

AN ASSESSMENT OF
THE SEPARATION AND BALANCE OF POWER IN MALAYSIA
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I. To Be or Not To Be: That's Not the Question
The Question is To Be Two Or To Be Three¹

The logic of separation in its simplest requires the making of two divisions from one whole. Beyond that, one can be divided into three or even more. Modern democracies that embrace the rational rule of law uniformly adopt for themselves through a constitution, the separation of powers of their government. The basic question is whether should monolithic government be best divided into two, three or more branches?

On this question that great oracle, Baron de Montesquieu (1689-1755) should always be consulted. Montesquieu recognized the need for and recommended the separation of the one into three. He also cautioned all who would listen where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

In a similar vein, John Locke (1632-1704), who preceded Montesquieu, searched for a state of more balanced government. In his effort to avoid the evils of absolute power, and because human frailty is such that it will succumb to the temptation by a strong personality to grasp for absolute power, Locke advocated the limitation of the power of government by placing several parts of it into different hands. Locke squarely rejected the divine right of kings.

The sentiments as manifested by Locke and Montesquieu can be contrasted with that of Thomas Hobbes (1588-1679). Contrary to the supporters of limited government, Hobbes believed in the rule of a king because he felt a country needed an authority figure to provide clear direction and firm leadership. Because the people were only interested in promoting their own self-interests, Hobbes argued that democracy which gave the power citizens to choose their government leaders would end in failure. To Hobbes, the best government was an all powerful creature comparable to the Biblical sea monster, the Leviathan.² Hobbes stood for keeping government intact as one.

¹ This caption is inspired by the remark of Justice NH Chan in Ayer Molek Rubber case: "There is something rotten in Denmark." His Lordship appeared to be referring to the Denmark House in which the superior courts were temporarily lodged while the courthouse was being reburished. See, Au Min Wu, *the Malaysian Legal System*, (Longmans 1999) 62.

² Notwithstanding his distrust of democracy, Hobbes believed that a diverse group of representatives presenting the problems of the common person would, hopefully, prevent a king from being cruel and unfair. Rather surprisingly, Hobbes came up with the concept of "voice of the people," which meant that one person could be chosen to represent a group with similar views. However, this "voice" was merely solicited and not necessarily listened to - the last say lay with the king.

The historical background for the schemes of Locke, Montesquieu, and Hobbes was the conflict between the absolute monarch and the emerging parliamentary assemblies of Europe. The American colonies broke with the European monarchical tradition by first revolting against King George III of Britain and then implementing Montesquieu. The Constitution of the United States upon which the new nation was founded required three separate branches of government: the Executive (Article I), the Legislative (Article II) and the Judiciary (Article III). The three branches were given substantive power and each branch was expected to substantially check and balance the powers of the other two. Even so, drafters of this constitution were practical men who quite understood that there is not a single instance in which the several departments of power have been kept absolutely separate and distinct, but that every effort must be made towards the ideal of separation, and therefore the realization of constrained government.

On the other side of the Atlantic, the nations of Europe were less inclined to adhere to the three branched Montesquieu model. British Parliament became supreme and came to be viewed by the people as the embodiment of democracy. Although the English Republic ended with the death of Oliver Cromwell and the monarchy was restored, Kings and Queens had only a symbolic existence, particular after the reign of Queen Anne. The Westminster system, perhaps following in the ironclad footsteps of the Lord Protector, has the functions of the executive and legislative merging into one. The chief executive is to be drawn from the ranks of Parliament. The British Prime Minister who heads up the Executive must be a member of House of Commons and indeed, is always from the majority party in Parliament. The Judiciary is the other separate branch. Under this model, effectively there are only two separate divisions of the government with the Prime Minister and his or her Cabinet conducting the daily affairs of government. While there is formal separation between the legislative/executive and the judiciary, the power of the courts may be less than that under the American system. For example, Acts of the Parliament cannot be voided through judicial declaration: British judges must accept and work with the laws made by Parliament.

II The Federal Constitution of Malaysia

Since Merdeka on August 31, 1957, Malaysia has adopted a federal system of government. Malaysia comprises of 13 federated states and 2 federal territories (Kuala Lumpur in the state of Selangor and Labuan, an island of the state of Sabah). Prior to Independence Day, a Constitutional Commission completed its Report and this Report was reviewed by a Constitutional Working Party and was recommended for adoption.³

³ The Constitutional Commission was headed by Lord Reid, a Lord of Appeal in Ordinary and issued its Report on February 11, 1957. This was reviewed by a Working Party consisting of members appointed by the British Government, the Malayan Conference of Rulers, and the Malayan Government and on the basis of its recommendations, the *Federal Constitution* was born. See, Au Min Wu, *The Malaysian Legal System* 39-41. See, Shafruddin Hashim, *The Constitution and The Federal Idea in Peninsula Malaysia*, [1984] 11JMCL pp 139-178. See, also, H. P. Lee *Constitutional Conflicts in Contemporary Malaysia*, 7-8.

The *Federal Constitution* provides for the separation of powers and actually speaks of three branches: the Executive (Part IV Chapter 3, Articles 39-43), the Federal Legislative (Part IV, Chapter 4, Articles 44-65), and the Judiciary (Part IX Articles 121-131). In theory, it would appear that the *Federal Constitution* contemplates the division of powers into three but in practice, the separation of powers in Malaysia is into two. There is no effective separation of executive-legislative power. The Malaysian system is more akin to Westminster than that of Washington. Of even greater commonality is the existence of a hereditary King or Supreme Ruler who is accorded ultimate ceremonial authority as Malaysia's head of state, but who in actuality has wielded little executive power.

II(a) The Yang Di-Pertuan Agong

Article 32 of the *Federal Constitution* provides that “[t]he Supreme head of the Federation to be called the Yang di-Pertuan Agong, who shall take precedence over all persons in the Federation and shall not be liable to any proceeding whatsoever in any court except the special court established under Part XV.”

Article 39 actually provides that “[t]he executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive function on other persons.” The operative part of this sentence is in the latter half: The Yang di-Pertuan Agong, like the modern British monarch, understands that while he is to be “consulted,” the actual day-to-day executive authority lies with the Prime Minister and his Cabinet. In the words of the *Federal Constitution*, he “shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except, as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.”⁴

This titular monarch is further hamstrung by the next provision (which seems almost an after thought): “In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, [he] shall accept and act in accordance with such advice,”⁵ This paragraph seems to deprive him of his own free will, thus making him a true constitutional monarch.

Having taken of the monarchy, the *Federal Constitution*, also returns some power in the form of discretion in the next provision: “The Yang di-Pertuan Agong may act, in his discretion in the performance of the following functions, that is to say: (a) the

⁴ Article 40(1) of the *Federal Constitution*.

⁵ Article 40(1A).

appointment of a Prime Minister; (b) the withholding of consent to a request for the dissolution of Parliament.⁶ This empowerment of the monarch as serve as a putative balancing counter against an overly ambitious Prime Minister, especially one who has outgrown the confines of Parliament from which the Prime Minister would have owed his origin.

Yet, while seemingly a figurehead, the Agong (and in corresponding reality, the Executive Cabinet) is also given a number of more nebulous powers over Parliament itself. These are the “Special Emergency Powers,”⁷ which includes the power to act as a legislature in lieu of Parliament. Since the concept of executive power occupies a inordinate influence in Malaysian life, the emergency power will be discussed more fully under its own subheading, *infra*.

II(b) The Prime Minister and His Cabinet

In Malaysia, as in Great Britain, the real chief executive is the Prime Minister. Surrounding the Prime Minister to share in the workload are the Deputy Prime Minister and the lesser ministers of the ruling Cabinet. In a sense, the Malaysian Prime Minister is comparable to the President of the United States. One difference is that the political party of the President need not command a majority in the Congress, in which case there would exist a condition known as “grid-lock,” meaning that Congress may oppose and actually derail the programs of the president.

In Malaysia, the Prime Minister must be drawn from the majority party in Parliament which makes this chief executive uniformly more powerful as he and the legislature by definition are of one will. The only political entities (outside the Cabinet and those Members of Parliament of his own party) that, in constitutional theory, can check the powers of the Prime Minister is the Yang di-Pertuan Agong and the judiciary. In practice, throughout the history of Malaysia, the Prime Minister’s party, now known as the Barisan Nasional (National Front) and formerly known simply as the Alliance has always enjoyed an overwhelming majority in Parliament, thus freeing the Prime Minister from serious political detractors and allowing the chief executive to carry out at will his federal programs.

⁶ Article 40(2)

⁷ Part XI, Articles 149-151 bearing the full title of “SPECIAL POWERS AGAINST SUBVERSION, ORGANISED VIOLENCE, AND ACTS AND CRIMES PREJUDICIAL TO THE PUBLIC AND EMERGENCY POWERS.”

II(c) The Parliament

Under the *Federal Constitution*, the Parliament is accorded ultimate powers as this legislative body because its members are elected by the people and thus in theory embodies the will of the citizens. Article 44 defines the Parliament as being comprised of “the Yang di-Pertuan Agong [once again in what is understood to be a symbolic role] and two Majlis (Houses of Parliament) to be known as the Dewan Negara (Senate) and the Dewan Rakyat (House of Representatives).

The number of Senators is set at two from each state (26), two from the federal territory of Kuala Lumpur, one from Labuan (appointed by the Agong) and 40 additional members solely appointed by the Agong. Since the Agong must follow the advice of the Cabinet, Senate effectively is device of the Executive.

The Dewan Rakyat has 193 members elected from single member constituencies based on geography using the “first past the post” method of ballot counting.⁸ The Prime Ministers of Malaysia always justified their power by reason of the majority presence in the Dewan Rakyat of members of his own party. A strong Prime Minister is ever under the temptation to justify his policies solely on the reason that his party commands a majority presence in Parliament and to disregard the other vital branch of Malaysian Government, the Judiciary.

II(d) The Judiciary

Even by its numerical position in the *Federal Constitution*, (the enabling articles are 121 – 131 in Part IX) the judiciary seems a distant member of the government. Article 122B(1) provides that judges of the Federal Court (the highest court of Malaysia, formerly the Supreme Court which replaced an earlier Federal Court), the Court of Appeals and the High Court are “appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.” The Prime Minister, must in turn, before tendering advice to the appointment of judge other than the Chief Justice of the Federal Court consult the Chief Justice.⁹ Once appointed a Judge of the Federal Court is empowered to sit until the age of 65¹⁰ or until removed for a breach of the code of ethics.¹¹

Article 128 delineates the jurisdiction of the Federal Court as follows:

- (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction-

⁸ See, Aun Min Wu, *The Malaysian Legal System* 67-75.

⁹ Article 122B(2). See also Articles 122B(3) and (4) on the appointment of lesser judges.

¹⁰ Article 125(2).

¹¹ Article 125(3).

- (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and
 - (b) disputes on any other question between States or between the Federation and any State.
- (2) Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as of the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.
- (3) The jurisdiction of the Federal Court to determine appeals from the Court of Appeals, a High Court or a judge thereof shall be such as may be provided by federal law.

By reason of these provisions, it would appear that the Federal Court is the supreme court of Malaysia and has exclusive powers to declare an act of Parliament void by reason of it being *ultra vires*. Perhaps, it is exactly this provision that has brought the Judiciary into a head-to-head collision with the Executive.

III. Special Emergency Powers **The Executive v. the Rest of Parliament**

The existence of the perceived need to incorporate and to continue to retain emergency powers in the *Federal Constitution* can be traced to two post-World War II events. These are: (1) the Communist Emergency from 1948-1960, and (2) the May 13th riots of 1969.¹² In the former, the armed insurrections of the Malayan Communist Party against the returning British administration after 1945 actually for a period raised a real threat to

¹² Professor R. H. Hickling cites four post-Merdeka emergencies: (1) 3 September 1964: confrontation; 15 May 1969” “May 13th”; 14 September 1966: Sarawak; 8 November 1977: Kelantan. R. H. Hickling *The Yang Di-Pertuan Agong as the Head of the Executive*, The Supreme Court Journal 1991. *Emergency (Federal Constitution and Constitution of Sarawak Act 1966* dealt with the civil unrest that followed dismissal of Stephen Kalong Ningkan as Chief Minister of Sarawak by the Governor. The Chief Minister brought a lawsuit that reached the Privy Council. In *Stephen Kalong Ningkan v. Government of Malaysia* [1968] 2 MLJ 238; PC [1970] AC 379, the emergency legislation was upheld as *intra vires*. In October 1977 the Menteri Besar of Kelantan refused to resign after losing the confidence of a majority of members of the State Legislative Assembly. Instead he asked the Sultan’s Regent to dissolve the Assembly and hold fresh elections. Disorder ensued and the Federal Government declared an emergency through the Emergency Powers (Kelantan) Act 1977, which Professor Hickling calls “a curious Act in that in section 14 it contained its own mechanism for repeal – which was in fact effected by an order of 11 February, 1978. *Id.* at 57. . See, Shafruddin Hashim, *The Constitution and The Federal Idea in Peninsula Malaysia*, at 171-172.

the survival of democratic ideas in Malaya. However by 1954, the prospects of a successful communist revolution was quite dead. After Merdeka, a major quest for the new multiracial nation with diverse religions is the harmony of the races. This goal remained fundamental after the peaceful separation of Singapore from the Federation on August 9th 1965.¹³ Unfortunately, this cherished harmony was shattered on May 13th 1969 when after general elections, Kuala Lumpur and to a lesser extent other places in West Malaysia, were the scene of racial riots resulting in death and destruction of property. The magnitude of this civil disturbance pales in comparison with the guerilla warfare of the Emergency. Nevertheless, emergency powers were once again invoked by the government and it appears that since this 1969 proclamation remains in force to this day!¹⁴

The power to proclaim an emergency is vested in the Yang di-Pertuan Agong (and correspondingly in the Prime Minister) by Article 150 of the *Federal Constitution*. Article 150(2B) provides:

If at any time while a Proclamation of Emergency is in operation, except when both Houses of Parliament are sitting concurrently, the Yang di-Pertuan Agong is satisfied that certain circumstances exist which render it necessary for him to take immediate action, he may promulgate such ordinances as circumstances appear to him to require.¹⁵

This concession by Parliament of law-making power to the titular Executive (and hence in reality to the Prime Minister) is a violation of the fundamental principle of the separation of powers envisaged by Locke, Montesquieu and other proponents of natural rights democracy. It smacks of the Cromwellian injunction to the rump Parliament of England:

You have sat too long here for any good you have been doing. Depart, I say, and let us have done with you. In the name of God, go!”¹⁶

Only in the event of the direst national emergency when the two Houses of Parliament are unable to meet, should such plenary authority be transferred by reason of sheer necessity to the Executive. Stated differently, the members of both Houses of Parliament have a obligation to keep meeting and functioning in their appointed duty of making laws, unless they are simply unable to meet by reason of a national emergency most dire.

¹³ The separation of Singapore into a separate sovereign nation was effected by *the Malaysia (Singapore Amendment) Act 1965*. See, H. P. Lee, *Constitutional Conflicts in Contemporary Malaysia*, 10-11.

¹⁴ Prof. Wu notes in 1999: “At the time of writing, the author is unable to find either a formal revocation by the King of the emergency proclaimed in 1969 or an annulling resolution by Parliament and must assume that it is still in force, twenty nine years later” Au Min Wu, *The Malaysian Legal System* 255.

¹⁵ This clause was added by the *Constitution (Amendment) Act 1981* to undo the judicial ruling by the Privy Council in the case of *Teh Cheng Poh v. PP* [1979] 1 MLJ 50 and to confer upon the Yang di-Pertuan Agong a continuing authority to make law, “an authority which is *temporarily* eclipsed when both Houses of Parliament are actually in session. See, Au Min Wu, *The Malaysian Legal System* 255.

¹⁶ As quoted by Leo Amery to Neville Chamberlain in the House of Commons, 7 May 1940 *addressing the Rump Parliament, 20 Apr 1653*.

The power to legislate is a privilege that should not be surrendered to the absolute executive unless Parliament is plainly unable to do so. Simultaneously, the Cabinet, unlike the Lord Protector, should use its executive powers to protect the integrity of Parliament, from where the Cabinet originated, and promptly restore Parliament at the first opportunity. The Executive should not use the common Malaysian fear of community strife as a pretext to extend Executive powers at the expense of the Parliament.

The abdication of its proper political duties is exacerbated by the legal fact that Parliament is empowered by *Federal Constitution* to pass resolutions within both its Houses to annul a proclamation of emergency and to annul its own emergency ordinances.¹⁷ It appears that Parliament has never taken upon itself to annul the 1969 proclamation of emergency, a fact that the Cabinet through a strong Prime Minister can take comfort in and upon which to base its politically motivated actions. A critical question for Parliament to address is whether there presently exists in Malaysia an emergency that satisfies Article 150(1) which provides the linchpin for the proclamation of emergency. Article 150(1) requires that the existence of “a grave emergency ... whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened.”¹⁸

Furthermore, unlike the matter of Stephen Kalong Ningkan (footnote 12, *infra*), the constitutionality of 1969 emergency proclamation has never been tested in court.

IV Judicial Independence in Malaysia? **The Prime Minister v. the Judges**

Herein we see the heart of the Hobbesian Leviathan. The Malaysian Prime Minister has traditionally accepted that post with the understanding that he will be the leader of the nation. Since independence, the following Prime Ministers have served:

¹⁷ Article 150(3) reads: A Proclamation of Emergency and any ordinance promulgated under Clause (2B) shall be laid before both Houses of Parliament and if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2B). See also observations of Professor Wu at note 11, *supra*.

¹⁸ Article 150(1) which lays down the threshold for the Executive proclamation of emergency must be scrupulously distinguished from Article 149 which speaks to Parliamentary legislative action directed towards emergencies. Other than occasional, sporadic outbursts of sensationalized news-making events, it appears that Malaysia is not under “a grave emergency” whereby national order is seriously threatened; such outbursts can be dealt with under the ordinary criminal statutes. Of course, like the parable of the boy who cried wolf, given the recent governmental action against Anwar Ibrahim, the fuzzy acquiescence for the existence of emergency may congeal into a self-fulfilling prophecy.

- Tunku Abdul Rahman Putra al Haj ibni al-Marhum Sultan Abdul Hamid Halim Shah 1903-1990, First Malaysian Prime Minister (1957 – 1970). He read the Proclamation of Independence on Merdeka day.
- Tun Abdul Razak Dato Hussein 1922-1976, Second Malaysian Prime Minister (1970-1976).
- Tun Hussein Onn bin Jaafar (1922-1990), Third Malaysian Prime Minister (1976-1981)
- Datuk Seri Dr Mahathir Mohamad (1925-) Presently serving as Malaysian Prime Minister (1981-). This Prime Minister has racked up the distinction of being the longest serving elected Chief Executive amongst the democracies of Asia.

Tensions between the Executive and the Judiciary materially began surfacing during the tenure of the present Prime Minister, Dr. Mahathir Mohamad. A preview of things was available to the astute observer in the 1983 constitutional crisis which involved the powers of the hereditary Rulers and the Yang di-Pertuan Agong (the nominal head of state elected from the Rulers).

IV(a) The Constitutional Crisis of 1983 – A Prelude Of Things To Come

In 1983, the Mahathir Government, passed through Parliament the Constitutional (Amendment) Bill 1983. Under Article of the *Federal Constitution*, the bill must have the assent of the Yang di-Pertuan Agong. Sultan Ahmad Shah, who was Agong at the time, refused to give his assent. The reason for his refusal is obvious. Clause 12(b) of Bill 1983 provided for a “deeming” of assent to have been given after a lapse of 15 days from presentation to the Agong. Clause 21 purports to do the same for state legislation presented for assent by the state Ruler. Clause 20 would amend Article 150 by substituting the Prime Minister in place of the Agong as the executive who can proclaim emergency. Why did the Government propose these amendments? Professor H. P. Lee explains: “General opinion was that ... Bill 1983 was prompted by the impending change of the ... Agong in April 1984.”¹⁹

Given these encroachments against his own authority, the Agong naturally refused to give his assent. The crisis concerned whether the Agong was constitutionally bound to give assent. A stand-off ensued between the Prime Minister and the hereditary Rulers. Finally, a compromise was struck in order to persuade the Agong to assent. This compromise, taking the form of the Constitutional (Amendment) Bill 1984 retracted Clause 20 and 21 and Clause 12(b) was modified to deem assent after 30 days for bills other than money bills, and for money bills, the Agong may return it to Parliament

¹⁹ Professor Lee cites Tan Chee Khoon’s column “Without Fear or Favor” in the *Star*: “In April, the reign of the present King will come to an end. A new one will be elected, with the mostly likely candidates for the throne being the Sultan of Perak or the Sultan of Johor. Both of them are strong-willed and are quite likely to defy the Government. This prospect is not quite relished by the Government and it set about to curb the powers of not only the King but also his brother rulers as well.” *Star*, 4 January, 1984, p.20.

without assent but with a statement of reasons of his objections. Most constitutional observers are in agreement that the Rulers and the Agong did a “singular service – perhaps unwitting by forcing a government retreat” of the amendment that proposed to give the Prime Ministers the power to proclaim emergency.²⁰

IV(b) Taking On the Court **To Be Two Or One?**

In all constitutional systems, the judiciary is considered the weakest branch of government. A reason is that the courts had only available to it the force of rationality and the ability to issue a just ruling. The judiciary is dependent on the executive for the enforcement of its judgment. A crisis would arise if a judgment is perceived to be adverse to the interest of the executive and the executive refused to abide by or to enforce the judgment.²¹ Worse yet, an infuriated executive may lose sight of the doctrine of the separation of powers and seek to take retribution for a recalcitrant judiciary.

This is what is happening in Malaysia today.²² A series of judicial decisions can be seen as stirring up the wrath of the Prime Minister. In Berthelsen v. Director General of Immigration, Malaysia and Ors, [1987] 1 MLJ 134, the Supreme Court (now replaced by the Federal Court) overruled the decision of Malaysian Immigration and quashed the cancellation of the visa of an American reporter of the *Asian Wall Street Journal*. The Prime Minister was unhappy at this slap in the face of the Executive and made his feeling known in Parliament and also to the bureau chief of *Time* magazine.²³

To fan the flames of anger, the Leader of the Opposition in Parliament, Lim Kit Siang (of the Democratic Action Party or DAP) filed a lawsuit for contempt of court against the Prime Minister for his *Time* remarks concerning the judiciary. Nothing came of this tactic as the High Court dismissed the action and the Supreme Court affirmed the dismissal.

To not be foiled from his role as opposition leader, Lim Kit Siang had instituted another lawsuit in that capacity and in the capacity as taxpayer. This case involved the decision to award a contract to United Engineers (Malaysia) Berhad (UEM), a holding company controlled by UMNO, the Government of Malaysia and two ministers. Lim sought a declaration that the contract was void and an injunction to prevent UEM from signing the

²⁰ See, e.g. H.P. Lee *Constitutional Conflicts in Contemporary Malaysia*, pp 22-36, 38.

²¹ The Wizard of Oz then is exposed. Section.

²² See H.P. Lee *Constitutional Conflicts in Contemporary Malaysia*, pp 43-85. At p.42, Professor Lee cites to C. Muzzaffar. “A Challenge to the Basic Character of the Malaysian Constitution” quoting “An independent Judiciary that is not subservient to the Legislature or the Executive, either in theory or in practice, is often regarded as the bastion of Parliamentary Democracy. That bastion is under siege today.”

²³ Dr. Mahathir is quoted as saying, *inter alia*, “If we find out that a court always throw us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish.” *Time*, 24 November, 1986 p.18.

contract with the government. On August 25, 1987 the Supreme Court granted an interlocutory injunction against UEM. The threshold issue was whether Lim had standing or *locus standi* to bring the action. Although the procedural aspects of this case is convoluted, this case sent a strong signal to the Prime Ministers that members of the judiciary were prepared to exercise judicial review of executive actions.

In another case, PP v. Dato' Yap Peng, involved the constitutionality of a criminal statute authorizing the removal of a case from a subordinate court to the High Court.²⁴ The public prosecutor had removed the case from the Sessions Court to the High Court. The High Court agreed that the removal provision violated Article 121(1) of the *Federal Constitution* and the Supreme Court affirmed. The Government responded to this decision have pushed through Parliament the Constitution (Amendment) Act 1988 which removed the constitutional jurisdiction previously available to the High Courts and the inferior courts and substituted language which subjected the jurisdiction of these courts for federal legislation.

The straw that broke the judicial camel's back was Mohamed Noor bin Othman v. Mohamed Yusof Jaafar [1988] 2 MLJ 129, also known as the "UMNO 11" case. This case touched the very right of Dr. Mahathir to be Prime Minister. The political custom of Malaysia and within UMNO was that whoever is elected President of UMNO will also be Prime Minister. The ranks of UMNO were bitterly divided by two factions vying for control of the party and under this division, Dr. Mahathir won the presidency by a very narrow majority. Eleven dissatisfied UMNO members challenged the validity of the election. The court issued a nebulous decision holding that it cannot grant the relief sought because these UMNO members belonged to an unregistered branch of UMNO. The case also gave rise to the conclusion that since there were unregistered branches within UMNO, the party itself had become an unlawful society. The case was appealed to the Supreme Court. In an unprecedented move the appeal was calendered to be heard by the full court of 9 judges on 13 June 1988.

Using the reason of an inappropriate letter written by the Lord President of the Supreme Court, Tun Salleh Abbas to the Yang di-Pertuan Agong, the Prime Minister commenced an investigation of the chief jurist who was abroad for medical treatment. On 25 May 1988, the Prime Minister represented to the Agong that the Lord President should be removed from office.²⁵ A Tribunal was appointed by the Agong²⁶ and the King also agreed to the suspension of Tun Salleh pending a final report by the Tribunal.²⁷ When Tun Salleh returned from medical treatment, he was summoned to the Prime Minister's office where he was informed that the Agong had taken exception to his letter and was asked to resign. Tun Salleh refused and left the meeting. After feverish judicial applications for relief from the action of the Tribunal by Tun Salleh, the Supreme Court acting through 5 judges finally granted a limited stay and restrained the Tribunal from proceeding. The new Chief Justice, Tan Sri Abdul Hamid Omar complained to the

²⁴ 418A of the Criminal Procedure Code.

²⁵ This was pursuant to Article 125(3).

²⁶ This was pursuant to Article 125(3) and 125(4).

²⁷ This was pursuant to Article 125(5).

Agong about the conduct of these 5 judges. The Agong responded by suspending the five judges and also appointed a Tribunal to investigate.

A re-constituted bench set aside the interim order and the Tribunal concluded by recommending the removal of Tun Salleh. The Agong set the effective date of removal for 8 August 1988. On that same day, the appeal of the UMNO 11 was heard and the Court dismissed the case the next day. The second Tribunal investigating the other 5 judges recommended the dismissal of 2, namely Tan Sri Wan Suleiman and Datuk George Seah, and the Agong agreed.²⁸

II. Conclusion: The Aftermath

III.

Regarding the merits of the charges against the judges removed, F. Trindade, after a detailed analysis made the following observations²⁹:

- Even if it was possible to say that the conduct of Tun Salleh and the other two judges involved errors of protocol, acts of discourtesy or errors of judgment it was certainly not the kind of conduct which justified the initiation of the procedures for removal under Article 125(3) of the Constitution.

²⁸ There is a analogous episode in American constitutional history and this involves the court packing plan of President Franklin D. Roosevelt. After the persistent voiding of Roosevelt's New Deal legislation passed in the depths of the Great Depression by the U. S. Supreme, (see, e.g. Schechter Poultry Corp. v. U. S., 343 U.S. 579 (1932) and Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) – the “sick chicken” and “hot oil” cases respectively) the President came out with a court packing plan. After being re-elected, Roosevelt proposed the “judicial reform,” which forever came to be known as his attempt to “pack” the Supreme Court. Roosevelt and his Attorney General, Homer Cummings, could have attacked the issue of judicial review head on, as Congress's proposed amendments had sought to do, but they chose not to, perhaps anticipating the public's attachment to the idea of the judiciary as the guardian of the Constitution. Instead, unlike the Mahathir Government's removal of the judges, Roosevelt chose to increase the number of Justices on the Court. This had been done six times since 1789. The plan had a different twist, however, for it proposed adding a justice for every justice over the age of 70 who refused to retire, up to a maximum of 15 total. The Republicans were expected cry foul, but when the chairman of the House Judiciary Committee, Democrat Hatton Sumners of Texas, announced his opposition, the plan was dead. Further resistance developed in Congress as the Court began a reversal of its previous conservative course by ruling in favor of the National Labor Relations Act and the Social Security Act. Congressmen urged the White House to withdraw the bill, but confident of victory, FDR refused. The cost was the alienation of conservative Democrats and the loss of the fight in Congress. Even those who trusted Roosevelt, and who believed in the New Deal, were wary. Letters poured in from all quarters and the following excerpt is from a telegram to the President:

Please watch your step while attempting to curb the powers of the honorable Supreme Court of the United States. Such action may be in order while so able a person as your excellency may remain in the president's chair but please let us look to the future when it might be in order for the citizenship of our great country to look to the Supreme Court for guidance which we might justly require.

President Roosevelt did not remove any Justices from the U.S. Supreme Court.

²⁹ Trindade F., *The Removal of the Malaysian Judges*, [1990] LQR Vol 106 pp 51-86 at 85.

- This conclusion also implies that the findings of the two Tribunals that were appointed to enquire into that conduct, were not justified by the facts and that the behaviour of Tun Salleh and the two Supreme Court judges should never have been regarded as judicial misbehaviour or misconduct which rendered them unfit to hold office.

In 1987, Tun Mohamed Suffian, a former Lord President who recently passed away on September 26, 2000 at the age of 82, and perhaps Malaysia's greatest jurist, said: "So far the independence of the judiciary has never been in jeopardy, thanks mainly to the fact that our first three Prime Ministers were lawyers who understood the importance of having a judiciary that enjoyed public confidence." He then asked, "But what of the future?"³⁰

The aftermath of the 1988 Tribunals was a Judiciary that was more receptive to the wishes of the Prime Minister. The judiciary suffered a severe loss of prestige and corresponding loss of independence. According to Professor Lee, "[t]he rule of law is eroded when the independence of the judiciary is subverted, leading to dictatorial rule which has characterized many of the Third World countries."³¹ Professor Lee wisely adds: "The framers of the Constitution did not make a mistake in opting for the removal mechanism in Article 125; their mistake lay in the assumption that the executive arm would subscribe to the rule of law."³² This sentiment is echoed by Tun Salleh himself as he said "the frailty and weaknesses of human nature" is most difficult to safeguard against.³³

To regain their former stature and fair allocation of governmental powers, and more importantly to restore the proper separation of powers, the judiciary must regain the confidence of the general population. Ultimately, the judiciary is another branch of government, one whose existence and prestige is to balance the power of the other branches. To reciprocate, the general population should support the function of the judiciary. One high tribunal defined the core matter as the following: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply

³⁰ Tun Mohamed Suffian, *The Role of the Judiciary*, [1987] MLJ 2: xxii-xxiv. This great jurist also said "Those who stand by and do nothing to protect the independence of the judiciary, will in the end get the judiciary they deserve - one powerless to stand between them and tyranny." Cited in the *Daily Telegraph*, 28 September, 2000.

³¹ H. P. Lee, *Constitutional Conflict in Contemporary Malaysia*, pp 76-77.

³² *Id.* at 76.

³³ Tun Salleh, *The Role of the Judiciary*, p.46.

the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.”³⁴

In a democracy, the last say and power itself originates from the people. Fundamental justice is a prized commodity in a democracy and it is meant to benefit the people themselves. It is a benefit can be best delivered by the judiciary to the citizens. It can even be a monopoly in that it is a commodity that only the courts can provide. On the other side of the coin of democracy, the people themselves determine the quality of government they live under. It is a “social contract.” With the chilling of judicial independence and the erosion of the separation of powers, Malaysia is sailing towards a Hobbesian state. As Hobbes grew up an Elizabethan, it may be quite apt to close this essay with a famous words from another which to this day, has telling relevance:

*The fault, dear Brutus, is not in our stars,
But in ourselves, that we are underlings.*³⁵

Charleston C. K. Wang

³⁴ Marbury v. Madison, 1 Cranch 137 (1803). Since Chief Justice John Marshall established judiciary supremacy in the United States, that tradition has been preserved and is viable today. If anything, with the constitutional crises during the Nixon presidency, the public prestige of the courts have been enhanced. See, e. g. U. S. v. Nixon 418 U.S. 683 (1974) (the president must obey an subpoena tuces tecum issued by a federal district court but the court at the same time has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. But see, Nixon v. Fitzgerald, 457 U.S. 731 (1982). Cf. Harlow v. Fitzgerald, 457 U.S. 800 (1982).

³⁵ William Shakespeare. *Julius Caesar*, Act I Scene II Lines 140-141.