

LAWASIA

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ARRESTS AND THE MALAYSIAN INTERNAL SECURITY ACT

Everyone concerned about the rule of law and respect for human rights must pay close attention to recent developments in Malaysia. The situation there is of special concern to Australian judges and lawyers. This is because Malaysia is in our region. It shares many of the same historical links to the common law and the English tradition of an independent judiciary. Moreover many Australian judges and lawyers undertook their studies at university side by side with students from Malaysia in the 1960s. Although many Malaysian lawyers continued at that time to receive training in England, some were educated in Australia. Close friendships were formed. Malaysia always seemed such a stable, law abiding multicultural society adhering to the rule of law. It enjoyed a strong constitution and an independent judiciary. Its economy flourished under these beneficial features of its government.

Lately, things have changed dramatically. In a recent report to the Australian Section of the ICJ, (ICJA) there were recorded the arrests and detention of approximately a hundred persons detained under the Malaysian Internal Security Act. Some of the people arrested were Members of Parliament, educationalists, leaders of reform groups, academics and

religious workers. The leader of the main Opposition Party was arrested. So was a leading human rights lawyer. Many features of the hearings, judgments and legal provisions applied to these people were criticised in the ICJA report. The Bar of Malaysia has a long record of support for human rights, democracy and the rule of law. It has made strong statements calling for the unconditional and immediate release of all the persons detained.

#### THE LORD PRESIDENT WRITES TO THE KING

During 1988 a number of suits in the courts of Malaysia against the Government and Government Party resulted in attacks on the judiciary by members of the Government, notably the Prime Minister. These culminated in amendments to the constitution and the suspension and later dismissal of the Lord President of the Supreme Court of Malaysia. The Lord President, Tun Mohd Salleh Bin Abas was summoned to the presence of the Prime Minister to be told of his suspension. His alleged offence was a letter he had written on behalf of Malaysian Judges to the King of Malaysia. The Lord President wrote the letter in a representative capacity. The terms in which he reported the anxiety of the judges about developments affecting the judiciary were mild by comparison with statements frequently made in Australia, England and elsewhere when judges detect unwarranted intrusion by the Executive Government into the Judicial Branch.

Because the Lord President would not stand down, conceiving himself guilty of no wrongdoing, he was hastily investigated by a hand-picked Tribunal. Some of the members of

the Tribunal were inappropriate participants in it, being junior in rank to the Lord President; possible candidates to succeed him; or, in one case, a person who had actually participated in the vote of the judges that the allegedly offending letter should be sent to the King. The Malaysian Bar protested against the constitution of the Tribunal.

The ICJ, Geneva, issued a statement questioning whether any action by the Lord President constituted "misbehaviour" or "inability" within the meaning of the Malaysian Constitution. The letter sent to the King of Malaysia had been a private one. By the standards of the common law world it did not even begin to justify the extreme action which had followed it. The letter was obviously just a pretext to remove the independent minded Lord President Salleh Abas from his office.

#### REMOVAL OF JUDGES

When the Lord President challenged the adverse decision of the Tribunal in the Malaysian courts and sought a stay whilst his challenge was pending in the High Court of Malaysia, the five Supreme Court Judges who granted the stay were in turn suspended on the initiative of the Government. The five judges explained that it was their duty under the law to hear and determine the application brought as a matter of urgency. Clearly, they did no more than to perform their judicial functions as the law and their judicial oaths required them. The result of their insistence upon the rule of law has been disastrous for them personally. But it is even more disastrous for the law and the independence of the judiciary in Malaysia. The former Prime Minister of Malaysia, Tunku Abdul Rahman, has

described the events as putting Malaysia "on the road to dictatorship".

Judges and lawyers throughout Australia, and other common law countries in the region have watched these developments with the greatest anxiety. The apparent misuse of the internal security law has now been escalated into attacks on the judiciary and even the removal from office of the most senior judges in the country. The only shining examples to be given at this time were the courage of the former Lord President Salleh and of the Judges of the Supreme Court suspended for doing no more than their judicial and constitutional duty. The Malaysian Bar has also been fearless in its support of the independent judges and in its condemnation of the attacks on the judiciary. In this fearless support of judicial independence lies hope, in the long run, for the future of the rule of law in Malaysia.

I met Tun Mohd Salleh Bin Abas when he was Lord President. In February 1988 we both attended a conference in Bangalore, India on the recognition of international human rights norms and their application in domestic law. I found Tun Salleh courteous, perceptive, intelligent and independently minded. He took an active part in the deliberations of the Chief Justices and Judges who attended the conference. He was properly discreet and courteous. When the question of a concluding statement by the participants at the end of the conference was mooted, he urged, instead, that the statement should be made only by Justice Baghwati, the former Chief Justice of India. (See (1988) 62 ALJ 531; (1988) 14 CLB

882). This signalled the Lord President's high sense of propriety and the limits which he imposed upon himself in the public expression of opinions on matters which could be regarded as in any way controversial in Malaysia. Out of respect for his views, the concluding statement of the Bangalore Conference was made by Chief Justice Baghwati of India. Imagine, then, my surprise to hear that it was suggested that Tun Salleh should be removed from office for the indiscretion of writing a private letter to the King at the behest of his judicial colleagues.

#### UNDERSTANDING THE INDEPENDENCE OF THE JUDICIARY

At the swearing in of the new Chief Justice of New South Wales (Chief Justice Gleeson) on 2 November 1988, the State Attorney General (Mr John Dowd MP), a past President of the Australian Section of the ICJ, reminded those present of the need to reinforce respect for the independence of the judiciary. Necessarily, judges must occasionally do things which upset the Executive Government. Mr Dowd said:

"The separation between the judicial and the executive branches of Government is not simply a matter of theory but of crucial importance to the maintenance of our system of Government. There is no doubt that Governments are irritated from time to time because a decision by a court does not conform to Government policy; or in some way the bulldozer of the State is forced to halt before it squashes the right of some individual or organisation...The importance of the role of the courts in the balancing of interests and the application of the law without fear or favour is not as widely understood as it should be. So it is worth restating publicly here today. The authority of the courts and their ability to carry out constitutional functions is directly related to the way in which the public perceives the administration of justice".

It seems that respect for judicial independence in Malaysia has been overborne by transient political passions. The precedent of the removal of judges from office is a very sorry one. It is not only a terrible assault upon judges of integrity and honour. It is an attack on the constitutional independence of the judiciary. Unless quickly reversed, it will do great damage to the confidence of the outside world in the Malaysian judicial and legal system. A judiciary attacked in this way may become supine and subservient to the Executive. One has only to look at what happens to those who do their duty!

THE DUTY TO SPEAK UP

No Australian lawyer, still less a judge, has a right to interfere in the internal affairs of another country. But no one with an affection for Malaysia and its people, a feeling for the historical link through the shared traditions of the common law and a respect for the principal victims of these recent events can keep silent at this time. It is essential that those who enjoy the blessings of the rule of law and respect for human rights should speak out against abuses, wherever they occur. Lately, there have been too many abuses in the Asia/Pacific region. That is why Australasian lawyers cannot remain silent about the situation in Malaysia. They owe it to the independent judges of Malaysia and to the Malaysian Bar to speak out and to express their deep concern. They owe it to the suspended and dismissed judges to express their admiration for their fearless actions. They owe it to fellow human beings in Malaysia to do what they properly can to let it

be known that these shocking events are becoming more and more widely known. And that they will do great harm to confidence in Malaysia's economy and political and legal system. Only in this way may those embarked on the "road to dictatorship" be forced to turn back.

I have asked the International Commission of Jurists to devote a session to the situation in Malaysia during the forthcoming biennial meeting of the Commissioners of the ICJ. This will take place in Caracas, Venezuela between 15-21 January 1989. Meanwhile, missions of Australian lawyers and others are going to Malaysia to gather information which will be placed before the International Commission of Jurists. That Commission, with its global function of monitoring derogations from the rule of law and human rights will, I am sure, make it its business to call the situation in Malaysia to the notice of the widest possible international community. May the independent judges of Malaysia gain strength from the support which they have from the independent judges of their region. Judicial independence matters most when it is most in peril.

Commissioner of the International Commission of Jurists  
President, Court of Appeal of New South Wales  
Personal views only.