

A FRAGILE BASTION UNDER SIEGE — THE 1988 CONVULSION IN THE MALAYSIAN JUDICIARY

BY H. P. LEE*

INTRODUCTION

Every government in the world swears belief in the independence of the judiciary, but some governments work subtly to undermine it.¹

In 1988 a constitutional drama with disturbing implications for constitutionalism unfolded in Malaysia.² For the first time in Malaysian legal history, the highest judicial officer in the land was suspended and, after an inquiry to determine whether he should be removed for alleged 'misbehaviour', was subsequently removed.³ Following in the wake of this shocking development, two other senior judges of the Supreme Court were, after an inquiry by a second tribunal, also removed from office.

The high drama should be seen in the context of a 'high stakes' political struggle within the ranks of the United Malay National Organisation or

* LL.B., LL.M., Ph.D. Associate Professor of Law, Monash University. I benefited from the award of an Australian Vice-Chancellors' Committee Fellowship which enabled me to conduct the research for this article in Malaysia and Singapore from December 1988-January 1989. I wish to record my gratitude to the Faculty of Law, National University of Singapore for receiving me during that period as a Visiting Research Scholar.

¹ Tun Mohamed Suffian, 'The Role of the Judiciary' [1987] 2 *Malayan Law Journal* xxiii, xxiv.

² See, generally, Tun Salleh Abas, *The Role of the Independent Judiciary* (The Sir John Foster Galaway Memorial Lecture delivered at University College, London, on 4 November 1988). The Lecture was published in book form by Promarketing Publications in 1989; Tun Salleh Abas with Das, K., *May Day for Justice* (1989); Hickling, R. H., 'The Malaysian Judiciary in Crisis' [1989] *Public Law* 20; Trindade, F. A., 'The Removal of the Malaysian Judges' (1990) 106 *Law Quarterly Review* 51; Harding, A. J., 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 *International and Comparative Law Quarterly* 57. The drama evoked considerable international concern — see e.g., Justice Kirby, 'Malaysia — the Judiciary and the Rule of Law' (1988) 41 *International Commission of Jurists Review* 40; (1988) *Australian Law News*, August, 12-6; [1988] *New Zealand Law Journal* 217-8, 266-7; Resolution adopted by the International Commission of Jurists at its meeting in Caracas, Venezuela, on 20 January 1989 (reproduced in [1989] 1 *Malayan Law Journal* cxxii).

³ *Report of The Tribunal Established Under Article 125(3) and (4) of the Federal Constitution. Re: Y. A. A. Tun Dato' Hj. Mohamed Salleh Abas* (Govt Printer, Kuala Lumpur, 1988; hereinafter referred to as the *First Tribunal Report*). Instances of the removal of judges from office are rare, and in the case of a Chief Justice, extremely rare. Professor Weeramantry mentioned the removal of Chief Justice Korsah of Ghana by President Nkrumah, when the Chief Justice found on the evidence that three former Ministers charged with treason had no case to answer — Weeramantry, C. G., *Equality and Freedom: Some Third World Perspectives* (1976) 103. In 1984, a select committee was appointed to investigate and report to the Sri Lankan Parliament regarding a speech made by the Chief Justice (N. D. M. Samarakoon) with a view to his removal from office. A majority of the committee, while of the view that the speech constituted a 'serious breach of convention', could not arrive at the conclusion that the Chief Justice was guilty of proved misbehaviour. Protracted proceedings to remove Justice Lionel Murphy from the High Court of Australia were brought to an end when the judge died from cancer in 1986. In relation to the 'Murphy Affair', see 'Parliamentary Commission of Inquiry — Re the Hon. Mr Justice Murphy' (1986) 2 *Australian Bar Review* 203; *Senate Select Committee on Allegations Concerning a Judge* (1984); *Senate Select Committee on the Conduct of a Judge* (1984). In 1989, for the first time in Australian judicial history, a judge of the Supreme Court of Queensland was removed from office: *The Australian*, 13-14 May 1989. In Canada a Committee of Investigation was appointed by the Canadian Judicial Council in relation to the public expression of certain views by Justice Berger on 'a matter of great political sensitivity'. Although the complaint was held to be well-founded, no recommendation for his removal was made: (1982-83) 28 *McGill Law Journal* 378-404.

'UMNO', Malaysia's dominant political party. It must also be viewed against a backdrop of an entanglement of prominent personalities: the Prime Minister (Dr Mahathir Mohamed), the then 'Yang di-Pertuan Agong' or King (Sultan Mahmood Iskandar of the State of Johore) and the then Lord President of the Supreme Court of Malaysia (Tun Salleh Abas). Other actors who were hovering in the wings included Sultan Azlan Shah of the State of Perak (the then Deputy King) and Tan Sri Abu Talib Osman (the Federal Attorney-General). Eventually, the spotlight was also turned on Tan Sri Abdul Hamid (the then Chief Justice of the High Court of Malaya).

It is unquestionable that the position of the judiciary in the Malaysian constitutional system has been severely undermined. Confidence in the independence of the judiciary has been so badly shaken that it may take a long time before that confidence can be restored. The road to recovery may require the adoption of certain drastic measures as recommended in the concluding part of this article.

The aim of this article is to explore the various constitutional and political dimensions of the convulsion which afflicted the Malaysian judiciary in 1988. The political aspect cannot be divorced from the constitutional implications for the legal and constitutional manoeuvrings were consonant with the political skirmishings which involved at one stage the very survival of the Prime Minister, Dr Mahathir.

THE BACKDROP

... an independent Judiciary that is not subservient to the Legislature or the Executive, either in theory or in practice, is often regarded as the bastion of Parliamentary Democracy. That bastion is under siege today.⁴

A Letter to the King

The crisis was developed from a letter sent by Tun Salleh on 26 March 1988 to the King of Malaysia and a copy to each of the State Rulers. The contents of the English translation of the letter as reproduced in the First Tribunal Report are as follows:

I as Lord President on behalf of myself and all the Judges of the country beg to express our feelings regarding the development in the relationship between the Executive and the Judiciary.

All of us are disappointed with the various comments and accusations made by the Honourable Prime Minister against the Judiciary, not only outside but within Parliament.

However all of us are patient and do not like to reply to the accusations publicly because such action is not compatible with our position as Judges under the Constitution. Furthermore such action will not be in keeping with Malay tradition and custom. It is to be remembered that we are Judges appointed and given letters of appointment by Duli Maha Mulia Seri Paduka Baginda Yang di-Pertuan Agong and also Duli Yang Maha Mulia the Malay Rulers to preserve, protect and defend the Constitution. As such it is only proper for us to be patient in the interest of the nation.

Other than that the accusations and comments have brought shame to all of us and left us mentally disturbed to the extent of being unable to discharge our functions orderly and properly. We all feel ashamed because we are not able to avoid from being looked down by those who do not understand our position under the Constitution.

This letter is an effort to convey our feelings to Duli Yang Maha Mulia Tuanku with the hope that all of those unfounded accusations will be stopped.⁵

⁴ Muzzafar, C. (President of Aliran), Press Release of 16 March 1988.

⁵ *First Tribunal Report*, Vol. 1, Annexure 2.

It must be pointed out that the letter was couched in High Malay, which is the customary mode of writing to the King. Those who are familiar with Malay culture and language would describe the letter as quiet, courteous and dignified. The English translation did not do justice to the letter.

This letter was written in response to a continuing barrage of criticisms levelled by the Prime Minister at the judiciary.⁶ As Tun Salleh himself explained:

A judge of the High Court Malaya, who was unable to bear the criticisms of the Prime Minister wrote a letter to me and the Chief Justice Malaya (who is now the Acting Lord President), threatening to go public if the criticisms continued. I therefore immediately called a meeting of judges. There were 20 judges altogether attending the meeting, all Kuala Lumpur judges, including the Acting Lord President. It was then decided that no public speech in reply to the Prime Minister's criticisms should be made, but a letter should be addressed to the King and other Malay Rulers. This was agreed to by all, including the Acting Lord President, although one Supreme Court Judge, Hashim Sani, felt a bit unhappy about the decision. The letters to the King and to the Malay Rulers were all identical in terms except for the addresses. These were drafted by me and a drafting committee, which was set up at the judges' meeting. All judges including those who did not attend the meeting were each given a copy of the letter. I received no objection from any of them but instead a few of them wrote to me positively supporting the move.⁷

The letter sent by Tun Salleh to the King constituted the central 'justification' for the ultimate removal of the Lord President of the Supreme Court.

However, a number of significant developments had given impetus to the moves which eventually resulted in the removal of the Lord President. Some of these developments will now be explored.

The Berthelsen Case

Dissatisfaction with the judiciary started to simmer rapidly when the Prime Minister was clearly stung by the decision of the Supreme Court in *J.P. Berthelsen v. Director-General of Immigration, Malaysia & Ors.*⁸ This was a case involving a staff correspondent, an American citizen, who was attached to the Kuala Lumpur office of the Asian Wall Street Journal and who had been granted an employment pass for a period of two years. The pass was valid until 2 November 1986. However, on 26 September 1986, he was served with a notice of cancellation forthwith of his employment pass under the Immigration Regulations 1963.⁹ The notice of cancellation recited that the Director-General of Immigration was satisfied that Berthelsen had contravened or failed to comply

⁶ The occasions on which the Prime Minister had criticized the judiciary are set out in 'A Report by the Bar Council on the Report of the Tribunal Established in Respect of Tun Mohamed Salleh Abas' (1988) *INSAF* (Journal of the Malaysian Bar), Vol. XX, No. 5, 30, 36-7.

Initially, Tun Salleh opted to maintain 'a profile of silence'. However, believing that continued silence in the face of the unending attacks would 'seriously undermine the confidence of the public in the judiciary' he began to reply to the criticisms of the Prime Minister in a speech at an official book-launching ceremony at the Shangri-la Hotel, Kuala Lumpur on 12 January 1988. A copy of this speech is reproduced in *First Tribunal Report*, Vol. III, 32-4.

⁷ Tun Salleh Abas, *op cit.* 15-6. In his latest book, *May Day for Justice*, Tun Salleh disclosed that the High Court judge who had written to him was Abdul Razak J. The full text of that letter is set out at pp. 67-8 of that book.

⁸ [1987] 1 *Malayan Law Journal* 134.

⁹ Berthelsen was one of two journalists of the *Asian Wall Street Journal* to be expelled. In September 1986 the Malaysian Government had banned the distribution of the journal. Although no specific reasons were given by the Government, it was alleged that the reason for the action against the journal was an article it ran on 'conyonym' in Malaysian banking and mismanagement in economic affairs: [1986] *International Commission of Jurists Review* 12.

with the Immigration Act 1959-1963 and the Immigration Regulations 1963, that he had failed to comply with the conditions imposed in respect of that pass or the instructions endorsed thereon, and his presence in the Federation was or would be prejudicial to the security of the country. Berthelsen sought leave from the High Court to apply for an order of *certiorari* to quash the cancellation of the employment pass and for an order of prohibition against his removal from the country. When leave was refused he appealed to the Supreme Court.

Abdoolcader S.C.J., delivering the judgment of the Court,¹⁰ pointed out that Berthelsen was lawfully in the country under the sanction of an employment pass validly issued for a stipulated period, and that he clearly had a 'legitimate expectation' to be entitled to remain in the country at least until the expiry of the prescribed duration. Abdoolcader S.C.J. added:

[A]ny action to curtail that expectation would in law attract the application of the rules of natural justice requiring that he be given an opportunity of making whatever representations he thought necessary in the circumstances.¹¹

It was the conclusion of the Court that Berthelsen was so circumstanced in relation to the action of the Director-General of Immigration as to be entitled to the observance of the rules of natural justice. As Berthelsen had not been invited to make representations regarding the cancellation of his employment pass, the requirements of natural justice had not been satisfied. Accordingly, the Court ordered that *certiorari* be issued to quash the cancellation.

The Prime Minister must have taken umbrage at this bold decision of the Supreme Court. In the parliamentary debates on a Constitutional Amendment Bill, Dr Mahathir, after referring to the *Berthelsen* case, was reported to have said that the laws clearly stated that the Minister could decide how long a foreigner could stay in the country and that this decision was final. He was also quoted as saying:

But the judge overruled this. That was a well-known case. The person was allowed to stay here and the Minister could not do anything.¹²

These reported remarks of Dr Mahathir gave an impression of a failure to appreciate the nature of the judicial function. In many countries committed to the rule of law curial constraints imposed upon the exercise of ministerial powers have been accepted as commonplace. Governments do not rail against the judiciary simply because the judiciary has not facilitated the exercise of executive powers; instead, attempts are made to exercise the powers in accordance with the judicial rulings.

Dr Mahathir was misconceiving the thrust of the decision in *Berthelsen*. The Court was not saying that 'the Minister could not do anything'. What the Supreme Court was emphasizing was that Berthelsen's employment pass could be cancelled but that such cancellation should be in accordance with well-established principles of natural justice. These principles, which have been developed by eminent courts of the common law world, simply reflect a mature

¹⁰ The other members of the Court were Salleh Abas L.P. and Mohamed Azmi S.C.J.

¹¹ [1987] 1 *Malayan Law Journal* 137.

¹² *New Straits Times* Malaysia, 19 March 1988.

and civilised society. All that the Minister was required to do was to provide an opportunity for the accused to tell his side of the story.

If, having done all this, the [Director-General of Immigration] then gives consideration to [Berthelsen's] representations, the requirements of natural justice will have been satisfied and it would be for the [Director-General of Immigration] to make his decision whether or not to cancel the employment pass in the exercise of the discretion conferred upon him . . .¹³

The remarks of Dr Mahathir were unfortunate. The Supreme Court's decision in *Berthelsen* was clearly impeccable: it was logical and consistent with established authorities.

The Contempt of Court Action Against the Prime Minister

The annoyance felt by Dr Mahathir with the *Berthelsen* decision was highlighted soon after that case in an interview he gave to the International Editor and the Bangkok Bureau Chief of *Time* magazine. Excerpts of the interview were published under the heading 'I Know How The People Feel'. In commenting on the role of the courts, Dr Mahathir observed as follows:

The judiciary says [to us], 'Although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation.' If we disagree, the courts will say, 'We will interpret your disagreement.' If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to interpret it our way. If we find out that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish.¹⁴

This passage sparked off a contempt of court action instituted by Mr Lim Kit Siang, the Leader of the Opposition, against the Prime Minister. Harun J. (as he then was) of the High Court dismissed the application.¹⁵ Harun J. subjected the passage from the *Time* magazine to rigorous scrutiny, as if he were a law lecturer grading the paper of a law student of doubtful quality. Harun J. was reported as having made a certain remark to which the Prime Minister 'took exception'.¹⁶ The remark was as follows:

The Prime Minister's real complaint is that laws are not being made foolproof, so to speak. The statement is an expression of Dr Mahathir's dilemma that the courts are not able to express the intention of the Government in their decisions because of faulty or slipshod laws made by Parliament.¹⁷

An appeal by Mr Lim Kit Siang to the Supreme Court was dismissed. The Supreme Court (Salleh Abas L.P., Abdul Hamid C.J. (Malaya) and Abdoolcader S.C.J.) regarded the passage as containing statements which stemmed from 'a misconception of the role of the courts'.¹⁸ When viewed 'objectively and dispassionately and in proper perspective', it was simply an articulation of the executive's frustration in not being able to achieve its objects in matters where

¹³ [1987] 1 *Malayan Law Journal* 134, 138.

¹⁴ *Time* magazine, 24 November 1986, 18.

¹⁵ *Lim Kit Siang v. Dato Seri Dr Mahathir Mohamad* [1987] 1 *Malayan Law Journal* 383.

¹⁶ Tun Salleh Abas, *op cit.* 10.

¹⁷ The *Star* Malaysia, 29 November 1986. The remarks were reported under the caption 'Mahathir's Dilemma'. On 5 September 1987, Harun J. at a Law Seminar at Universiti Kebangsaan expressed certain views regarding the need to make improvements to the Malaysian Constitution, particularly, the need to revamp the Senate. These reported comments aroused the ire of the Prime Minister.

¹⁸ *Ibid.*

the intervention of the courts had been sought to some avail. It was the conclusion of the Supreme Court that the passage did not amount to a contempt of court.

The UEM Case

Another case which troubled the Prime Minister considerably was the *UEM* case¹⁹ — a case which was also initiated by Mr Lim Kit Siang in his capacity as ‘a Member of Parliament, the Leader of the Opposition in the House of Representatives, a State Assemblyman, a taxpayer, a motorist and a frequent user of highways and roads in the country’.²⁰ For the purposes of the present discussion it is sufficient to simplify the facts of the case.

The case concerned the privatisation of the North-South Highway. Mr Lim, in his proceedings instituted against United Engineers (M), Berhad (UEM) (a holding company controlled by UMNO), the Government of Malaysia and two ministers, the Minister of Finance and the Minister of Works, sought from the Court a declaration to the effect that the letter of intent given in December 1986 by the government to UEM in respect of the Highway contract was null and void, and an injunction to restrain UEM from signing the contract for the project with any agent or servant of the government.

On 25 August 1987, the Supreme Court, allowing an appeal from the decision of Edgar Joseph Jr J. of the High Court, granted an interlocutory injunction against UEM to restrain it from signing the proposed contract pursuant to the letter of intent pending the final determination of the suit. In its oral judgment the Supreme Court said, *inter alia*:

We have considered a number of authorities both English and local as to the question of *locus standi*. We need only say that on the facts of this case the appellant clearly has *locus standi* to bring this suit.²¹

An appeal by UEM and the government to have the interlocutory injunction set aside was dismissed by the High Court, but the appeal by the two ministers to have the suit against them struck out was allowed. Both UEM and the government promptly appealed to the Supreme Court against the dismissal of their respective applications.

Tun Salleh subsequently explained the main thrust of the case as follows:

The case turned upon the issue of *locus standi*. The Supreme Court sat in a panel of 5 judges and was almost evenly divided . . . Two judges held that Mr Lim had *locus standi* whilst two others held otherwise. I sided with the latter not so much on the ground that Mr Lim had no *locus standi* but more on the ground that the allegations of fraud and criminal offence should be thrashed out according to criminal law in a criminal law court.²²

Hamid Omar C.J. described the question of *locus standi* as the ‘central issue’²³ whilst Hashim Yeop Sani S.C.J. described it as ‘the crucial question’.²⁴ Both judges appeared to have sympathy for the argument that the judgment of the

¹⁹ *Government of Malaysia v. Lim Kit Siang* [1988] 2 *Malayan Law Journal* 12.

²⁰ *Ibid.* 43 (per Abdoolcader S.C.J.).

²¹ The oral judgment is quoted in [1988] 1 *Malayan Law Journal* 50, 53.

²² Tun Salleh Abas, *op. cit.* 12.

²³ [1988] 2 *Malayan Law Journal* 12, 27.

²⁴ *Ibid.* 38.

Supreme Court on the issue of *locus standi* 'was merely *obiter*'. It is not difficult to share the annoyance of Abdoolcader S.C.J. who described the argument as a 'preposterous contention', and added:

The pronouncement on 25 August 1987 is a judgment of the Supreme Court which unequivocally made a decision on the points in issue before it including that of standing taken by the appellants themselves and crucial to the substratum and basis of the respondent's suit. Any view to the contrary as to the efficacy of that judgment would lay open the door to similar contentions in relation to decisions of this court and indeed of other courts as well in matters where brief oral judgments are delivered at the conclusion of argument.²⁵

Abdoolcader S.C.J. entered a self-described 'vigorous dissent' and endeavoured 'to translate the sting of the thing into language as mild as [he] can mobilise and muster without mincing words'.²⁶ George Seah S.C.J., the other dissenting judge, also argued convincingly that the Court lacked the jurisdiction to review and reverse the decision made by the Supreme Court on 25 August 1987.

The dissenting judges have clearly adopted an enlightened view of the rule relating to *locus standi*. In his eloquent judgment, Abdoolcader S.C.J. dealt with the question of a relator action by describing it as 'a theoretical possibility with no conceivable hope generally for practical purposes of advancing the concrete action beyond that'. He also remarked:

I would think it would be too much to expect process of this nature involving the ventilation of a public grievance to proceed only through this channel, given even the fortitude the incumbent of the office would presumably be endowed with, in view of the rebound where the complaint is against the Government itself and the Attorney-General is its legal adviser, as it would surely be expected that if the complaint merited action by the Attorney-General or by his fiat to a relator, he would himself in the first instance have had the cause of complaint aborted before its overt manifestation.²⁷

Undoubtedly, the views of Hamid Omar C.J. and Hashim Yeop Sani S.C.J., and which were shared by Salleh Abas L.P., represented a retrograde step in the development of administrative law in Malaysia. To deny *locus standi* to Mr Lim would possibly lead to an enormous sum of public money running into billions of dollars being spent illegally. Surely, George Seah S.C.J.'s proposition that Mr Lim as a Member of Parliament owes a duty not only to his own electorate but also to the Dewan Rakyat and the peoples of Malaysia is uncontroversial. It would constitute an abdication of his judicial duty if he were to hold that Mr Lim lacked the standing to institute the proceedings.

The additional reason advanced by Salleh Abas L.P. cannot withstand scrutiny: he regarded the complaint as an attempt to enforce the criminal law against the Prime Minister (because UEM belongs to UMNO of which the Prime Minister is the President), the Minister of Finance and the Minister of Works. George Seah S.C.J. gave short shrift to such a view with the succinct rejoinder that Mr Lim did not bring the suit to enforce the criminal law: '. . . it was a public interest suit calling for judicial review of the legality of the proposed executive action'.²⁸

Although the *UEM* case represented a victory for the government, it was,

²⁵ *Ibid.* 46.

²⁶ *Ibid.* 41-2.

²⁷ *Ibid.* 45.

²⁸ *Ibid.* 35.

nevertheless, a decision which had likely engendered disquiet in the Prime Minister: the dissenting judgments signalled that some members of the judiciary were prepared to exercise judicial control over executive actions and were not prepared to countenance procedural expedients, such as *locus standi*.

Several other cases and events also aggravated the strain in the relationship between the government and the judiciary.

On 19 March 1987, the Supreme Court, by a majority, dismissed the appeal of the Public Prosecutor against the decision of High Court judge, Zakaria Yatim J., in *Public Prosecutor v. Dato' Yap Peng*.²⁹ The decision of the Supreme Court provoked the Prime Minister to bring about a legislative undermining of that decision: the Malaysian Parliament enacted the Constitution (Amendment) Act 1988.³⁰

In *Dato' Yap Peng*, the accused was first produced before the Sessions Court at Kuala Lumpur and was charged on two charges of criminal breach of trust to which he claimed trial. When his case was mentioned again in the Sessions Court, the Deputy Public Prosecutor tendered a certificate under s. 418A of the Criminal Procedure Code which was signed by the Public Prosecutor himself. The President of the Court thereupon transmitted the case to the High Court. When the accused was charged again in the High Court at Kuala Lumpur on the same two charges, objection was taken to the transfer of the case from the Sessions Court to the High Court.

In *Yap Peng* it was asserted that s. 418A of the Criminal Procedure Code was unconstitutional on the ground that it infringed, *inter alia*, Article 121(1) of the Constitution.³¹ Section 418A of the Criminal Procedure Code provided as follows:

(1) Notwithstanding the provisions of section 417, the Public Prosecutor may in any particular case triable by a Criminal Court subordinate to the High Court issue a certificate requiring the Court before which the case is pending to remove it to the High Court at such place as may be specified in the certificate and to cause the accused person to appear or be produced before the said High Court.

Article 121(1) of the Constitution provided that 'the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status . . . and in such inferior courts as may be provided by federal law'.

Zakaria Yatim J. of the High Court concluded that s. 418A of the Criminal Procedure Code did encroach upon the judicial power of the Federation, which under Article 121(1) was vested in the Courts.

The Supreme Court, by a majority, dismissed the appeal by the Public Prosecutor. Abdoolcader S.C.J., with whom Lee Hun Hoe C.J. (Borneo) agreed, pointed out that what was under challenge was a power at any stage of

²⁹ [1987] 2 *Malayan Law Journal* 311 (High Court), 316 (Supreme Court).

³⁰ Act A704.

³¹ Previous challenges to the validity of s. 418A of the Criminal Procedure Code on the ground of violation of Article 8(1) of the Constitution had been dismissed: by the Federal Court in *Datuk Haji Harun bin Idris v. P.P.* [1977] 2 *Malayan Law Journal* 155; *P.P. v. Oh Keng Seng* [1977] 2 *Malayan Law Journal* 206; by Hashim Yeop A. Sani J. in *P.P. v. Su Liang Yu* [1976] 2 *Malayan Law Journal* 128; by Ajaib Singh J. in *P.P. v. Oh Keng Seng* [1976] 2 *Malayan Law Journal* 125. Cf. Abdoolcader J. in *P.P. v. Datuk Harun bin Hj. Idris & Ors.* [1976] 2 *Malayan Law Journal* 116.

the proceedings to effect the transfer of any particular case pending before a subordinate court competent to try it to the High Court. Section 418A was 'both a legislative and executive intromission into the judicial power of the Federation'. In colourful language, Abdoolcader S.C.J. said:

[A]ny other view would *ex necessitate rei* result in relegating the provisions of article 121(1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper's will.³²

Mohamed Azmi S.C.J., to like effect, said that judicial power to transfer cases from a subordinate court of competent jurisdiction could not be conferred on any organ of government other than the judiciary.³³

Both Salleh Abas L.P. and Hashim Yeop A. Sani S.C.J. dissented. The former was prepared to make a concession: the law under challenge was constitutional to the extent that the Public Prosecutor's power was exercisable before the trial had started. This concession was clarified by Salleh Abas L.P. as follows:

If the Public Prosecutor purports to exercise his power under section 418A after the trial has commenced in the Subordinate Court, such exercise, I agree, would be unconstitutional because viewed from the Court's angle it interferes with the Court's function of carrying on with the trial to its conclusion and therefore could be regarded as encroaching upon the judicial power of the Court.³⁴

As a response to the decision, the Constitution (Amendment) Act 1988 was enacted. One of the provisions of this Act sought to excise the vesting of the judicial power of the Federation in the Courts. Henceforth the High Courts and inferior courts 'shall have such jurisdiction and powers as may be conferred by or under federal law'.

The UMNO 11 Case

The case which finally galvanised Dr Mahathir into action was the '*UMNO 11 Case*'.³⁵ The significance of this case must be viewed in the context of the factionalism which had split the ranks of the UMNO. Two opposing factions were vying for the top leadership of the party.³⁶ In Malaysian politics, whoever holds the presidency of UMNO also becomes the Prime Minister of Malaysia. Dr Mahathir had won the election for presidency of the party in 1987 by a very slim majority (of 43 votes).³⁷ Eleven dissatisfied members sought to challenge the validity of the election. The case was argued before Harun J.

In relation to UMNO's structure, each year branch elections are held whereby delegates are elected who in turn attend divisional meetings to elect delegates to the general assembly. The kernel of the plaintiffs' case was that a number of branches which had elected delegates to the divisional conferences had not been registered by of the Registrar of Societies, and that this was in clear violation of the Societies Act 1966. Harun J. delivered a judgment which was described as

³² [1987] 2 *Malayan Law Journal* 316, 319.

³³ *Ibid.* 324.

³⁴ *Ibid.* 327.

³⁵ *Mohd. Noor bin Othman v. Mohd. Yusof Jaafar* [1988] 2 *Malayan Law Journal* 129.

³⁶ See Goh Cheng Teik, *Racial Politics in Malaysia* (1989) 68-75 ('A Postscript on UMNO').

³⁷ Dr Mahathir received 761 votes while his rival, Tengku Razaleigh Hamzah received 718 votes.

creating 'great confusion':³⁸ he simply held that UMNO by virtue of the existence of the unregistered branches had become an unlawful society. He added:

That being so, the plaintiffs as members of UMNO cannot acquire any right which is founded upon that which is unlawful. The court will therefore not lend its aid to the reliefs sought by the plaintiffs.³⁹

The plaintiffs had sought, *inter alia*, a declaration that the general assembly election was null and void.⁴⁰

The plaintiffs inevitably appealed to the Supreme Court. In an unprecedented move, the appeal was fixed to be heard by a full bench of nine Supreme Court judges on 13 June 1988. What was placed at stake in consequence was the political survival of the Prime Minister. In the meantime, the letter of Tun Salleh to the King had evoked an unexpected response. Two days after despatching the letter to the King and the Rulers, the Lord President had gone abroad for medical treatment and only returned on 17 May 1988.⁴¹ In his absence events were unfolding with escalating speed: the survival of the Lord President had now moved to centre stage. The convulsion in the judiciary which soon erupted had shunted aside the Prime Minister's survival problem.

CHRONOLOGY OF EVENTS

Politicians sometimes see in the courts the main source of limitation of their authority: and over the years political influence begins to erode judicial independence at its peripheries through a lowering of the morale of some of the weaker judges. Direct confrontations sometimes occur . . .⁴²

The letter of Tun Salleh which was sent on 26 March 1988 had allegedly so incurred the disapproval of the King that on 1 May 1988 he commanded the Prime Minister 'to take appropriate action' against the Lord President.⁴³ On 5 May 1988, the Prime Minister in a letter to the King said that, according to the advice of the Attorney-General, he could not take any action against the Lord

³⁸ Tun Salleh Abas, *op. cit.* 13.

³⁹ *Mohd. Noor bin Othman and Ors v. Mohd. Yusof Jaafar and Ors* [1988] 2 *Malayan Law Journal* 129, 134. The judgment is a most perplexing one. For instance, Harun J., after denying the plaintiffs the assistance of the court, went on to say as follows:

In the circumstances of this case although the plaintiffs have lost their case they have succeeded in obtaining a declaration that the 1987 UMNO elections were null and void and the most appropriate order would be to make no order as to costs.

But where is the declaration if the court could not 'lend its aid to the reliefs sought by the plaintiffs'?

⁴⁰ In the ensuing confusion, Dr Mahathir managed to secure the registration of his UMNO Baru (new UMNO). His opponents' attempt to register UMNO Malaysia was rejected by the Registrar of Societies. See *Tunku Abdul Rahman Putra Al-Haj and Ors v. Dato Seri Dr Mahathir Mohamad* [1989] 1 *Malayan Law Journal* 48.

⁴¹ A few days after his return from overseas, Tun Salleh, apart from fixing the appeal in the *UMNO 11* case for 13 June 1988, also fixed the appeal in the *Karpal Singh* case for 15 June 1988. Karpal Singh (a prominent member of the opposition and a well-known lawyer) who had been detained under the Internal Security Act successfully applied for habeas corpus in the High Court (Ipoh). Nine hours after his release he was re-arrested. He filed a second habeas corpus application. In the meantime an appeal had been lodged against the order of the High Court. The outcome of the second habeas corpus application depended upon this appeal. See Tun Salleh Abas and Das, K., *May Day for Justice* (1989) 61, 82-3.

⁴² Weeramantry, C. G., *op. cit.* n. 3, 102-3.

⁴³ *First Tribunal Report*, Vol. I, 4.

President except in the circumstances provided for by Article 125(3) of the Federal Constitution. The Prime Minister undertook to investigate and examine the position of the Lord President, and added:

[I]f there is evidence of any behaviour or other causes which, in my opinion, clearly show that he is no longer able to discharge his functions as Lord President properly and in an orderly manner, I shall then make an appropriate representation to Your Majesty.⁴⁴

On 25 May 1988, the Prime Minister wrote again to the King, this time informing him that on the ground of the behaviour of the Lord President and other causes the Lord President should be removed from office.⁴⁵ Advice was tendered to the King to appoint a Tribunal to investigate and report back to the King. The King was further advised that pending a referral of the matter to the Tribunal, he should suspend the Lord President with effect from 26 May 1988. The King agreed to the appointment of a Tribunal and to the suspension of the Lord President.⁴⁶

On 27 May 1988, the Lord President was summoned to the Prime Minister's office where he was informed that the King had taken exception to the letter of 26 March 1988 and had initially wanted him to be replaced but that on advice he had decided to set up a Tribunal. The Lord President said he would not resign but was willing to face the Tribunal and immediately thereafter left the meeting. Present at this meeting were the Deputy Prime Minister (Abdul Ghafar Baba) and the Chief Secretary to the Government (Tan Sri Sallehuddin Mohammed). That same day the Lord President was served a letter from the Prime Minister informing him that he had been suspended with effect from the previous day, 26 May 1988.

In most respects the sequence of events stemming from the fateful day of Friday, 27 May 1988 to 8 August 1988, when the Lord President was removed from office, has not been disputed. There were, however, contradictory versions of the exchange that took place when the Lord President presented himself in the office of the Prime Minister on 27 May 1988 — a contradiction which bore significance in reinforcing the possible motivation behind the whole saga. In the encounter did the Prime Minister accuse the Lord President of having shown bias in cases involving UMNO?⁴⁷ This contradiction is examined in the analysis of the First Tribunal Report.

On 28 May 1988 (a Saturday and a half working day), the Lord President wrote to the Prime Minister conveying his decision to take early retirement 'in the national interest'.⁴⁸ This decision was accepted with alacrity by the Prime Minister the same day. The next day, Sunday, 29 May 1988, the Lord President wrote to the Prime Minister to say that 'on careful reflection' he had concluded that his earlier retirement decision 'would be detrimental to the standing of the Judiciary and quite adverse to the interest of the nation'. Hence he had decided to withdraw his application for early retirement. He ended his letter by saying:

⁴⁴ *Ibid.* 5. The English translation of the letter dated 5 May 1988 is set out in Annexure 3 to the Report (Vol. II).

⁴⁵ *Ibid.*, Vol. II, Annexure 4.

⁴⁶ *Ibid.*, Vol. II, Annexure 5.

⁴⁷ See Tun Salleh Abas, *op. cit.* 16.

⁴⁸ *First Tribunal Report*, Vol. II, Annexure 6.

I shall await the appointment of the Tribunal which, I have no doubt, will clear my name. I have also no doubt that justice will prevail in the end.⁴⁹

The Lord President was in for a rude shock: for justice to prevail, the constitutional process for removal of judges had to be observed according to its *spirit* as well as its letter, and there needed to be enough persons donning the judicial garb who were of sufficient courage and integrity to ensure such compliance. Sadly for the Lord President, justice was to be the casualty of the unfolding saga. But more sadly for the Malaysian nation, the independence of the judiciary was to be undermined; the Prime Minister simply lobbed the grenade and confidently waited for the pin to be pulled from within the judiciary.

After despatching his letter retracting his early retirement application the Lord President on the same day called a press conference at his residence. The next day (30 May 1988) he gave a BBC interview. These actions were regarded by the Prime Minister as further showing that the Lord President was no longer able to discharge his functions as Lord President properly: thus the Tribunal was required to look into this matter too. The condemned man was to be further condemned for speaking out in his own defence!

On 13 June 1988, the composition of the Tribunal was publicly announced. The Tribunal was to be chaired by Tan Sri Abdul Hamid who was then the Chief Justice (Malaya). The other members of the Tribunal were: Tan Sri Lee Hun Hoe (Chief Justice (Borneo)); Ranasinghe C.J. (Chief Justice of Sri Lanka); Sinnathuray J. (a Judge of the Singapore High Court); Tan Sri Abdul Aziz (a retired judge of the then Federal Court of Malaysia) and Tan Sri Mohd. Zahir (a retired Judge of the High Court of Malaya).

Various objections were taken in respect of the composition of the Tribunal. In the first place, Tan Sri Abdul Hamid was present at the meeting of the Kuala Lumpur judges which resulted in the letter being written by the Lord President to the King. Secondly, Tan Sri Mohd. Zahir's appointment was inappropriate under the doctrine of separation of powers. Apart from being the Speaker of the House of Representatives, he had also presided at a sitting of the House in which the Prime Minister had criticized the judiciary. It was also 'undesirable' for Tan Sri Abdul Aziz to sit on the Tribunal as his current status was that of a businessman-cum-lawyer. As no change was made by the King to the composition of the Tribunal after the objections were brought to his notice the Tribunal proceeded with its inquiry. It must be stressed that the judges constituting the Tribunal were chosen by the Prime Minister; the King formally appointed them. The disconcerting feature was that the Prime Minister was also Tun Salleh's accuser.

Apart from these objections, the composition of the Tribunal could be criticized on the ground that, except for Ranasinghe C.J., the other members were clearly not of equivalent status to Tun Salleh.⁵⁰ The Bar Council rightly pointed out as follows:

⁴⁹ *Ibid.*, Annexure 8.

⁵⁰ The Malaysian Constitution embodies the principle that no public servant 'shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank': Article 135(1) of the Malaysian Constitution. Surely, this principle must, *a fortiori*, apply by necessary implication to members of the judiciary.

It is felt that when appointing the Members of the Tribunal the principle ought to be followed that Members of the Tribunal as far as possible should be more senior in rank than the person facing the proceedings. In this respect, the Bar Council had brought to the notice of the Government that there were available two retired Lord Presidents, at least one retired Chief Justice and a number of retired Supreme Court Judges who could have been appointed.⁵¹

The Tribunal rejected the Lord President's application for a public hearing. The Tribunal also refused his 'application for adjournment so as to enable [his] counsel, Mr Anthony Lester Q.C., to appear before the Tribunal'.⁵² However, the Tribunal was prepared to adjourn the commencement of its hearing from 27 June 1988 to 29 June 1988: an adjournment of a mere two days. The whole process smacked of unseemly haste.

A day before the Tribunal was to sit, the Lord President turned to the courts in his quest for a fair hearing. He sought leave from the High Court in Kuala Lumpur to apply for an order of prohibition against the members of the Tribunal, on various grounds, restraining them from making any investigation, report or recommendation. What was supposed to be a fairly straightforward matter developed into a most 'bizarre' situation: while the Tribunal was working feverishly to complete its work, the High Court was perceived to be dragging its feet on the application by the Lord President. The application filed on 28 June 1988 was set down for hearing on 1 July 1988 before Yusoff J. However, the application had to be transferred to Ajaib Singh J. because Yusoff J. had 'produced a medical certificate'.⁵³ On Friday, 1 July 1988, Ajaib Singh J. after partly hearing the application adjourned the matter to the next day. The next day, he further adjourned the hearing till Monday, 4 July 1988. The progress of the Tribunal suggested a strong likelihood that by 4 July 1988 the application would have been rendered academic. The unfolding events looked alarming: Ajaib Singh J. had also refused an oral application for a limited stay order against the Tribunal.

Following Ajaib Singh J's rejection of the application for a limited stay, counsel for Tun Salleh approached Wan Suleiman S.C.J. who, purporting to act under s. 9(1) of the Courts of Judicature Act 1964, convened an immediate special sitting of the Supreme Court just before lunch, again on a Saturday which was a half working day. A bench of five judges unanimously granted the oral application for a limited stay, restraining the Tribunal from submitting its report, recommendation and advice to the King until further order.

The response to the action of these five Supreme Court judges (Tan Sri Wan Suleiman, Datuk George Seah, Tan Sri Azmi Kamaruddin, Tan Sri Eusoffe Abdoolcader and Tan Sri Wan Hamzah) was swift. After consulting the Prime Minister, Tan Sri Abdul Hamid made a representation dated 5 July 1988 to the King, complaining of the gross misbehaviour of the five Supreme Court judges and expressing the opinion that the misbehaviour justified their removal from

⁵¹ See 'A Report by the Bar Council on the Report of the Tribunal Established in Respect of Tun Mohamed Salleh Abas', *op. cit.* n. 6, 32. For a similar criticism see Trindade, F. A., 'The Removal of the Malaysian Judges' [1990] 106 *Law Quarterly Review* 51, 57-8. Professor Trindade has also levelled this criticism in relation to the composition of the Second Tribunal: *ibid.* 69.

⁵² Tun Salleh Abas, *op. cit.* 24.

⁵³ *Ibid.* 25.

office. The King then ordered that a tribunal be established to investigate the representation. He also ordered that the five Supreme Court judges should be suspended with effect from 6 July 1988. Thus was set in motion the process in Article 125(3) of the Federal Constitution which culminated in the removal of two of these judges.

The legal barriers were now shoved aside to enable a number of developments to occur. On 22 July 1988, a differently constituted bench of five judges set aside the interim order which had been issued by the five suspended judges.⁵⁴ The First Tribunal wound up its work and on 7 July 1988 completed its report which recommended the removal of Tun Salleh. On 6 August 1988, a statement issued by the Prime Minister's department said that the King had agreed with the recommendation of the Tribunal to remove Tun Salleh. The removal was to take effect from 8 August 1988.⁵⁵ On 8 August 1988, the UMNO 11 appeal was heard and, on the following day, dismissed. The Prime Minister must have been very delighted; the ousted Lord President was possibly left very bewildered by the actions of a number of his judicial brethren.

On 12 August 1988, the King appointed the following persons to the Tribunal (hereinafter referred to as the 'Second Tribunal') to investigate and report in relation to the conduct of the five suspended Supreme Court judges: Tan Sri Hashim Yeop as Chairman, Datuk Edgar Joseph Jr., Datuk Mohd. Eusoff Chin, Dato Lamin Yunus, Mark Fernando J. (a judge of the Supreme Court of Sri Lanka) and P. Coomaraswamy J. (a judge of the High Court of Singapore).

Subsequently, on 30 August 1988, Tan Sri Hashim Yeop, in the face of vigorous submissions regarding public perception of a real likelihood of bias, withdrew from the Tribunal. Datuk Edgar Joseph Jr. was appointed the new chairman. In accordance with the recommendations of the Tribunal the King on 4 October 1988 ordered the dismissal of Tan Sri Wan Suleiman and Datuk George Seah. The other three suspended judges were reinstated.

On 10 November 1988, Tan Sri Abdul Hamid became the Lord President of the Supreme Court of Malaysia. This elevation of a man who, many believed, should not have sat in judgment on Tun Salleh underlined the sorry nature of this whole episode.

THE REMOVAL OF THE LORD PRESIDENT: AN ANALYSIS OF THE FIRST TRIBUNAL REPORT

In a very real sense the members of the Tribunal themselves will be on trial before the bar of international legal opinion as much as Tun Abas will be on trial before the Tribunal.⁵⁶

Tun Salleh, Tan Sri Wan Suleiman and Datuk George Seah were all removed through the purported operation of Article 125 of the Malaysian Constitution. It

⁵⁴ *Tun Dato Haji Mohamed Salleh bin Abas v. Tan Sri Dato Abdul Hamid bin Omar & Ors* [1988] 3 *Malayan Law Journal* 149. The Court comprised the following: Hashim Yeop A. Sani and Harun SCJJ., Mohamed Yusoff, Gunn Chit Tuan and Anuar JJ.

⁵⁵ See *New Sunday Times* (Malaysia), 7 August 1988.

⁵⁶ Downey, P. J., 'Judicial Independence In Malaysia' (Editorial) [1988] *New Zealand Law Journal* 217.

is therefore worthwhile to digress slightly and examine the scope of this constitutional provision first. The Lord President presides over the Supreme Court of the Federation of Malaysia.⁵⁷ He occupies the post at the apex of the Malaysian judiciary. He is appointed by the King on the advice of the Prime Minister, after consultation with the Conference of Rulers.⁵⁸ All Supreme Court judges hold office until they attain the age of sixty-five years.⁵⁹

A Supreme Court judge may at any time resign his office by writing under his hand addressed to the King.⁶⁰ Removal of a Supreme Court judge can only be effected in accordance with the provisions of Article 125 of the Malaysian Constitution.

Article 125(3) provides as follows:

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

The tribunal must consist of not less than five persons who hold or have held office as judge of the Supreme Court or a High Court or who hold or have held equivalent office in any other part of the Commonwealth. The tribunal is to be presided over by the member first in the following order, namely, 'the Lord President of the Supreme Court, the Chief Justices according to their precedence among themselves, and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of two members with appointment of the same date)'.⁶¹

It is also provided by Article 125(5) that pending any reference and report under Article 125(3) the King may on the recommendation of the Prime Minister and, in the case of any other judge after consulting the Lord President, suspend a judge of the Supreme Court from the exercise of his functions.

The following provisions of Article 131A(1) should also be noted:

Any provision made by federal law for the functions of the Lord President of the Supreme Court to be performed, in the event of a vacancy in the office or of his inability to act, by another judge of the Supreme Court may extend to his functions under this Constitution.

Two issues may arise in relation to the invocation of Article 125 for the removal of the Lord President: first, does Article 125 contemplate the removal of the Lord President of the Supreme Court; secondly, what is the scope of the grounds for removal?

As far as the first issue is concerned, a careful reading of the provisions of Article 125 would support the application of that Article to the removal of the Lord President.⁶² The opening words of Article 125(3) provide for the referral to the King to be achieved in either of two ways: either by a direct reference by the Prime Minister himself or by the Lord President after consultation with the Prime Minister. Thus in the case of the removal of the Lord President there is no

⁵⁷ Article 122(1).

⁵⁸ Article 122B(1).

⁵⁹ Article 125(1).

⁶⁰ Article 125(2).

⁶¹ Article 125(4).

⁶² Cf. Tun Salleh Abas, *op. cit.* 48.

requirement for consultation with him. The setting out of the order of precedence of members as to who will preside over the tribunal indicates the possibility that the Lord President may not always be the presiding person. Finally, the provisions of Article 131A(1) contemplate the removal of the Lord President on, *inter alia*, the ground of 'inability to act', a ground which is set out in Article 125(3).

It is thus submitted that the removal of the Lord President is contemplated by the provisions of Article 125.

The second issue is the more difficult and important one, namely the grounds for removal. The Constitution provides for two main grounds:

- (i) 'misbehaviour', and
- (ii) 'inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office'.

Article 160, which deals with the interpretation of the Constitution does not contain any definition of the word 'misbehaviour'. The First Tribunal favoured the following broad definition:

. . . unlawful conduct, or immoral conduct such as bribery [and] corruption, [and] acts done with improper motives relating to the office of a judge or which would shake the confidence of the public in a judge.⁶³

The Second Tribunal also endorsed a broad approach.⁶⁴ In its Report, it canvassed the various attempts at defining 'misbehaviour' in various jurisdictions, especially in Australia. Considerable attention was focused on the definition of 'misbehaviour' of the Parliamentary Commission of Inquiry appointed in relation to the 'Justice Murphy Affair'. In the end, the Second Tribunal opted for the following broad test as formulated by Sir Richard Blackburn in the 'Justice Murphy Affair':

. . . 'proved misbehaviour' means such misconduct, whether criminal or not, and whether or not displayed in the actual exercise of judicial functions, as, being morally wrong, demonstrates the unfitness for office of the judge in question.⁶⁵

The Second Tribunal also insisted that proof of improper motive was an essential requirement.⁶⁶ It openly acknowledged that a tribunal under Article 125(3) has only one course open to it, namely to recommend removal or not to recommend removal; no possibility for an intermediate recommendation existed under that provision.⁶⁷

Coming back to the Tun Salleh saga, a request by him for an open hearing was refused by the Tribunal, which said: 'The majority of the members of the Tribunal were of the view that as several of the allegations to be enquired into involved issues of a sensitive nature, the hearing should not be held in public'.⁶⁸

⁶³ *First Tribunal Report*, 50.

⁶⁴ *Second Tribunal Report*, 32-3.

⁶⁵ (1986) 2 *Australian Bar Review* 203, 221.

⁶⁶ *Second Tribunal Report*, 37.

⁶⁷ *Ibid.* 40. The Tribunal referred to Cowen, Z. and Derham, D. P. 'The Independence of Judges' (1953) 26 *Australian Law Journal* 462.

⁶⁸ *First Tribunal Report*, 18. Cf. 'Basic Principles on the Independence of the Judiciary' — Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolution 40/32 of 29 November 1985 and 40/146 of 13 September 1985. Basic principle 17 provides that in relation to a charge or complaint against a judge the examination of the matter at its initial stage 'shall be kept confidential, unless otherwise requested by the judge'. (Emphasis added.)

Despite this, the Government saw fit to publish not only the findings of the Tribunal but also the transcripts of the proceedings. This publication was a blessing in disguise for it revealed the travesty of justice occasioned against Tun Salleh.

At the outset, the following observations could be made about the Tribunal's report which has been described as among 'the most despicable documents in modern history':⁶⁹

- (i) The 'Notes on Proceedings' revealed an utter failure by the Tribunal to appreciate the nature of its role when carrying out the task envisaged for it by the Constitution;
- (ii) The questioning of the Chief Secretary to the Government was an indictment of the accumulated years of experience and wisdom of all the members of the Tribunal combined;
- (iii) The participation of Tan Sri Abdul Hamid made a mockery of the whole process.

Before these observations are looked at more closely, it is necessary to mention the five allegations levelled against Tun Salleh and the deliberations of the Tribunal. In brief, it was alleged: (1) that in a speech on the occasion of the conferment of the Honorary degree of Doctor of Letters at the University of Malaya he had made statements critical of the Government; (2) that at the launching of a book he had also made statements which sought to discredit the Government; (3) that he had adjourned *sine die* a case (*Teoh Eng Huat v. Kadhi Pasir Mas, Kelantan and Another*⁷⁰) which involved the issue of a minor's choice of religion; (4) that he had written the letter of 26 March 1988 to the King, a letter which, amongst other things, was intended to influence the Rulers and the King to take some form of action against the Prime Minister; (5) that various statements made after his suspension as Lord President contained untruths and were calculated to politicize the issues and to further discredit the Government.

In relation to allegations (1) and (2), it was claimed that certain statements of Tun Salleh displayed 'prejudice and bias against the Government' and that these statements were 'incompatible' with his position as Lord President of the Supreme Court. It was also claimed that in his book-launching speech he had also made statements which discredited the Government and 'thereby sought to undermine public confidence in the Government's administration of this country in accordance with law'. The finding of the Tribunal on these allegations cannot withstand scrutiny if one were to read the speeches as set out in the Report and analyse the cursory evidence of the two witnesses (the Director-General of Fisheries and the Deputy-Director of Budget) which was used to substantiate these claims. An insidious aspect of the allegations was the distortion of statements made by Tun Salleh in his book-launching speech to create the impression that Tun Salleh was advocating the acceptance of the Islamic Legal System not only in the interpretation of the Civil Law of Malaysia but in its

⁶⁹ Geoffrey Robertson, Q.C., 'Justice hangs in the balance', *The Observer*, 28 August 1988.

⁷⁰ Civil Appeal No. 220 of 1986.

general application. Clearly this distortion was mischievous and raised serious doubts about whether the Attorney-General had acted fairly. As has been pointed out:

A reading of the passage in question shows that the Tribunal took the remarks of the Lord President out of context, deleting a crucial sentence at the beginning of the passage in question. In the edited passage, Salleh appears to praise Islamic law, but a reading of the entire passage indicates clearly that he does not do so.⁷¹

Allegation (3) involved a case where a father had alleged that he had not consented to his daughter's conversion to Islam. The fact that Tun Salleh had adjourned the case (which had come on appeal to the Supreme Court) *sine die* was intertwined with the earlier allegation that he was advocating the acceptance of the Islamic Legal System: this somehow or other enabled the Tribunal to accept the contention of the Attorney-General that Tun Salleh had meted out 'discriminatory treatment' to the father and that this was 'deliberately done for extraneous considerations'.⁷² Tun Salleh, in a response to the Tribunal's report, said:

This finding of the Tribunal is capricious and judicially outrageous. In coming to that finding, the Tribunal disregarded all the evidence before it:

the Tribunal deliberately ignored —

- (a) that the application for adjournment was made by the appellant himself (through his solicitors);
- (b) that the other parties to the appeal did not object to the appellant's request for the adjournment;
- (c) that it has been the practice of the Supreme Court to grant adjournments requested for by any party for good reasons, without the matter having to be called up on the hearing date;
- (d) that the Chief Registrar, in answer to Mr Justice T.S. Sinathuray, agreed that the matter was kept aside 'until such time one or the other party writes in and requests for it to be restored';
- (e) that since the adjournment, neither the Appellant nor any of the other parties had written in for the appeal to be restored.⁷³

It is not difficult to share the view that the finding of the Tribunal on allegation (3) was 'clearly perverse'.

Allegation (4) concerned the letter of 26 March 1988 sent to the King and the Rulers. Tun Salleh was accused of making false representations in his letter: it was alleged that his statement that the letter was from all the judges in the country was false as the letter was written after a meeting of all Kuala Lumpur judges.⁷⁴ The Tribunal expressed the view that 'this was not a mistake or an accidental slip . . . since as Lord President he knew full well that the number of judges in Kuala Lumpur is less than half the number of judges in the country'.⁷⁵ The assertion by Tun Salleh in his letter that he had been patient and had not publicly replied to accusations made against the judges was regarded by the Tribunal as untrue. The Tribunal concluded that Tun Salleh, by sending the letter to the King and the Malay Rulers, was asking them 'to take some action to discipline the Prime Minister'. The finding of the Tribunal on allegation (4) cannot be sustained if the Tribunal had taken into account the background under

⁷¹ *Malaysia: Assault on the Judiciary* (1990), 46.

⁷² *First Tribunal Report*, 43.

⁷³ Press Statement by Tun Salleh and reproduced in *INSAF*, *op.cit.* n. 6, 23.

⁷⁴ *First Tribunal Report*, 24.

⁷⁵ *Ibid.* 44.

which the letter was written and the fact that as head of the judiciary Tun Salleh was appointed by the King after consultation with the Malay Rulers. This finding led a commentator to express as follows:

How Hamid, the chairman of the tribunal, managed to get through this part of the proceedings without choking is hard to understand, since *he was himself one of the judges at the meeting where the letter was discussed and agreed upon and he made no objection to it or to any other part of the business.*⁷⁶

Allegation (5) related to various statements made by Tun Salleh after his suspension as Lord President, in particular statements made by him in an interview with the BBC. The Tribunal found that in the absence of any explanation from Tun Salleh it was unable to disagree with the submission of the Attorney-General that the 'unfounded statement' ('that he was unjustly removed from office because he had expressed partiality in respect of UMNO cases that have come before the courts') was made by Tun Salleh 'with a view to politicizing the issue of his suspension and to gain public sympathy for himself'.⁷⁷ It is difficult for this finding to be sustained when one examines notes of proceedings of the Tribunal: the questioning of the Chief Secretary to the Government was conducted in a most perfunctory manner.

The writing of the letter to the King was generally viewed as providing the pretext for initiating the removal process. The other four allegations were in truth 'afterthought' charges to reinforce the action against the Lord President.⁷⁸ Nevertheless, the Tribunal found that all allegations had been established against the Lord President. The Tribunal then concluded with the following remarks:

We very much regret that the respondent chose not to appear before us, even though every reasonable opportunity was afforded to him by us. We have, as has been made clear in this Report, come to the findings which we have arrived at only upon the unchallenged and uncontradicted material placed before us. Needless to say that had we had the benefit of a plausible explanation from the respondent in regard to the several issues which were presented to us for our consideration, our decision may well have been different.⁷⁹

This explanation by the Tribunal exposes the failure by the Tribunal to appreciate its role in relation to the task assigned to it under the Constitution. After noting that Article 125(3) provides for the Tribunal to make a recommendation to the King, the Tribunal observed:

The obligation and the duty so cast upon us by law is therefore an extremely onerous one, and calls for the most anxious consideration by us. It becomes even more so when the person involved is the Lord President, the head of the Judiciary.⁸⁰

The actions of the Tribunal belied its words. Surely in the absence of the suspended Lord President it was all the more important for the Tribunal to investigate meticulously and rigorously the material placed before it. The 'extremely onerous' duty was discharged in a most superficial manner. This

⁷⁶ Levin, B., 'Malaysia's Law of the Jungle', *The Times*, 19 October 1989.

⁷⁷ *First Tribunal Report*, 48. A transcript of the BBC interview is set out in Vol. II, Annexure 11.

⁷⁸ It is not intended in this article to recite all the arguments which can be marshalled against the findings of the Tribunal in relation to the five allegations. This task has been lucidly performed by F.A. Trindale in his article, 'The Removal of the Malaysian Judges' [1990] 106 *Law Quarterly Review* 51, esp. 59-66. See also 'A Report by the Bar Council on the Report of the Tribunal Established in Respect of Tun Mohamed Salleh Abas' (1988) *INSAF*, Vol. XX, 30, 38-44.

⁷⁹ *First Tribunal Report*, Vol. I, 51.

⁸⁰ *Ibid.* 50.

submission can be illustrated by reference to the contradictory versions of the exchange that took place when Tun Salleh presented himself in the office of the Prime Minister on 27 May 1988. The account of the exchange by Tun Salleh if established would provide evidence that the steps taken to remove him were actuated by an improper purpose. In his account Tun Salleh said:

At the meeting the Prime Minister told me that the King wanted me to step down because of the letters I wrote to him and the Malay Rulers. When I tried to explain to the Prime Minister why I wrote those letters he cut me short and said that I, through my speeches, had shown bias in UMNO cases. I denied this allegation . . .⁸¹

It should be recalled that present at this meeting were the Deputy Prime Minister (Ghaffar Baba) and the Chief Secretary to the Government (Tan Sri Sallehuddin Mohammed). The notes of proceedings of the Tribunal contained the following:

Tan Sri Abu Talib Othman: Can you please tell the Tribunal whether or not the Prime Minister said that this action was taken because of the fact that he is biased in respect of UMNO cases then pending in court?

Tan Sri Sallehuddin Mohammed: I do not recall what the Prime Minister said, that UMNO cases is the reason for the Agong [*i.e.* the King] asking the Lord President to relinquish his post.⁸²

In response to a question from Tan Sri Hamid, the Chief Secretary recalled that the meeting was quite short, lasting 'roughly 5 to 6 minutes'.⁸³ The following questions were then directed to the Chief Secretary:

Tan Sri Mohamed Zahir Ismail: Nothing was mentioned about the UMNO cases?

Tan Sri Sallehuddin Mohammed: I cannot recall.

Tan Sri Mohamed Zahir Ismail: Did you take any note?

Tan Sri Sallehuddin Mohammed: Yes, I took note. I had a note book and I jotted down as they were speaking.

Tan Sri Mohamed Zahir Ismail: In your note book was there any mention about UMNO cases?

Tan Sri Sallehuddin Mohammed: No. My note book only mentions two things. That Lord President wrote the letter to the Agong and speeches made against Government interest. These are in my note book. I cannot recall him saying anything about UMNO.

Tan Sri Dato' Abdul Hamid bin Hj Omar: Have you got the note book?

Tan Sri Sallehuddin Mohammed: Yes.

Tan Sri Dato' Abdul Hamid bin Hj Omar: I think that would be all.⁸⁴

It is important to note that the Tribunal was of the view that it lacked the power to administer an oath or affirmation to witnesses testifying before it.⁸⁵ Nevertheless, the witnesses appearing before the Tribunal stated that they would tell 'the truth and nothing but the truth'. The formula did not include the telling of the whole truth. Therefore the Tribunal had to be very rigorous in the task of establishing the facts: the questions put to the Chief Secretary could hardly be described as searching questions. The Chief Secretary did not answer directly the question whether there was a mention of the UMNO cases. His reply was simply that he had no recollection, which is not the same thing as saying that there was no mention of the matter. How was it possible that a Tribunal with the collective wisdom of over one hundred years of combined judicial and legal experience did not do the most obvious thing, namely to take a look in the note book of the Chief

⁸¹ Tun Salleh Abas, 'The Role of the Independent Judiciary', 16.

⁸² *First Tribunal Report*, Vol. IV, 17-8.

⁸³ *Ibid.* 18.

⁸⁴ *Ibid.* 19-20.

⁸⁵ *Ibid.* Vol. I, 36.

Secretary? It is hardly convincing that in a meeting which lasted only five to six minutes the Chief Secretary could remember everything except the mention of the UMNO cases. The Report of the Tribunal thus carried its own death wound.⁸⁶

The other aspect which is manifest from a reading of the Report is the failure to articulate the standard of proof which should be adopted, except for the following comment:

[T]he Tribunal has endeavoured to follow the well-known principles applied and followed in such matters and also in regard to the burden of proof and the standard of proof by similar tribunals in other jurisdictions.⁸⁷

However, a reading of the Reports indicates that the Tribunal was simply adopting the submissions of the Attorney-General (who had contended that a 'preponderance of the evidence' was sufficient) and then sought to rationalize its stand by pointing to the absence of any explanation from Tun Salleh.

The most deficient aspect of the proceedings was the infringement of one of the twin pillars of natural justice — the rule against bias. As long ago as 1924, Lord Hewart C.J. had said:

[A] long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.⁸⁸

Lord Denning elaborated on this requirement:

The court will not inquire whether he [the judge] did, in fact, favour one side unfairly. Suffice it that responsible people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.⁸⁹

It is submitted that Tan Sri Hamid should have disqualified himself from not only chairing the Tribunal but also from the Tribunal itself. The arguments for disqualification are so obvious. Here was a person who could stand to gain from the removal of Tun Salleh: as Chief Justice of the High Court of Malaya he would generally be regarded as 'next in line' for the Lord President's post. Furthermore, if the younger Tun Salleh had remained in office until he reached the retirement age of 65, Tan Sri Hamid would not have the opportunity to succeed him for both were born in 1929.⁹⁰ A more fundamental objection was that Tan Sri Hamid had attended the meeting of 25 May 1988 which led to the decision to send the letter to the King.

Coincidentally, a judgment delivered by the Privy Council two months after the Second Tribunal had completed its task supplies strong support (on an

⁸⁶ The Tribunal, in its Report (Vol. I, 48), said:

There is also no evidence that any reference whatsoever was made to the UMNO cases at the meeting between the respondent and the Prime Minister on May 27, 1988.

A commentator, after highlighting this finding of the Tribunal, countered with the following question: 'Is there any evidence that UMNO was not mentioned at the ministry or is the evidence silent on this point altogether?': Moosdeen, A., 'The Tribunal on Tun Salleh Abas — A Hundred Years of Legal Wisdom', *INSAF* (Journal of the Malaysian Bar), November 1988, Vol. XX, No. 5, 68, 71.

⁸⁷ *First Tribunal Report*, Vol. I, 36.

⁸⁸ *R. v. Sussex Justices; ex parte McCarthy* [1924] 1 K.B. 256, 259.

⁸⁹ *Metropolitan Properties v. Lannan* [1969] 1 Q.B. 577, 599. The words of Lord Denning are equally applicable to administrative authorities: Sykes, E., Lanham, D., and Tracey, R., *General Principles of Administrative Law* (3rd ed. 1989) 200.

⁹⁰ Tan Sri Hamid was born on 25 March 1929; Tun Salleh was born on 25 August 1929.

analogous level) for the disqualification of Tan Sri Hamid from the First Tribunal. In *J.B. Jeyaratnam v. Law Society of Singapore*,⁹¹ the Privy Council allowed an appeal by Jeyaratnam from an order of the High Court of Singapore that the appellant be struck off the roll of advocates and solicitors of the Supreme Court of Singapore. Without going into the intricacies of the facts of the case, it would be sufficient to recite from the following passage from the judgment of the Privy Council:

Their Lordships must record their opinion that the refusal of the appellant's objection to the Chief Justice sitting was both erroneous and unfortunate . . . It would be absurd that the Chief Justice should not be able to disqualify himself from sitting if the advocate and solicitor facing disciplinary charges was either a close relative or a sworn enemy or for any other good reason. The refusal of the objection was unfortunate because the court was to be invited to go behind and condemn the Chief Justice's own decision on the appeals from Judge Khoo and his later refusal to reserve questions of law for the Court of Criminal Appeal. It was quite unacceptable that he should preside. Justice might be done, but certainly could not be seen to be done.⁹²

In Tun Salleh's case, justice certainly could not be seen to be done. Tan Sri Hamid's stand in refusing to disqualify himself from the First Tribunal was contradicted not only by the words of the Privy Council in *Jeyaratnam v. Law Society of Singapore* but also by the following clear utterances of the Second Tribunal:

The rules and principles governing disqualification for bias or interest *qua* Judge are amply prescribed by the common law; they apply to the Lord President and to all Judges equally, and no special provision was needed for the Lord President. Those principles of natural justice apply to the exercise of judicial functions, to the task of adjudication; in the broadest sense, to the exercise of powers affecting rights.⁹³

The only justification proffered by Tan Sri Hamid was that he was not at liberty to disobey a 'royal command'.⁹⁴ He also expressed the view that disobedience would amount to an 'act of disloyalty'.⁹⁵ This explanation was clearly a most startling one. The 'royal command' in the circumstances of this affair must be subject to the Constitution and the operation of the common law principles of natural justice. It is an unchallengeable proposition that the Malaysian nation in adopting the *merdeka* Constitution did not intend to create an absolute monarchy. Tan Sri Hamid's explanation is also not a tenable one especially as the King did accede to the wishes of Tan Sri Hashim to be relieved of the chairmanship of the Second Tribunal.

THE REMOVAL OF OTHER SUPREME COURT JUDGES: AN ANALYSIS OF THE SECOND TRIBUNAL REPORT

[Datuk George Seah's] removal, together with Tun Salleh Abas and Tan Sri Wan Suleiman Pawan Teh, will not relegate them to the footnotes of history, but will instead elevate them to the Pantheon of warriors in the cause of Justice. History will vindicate them.⁹⁶

⁹¹ [1988] 3 *Malayan Law Journal* 425.

⁹² *Ibid.* 431.

⁹³ *Second Tribunal Report*, 46-7.

⁹⁴ This 'royal command' excuse was reiterated by Tan Sri Hamid in his letter dated 20 March 1989 and addressed to Mr Niall MacDermot, the Secretary-General of the International Commission of Jurists (I.C.J.). This letter was a response to a resolution adopted by the I.C.J. at a meeting held in Caracas, Venezuela on 20 January 1989. The exchange of correspondence between the I.C.J. and Tan Sri Hamid is reproduced in [1989] 1 *Malayan Law Journal* cxxii.

⁹⁵ See Tun Salleh Abas, *op. cit.* 20.

⁹⁶ Joint Statement of Sabah Law Association and Advocates' Association of Sarawak, (1988) *INSAF*, Volume XX, No. 5, 82.

As a result of the intervention of the five Supreme Court judges, two of them (Tan Sri Wan Suleiman and Datuk George Seah) eventually paid the heavy price of removal from office. Their removal was effected pursuant to the recommendations of the Second Tribunal. Some aspects of the Report of the Second Tribunal require closer scrutiny in order to determine whether these recommendations were deficient in any way.

On this occasion, the judges decided to appear before the Tribunal. The following preliminary observations can be made about this Tribunal:

(i) Tan Sri Hashim in the first place should never have been appointed a member of the Tribunal, let alone its chairman. It was therefore not surprising that at the first sitting of the Tribunal that it was submitted that 'there were circumstances from which it might appear to others, and especially to ordinary members of the public, that there was a real likelihood of bias'.⁹⁷ Particular reference was made to the fact that he had been a member of the bench of the Supreme Court which had set aside the order made by the five judges on 2 July 1988. Tan Sri Hashim much to his credit withdrew from the Tribunal; Datuk Edgar Joseph Jr. was then made the chairman of the Tribunal. The withdrawal of Tan Sri Hashim demolished Tan Sri Hamid's justification for refusing to disqualify himself from the First Tribunal.

(ii) The Second Tribunal at the outset dealt with the important issue of the burden of proof required in respect of the allegations made in the representation against the five judges. It concluded that proof beyond reasonable doubt was required.⁹⁸ This determination of the Tribunal is to be commended (although its application of the burden is questionable). Once again, the contrast with the stand taken by the First Tribunal is very glaring: the First Tribunal had failed to give a clear ruling on this fundamental issue.

The first allegation against four of the judges (Tan Sri Wan Suleiman excepted) was for 'intentionally attending' the Supreme Court sitting 'without the permission or knowledge of the Acting Lord President'.⁹⁹ It was alleged that this was in violation of ss. 38(1) and 39(1) of the Courts of Judicature Act 1964¹ and that such conduct reflected 'an irresponsible and improper attitude' which tarnished the image of the judiciary and was unbecoming of a person holding the office of Supreme Court judge. A similar allegation against Tan Sri Wan Suleiman was for 'intentionally convening and being present' at the 2 July 1988 sitting of the Supreme Court.² The Tribunal found that these allegations against the judges had not been established: proof of improper motive was essential and had to be established beyond reasonable doubt. The evidence, according to the Tribunal, showed that the five judges had acted in the honest belief that Tan Sri Wan Suleiman was entitled to convene the special sitting, and that the other four judges were entitled to attend that sitting.³

⁹⁷ *Second Tribunal Report*, 4.

⁹⁸ *Ibid.* 23-9.

⁹⁹ *Ibid.* 71.

¹ Sections 38 and 39 of the Courts of Judicature Act 1964 read as follows:

38(1) Subject as hereinafter provided, every proceeding in the Supreme Court shall be heard and disposed of by three judges or such greater uneven number of judges as the Lord President may in any particular case determine.

(2) In the Absence of the Lord President the senior member of the Court shall preside.

39(1) The Court shall sit on such dates and at such places as the Lord President may from time to time appoint:

Provided that the Lord President may, when he deems it expedient, direct that any appeal be heard at any time and in any place in Malaysia.

(2) The Lord President may cancel or postpone any sitting of the Court which has been appointed under subsection (1).

² *Second Tribunal Report*, 71.

³ *Ibid.* 74. Two members of the Tribunal were of the view that if the standard of proof had been one of 'on balance of probabilities' they would have found against Tan Sri Eusoffe Abdoolcader and Tan Sri Azmi.

The second allegation common to all five judges was for 'intentionally hearing' the application at the Supreme Court sitting on 2 July 1988 on a matter still being heard by Justice Dato Ajaib Singh.⁴ It was therefore alleged that this showed lack of impartiality and was unbecoming of a person holding the office of a judge. The Tribunal found this allegation to be 'clearly unsustainable'.⁵

There were two additional allegations against Tan Sri Wan Suleiman and one additional allegation against Datuk George Seah. In the case of Tan Sri Wan Suleiman it was alleged that he had stayed away from a Supreme Court sitting scheduled for 2 July 1988 at Kota Bahru without reasonable cause and that he had directed both Datuk George Seah and Dato Harum Hashim to leave the same Supreme Court sitting without proper and reasonable cause.⁶ The additional allegation against Datuk George Seah was for staying away from the scheduled Supreme Court sitting at Kota Bahru.

The Tribunal unanimously held that the additional allegations against Tan Sri Wan Suleiman had been established and that they amounted to misbehaviour.⁷ The Tribunal by a majority recommended that he be removed from office.⁸ One member of the Tribunal was of the opinion that removal from office was not justified in the circumstances.⁹

The additional allegation against Datuk George Seah was upheld by four members of the Tribunal, three of whom recommended that he be removed from office.¹⁰

It is unnecessary to deal with the Second Tribunal's Report in relation to the allegations against the five judges which were dismissed by the Tribunal.¹¹ Once it was clearly established before the Tribunal that there had been no conspiracy¹² or prior agreement of any kind by the five judges to help Tun Salleh to obtain the interim stay order against the First Tribunal,¹³ and once it was accepted that there was nothing wrong in the Supreme Court entertaining the *ex parte* oral application for interim stay even though at very short notice,¹⁴ any other conclusion by the Tribunal would be viewed as perverse.

⁴ *Ibid.* 62.

⁵ *Ibid.* 70.

⁶ *Ibid.* 77-8.

⁷ *Ibid.* 120.

⁸ The majority of the Tribunal, however, recommended that Tan Sri Wan Suleiman should be accorded full pension rights on account of his 'long and hitherto untarnished service as a Judge of the Superior Courts': *ibid.* 122.

⁹ *Ibid.* 122.

¹⁰ *Ibid.* 130-1.

The three members who arrived at the 'inevitable conclusion' that the misbehaviour provided was sufficiently serious to justify removal proffered this reason:

To hold otherwise would mean the end of all judicial discipline in the courts of this country — a prospect so alarming that it might at all costs never happen again. (*ibid.* 131)

It is difficult to comprehend how judicial discipline would come to an end considering that these three members of the Tribunal acknowledged that the circumstances of the case were 'exceptional'! (Note: It was also recommended that Datuk George Seah be accorded full pension rights. (*ibid.* 132)).

¹¹ An analysis can be found in Trindade, F. A., 'The Removal of the Malaysian Judges' [1990] 106 *Law Quarterly Review* 51.

¹² The Tribunal pointed out that the word 'conspiracy' was used in paragraph 6 of the English translation of the representation which was first tendered to the Tribunal. The accuracy of this translation was queried and subsequently another translation was tendered: *Second Tribunal Report*, 55.

¹³ *Ibid.* 60.

¹⁴ *Ibid.* 70.

Insofar as the additional allegations against Tan Sri Wan Suleiman and Datuk George Seah were concerned, the adverse finding by the Tribunal could not be sustained. The Tribunal articulated 'six broad strands' in the case against Tan Sri Wan Suleiman.¹⁵ The first strand, which was not accepted by the Tribunal, was based on an improper motive to 'stick his neck out' for Tun Salleh to be inferred from his presence at the meetings of 25 March 1988 and 27 May 1988. The second strand which was based on his cancellation of a reserved flight to Kota Bahru the day before the scheduled sitting of the Supreme Court at Kota Bahru and the third strand which was based on his action in sending his secretary and other court staff to 'monitor' the proceedings in Dato Ajaib Singh's court enabled the Tribunal to find, 'beyond reasonable doubt', that he was actuated by an improper motive. The second and third strands were, according to the Tribunal, corroborated by the fourth strand, namely, his conduct in cancelling the sitting at Kota Bahru. The Tribunal proceeded to look at the fifth and sixth strands in the case against Tan Sri Wan Suleiman. The fifth strand consisted in 'his eagerness to empanel a seven-judge panel to hear a matter which was then not even pending in the Supreme Court'.¹⁶ The sixth strand 'lay in the events of 2 July, 1988 prior to the sitting of the Supreme Court . . . when [Tan Sri Wan Suleiman] sent for the Chief Registrar Haidar and said that he was aware of the consequences of his action and was willing to be suspended from office'.¹⁷ The Tribunal expressed the view that the fifth and sixth strands, standing alone, amounted to evidence of a 'slender' kind and therefore of 'negligible' value. However, when these strands were taken together with the fourth and fifth strands, they provided further support for the conclusion that the charge of misbehaviour had been made out.

After considering the six strands in the case against Tan Sri Wan Suleiman, the Tribunal said:

In these circumstances, it was impossible to give the slightest credence to this Respondent's explanation that because the sitting at Kuala Lumpur concerned an urgent matter of grave national importance, he gave it priority over the Kota Bahru sitting and not to do so would have amounted to a serious dereliction of his duty and be making a mockery of his oath of office.¹⁸

The Tribunal added:

The alleged belief that he had the power to cancel or postpone or adjourn the sitting before the commencement of the sitting as presiding Judge is clearly wrong. He claimed to have had such an honest belief, based on law, convention or practice.¹⁹

The Tribunal then went on to enumerate the reasons why it found that Tan Sri Wan Suleiman did not have such an honest belief and did not act in pursuance of such belief.²⁰

It is unnecessary to rebut the rather unconvincing reasons enumerated by the Second Tribunal.²¹ A reference to a rather bizarre reason proffered by the Tribunal is sufficient to highlight the deficiencies of the Report. The Tribunal said:

¹⁵ *Ibid.* 110-5.

¹⁶ *Ibid.* 112.

¹⁷ *Ibid.* 113.

¹⁸ *Ibid.* 115.

¹⁹ *Ibid.* 116.

²⁰ *Ibid.* 116-20.

²¹ See Trindade, F.A., *op. cit.* 80-5.

It was open to Tan Sri Wan Suleiman to have contacted the Acting Lord President and to have explained that an urgent matter was likely to come up in Kuala Lumpur in which the Acting Lord President would be a party and so would be disqualified from sitting on it. In that event, Tan Sri Wan Suleiman could have explained that he himself would have to convene the sitting. He could have told the Acting Lord President that for these reasons it was desirable for him (Tan Sri Wan Suleiman) to be in Kuala Lumpur on 2 July 1988 so that it was necessary that the Kota Bahru [*sic.*] sitting be cancelled. On that basis, he could have asked the Acting Lord President that he be excused from going to Kota Bahru.²²

If Tan Sri Wan Suleiman were to seek the permission of Tan Sri Hamid to stay back in Kuala Lumpur instead of going to Kota Bahru, this would in effect mean that Tan Sri Hamid was in a position to appoint the judges to decide a case brought by Tun Salleh and in which he (Tan Sri Hamid) would be a party.²³ The incredulity of the proposition of the Tribunal led the Malaysian Bar Council to comment as follows:

The Tribunal's conclusion that this would have been a valid excuse for staying away from Kota Bahru defies accepted norms that a litigant should not be consulted about any matter relating to his own case.²⁴

Similarly, the Tribunal's conclusion that the conduct of Datuk George Seah in choosing to return to Kuala Lumpur at the request of Tan Sri Wan Suleiman despite an explicit directive by Tan Sri Hamid to remain in Kuala Lumpur and his absence 'without reasonable cause' from the Kota Bahru sitting constituted 'misbehaviour' cannot be sustained.²⁵ Instead of finding a manifest case of 'a clear abdication of responsibility', Datuk George Seah should have been commended for acting in a most proper and responsible manner. The Tribunal accepted as a fact that Datuk George Seah had told Dato Harun²⁶ (who had communicated Tan Sri Hamid's directive to Datuk George Seah) that he did not wish to speak to the Acting Lord President 'as he did not wish to involve him' as he (*i.e.* Tan Sri Hamid) had been named the first defendant/respondent in the application taken out by Tun Salleh.²⁷

What ultimately makes the adverse findings against both Tan Sri Wan Suleiman and Datuk George Seah highly questionable was the Tribunal's perplexing failure to render a decision on the proper interpretation of s. 9(1) of the Courts of Judicature Act 1964. The Malaysian Bar Council was right when in a press statement it said:

This was the crux of the whole matter, and it was incumbent on the Tribunal to come to a decision on the interpretation of this section before they could determine whether or not the judges were wrong to have acted as they did under that provision of the law.²⁸

²² *Second Tribunal Report*, 118-9.

²³ This point was put in a most cogent fashion (*ibid.* 98-9) by Tan Sri Wan Suleiman when he explained to the Tribunal why he did not seek the permission of Tan Sri Hamid:

In my case, on this particular occasion, even if I wished to speak to the person officiating as Lord President, Tan Sri Abdul Hamid . . . I do not think, in the circumstances pertaining at that time, it would be proper for me to do so. He was already a party to the proceedings in respect of which, any sitting of the Supreme Court I should convene under s.9, would have to deal with any application made to us, which I expected would be made shortly. I could not very well ask him 'whether I can sit in Kuala Lumpur to decide on this matter between you and Tun Salleh'. Could I?

²⁴ Press Statement of 9 October 1988: reproduced in (1988) *INSAF*, Vol. XX, No. 5, 78.

²⁵ For a critical analysis of the Tribunal's findings regarding Datuk George Seah, see Trindade, F. A., *op. cit.* 78-80.

²⁶ The third member of the *coram* for the Supreme Court sitting at Kota Bahru.

²⁷ *Second Tribunal Report*, 125-6.

²⁸ See *INSAF*, *op. cit.* n. 24, 78.

Section 9(1) of the Courts of Judicature Act 1964 provides as follows:

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

The crucial issue which the Tribunal was confronted with was whether the phrase 'any other cause' included disqualification, by reason of bias or possible interest in the proceedings. Surely the interpretation of s. 9(1) was pivotal in determining the case against Tan Sri Wan Suleiman, Datuk George Seah and the other three judges. If s. 9(1) carried the inclusion of a 'bias or possible interest' disqualification, Tan Sri Wan Suleiman could have the legal power to perform those acts of which he stood accused. Being the next most senior Supreme Court judge (the Chief Justice of Borneo would also be disqualified as he was also a respondent in the Tun Salleh case) the power therefore rightly devolved on him. If this interpretation of s. 9(1) is the proper one, then all the allegations against the judges must collapse like a pack of cards.

Faced with two opposing submissions on this crucial issue, the Tribunal simply said:

This Tribunal is not constitutionally empowered to interpret s. 9(1) authoritatively, so as to be finally and conclusively binding upon the courts of Malaysia: that function belongs to the Supreme Court alone. In these circumstances, while it is the definite view of this Tribunal that 'any other cause' does not include disqualification on the ground of interest or possible bias, and that this is certainly the better view, it is clear that the other view is not unreasonable.²⁹

If Tan Sri Wan Suleiman was acting in accordance with an interpretation of s. 9(1) which was accepted by the Tribunal as 'not unreasonable', how could the adverse findings against Tan Sri Wan Suleiman and Datuk George Seah be sustained, let alone a finding based on the test of 'beyond reasonable doubt'? How could the Tribunal, on one hand, avoid a decision on the interpretation of s. 9(1) and, on the other hand, have no difficulty in reaching a decision that the language of s. 39(2) of the Courts of Judicature Act 1964 was clear and that there was 'no ambiguity' about it? How could the finding that Tan Sri Wan Suleiman could not have held the honest belief that he had the power pursuant to s. 39(2) 'to cancel or postpone any sitting of the Court' be sustained when it could be argued quite logically that this power could vest in Tan Sri Wan Suleiman from the 'not unreasonable' interpretation of s. 9(1)? How could the finding against Datuk George Seah that he had 'no reasonable cause' for absence from the Kota Bharu sitting be sustained when the Tribunal had acknowledged that the five judges had acted 'in the honest belief' that Tan Sri Wan Suleiman was entitled to convene the special sitting of the Supreme Court?³⁰

It is very difficult to justify the recommendation by the Tribunal that Tan Sri Wan Suleiman and Datuk George Seah should be removed, even if it was assumed that there was 'misbehaviour'. The member of the Tribunal who

²⁹ *Second Tribunal Report*, 48.

³⁰ The dissenting member of the Tribunal put it as follows: [I]f Y.A. Datuk George Seah's decision that he should attend the Kuala Lumpur sitting was proper (even if only on the basis of an honest belief in its propriety) it cannot be that his absence from Kota Bharu [sic.] was improper. (*ibid.* 133).

disagreed with the recommendation for the removal of Tan Sri Wan Suleiman cogently pointed to the following factors against removal:

- (a) it is a single isolated incident, which could not have, and which did not, result in a miscarriage or perversion of justice, for the cancellation of the Kota Bahru sitting did not have that consequence;
- (b) it was not a case of partisanship . . .
- (c) a long record of service, of unquestioned integrity, and this was the first blemish;
- (d) the capacity to administer justice in future, and public confidence in his ability to do so, remain unimpaired;
- (e) none of the precedents suggest that removal in these circumstances could be justified . . .³¹

These factors were equally applicable to Datuk George Seah.

An analysis of the Second Tribunal Report cannot be concluded without a reference to some disturbing observations of the Tribunal. The five judges were suspended and the Second Tribunal was established pursuant to a representation of Tan Sri Hamid (in his capacity as Acting Lord President) to the King. The representation of Tan Sri Hamid upon which the allegation common to the five judges was formulated appeared to be based 'on nothing more than misinformation and an erroneous inference by the Acting Lord President'.³² First, the Tribunal pointed out that in para. 6 of the English translation of the representation which was first tendered to the Tribunal, the word 'conspiracy' was used. After the accuracy of this translation was queried, another translation was tendered, the accuracy of which was undisputed and which alleged a prior agreement among the five judges to issue the order sought by Tun Salleh.³³ The finding by the Tribunal that there was no conspiracy or prior agreement of any kind rendered this portion of the representation erroneous.³⁴ Secondly, the Tribunal said:

The Acting Lord President was without doubt misinformed when he so stated, quoting information given to him, in the opening words of paragraph 6 of the representation to Your Majesty, that they (the five judges) 'took the seal from the registry even though the office was closed and the officers had gone home'.³⁵

A representation to the King seeking the removal of five members of the Supreme Court must be a matter of an extremely serious nature. It was essential for Tan Sri Hamid to ensure the factual accuracy of the allegations before embarking on such a drastic measure. The following observation of the First Tribunal which was chaired by Tan Sri Hamid should be noted:

Even assuming that [Tun Salleh] was justified in writing to Your Majesty, in the circumstances of this important matter, he should have presented the facts to Your Majesty in good faith and frankness instead of basing his representations on certain facts which were untrue.³⁶

³¹ *Ibid.* 137. In the case of factor (b), 'partisanship' was used in the sense as defined in *Grantham's* case (1906) 160 *Parliamentary Debates*, 4th Series, 394-5 (*ibid.* 39); in the case of factor (e), it was pointed out that even in the case of Justice Berger (in Canada) there was no recommendation for removal and that an examination of previous instances cited in 'The Canadian Legal System', (2nd ed, 1983) 185-94, from all over the world suggested that removal would not be justified.

³² Trindade, F. A., *op. cit.* 77.

³³ *Second Tribunal Report*, 55.

³⁴ *Ibid.* 60.

³⁵ *Ibid.* 67. Tan Sri Hamid, after having received information that Tan Sri Wan Suleiman had decided to convene the special sitting of the Supreme Court, instructed 'that the courtrooms should be kept closed, that the staff should not assist in such sitting, and that the court seal should not be made available' (*ibid.* 72). The Tribunal was satisfied that none of the five judges took the seal from the registry: *ibid.* 67.

³⁶ *First Tribunal Report*, Vol. 1, 46.

If Tun Salleh was condemned for the alleged misrepresentations of fact in a letter to the King, what fate should befall Tan Sri Hamid for erroneous statements in a representation pursuant to Article 125(3) to the King?

BUT WHAT OF THE FUTURE?

Abuse of power occurs at all levels of society. It is a part of life today. The extent to which that abuse has been held to tolerable levels is because we have an independent judiciary which can assert the rule of law over these people.³⁷

In 1987, Tun Mohamed Suffian, a former Lord President of Malaysia, in delivering a lecture on 'The Role of the Judiciary' said:

So far the independence of the judiciary has never been in jeopardy, thanks mainly to the fact that our first three Prime Ministers were lawyers who understood the importance of having a judiciary that enjoys public confidence. But what of the future?³⁸

This comment could be construed as reflecting a troubled state of mind as to what was in store for the judiciary under the Mahathir government.³⁹ While clearly concerned about possible threats to the independence of the judiciary, Tun Suffian could not have envisaged the future that unfolded not too long after his comment was made.

In the period from Independence in 1957 to the 1988 constitutional convulsion, it was widely acknowledged that the Malaysian judiciary had nurtured a quality of independence which was the envy of judiciaries in many Third World countries. The tragic-comic events which led to the removal of the Lord President (Tun Salleh) and the two Supreme Court judges rudely undermined that quality of independence. The clock cannot be turned back but it is possible for certain measures to be taken to ensure a truly independent judiciary in Malaysia. It may be wishful thinking at this point in time to expect priority to be accorded to the restoration of the quality of independence of the judiciary which had been the pride of the Malaysian nation. Nevertheless, these measures should be seriously considered once common sense prevails among those who wield the power to implement the changes.

A discussion of reform measures necessitates some reference to the role of the Conference of Rulers.⁴⁰ From unofficial sources it was clear that the Conference of Rulers was concerned about the suspension and the subsequent moves to remove Tun Salleh.⁴¹ If the Conference of Rulers was of the view that what had

³⁷ DYMM Sultan Azlan Shah, 'Supremacy of Law in Malaysia' [1984], J.M.C.L. I.

³⁸ [1987] *Malayan Law Journal* xxiii, xxvii.

³⁹ Dr Mahathir, the fourth Prime Minister, is a medical doctor.

⁴⁰ Malaysia is a federation of thirteen States, with hereditary Rulers in nine of the States and with an appointed Yang di-Pertuan Negeri (formerly known as 'Governor') in the remaining States. The King and Deputy King are elected by the nine hereditary Rulers from among themselves for a term of five years — see Trindade, F. A., 'The Constitutional Position of the Yang di-Pertuan Agong' in Tun Suffian, Lee, H. P., and Trindade, F. A. (eds), *The Constitution of Malaysia — Its Development: 1957-1977* (1978) 103.

⁴¹ *Australian*, 8 July 1988. The Malay Rulers, it would appear, did play an unpublicized role in the crisis. According to Tun Salleh, the Rulers had told him that it had been arranged for him to meet the King where he could apologize to the King for his failure to observe proper protocol in sending the letter. Tun Salleh in setting out his version of the Rulers' involvement said, 'They had spoken to His Majesty who had agreed to receive me and accept my explanation and apology.' (Tun Salleh Abas and Das, K., *May Day for Justice* (1989) 142).

The 'arrangements' with the King did not unfold as expected by Tun Salleh. An account of the meeting with the King is found in Chapter XI of *May Day for Justice*.

befallen Tun Salleh was wrong, the Conference of Rulers had the constitutional power to alter the course of events.

Article 38(6) of the Malaysian Constitution provides as follows:

The members of the Conference of Rulers may act in their discretion in any proceedings relating to the following functions, that is to say —

- (a) the election or removal from office of the Yang di-Pertuan Agong [King] or the election of the Timbalan Yang di-Pertuan Agong [Deputy King];
- (b) the advising on any appointment; . . .

The Constitution also provides, in Article 122B, that the Lord President of the Supreme Court, the Chief Justices of the High Courts and other judges of the Supreme Court and High Courts 'shall be appointed by the [King] acting on the advice of the Prime Minister, *after consulting the Conference of Rulers*'.⁴²

The important question which arises is whether the Rulers should have been consulted at all on the suspension and the removal of Tun Salleh. It could be argued that construed literally, there is a lacuna in the Constitution: after all, the Constitution refers to the participation of the Conference of Rulers in the matter of 'any appointment'.⁴³ Whatever is the appropriate construction of Article 38(6), there is no ambiguity about the power of the Conference of Rulers to deliberate on 'any other matter that it thinks fit': Article 38(2). An intransigent King can be made to accede to the wishes of the Conference through the operation of Article 32(4) and the provisions of Part III of the Third Schedule which provides as follows:

A resolution of the Conference of Rulers to remove the Yang di-Pertuan Agong from office shall not be carried unless at least five members of the Conference have voted in favour of it.

It is hoped that one day the role of the Conference of Rulers during the constitutional crisis would come to light. It may not be out of place to recall the following words of Sultan Iskandar of Johore, when he was interviewed about two weeks before he ascended the throne of Malaysia:

I told them all, when they asked me to accept their offer (to make me King). I said, Sir, one thing: our actions and efforts are based on collective decision and collective effort. You ask me to represent you. I am beholden to all of you, your wishes I obey, I accept. If I am King, you are also King; if I am to be His Majesty, you are also His Majesty.⁴⁴

However, in response to another question, 'When you are King, what role do you expect to play?', Sultan Iskandar said: 'I shall do whatever the Prime Minister advises me to.'⁴⁵ If a lacuna exists in relation to the issue of *removal* of judges, these statements of Sultan Iskandar pose a constitutional dilemma in terms of his relationship with the Conference of Rulers and with the Prime Minister. However, no such dilemma was posed to the King on 1 May 1988 because it was the King who initially commanded the Prime Minister 'to take appropriate action' against Tun Salleh.⁴⁶ The net effect of the removal of Tun

⁴² Emphasis added.

⁴³ Cf. Tun Salleh Abas and Das, K., *op. cit.* 139-40.

⁴⁴ Tan Chee Khoo, *The Monarchy in Malaysia* (1984) 60.

⁴⁵ *Ibid.* 53. The irony is that it was the fear that Sultan Iskander of Johore when he became King would be too 'strongwilled' that provoked an earlier constitutional crisis which pitted the Mahathir Government against the Conference of Rulers — see Lee, H. P., 'The Malaysian Constitutional Crisis: King, Rulers and Royal Assent' in Trindade, F. A. and Lee, H. P. (eds), *The Constitution of Malaysia — Further Perspectives and Developments* (1986) 237-61; Rawlings, H. F., 'The Malaysian Constitutional Crisis of 1983' (1986) 35 *I.C.L.Q.* 237.

⁴⁶ *First Tribunal Report*, 4.

Salleh is that the checks and balances envisaged for the Malaysian constitutional system have been rendered askew.

Commentators have now questioned the efficacy of the mechanism embodied in Article 125. Professor Trindade in his analysis of the crisis said:

The choice and composition of the two Tribunals, the procedures followed by them (particularly by the Tun Salleh Tribunal) and the broad definition of judicial 'misbehaviour' adopted by those Tribunals might well have left those judges who have been removed with the distinct feeling that these matters should be spelt out in greater detail and that Article 125 in its present form is not the safeguard for judges that it was intended to be. This constitutional provision needs to be looked at again by those concerned with constitutional matters in Malaysia.⁴⁷

Tun Salleh has questioned the efficacy of Article 125. He has even said:

Looking back at our recent Malaysian experience, I am convinced more than ever that removal by a Parliamentary address provides a better safeguard for judges despite being an apparent anachronism, *provided* that there is a reasonably free press.⁴⁸

It is highly questionable whether in the context of Malaysia, a parliamentary address is a better safeguard than the mechanism in Article 125. There is really no need to ponder over this issue: a conspectus of the vast number of fundamental amendments to the Constitution which have been passed by the Malaysian Parliament by a two-thirds majority does not inspire confidence in the Parliamentary address system.⁴⁹ If the Constitution could be so easily amended, is the fate of one person (albeit the head of the judiciary) likely to move the government members of Parliament to go against a direction of the Prime Minister?

Those who drafted the Malaysian Constitution regarded a special tribunal as being a more effective way of securing judicial independence and accordingly deviated from the proposal for a parliamentary address system recommended by the Reid Constitutional Commission.⁵⁰ In going back to the drawing-board, rather than adopt the parliamentary address as the mode for removing a judge, it would be better to strengthen the provisions of Article 125. It is suggested that the Constitution should be amended to provide explicitly for consultation with the Conference of Rulers on matters of judicial suspension and removal. In terms of the choice and composition of a Tribunal, consideration should be given to an enhanced role for the Conference of Rulers.

In the end, no matter what system is adopted, the safeguards are only effective so long as those who constitute the checks and balances want them to work. The framers of the Constitution did not make a mistake in opting for the removal mechanism in Article 125; their mistake lay in the assumption that the executive arm of government would subscribe to the Rule of Law. Safeguards require the co-operation of human beings; it is very difficult to safeguard completely against the 'frailty and weakness of human nature'.⁵¹

⁴⁷ Trindade, F. A., *op. cit.* 85.

⁴⁸ Tun Salleh Abas, *op. cit.* 46-7.

⁴⁹ See Lee, H. P., 'Constitutional Amendments in Malaysia' (1976) 18 *Malaya Law Review* 59; 'The Process of Constitutional Change in Malaysia' in Tun Suffian, Lee, H. P. and Trindade, F. A. (eds), *op. cit.* 369; Tan Sri Salleh Abas, 'Amendment of the Malaysian Constitution' [1977] 2 *Malayan Law Journal* xxxiv; Sheridan, L. A. and Groves, H. E., *The Constitution of Malaysia* (4th ed. 1987) 14-6.

⁵⁰ *Second Tribunal Report*, 22. See also: King, L. J., 'Minimum Standards of Judicial Independence' (1984) 58 *Australian Law Journal* 340, 345: 'It is at least questionable whether the system of removal by an address of both Houses of Parliament accords to a judge the degree of security which is required by the concept of judicial independence'.

⁵¹ Tun Salleh Abas, *op. cit.* 46.

Apart from providing for explicit recognition of the Conference of Rulers' right to consultation on matters of judicial suspension and removal, it is also suggested that confidence in the judiciary can be boosted by repealing a number of constitutional amendments which have diminished the stature of the judiciary. First of all, the Constitution (Amendment) Act 1988 which excised the vesting of the judicial power of the Federation in the courts should be repealed. Secondly, all those amendments to Article 150 (which provides for a proclamation of emergency) which ousted the role of the courts in controlling abuses of emergency powers must also be repealed so that Article 150 as originally conceived by the framers is restored.⁵² Thirdly, Article 151 which regulates the powers of preventive detention must be revamped so that such a power is not capriciously and arbitrarily invoked. These measures will undoubtedly promote the cause of constitutionalism and revitalize the judiciary.

A final suggestion is that Tan Sri (now Tun) Abdul Hamid should, in the national interest, resign as Lord President: much of the resentment generated by his role in the crisis would be dissipated by such a gesture. This would help to some extent to heal the rift within the ranks of the judiciary and the rift between the Lord President and the Bar.⁵³

The Rule of Law is dimmed when the independence of the judiciary is subverted, leading to dictatorial rule which has characterized many of the Third World countries.⁵⁴ Whether the Malaysian nation can re-direct itself along the path of constitutional democracy is a matter which rests ultimately in the hands of the Malaysian people. The lessons of the 'people's Revolution' in 1986 in the Philippines should not be lost on those who pay scant regard to the Rule of Law.⁵⁵ The Right Hon. Sir Ninian Stephen, a former judge of the High Court of Australia and a former Governor-General of Australia, once said:

What ultimately protects the independence of the judiciary is a community consensus that that independence is a quality worth protecting, the citizen being better served if the judiciary is preserved from domination by those more overtly powerful elements of governments, on whose support the judiciary is dependent, yet whose exercise of power the judiciary is charged with keeping within bounds prescribed by law.⁵⁶

Sir Ninian Stephen also observed that 'an independent judiciary, although a formidable protector of individual liberty, is at the same time a very vulnerable institution, a fragile bastion indeed'.⁵⁷ That fragility in the case of the Malaysian judiciary was starkly highlighted by the cataclysmic convulsion in 1988.

⁵² Jayakumar, S., 'Emergency Powers in Malaysia' in Tun Suffian, Lee, H. P. and Trindade, F. A. (eds), *op. cit.* 328-68; Lee, H. P., 'Emergency Powers in Malaysia' in Trindade, F. A., and Lee, H. P. (eds) *op. cit.* 135-56.

⁵³ *Malaysian Bar v. Tan Sri Dato Abdul Hamid bin Omar* [1989] 2 *Malayan Law Journal* 281; *Malaysian Bar v. Tan Sri Dato Abdul Hamid bin Omar (No. 2)* [1989] 2 *Malayan Law Journal* 283.

⁵⁴ 'An independent Judiciary is an indispensable requisite of a free society under the Rule of Law': see Clause 1, Report of Committee IV, annexed conclusions to 'The Declaration of Delhi' (10 January 1959).

⁵⁵ See Tehankee, C., 'The Return of Constitutional Democracy in the Philippines' (Tun A. Razak Memorial Lecture delivered on 7 July, 1988), reproduced in *INSAF, op. cit.* 83.

⁵⁶ Stephen, N., 'Southey Memorial Lecture 1981: Judicial Independence — A Fragile Bastion' (1982) 13 *M.U.L.R.* 334, 339.

⁵⁷ *Ibid.* 338.