Freedom of speech—need for balance

" A meaningful understanding of the right to freedom of speech under the constitution must be based on the realities of our contemporary society in Malaysia by striking a balance of the individual interest against the general security or the general morals, or the existing political and cultural institutions.

Our sedition law would not necessarily be apt for other people but we ought always remember that it is a law which suits our temperament.

A line must therefore be drawn between the right to freedom of speech and sedition. In this country the court draws the line. "

—Raja Azlan Shah J (as he then was)
Public Prosecutor v Ooi Kee Saik & Ors
[1971] 2 MLJ 108, HC at 112

HRH Sultan Azlan Shah

What others say …

Tun Mohamed Suffian,
Formerly Lord President, Federal Court, Malaysia:

Adapted from speech at the official launch of *Judgments of Sultan Azlan Shah With Commentary*, editor, Visu Sinnadurai, Kuala Lumpur, 28 February 1986.

This book makes history: it is the first collection within the covers of a single book of the judgments of a judge in this country.

It is fitting that the judge so honoured is Duli Yang Maha Mulia Paduka Seri Sultan Azlan Muhibbuddin Shah (better known among the legal fraternity as Raja Tun Azlan Shah), Sultan of the State of Perak, the fifth Lord President of the Federal Court, who reached the pinnacle of the judiciary after 17 years on the superior courts—at the comparatively youthful age of 54, an achievement predicted for him by the first Lord President Tun Sir James B Thomson who recommended his elevation in 1965 at the age of 37. But for his sudden succession to the Perak throne he would have had 28 years on the superior bench and the opportunity of leading and moulding the Malaysian judiciary for 11 years. The judiciary's loss is undoubtedly Perak's gain …

Educated at Nottingham University, now famous for the quality of its legal education, and at Lincoln's Inn by whom he was called to the English Bar in 1954, at an early stage of his career in the public service he showed remarkable interest in the law by subscribing, at his own expense, to the *All England Law Reports* and buying law books which the judicial or legal department, because of financial and bureaucratic constraints, was unable to supply, and by the practice, which I adopted but only haphazardly as being too tedious, of noting in a large book points of law which might become useful later on. It was on this foundation that was laid the learning which shines through in his judgments.

At work on the Bench he was a good and patient listener, seldom interrupted or asked questions and thereby gave the impression of agreeing to what was being said. It was a good way of curbing prolix counsel, for the experienced judge knows that with some counsel the more you try to steer them away from tedious repetitions and irrelevancies the more persistent and garrulous they become; all the while you are thinking of the reversed judgments still to be pondered and written and the long list of trials and appeals to be disposed of. It was only after Raja Tun Azlan Shah had delivered judgment that counsel realised to his dismay that the Lord President's reticence meant that he was only listening, but not necessarily agreeing.

In a splendid lecture, the Tunku Abdul Rahman Lecture XI, delivered to the Malaysian Institute of Management on 23 November 1984 entitled *Supremacy of Law in Malaysia* [Editor's note: see chapter 1, above], the Sultan gave his views on the relations between Parliament, the executive and the judiciary. …

On the Perak throne Sultan Azlan Shah has reached high constitutional office indeed. Malaysia is luckly to have a distinguished jurist as attested to by the collection of judgments herein presented—with great experience in administering the law and actually seeing it in operation and its impact in real life on Parliament, Government and on the ordinary citizen. The way he performs the duties of his high royal office supported by his gracious Raja Permaisuri in wisely guiding the destiny of his people should make his erstwhile colleagues in the judiciary and of the Bar proud that the profession is capable of producing not only distinguished prime ministers.

“ Judges play an important role in the development of the law in a country. It is their decisions that become precedents in subsequent cases, and it is their decisions that reflect the current state of the law. For this reason, their decisions must be based on the law, with sufficient authorities and reasoning. ”

—HRH Sultan Azlan Shah
The Judiciary: The Role of Judges

11 The Judiciary: The Role of Judges

A Selection of Speeches

Role of judges

Official launch by YAB Tun Hussein Onn of
Judgments of HRH Sultan Azlan Shah with Commentary
Kuala Lumpur, 28 February 1986

The role of the judge is not an easy one. It is the duty of a judge not only to act as an umpire in resolving disputes between parties but also to administer justice in accordance with the law.

Furthermore, though the Malaysian Constitution places on all the major participants in government the role to act as guardian of the Constitution, it is the judiciary which is placed in a special position. The Constitution of Malaysia grants the power of judicial review to our courts. The power to control and correct any law which is inconsistent with the Constitution rests on the judiciary. It is also the duty of the courts to safeguard the interests of the individual

against any encroachment of the rights and liberties guaranteed by the Constitution. For a proper and effective exercise of these duties, it is vital that the judiciary should be wholly independent. In a country like ours, the independence of the judiciary remains a cornerstone in the structure of our system of government.

In any modern system of government, a judiciary which ceases to have the confidence of the people serves no purpose at all.

Amongst the three organs of government, the executive, the legislature and the judiciary, the judiciary must always remain independent because a judiciary which is not independent cannot have the confidence of the people. In any modern system of government, a judiciary which ceases to have the confidence of the people serves no purpose at all. We, in Malaysia, have much to be proud of, in that the independence of our judiciary has always been upheld. It is not only the duty of the judges but also of all persons concerned to ensure that this organ of the government, which all of us in Malaysia are truly proud of, continues to maintain its independence at all times.

Accessibility of the law

I would at this stage take this opportunity to make a brief comment on the importance of the accessibility of the law by the people of the country. In a legal system like ours, which is based both on statute law and common law, it is the function of the courts to interpret the statutes and to evolve the common law. In this regard, case law or judge-made law plays an important role in the development of

the law in the country. That judges in interpreting a statute in a particular manner do make law can no longer be denied. It is for this reason that judgments delivered by judges are important. It is only from these judgments that the current position of the law may be determined not only by the lawyers so as to advise their clients, but also by all persons who wish to know what the law is. The judgments as delivered by the judges therefore form an important source of the law.

> Judgments delivered by judges are important. It is from these judgments that the current position of the law may be determined by all persons who wish to know what the law is.

It is therefore important for judges to deliver written judgments in every important case. Judgments which are not written will only be confined to those present in the courtroom. The ordinary citizen will therefore have no access to them. It must always be borne in mind that knowledge of the law is not merely the privilege of the lawyers but also of all others who are interested in gaining knowledge. In a legal system where the maxim "Ignorance of the law is no excuse" is generally applicable, there is a greater need for the ordinary citizen to have easy access to the law, be it statute law or case law. In this connection the publication of laws passed by Parliament and of judgments delivered by the courts should be further encouraged.

Be that as it may, it is better to make a wrong decision than to make no decision at all. Obviously, too many wrong decisions will eventually catch up with the judge and get him into trouble, but no decision will frustrate everyone. The faster a decision is made, the

better the judge demonstrates his ability to handle responsibility and authority. …

Creativity of judges

Official opening of the Fourth International Appellate Judges Conference and the Third Commonwealth Chief Justices Conference
Kuala Lumpur, 20 April 1987

It is my pleasure this morning to welcome all of you to Malaysia as delegates of the Fourth International Appellate Judges Conference and the Third Commonwealth Chief Justices Conference.

The presence of such a galaxy of distinguished legal luminaries from all parts of the world at this gathering here today helps to sustain and enrich the close personal links between judges from so many different countries. This is indeed a testimony of the foundation and bond of our enduring friendship.

I am also happy to see so many familiar faces amongst you. Although I realise that judges are by far too serious-minded, for I was one myself until recently, I express the hope that your time in this country will not be all work and no play. I do hope that you have an interesting and stimulating discussion on the various topics which you would be discussing over the next few days. It is also my sincere hope that you may have the opportunity to see a little of our beautiful country and to experience some of our hospitality.

Most citizens regard law as a mystery: a mystery which is within the comprehension of only the lawyers and the judges. Yet, as all of us are aware, there is no mystery to the law: law regulates all of our lives—it makes us citizens, it protects us, it confers rights and obligations on us—in fact it governs every facet of our lives. It makes us and, as some would venture to say, it "unmakes" us.

There is no mystery to the law: law regulates all of our lives—it makes us citizens, it protects us, it confers rights and obligations on us—in fact it governs every facet of our lives.

The important question, however, is how do you as judges perceive the law and how do you perceive your roles? No matter what legal systems you derive your training from, all of you as *judges share a common objective:* to uphold the cause of justice. It is to you, as judges, that citizens in your own countries look to mete out justice — to settle a simple family dispute, to determine the legality of a takeover of a company, or simply to guarantee his rights, be it against another individual or the State. It is to you that the ordinary citizen invariably turns when there is despair. In the judiciary in any country, the citizen generally has hope. But what is it that makes judges so special? Why is it that the judiciary, more so than the executive or the legislature, is able to command such respect?

It is axiomatic that judges in all legal systems occupy a special status. This status is bestowed on them not because of their personal qualities but more so because of the position they hold. The judiciary in every country is an important part of the government machinery. In most countries, members of the executive and the legislature have only a limited tenure. In a democratic society, where there is a free election, members of the executive and legislature are

elected once in every five years, or less. But members of the judiciary stay on until they retire. In these countries, unlike others, judges see governments come and they see governments go. However, no matter what government is in power, judges aspire and continue to serve the very same objective: to uphold the cause of justice.

Judges see governments come and they see governments go. No matter what government is in power, judges aspire and continue to serve the very same objective: to uphold the cause of justice.

In certain times, the role of the judiciary is misunderstood. In others, it is criticised. Occasionally, even the executive or the legislature is displeased with some of the decisions made by judges. In legal systems which are based on the common law, the judiciary is sometimes accused of usurping the functions of the legislature. Judges are told that their function is not to make laws but merely to interpret them.

Judges are also subject to criticisms for interpreting certain laws in a way which is not in accordance with the *original intent* of the legislature. But whatever the criticisms and whatever the pressures asserted on the judiciary, judges should never lose sight of their roles. This does not, however, mean that judges can interpret the laws according to their own standards. As Benjamin N Cardozo pointed out:

> … in judging the validity of statutes they [judges] are [not] free to substitute their own ideas of reason and justice for those of the men and women whom they serve. Their standard must be an objective one. In such matters, the thing that counts is not what I believe to

be right. It is what I may reasonably believe that some other man of normal intellect and conscience might reasonably look upon as right.

Over the recent years, the role of the judiciary has become of increasing importance. In countries which practise a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the rule of law. This duty to uphold the rule of law, I may add, is not only imposed on the judiciary but also on the executive and the legislature by recognising that they can never be above the law; by giving an unstinting support for the courts which administer the law; and, in constructing the law, to give an honest account of what is practical and not merely a rhetorical account of what is desirable.

In countries which practise a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the rule of law.

I am pleased to learn that over the next few days, you will be discussing certain important topics relating to the role of judges. These topics are of universal interest no matter what legal system each of you may come from. Courts in all countries, especially those which have a written constitution, and especially those which have their origin in the common law system, play a great role in ensuring that the basic principles, as embodied in the constitution, are always upheld. Reading some of the papers which are to be discussed at this Conference, I notice that the role of the courts in countries like Australia, Ireland, India, United States of America and Malaysia is to act as the guardian of the constitution. Sir Harry Gibbs, the former Chief Justice of Australia, in his paper which is to be discussed at this Conference, makes a detailed study of the role played by the

courts in the various countries in ensuring that the provisions of the Constitution and the rights conferred therein are always upheld.

> Courts in all countries, especially those which have a written constitution, and especially those which have their origin in the common law system, play a great role in ensuring that the basic principles, as embodied in the constitution, are always upheld.

Over the recent years too, the courts have played an increasingly creative and constructive role in the control of executive power. The paper by Lord Ackner on *Judicial Review* highlights some of the developments under English law.

I also observe that a subject which frequently plagues the courts in many countries will be discussed. One of the major concerns of the courts is to ensure that an accused or a litigant has his case disposed of by the courts within a reasonably short space of time. The maxim, *justice delayed is justice denied*, is all too familiar to everyone. Therefore, discussions on the topic *Pre-Trial Procedures to Expedite Judicial Proceedings* will prove to be most relevant to all. I am also pleased to learn that the *Alternative Methods of Dispute Settlement*, particularly relating to arbitrations and conciliation, will be discussed by you in this Conference.[1]

May all your deliberations at both these Conferences be fruitful and your undertakings just as pleasant.

It now gives me great pleasure to declare open the Fourth International Appellate Judges Conference and the Third Commonwealth Chief Justices Conferences.

1
Editor's note:
The papers delivered at this Conference are now published in Salleh Abas and Sinnadurai, *Justice and the Judiciary: Transnational Trends*, 1988, Professional Law Books.

The courts

Official Visit to the Courts of Justice
Sultan Abdul Samad Building
Kuala Lumpur, 29 April 1993

It is now over 10 years since I left the judiciary. As tonight's dinner coincides almost with the date I would have retired, had it not been for the events which led to my relinquishing the post of the Lord President, I have a suspicion that this dinner was organised, or to use the legal jargon, the date was "fixed" by the Chief Registrar many years ago as a farewell for me to coincide with my retirement. But as fate would have it, it has now become a welcome dinner for me in conjunction with my Official Visit to the Supreme Court tomorrow, rather than a farewell one.

I am very pleased to be present here this evening, especially so when, unlike at so many other functions, I almost feel I am on familiar territories. Many of you here were my colleagues during my tenure on the Bench and it is with fond memories that I recollect the many happy years I spent in the judiciary. I am also happy to see so many other familiar faces, which since my leaving the courts have joined the ranks in the judiciary.

> Judges play an even more important role than that which I realised when I myself was a judge.

My term of office as a judge spanned over a period of almost 20 years. The major part of my working life was, therefore, spent in the courts. On reflection now, I believe judges play an even more important role than that which I realised when I myself was a judge.

Written judgments

Written judgments form an important aspect of our legal system. I need not labour upon it tonight except to say that written judgments delivered by the courts are vital for the law to mature and flourish. In this regard, I share the sentiments expressed by a jurist who once remarked on the importance of delivering judgment:

> It is better to make a wrong decision than to make no decision at all … Obviously, too many wrong decisions will eventually catch up with you and get you into trouble, but delivering no decision will frustrate everyone—above and below—who work with you. The faster you make decisions, the better you demonstrate your ability to handle responsibility and authority.

Written judgments form an important aspect of our legal system. Written judgments delivered by the courts are vital for the law to mature and flourish.

Backlog of cases

I am pleased that more judges have been appointed over the recent years and that more courts will soon be established all over the country to serve the nation's needs. With proper facilities and adequate supporting staff, I am confident that the backlog of cases will further be minimised.

However, one major and inevitable consequence of the increase in the number of judges is that there would be more appeals from the High Court to the Supreme Court. To rectify this problem, and so as not to create a new backlog of appeals in the Supreme Court, the Government has agreed to the setting up of the Court of Appeal, the need for which has long been felt. The Court of Appeal serves a useful purpose in filtering appeals from the High Courts to the Supreme Court, thereby easing the pressure on the Supreme Court. This will enable the Supreme Court, as the final court of appeal under our legal system, to be in a better position to hear and determine the more important cases, especially those which are of public interest. I am confident that these written judgments of the Supreme Court on important legal issues will further contribute towards the corpus of Malaysian law.

It is also my earnest hope that more judgments will be written or translated in Bahasa Malaysia, so as to further contribute towards the development of the law in Bahasa Malaysia. However, as international trade and foreign investment are fast growing in this country, and as Malaysian decisions on certain legal issues are being applied by the courts in other Commonwealth jurisdictions, efforts should be made to ensure that judgments on important decisions are either translated into English or also written in English. In this way, as Malaysian law develops, it may also be applied by the courts in other jurisdictions.

In conclusion, I thank Tun Abdul Hamid Omar, the Lord President and all the judges of the Supreme Court and the High Court for an enjoyable evening. The Raja Permaisuri Agong, who unfortunately is unable to be present here this evening, joins me in wishing each of you good health and success.

Interpretative role of judges

Official launch of
Sinnadurai, Law of Contract, Third Edition
Kuala Lumpur, 20 March 2003

I remember some 20 years ago, when I was on the Bench, lawyers appearing before the courts relied heavily on English and Indian authorities. As many of the laws applicable in Malaysia, like the Contracts Act, Specific Relief Act, Penal Code and Evidence Act, were based on Indian law, almost invariably, the most common texts that were often cited to us were *Pollock and Mulla*, *Ratanlal*, or *Sarkar*.

I am happy to note that over the past few years this trend of relying on foreign text books and commentaries has changed. We now have a corpus of case law and textbooks on almost every important branch of Malaysian law. Our presence here this evening to witness the launching of this new edition of the book written by Dato' Seri Visu Sinnadurai is a testament to the interest we share in the publication of a new law text.

I now like to say a few words on the role of the courts in the development of the law. It is often said that law is not static, and that the law must change with time and circumstances. Many changes to the law are brought about by Parliament. This is the legislative organ of the government, and the power of Parliament to make new laws cannot be denied, nor indeed, in most cases challenged, unless, of course, the law itself is unconstitutional. But the question that arises is whether Parliament is the only source of the law-making process. In the early development of the common law, changes to the law were brought about by judicial creativity. The doctrine of

promissory estoppel, collateral contracts, the distinction between conditions and warranties, and in fact the entire law of torts and trusts, until modified by statutory changes, are all examples of judge-made laws.

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This debate as to whether judges do in fact make laws, and whether they do have the powers to make laws has sparked much controversy since the early history of the common law. And, interestingly enough, this debate continues.

It may be said that it is the lack of understanding of how the judicial process works that triggers off much of this debate. The argument is straightforward: the law-making power is vested in the legislature, and the duty of the judicial arm of the government is merely to apply the existing law, with no power, whatsoever, to make laws. There is some merit in this argument. However, it does not portray the true position.

There is no denying that a judge cannot take upon himself the legislative role of Parliament. He cannot change the Constitution, for example, nor, for that matter, can he introduce any new policies. A judge's duty is to apply the law. However, in applying the law, there is an interpretative role played by the judges. The cold words of a statute may be subject to different interpretations, sometimes, even conflicting. The judge then becomes duty-bound to discover

the shibboleth "the intention of Parliament" by invoking established principles of statutory interpretation, usually confining himself to a linguistic analysis of the statute, eschewing such external aids as the White Papers and Hansard; though since the decision of the House of Lords in *Pepper v Hart*,[2] he may now have regard to the legislative debates in Parliament. But the judge then makes a clear decision as to the meaning of the words, and then applies that prescribed meaning to the facts of the case so as to make his final findings. In so deciding, the judge gives meaning to the words of the statute. And ultimately, it is this meaning that becomes the law.

A judge cannot take upon himself the legislative role of Parliament. He cannot change the Constitution, for example, nor, for that matter, can he introduce any new policies. A judge's duty is to apply the law.

Whilst in most cases, this interpretation given by the judge may correspond with what was intended by the legislature, there might, on occasions, be some cases where it may not. In the latter situation, it is not uncommon for the legislature to subsequently amend the statute.

It can therefore be seen that judges play an important role in the development of the law in a country. It is their decisions that become precedents in subsequent cases, and it is their decisions that reflect the current state of the law. For this reason, their decisions must be based on the law, with sufficient authorities and reasoning.

I should point out that I am not this evening advocating that judges should usurp the functions of the legislature in making new

2 [1993] AC 593; [1993] 1 All ER 42, as explained recently by the House of Lords in *R v Secretary of State, ex parte Spath Holme Ltd* [2001] 1 All ER 195.

laws. As I had on an earlier occasion (when delivering the Eleventh Tunku Abdul Rahman Lecture in November 1984[3]) observed:

> … just as politicians ought not to be judges, so too judges ought not be politicians.

It is the doctrine of the separation of powers between making laws and administering laws which is put at risk if judges are empowered to make and unmake laws by interpreting a particular statute which requires them to make policy decisions.

It is the doctrine of the separation of powers between making laws and administering laws which is put at risk if judges are empowered to make and unmake laws by interpreting a particular statute which requires them to make policy decisions.

The point, however, that I wish to stress is that as part of the judicial process, judges do, in fact make laws, as it is an integral part of their judicial functions. Whilst it is true that judges cannot change the letter of the law, they can instill into it the new spirit that a new society demands. I am confident that this solemn duty our judiciary will faithfully continue to perform.

I am given to understand by the author of this book that there have been several decisions given by the Malaysian courts in recent years on the interpretation of the various provisions of the Contracts Act. The existence of these decisions was one of the factors that prompted the author to publish this new edition of his earlier work. As a consequence of the numerous decisions, for the

3 *Editor's note:* Chapter 1, *Supremacy of Law in Malaysia*, above.

first time too, this work is now entirely restricted to Malaysian law. This, I believe is a positive development. It is my earnest hope that more judges will write detailed judgments so that our law may develop even further to the stage where we can have our very own jurisprudence: our home grown Malaysian jurisprudence.

I am aware that, with a limited market, writing law books is not lucrative. Yet, it is the dedication and discipline of authors like Dato' Seri Visu Sinnadurai that a vacuum in our legal literature is filled. Again, it is only by such publications that authors are able to share their knowledge, experience and wisdom with others. I know that there are many others, some of whom are present here this evening, who are also experts in their own respective fields. I call upon them to take the challenge and write books in their area of specialisation, so as to contribute further to our Malaysian corpus.

Editor's note

Comments on judges: See the case of *Raja Segaram v Bar Council Malaysia & Ors* [2000] 1 MLJ 1, HC, and the sequels.