30th Anniversary of the 1988 Judicial Crisis: Lessons about the Importance of Judicial Independence and Impartiality

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Thank you, Mr. President, George Varughese, My Lords, Your Excellencies, Honourable Ministers, distinguished guests, and fellow members of the legal community.

We are all here to honour the memory of Raja Aziz Addruse who illuminated the Malaysian legal profession for many decades. His steadfast morality, reasoned voice, and courageous leadership steered the Bar through many turbulent times in the seventies and beyond. His legacy lives on and is evidenced in the many principled positions that the Malaysian Bar continues to adopt on issues of rule of law, democracy and human rights.

I wish to say this at the very outset that in the last nine years while institution after institution, including some elements in the judiciary, were successfully co-opted by the Executive to do its bidding, the Malaysian Bar along with a few other non-governmental organisations, continued to provide dykes against the tide of authoritarianism. For that, Mr. President, the entire citizenry owes the *Badan Peguam Malaysia* (the Bar Council), the Advocates Association of Sarawak and the Sabah Law Association our deepest gratitude.

I. IMPORTANCE OF JUDICIAL INDEPENDENCE

The judiciary occupies a central place in Malaysia's democratic, constitutional set-up. The Constitution envisages a rich variety of functions for the courts to preserve the rule of law and constitutionalism in the country.

Judges are under oath to preserve, protect and defend the Constitution.[1] It is their duty to enforce the supremacy of the Constitution against all pre-independence and post-independence legislation.[2] They have an inherent power to employ the 'first principles of administrative law' to keep the government in check.[3]

The judiciary supplies the balance wheel of federalism.[4] It has a duty to safeguard human rights by balancing the might of the State with the rights of the citizens. Judges interpret the Constitution to harmonise conflicting provisions, to make explicit what

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1 Sixth Schedule. Para 1 of the Federal Constitution.

2 Articles 4(1), 128(1), 130 and 162(6) of the Federal Constitution.

3 *Lim Lian Geok v Minister* [1964] 1 MLJ 158; *Lembaga Lebuhraya Malaysia V Pentadbir Tanah Daerah Hulu Langat And Semenyih Jaya Sdn Bhd (Third Party)* [2007] MLJU 396; [2010] MLJU 1737; [2014] MLJU 1871; [2017] 3 MLJ 56. See also the see also the Criminal Justice Act 1953, Schedule Subsection 25(2).

4 Article 128(1) and (2) of the Federal Constitution.

is implicit in the law and to fill the gaps found in legislation. They provide remedies whenever rights are infringed.[5]

The courts supply a dispute-resolving mechanism between the citizen and the State, and between the citizen and the citizen. In the field of criminal law, they legitimise the application of sanctions against transgressors of the law.

The judiciary is an essential component, though not the only one, of a system of checks and balances. It is a safety valve without which no democracy can flourish. For these reasons judicial independence must be safeguarded, integrity and ability must be rewarded and respect for judicial decisions must be maintained. The judicial branch must be separate from and independent of the other branches of the State.

Judges must be men and women of integrity, impartiality and legal wisdom. Besides a deep and holistic knowledge of the law they must have a sense of justice. They must have the moral courage to stand between the citizen and the State and to administer justice without fear of the other branches of the State or of public opinion.

Before I say more, let me submit that freedom to do justice according to the law is not simply a matter of constitutional safeguards. A host of other factors - within the judiciary and outside the judiciary, within the law and within politics, economics, religion and psychology - impinge on the performance of a judge.

For example, a judge's impartiality, his ability to transcend race and religion, his emotional maturity and objectivity, are personal attributes that no Constitution can guarantee. No law can ensure that a judicial appointee will soar above the timberline of the trivial and transcend the prides, prejudices and temptations that afflict ordinary mortals.

II. THE 1988 JUDICIAL CRISIS

30 years ago, the Malaysian judiciary suffered a series of devastating setbacks. The Lord President and five other Supreme Court judges were suspended. Ultimately, the Lord President and two brother judges of the apex court were dismissed. Three were reinstated. The Chairman of the Tribunal that recommended the dismissal of Tun Salleh, was rewarded with the post of Lord President. The Bar Council refused to recognise the new head of the judiciary who, nevertheless, worked with the Executive to pack the superior courts with new appointees loyal to him. Many good men on the Bench were either transferred out of Kuala Lumpur or marginalised. A number of disgraceful decisions like the one in the *Aliran*[6] case, with extreme bias in favour of the Executive, filled the law reports.

The process of packing the courts with compliant and executive-minded judges has continued since then and the effects are discernible in some highly controversial judicial decisions in areas such as, challenges to electoral results, issues relating to malapportionment, gerrymandering and electoral fraud by the Election Commission, the 1-MDB series of cases, *Syariah* and civil court jurisdictional issues and the Anwar Ibrahim (Sodomy II) series of cases.

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5 See Article 5(2) of the Federal Constitution on habeas corpus. See also the CJA, Schedule, Subsection 25(2).

6 *Persatuan Aliran v Minister* [1988] 1 MLJ 442; [1990] 1 MLJ 351 SC.

Around the same time as the dismissal of the Lord President and two other Supreme Court judges, Article 121(1) of the Federal Constitution was amended to divest the courts of the 'judicial power of the Federation'. The courts were allocated only such powers as Parliament might grant them.

I have been asked in this talk to assess where we stand today on the issue of judicial independence and impartiality 30 years later. Let me say without hesitation that the winter has not yet thawed. However, now and then, there are warm rays of sunlight that give hope that summer is nigh. A mature and fair assessment is not possible because over the last thirty years, thousands of judicial decisions – some very admirable, some very regrettable - have been delivered. I cannot in any objective way assess the work of 160 or so superior court judges and Judicial Commissioners over the last 30 years. I can only make sweeping generalisations about the highs and the lows of judicial conduct and recount some memorable or miserable constitutional developments.

III. SAFEGUARDS IN THE FEDERAL CONSTITUTION

The Federal Constitution and laws contain several sterling safeguards for preserving judicial independence.

Institutional Separation of Superior Courts

The Merdeka Constitution of 1957 sought diligently to secure institutional separation between the superior courts and the other organs of the State.[7] The superior courts are structurally separate from and functionally independent of the executive and the legislature. The existence of the judiciary, the judicial hierarchy, the jurisdiction and composition of the courts and provisions for discipline within the judiciary are prescribed by law and not open to tampering by the executive. However, there are several contradictory provisions within the Constitution that will be mentioned later.

Proper Qualifications

Article 123 prescribes the rules of eligibility for appointment to the superior courts. Members of the Judicial and Legal Service and of the Bar with 10 years' standing are eligible to be elevated to the Bench.

A Consultative Appointment Process

An elaborate and multi-tiered process of consultation amongst the Prime Minister (PM), senior-most judges, the *Yang di-Pertuan Agong* (the King) and the Conference of Rulers precedes every judicial appointment.[8] A wholesome improvement in this area was the creation of a Judicial Appointments Commission (JAC) which makes

[7] Articles 121-131A of the Federal Constitution.

[8] Article 122B of the Federal Constitution.

non-binding recommendations to the PM.[9] Regrettably, the PM often rejects the JAC's recommendations.

Security of Tenure

Under Article 125, superior court judges have security of tenure and cannot be dismissed except on the recommendation of a tribunal of not less than five, serving or retired, local or Commonwealth judges. Superior court judges cannot be removed from office by the Parliament, the PM or the King on their own initiative. Regrettably this constitutional safeguard failed tragically in the Tun Salleh episode of 1988 and the judicial winter that descended has not yet fully thawed.

Terms of Service

Judicial salaries and terms of service are more favourable than those of civil servants. Under Article 125(7) these terms can be improved but cannot be changed to the detriment of judges.

Transfer

Under Article 122C the King can transfer a High Court judge to another High Court but only on the advice of the Chief Justice (CJ). However, there are no safeguards if the CJ recommends the transfer of a judge for extraneous or *mala fide* considerations.

Insulation from Politics

Many rules and practices protect the judiciary against political vitriol. Article 127 bars parliamentary discussions of the conduct of judges save on a substantive motion supported by not less than one quarter of the members. Cases that are *sub-judice* are not allowed to be discussed in Parliament under Parliament's Standing Orders.[10] Under Article 125(6) the remuneration of judges is charged on the Consolidated Fund thereby excluding it from the partisan budget debate.

Power to Punish for Contempt

Article 126 of the Constitution confers on the courts the power to punish for contempt.[11] Nobody, including the PM, the Attorney-General, the Inspector General of Police, a *Syariah* official or a civil servant is exempt from this power. So expansively has this rule been interpreted by the courts that any discussion at the Bar's Annual General Meeting

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[9] Refer to the Judicial Appointments Commission Act 2009 [Act 695]. The Commission has eight members – four ex-officio and four appointed by the PM. The ex-officio members are the CJ of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court of Malaya and the Chief Judge of the High Court of Sabah and Sarawak. The appointed members in July 2018 are a former CJ, a former judge, a former Sarawak Attorney-General and an academician from the Faculty of Law, University of Malaya. The Bar Councils of Malaya and the Borneo States are left out. Six out of eight members are serving or ex-judges.

[10] Standing Orders of the Dewan Negara, SO 35(2). Standing Orders of the Dewan Rakyat SO 23(1)(g).

[11] See also section 13 CJA.

(AGM) of the alleged misconduct of the Lord President would amount to scandalising the court.[12]

Lately, however, many cases of defiance of judicial decisions by the *Syariah* authorities, the police, Election Commission officials[13] and the National Registration Department have occurred but have gone unchallenged and unpunished. The judiciary maintains an elegant silence.

Immunity

In the performance of their functions, all judges are immune from the law of torts and crime for their official work.[14]

Promotion

In some countries like Pakistan the appointment and promotion process is insulated against politics and the appointing authority cannot disregard the recommendations of the CJ.[15] Regrettably our Article 122B offers no such protection. In the matter of promotion there are, regrettably, no guiding principles. Seniority and legal acumen do not count. The discretion of the CJ and the PM are paramount. In 2007 it came to light that a judge had not written judgments in 35 cases and yet was elevated to the Court of Appeal and later to the Federal Court.[16] We also know that in the matter of two distinguished and independent-minded judges - Justice Abdul Malek Ahmad and Justice Mohd Hishamudin Yunus - the PM vetoed their promotions. It is only rarely that the Conference of Rulers is able to block an improper political appointment or promotion of a malleable judge.

A few weeks ago, when the senior most Federal Court judge, who was admired for some of his dissenting judgments, was promoted to CJ by the new Pakatan Government some racist and religious bigots, in disregard of the Constitution, raised questions about the suitability of a non-Muslim to hold the top judicial post.

The Courts of Judicature Act 1964

Under the Courts of Judicature Act 1964 (CJA), our courts are open to the public.[17] The court hierarchy and a system of appeals are provided for. Legal representation is allowed.

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12 *Raja Segaran A/L S Krishnan v Bar Council Malaysia & Ors* [2000] 1 MLJ 1; [2000] 4 MLJ 571; *Raja Segaran A/L S Krishnan v Bar Council Malaysia & Ors* [2001] 1 MLJ 472; (No 3) [2001] 5 MLJ 305; (No 4) [2001] 6 MLJ 166; *Majlis Peguam Malaysia & Ors v Raja Segaran A/L S Krishnan* [2002] 3 MLJ 155; *Raja Segaran A/L S Krishnan v Bar Council Malaysia & Ors* [2004] 1 MLJ 34; *Majlis Peguam Malaysia & Ors v Raja Segaran A/L Krishnan* [2005] 1 MLJ 15; *Raja Segaran a/l S Krishnan v Malaysian Bar* [2008] 4 MLJ 941.

13 Despite an earlier High Court order in favour of his eligibility, Tian Chua was prevented by the Election Commission from filing his papers as a candidate for GE14: *Chua Tian Chang v Anwar Mohd Zain & Anor* [2018] MLJU 526. The High Court declined to review the Commission's decision.

14 Section 14, CJA.

15 In *Al-Jehad Trust* case (1996) the Supreme Court of Pakistan ruled that the recommendations of the CJ of Pakistan for appointments in the superior judiciary are binding upon the President. In *Munir Bhatti's* case 2011, the Supreme Court held that the Parliamentary Committee has no authority to question recommendations by the Judicial Commission: *Daily Times,* Lahore, Sept 16, 2018.

16 *The Sun,* 6 Sept 2007, p.2

17 Section 15, CJA.

The superior courts have the power to issue enumerated as well as unenumerated remedies whenever rights are breached. The Schedule to the CJA in Sub-Section 25(2) confers power to issue directions, orders or writs like habeas corpus, mandamus, prohibition, quo warranto and certiorari 'or any others' for the enforcement of liberties or for any purpose. Section 35 of the CJA confers on the High Court general supervisory and revisionary jurisdiction over all inferior courts.

There is a mature system of law reporting and the country is blessed with three vigorous Bar Associations that refuse to be cowed down by any threats.

IV. SOME UNSATISFACTORY ASPECTS

Despite the above safeguards, the Constitution and the legal system are replete with many unsatisfactory features. In addition, there are internal attitudes of subservience to an omnipotent executive, loyalty to some inarticulate premises, and a generally legalist, literalist and formalist approach to the interpretation of the glittering generalities of the Constitution and the laws.

Judicial Commissioners and Additional Judges

Due to constitutional amendments, the King was empowered in 2006 to increase the number of superior court judges,[18] to appoint non-tenured Judicial Commissioners (JC) to the High Court[19] and Additional Judges to the Federal Court.[20] Whatever noble motives there may be for the innovation to create the position of JCs, the appointment of non-tenured and probationary High Court posts poses dangers for judicial independence.[21]

As to the Additional Judges, they are appointed 'for such purposes or for such period' as the King may specify. In 2017 this provision was abused to fill vacancies in the posts of the CJ and President of the Court of Appeal so that the two top judges of the country were entirely at the mercy of the Executive in relation to their tenure.

Removal of Inherent Judicial Power

Article 121(1), prior to its amendment in 1988, conferred the judicial power of the Federation on the Courts. After the government's defeat in the *Dato' Yap Peng case,*[22] Article 121(1) was amended to take away the judicial power from the courts and to provide that judges shall have only such power as is conferred by Federal law. The intention was to deprive the judges of any inherent or prerogative powers that judges may exercise to keep the government in check. Another controversial intention of this amendment was to reject the *Dato' Yap Peng* notion that judicial power is exclusive to the judiciary.

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18 P.U.(A) 384/2006; P.U. (A) 385/2006.

19 Article 122AB of the Federal Constitution.

20 Article 122(1A) of the Federal Constitution.

21 Refer to the views of Ranita Hussein, a former JAC and SUHAKAM Commissioner: *New Straits Times*, 7 April 2007, p. 23.

22 *Dato' Yap Peng v PP* [1987] 2 MLJ 311.

Some judges like the Federal Court majority in *Kok Wah Kuan* (2008)[23] timidly jumped on to the bandwagon of the amended Article 121(1). Others courageously resisted. Notable in this latter category are the celebrated minority opinion of Justice Richard Malanjum in *Kok Wah Kuan* and the groundbreaking *Semenyih Jaya* decision of Justice Zainun Ali.[24]

Conflict of Jurisdiction between *Syariah* Courts and Civil Courts

By a constitutional amendment, Article 121(1A) was inserted into the Constitution to immunise *Syariah* courts, acting within their jurisdiction, from interference by the civil courts. However, the amendment did not clarify as to who is to have power to determine conflict of law situations or issues of constitutionality or human rights. For about 29 years since 1988, many superior court judges ruled that the *Syariah* courts are on par with civil courts and, therefore, immune from judicial review by the civil courts.[25] This is despite the legal fact that *Syariah* courts are courts of limited jurisdiction.[26] Their existence is authorised by the Federal Constitution, but their creation and jurisdiction are dependent on State legislation.[27] They do not enjoy security of tenure and other safeguards guaranteed to superior civil court judges under Articles 121-131A of the Federal Constitution or of State laws.

Their civil jurisdiction is limited to the 24 topics enumerated in Schedule 9 List II, Para 1. Their power to administer criminal law is subject to severe limitations.

First, they have jurisdiction only over persons professing the religion of Islam.

Second, though State legislation may create and punish offences "against the precepts of Islam",[28] the offences created and punished must not be in the Federal List or be covered by Federal law.

Third, the 'jurisdiction of the *Syariah* courts' (by which is meant the persons they may try, the offences they may try and the penalties they may impose) must be prescribed by Federal law.

Fourth, the Federal law concerned - the Syariah Courts (Criminal Jurisdiction) Act 1965 [Act 355] – limits the penalties to a maximum of three years' imprisonment, six

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23 *Kok Wah Kuan v Pengarah Penjara Kajang, Selangor Darul Ehsan* [2004] 5 MLJ 193; [2007] 5 MLJ 174; [2008] 1 MLJ 1.

24 *Lembaga Lebuhraya Malaysia V Pentadbir Tanah Daerah Hulu Langat And Semenyih Jaya Sdn Bhd (Third Party)* [2007] MLJU 396; [2010] MLJU 1737; [2014] MLJU 1871; [2017] 3 MLJ 561.

25 *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & anor* [1998] 4 MLJ 742; [1999] 1 MLJ 266; [1999] 2 MLJ 241; *Kamariah bte Ali lwn Kerajaan Negeri Kelantan* [2002] 3 MLJ 657.

26 Schedule 9 List II, Para 1 enumerates 25 areas on which *Syariah* legislation may be enacted.

27 *Dato Kader Shah Tun Sulaiman v Datin Fauziah* [2008] 7 MLJ 779. *Syariah* judges do not enjoy security of tenure and other safeguards guaranteed to superior civil court judges under Articles l

28 What amounts to a "precept of Islam" is a matter of scholarly dispute. *Sulaiman Takrib v Kerajaan Terrengganu* [2009] 6 MLJ 354 and *State Government of Negeri Sembilan v Muhammad Juzaili bin Mohd Khamis [2015] 6 MLJ 736* have held that the term "precepts of Islam extend to all matters of *Aqidah,* Shariah and *Akhlaq*. In *Sulaiman Takrib*, the court also made the startling suggestion at 375-377 that if the offence is an offence against the precepts of Islam, then it should not be treated as 'criminal law'. This amounts to a total rewriting of the Constitution. Crime was generally in federal hands. The residue was given to the states. *Sulaiman Takrib* implies that all matters of Islamic criminal law are in state hands and the residue is for the federal penal code! This is contrary to the explicit language of Sch 9 List II, Para 1.

strokes of the cane and a fine of RM5000. This 3-6-5 jurisdiction to impose criminal penalties is equivalent to that of Second Class Civil Magistrates.

In some cases decided by the civil courts, *Syariah* courts were conferred implied powers. In *Jenny Peter@ Nur Muzdhalifah Abdullah*[29] there was an attempted apostasy by a Muslim. The power of the Sarawak *Syariah* Court to try the case was challenged. Although the Sarawak Syariah Courts Ordinance 2001 does not provide for the conversion in or out of Islam, the Majlis Islam Sarawak Ordinance 2001 contains provisions for conversion to Islam but not for conversion out of Islam. It was held following *Soon Singh*[30] and *Lina Joy*[31] that the *Syariah* Court has implied jurisdiction.[32] Contrast this view with the view of *Mohammed Habibullah Mahmood v Faridah Dato Talib*[33] that when there is a challenge to jurisdiction the correct approach is to establish whether the State legislation had conferred jurisdiction on the *Syariah* court and not whether the State legislature has the power to enact the law conferring jurisdiction on the *Syariah* court. This view was confirmed strongly by the Federal Court in the recent *Indira Gandhi* (2018) decision.[34] The Federal Court clarified that the *Syariah* courts are not superior courts and have no inherent powers. Their exercise of power must be derived from a statute. *Indira Gandhi* (2018) strikes a strong blow for constitutional supremacy over all authorities including *Syariah* authorities.

In some cases, the civil courts have relied on Article 121(1A) to extend immunity from judicial review to even non-judicial *Syariah* officials like the Registrar of Converts.[35] It is only this year that the courageous *Indira Gandhi* (2018) decision ruled that in our constitutional scheme of things, the superior courts maintain the power of review on issues of constitutionality and ultra vires over all tribunals that do not enjoy the safeguards conferred by Part IX of the Constitution.

Subordinate Courts

To the ordinary citizen, the quality of justice is what happens in the subordinate courts. Regrettably, most of the safeguards for judicial independence under Articles 121 to 131A are unavailable to the hundreds of judges of our Sessions and Magistrates Courts. This should be a cause of concern because 90 per cent of criminal and 50 per cent of civil cases are adjudicated in the lower courts.

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29 *Jenny Peter@ Nur Muzdhalifah Abdullah v Director of Jabatan Agama Islam Sarawak* [2017] 1 MLJ 340.

30 *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah* [1994] 1 MLJ 690; *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah* [1999] MLJU 60; *Soon Singh a/l Bikar Singh v Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah* [1999] 1 MLJ 489.

31 *Lina Joy v Majlis Agama Islam Wilayah &* [2004] 2 MLJ 119; [2005] 6 MLJ 193; [2007] 4 MLJ 585.

32 These rulings are now questionable after the FC decision in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545.

33 [1992] 2 MLJ 793.

34 *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 54.

35 *Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan* [2015] 3 MLJ 513; [2015] 6 MLJ 736.

Article 138 provides for a fused judicial and legal service under a Judicial and Legal Service Commission (JLSC). From the point of view of the independence of the judiciary, there are many objectionable features of the JLSC set-up:

- The Chairman of the JLSC is a top civil servant who is also the Chairman of the Public Services Commission (PSC). Prior to 1960, the CJ was the Chairman of the JLSC. We need to restore the earlier wholesome law.
- The composition of the JLSC consists of the Chairman of the Public Services Commission, the Attorney General (AG) (or if the AG is disqualified under Article 138(2)(b), then the Solicitor General) and one or more judges appointed by the King.
- The presence of the AG on the JLSC is problematic because under Article 145 the AG is the government's chief legal advisor, lawyer and public prosecutor. He may appear before a judge of the Sessions or Magistrates Court one day and sit on the JLSC the next day to consider the promotion, transfer or discipline of that judicial officer.
- From the point of view of judicial independence, freedom from fear and institutional bias, the position of judicial officers in this country is quite untenable. A judicial officer may be transferable from the judicial service to the legal service and vice versa. His transfer, promotion and discipline are in the hands of a Commission chaired by the PSC head with the AG in attendance. The latter has administrative control over all legal officers. This was demonstrated in the case of *Maleb Su v PP* (1984)[36] where the lower court judge frankly expressed his fears of the Attorney-General. In the end the High Court dismissed, though not so convincingly, the concerns of the lower court judge.
- A Government Circular- the *JPA Circular 6/2010* - puts all *Pegawai Undang-Undang* (legal officer) under the administrative control of the Attorney-General. With all due respect even if the Circular reproduces the existentialist reality of the AG's omnipotence, its constitutionality is in doubt. Under Article 138, the JLSC's "jurisdiction shall extend to all members of the judicial and legal service". No *Pekeliling Perkhidmatan* (Service Circular) can override the Constitution. In *Maleb Su v PP* it was held that the AG is not the head of the service nor can he be by virtue of Article 138.
- We have learnt recently that along with other civil servants, subordinate court judges are being required to attend *Biro Tatanegara* (National Civics Bureau) courses which, under the previous government were widely criticised for their inflammatory political, racial and religious content.

Article 138 needs to be amended to separate the Judicial Service from the Legal Service. This will require a constitutional amendment with a two-thirds bipartisan majority – something that should not be difficult to obtain given the non-political nature of this proposal. The Legal Service should be under the Attorney-General. The Judicial Service should be under the CJ as before 1960. Alternatively, ex-CJ Tun Ariffin's suggestion may

[36] [1984] 1 MLJ 311.

be worthy of consideration that the Chief Registrar of the Federal Court should head the Judicial Service. To avoid institutional bias and fear of victimisation, officers in the two services should not be transferable, except on a permanent basis, from one service to the other. Appointments to the Judicial Service could be made subject to the recommendation of the already existing Judicial Appointments Commission under Act 695 of 2009. This will, of course, require amendments to Article 138 of the Constitution as well as Act 695. What is important is that justice should not only be done but must be seen to be done.

Reasonableness of Laws

In several decisions, the courts have held that the reasonableness or fairness of a law is not for the courts to determine. Law is *lex,* not *jus* or *recht*. The necessity, wisdom, justice, reasonableness or fairness of the law is for Parliament to determine and courts should not tread in this area.[37] This judicial approach is supported by many 'legal positivists' within the judiciary, especially at the apex court, who hold a passive view of the judicial function. They adopt "strict literalism that is formalist and insular in its approach towards the interpretation of constitutional rights".[38] Their 'four-walls' approach has been followed in a number of prominent decisions.[39]

In *Abdul Ghani Haroon* (2001)[40] it was held that despite the constitutional right of every detainee in Article 5(2) to apply for the writ of habeas corpus, the detaining authority has no duty to produce the detainee in court unless the detention is tainted with illegality. This is because the language of Article 5(2) states that "Where a complaint is made to a High Court … the court shall inquire into the complaint and, *unless satisfied that the detention is lawful*, shall order him to be produced before the court and release him." This decision shows callous disregard for detainees who are being subjected to torture but cannot prove it unless allowed to appear in court.

In *Danaharta Urus v Kekatong*[41] a statute ousted the power of the court to stay, restrain or affect any action taken by the newly created national asset management company (Danaharta). Kekatong mounted a constitutional challenge on the ground of unequal treatment, denial of right of access to justice and breach of natural justice. The Court of Appeal agreed that the right to access to courts is an integral part of equality. Rights should be interpreted in a broad, liberal and purposive way. However, the Federal Court overruled and held that the ouster clause was effective. Access to justice is subject to the court's jurisdiction under Federal law and in this case the law had denied the access. With all due respect, the term law cannot mean any law but a law that does not violate the constitutional guarantees of liberty, equality and property.

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37 *Cheow Siong Chin v Timbalan Menteri* [1986] 2 MLJ 235; *Nalla karuppan v Ketua Pengarah Penjara* [1999] 1 MLJ 96; *AG v Chiow Thiam Guan* [1983] 1 MLJ 51.

38 Yvonne Tew, "On the Uneven Journey to Constitutional Redemption: The Malaysian Judiciary and Constitutional Politics", Georgetown University Law Center, Scholarship @Georgetown Law, 2016, 672; 25 *Wash. Int'l. L.J.* 673 (2016).

39 *Government of Kelantan Govt of Malaya* [1963] 29 MLJ 355; *Loh Kooi Choon v Government* [1997] 2 MLJ 187; *Merdeka University v Government* [1981] CLJ (Re) 191, 209.

40 *Ketua Polis Negara v Abdul Ghani Haroon* [2001] 4 MLJ 11.

41 [2004] 2 MLJ 257.

In *PP v Yuneswaran*[42] the issue was whether the power of Parliament in Article 10(2) to impose "such restrictions as it deems necessary" meant "such *reasonable* restrictions as it deems necessary". The Court of Appeal in disregard of the apex court ruling in *Sivarasa Rasiah*[43] and in disagreement with its own decision in *Nik Nazmi Nik Ahmad v PP*[44] held that "the courts do not consider it any part of its judicial function to paint any law as 'reasonable' or 'unreasonable' or 'harsh' or 'unjust'…" This preference for literal interpretation was confirmed in *PP v Azmi Sharom*[45] in which the Federal Court disowned the reasonableness test in *Sivarasa* because Article 10(2) contains no such requirement. The court, however, contradicted itself by rejecting the reasonableness test of *Sivarasa,* but accepting *Sivarasa*'s proportionality standard!

In *Tan Boon Wah v Datuk Seri Ahmad Said Hamdan*[46] the anti-corruption law allows "day-to-day" interrogation of suspects. The issue was whether interrogation beyond normal working hours violated the guarantees of personal liberty in Article 5. The High Court ruled admirably that there should be less room for literalism but greater scope for rights-oriented approach. The Court of Appeal and Federal Court disagreed and insisted that the plain meaning of words in legislation ought to be followed.

In contrast with the literalists, the 'liberals'[47] insist that the judicial function can never be purely mechanical. All judges are forced now and then to fill gaps in the law, resolve conflicts, interpret the laws purposively rather than literally and make explicit what is implicit in the law. In Malaysia, in a long line of cases under Article 8 (equality before the law) our courts have held that legislative classification in a statute must be reasonable and must have a rational nexus with the object sought to be achieved.[48] If such activism is permitted in areas of equality, then it should also be permissible in matters of liberty, property, and due process.

Articles 149 and 150

These Articles confer such extraordinary powers on the legislature and the executive in times of subversion and emergency, that judicial review is almost impossible to obtain. Article 149 permits Parliament to pass laws notwithstanding any violation of Article 5 (personal liberty), Article 9 (protection against banishment and freedom of movement), Article 10 (freedom of speech, assembly and association) and Article 13 (right to property). Article 150 permits the entire Constitution except six provisions in Article 150(6A) to be suspended in times of emergency. Emergency provisions have no time limit. Article 150(8) contains an ouster clause that bars judicial review on matters of emergency. This

42 [2015] 9 CLJ 873.

43 [2010] 3 MLJ 193.

44 [2014] 4 MLJ 157.

45 [2015] MLJU 594.

46 [2010] 2 MLJ 193.

47 Known by many names among them 'judicial activists', supporters of holistic or purposive approaches and those who believe that moral reasoning is part of legal reasoning.

48 *Datuk Haji Harun Haji Idris v PP* [1976] 2 MLJ 116.

provision is alarming because Malaysia was under a continuous state of emergency from 1964 to 2011.

Ouster Clauses

The Constitution is replete with ouster clauses in such areas as citizenship[49] and emergency powers.[50] These clauses, if interpreted literally, are a clear affront to the judicial function to ensure that all persons stay within the limits of the law.

Code of Ethics

Articles 125(3A), (3B) & (3C) were inserted in the post Tun Salleh era to provide for disciplining judges who breach the Code of Ethics. There are two disturbing features in this Code: (i) the formulation of the Code is in the hands of the executive and (ii) its use is in the hands of the CJ and not a judicial tribunal. The Code strengthens the coercive powers of the CJ over his brother judges.

Stare Decisis

This venerable doctrine of the common law stands in the way of many brilliant judges in the High Court and Court of Appeal from taking constitutional law forward. They are forced to follow some horrible decisions by the Federal Court. In many cases scintillating landmark decisions at the High Court or Court of Appeal were overturned by a conservative Federal Court.[51]

Pressures from Within

In the Likas by-election case of *Haris Mohd Salleh v Ismail Majin* (2000)[52] we learnt that a judge's freedom of action can be threatened by pressures from his judicial superiors. It is not unknown that some CJs try to influence their brothers to reach particular outcomes and to show regard for 'larger' but extra-legal considerations.

Influence-peddling Lawyers

We learnt after a Royal Commission Report that judicial integrity can be compromised by influence-peddling lawyers. Despite the Royal Commission Report on the V K Lingam Videotape,[53] the lawyer or judge concerned was not prosecuted by the public prosecutor. However, the Bar Council Disciplinary Committee did its duty to discipline the member of the Bar.[54]

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49 Second Schedule, Part III, section 2 of the Federal Constitution.

50 Article 150(8) of the Federal Constitution.

51 *Muhamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan* [2015] 3 MLJ 513; [2015] 6 MLJ 736.

52 *Harris Mohd Salleh v Ismail Bin Majin, Returning Officer* [2000] 3 MLJ 434; [2001] 3 MLJ 433; (No 2) [2001] 6 MLJ 610.

53 *Report of the Commission of Enquiry on the Video Clip Recording Images of a Person Purported to be an Advocate and Solicitor* (May 9, 2008).

54 *The Star*, 20 November 2015.

Chief Justice's Power of Empaneling

An area discussed only hush-hush, is the unlimited power of the CJ to empanel a hand-picked Bench that is ideologically inclined towards one side. In one case the CJ went to the extent of unconstitutionally asking a High Court judge to sit with him on the Federal Court.[55]

An observer cannot fail to note that in many inter-racial or inter-religious disputes, the Bench that is constituted has no representation from the religious or racial minorities concerned. In a few cases involving Sabah and Sarawak, no effort was made to have an East Malaysian judge sit on the panel. The new CJ has fortunately addressed this issue of empaneling and we have to wait and see how the new system works.

Untrammeled Powers of the Attorney General

Under Article 145(3), the AG "shall have the power, exercisable at his discretion, to institute, conduct, or discontinue any proceedings for an offence…." Nowhere does the Constitution say that the power of the AG shall be sole or exclusive. Yet, many judges have given to the AG an absolute monopoly over criminal prosecutions.[56] The 1MDB debacle which the AG under the Najib government refused to pursue, clearly illustrates the danger of trusting the AG with unfettered discretion over prosecutions.

An additional and undesirable provision is Article 145(3A) which gives to the AG the power to choose the venue at which judicial proceedings will commence or be transferred to. It is not clear why the AG's discretion should not be subject to judicial review. Articles 145(3) and (3A) should be subject to Article 8 – equality before the law.

Defiance of Judicial Decisions

Judicial independence has lately been compromised by officials in other agencies of the State e.g. the various Islamic religious establishments, the National Registration Department, the Election Commission and the police who have refused to obey judicial decisions. There is a host of cases where habeas corpus was issued and as soon as the detainee left the court, he was re-arrested under a different charge. Often a law or an action is invalidated by the High Court, but the executive continues to rely on the invalidated law because an appeal against the judicial decision is pending!

Intimidation of Judges

Lately there is a common practice of trying to intimidate judges who are hearing cases involving religious disputes. Demonstrations are held outside court precincts. The police, otherwise very vigorous in regulating political demonstrations, turn a blind eye towards such acts of intimidation. The law should be amended to ban demonstrations near court precincts.

It must be noted that some lawyers and members of the public attempt 'religious shaming' of judges. Arguments in court are couched by reference to religious duties. A

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55 *Dato' V Kanalingam v David* Samuels [2006] 6 MLJ 521.

56 *Long Samat v PP* [1974] 2 MLJ 152.

member of the public filed a police report against the judge who handed down the decision in the *Meor Atiqulrahman (serban)* case.[57]

Race and Religion Trump the Constitution

In his Braddel Memorial Lecture in Singapore in 1982, the late Tun Suffian had observed that in reading the law reports one would not be able to tell whether the judgment was written by a jurist of one race, religion or another. Regrettably those days are gone. There is now a predictability about many judicial decisions and the predictive, behavioralist theories of 'jurimetrics' need not be employed to foresee some results. In a case, the Muslim judge in evaluating the evidence of witnesses is supposed to have made the remarkable suggestion that "Muslims do not lie!"[58]

Since the Islamisation wave of the 80s, some judges have found it fashionable to subordinate their duty to uphold the Constitution to their race or religion. In matters involving the *Syariah*, some civil courts are reluctant to examine issues of constitutionality and ultra vires.

Article 4(1) on constitutional supremacy is being subordinated to Article 3(1) on Islam as the religion of the Federation. In relation to any matter with the slightest whiff of Islam, the chapter on fundamental rights and the Federal-State division of powers are often not respected by the courts. The State Assemblies and the *Syariah* courts are granted virtually unlimited powers. Article 4 (constitutional supremacy), Articles 5-13 (fundamental rights), and Schedule 9 (Federal-State division of powers) appear to be subordinated to Article 3.[59]

Many civil judges are subordinating the entire chapter on fundamental rights to Article 3(1). This is despite the crystal-clear provision in Article 3(4) that "nothing in this Article derogates from any other provision of this Constitution". Other civil courts are subordinating fundamental rights to Schedule 9 List II Paragraph 1. It is humbly submitted that Schedule 9 List II Paragraph 1 on the legislative power of the State Assemblies is subordinate to fundamental rights and not vice versa. In *Fathul Bari Mat Jahya*,[60] a provision of a State Enactment requiring prior accreditation from *Syariah* authorities before anyone can speak about Islam other than in his house was challenged as unconstitutional as it was an unconstitutional and unreasonable limitation on free speech. In upholding the Enactment and rejecting the constitutional arguments, the learned CJ observed that "the integrity of the religion needs to be safeguarded *at all cost*". We have a case in which there was the delightful nonsense that because Article 3 (on Islam) precedes Article 4 (on constitutional supremacy) therefore Article 3 is more important![61] Many civil judges are feigning ignorance of Article 3(4) which says in clear terms that

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57 *Fatimah Bte Sihi & Ors v Meor Atiqulrahman Bin Ishak* [2005] 2 MLJ 25; [2006] 4 MLJ 605.

58 Ravinder Singh, "A Muslim Would Not tell Lies", *Malay Mail Online* quoting a retired judge, 28 July 2014.

59 *ZI Publications v Kerajaan Negeri Selangor* [2016] 1 MLJ 153; *Menteri Dalam negeri v Titular Roman Catholic Archbishop of KL* [2013] 6 MLJ 468; [2010] 2 MLJ 78; *Muhamad Juzaili Mohd Khamis v Negeri Sembilan* [2015] 3 MLJ 513.

60 *Fathul Bari bin Mat Jahya & Anor v Majlis Agama Islam Negeri Sembilan & Ors* [2012] 4 MLJ 281.

61 *Menteri Dalam Negeri v Titular Roman Catholic Archbishop of KL* [2013] 6 MLJ 468.

"nothing in this Article derogates from any other provision of this Constitution". There is deliberate avoidance or evasion of the Supreme Court judgment in *Che Omar Che Soh v PP*[62] which stated categorically that supremacy of Islamic law over the Constitution is not and was not meant to be the scheme of things in Malaysia.

In some cases, civil judges advise non-Muslims to be open to appearing before *Syariah* courts. This is contrary to the constitutional provision in Schedule 9 List II Para 1 that *Syariah* courts have jurisdiction only over persons professing the religion of Islam.

A painful and deeply unjust situation is how, due to a religiously biased interpretation of Article 121(1A), our civil courts are unwilling to help non-Muslim women whose spouses, to circumvent the civil law, convert to Islam and get the *Syariah* courts to participate in the ignoble, illegal and un-Islamic act of snatching infant children from the bosoms of their pining mothers. The children are unilaterally converted to Islam and the converting spouse often gains custody and guardianship in *ex parte* proceedings without the mother being heard. These incredibly unjust practices are bringing infamy to Islam and to our civil and *Syariah* courts.[63]

It must be stated, however, that the 'Islamisation' of the judiciary is confined to only some theocratic-minded Muslim judges. Many others transcend race and religion, as they ought to. The 2018 Federal Court *Indira Gandhi* decision is a case in point. The dissenting judgement of Justice Hamid Sultan at the Court of Appeal in the same case was another admirable expression of impartiality and integrity.

Grant of Honours

The power to recommend a judge for a civil honour belongs to the CJ. This gives the CJ too much leverage over his brother judges. It is recommended that as a matter of constitutional convention, every High Court judge should be conferred a Federal title 'Datuk'. Every Court of Appeal Judge should be awarded the title of a 'Tan Sri' and the CJ should be honoured with the title of 'Tun'.

Ethnic and Gender Imbalances

An inclusive judiciary with a racial, religious, regional and gender balance is likely to arouse confidence in its ability to deliver justice fairly and impartially.[64] Regrettably our courts suffer massive imbalances in their ethnic composition. An analysis of data for early 2018[65] indicates the following:

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62 [1988] 2 MLJ 55.

63 There is long list of such tragic cases and reference to some of them can be found *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545.

64 The problem is not unique to Malaysia. The elite background and cloistered circles of US Supreme Court justices are an unfortunate phenomenon in the USA. See William Wan, "Every Current Supreme Court Justice Attended Harvard or Yale", *The Washington Post*, 11 July 2018.

65 Part of the data is summarised from Poo Hao Yi, *Diversity of Judiciary in Malaysia: A Preliminary Insight*, Unpublished Project Paper at the Faculty of Law, University of Malaya, 2017/2018.

Number of Judges of the Federal Court
- Malays 84.6 %. Non-Malays 15.4%
- Male 69%. Female 31%
- From the Judicial & Legal Service 85%. From other sources 15%.

Number of Judges of the Court of Appeal
- Malays 76%. Non-Malays 24%
- Male 52%. Female 48%
- From the Judicial & Legal Service 80%. From other sources 20%.

Number of Judges of the High Court
- Malays 74%. Non-Malays 26%
- Male 67%. Female 33%
- From the Judicial & Legal Service 72%. From other sources 28%.

Number of JCs
- Malays 76.4%. Non-Malays 23.6%
- Male 76.5%. Female 23.5%
- From the Judicial & Legal Service 64.7%. From other sources 35%.

Judicial Corruption

This is a well-known but not openly talked about phenomenon around the world. Up till the 1980s, the Malaysian judiciary had a high reputation for integrity. But regrettably many incidents throw doubt on how corruption-free our judiciary is now. In the mid-90s there was an anonymous letter accusing the CJ and 11 other judges of corruption and grave improprieties. The issue was not officially investigated and neither the author of the letter nor the judges targeted were investigated or prosecuted.

In 2000, the case of *Adorna Properties Sdn Bhd v Boonsom Boonyanit*[66] a shameful decision legitimising the transfer of stolen land was delivered and it took about a decade to set things right. In the 'Lingam Gate' Royal Commission Report and subsequent litigation, evidence was put forward that a senior lawyer was in cahoots with a senior judge to recommend the judge for a coveted award. There is a story about a lawyer sponsoring the holiday abroad of a CJ. There was scandalous news that in a case the judge's judgment was composed by the lawyer involved in the case.

The 1988 judicial crisis gave birth to a number of other shameful tendencies within the top echelons of the judiciary and it is painful to acknowledge these sad realities.

Refusal to Review Issues of Constitutional Politics

Barring some honourable exceptions, our judges have demonstrated a remarkable executive-mindedness in a number of areas. Among them are ministerial discretion (as opposed to police discretion) under preventive detention laws; literal interpretation of

[66] *Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng* [2001] 1 MLJ 241.

ouster clauses in some legislation like the Danaharta Act; the 1-MDB related cases;[67] appeals to the superior courts in election disputes after General Election 13; challenges to the rigged electoral roll prior to General Election 14; the Anwar Ibrahim 'Sodomy 2' trials; arbitrary powers of the AG under Article 145; and *Syariah*-civil disputes under Article 121(1A). Constitutional review of Acts of Parliament and State Enactments is rarely resorted to.

The courts often evade or avoid their responsibility by resorting to technicalities to dismiss an application or pleading. Among the escape routes are: Federal Court's power to refuse grant of leave, the doctrine of non-justiciability, the lack of locus standi, expiry of time limits or failure to observe proper procedure. In *Mohd Juzaili Mohd Khamis*, there was a Court of Appeal decision in favour of cross-dressers who were suffering from gender identity disorder. They had successfully challenged the constitutionality of the State law which subjected them to harassment and arrest, loss of livelihood, gender discrimination and infringement of freedom of expression. Counsel for the Defendant (the State of Negeri Sembilan) sought to avoid the substantive issues before the Federal Court by raising a preliminary objection that the case involves the Federal Court's exclusive jurisdiction under Article 4(4) and should not have been entertained by the High Court or the Court of Appeal. This expansive view of the Federal Court's original jurisdiction was quite out of line with innumerable precedents to the contrary, including one in *Ah Thian.*[68] In any case, the jurisdictional argument was not raised in the grounds of appeal. It had not been raised before the High Court or the Court of Appeal. Yet, the Federal Court bent over backward to entertain it, accept it and censure the Court of Appeal's well-reasoned decision. The substantive issues were evaded. A learned judgment by the Court of Appeal was overturned and the victims condemned to the status quo. Justice failed and the Federal Court's reputation for impartiality and integrity suffered.

Evasion of Constitutional Issues

Judicial review of legislation is not an important feature of our Constitution. In 61 years of *Merdeka* (Independence) there are only 15 or so cases where a law of Parliament or the State Assembly was invalidated by the courts on constitutional grounds. An example is the Court of Appeal decision in *Hilman* (2011).[69]

However, there is no dearth of cases in which administrative improprieties by the police and municipal officers have been censured by the courts. Nevertheless, an observation can be made. For several decades after independence, the approach of our courts was that constitutional law cases were often reduced to issues of ultra vires and natural justice. A good example is the *Aliran* case[70] where three issues of constitutional law were at stake: free speech under Article 10(1)(a); right under Article 152 to use the

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67 Several suits against then PM Najib Razak for misfeasance in public office in relation to 1-MDB were avoided and evaded by the courts on technical grounds: *Tun Dr Mahathir Mohamad v Datuk Seri Mohd Najib* [2017] 9 MLJ 1, [2018] 3 MLJ 466; *Tony Pua Kiam Wee v Dato' Seri Mohd Najib* [2018] 8 MLJ 43.

68 *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112.

69 *Muhammad Hilman bin Idham & Ors v Kerajaan Malaysia* [2011] 6 MLJ 575; [2011] 6 MLJ 507.

70 *Persatuan Aliran Kesedaran Negara v Minister of Home Affairs* [1988] 1 MLJ 440; [1990] 1 MLJ 351 SC.

national language in the NGO's publication; and right to equality before the law under Article 8. Neither issue was addressed by the court. The case was treated as a matter of ultra vires in administrative law. The Supreme Court relied on the British *GCHQ/CCSU*[71] principles of illegality, irrationality and procedural impropriety and brushed aside the three constitutional articles in two lines of its judgment. This approach is detrimental to constitutional rights because in a country with a supreme Constitution, it is not enough for the executive to conform to the enabling law. The law itself must conform to the letter, spirit and ideals of the Constitution.

Courts are Required to Accept Expert Opinions

In legislation relating to Islamic banking,[72] the Courts are directed by legislation to comply with the decision of the Islamic advisory body. With all due respect, this is a serious violation of the doctrine of separation of powers and of judicial independence. Expert evidence while admissible should not be statutorily made binding on judges. Fortunately, the recent *Semenyih* decision has invalidated one such legislation in relation to compulsory acquisition of land.

Constitutional Amendments to Overturn Judicial Decisions

From 1957 to 2008, the ruling *Barisan Nasional* enjoyed a handsome two-thirds majority in both Houses. Often when it lost a case in the courts, it resorted to the political expediency of amending the Constitution and backdating the amendment to *Merdeka* Day![73]

International Law Not Part of our Corpus Juris

In relation to the interface between municipal law and international law, Malaysia adopts the dualistic theory. International law is not law per se unless incorporated into the corpus juris by an Act of Parliament.[74] However, in an age of globalisation, international commerce and internationalisation of human rights, it will be difficult to build dykes against the incoming tide of international law. A judge wishing to internationalise her juristic horizons may note that the Article 160(2) uses the words "law includes…." It does not say "law means…." Also, the definition includes common law" and "any custom or usage…." As in the UK, we can develop a common law rule of implication that all national legislation is consistent with our government's international obligations unless the domestic law explicitly says otherwise. This way there may be some scope for drinking from the cup of international jurisprudence especially in such areas as human rights and commercial law. Some courageous judges, indeed, do. Regrettably they are overruled

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71 *Council of Civil Service Union v Minister for the Civil Service* [1985] AC 374.

72 Islamic Banking Act 1983 - Act 276.

73 Note for example the amendment of Article 150 after the government's defeat in *Teh Cheng Poh v PP* [1980] AC 458. Article 151 was amended to reverse the law after the government lost the decision in *Tan Boon Liat v Menteri* [1977] 2 MLJ 108. Article 121(1) was amended after the public prosecutor lost the decision in *Dato' Yap Peng v PP* [1987] 2 MLJ 311.

74 Refer to the definition of law in Article 160(2) of the Federal Constitution.

and reprimanded.[75] This is what happened to Justice Lee Swee Seng who in deciding a family cum religious dispute invoked "our commitments to various Conventions" in the matter of freedom of religion and women's rights. In overruling him, the Court of Appeal harshly rebuked him for using international norms as a guide to interpret our Federal Constitution!

V. JUDICIAL ACTIVISM v JUDICIAL RESTRAINT

The concepts of 'judicial activism' or 'judicial restraint' have no agreed meaning. Both are subject to vicious criticisms. I use 'judicial activism' to mean willingness of a judge to decide constitutional issues, and if need be, to invalidate legislative or executive actions on the touchstone of the basic law.

An activist judge interprets the law purposively, not literally. He goes behind the law to see its moral aims and purposes and beyond the law to note its consequences. He is prepared to make explicit what is implicit in the law; to iron out creases; and to fill gaps in the law. He reads the law in the light of the felt necessities of the times and the contemporary realities. In distilling the meaning and purpose of the law, he pays close attention but not deference to executive views of the law. His vision of the law is holistic. He sees Law as a majestic, seamless web of inter-connected rules and standards. He refuses to let the deadweight of the past prevent him from reinterpreting, distinguishing or overruling an archaic precedent.

In the field of human rights, he sees it as one of his primary roles to achieve a balance between freedom and responsibility, liberty and order and the rights of the citizens versus the might of the State.

We have many activists, liberal and dynamic judges who give life to the law by reading it in the light of constitutional ideals. Whatever one's view may be for or against a liberal versus a literal, an activist versus a passivist interpretation of the law, it must be conceded that judicial activism reflects judicial independence.

The record of the Malaysian Judiciary in this area is mixed. The general trend is towards a literal interpretation of subjective and wide powers. Nevertheless, there is no shortage of cases where judges have interpreted the Constitution and laws creatively.

Separation of Powers: In *Kok Wah Kuan,*[76] the Federal Court had mocked at the doctrine of separation of powers as having no explicit mention in our basic charter. Justice Richard Malanjum had delivered a learned dissent. In late 2017 separation of powers and independence of the judiciary were restored in a landmark decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat.*[77] Under the Land Acquisition Act 1960, two valuation experts or Assessors sit with a single High Court judge to determine what amounts to adequate compensation under Article 13(2). It was held that under the Constitution the two assessors have no right to sit on the High Court. The court (as

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[75] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2013] 5 MLJ 552.

[76] *Kok Wah Kuan v Pengarah Penjara Kajang, Selangor Darul Ehsan* [2004] 5 MLJ 193; [2007] 5 MLJ 174; [2008] 1 MLJ 1.

[77] [2017] MLJU 535.

constituted under the Act) cannot usurp the function of the High Court despite a provision in the Land Acquisition Act 1960 to enable the court to have the last say in the matter. The constitutional function of the superior courts cannot be ousted by legislation.

But note a contrary approach in *Dr Koay Cheng Boon v Majlis Perubatan Malaysi*a.[78] Under the Medical Act 1971, an appeal from the Malaysian Medical Council in a disciplinary case lay to the High Court. The High Court's decision was expressed by Section 31(2) of the Act to be final. The appellant nevertheless appealed to the Court of Appeal based on Article 121(1B). It was held that the jurisdiction of the Court of Appeal must be read in the light of Section 31(2) of the Act. The Court of Appeal has no right to hear the appeal.

It is humbly submitted that *Koay Cheng* and *Semenyih Jaya* can be distinguished. First, there has always been a distinction between appeal and review. Appeal is a creature of the statute and no appeal lies if there is no statutory path carved out by a statute. *Koay Cheng* is a case of statutory appeal. *Semenyih* is a case of inherent review. Second, in *Koay Cheng* an appeal did exist to the High Court whose decision was final. In *Semenyih* the appeal to the High Court was a sham. The judge was outnumbered by the two assessors. *Semenyih* looks more like a case of ouster. The land acquisition matter is in reality heard by a tribunal consisting of two assessors and a High Court judge. Third, in *Semenyih,* an issue of a constitutional right (adequate compensation as required by Article 13(2)) was involved. No clear constitutional right was involved in *Koay Cheng*.

Basic Structure Doctrine: The *Semenyih Jaya* decision and the *Indira Gandhi* verdict restore some of the old lustre of Article 121. Their Lordships in *Semenyih* have boldly asserted that parliament is not supreme. It cannot provide in the Land Acquisition Act for outsiders to sit on the High Court; to reduce the High Court judge to a rubber stamp and to take away from him the right and duty to determine what amounts to adequate compensation under Article 13. A most significant aspect of the verdict is that the Land Acquisition Act's ouster or finality clause cannot bar the superior courts from hearing an appeal. In *Indira Gandhi* (2018) the principle was emphasised that the judicial power must remain with the judiciary and cannot be transferred out to others even by an elected Parliament. The doctrine of basic structure was revived.

Prismatic Interpretation of Rights and Restrictive Interpretation of Limitations: In the *SIS Forum Case* (2012)[79] it was held that the restriction imposed by Parliament on free speech must be confined to the permissible, enumerated grounds in Article 10(2). The law restricting rights must be precise and not vague: *PP v Pung Chen* [1994].[80] The restriction imposed must be reasonable and proportionate: *Sivarasa* [2010][81] and *Mat Shuhaimi Shafiei* [2014].[82]

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78 [2012] 3 MLJ 173.

79 *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377.

80 *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566.

81 *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333.

82 *Mat Shuhaimi bin Shafiei v Public Prosecutor* [2014] 2 MLJ 145; [2017] 1 MLJ 436; [2018] 2 MLJ 133.

The Constitution must be read as a whole. Article 10 (on free speech) must be read along with Article 8 (on equality) because equality requires fairness: *Dr. Mohd Nasir* [2006].[83] A Constitution is a living and organic thing: *Tan Tek Seng* (996).[84] Fundamental rights are part of the basic structure of the Constitution: *Semenyih* (2017).[85] In *Sivarasa* (2010), *Lee Kwan Ho* (2009)[86] and *Shamim Reza Abdul Samad* (2009),[87] the Federal Court held that fundamental rights provisions must be generously interpreted. A prismatic approach to interpretation must be adopted. Provisions that limit a guaranteed right must be read restrictively. In line with this new jurisprudence, the terms 'life' and 'liberty' in Article 5 are being interpreted broadly to encompass many implied, un-enumerated and non-textual rights. The expression 'life' in Article 5(1) includes right to livelihood and the right to continue in public or private service subject to removal for good cause and by resort to fair procedure.[88] The concept of liberty in Article 5(1) is the basis of a right of access to the courts: *Sugumar Balakrishnan.*[89] Alternative remedies are not a bar to habeas corpus. Article 5(2) is the basis of habeas corpus and therefore the existence of other remedies cannot be the ground for refusing habeas corpus: *Sukma Darmawan* (1998).[90] In *Michael Philip Spears v Ketua Pengarah Penjara Kajang*[91] a 14-year delay in carrying out the death sentence is cruel and oppressive.[92] More so, if the inmate has begun to suffer from mental sickness due to his situation on death row. Execution of a mentally sick inmate is in violation of Article 5.[93] Inhumane and degrading treatment raises issues under Article 5 and the High Court was ordered by the Court of Appeal to retry these issues. In *Selvi Narayan v Koperal Zainal Mohd Ali*[94] members of the family have visitation rights. The police have a duty of care to safeguard the health of all detainees. Police are liable for negligence resulting in the death of a sick detainee.[95]

Laws against subversion are being interpreted purposively**.** In *Teresa Kok Suh Sim v Menteri*[96] the plaintiff was detained by the police under Section 73 of the Internal Security Act 1960 (ISA). She was denied her right to see a lawyer, was kept in solitary confinement and under inhumane conditions and was prevented from contacting the

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83 *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213.

84 *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

85 *Lembaga Lebuhraya Malaysia v Pentadbir Tanah Daerah Hulu Langat And Semenyih Jaya Sdn Bhd (Third Party)* [2007] MLJU 396; [2010] MLJU 1737; [2014] MLJU 1871; [2017] 3 MLJ 561.

86 *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301.

87 *Shamim Reza bin Abdul Samad v Public Prosecutor* [2009] 2 MLJ 506; [2011] 1 MLJ 471.

88 However, no livelihood was at stake when a non-Muslim lawyer wishes to practise in a *Syariah* court and is barred from doing so on the ground of her religion: *Majlis Agama Islam WP v Victoria Jeyaseele Martin* [2016] 2MLJ 309.

89 *Sugumar Balakrishnan v Director of Immigration, State of Sabah & Anor* [1998] 2 MLJ 217.

90 Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia [1998] 4 MLJ 742; [1999] 1 MLJ 266; [1999] 2 MLJ 241.

91 [2017] 1 MLJ 472.

92 Indian case of *Trivenibens* 1989 AIR 1335, SC was referred to.

93 Indian case of *Shatrughan Chauhan* [2014] 3SCC 1 was referred to.

94 [2017] 5 CLJ 84.

95 *Mohd Hady YaAkop v Hassan Marsom* [2016] 4 MLJ 141, [2018] MLJU 683.

96 [2016] 6 MLJ 352.

family. The court was not satisfied that any reasonable and fair grounds existed to justify her detention under Section 73. It emphasised that an objective test should be applied to evaluate police detentions (as opposed to a subjective test to evaluate ministerial decisions under Section 8 of the ISA). This was in line with Federal Court decision in *Mohamed Ezam's* case.[97] The court awarded exemplary damages.

In *PP v Khairuddin Abu Hassan & Anor*[98] the accused was charged under the Penal Code (Sections 124L and 34) for trying to sabotage the banking and financial services in Malaysia. They were tried under the special procedures of Sections 12-13 of Security Offences (Special Measures) Act 2012 (SOSMA) which deny any right to bail contrary to the Criminal Procedure Code. The court was of the view that sabotaging essential services is not a security offence under SOSMA. SOSMA was enacted to combat terrorism and as such any ambiguity in SOSMA should be resolved in favour of fundamental rights. SOSMA did not apply to their charge.

Freedom of speech was given a boost in *Mat Shuhaimi Shafie v Kerajaan Malaysia*[99] where it was held that Section 3(3) of the Sedition Act 1948 which excludes mens rea is a disproportionate restriction on freedom of speech in Article 10(2)(a) and therefore unconstitutional. The *Mat Shuhaimi* decision was, unfortunately, overruled by the Federal Court.[100]

Freedom of assembly was given a boost by the case of *Nik Nazmi* which had ruled that criminalising the failure to give the 10-day notice under the Peaceful Assemblies Act, Section 9(5), went far beyond the constitutional permission in Art 10(2)(b) to impose restrictions on the permitted grounds of security and public order. Regrettably, in another later case, *PP v Yuneswaran a/l Ramaraj,* [101] it had been ruled that the power to impose a criminal penalty was not ultra vires. In *Maria Chin Abdullah v Pendakwa Raya,*[102] there was a charge for not giving the 10-day notice. On the constitutionality of Section 9(5) there were two Court of Appeal decisions. *Maria Chin* followed *Yuneswaran.*[103]

Article 13 of the Constitution came to the aid of a party not being paid its damages by the government. An admirable aspect of the *Finance Minister and Sabah Government vs Petrojasa Sdn Bhd* (2008) decision is that the CJ saw a seemingly purely civil dispute in a constitutional light. Petrojasa was entitled to the sum granted to it by the court. This sum was a property. Property is protected by Article 13(1) of the Constitution which states that "no person shall be deprived of property save in accordance with law". According to the CJ, mandamus must issue for the purpose of enforcing the right of a person who has been deprived of his property not in accordance with law. This is very heartening.

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97 *Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372; [2001] 3 MLJ 34; [2001] 2 MLJ 481; [2002] 1 MLJ 321; [2002] 4 MLJ 449; [2003] 2 MLJ 364; [2013] 3 MLJ 110.

98 [2017] 4 CLJ 701.

99 [2017] 1MLJ 436.

100 See also *Public Prosecutor v Azmi Sharom* [2015] 6 MLJ 751; *PP v Ooi Kee Saik* [1971] 2 MLJ 108 & *PP v Param Cumaraswamy* [1986] 1 MLJ 512.

101 [2015] 6 MLJ 47.

102 [2016] 9 MLJ 601.

103 See also *Mohd Rafizi Ramli v PP* [2016] 7 CLJ 246.

The Court of Appeal and the Federal Court deserve congratulations for extending the horizons of constitutional and administrative law.

Judicial Review and Parliamentary Privileges: In *Dewan Undangan Negeri Selangor v Mohd Hafarizam Harun,*[104] it was held that courts are not totally ousted from examining parliamentary privileges. Parliament and State assemblies have the power to punish members and outsiders for contempt of the House. In the UK the contempt can be committed within the House or outside the House. In this case the Selangor Assembly had cited a United Malays National Organisation (UMNO) lawyer for contemptuous actions committed outside the Assembly. Under Article 72(1) of the Federal Constitution the validity of any proceedings in a legislative assembly should not be questioned in a court. The court held that Article 72(1) applies only if the Assembly acts within its jurisdiction. The court held that under the Standing Orders of the Selangor Assembly, there is no power to commit for contempt an act committed outside the House.

As a comment it can be observed that this is a restrictive view of parliamentary privileges which can be applauded. Extending judicial review to parliamentary proceedings is a courageous move.[105] However it goes against common law decisions in the UK which give to Parliament power to punish anyone anywhere for conduct which the Assembly holds to be in contempt. How else are outsiders going to be punished for contempt if the act must be committed within the four corners of the House?

Article 121(1) and the Judicial Power of the Federation: *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[106] held that Section 40D(3) and the proviso to Section 49(1) of the Land Acquisition Act 1960 are ultra vires Articles 121(1) and 121(1B) because they usurp the function of the judiciary. These sections are also violative of Article 13(2) in that they prevent the question of the adequacy of the compensation from being determined by the court. The Land Acquisition Act cannot oust the jurisdiction of the court to determine the question of the adequacy of compensation. See also *Indira Gandhi* (2018) and the contrasting *Dr Koay Cheng v Majlis Perubatan Malaysia.*[107]

Article 149: In *PP v Khairuddin Abu Hassan & Others*[108] the accused were charged under the Penal Code (Sections 124L and 34) for trying to sabotage the banking and financial services in Malaysia. They were tried under the special procedures of sections 12-13 of SOSMA which deny any right to bail. SOSMA was enacted under Article 149 which permits Parliament to violate fundamental rights enshrined in Articles 5, 9, 10 and 13. But this violation of fundamental rights is allowed only if the Act invokes one or more of the grounds enumerated in Articles 149(1) (a) to (e). SOSMA invoked grounds (a), (b), (d) and (f) but not grounds (c) and (e). The ground in 149(1)(e) relates to the maintenance of supplies and services. It was therefore held that a charge of sabotaging the banking service is not a security offence and is not triable under SOSMA.

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104 [2016] 4 MLJ 661.

105 See also the recent case involving DAP's Pujut Assemblyman Dr Ting Tiong Chun whose disqualification by the Sarawak Assembly has been overturned: *The Star*, 14 July 2018, p.14.

106 [2017] MLJU 535.

107 [2012] 3 MLJ 173.

108 [2017] 4 CLJ 701.

Article 159, Amendments and the Basic Structure of the Constitution: In *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* (2017) it was held that judicial independence is part of the basic structure. The basic structure cannot be destroyed by Parliament. *Sivarasa Rasiah v Badan Peguam Malaysia* was referred to.[109]

Administrative Law Principles are being Constitutionalised: Articles 5(1) and 8(1) of the Constitution are being used as the doctrinal basis for requiring procedural fairness. In *Tan Tek Seng v Suruhanjaya Perkhidmatan*[110] the Court of Appeal held that the expression 'law' in Articles 5(1) and 8(1) refers not only to substantive law but also to procedural law. In *Sugumar,* the court also stated obiter that the exclusion of the right to be heard may well contravene Articles 5 and 8.

The term equality in Article 8(1) includes fairness.[111] And procedural fairness is an expanding concept. In *Sugumar Balakrishnan v Pengarah Imigresen*[112] Section 59 of the Immigration Act 1959/63 excluded the right to be heard. The court held that even if *audi alteram partem* was excluded, that did not exclude the other facets of the wider doctrine of procedural fairness e.g. the duty to give reasons. The categories of procedural fairness are not closed. The procedure adopted in a particular case may be fair or otherwise according to its own facts. Likewise, in *Tan Tek Seng* it was held that as a result of constitutionalising procedural fairness, the position is that the doctrine of procedural fairness is wider than natural justice.[113]

Article 8 on equality is being read as a generic article to require fair processes as well as fair results. In *Tan Tek Seng*, natural justice and unreasonableness were linked with the Constitution.

Duty to Act Fairly: In relation to the duty to observe procedural fairness, an important development is the concept of legitimate expectation. The doctrine of natural justice – often limited to reviewing judicial and quasi-judicial actions - has now expanded to include a duty to act fairly in all legitimate expectation cases – whether administrative, judicial or quasi-judicial. In *John Peter Berthelsen* (1987)[114] a foreign journalist on a work pass was held to have a legitimate expectation of being heard. In *Mohd Noor Abdullah v Nordin Haji Zakaria*[115] junior police officers who were facing disciplinary proceedings have a legitimate expectation that like their senior officers, they too had a right to be warned of the possible punishment that may be imposed.

Duty to give reasons: There are some judicial precedents affirming a duty to give reasons for an administrative decision. In *Hong Leong v Liew Fook Chuan*[116] it was observed that procedural fairness imposes a duty on decision makers to give reasoned decisions.

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109 See also *Indira Gandhi* [2018] 1 MLJ 545.

110 (1996) 2 AMR 1617.

111 See also *Hong Leong* [1996] 1 MLJ 46.

112 [1998] 3MLJ 289.

113 See also *Raja Abdul Malek Muzaffar Shah* [1995] 1MLJ 308.

114 *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134.

115 [2001] 2MLJ 257.

116 (1996) 1 MLJ 46.

Proportionality: There is now a new doctrine of proportionality. The *GCHQ* doctrine of ultra vires (illegality, irrationality and procedural impropriety) has expanded in Malaysia to incorporate a fourth dimension of ultra vires – the principle of proportionality. *Tan Tek Seng*[117] was approved by the Federal Court in *Rama Chandran*[118] but overruled in *Ng Hock Cheng v Pengarah Am Penjara* (1998)[119] and revived in *Syarikat Bekerjasama.*[120]

New Use of Mandamus: In the Sabah case of *Finance Minister and Sabah Government vs Petrojasa Sdn Bhd* (2008),[121] judges Tun Abdul Hamid Mohamad, Datuk Ariffin Zakaria, and Datuk Hashim Yusoff of the Federal Court faced a situation in which the age-old dictum that 'wherever there is a right, there must be a remedy"' was being trumped by procedural rules hindering the obtaining of a remedy. The litigant had obtained a court judgment of RM6.56mil against the Sabah Government in 2002. The 'judgment remained barren' because the State government claimed to have no funds to meet this debt. Despite the default, execution of judgment was not possible because Section 33(4) of the Government Proceedings Act declares that "no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any such money or costs as aforesaid". Other laws like Section 44(2)(b) of the Specific Relief Act and Order 73 r 12(1) of the Rules of the High Court also laid down impediments or restrictions in the way of enforcement of the judgment. The High Court wrung its hands in despair and dismissed the proceedings by Petrojasa. However, the Court of Appeal and the Federal Court heard the call of justice. In a heartening and innovative decision that broke new ground, the judges held that though execution or attachment cannot lie against the Sabah Government, judicial review is available. The Court of Appeal and the Federal Court unanimously held that an order of mandamus be issued to require the state government to meet its legal obligation. In making their decision to issue an order of mandamus the courts were faced with many hurdles. One was the legal issue that under Section 44(1) of the Specific Relief Act, the order of mandamus can lie only to "a person holding a public office". A unanimous Court of Appeal held that governments and ministers are fully subject to prerogative orders and to injunctions and interim injunctions. At the Federal Court, Abdul Hamid felt that under Section 44(1) of the Specific Relief Act, the Sabah Government did not qualify as "a person holding a public office". But, intent on doing justice, he overcame this hurdle by relying on the additional powers of the court under Section 25(2) CJA to grant the remedy.

Ouster Clauses are Being Weakened: In *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*[122] it was held that Valuation Experts or Assessors cannot usurp the function of the court despite a provision in the Land Acquisition Act 1960 to enable them to have the last say in determining what amounts to adequate compensation under Article 13(2).

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117 [1996] 1 MLJ 261.

118 *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

119 Ng Hock Cheng v Pengarah Am Penjara [1998] 1 MLJ 153.

120 *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama sama Sebaguna Sungai Gelugor* [1999] 23 CLJ FC.

121 [2008] 5 CLJ 321 FC.

122 [2017] MLJU 535.

Distinction between Appeal and Review is Weakening: Judicial Review was generally regarded as a scrutiny of the vires of the decision not of its merit. In its supervisory power the court merely examined the decision-making process, not the decision. But in quite a few cases the courts are now substituting their own decision for the decision of the inferior authority. This was what happened in *Tan Tek Seng* (1996). *Tan Tek Seng* was disapproved of in *Ng Hock Cheng* (1998) where the Federal Court held that judges do not have the power to review the punishment awarded. Nevertheless, the growth of the doctrine of proportionality and the strengthening of the concept of reasonableness strengthened the possibility of judicial review of a disproportionate decision. Note the sentiment in *Menteri Kewangan v Wincor Nixdorf Sdn Bhd.*[123] The public law question was whether in a judicial review application, the High Court can substitute the decision of the executive authority under the Customs Act 1967 and the Sales Tax Act 1972 with a new decision of its own. It was held by the Court of Appeal that as a general rule that should not be done. The High Court should quash an ultra vires decision and remit the case to the authority to give the executive another opportunity to reconsider the decision according to law. However, in appropriate and extraordinary circumstances the High Court can (i) issue mandamus (ii) besides prerogative orders, issue any appropriate order or direction, and (iii) ensure compliance by way of contempt jurisdiction. Mandamus should be issued only if the applicant had exhausted all other avenues. However, to the extent that the *Nixdorf* decision approves the possibility of any appropriate order or direction, *Tan Tek Seng* still survives.

VI. CONCLUSION

The judicial winter that descended in 1988 has not yet fully thawed. The picture is mixed. There are currents and cross currents.

On the positive side we have more judicial activism today than in the days of Tun Salleh though it must be recorded that the Salleh Court (though not Tun Salleh himself) was the most activist constitutional court in Malaysian history. The burst of judicial assertiveness in the Tun Salleh era as evidenced in such cases as *JP Berthelsen*, *Mamat Daud*, and *Teoh Eng Huat* has reappeared.

The basic structure doctrine has been revived. The judicial power of the courts eclipsed by an amendment to Article 121 seems to have been restored. The review power of the civil courts over *Syariah* courts has been re-asserted. In many cases the Constitution is being interpreted prismatically. In extremely innovative decisions, the courts have asserted that the word 'life', in Article 5 includes livelihood; the word 'liberty' includes the right to go to the courts; and the word 'law' in Articles 5 and 10 must be read to mean a 'reasonable law'.

Though constitutional law remains in its infancy, administrative law is in renaissance. Ouster clauses are being denuded of their exclusionary power. The rules of *locus standi* have been liberalised. A new doctrine of proportionality in administrative law has been introduced. Natural justice has been upgraded from being a rule of common law to

[123] [2016] 6 CLJ 215.

becoming a part of due process and equal treatment under the Constitution's Articles 5 and 8. All in all, there is enough in Malaysian constitutional jurisprudence to provide a renaissance in public law. Some developments kindle hope that judges are bringing the Constitution from the peripheries to the centre.

Despite some flaws in the laws, judges are as free to walk the path of justice as their conviction beckons them to. Many do. Ultimately the issue is one of character, courage and integrity.

Having said that it must be observed that there remains a *sanctum sanctorum* of executive power, privilege and immunity where the judiciary fears to tread, where judicial redemption is needed and is not forthcoming. Any dispute that has implications for the ruling leadership's hold on political or economic power tends to go in favour of the status quo and evaded or avoided as a non-justiciable issue. Constitutional review of parliamentary enactments is so rare that we have de facto parliamentary supremacy. Judicial commitment to the basic charter and to human rights is not a significant feature of Malaysian constitutional jurisprudence.

However, there are winds of change. Judicial leadership can harness these winds in the direction of strong constitutionalism. The role of individual, courageous, dissenting judges is also important. Dissenting judgments often provide a landmark for the future. As they say, in the forest sometimes there is no path. But then some people begin to walk in a particular direction. Their footsteps soon carve out a path for others to follow.