

FOREWORD

MAY DAY FOR JUSTICE

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Strong tradition - high standards

The Malaysian judiciary is the proud inheritor of the mantle of eight centuries of British justice. This fact was symbolised on Malaysia Day when Sir James Thomson, Chief Justice, became the first Lord President of Malaysia and a Tun.<sup>1</sup> The Judges are the successors to a strong tradition of impartiality, uncorruptibility, efficiency, independence and intellectual ability. These are testing standards.

The principles of the independence of the judiciary and the rule of law - which are enshrined in the law of civilized nations and reflected in the constitution of Malaysia and international standards - matter most when they come under pressure. This trueism applies to the respect for basic principles and human rights generally. As one Chief Justice of Australia said, during war-time as in peace-time it is relatively easy to accord freedom of religion to members of

the faith of the majority of the population. But the guarantee matters most when it is tested, in time of war, by members of a minority religion. They need the constitution to protect them. Such protections are rarely needed by members of the majority faith, who can generally look after themselves.<sup>2</sup>

So it is that the recent events affecting the Malaysian judiciary are important because they demonstrate what happens when a much vaunted and ancient institution - the independent judiciary - is put under strain. There are lessons in what occurred in Malaysia for lawyers and judges - and other citizens as well - in many other countries, particularly those of our region.

Judicial independence and integrity are all too often taken for granted. There was a time when we - who are the successors to the constitutional settlement which protected the judges of England - assumed that we were immune from any real threat. We thought that challenges to the independence of the judiciary were confined to other less happy lands: heirs to other cultural and legal traditions. The removal of judges was something which happened in Latin America or under fascist dictatorships. It was not something which happened in countries which had inherited the British legal tradition.

#### The malaise of overweening power

Events of recent years, however, including those occurring in our region, demonstrate how hopelessly naive and misguided was this opinion. It is vital to see the events

described in this book in a wider context. That context is the challenge to the independence of the judiciary in many lands, including those of the common law. In this sense, Malaysia is not alone. The malaise which is at work is the overweening power of the Executive Government, and often of the Head of Government.

Political scientists can trace the gradual erosion of the power of parliament from those heady days when A V Dicey traced all sovereign power in British affairs to the Imperial Parliament at Westminster.<sup>3</sup> If ever Dicey's theory of parliamentary sovereignty was right<sup>4</sup> it has certainly suffered a battering this century. There has been a gradual loss of power of parliament to the cabinet and to the bureaucracy. Even within the cabinet the features of the modern state, and of modern means of communication, have led to an erosion of Executive power to the Prime Minister. Wars and other pressures associated with the post-Colonial era have exacerbated these tendencies.

The result of these developments has been the emergence of governments and heads of government who are fundamentally out of sympathy with the notion of sharing power with an independent judiciary. Yet that sharing of power tempers absolute power. Looked at in sociological terms it spreads the responsibility for important decisions, promotes observance of proper forms, provides opportunities for the reconsideration of important matters, reduces the risks of oppression and tyranny and enhances the continuity of

institutions in times of rapid technological and social change. These are some of the functions protected by an independent judiciary. They are endangered by the Executive Government - elected and unelected - when it forgets or under-estimates the utility of the judicial function. They are at risk when impatience, pride or unwillingness to brook opposition lead the Executive Government to challenge the judiciary or individual members of it.

#### The need for courageous judges of principle

We should not really be surprised when such challenges come. Even within the British tradition, judges of earlier times had to take risks in upholding the rule of law and their independence. In the days of the autocratic monarchs, up to the Stuarts, the will of the sovereign (and of the coterie of advisers around him or her) frequently overbore the judges who were simply seen as part of the sovereign's bureaucracy. When Sir Edward Coke asserted before James I that the King was under God and the law, it is noteworthy that he did so trembling and on his knees. In those times such was a bold notion indeed. Alone of all the Judges in the Council, Coke told the King that he would not stay a case on royal direction. He would do what "should be fit for a judge to do". For his brave reply Coke was removed by the King. But it was the beginning of the erosion of the divine right of Kings in England. We have modern Kings. Happily we also have modern Cokes.

After the Glorious Revolution, whose 300th anniversary

was celebrated, ironically, in 1988 - the gradual acceptance of the independence of the judges from the dictates and whims of the changing Executive government came gradually to be accepted in England. It was not always observed in colonial situations. But it was the model which countries such as Malaysia and Australia inherited when they came to independence. It was, and is, an ideal. The events of these pages demonstrate that it is an ideal that must constantly be reinforced. It must be reinforced in the conduct of courageous independent judges who perform their duties and faithful to their oaths of service, to the law and the constitution and to international standards. But it must also be reinforced by the legal profession which can speak out when the voice of the judges is muted. Most importantly of all, it must be reinforced in the opinion of ordinary citizens. For it is in the heart of the people that fundamental constitutional rights must be nurtured, if they are to survive.<sup>5</sup>

#### Challenge to the judiciary in Fiji

The last three years have seen a number of unprecedented challenges to the independence of the judiciary in countries of our region. In May 1987 following an election which brought a change of government, the commander of the Royal Fiji Military Forces (Colonel Rabuka) purported to suspend the constitution of Fiji and to assume Executive authority. Immediately Her Majesty's judges of Fiji wrote to the Governor General declaring that the purported suspension

of the constitution was illegal and invalid. They asserted with one voice that the suspension of the judiciary was unconstitutional. They assured the Governor General of "our undivided and complete loyalty and of our readiness to continue to exercise our duties in accordance with the law of Fiji and our oaths of office".

As a result of this letter the Governor General was emboldened to assert his authority. Fiji returned for a short time to the rule of law. However, in September 1987 the military reasserted control over the government of Fiji. The judges wrote again to the Governor General. They repeated that the constitution of Fiji "enshrines the rule of law, that the judges of Fiji are appointed as the independent and impartial custodians of the law, and that they are bound to administer it in accordance with the judicial oath of office".

These assertions of independence led to the arrest of two of the judges and of a magistrate. Because most of the judges refused to accept a commission from the new regime, they were simply discarded. Some at least of them paid with temporary loss of liberty and humiliation. Some lost pension rights and other benefits. But they were true to their consciences.

#### Challenge to judicial independence in Australia

In Australia, 1989 saw the reconstitution of the Federal Industrial Relations Tribunal. The President and presidential members of the old Australian Conciliation and

Arbitration Commission had been promised by parliament a status precisely equivalent to that of judges of the Federal Court of Australia. They were protected against removal except for incapacity or misbehaviour proved to the satisfaction of both Houses of the Australian Federal Parliament. Yet when the new Industrial Relations Commission was established and the members appointed all but one of the judges of the Arbitration Commission were appointed to the new body. The exception was Justice James Staples. By a quirk of the Australian constitution he was not, constitutionally speaking, a Federal judge. But by Act of Parliament he had the same status, rank, precedence, salary and protection from removal as a judge. Those guarantees were swept aside. Justice Staples was simply not appointed. No explanation was ever given publicly. Privately, it was said that he was a "maverick". Many senior members of the judiciary and of the legal profession throughout Australia protested at this departure from respect for the independence of people like Justice Staples who have the same need for immunity as judges.<sup>6</sup> But to no avail. The opinionated Executive refused to budge. In the uproar which followed the Australian Parliament established a committee to enquire into the circumstances.

#### The sorry attack on the Malaysian judiciary

Between the sorry events in Fiji and the lamentable departure from tradition in Australia comes the story of the Malaysian judges. My concern at what occurred arose from the



very close feeling that many Australians of my generation have for Malaysia. We were educated at universities beside Malaysians of the early days of independence. We have professional and personal association with lawyers and others in the country. We have been there on delegations and as tourists. We share many of the same sources of law and we are custodians of the same traditions. I also had an interest as a Commissioner of the International Commission of Jurists (ICJ) in Geneva. That body is dedicated to maintenance of the rule of law and the independence of the judiciary.

It was in the latter capacity, at the triennial meeting of that Commission in Caracas, Venezuela in January 1989 that I supported the resolution expressing grave concern about the removal from office of the former Lord President, Tun Salleh Abas. The removal of the two other judges of the Supreme Court (Tan Sri Wan Suleiman and Datuk George Siah) as well as the suspension from office of those and other judges of the Court were so unprecedented as to attract the anxiety of the world assembly of the Commission. Singled out for particular mention was the concern of the ICJ about the campaign of attacks on the judiciary by the Prime Minister of Malaysia; the inducement made to the Lord President to resign his office quietly; the apparently biased constitution of the tribunal set up to enquire into his removal; the inclusion in the tribunal, as its chairman, of a judge who succeeded to the Lord President's office; the unprecedented action of

that judge in securing the removal and suspension of Supreme court judges who provided a stay to allow the constitutionality of the tribunal to be tested in the Malaysian Supreme Court; and the "unpersuasive" report of the tribunal following which the Lord President was removed. The concerns of the ICJ were brought to the attention of the authorities in Malaysia.

#### The value of this tale

Recounting this story again cannot reverse the injustice done to independent judges of courage and conviction. It cannot unmake the history that has been written. It cannot restore confidence in institutions that have been damaged. But it can serve to remind judges and others lawyers of the need for courage in defending time-honoured concepts. It can help to perpetuate the recollection of the integrity of people appointed to judicial office so that their example serves as an inspiration to successors. It can also help to bring home to the impatient, opinionated Executive governments which attack judicial independence that there are people in every land concerned to uphold the principle and to scrutinize departures from it against established international standards.<sup>7</sup>

The price of freedom is eternal vigilance. One of the surest guarantees of freedom is the existence of a courageous and independent judiciary. If judges do not stand up for this notion when it is put to the test, the vaunted boast of constitutionality is shown to be a mere shibboleth. That is

Why this book is an important one - not only for Malaysians and for lawyers. But for free people everywhere.

#### ENDNOTES

\* Personal opinions.

1. Tun Mohamed Suffian, "Four Decades in the Law - Looking Back", 1982 Braddell Memorial Lecture, reproduced in F A Trindade and H P Lee, "The Constitution of Malaysia - Further Perspectives and Developments", OUP, Singapore, 1986, 215.
2. Adelaide Company of Jehovah's Witnesses Incorporated v The Commonwealth (1943) 67 Commonwealth L Rep 116, 124.
3. A V Dicey, Introduction to the Study of the Law of the Constitution, 1885, London, 10th ed, 1959, 62.
4. G de Q Walker, "Dicey's Dubious Dogma of Parliamentary Sovereignty; A Recent Fray with Freedom of Religion" (1985) 59 Aust L J 276, 283. See also Building Construction Employees and Builders Labourers Federation of New South Wales v Minister for Industrial Relations & Anor (1986) 7 NSWLR 372 (CA).
5. D Cardozo, "The Nature of the Judicial Process", 1921, 141.
6. M D Kirby, "The 'Removal' of Justice Staples - Contrived Nonsense or Matter of Principle", in Australian Bar Review, 1989, forthcoming.

7. See eg Basic Principles on the Independence of the  
Judiciary endorsed by the General Assembly of the  
United Nations, Resolution 40/146 (December 1985).