When the Malaysian Judiciary Blinks

Article 4(1) of the *Federal Constitution* provides that "This Constitution is the supreme law of the Federation and any law passed after Merdeka Day [Independence Day] which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

Having appropriately established itself as the supreme law of Malaysia, the *Federal Constitution* proceeds to guarantee fundamental liberties for Malaysians. Article 5 addresses the subject of the process of law respecting personal liberty and freedom from unlawful arrest or prosecution by the government. Article 5 has 5 sub-articles, these specifically providing for the following:

> (1) No person shall be deprived of his life or personal liberty save in accordance with law.
>
> (2) Where complaint is made to a High court or any judge thereof that a person is being unlawfully detained 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.
>
> (3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.
>
> (4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority: Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day.
>
> (5) Clauses (3) and (4) do not apply to an enemy alien.

Article 5 was made part of the *Federal Constitution* to serve the fundamental purpose of protecting the citizen from the arbitrary authority of the government. It is a very important foundation upon which rests the civil rights of Malaysians.

The Power of Judicial Review

As in any legal system, the effectiveness of any legal provision, including the supreme statutory law of the land, is dependent on the autonomy of the judiciary, upon whose shoulders are placed the power and responsibility to ensure day-to-day compliance with the lofty ideals of due process of law and of a nation's Constitution. Thus, the *Federal Constitution* (Part IX Articles 121 – 131) created an independent judiciary and endowed the judiciary certain enumerated powers.

With respect to actual judicial power, Article 128 provides:

(1) The Supreme [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 -

> (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 a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws;

This is the constitutional embodiment of the doctrine of *ultra vires*. There are many cases where courts have voided legislation by reason that it was *ultra vires,* but these mostly pertain to matters other than internal security and the emergency powers of the Executive.[1] Where subsidiary legislation such as the Internal Security Act 1960 is concerned, the reverse judicial position is observed. In the case of Eng Keok Cheng v. PP [1966] 1 MLJ 18, the Federal Court held that provisions of the Internal Security Act and the Emergency (CriminalTrials) Regulations 1963 were valid notwithstanding any inconsistency with the Constitution.

Further, beginning around 1980, government action by the Executive, amendments to the constitution by Parliament, other legislation, and practical developments have eroded judicial independence and strengthened executive influence over the judiciary. A number of high-profile cases for which the courts themselves must take responsibility added to a perception of the deterioration of judicial impartiality and independence. Continuing judicial infirmities raise more questions of arbitrary verdicts, selective prosecution, and preferential treatment of some litigants and favored lawyers.

The Jury As Lay Judge: A Missing Link in the Malaysian Legal System

A comparative difference in the Malaysian constitutional scheme from that of other common law countries, is that no provision has been made for criminal trials by jury. The jury is a lay *ad hoc* judiciary empanelled for a particular trial and after having discharged its judicial duties, is never to be duplicated again. The Anglo-American

[1] See, e.g., Low Leng Huat v.PP, (1917) FMSLR 162, CA; Ghazali v. PP, [1964[MLJ 156; Port Swettenham Authority v. T W Wu (M) Sdn Bhd, [1987] 2 MLJ 137.

adherence[2] to the jury has the systemic effect of bolstering the "cadre of professional, experienced judges with this transient, ever-changing, ever inexperienced group of amateurs."[3] If nothing else, the jury brings with it the common sense and common grasp of social justice into what can be a jaded courtroom. A timid judge sitting alone and in awe of the Attorney General can be fortified by twelve average men and women. Similarly, an overbearing attorney general can be tempered by twelve stalwart citizens, especially if the press is in attendance as well.[4]

Other high tribunals, such as the United States Supreme Court, have endorsed the jury in this manner:

> "The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. **A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government**. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]he jury trial provisions . . . reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence." [Emphasis added] Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968).

Presently, Malaysian citizens are not empowered by the *Federal Constitution* to participate in criminal trials as jurors. Perhaps, in due course, the Malaysian Parliament will consider and approve of having its citizen serve jury duty in criminal trials that

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[2] For example, in criminal prosecutions, a trial by jury is guaranteed under Article VI of the Amendments to the *United States Constitution*. Article 6 provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence." It must be noted that there is no right to a jury for petty offenses resulting in imprisonment for less than six months. Baldwin v. New York, 399 U.S. 66, 69 (1970). Accord, Cheff v. Schnackenberg, 384 U.S. 373, 384 , 386 (1966).

[3] Kalven & Zerisel, *The American Jury* 3-4 Little Brown & Company.

[4] The freedom and independence of the press is also important in any constitutional scheme. See, e.g. the First Amendment to the U.S. Constitution, that *sanctum sanctorum* of liberty. In Malaysia, the tug-of-war concerning the freedom of speech can be seen by examing Article 10(1) against Articles 10(2), 10(3) and 10(4) of the *Federal Constitution.*

proceed through the courts. While the jury system, like all human institutions, is subject to human foibles and failures, it may also have many benefits, especially when a society matures.[5] Hopefully, the time will come when the citizen of Malaysia will be entrusted with this vital responsibility of citizenship.

Statutory Amendments That Weaken the Judiciary

The 1997 Amendment to the Criminal Procedure Code can be viewed as a blow to the criminal defendant's presumption of innocence. Before the 1997 Amendment, the prosecution must prove its case beyond a reasonable doubt. If the government is unable to do so, the defense is not required to present its case and judge shall grant the defendant a summary dismissal. After the amendment, the prosecution only needs to prove *a prima facie* case and the defense must go forward with its evidence. In August 1999, a man was convicted of murder after electing to enter no defense. The judge ruled that the prosecution had proven a prima facie case and, when the man chose to offer no defense, the judge convicted him and sentenced him to death.

In 1998 Parliament passed amendments to the Courts of Judicature Act 1964 that limited the rights of defendants to appeal in some circumstances. The Government's reason was that these amendments would expedite the hearing of cases in the upper courts. The president of the Bar Association believed that the amendments were too restrictive on the right to appeal.

Executive Practices That Weaken the Judiciary

The application of the police power during trial is another example of the overbearing Executive. For example, police can during the course of a trial bring in and interrogate witnesses who have testified against the prosecution. This can be viewed as an intimidation of witnesses and an attempt to influence an on-going court process. One instance of this practice led the Bar Council in July 1999 to issue a statement of concern. Police also have used raids and document seizures to chill the defense.
Selective prosecution,[6] that is prosecution based on political exigency or even political convenience rather than sound legal cause, is another significant detraction against constitutional ideals. According to the law, the decision to prosecute a case rests solely with the Attorney General. In August 1999, the Chief Justice publicly reminded subordinate magistrates and judges not to question the Attorney General's sole discretion to prosecute. Opposition leaders have accused the current Attorney General of having on

[5] In some legal systems, the jury has found employment in civil proceedings as well, and Malaysia may at some future time investigate the feasibility of the civil jury and the pros and cons of such an instrument.

[6]The charge of selective prosecution surfaces in just about any legal system. A recent and prominent cause of concern is the case of U.S. v. Wen Ho Lee. (U. S.Dist. Ct for New Mexico Crim.No. 99-1417JP). To the credit of the federal judiciary, U.S District Judge James Parker made a number of rulings including the granting of discovery of evidence pertaining to selective prosecution that had the effect of causing the U.S.Attorney General to accept a plea bargain most observers saw as being favorable to the defendant.

occasion succumbed to the intervention of Prime Minister Mahathir Mohammad. In April the Perdana Menteri denied that he interferes in the decisions of the Attorney General. In September, he reiterated that the Executive does not practice selective prosecution. In May the Attorney General warned that those persons who were accusing the government of selective prosecution could be charged with sedition or criminal defamation. The Bar Council retorted that the Attorney General showed "a lack of respect or understanding of the concept of democracy and the rule of law." This heated exchange, albeit a stand-off, continues under a highly charged atmosphere.

The Judiciary's Use of Contempt of Court Charges in Political Cases: A Self Inflicted Weakening

Article 126 of the *Federal Constitution* provides that "[t]he Supreme [Federal] Court or a High Court shall have power to punish any contempt of itself." Contempt of court charges when imposed by a judge devastate the ability of defendants and their attorneys to conduct a vigorous defense. For example, defense attorney Zainur Zakaria, after raising in court a legal issue on behalf of his client Anwar Ibrahim, was charged with contempt in 1998. The Bar Council rallied in favor of Zainur and other persons accused of contempt of court. In March 1999, the Bar Council readied a draft "Contempt of Courts Act" aimed at defining what would constitute contempt and what would not. In April, the Chief Justice responded by declaring a lack of need for such legislation on the ground that judges do not abuse their power when it comes to the use of the bench contempt power.

The Internal Security Act (ISA)

The Internal Security Act 1960 (as amended) is enacted pursuant to Article 149 of the *Federal Constitution.* Article 149 provides:

(1) If an act of parliament recites that action has been taken or threatened by any substantial body of persons, whether inside or outside the Federation -

(a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; or
(b) to excite disaffection against the Yang di-Pertuan Agong [Paramount Ruler] or any Government in the Federation; or
(c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; or
(d) to procure the alteration, otherwise than by lawful means, of anything by law established; or
(e) which is prejudicial to the maintenance or the functioning of any supply or service to the public or any class of the public in the Federation or any part thereof; or
(f) which is prejudicial to public order in, or the security of, the Federation or any part thereof, any provision of that law designed to stop or prevent that action is valid notwithstanding that it is inconsistent with any of the provisions of Article 5, 9, 10 or 13,

or would apart from this Article be outside the legislative power of Parliament; and Article 79 shall not apply to a Bill for such an Act or any amendment to such a Bill. (2) A law containing such a recital as is mentioned in Clause (1) shall, if not sooner repealed, cease to have effect if resolutions are passed by both Houses of Parliament annulling such law, but without prejudice to anything previously done by virtue thereof or to the power of Parliament to make a new law under this Article.

In a nutshell, the ISA provides for preventive detention of targeted persons initially for 60 days and then for up to two years with the possibility of renewal every two years. Apparently the renewals can be made indefinitely.[7] The police may, without a warrant, arrest and detain anyone who has given "reason to believe" that he or she has acted or likely to act in "any manner prejudicial to the security of Malaysia." When invoked, the ISA also allows for restrictions on freedom of assembly, association, and expression, freedom of movement, residence and employment. It allows for the closing of schools and educational institutions if they are used as a meeting place for an unlawful organization or for any other reason are deemed detrimental to the interests of Malaysia or the public. The right of ISA detainees to be fairly charged and tried is restricted not only by the provisions in the ISA for indefinitely renewable detention without trial, but also by a separate June 1989 amendment removing the jurisdiction of courts to hear *habeas corpus* petitions from ISA detainees.

Because of the breath of the language of Article 149(1), the legal effect derived from basing the ISA on it is that any provision of the ISA directed at any action enumerated in Article 149(1) is "valid, nothwithstanding any inconsistency with specified articles of the *Federal Constitution*, namely Articles 5 (personal liberty), 9 (freedom of movement), 10 (freedom of speech) or 13 (rights of property), or which would apart from the articles be outside the legislative power of Parliament"[8]

The ISA can be traced to the practices of the British during the colonial period. When necessary, the Special Branch flexed unrestrained power for the purpose of maintaining the *status quo*. During a period of armed conflict such as the Emergency (1948-1960, although the most dangerous period of guerilla warfare ended by 1954), when the survival of democratic principles in Malaya was at issue, the use of such police state tactics may find qualified justification.[9] However, the Malayan communist insurrection was broken and Merdeka Day arrived on August 31, 1957. Aside from a short episode of

[7]The ISA provides for a person to "be detained for any period not exceeding two years." But the ISA also allows "any detention order, or restriction order, be extended for such further period, not exceeding two years, as (the government) may specify, and thereafter for such further periods, not exceeding two years at a time." Therefore, imprisonment can be extended every two years until forever as the government determines.

[8] Wu Min Au *The Malaysian Legal System* 273-276.

[9] The *Emergency Regulations Ordinance* 1948 authorized the British High Commissioner, upon the declaration of an emergency to make any regulation which he considered to be desirable in the public interest, including regulations for the detention of certain persons. Accordingly, Section 17 of the *Emergency Regulations* authorized the executive of the Federation of Malaya to detain any person named by way of an order for any period not exceeding one year. See, e.g. Wu Min Au, *The Malaysian Legal System* (1999 Longman) 266-282.

armed Confrontation with Sukarno's Indonesia, modern Malaysia had never been threatened with any war or armed rebellion that can be viewed as being a threat to her sovereignty. Nevertheless, the legacy of the Special Branch can be seen in the letter of the ISA and felt in its continued implementation against selected persons. One might say that the mischievous spirit and a certain tradition of diabolical dirty tricks were passed on from the departing British to the new government of Malaysia through the corpus of the ISA.

Despite the draconian nature of the ISA, a number of rights vital to personal liberty have been preserved by judicial action. The right to counsel is available. Theresa Lim Chin Chin & Ors v. Inspector General of Police, [1988] 1 MLJ 293. An arrested person has the right to be informed of the charges that form the basis of the arrest. Chong Kim Loy v. Timbalan Menteri Dalam Negeri, Malaysia & Anor [1989] 3 MLJ 121; Yit Hon Kit v. Minister of Home Affairs, Malaysia & Anor, [1988] 2 MLJ 638.

Nevertheless, the comments of Professor R. H. Hickling, Parliamentary Draftsman in post-independence Malaya who also took part in drafting the ISA given in 1993 is worth restating here:

> Since I drafted the original act, the ISA has been tightened up and tightened up until now there's no provision for judicial review. Unfortunately over the year the powers have been abused. Instead of locking up people suspected of organizing violence, which is the phrase used in the preamble to the ISA, it's been used to lock up political opponents, quite harmless people.[10]

The Great Writ

The writ of *habeas corpus* is a landmark contribution of the English common law. The Great Writ has been incorporated into Article 1 Section 9 of the U. S. Constitution:

> The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases or Rebellion or Invasion the public Safety may require it. [11]

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[10] Conversation recorded with journalist Roger Mitton and reported in *Asiaweek* 28 July 1993 at page 46. Reproduced at page 269 of *The Malaysian Legal System.* Professor Wu also notes that Professor Hickling confirmed with him in a July 1995 conversation that the quote was accurate and that he "expressed some regrets at the whole scheme of preventive detention which has since been used for purposes in which he had no hand." *Id.*

[11] Nevertheless, President Abraham Lincoln suspended the privilege by Executive Order in the early Civil War period, but this met with such opposition that Lincoln sought and received congressional authorization. Three other suspensions were subsequently ordered on the basis of more or less express authorizations from Congress. The privilege of the Writ was suspended in nine counties in South Carolina in order to combat the Ku Klux Klan, pursuant to Act of April 20, 1871, 4, 17 Stat. 14. It was suspended in the Philippines in 1905, pursuant to the Act of July 1, 1902, 5, 32 Stat. 692. Cf. Fisher v. Baker, 203 U.S. 174 (1906). Finally, it was suspended in Hawaii during World War II, pursuant to a section of the Hawaiian Organic Act, 67, 31 Stat. 153 (1900). Cf. Duncan v. Kahanamoku, 327 U.S. 304 (1946).

Interestingly, this is the only place in the U.S. Constitution wherein *habeas corpus* is mentioned. Subsequently, Section 14 of the Judiciary Act of 1789 provided that all courts of the United States should "have power to issue writs of *scire facias, habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdiction, and agreeable to the principles and usages of law." Thus it falls upon the judiciary during the course of exercising jurisdiction and upholding the principles and usages of law to have available for its own use the doctrine of *habeas corpus*.

In the United States, prisoners can seek release by filing a petition for a writ of *habeas corpus* with a court, usually a federal district court. The writ is a judicial mandate to a prison official commanding the jailer to bring forth an inmate into court in order a determination can be made by the judge as to whether or not that person is imprisoned lawfully and whether or not he should be released from custody. A *habeas corpus* petition can be filed with a court by a person who objects to his own or another's detention or imprisonment. The petition must show that the court ordering the detention or imprisonment made a legal or factual error. In family law, a parent who has been denied custody of his child by a trial court may file a *habeas corpus* petition. Also, a party may file a habeas corpus petition if a judge declares her in contempt of court and jails or threatens to jail him or her.

In Brown v. Vasquez,[12] it was noted that the U.S. Supreme Court has "recognized the fact that [t]he writ of *habeas corpus* is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Since habeas corpus serves a fundamentally important purpose the writ must be "administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." Harris v. Nelson.[13]

Under the system of American federalism, *habeas corpus* serves as an important check on the manner in which state courts observe federal constitutional guarantees. Because the *habeas* process delays the finality of a criminal case, however, the Supreme Court in recent years has attempted to more narrowly interpret the writ to ensure that the costs of the process do not exceed its manifest benefits. In the case of McCleskey the Court raised barriers against repetitive or frivolous petitions. The Court expressed significant concerns about delay, cost, prejudice to the prosecution, frustration of the sovereign power of the states, and the "heavy burden" federal collateral litigation places on "scarce federal judicial resources," a burden that "threatens the capacity of the system to resolve primary disputes." McCleskey v. Zant, 499 U.S. 467 (1991).

In the *Federal Constitution* of Malaysia, Article 5(2) is essentially a provision for *habeas corpus*, even though that Article does not *per se* spell out the magic words.[14] That

[12] 952 F.2d 1164, 1166 (9th Cir. 1991), cert. denied, 112 S.Ct. 1778 (1992).
[13] 394 U.S. 286, 290-91 (1969).
[14] Article 5(2) reflects Principle 32(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which states: "A detained person or his counsel shall be entitled

however, is not the problem. The cause for concern is that a line of increasingly restrictive amendments by Parliament, and affirmed by judicial rulings interpreting these amendments, have emasculated *habeas corpus* insofar ISA detainees are involved. Court decisions have ratified the principle that once the Executive, through the Minister of Home Affairs, determines the necessity to detain a subject and issues a detention order, the courts cannot "second guess" that decision.

Nevertheless, *habeas corpus*, as a *sine qua non* of civil rights, is recognized by the Malaysian courts. In Yeap Hock Seng @ Ah Seng v.Minister for Home Affairs, Malaysia [1975] 2MLJ 279, the court endorsed the Great Writ thus:

> *Habeas corpus* is a high prerogative writ of summary character for the enforcement of this cherished civil right of personal liberty and entitles the subject of detention to a judicial determination that the administrative order adduced as warrant for detention is legally valid.

On the other hand, that court framed the question before it as "not being whether the belief was justified, but whether it existed, and provided that the executive indicated in his affidavit that he had the requisite belief, the court's role was limited to inquiring into whether this was expressed in good faith."[15]

The judiciary, through self-restraint bordering on compliance, will not question the basis for detention. This applies even when irregularities such as when the cause for detaining a person proffered in court is not the same as that written in the original detention order. The caprice and arbitrariness of the government cannot be challenged unless it was rendered in *male fide*. In the case of Karam Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia [1969] it was held that the law did not impose a burden on the part of the detaining authority to show its good faith. Thus, the onus of proving improper motive on the part of the authorities lies on the detainee.

As noted earlier, the scope of judicial review, including *habeas corpus*, was weakened further in 1989 when Parliament amended to the ISA to actually prevent acts of the government taken under the ISA from being questioned in the courts. Section 8B(1) as amended read:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the *Yang di-Pertuan Agong* [the Paramount Ruler/Constitutional Monarch] or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision."

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at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful.'"

[15] See, generally Wu Min Au *The Malaysian Legal System 277*, 276-281, citing Yeap Hock Seng.

Section 8C included *habeas corpus* as within the judicial powers curtailed. Dr. Mahathir, the longest serving Prime Minister of Malaysia, was supportive of the legislation giving the government the unfettered discretion to determine what action was necessary to preserve the country's stability and security. The Prime Minister declared that, "It is not appropriate for us to follow the practice in other countries where courts play an interventionist role in substituting the decisions of the Executive as this is against the concept of 'separation of powers' between the Executive and the Judiciary."

The Bar Council stated its concern in this fashion:

> [T]he court's jurisdiction to protect a detainee from unlawful and improper detention will have been removed . . . the security of the nation must at all times remain paramount, yet to completely remove the court's supervisory jurisdiction on grounds that the executive is the best judge to decide on national security cannot be justified legally or morally.[16]

There is a glimmer of hope in the direction of judicial oversight of the puissant Executive. In the rare instance of Lee Guan Seng v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor [1992] 2 MLJ 878 the High Court held that "acting mechanically or a non application of mind" would render a detention *ultra vires*, and therefore, void for having failed to conform to provisions of the Ordinance.[17]

In December 1997, two Muslim academicians, Professor Lupti Ibrahim and Lecturer Fadzullah Shuib, who had been detained the previous month under the ISA because of the practice of their Shi'a faith had their *habeas corpus* petitions upheld after the court recognized a procedural error - a copy of the ISA police detention order had not been dated. The two were immediately re-arrested on leaving the court house and returned to detention under a new ISA order. Thus the substantive interests of the Executive overrode procedural niceties.

It appears that an effective application for *habeas corpus* had been that of Jamaluddin Othman who was arrested in October 1987 (Operation *Lalang*[18] - *Lalang* is Bahasa

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[16] Wu Au Min, *The Malaysian Legal System* 279.

[17] *Id*.

[18] Operation Lalang resulted in arrests of October 1987. Petitions for writs of *habeas corpus* on behalf of 9 detainees were lodged at the High Court during the detainees' initial 60-day police detention under the ISA. The petitions contended that the detentions were illegal because, amongst other things, the arrests were conducted *male fide*. The government argued that the only circumstance under which the writ of habeas corpus could be entertained was if the detainees could prove that their arrest was effected because of an improper motive or bad faith. This placed the burden on the detainees to prove improper motive. The detainees were not permitted to give testimony and the court dismissed the petition. Three judges of the Supreme Court upheld the ruling. Another arrested was Karpal Singh, a lawyer and prominent opposition Democratic Action Party (DAP) parliamentarian. Being permitted to represent himself, he challenged the validity of his detention order on the grounds that *male fide* on the part of the detaining authority was evident in the whole process. One of the grounds for his arrest was proven to be factually wrong because he was not present at a place where he was alleged to have given "the inciting speech." The High Court ordered Karpal Singh's release. The government subsequently appealed this ruling to the Federal Court which overruled the High Court, stating that the sufficiency or insufficiency of the grounds of detention

Malaysia for a type of long leafed nuisance grass) and served a two-year detention order for alleged involvement in a plan to propagate Christianity among Malays. The grounds for detention stated only that the respondent had participated in Christian meetings and seminars, and in October 1988 the High Court ruled that the Minister has no power under the ISA to deprive a person of his constitutional right to profess and practice his religion (Article 11). The ruling was upheld by the Federal Court.[19]

The Prosecution of Anwar Ibrahim

Former Deputy Prime Minister Anwar Ibrahim is now considered by some to be a premier political prisoner. In 1998, after political and policy disagreements, Prime Minister Mahathir Mohammad fired his Deputy and heir apparent. While the Prime Minister may have his own sincere reasons for discharging Anwar and while the question of who the real Anwar Ibrahim is and what he really stands for remains to be seen, the procedural aspects of the prosecution has garnered the scrutiny, if not criticism of many neutral observers.

After being fired, Anwar did not remain sedate - he appeared at public meetings to criticize Mahathir. After a demonstration in which he called for Mahathir's resignation, Anwar was arrested by the police. The charge was sodomy. While in detention, Anwar was beaten by then-Inspector General of Police Rahim Noor. Presumably to avoid bringing a bruised Anwar into open court, police changed Anwar's status to detention without charge under the ISA. Anwar's status subsequently was changed again to criminal detention under which he had a right to his day in court. Anwar was denied bail on shaky legal grounds (bail is a right afforded by Article 4(4) of the *Federal Constitution*).

Anwar was first tried and convicted on four counts of corruption. During this corruption trial, the judge made several rulings that substantially reduced Anwar's ability to present his defense. For example, the judge sentenced one of his lawyers to three months' imprisonment for contempt after that lawyer raised in court charges of prosecutorial misconduct. This can be seen as a violation of Article 4(3) of the *Constitution* which guarantees the accused the right to "consult and be defended by a legal practitioner of his choice."

The judge also limited the scope of Anwar's defense (during trial the judge explicitly commented that he did could not be concerned if there was a conspiracy to bring down Anwar) and was lenient towards improper activities by the police and prosecutors. The judge allowed prosecutors to amend the charges in the middle of the trial, which is permitted under national law but such surprise was unfair to the defense.

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were not a matter for the courts to decide. The Court held that the basis for an ISA detention, "is something which exists solely in the mind of the Minister of Home Affairs and that he alone can decide and it is not subject to challenge or judicial review unless it can be shown that he does not hold the opinion which he professes to hold." In any case, Singh was re-arrested under a new and separate detention order.

[19] Minister for Home Affairs, Malaysia & Anor v Jamaluddin bin Othman, [1989] 1 MLJ 418.

After the corruption conviction, Anwar next was tried for sodomy. At the beginning of the second trial, prosecutors changed the dates of the alleged acts of sodomy, allegedly because the defense had discovered that the apartment building where the sodomy allegedly took place had not been completed by the original dates. Despite testimony detailing how police had coerced a confession from an alleged homosexual partner, on July 26, the judge ruled that the prosecution had proven beyond a reasonable doubt that this confession had been voluntary. On August 4, another witness admitted that police had couched part of his testimony. On August 18, the lead police investigator materially contradicted his testimony (in order to make it consistent with the amended dates of the alleged offense); the next day the judge ruled that the policeman had not lied. In the end, on August 8, 2000, to nobody's surprise Answer was convicted of sodomy. The judge sentenced him to a further nine years in jail above the six-year sentence he was serving for corruption. Some observers believe that Anwar was convicted despite evidence that the allegation against him was fabricated. The former Deputy Prime Minister, who once occupied the lofty position of heir apparent, must now remain in jail until the year 2014. He was spared corporal punishment by the rattan by reason of his older age.

Another Political Prisoner Whose Freedom of Speech the Judiciary Did not Protect

In August 1999, Lim Guan Eng was released from prison after having served his sentence. Lim had been convicted on charges under the Sedition and Printing Presses and Publications Acts. The charges arose after Lim criticized, in a speech and in a pamphlet, the justice of detaining for three years a fifteen-year-old victim of statutory rape while allowing her rapists, including, allegedly, the former chief minister of Malacca, Rahim Thamby Chik, to go free. In November shortly before elections were held, the alleged rape victim retracted her charges against Rahim Thamby Chik, stating that she was coerced into fabricating them.

Conclusion: When the Judiciary Blinks

According to Professor Wu, "judicial power" can be broadly defined as "the power which every sovereign authority must have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate life, liberty, or property.[20] Further, "[t]he exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether the subject appeal or not) upon to take action."[21]

The subtlety of the common law tradition is that a judge must rest dormant until called upon by feuding parties to decide, upon the principles and traditions of justice and

[20] Au Min Wu, *The Malaysian Legal System*, 283.
[21] *Id.*at 283-284, citing Griffith CJ in Huddart, Parker & Co. v. Moorhead (1908-1909) 5 CLR 330 at 357. This approach was cited with approval in Public Prosecutor v. Dato' Yap Peng [1987] 2 MLJ 311.

fairness that controversy. [22] However, *when* a court is called upon to exercise jurisdiction, it must *rise to the occasion*. Having risen to the challenge, the court is expected to render a lofty decision that commands the respect of the community, thus making conceptual justice a reality. *Carpe diem* - justice alone must be served

Perhaps, the most notorious case of American constitutional law is that of Dred Scott v. Sanford, 60 U.S. 393, 19 How. 393, 15 L.Ed. 691 (1856). Dred Scott was a slave from Missouri who believed that that he had gained his freedom when his first master died while they resided in Illinois (a free state). His next master brought him back to Missouri (a territory divided on the issue of slavery by a statute known as the Missouri Compromise) as a slave. Scott, through his lawyers sought a judicial ruling on the legality of slavery in Missouri, hoping that the judiciary would strike a blow against that inhumane institution. Scott's cause ultimately reached the U. S. Supreme Court. The Court under Chief Justice Taney actually undertook to decide a number of questions of law, but the one most relevant to our discussion is the issue of the jurisdiction of the court to entertain a lawsuit by Scott. To the lasting infamy of the Taney Court, it found Scott to be a slave, and being a slave, was not a citizen of Missouri. The final words of the Court were these: "Upon the whole, therefore, it is the judgment of this court, that it appears by the record before us that the plaintiff in error is not a citizen of Missouri, in the sense in which that word is used in the Constitution; and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued, directing the suit to be dismissed for want of jurisdiction." A slave had no access to the courts.

In this fashion the U. S. Supreme Court in December of 1857, by declining jurisdiction, failed to rise to the occasion to strike a blow against an institutional injustice. Being denied the means of resolving a burning dispute of morality, as well as law, in a forum of reason and rationality, Americans continued to argue and agonize over the question of slavery in other arenas. No legislative or political solution could be reached. The only recourse was executive action. On April 12, 1861, the American Civil War commenced. This war was to last four years before the issue was settled at the point of the bayonet and at the cost of many lives against the institution of slavery and the states that supported slavery.

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[22] See, e.g. Marbury v. Madison, 5 U.S. 137 (1803) 5 U.S. 137 (Cranch) (1803). Just as President George Washington helped shape the actual form that the executive branch would take, so the third chief justice, John Marshall, shaped the role that the courts would play. Marshall's decision is a judicial *tour de force*. He declared that Madison should have delivered the commission to Marbury, but then held that the section of the Judiciary Act of 1789 that gave the U.S. Supreme Court the power to issue writs of mandamus exceeded the authority allotted the Court under Article III of the Constitution, and was therefore null and void. Marshall understood that if the Court awarded Marbury a writ of mandamus (an order to force an executive officer such as Madison to deliver the commission) the Jefferson administration would ignore it, and thus significantly weaken the authority of the courts. The plaintiff Marbury was turned away empty handed. Thus while the wise Marshall yielded to the superior Jeffersonian executive position, he claimed for the Court the judicial power to review, and overrule, if appropriate, the acts of both the legislature and the executive, a precious legacy that remains vested to this day with American courts.

The judiciary, especially the highest court of the land, has the duty and responsibility to help peacefully resolve controversies involving citizens and the government using the tools and powers of a judicial nature. It provides a hallowed forum where reason may be brought to bear and where the highest ideals of justice are argued, asserted, and even vindicated. Judicial failure to rise to the occasion deprives citizens of a vital means of dispute resolution. Such failure may compel people to take their continuing grievances that surely involve compelling questions of life and liberty down other less rational and more dangerous footpaths.

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