The Constitution

" The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts:

One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach.

The second is the distribution of sovereign power between the States and the Federation …

The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the executive, legislative and judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men. "

—Raja Azlan Shah FJ (as he then was)
Loh Kooi Choon v Government of Malaysia
[1977] 2 MLJ 187, FC at 188

The law and aspirations

"Every country, especially one which has broken its ties with colonial rule, would want to establish a corpus of law which truly reflects the aspirations and the identity of its people.

It is therefore the duty of everyone who is involved not only in the administration of the law, but also in the enactment and implementation of it, to ensure that steps are taken towards the development of a corpus of law which reflects these aspirations."

—HRH Sultan Azlan Shah
The Legal Profession and Legal Practice

HRH Sultan Azlan Shah

National and International Recognition

In recognition of His Royal Highness's contribution and his service to the nation, His Royal Highness was conferred the Honorary Degree of Doctor of Literature by the University of Malaya in 1979 and the Honorary Degree of Doctor of Laws by Universiti Sains Malaysia in 1980.

His Royal Highness has also gained international recognition for his role in the development of law in Malaysia and for his contribution to the advancement of higher education in the country.

His Royal Highness was conferred the Degree of Doctor of Laws *honoris causa* by his alma mater, the University of Nottingham in July 1986. In the same year, His Royal Highness was made a Bencher of the Honourable Society of Lincoln's Inn.

His Royal Highness was also awarded an Honorary Doctorate of Law by the University Gadja Mada, Jogjakarta, Indonesia (1990); University of Brunei Darulssalam (1990); and University Chulalongkorn, Bangkok, Thailand (1990). In 1999, His Royal Highness was conferred the Honorary Doctor of Laws by the University of London.

His Royal Highness has gained recognition not only amongst the legal fraternity but also by other professionals. In 1991, His Royal Highness was awarded an Honorary Fellowship of the Royal College of Physician of Ireland, the Fellowship of the Royal College of Surgeons of Ireland, and the Honorary Fellowship of the Royal College of Surgeons of Edinburgh. In 1999, he was made an Honorary Fellows of the Royal College of Surgeons of England.

Safeguard for the ordinary citizen

" The courts are the only defence of the liberty of the subject against departmental aggression. In these days, when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influences are exercised in accordance with law. "

—Raja Azlan Shah Acting CJ (Malaya) (as he then was)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd [1979] 1 MLJ 135, FC at 148

"If the party which forms the Government has an absolute majority, the authority which the Government in power may exert may be overwhelming. In such a case the Government will be a strong one, and able to implement many of its policies. In fact, it is this desire of the political party to continue to maintain a strong majority in Parliament that acts as a restraint or check on the party to act moderately and to implement policies for the general good of the public. "

—HRH Sultan Azlan Shah
Checks and Balances in a Constitutional Democracy

5 Checks and Balances in a Constitutional Democracy

Harvard Club of Malaysia
Kuala Lumpur, 19 September 1987

Democratic countries throughout the world practice a representative form of government, that is a government of the people, for the people, by the people. It is through this process that people themselves elect others to govern, to make laws, to take decisions, to implement the laws and to conduct all other acts which are necessary and expedient.

In so delegating or giving the authority to represent, the extent of the authority or power has to be clearly defined. It is generally felt that too much power should not be given to any individual or body of persons. This is to prevent any abuse of such powers. Abuse of power means no more than an organ of government improperly or mistakenly acting in a way which is not permitted by its powers. Some form of checks on the excessive use of these powers is necessary. At the same time, too many restrictions on these actions

could hamper the due exercise of these powers. A system of checks and balances of power should therefore be introduced.

Ladies and Gentlemen, it is of these checks and balances in the distribution and the exercise of governmental powers under our Constitution that I have been invited to address you this evening. (I apologise to anyone of you who may have come this evening thinking that I was to talk on how to get rich by maintaining your cheque books and your bank balances!)

The theme of my talk, "Checks and Balances in a Constitutional Democracy", concerns principally with the safeguards largely to be found in the supreme law of our country, the Constitution of the Federation of Malaysia.

In Malaysia, the form of democracy that is practised is to a large extent contained in the Constitution.

In Malaysia, the form of democracy that is practised is to a large extent contained in the Constitution. The Constitution, like that of most other countries with a written constitution, is:

> … a document having a special legal sanctity which sets out the framework and the principal functions of the organs of government within the State, and declares the principles by which those organs must operate.[1]

Though such a document provides for the governance of the government, no written constitution can contain all the detailed guidelines. At the risk of prolixity, I will repeat what I said on an earlier occasion:

1 Wade and Bradley, *Constitutional and Administrative Law*, 10th edition, page 4.

> The Constitution which contains important democratic values is sometimes necessarily skeletal, since it cannot successfully attempt to enumerate, elaborate and cater for all the myriad, complex circumstances characteristic of a modern democratic society. To be sure, the strength of a Constitution lies not so much in the elegant phraseologies which is used in the text but more in the manner in which the various actors in the governmental process view and implement it. It needs constant nourishment and a continuing commitment, lest it transforms itself into a mere facade—an elegant frontage which may conceal practices which are democratically questionable.[2]

If I may rephrase it, the only real security that we can have for all our important rights must be in the nature of the Government.

Bearing in mind these preliminary observations, let us now consider the various checks and balances.

Separation of powers

Most of you know that there are generally three classes of governmental functions: the executive, the legislative and the judicial. It was in the distribution of these functions that the need for a system of checks and balances was long felt. The power delegated by the people had to be divided and clearly identified according to the function they performed. Political philosophers and jurists formulated theories on how these powers may be divided. It was this that led to the formulation of the doctrine of the separation of powers.

2 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, FC at 188, and referred to also in chapter 1 *Supremacy of Law in Malaysia*, page 16 above.

Such a doctrine can be traced back to Aristotle. It was further developed by Locke. But it was the French political philosopher Montesquieu who fully expanded it. Montesquieu was concerned with the preservation of political liberty. He said:

> Political liberty is to be found only when there is no abuse of power. But constant experience shows us that every man invested with power is liable to abuse it and to carry his authority as far as it will go … To prevent this abuse, it is necessary from the nature of things that one power should be a check on another … When the legislative and executive powers are united in the same person or body there can be no liberty. Again, there is no liberty if the judicial power is not separated from the legislative and the executive … There would be an end of everything if the same person or body, whether of the nobles or of the people, were to exercise all three powers.[3]

Montesquieu's formulation of the doctrine of separation of powers did not receive total acceptance. A rigid separation of powers among the three classes of governmental functions was felt not to be expedient. It was realised that too much separation, or restrictions imposed to check any abuse of power, will not only hamper the due exercise of these powers, but will virtually bring government to a standstill.

The judiciary is secured of its independence by removing any form of control by the executive.

The aspect of the doctrine which is strictly adhered to in all democratic countries today is the separation of the judicial function of the government from the other two functions, especially from

3 See Hood Phillips, *Constitutional and Administrative Law*, 5th edition, page 14.

the executive. In all these countries, the judiciary is secured of its independence by removing any form of control by the executive.

Under a written constitution of a federation like Malaysia, the absolute independence of the judiciary is the bulwark of the Constitution against encroachment whether by the legislature or by the executive.[4] A similiar view has been taken in countries which practise a federal system of government, for example, as in Australia,[5] the USA[6] and India.[7]

Under a written constitution of a federation like Malaysia, the absolute independence of the judiciary is the bulwark of the Constitution against encroachment whether by the legislature or by the executive.

The Privy Council in the case of *Liyanage v R* [8] on an appeal from Sri Lanka, held that though there was no express provision in the Constitution of Sri Lanka (then called Ceylon) vesting the judicial power in the judiciary, the other provisions in the Constitution:

> … manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. [The other provisions in the Constitution] are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature.[9]

The Privy Council therefore held that neither the legislature nor the executive had any judicial power. It refused to accept the argument that no separation of powers existed under the then Sri Lankan Constitution. Lord Pearce said:

4
AG for Australia v R and Boilermaker's Society of Australia [1957] AC 288, 315.

5
AG for Victoria v The Commonwealth (1935) 52 CLR 533, 566.

6
Marlbury v Madison (1803) 5 US (1 Cranch) 137.

7
State of Rajasthan v Union of India (The Dissolution Case) (1977) 3 SCC 592; AIR 1977 SC 1361.

8
[1969] AC 259; [1966] 1 All ER 650.

9
Ibid at 658.

> … there exists a separate power in the judicature which under the Constitution as it stands cannot be usurped or infringed by the executive or the legislature.[10]

More recently, in the Supreme Court decision of *Public Prosecutor v Dato' Yap Peng*,[11] Abdoolcader SCJ in holding a provision in the Criminal Procedure Code to be unconstitutional observed:

> In my view the provisions of section 418A [of the Criminal Procedure Code which enabled the Attorney-General by merely issuing a certificate to transfer a case to the High Court from a subordinate court] are both a legislative and executive intromission into the judicial power of the Federation [of Malaysia]. It is a legislative incursion to facilitate executive intrusion ….[12]

I should, however, point out that in this particular case, the Supreme Court was divided in its views. Three[13] members of the Court held that section 418A of the Criminal Procedure Code was an interference of the judicial power which they held was vested only in the courts. The other two[14] Supreme Court Judges, forming the minority view, held the said section to be constitutional as it was not an exercise of a judicial power.[15]

The powers of the three organs can only be exercised in accordance with the terms of the constitution from which such powers are derived.

For our purposes, the case is useful, not so much as to what amounts to "judicial power" but rather in whom the judicial power

10
Ibid at 659. The above two passages were referred to in a later decision of the Privy Council in *Kariapper v Wijesinha* [1967] 3 All ER 485 at 488.

11
1987, Unreported. *Editor's note:* now reported in [1987] 2 MLJ 311.

12
[1987] 2 MLJ 311 at 318.

13
Lee Hun Hoe CJ (Borneo), Mohamed Azmi and Abdoolcader SCJJ.

14
Salleh Abas LP and Hashim Yeop Sani SCJ.

15
Editor's note: See Postscript, below.

is vested. All five Supreme Court Judges appear to be in agreement as to the important point that each of the organs of the Government can exercise only the powers, whatever they may be, which are conferred on them by the Constitution. Where they differed, however, was only on the question as to whether the Attorney-General in exercising his power under section 418A was interfering with the powers which the Constitution bestows on the judicature alone, and not on the executive or the legislature.

In countries which have a written constitution, the constitution itself generally spells out the scope of the powers of each of the organs of government. In such countries, the powers of the three organs can only be exercised in accordance with the terms of the constitution from which such powers are derived.

I now move on to the checks and balances on these organs of government.

Executive

Collective responsibility of Cabinet ministers

Article 43(3) of the Federal Constitution expressly incorporates a provision which in most countries is applied as a convention: that the Cabinet shall be collectively responsible to Parliament. What does collective responsibility of Ministers or the Cabinet entail? A leading writer on constitutional law has this to say:

> It is wise not to attempt to define in a constitutional document what exactly collective responsibility means, because the outlines of the concept are so vague and blurred.[16]

16 de Smith, *Constitutional and Administrative Law*, 5th edition, page 187.

The term, however, is generally understood to mean that all Ministers collectively assume responsibility for Cabinet decisions and all actions taken to implement those decisions.[17]

The Cabinet is a Party Committee; and it is a Secret Committee. In the secrecy of its Committee each Minister is free to express his views. But once the decision has been taken they are automatically committed by the doctrine of collective ministerial responsibility, to support it in public. The principle of collective governmental responsibility is totally binding on a Minister, in whatever function he may be performing or in whatever capacity he may be acting. A Minister is always a Minister, and there can be no derogation from his obligation always to act in that capacity.

The Cabinet is the supreme governing body. It has no corporate powers, but as each Cabinet Minister has usually large legal powers, the legal powers of the Cabinet are the sum of the legal powers of its members.

It follows that any public expression of dissent of a Minister on Cabinet decision or implementation is altogether inconsistent with Cabinet responsibility and ministerial cohesion.

The Cabinet is the supreme governing body. It has no corporate powers, but as each Cabinet Minister has usually large legal powers, the legal powers of the Cabinet are the sum of the legal powers of its members.[18]

It must be stressed that the power to take decisions resides in the Cabinet as a whole. This has provided us with a further valuable

17
de Smith, pages 192–193.

18
Renfree, *The Executive Power of the Commonwealth of Australia*, 1984, page 22.

constitutional check. All major decisions are Cabinet decisions and the Cabinet is collectively responsible for them. In this regard, the position is different to that in the United States of America. There the President is elected by direct popular sufferage. All major policy decisions are made by the President on the advice of a team of personal advisers. The doctrine of collective responsibility does not apply in the same manner.

The system of government is such that the Ministers must bear responsibility for their acts and the general conduct of their ministries. This ministerial responsibility may be political, legal or both. It is this responsibility, which is borne by Ministers, that protects the impartiality and anonymity of civil servants.

I would like to add that ministerial responsibility is not limited to Cabinet decisions alone but also to ministerial decisions. The system of government is such that the Ministers must bear responsibility for their acts and the general conduct of their ministries. This ministerial responsibility may be political, legal or both. It is this responsibility, which is borne by Ministers, that protects the impartiality and anonymity of civil servants.

Parliament

Parliament under the Federal Constitution is a trinity of the Yang di-Pertuan Agong, the Dewan Rakyat (House of Representatives) and the Dewan Negara (Senate).[19] However, it is the Dewan Rakyat which plays a more prominent role.

19 Article 44.

The Prime Minister must be a member of the Dewan Rakyat and most of the Ministers (unless they are members of the Senate) are all members of the Dewan Rakyat and participate in the proceedings.[20] The reason for this is obvious: most laws which are passed by Parliament originate from the Government. The Government, therefore, needs to be represented in Parliament, especially in the Dewan Rakyat, to introduce and explain to other members, particularly to members of the opposition, the need for the introduction of a new law. This is also the position in most other democratic countries. To this extent, therefore, the doctrine of separation of powers as propounded by Montesquieu is not strictly adhered to in the Constitution, or for that matter in most other democratic countries. The doctrine therefore is not absolute. However, it continues to shape constitutional arrangements, and influences decisions, and in some limited form, is necessary both for efficiency and liberty.

Question time has long been regarded as a vital part of the process whereby Parliament attempts to hold the Government accountable for its action.

Though the Constitution seems to suggest that the main role of Parliament is legislative, Parliament's role is by no means restricted to law-making. In addition, it is the forum in which the Government is called to account. The Government, and in this context means the executive Government in its various departments, must be prepared to defend its actions both specifically and generally before the House. This it does in response to questions raised at question time, in debates initiated on the adjournment, or in debates on motions of censure tabled by the opposition. Question time has long been

20 See also Article 61(1), (3) and (4).

regarded as a vital part of the process whereby Parliament attempts to hold the Government accountable for its action.

The role of Parliament, particularly that of the Dewan Rakyat, is also to control national expenditure and taxation. It is for this reason that the Budget Speech is always introduced in Parliament by the Minister of Finance each year. In fact, Article 67 of the Constitution provides expressly that any Bill or Amendment making provision, whether directly or indirectly involving taxation, expenditure, borrowing of money by the Federation, and the control of the Consolidated Fund must be introduced by the Minister, usually of Finance in the Dewan Rakyat. That Article further provides a safeguard by providing that such a Bill cannot be introduced in the Dewan Negara.[21] The rationale for such a requirement is that elected members must have a primary say in the expenditure and collection of all public funds.

Realising the heavy burden which is imposed on them, members of the Dewan Rakyat, as a further check on public expenditure, appoint the Public Accounts Committee at the beginning of every Parliament.[22] Its primary duty is to check that expenditure by Government has been for the purpose authorised and that value for money has been obtained. This important Committee is entrusted with the duty of examining (a) the accounts of the Federation and the appropriation of the sums granted by Parliament to meet the public expenditure; (b) such accounts of public authorities and other bodies administering public funds as may be laid before the House; (c) reports of the Auditor-General laid before the House in accordance with Article 107 of the Constitution; and (d) such other matters as the Committee may think fit, or which may be referred to the Committee by the House.

21
See Article 68(1) for money Bills.

22
Standing Order 77 of Dewan Rakyat.

It should also not be overlooked that Parliament in a sense also checks the executive, since by convention, Parliament may dismiss the Government which has lost the ability to command a majority on an issue of confidence.[23] But so long as the executive can retain that confidence, it has virtual control over the Dewan Rakyat. This is certainly so if the Government has secured a substantial majority, as any prospect of it being defeated in any major issue is remote. Nevertheless, democracy means more than just majority rule, for even the majority has to abide by the dictates of the Constitution.

Parliamentary control of the executive is a fundamental precept of our system of Government. Such control should be "influence, not direct power; advice, not command; criticism, not obstruction; scrutiny, not initiative; and publicity, not secrecy".

If the primary task of Parliament is to be that of maintaining the Government in power, the price it should be able to exact for performing this task is that of being sufficiently informed to criticise adequately the policies and actions of the Government. Parliamentary control of the executive is a fundamental precept of our system of Government. Such control should be "influence, not direct power; advice, not command; criticism, not obstruction; scrutiny, not initiative; and publicity, not secrecy".

The party system and the opposition

As we have seen, the political party which secures the majority of seats in a political election will form the Government. The party controls the Government. Again, as pointed out earlier, the majority of Members of Parliament, especially in the Dewan Rakyat, will be

23 *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119, FC; [1968] 2 MLJ 238, PC.

of the same party. This is also the position in the executive: all members of the Cabinet will belong to the party in power. This, therefore has the effect of the party having the majority controlling both the legislature, that is the Parliament, and the executive. If the party which forms the Government has an absolute majority, the authority which the Government in power may exert may be overwhelming. In such a case the government will be a strong one, and able to implement many of its policies. In fact, it is this desire of the political party to continue to maintain a strong majority in Parliament that acts as a restraint or check on the party to act moderately and to implement policies for the general good of the public. The prospect of a guaranteed election at least once in five years, and the desire to be re-elected with a two-thirds majority in Parliament, acts as a moderating influence on the party in power.

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Another check on the Government in power is the presence of an effective opposition. Much as many politicians in power would like their party to have full control of Parliament, it should not be forgotten that the existence of an opposition is a *sine qua non* to the practice of a democratic form of Government. It is, after all, the continued criticisms of Government policies by the opposition, which to a certain degree reflect public opinion, that act as a check on the legislature and the executive. As pointed out earlier, in reality the control of both the executive and legislative functions, not only in Malaysia but also in other countries like Britain, is concentrated in the Cabinet, presided over by the Prime Minister. It is for this

reason that an effective opposition in Parliament is necessary to act as a restraint on the party in power. A leading authority makes the following observation:

> The most important check on their power [that is, the party in power] is the existence of a powerful and organised parliamentary opposition.[24]

That the existence of an effective opposition is recognised in Malaysia can be seen from the fact that the leader of the opposition is accorded certain privileges: he has an office in Parliament House, and he is paid a special allowance.[25] But I would like to emphasise that just as the party in power must act responsibly, so must the opposition. The opposition for its part is obliged to present reasonable argument, to criticise, but not to obstruct.

Consultation

In a democratic country, generally the people or the electorate themselves do not take a direct part in the legislative or decision making functions of the Government. It is only through their elected members in the Dewan Rakyat, for example, that some semblance of participation by the people is maintained. It is therefore only through the ballot box that the people are able to indicate their degree of support for the party in power.

Since the minority interests may not always be represented in Parliament, it is only through a process of consultation that their views may be heard.

24
8 *Halbury's Laws of England*, 4th edition, paragraph 820. See also paragraph 1132.

25
See Members of Parliament (Remuneration) Act 1980, Act 237.

A party which wins a general election is conferred a mandate to implement its policies. Since the minority interests may not always be represented in Parliament (though to a certain extent the opposition may represent a part of the minority), it is only through a process of consultation that their views may be heard. Such consultation, of course, does not mean that their views must always be accepted.

Such prior consultation is already practised by our Government in Malaysia in certain cases. Prior to the Budget each year, the Minister of Finance consults various groups or bodies to seek their views on certain financial aspects which the Minister may adopt in his new Budget proposals. Likewise when a proposed legislation affects a certain section of the community (for example the financial institutions), there has been prior consultation.

> The practice of consultation of interested parties is a prudent exercise to follow, especially on important matters of legislation. The scope for arbitrariness is greatly reduced.

The practice of consultation of interested parties is therefore a prudent exercise to follow, especially on important matters of legislation. The scope for arbitrariness is greatly reduced. Whilst it is true that the power to introduce any legislation is within the absolute purview of the Government in power, through the exercise of its parliamentary majority, little harm is caused by such consultation. It does not impose an intolerable constraint on the freedom nor on the duty of the Government to govern. Such consultation would not stultify Government or make it a more difficult task than it already is. At least the people believe that they are participating in the decision-making process.

Judiciary

As we have seen earlier, the organ of the Government which is free from any influence from the other two organs is the judiciary. The judiciary therefore has freedom from political, legislative and executive control. It is only when the judiciary enjoys such freedom can the judiciary be said to be independent.

The Malaysian judiciary has, in a number of cases, declared certain laws passed by Parliament to be unconstitutional. In this way the judiciary acts as a check over the legislature, the Parliament. This is also the position in other democratic countries, especially those with a written constitution, for example, the Supreme Court of the United States, the Supreme Court of India and the High Court of Australia. In the celebrated case of *Marbury v Madison*,[26] the Supreme Court of the United States declared a law to be unconstitutional even though the Constitution of the United States itself did not confer any power of judicial review on the Supreme Court.[27] Landmark cases such as *Marbury v Madison* can teach us all something about how the delicate checks and balances between individual rights and the rights of society work.

The judiciary has freedom from political, legislative and executive control. It is only when the judiciary enjoys such freedom can the judiciary be said to be independent.

The judiciary has always guarded its domain over judicial powers with much jealousy. One clear example of this is the conflict between Chief Justice Marshall and President Jackson in 1832 at the time when the decision in *Marbury v Madison* was delivered. The

26
(1803) 5 US (1 Cranch) 137.

27
See Harry Gibbs, "The Court as Guardian of the Constitution". (Paper presented at the Fourth International Appellate Judges' Conference, April 1987, Kuala Lumpur); now published in Salleh Abas and Sinnadurai, *Law, Justice and the Judiciary: Transnational Trends*, 1988, Professional Law Books, page 51.

current public debate as to the interpretation of the United States Constitution relating to the "Spirit of the Constitution" between the Attorney-General and the Chief Justice is another example.

Such conflicts can only be alleviated if each of the organs of Government fully understands its powers and duties. If this is fully understood, much of the misunderstanding can be avoided and the organs of Government will function truly in their own respective spheres. Each of them has a role to play in the intricate web of checks and balances. The separation of powers, or more accurately, functions as embodied in the Constitution, must be observed. For instance, it can never be the function of the judiciary to express views on what the law should be. Such a course would be a complete deviation from its traditional role. It would lead to a rule by men rather than a rule by law. Again, it is no part of the court's duty, or power, to restrict or impede the working of legislation, even of unpopular legislation; to do so would be to weaken rather than advance the democratic process.

It can never be the function of the judiciary to express views on what the law should be. Such a course would be a complete deviation from its traditional role. It would lead to a rule by men rather than a rule by law.

However, judicial power, like any other power may be abused.[28] As I have observed once before:

> Just as politicians ought not be judges, so too judges ought not be politicians … Government by judges would be regarded as an usurpation of legislative and executive authority.[29]

28 Wade, "Constitutional Fundamentals", *32nd Hamlyn Lectures*, page 65.

29 *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, FC at 149. See also chapter 1, *Supremacy of Law in Malaysia*, above.

The courts will serve both the judicial tradition and the Malaysian people most usefully when it keeps to a path of duty more consistent with its real expertise—insisting upon a due regard to the Rule of Law, enforcing the plain command of the Constitution, but respecting the judgment of the other branches of Government always and most especially in those matters of high political decision that are the peculiar responsibility of the legislative and executive authorities.

No doubt these authorities sometimes err and have erred in the past. Insofar as such error is almost irrational (as in *Sri Lempah* case[30]), the courts must assume the burden of correcting it. Insofar as it violates the procedural imperatives of the Constitution (as in *Dato' Yap Peng*'s case[31]), the courts should call a halt. These judicial decisions preserve the vitality of constitutionalism while keeping the courts within the limits of a fitting role.

Judicial power, like any other power may be abused. The great powers entrusted to the judiciary require that it be exercised with wisdom and restraint if the courts are to command the confidence and respect of the public and the government.

The great powers entrusted to the judiciary require that it be exercised with wisdom and restraint if the courts are to command the confidence and respect of the public and the government.

Without wisdom and restraint, the system of checks and balances alone may not prove to be sufficient safeguard.

30 Ibid.

31 [1987] 2 MLJ 311, SC.

Conclusion

The Constitution is based upon what is called the British Westminster model. The similarities are there, clear enough. Yet there are subtle and profound differences. In a country with a written constitution, the Constitution must be supreme. Yet, the doctrine of parliamentary supremacy dies hard; not only among politicians, but even among lawyers. And the supremacy of Parliament means that of Government.

In Britain, the status of the leader of the opposition mitigates the tendency to authoritarianism that the system, the model, might otherwise dictate. And an independent press, a lively media, all prevent any movement to autocracy. Just as war is too important a matter to be left to the generals, so also—it may be—politics is too important a matter to be left exclusively to the politicians: that is the underlying principle of the Westminster model.

We are here dealing with power, that is decision-making which control or influence the action of others, the effect it has on those who have it, and how its use can be checked. Lord Acton's aphorism "All power tends to corrupt, and absolute power corrupts absolutely" is a good adage. By power he meant misuse of power.

> The Constitution is the supreme law of the land and no one is above or beyond it. And the court is the ultimate interpreter of the Constitution: it is for the court to uphold constitutional values and to enforce constitutional limitations. This is the essence of the Rule of Law.

How then can misuse of power be checked? The answer is by spreading power between the various organs of the Government so as to ensure that power is not concentrated in any one body, but dispersed and mutually checked. Our Constitution does that. It is firmly based on the doctrine of the separation of powers—executive, legislative and judicial, each counter-balancing and restraining the excesses of the other. While the Constitution provides valuable and sensible protective guidelines, they are by no means the final answer and cannot substitute sound judgment and public vigilance.

We must steadfastly keep on reminding ourselves all the time that we are a Government by laws and not by men. In a Government of men and laws, the portion that is a Government of men, like a malignant cancer, often tends to stifle the portion that is a Government of laws. Any branch of the Government which disregards the supremacy of the law is seen to be acting discordantly with the constitutional system from which its legitimacy is derived. The Constitution is the supreme law of the land and no one is above or beyond it. And the court is the ultimate interpreter of the Constitution: it is for the court to uphold constitutional values and to enforce constitutional limitations. This is the essence of the Rule of Law.[32]

Editor's notes

Judicial power—Article 121 of the Federal Constitution: For another case dealing with the separation of judicial and legislative powers under constitutions based on the Westminster model, see the Privy Council decision in *Chokolingo v Attorney General of Trinidad*

32 *State of Rajasthan v Union of India (The Dissolution Case)* (1977) 3 SCC 592; AIR 1977 SC 1361.

and Tobago [1981] 1 All ER 244, PC, especially the observations of Lord Diplock at 245-246. See also Postscript, below.

Judicial review of unconstitutional laws: See also chapter 1, *Supremacy of Laws in Malaysia*, above.

Judiciary: See further chapter 11, *The Judiciary: The Role of Judges*, below.

Obligations to the public

"All professions serve a wider interest: the interest of the community in general. It is for this reason that the law imposes certain obligations upon all of us who provide professional services to the public."

—HRH Sultan Azlan Shah
Engineers and the Law: Recent Developments