meaning and content …. Now obviously, the right to life enshrined in Art 21 cannot be restricted to mere animal existence. It means something much more than just physical survival …. Every limb or faculty through which life is enjoyed is thus protected by Art 21. And a fortiori, this would include the faculties of thinking and feeling.'

In turn, the Court of Appeal in *Sugumar Balakrishnan's case* adopted the Indian jurisprudence on the wide meaning of life and personal liberty in Art 21 and concluded (p 305):

> 'In our judgment, the words "personal liberty" in Art 5(1) should be similarly interpreted. Any other approach to construction will necessarily produce an incongruous and absurd result. For, "life" are both equally dynamic concepts and should be treated in like fashion.'

It also adopted the approach in *Maneka Gandhi's case* that the life and liberty provision, and the equality provision, are inter-related and give support to each other; they should not be read as having a separate existence. This was the interpretative dynamism propounded by Bhagwati J in *Maneka Gandhi's* case. It deserves reproduction:

> 'Now, the question immediately arises as to what is the requirement of Art 14: what is the content and reach of the great equalizing principle enunciated in this Article? There can be no doubt that it is a founding faith of the Constitution. It is indeed the pillar on which rests securely the foundation of our democratic republic. And, therefore, it must not be subjected to a narrow, pedantic or lexicographic approach. No attempt should be made to truncate its all-embracing scope and meaning …. In fact equality and, arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute

> monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art 14. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Art 14 like a brooding omnipresence and the procedure contemplated by Art 21 must answer the test of reasonableness in order to be in conformity with Art 14. It must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Art 21 would not be satisfied.'

The Federal Court expressly overruled both features of the reasoning of the Court of Appeal.

On the meaning of the words 'personal liberty' it denied that the words should be given a generous interpretation. Instead it said it should have a contextual meaning, namely, that Art 5(1) merely gave freedom from being unlawfully detained. The Federal Court said (at p 101):

> 'In our view, the words "personal liberty" should be given the meaning in the context of Art 5 as a whole …. We therefore disagree with the Court of Appeal that the words "personal liberty" should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life.'

As regards the interplay of Art 5 with other provisions of Part II of the Federal Constitution, the Federal Court took a view suggestive that they are separately enshrined. It said (p 101):

> 'We are of the view that other matters which go to form the quality of life has been similarly enshrined in Part II of the Federal Constitution under "FUNDAMENTAL LIBERTIES" viz, protection against retrospective criminal laws and repeated trials

(Art 7); quality (Art 8); freedom of speech, assembly and association (Art 10); freedom of religion (Art 11); rights in respect of education (Art 12) and rights to property (Art 13).'

However in overruling the Court of Appeal, the Federal Court did not proffer any reasoning of its own. Instead it took the *stare decisis* approach that reference was not made by the Court of Appeal to the earlier Federal Court decision in *Government of Malaysia v Loh Wai Kong*[15]. In that case Suffian LP had purported to interpret Art 5 in a narrow way. He said:

> 'Article 5(1) speaks of personal liberty, not of liberty simpliciter... It is well settled that the meaning of words used in any portion of a statute – *and the same principle applies to a constitution* – depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it. In the light of this principle, in construing "personal liberty" in Art 5(1) one must look at the other clauses of the Article, and doing so *we are convinced that the article only guarantees a person*, citizen or otherwise, except any enemy alien, *freedom from being "unlawfully detained"*; the right, if he is arrested, to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer; the right to be released without undue delay and in any case within 24 hours to be produced before a magistrate; and the right not to be further detained in custody without the magistrate's authority. It will be observed that these are all rights relating to the person or body of the individual ….' (Emphasis added).

The Federal Court in the instant case had obviously thought that the *Loh Wai Kong* decision was of pivotal value and that the failure of the Court of Appeal in this case and the trilogy of cases, supra, to consider the decision was fatal to its reasoning and made the decisions unsustainable. This is what it said (p 101):

[15] [1979] 2 MLJ 33.

> 'We note that neither in the instant case nor in *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* did the Court of Appeal refer to *Loh Wai Kong* and we cannot understand why. Unfortunately, too, in the majority judgment of the Federal Court in *Rama Chandran*, although reference was made to the Court of Appeal decision of *Tan Teck Seng* and to Art 5 in the context of the expression "life", the reference was only a brief reference and we note, too, that *Loh Wai Kong* was not cited, let alone considered by the Federal Court in *Rama Chandran*.'

How important really in constitutional terms is the *Loh Wai Kong* decision? It was a fairly nondescript case reflecting the constitutional thinking of the 1960s and 1970s as seen in a concatenation of cases like *Karam Singh v Menteri Hal Ehwal Dalam Negeri*[16], *Loh Kooi Choon v Government of Malaysia*[17], *Andrew s/o Thamboosamy v Supt of Pudu Prison*[18], and *PP v Khong Teng Khen*[19]. These were decisions before the development of the strong rights based jurisprudence that developed in the Privy Council and in the superior courts of the Commonwealth countries like India and Australia.

The old-style reasoning in *Loh Wai Kong's case* is evident in two respects. First, the approach taken by Suffian LP in interpreting the constitution was the old fashioned way of reading it as if it were an ordinary statute. It was an approach that has been expressly repudiated by Lord Diplock in the trilogy of cases in the Privy Council, namely, *Hinds*, supra, *Fisher*, supra, and *Ong Ah Chuan v Public Prosecutor*[20]. The Diplock way is to recognise that a constitution based on the Westminster model must be interpreted with due regard to the essential background principles that animate the constitution.

Secondly, *Loh Wai Kong* based its interpretation of life and liberty on the *Gopalan* decision of the Indian Supreme Court. The *Gopalan* case was the

[16] [1969] 2 MLJ 129, FC.
[17] [1977] 2 MLJ 187, FC.
[18] [1976] 2 MLJ 16.
[19] [1976] 2 MLJ 166.
[20] [1981] 1 MLJ 64, PC.

high water mark of the literalist approach in constitutional interpretation[21]. But *Gopalan* has since been repudiated in *Maneka Gandhi's* case. Thus it had ceased to be good law in India. It would be the height of irony if it continues to live on in Malaysia through the *Loh Wai Kong* case although rejected in its homeland.

The other area of concern is the construction of the words 'save in accordance with law' in Art 5(1). In a sense, it is the more important point. The Federal Court acceded to the argument of the State and took the view that 'the constitutional rights guaranteed under Art 5(1) of the Federal Constitution can be taken away in accordance with law' (p 103(d – e)). In short, the constitutional rights under Art 5 can be taken away by any law duly enacted by Parliament.

It is submitted with respect that this reasoning is unsustainable because it makes the constitutional guarantee illusory; the guarantee is made entirely dispensable at the will of Parliament; if so the Constitution would not be the supreme law of the land since a guarantee it purports to give could be taken away by a law passed by a simple majority in Parliament.

On this important issue the Federal Court had regrettably failed to consider the importance of the word 'law' itself in Art 5 and its definition in Art 160(2). It had further failed to consider the pivotal decision of the Privy Council in *Ong Ah Chuan's case*, supra, that interpreted the identical Singapore provision[22]. The Privy Council decision had brought about a significant change in the outlook on the interpretation of the phrase 'save in accordance with law' as seen in *Kulasingam's case*[23].

The word 'law' is defined in Art 160(2) as including 'written law' and the 'common law', and 'written law' in turn is defined as including the Constitution.

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[21] Jain, op cit 840.

[22] The former Federal Court in *Khalid Panjang v PP* [1964] MLJ 108 had said that decisions of the Privy Council on identical statutory provision from other Commonwealth jurisdictions would be binding on the Malaysian courts.

[23] See *S Kulasingam v Commissioner of Lands Federal Territory* [1982] 1 MLJ 204.

In *Ong Ah Chuan's case*, the Privy Council through Lord Diplock rejected an argument based on identical provisions in the Singapore Constitution that the safeguard provided by Art 5 could be taken away by any law duly enacted by Parliament. In adopting this approach, Lord Diplock made express reference to *Fisher's case*, supra, and emphasised 'the way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but as *sui generis* calling for principles of interpretation of its own suitable to its character'. His reasoning deserves full reading (pp 70 - 71):

> 'Accordingly their Lordships are unable to accept the narrow view of the effect of Articles 9(1) (our Art 5(1)) and 12(1) (our Art 8(1)) for which counsel for the Public Prosecutor contended. This was that since "written law" is defined in Art 2(1) to mean "this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore" and "law" is defined as including "written law", the requirements of the Constitution are satisfied if the deprivation of life or liberty complained of has been carried out in accordance with provision contained in any Act passed by the Parliament of Singapore, *however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be* ….
>
> Even on the most literalist approach to the construction of the Constitution this argument in their Lordships' view involves the logical fallacy of petitio principii. The definition of "written law" includes provisions of Acts passed by the Parliament of Singapore only to the extent that they are "for the time being in force in Singapore"; and Art 4 provides that "any law enacted by the legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void". *So the use of the expression "law" in Arts 9(1) and (2) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after 16 September 1963 and relied upon to justify depriving*

a person of his life or liberty are inconsistent with the Constitution and consequently void.

In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or right, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, refer to *a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords "protection" for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by Art 5) of Arts 9(1) and 12(1) would be little better than a mockery*.' (Emphasis added)

The *Ong Ah Chuan* decision was adopted by Hashim Yeop Sani J. (as he then was) at first instance in *Kulasingam's case*, supra. In doing so, his Lordship rejected the prevailing Malaysian view which gave a literalist interpretation to the words 'save in accordance with law'. This was also a case of the 1970s namely, *Comptroller-General of Inland Revenue v NP*[24] decided by Chang Min Tat J (as he then was) in December 1972. In rejecting the interpretation in the *NP* case, supra, and preferring the *Ong Ah Chuan* approach, Hashim Yeop Sani J said (p 206):

[24] [1973] 1 MLJ 165.

> 'In my view the proper interpretation of the word "law" is not as in *Comptroller-General of Inland Revenue v NP* [1973] 1 MLJ 165 which is with respect, too restrictive, but as interpreted in *Ong Ah Chuan v PP* in the judgment of the Privy Council dealing with the same words "in accordance with law" appearing in a provision of the Singapore Constitution, ….'

A further omission of the Federal Court in the instant case was the failure to realise that the narrow approach taken by Suffian LP on Art 5 in yet another case, namely, *Karam Singh*, supra, that 'law' does not include procedural law was rejected by Lee Hun Hoe CJ in *Re Tan Boon Liat @ Allen*[25] who said emphatically that 'to exclude procedure from "save in accordance with law" would make nonsense of Art 5'.

The significance of this holding is that it dovetails with the epochal statement in *Maneka Gandhi's* case that only a law that is fair, reasonable and non-arbitrary could validly deprive a person of life and liberty; otherwise it is liable to be struck down as offending Arts 5(1) and 8(1).

It is plain that if Art 5(1) is read as providing that any duly enacted law of Parliament can deprive a person of his constitutional safeguard under the provision, the safeguard becomes a mockery. In the *Wednesbury* case[26], Lord Greene MR gave as a famous example of unreasonableness the case of a schoolteacher being dismissed because she had red hair. There are no fixed categories of unreasonableness whether on the executive or legislative front. Could it legitimately be argued that if Parliament passes a law that says that all red-haired persons could be punished by way of imprisonment for any offence without a hearing, that such a law would pass muster under Art 5(1)? Could it be said that red-haired persons would not be protected by Art 5(1)?

The answer is obvious.

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[25] [1977] 2 MLJ 108 at 114.
[26] *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229.

The Federal Court decision in the *Sugumar Balakrishnan's case* has brought into focus yet again the sharp conflict in approaches to constitutional interpretation. In as much as it purports to favour the narrow literalist approach and eschews the broad liberal approach propounded by the Privy Council and the Indian Supreme Court, the decision is a throwback to the views of the yesteryears. The evolving rights-based jurisprudence in Malaysia, in tandem with the jurisprudence of countries like India, South Africa and Australia, has suffered a setback with this decision. It is time for a rethink.

RECENT CASES IN THE CRIMINAL JUSTICE SYSTEM: IS *CONSISTENCY* A VIRTUE?

OR THE ZAINUR/ANWAR *CASES: WHAT WENT WRONG WITH CONSISTENCY?*

MANJEET SINGH DHILLON*

When I was first approached some several weeks ago to talk at this Forum my specific assignment was a review of the *Anwar* saga and all cases related to the unfolding of that sorry tale. In fact the draft programme sent to me in no uncertain terms laid out the names 'Zainur/Anwar'. Now that was a subject that excited emotions and set brother against brother. I expected in my review to catalogue, briefly, before you the abuses of the criminal justice system that had occurred over the last three years or so, and I qualify this, as I saw them.

One caveat. No two persons will see or approach an issue in exactly the same manner and therein lies the rub: what price in*consistency*?

Somewhere along the way between the draft and this forum the topic got administratively high jacked and emerged suitably whitewashed into what you see it to be today: a bland, almost reverential dry review of the concept of adjudicative *consistency*. And then to compound things the Bar Council went and labeLled this shebang a 'colloquium', which is variously defined as an academic seminar! I almost feel as if I am expected to talk to you, after tea, when you are sated and tired, on the theory of stare decisis and the judicial glory of precedents.

I propose to do no such thing. If you want an academic paper on the theory of stare decisis as it has been applied, or not applied as the case may be, in recent criminal cases then that will have to wait for another day and will

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take far more than the 30 minutes allocated to me today. Besides there are always the law reports for you to look at and read when your time allows. I propose to talk about the matter that was first intimated to me and confine myself to the Anwar/Sukma/Munawar/Nalla/Zainur saga (and not necessarily in that order) and examine whether *consistency* in the criminal justice system was compromised in those matters. I expect you to go away from here today recognising the fact that *consistency*, whether adjudicative or otherwise, is foolish if it is not based on equality, integrity and justice; that, it, *consistency*, is not the private domain of courts and judges and hence limited only to that arena; and that you the Bar and the Public Prosecutor's office cannot wash your hands and turn a blind eye to the demands of collective responsibility for the wrongs carried out in the name of justice.

But first let's pose the Bar Council's question: *Is consistency a virtue?* The answer at first blush seems obvious but pause; it is not that obvious. What *consistency* are we talking about? Let me now ask you another question: Does the Bar Council mean by *consistency* the criminal justice system shenanigans of the last 3½ years? And if the answer to that second question is 'yes', then I will say to you that *consistency* of that sort is no virtue. You can almost hear Augustine Paul echoing Portia's words in *The Merchant of Venice* [Act 4, sc 1, ll 215-219]:

> '... There is no power in Venice
> Can alter a decree established:
> 'Twill be recorded for a precedent,
> And many an error by the same example
> Will rush into the state …'

And then in the very next breath hear Gani Patail whispering Shylock's exhortation to the judge:

> 'A Daniel come to judgment: yea a Daniel!
> O wise ... judge how I do honour thee!'

And then adding ever so obsequiously:

> '... O wise and upright judge,
> How much more elder art thou than thy looks!'

Those of you, in the audience today, who practice at the Criminal Bar may well disagree with what I have to say next. It is unlikely, very, very unlikely that the body of cases concerning the *Anwar* saga will feature prominently in Criminal Law texts as being authoritative citations on any point of law. They are not good law. Bad cases do not good precedent make. The cases will, naturally, be quoted ad nauseaum in certain Evidence texts but that will not change their quality or worth.

Let us approach the issue of *consistency* from the conduct of the three main players in the criminal justice system: the judge, the prosecutor and the defence lawyer.

The link between *consistency* and the doctrine of precedent

Perhaps the obvious needs to be first stated and considered. What is the doctrine of precedent or of stare decisis?

The operation of the doctrine of stare decisis is best explained by reference to the English translation of the Latin phrase. 'Stare decisis' literally translates as 'to stand by decided matters'. The phrase 'stare decisis' is itself an abbreviation of the Latin phrase 'stare decisis et non quieta movere' which translates as 'to stand by decisions and not to disturb settled matters'.

Basically, under the doctrine of stare decisis, the decision of a higher court within the same provincial jurisdiction acts as binding authority on a lower court within that same jurisdiction. The decision of a court of another jurisdiction only acts as persuasive authority. The degree of persuasiveness is dependent upon various factors, including, first, the nature of the other jurisdiction. Second, the degree of persuasiveness is dependent upon the level

of court that decided the precedent case in the other jurisdiction. Other factors include the date of the precedent case, on the assumption that the more recent the case, the more reliable it will be as authority for a given proposition, although this is not necessarily so. And on some occasions, the judge's reputation may affect the degree of persuasiveness of the authority.

In *Learning the Law* (9th ed, 1973), Glanville Williams describes the doctrine in practical terms:

What the doctrine of precedent declares is that cases must be decided the same way when their material facts are the same. Obviously it does not require that all the facts should be the same. We know that in the flux of life all the facts of a case will never recur, but the legally material facts may recur and it is with these that the doctrine is concerned.

There is considerable literature about whether the doctrine of stare decisis is a good or bad one but the doctrine is usually justified by arguments that focus on the desirability of stability and certainty in the law and also by notions of justice and fairness. Benjamin Cardozo in his treatise, *The Nature of the Judicial Process* stated:

> *'It will not do to decide the same question one way between one set of litigants and the opposite way between another. If a group of cases involves the same point, the parties expect the same decision. It would be a gross injustice to decide alternate cases on opposite principles. If a case was decided against me yesterday when I was a defendant, I shall look for the same judgment today if I am plaintiff. To decide differently would raise a feeling of resentment and wrong in my breast, it would be an infringement, material and moral, of my rights. Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts.'*

But liberty to decide each case as you think right, without regard to principles laid down in previous similar cases, would only result in a completely

uncertain law in which no citizen would know his rights or liabilities until he knew before what Judge his case would come and could guess what view that Judge would take on a consideration of the matter, without any regard to previous decisions.

That the doctrine of stare decisis is related to justice and fairness may be appreciated by considering the observation of American philosopher William K Frankena as to what constitutes injustice:

> *'The paradigm case of injustice is that in which there are two similar individuals in similar circumstances and one of them is treated better or worse than the other. In this case, the cry of injustice rightly goes up against the responsible agent or group; and unless that agent or group can establish that there is some relevant dissimilarity after all between the individuals concerned and their circumstances, he or they will be guilty as charged.'*

The critics of the doctrine accept it as the general rule but chafe under it when the staleness of old law leads to unfairness and injustice. For example, Lord Denning, the former Master of the Rolls has argued:

> *'If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice, which they should serve, they may find the whole edifice comes tumbling down about them. Just as the scientist seeks for truth, so the lawyer should seek for justice. Just as the scientist takes his instances and from them builds up his general propositions, so the lawyer should take his precedents and from them build up his general principles. Just as the propositions of the scientist fail to be modified when shown not to fit all instances, or even discarded when shown in error, so the principles of the lawyer should be modified when found to be unsuited to the times or discarded when found to work injustice.'*

But if strictly observed, the scope of stare decisis can extend far beyond a single unjust decision. Its effects can be cumulative: A single erroneous court

decision, if followed, becomes two erroneous decisions, then three, and soon a 'line' of cases. In this way, stare decisis has the potential to import injustice irremediably into the law.

Of course, in practice stare decisis probably is not often as bad as all that. Just as it can institutionalise erroneous results, it also can (and certainly often does) ensure that just decisions are reproduced more often than they otherwise would be. And the rule of stare decisis as currently observed in Anglo-American law is not a strict one: Courts can decline to follow their own previous decisions when those precedents are judged to be clearly in error. Lawyers and judges, moreover, regularly display amazing ingenuity in 'distinguishing' unfavourable precedents that otherwise would be 'controlling'. In the real world, then, the prospect of grievous injustice 'rushing into the state' may seem rather remote.

But the prospect exists nonetheless. Courts may be adept at manipulating precedent to reach decisions they want to reach, but they are not always able or willing to do so; sometimes courts believe (or claim to believe) they are bound by stare decisis to reach results they think unjust.

But if stare decisis continues to play an important role in adjudication, it is a strange, uncomfortable role – one that sometimes seems to procure injustice in the name of the law, and one that therefore demands convincing explanation. What good can come of a rule that prescribes *consistency* even at the expense of justice? What, indeed, is the point of stare decisis?

There are two answers to that question. The difference between them is crucial. One kind of answer is that stare decisis is justified because, and only to the extent that, it serves the interests of justice in a general sense. This answer acknowledges that stare decisis must always be tested for how well it serves the ultimate end of justice to determine whether it has value in any given case. The other kind of answer is that stare decisis (or, more precisely, the adjudicative *consistency* it serves) is an end in itself.

How do you justify *consistency*?

How does one justify the need for *consistency*? There are two fundamentally different answers to that question.

The first kind of answer, the kind most frequently given, has to do with ends justifying means. Those giving this explanation for the need for *consistency* (and equally for the Doctrine of Precedent) contend that the sacrifice of justice the doctrine may entail in an occasional case is justified by the justice-promoting interests the practice serves more generally. Such justifications include the notions that the rule allows for advantageous predictability in the ordering of private conduct, that it promotes the necessary perception that law is stable and relatively unchanging, that it prevents frustration of private expectations, that it serves the resource-saving goal of judicial efficiency, and even that it preserves the separation of powers by enforcing judicial restraint. All of these explanations acknowledge, usually explicitly, that *consistency* sometimes requires perpetuating erroneous decisions. The assertion here is that specific instances of what otherwise would be injustice may be tolerated in the interest of justice more generally.

But there is a second, fundamentally different sort of explanation of the need for *consistency* that finds support in the cases and in the literature. Courts and commentators sometimes have attempted to justify this by claiming that a rule of *consistency* is itself an intrinsic good. While the first theory assigns value to that doctrine only to the extent that it serves the interests of justice in the long run, the alternative theory asserts that the value of adjudicative *consistency* is inherent and therefore unaffected by whether it results in justice. Adjudicative *consistency* is a good in itself, and although it might in some cases be outweighed by opposing intrinsic goods, it is always entitled to be weighed against those opposing goods.

The obligation to follow precedent begins with necessity, and a contrary necessity marks its outer limit. It must be recognised that no judicial system could do society's work if it eyed each issue afresh in every case that raised it. Indeed, the very concept of the rule of law requires such continuity over time

that a respect for precedent is, by definition, indispensable. At the other extreme, a different necessity would make itself felt if, eg, a prior judicial ruling should come to be seen so clearly as error that its enforcement was for that very reason doomed. Justice may be sacrificed in the occasional individual case so that these goals may be furthered and, consequently, justice may be done more generally. At the same time it has to be acknowledged that *consistency* and adherence to precedents must have its limits. When a prior decision is 'seen so clearly as error that its enforcement [is] for that very reason doomed' the goals of efficiency and the rule of law are outweighed by the practical drawbacks of attempting to enforce a clearly erroneous decision.

Consistency can be conceived of as a tool to accomplish certain specific goals, goals that in turn are necessary ingredients of 'the rule of law', generally and consistently applied. But sometimes the tool malfunctions; sometimes *consistency* frustrates the goals it was designed to serve, or serves ill ends that outweigh its worthy ones. The cry for *consistency* is not an inexorable command and we must weigh its benefits against its burdens.

The failure of *consistency* as equality

Theories of adjudicative *consistency* as equality hold that courts must adhere to precedent because the norm of equality – of treating similarly situated people similarly – demands it. The force of precedent, and hence the need for *consistency*, can at least in part be traced to a concern for equality. Indeed Courts have purported to enshrine what is called 'the equality principle' – the perceived necessity of treating 'similarly situated litigants... the same' as a foundation of adjudicative *consistency*.

Whether courts should be taken seriously when they purport to rely on equality in following precedent is difficult to tell. 'Equality' is precisely the sort of evocative buzzword to which one might suspect courts would turn in justifying otherwise unpopular decisions. But whether courts, in speaking of 'equality' to explain stare decisis, envision the concept as an honest ideal or whether they merely use it as a crutch – as a strategic excuse to follow precedent

they secretly want to follow – the result is the same. In resorting (sincerely or not) to the vague and happy idea 'equality', courts neglect (or reject) the important and often difficult task of examining the many pragmatic considerations that might play into the question of whether to follow precedent in a given case. Courts that believe they are constrained by equality to adhere to precedent – or that they can get away with professing to be so constrained – need not, and undoubtedly do not, engage in the kind of rational analysis of the value of stare decisis that a just decision requires.

The evolution of law as integrity

As applied to adjudication, law as integrity requires the judge, prosecutor and lawyer to view the entire body of existing legal decisions within a jurisdiction – its statutes, its case law, and presumably its administrative rules and decisions – as a whole. They must interpret this entire body of law in its most coherent light; they then must extract from this coherent or nearly coherent system the principles it produces that apply to the case then being handled They, all three participants, must, 'so far as this is possible, ... treat the existing system of public standards as expressing and respecting a coherent set of principles, and, to that end, ...interpret these standards to find implicit standards between and beneath the explicit ones'.

'Law as integrity' assigns a vital role to adjudicative *consistency.* A number of sensible-sounding reasons can be advanced why we should strive to be consistent from case to case. The protection of reliance interests, the need for certainty and predictability in the law, the goal of judicial efficiency, the promotion of confidence in something called "the rule of law", the imposition of constraints on judicial lawmaking – the list is a familiar one to any lawyer.

What is important in adjudicative *consistency* is reaching the right result – the just result, all things considered. If part of the 'just result' is protection of reasonable expectations or establishment of a stable rule or preservation of judicial resources, so be it; *consistency* may serve the ends of justice. But equally we must rid ourselves of the habit of thinking that adjudicative

consistency holds some inherent value tugging us away from what is just. We must adopt an approach that is prudent and pragmatic; we must display a sceptical willingness to immerse that doctrine in the exacting crucible of justice.

This is not to say that the bitter pill of bad precedent should never be swallowed. Sometimes the general injustice flowing from in*consistency* will outweigh the particular injustice of a result that would, standing alone, be indefensible. In commercial law, for instance – where lawyers structure transactions on the promise of steady doctrine – frequent rejection of precedent would engender chaos. In other areas of the law with high visibility – eg free speech and equal protection – slapdash application of supposedly immutable constitutional provisions would undermine public confidence in the courts. In statutory interpretation fragmented case law would frustrate the very purpose of having a statute in the first place.

The Munawar/Sukma/Nallakaruppan/Zainur/Anwar saga: inconsistencies to a fault – a brief overview

You have to begin with a premise. Destroy a reputation, totally. How? Use abuse of men, women and power, add in a dash of corruption but thankfully no wine, no song. And there you have it! Perfect!

Episode 1: The purported men issue – Munawar/Sukma

1. These two men were purportedly arrested under the ISA turned over, then released and immediately rearrested, detained for a further day and then charged under s 377D of the Penal Code. This was tantamount to charging the victim and not the assailant. The purported assailant was at that time still free and very much around.

2. There was no 'investigation' as such. The entire prosecution case was founded on purported police interrogations of Munawar/Sukma and nothing more.

3. The charge sheet concealed the original date of arrest and had no complainant (the arresting officer was slotted in as the complainant). In a typical sexual accusation the victim is the complainant. That was certainly not the case here.

4. The charge was vague and omitted material particulars.

5. The offence was one that came within the jurisdiction of the Magistrates Courts but the prosecution went forum shopping and registered the matters in the Sessions Court. Amazingly two supposedly independent courts displayed great *consistency* in handing down exactly similar sentences of six months' imprisonment.

6. The matters were completed with great speed and maximum publicity yet both Sessions judges saw no reason to consider the state of the accused. In Munawar's case he was seen visibly trembling in Court when the proceedings were underway.

7. The prosecution came ready prepared to receive pleas of guilt.

8. Defense Counsel, not appointed by the accused, came ready with pleas in mitigation. Typed to say the least. Where did these lawyers come from? In Munawar's case the lawyer appointed by the family was turned away by the police and refused access to his client. Typically where the police keep lawyers away from arrested persons, here the police went out of the way to find two user-friendly lawyers and provide them clients, ready-made pleas of guilty and facilities to boot.

9. Defense Counsel went to town in the prepared mitigation pleas and coloured their pleas with 'admissions' of offences that were not even before the Court but were being advanced for the benefit of the waiting press. *Consistency* requires juicy details from the prosecution. Here the user-friendly lawyers undertook the task. The judges 'played' along. Sukma's lawyer even 'conveniently' tendered a confession during his mitigation.

10. The mitigation 'qualified' the pleas. The judges turned a blind eye to this. Consider a rape victim pleading that she was raped against her will. *Consistency* requires the guilty pleas to be rejected and the matter to be set down for trial. That would have defeated the police machinations being undertaken. However in*consistency* ruled the day and qualified pleas were conveniently overlooked. The alternative to that would have been cases literally beyond proof.

11. *Consistency* demanded that the accused be left alone to pursue his legal remedies after the Sessions Courts fiasco. In*consistency* enabled the police and the user-friendly lawyer to attempt to hound Munawar into not challenging or exposing the lies.

Episode 2: The purported women issue – Nallakaruppan

1. A simple licensing offence turned on its head and conveniently slotted under the ISA and warranting the death sentence.

2. *Consistency* warranted a prosecution under Arms licensing provisions, like for like. In*consistency* and mala fides by the Attorney General resulted in the ISA prosecution.

3. *Consistency* would have justified a bailable offence. In*consistency* enabled continued detention and attempts to interrogate/extort non-existent evidence.

4. *Consistency* required remand in a prison. In*consistency* ensured continued detention in the hands of the interrogators when they moved him out of the prison back to Police Headquarters.

5. *Consistency* permitted no abuse of the prosecution process to justify spurious ends. In*consistency* permitted a blatant open attempt by the Attorney General's office to bargain with the life of a man in exchange

for non-existent evidence concerning women that would have helped along the destruction of a reputation.

6. *Consistency* demanded that in any prosecution launched there be credible evidence before commencement. In*consistency* enabled vague 'fishing' expeditions to secure evidence.

7. *Consistency* demanded honourable conduct in court. In*consistency* permitted the release of vague, unfounded allegations against a person not present to defend himself and the post haste release of information to the media to blacken reputations.

8. If you recollect on the day that Nallakruppan was challenging his transfer back from the prison into the hands of the police, the AG's officers were busy releasing affidavits founded on supposition and hearsay against Anwar to the press with such impeccable timing that it appeared in that very day's *Malay Mail* while arguments were still going on in Court. The judge inconsistently refused even a temporary gag on the publication of totally unsubstantiated material. As events turned out those unfounded allegations remained unfounded.

9. *Consistency* ensures that legal rights are never compromised and that a right of appeal is an inviolable right. In*consistency* was a demand that there be no appeal.

10. *Consistency* demanded in light of established precedents, a fine for what was at worst a licensing offence. In*consistency* ensured a totally unjustified 36-month imprisonment term.

Episode 3: The purported corruption issue – Anwar/Zainur

1. Pre-trial *consistency* stipulated a just, fair and equal treatment. In*consistency* enabled a departure from basic rights and an open blatant abuse of them.

2. *Consistency* demanded an even-handed fair trial. In*consistency* ensured an unusual heavy-handed approach by the judge that consistently and constantly brought him down into the arena of the adjudicative conflict being played out before him.

3. *Consistency* justified bail but in*consistency* ensured refusal on both dubious and spurious grounds.

4. Precedent guaranteed the accused's right to raise every possible and conceivable defence. In*consistency* resulted in a denial of this right and the convenient expunging of evidence received on oath that was central and vital to the defence case.

5. *Consistency* demanded, in the criminal justice system, that the benefit of all doubts flow to an accused. In*consistency* enabled Augustine Paul to found a judgement on a misconception of facts and draw negative personal conclusions where the facts indicated otherwise.

6. In*consistency* enabled:

   a. Demands that the defence state beforehand the evidence to be adduced through defence witnesses even before they testified;

   b. The rejection of witnesses and their testimony even before it had been heard;

   c. The citing and threatening of defence lawyers with contempt including the sentencing of Zainur to three months' imprisonment.

An overview: The need for *consistency*

1. If justice is to be dispensed even-handedly, similar cases must be dealt with and decided similarly. In*consistency* ensures abuse.

2. Ad hoc decisions that yield unexplained verdicts reflect the self-contained values our judicial system embraces. But appellate adjudication performs a different function and creates different expectations. The core function of appellate courts is to assure that legal principles derived from the Constitution and the general body of statutes and the common law are applied correctly and consistently.

3. The Doctrine of Precedent requires that a prior decision be followed in subsequent cases unless it is distinguished or overruled. The application of the doctrine usually turns on a determination of the identity between two cases – a determination that cannot be made unless the facts and reasoning of the prior case are known.

4. The core values that need to be preserved are stability, certainty, predictability, *consistency*, and fidelity to authority.

5. And transparency must exist because such publication furthers an important institutional goal: maintaining the appearance that justice has been done. Publication is a signal to litigants and observers that court has nothing to hide, that the quality of its work in a case and of those who participated in the entire adjudicative process is open for public inspection.

Consistency as a quality control mechanism

1. It is a quality control mechanism, raising all error for discussion and correction.

2. It guarantees a consistent level of quality, *consistency* or reasoning in the law and application of the law.

3. It guarantees that all judges, prosecutors and lawyers will meet the standards of the most conscientious of their brethren. As such, it raises the quality of law and judicial functions.

4. Public awareness of the doctrine encourages the continual inspection of the law and participation in the legal process by the public.

The erosion of *consistency*

1. Conversely, its erosion will create chaos. It robs even experienced lawyers of the ability to predict with reasonable certainty the outcome of litigation. This inevitably raises the cost of the legal system and lowers its legitimacy.

2. Erosion of *consistency* creates random results that inundate the appellate courts. Citation of unpublished cases, conversely, would permit lower courts (and potential litigants themselves) to have access to precedents that would clearly decide cases or head off litigation.

3. Lack of transparency and non-publication diminishes the Doctrine twice: first, the decision itself is freed from the responsibility to reason within the full view. Second, an increment of precedent is rendered unusable.

The answer to the question?

The Doctrine of *Consistency* cannot operate as a workable doctrine as long the Courts, the Prosecution and the Bar while adjudicating sets of identical facts, are able to act in and reach directly contrary results on diametrically opposed legal theories, by the simple expedient of acting arbitrarily and without regard to the integrity of the Rule of Law.

So, yes, *consistency* is a virtue. If nothing else you can at least set your legal clock by it. The point is that *consistency* is, and must be seen to be, a tool to achieve the ends of justice, it is not an end in itself.

Simply put, if we all do our job right, justice will be done.