Constitutional Monarchy, Rule of Law and Good Governance



Officially launched by The Right Honourable Lord Woolf, Lord Chief Justice of England and Wales, in the presence of Their Royal Highnesses Sultan Azlan Shah and Tuanku Bainun, and His Royal Highness Raja Nazrin Shah on 13 April 2004, Kuala Lumpur. Constitutional Monarchy, Rule of Law ^{and} Good Governance

> Selected Essays and Speeches

HRF Sultan Azlan Shah



THOMSON * SWEET & MAXWELL ASIA Professor Dato' Seri Visu Sinnadurai Editor



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Editor's Preface and Acknowledgements

B

his volume contains a selection of the leading public lectures and speeches primarily in the area of law that were delivered by His Royal Highness Sultan Azlan Shah. It also includes two essays written by His Royal Highness—one on *The Role of Constitutional Rulers*, and the other, which appears as the Postscript to this book entitled *The Role of Constitutional Rulers and The Judiciary: Revisited*, written specifically for this book.

-1

The lectures, speeches and essays have been edited so as to follow a book structure. Whilst the lectures and essays have generally been reproduced in their original form, the many speeches delivered by His Royal Highness have been amalgamated and edited into certain thematic topics, and appear as specific chapters. All lectures, speeches and essays, have also been edited so as to conform to standard house-style. In some chapters, editor's notes, which act

vi Constitutional Monarchy, Rule of Law and Good Governance

as an update to some of the materials contained in the chapters, have been added. Where the updates are themselves covered by His Royal Highness in the Postscript, cross-references are made to the Postscript in the relevant part of the chapter.

The book contains two other features: The first consists of certain significant quotes of His Royal Highness Sultan Azlan Shah. These quotes, mainly on certain important aspects of the law, are drawn either from the various chapters contained in the book, or from important judgments delivered by His Royal Highness during his tenure on the Bench. Secondly, chapters in the book have been interspersed with certain aspects of His Royal Highness's biography, classified under certain key subject headings, including his judicial career, contribution to higher education, development of the law, and a list of the national and international recognition accorded to His Royal Highness.

The editing and compilation of this book was undertaken at the same time as the book that now appears as *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, Professional Law Books and Sweet & Maxwell, 2004. The publication of both these books would not have been possible without the assistance of many.

His Royal Highness Sultan Azlan Shah took a personal interest in the publication of this book and gave many constructive comments. His Royal Highness Raja Nazrin Shah gave me the same support and encouragement as he did with the first book. To both Their Royal Highnesses, I am most grateful for their gracious involvement in the publication of the book. Their personal interest was a great inspiration to me.

editor's preface and acknowledgements vii

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Professor Dato' Seri Visu Sinnadurai *Editor*

Kuala Lumpur 5 March 2004



* Table of Contents

-13-

Editor's Preface and Acknowledgements	ν
Table of Cases	xiii
Table of Legislation	XXV
Biography of	
His Royal Highness Sultan Azlan Shah	xxxv
Introduction	1
1 Supremacy of Law in Malaysia	13
Tunku Abdul Rahman Lecture XI	
2	
Climates of Freedom	37
Conference on the Malaysian Constitution	

-A-

3	
The Right to Know	51
Public Lecture, Universiti Sains Malaysia	
4	
Parliamentary Democracy	89
Aliran Seminar	
5	
Checks and Balances in a Constitutional Democracy	101
Harvard Club of Malaysia	101
6	
Corporate Activity: Law and Ethics	127
Malaysian Institute of Management	127
manysiun institute of management	
7	
Corporate Misconduct: Crime and Accountability	151
Harvard Business School Alumni Club of Malaysia	
8	
Engineers and the Law: Recent Developments	171
Institution of Engineers, Malaysia	
9	
Medicine, Ethics and the Law	219
The 8th Tun (Dr) Ismail Oration	
10	
The Role Constitutional Rulers	251
An Essay	

table of contents xi

11 The Judiciary: The Role of Judges A Selection of Speeches	289
12 The Legal Profession and Legal Practice A Selection of Speeches	313
13 Law and Globalisation: Some Perspectives Selected Speeches to the Malaysian Students' Law Society in the United Kingdom and Eire	337
14 The New Millennium: Challenges and Responsibilities Universiti Kebangsaan Malaysia	367
Postscript The Role of Constitutional Rulers and The Judiciary: Revisited An Essay	385



***** Table of Cases

AG for Australia v R and Boilermaker's	
Society of Australia [1957] AC 288	105
AG for Victoria v The Commonwealth	
(1935) 52 CLR 533; [1935] ALR 246, HC	105
Agip (Africa) Ltd v Jackson Bowers	
[1991] 1 Banking Law Review 23 (CA)	140
Ah Thian v Government of Malaysia	
[1976] 2 MLJ 112, FC	18
Anns and others v Merton London Borough Council	
[1977] 2 All ER 492, [1978] AC 728;	
[1977] WLR 1024, HL	202, 207
Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon	
ల్ Ors & other appeals [2003] 2 AMR 6;	
[2003] 1 MLJ 567; [2003] 1 CLJ 585, CA	212
Attorney-General of Hong Kong v Ng Yuen Shiu	
[1983] 2 WLR 735; [1983] 2 AC 629;	
[1983] 2 All ER 346, PC	72

-H-

Ayer Molek Rubber Co Bhd v Insas Bhd	
[1995] 3 AMR 2098; [1995] 2 MLJ 734;	
[1995] 3 CLJ 359, CA; [1995] 2 MLJ 833, FC	399
<i>B</i> (<i>a minor</i>), <i>Re</i> [1987] 2 All ER 206; [1988] AC 199;	
[1987] 2 WLR 1213, Fam Div, CA, HL	238
B Surinder Singh Kanda v Government of Malaya	
[1962] AC 322; [1962] 2 WLR 1153;	
(1962) 2 PCC 209, PC (Malaysia)	69
BA Rao v Sapuran Kaur & Anor	
[1978] 2 MLJ 146, FC	52, 77, 305
Bolam v Friern Hospital Management Committee	
[1957] 2 All ER 118;	
[1957] 1 WLR 582, QBD	237, 243
<i>Bray v Ford</i> [1896] AC 44, HL	134
British Leyland Motor Corporation Ltd v	
Armstrong Patents Co Ltd [1986] AC 577;	
[1986] 2 WLR 400; [1986] 1 All ER 850, HL	175
C (a minor) (wardship: medical treatment)(No 1), Re	
[1989] 2 All ER 782; [1989] 3 WLR 240, CA	230
Chan Cheng Kum v Wah Tat Bank Ltd	
[1971] 1 MLJ 177; (1971) 2 PCC 681, PC (Singapore)	190, 191
Charterbridge Corp v Lloyds Bank Ltd	
[1970] Ch 62; [1969] 3 WLR 122;	
[1969] 2 All ER 1185, Ch D	132
Chartered Bank, The v Yong Chan	
[1974] 1 MLJ 157, FC	193, 327

table of cases

xv

Che Omar bin Che Soh v Public Prosecutor	
[1988] 2 MLJ 55; [1988] 1 SCR 73, SC	283
Chelmsford DC v Evers (1983) 25 Build LR 99	187
Cheng Keng Hong v The Government of	
the Federation of Malaya [1966] 2 MLJ 33, H	C 191, 192
Chokolingo v Attorney General of	,
Trinidad and Tobago [1981] 1 All ER 244;	
[1981] 1 WLR 106, PC	120
Clayton v Woodman & Sons (Builders) Ltd	
[1962] 2 QB 533; [1962] 1 WLR 585;	
[1962] 2 All ER 33, CA	198
Conway v Rimmer [1968] AC 910;	
[1968] 2 WLR 998; [1968] 1 All ER 874, HL	77
Council for Civil Service Unions v	
Minister for the Civil Service [1984] 1 WLR 1	.174;
[1985] AC 374; [1984] All ER 935, HL	72
S	
D & F Estates Ltd and Others v Church Commiss	ioners
for England and Others [1988] 2 All ER 992;	
[1989] AC 177; [1988] 3 WLR 368, HL	194, 197, 203, 204,
	205, 206, 211, 212
Dato Menteri Othman bin Baginda & Anor v	
Dato Ombi Syed Alwi bin Syed Idrus	
[1981] 1 MLJ 29; [1984] 1 CLJ 28;	
[1984] 1 CLJ (Rep) 98, FC	4, 148, 281, 395
Dato' Seri Anwar bin Ibrahim to disaualify	

Dato' Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal, In the matter of an oral application by [2000] 2 MLJ 481, CA 392, 394, 395

xvi Constitutional Monarchy, Rule of Law and Good Governance

ns Ltd
200, 203
7;
200, 205
199
175
197, 201, 212
r
280, 281
208
208
222, 235, 238, 239
R 1498;
Court) 282
134

Gillick v West Norfolk and Wisbech Area Health Authority	
[1986] AC 112; [1985] 3 WLR 830;	
[1985] 3 All ER 402, HL	243
Grant v Australian Knitting Mills Ltd [1936] AC 85, PC	200
Greater Nottingham Co-operative Society Ltd v Cementation	
Piling and Foundations Ltd [1988] 2 All ER 971;	
[1989] QB 71; [1988] 3 WLR 396, CA 200, 203	
Greaves & Co v Baynham Meikle	
[1975] 1 WLR 1095; [1975] 3 All ER 99, CA	188
Guinness plc v Saunders [1990] 1 All ER 652;	
[1990] AC 663; [1990] 2 WLR 324, HL	134
Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd	
[1985] 1 MLJ 45, FC	191
Henry v Geopresco International Ltd [1975] 2 All ER 702;	
[1976] QB 726; [1975] 3 WLR 620, CA	324
HK (an infant), Re [1967] 2 QB 617;	
[1975] 2 WLR 962; [1967] 1 All ER 226, QBD	70
HI Bolton (Engineering) Co Ltd v TI Graham & Sons Ltd	

Humzan & Teang San Bha V Lazar San Bha	
[1985] 1 MLJ 45, FC	191
Henry v Geopresco International Ltd [1975] 2 All ER 702;	
[1976] QB 726; [1975] 3 WLR 620, CA	324
HK (an infant), Re [1967] 2 QB 617;	
[1975] 2 WLR 962; [1967] 1 All ER 226, QBD	70
HL Bolton (Engineering) Co Ltd v TJ Graham & Sons Ltd	
[1957] 1 QB 159; [1956] 3 WLR 804;	
[1956] 3 All ER 624, CA	132

Independent Broadcasting Authority v	
EMI and BICC Construction Ltd	
(1980) 14 BLR 1; [1955-95] PNLR 179, HL	187
Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors	
[1995] 3 AMR 2127; [1995] 2 MLJ 833, FC;	
[1995] 2 MLJ 734, CA	399

xviii Constitutional Monarchy, Rule of Law and Good Governance

Interlego AG v Tyco Industries Inc and others	
[1988] 3 All ER 949; [1989] AC 217;	
[1988] 3 WLR 678, PC	175, 176
Invercargill City Council v Hamlin	
[1996] 1 All ER 756; [1996] AC 624;	
[1996] 2 WLR 367, PC	212
T	
John B Skilling & Ors v Consolidated Hotels Ltd	
[1979] 2 MLJ 2, CA	182
John Peter Berthelsen v DG of Immigration,	
Malaysia & Others [1987] 1 MLJ 134;	
[1986] 2 CLJ 409; [1986] CLJ (Rep) 160, SC	69, 73
Junior Books Ltd v Veitchi Co Ltd [1983] 1 AC 520;	
[1983] 3 WLR 477; [1982] 3 All ER 201, HL	205
T 7	
Kariapper v Wijesinha [1967] 3 All ER 485;	
[1968] AC 717; [1967] 3 WLR 1460, PC	106
KC Lim & Associates Sdn Bhd v	
Pembenaan Udarama Sdn Bhd	
[1980] 2 MLJ 26, FC	192, 193
Kennison v Daire (1987) 160 CLR 129, HC	141
Kensington and Chelsea and Westminister AHA v	
Wettern Composites Ltd [1985] 1 All ER 346;	
31 BLR 57, DC	195
Ketua Pengarah Kastam v Ho Kwan Seng	
[1977] 2 MLJ 152, FC	40, 69, 334
Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung	
[1978] 2 MLJ 227; (1978) 3 PCC 388, PC (Malaysia)	135

table of cases

xix

Kuwait Asia Bank EC v	
National Mutual Life Nominees Ltd	
[1990] 3 All ER 404; [1991] 1 AC 187;	
[1990] 3 WLR 297, PC	134

Land Executive Committee of Federal T	erritory v
Harper Gilfillan Bhd [1981] 1 MLJ	234, FC 382
Lim Kit Siang v Public Prosecutor	
[1980] 1 MLJ 293, FC	62
<i>Liyanage v R</i> [1969] AC 259; [1966] 1 A	All ER 650;
[1966] 2 WLR 682, PC (Ceylon)	105, 403
Loh Kooi Choon v Government of Mala	ysia
[1977] 2 MLJ 187, FC	4, 15, 46, 85, 95, 103, 166
London Congregational Union Inc v	
Harriss and Harriss [1985] 1 All EF	R 335;
(1984) 1 Const LJ 54, QBD	195

Mahesan v Malaysian Government Officer's	
Co-operative Housing Society	
[1978] 2 All ER 405; (1977) 3 PCC 323;	
[1978] 2 WLR 444; [1979] AC 374, PC	135
Manfal Pty Ltd v Longuet (1983) 3 BCL (Australia) 105	175
Marbury v Madison	
(1803) 5 US (1 Cranch) 137, SC	23, 105, 116
McInnes v Onslow Fane [1978] 1 WLR 1520;	
[1978] 3 All ER 211, Ch D	75
McKay v Essex Area Health Authority [1982] 2 All ER 77	71;
[1982] QB 1166; [1982] 2 WLR 890, CA	226

xx Constitutional Monarchy, Rule of Law and Good Governance

Midland Bank Trust Co Ltd v Hett Stubbs and Kemp	
[1979] Ch 384; [1978] 3 WLR 167;	
[1978] 3 All ER 571, Ch D	195
Mount Albert BC v Johnson [1979] 2 NZLR 234	211
Murphy v Brentwood District Council	
[1990] 2 All ER 908; [1991] 1 AC 398;	
[1990] 3 WLR 414, HL	212
Murray Heibert v Chandra Sri Ram	
[1999] 4 AMR 4005; [1999] 4 MLJ 321;	
[1999] 4 CLJ 65, CA	84
Norwich City Council v Harvey	
(1989) 139 NLJ 40; [1989] 1 WLR 828;	
[1989] 1 All ER 1180, CA	203
Oldschool v Gleeson (Contractors) Ltd	
(1976) 4 BLR 103, QBD	198, 199
Pacific Associates Inc v Baxter (1989) 139 NLJ 41;	
[1990] 1 QB 993; [1989] 3 WLR 1150;	
[1989] 2 All ER 159, CA	203
Paton v British Pregnancy Advisory Service Trustees	
and Anor [1978] 2 All ER 987; [1979] QB 276;	
[1978] 3 WLR 687, QBD	226
Pembangunan Maha Murni Sdn Bhd v	
Jururus Ladang Sdn Bhd [1986] 2 MLJ 30;	
[1985] 1 LNS 122, SC	192

Pengarah Tanah dan Galian, Wilayah Persekutuan	ν
Sri Lempah Enterprise Sdn Bhd	
[1979] 1 MLJ 135, FC	3, 29, 99, 117,
	118, 122, 331
Pepper v Hart [1993] AC 593; [1993] 1 All ER 42;	
[1992] 3 WLR 1032, HL	302
Pirelli General Cable Works Ltd v	
Oscar Faber & Partners [1983] 2 AC 1;	
[1983] 2 WLR 6; [1983] 1 All ER 65, HL	186
Public Prosecutor v Dato' Yap Peng	
[1987] 2 MLJ311; [1987] 1 CLJ 550;	
[1987] CLJ (Rep) 284, SC	106, 118, 401, 402
Public Prosecutor v Datuk Haji Harun bin	
Haji Idris (No 2) [1977] 1 MLJ 15, FC	86
Public Prosecutor v Masran bin Abu & Ors	
(1971) 4 MC 192, HC	214
Public Prosecutor v Ooi Kee Saik & Ors	
[1971] 2 MLJ 108, HC	246, 284
Public Prosecutor v Tengku Mahmood Iskandar & A	Anor
[1973] 1 MLJ 128, HC	34
R v Chief Constable of West Midlands, ex parte Wil	ey
[1994] 1 All ER 702; [1994] 1 WLR 114, CA;	
[1994] 3 All ER 421; [1995] 1 AC 274, HL	83
R v Gaming Board for Great Britain ex parte Benain	m
and Khaida [1970] 2 QB 417; [1970] 2 WLR 10)09;

[1970] 2 All ER 528, CA 72 *R v Gold and Schifreen* [1988] 2 All ER 186; [1988] 2 WLR 984; [1988] AC 1063, HL 142

xxii Constitutional Monarchy, Rule of Law and Good Governance

<i>R v Instan</i> [1893] 1 QB 450	224
R v Panel on Take-overs and Mergers,	
ex parte Guinness plc [1989] 1 All ER 509;	
[1990] 1 QB 146; [1989] 2 WLR 862, CA	130
R v Panel on Take-overs and Mergers, exparte Datafin plc	
[1987] QB 815; [1987] 2 WLR 699;	
[1987] 1 All ER 564, CA	130
R v Secretary of State for the Environment,	
ex parte, Brent London BC	
[1983] 3 All ER 321; [1982] QB 593;	
[1982] 2 WLR 693, DC	75
R v Secretary of State for the Environment, Transport	
and the Regions, ex parte Spath Holme Ltd	
[2001] 1 All ER 195; [2001] 2 AC 349;	
[2001] 2 AC 349, HL	302
R v Wear Valley DC ex parte Binks	
[1985] 2 All ER 699, QBD	72
Raja Mokhtar bin Raja Yaakob v	
Public Trustee, Malaysia [1970] 2 MLJ 151, HC	193, 327
Raja Segaran a/l S Krishnan v	
Bar Council Malaysia &Ors [2000] 1 AMR 540;	
[2000] 1 MLJ 1; [2000] 5 CLJ 136, HC	304
Raymond Banham & Anor v Consolidated Hotels Ltd	
[1976] 1 MLJ 5, HC	181
Ridge v Baldwin (No 1) [1964] AC 40;	
[1963] 2 WLR 935; [1963] 2 All ER 66, HL	71
Rimmer v Liverpool City Council [1985] QB 1;	
[1984] 2 WLR 426; [1984] 1 All ER 930, CA	198
Rivtow Marine Ltd v Washington Iron Works	
[1974] SCR 1189	208

xxiii

Salomon v Salomon [1897] AC 22, HL	132
Samuels v Davis [1943] KB 526, CA	187
Schloendorff v Society of New York Hospital	
(1914) 211 NY 125, CA	235
Schmidt v Secretary of State for Home Affairs	
[1969] 2 Ch 149; [1969] 2 WLR 337;	
[1969] 1 All ER 904, CA	72
Scott v Scott [1913] AC 417	333
Sidaway v Board of Governors of the	
Bethlem Royal Hospital [1985] 1 All ER 643;	
[1985] AC 871; [1985] 2 WLR 480, HL	242, 243
Smith & Ors v Croft & Ors (No 2)	
[1987] 3 All ER 909; [1988] Ch 114;	
[1987] 3 WLR 405, Ch D	137
Soon Nam Co Ltd v Archynamics Architects	
[1979] 1 MLJ 212, CA	193
State of Rajasthan v Union of India	
(The Dissolution Case)	
(1977) 3 SCC 592; AIR 1977 SC 1361	105, 120
Stephen Kalong Ningkan v Government of Malaysi	а
[1968] 1 MLJ 119, FC; [1968] 2 MLJ 238,	
(1968) 2 PCC 531, PC (Malaysia)	112,266
Superintendent of Pudu Prison & Ors v Sim Kie Ch	1011
[1986] 1 MLJ 494; [1986] 1 CLJ 548;	
[1986] CLJ (Rep) 256, SC	75

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] AC 80; [1985] 3 WLR 317; [1985] 2 All ER 947, PC

xxiv Constitutional Monarchy, Rule of Law and Good Governance

Udachin Development Sdn Bhd v Datin Peggy Taylor [1985] 1 MLJ 121; [1984] 2 CLJ 17; [1984] 1 CLJ (Rep) 403, FC

192

Westminster City Council v Greater London Council [1986] 2 All ER 278; [1986] AC 668; [1986] 2 WLR 807, HL

* Table of Legislation

-13

MALAYSIA

Administration of Muslim Law Enactment (Kedah)	
section 38	270
Administration of Muslim Law Enactment 1964 (Perlis)	
section 9	269
section 10	269
section 42	270
Administration of Muslim Law Enactment 1965 (Perak)	
section 39(1)	269
section 43	269
Civil Law Act 1956 (Act 67, Revised 1972)	189
section 3	189
section 5	189, 190
Communications and Multimedia Act 1998 (Act 588)	372
section 3	84

xxvi Constitutional Monarchy, Rule of Law and Good Governance

Communications and Multimedia	
Commission Act 1998 (Act 589)	372
Companies Act 1965 (Act 125)	129
section 181	136, 137
Computer Crimes Act 1997 (Act 563)	372
Constitution (Amendment) Act 1983 (Act A566)	
section 18	282
Constitution (Amendment) Act 1984 (Act A584)	387
Constitution (Amendment) Act 1988 (Act A704)	402
Constitution (Amendment) Act 1993 (Act A848)	388
Constitution of the State of Johore	
Article VII, Second Part	258
Article XIV, Second Part	272
Article LVIIA, First Part	268
Constitution of the State of Kedah	
Article 33B	268
Article 39	258
Article 44	272
Constitution of the State of Kelantan	
Article VI, First Part	268
Article XI, First Part	258
Article XXVIII, First Part	272
Constitution of the State of Malacca	
Article 5	268
Constitution of the State of Negeri Sembilan	
Article V	268
Article XL	258
Article XLVII	272

table of legislation xxvii

Constitution of the State of Pahang	
Article 6, Part II	258
Article 17	272
Article 24, Part 1	268
Constitution of the State of Penang	
Article 5	268
Constitution of the State of Perak	
Article VI, First Part	268
Article XVIII, First Part	258
Article XXVIII, First Part	272
Constitution of the State of Perlis	
Article 5	268
Article 39	258
Article 44	272
Constitution of the State of Sabah	
Article 5A	268
Constitution of the State of Sarawak	
Article 4A	268
Constitution of the State of Selangor	
Article XLVIII, Second Part	268
Article LIII(2)(a)	264
Article LV	258
Article LXI	272
Constitution of the State of Terengganu	
Article IV, First Part	268
Article XIX, First Part	258
Article XXVI, First Part	272

xxviii Constitutional Monarchy, Rule of Law and Good Governance

Courts of Judicature Act 1964 (Act 91,	
Reprint No 3 of 1988)	282
section 24(d), (e)	239
Courts of Judicature	
(Amendment) Act (Act A600)	282
Copyright Act 1987 (Act 332)	174, 372
Copyright (Amendment) Act 1997 (Act A994)	372
Criminal Procedure Code	
section 418A	106, 402
Digital Signature Act 1997 (Act 562)	372
Essential Powers (Kelantan) Act 1977	267
Essential (Security Cases) (Amendment) Regular	tions
1975 (PU(A) 362/75 amending PU(A) 320	(75) 282
Evidence Act 1950 (Act 56)	
section 123	76, 77, 78, 79, 305
section 124	76
section 162	76, 77, 78, 305
Federal Constitution	
Article 3(2)	268, 271
Article 3(3)	252, 268
Article 3(5)	268
Article 4(1)	17, 27
Article 5(1)	375
Article 6(1)	375
Article 8(1)	375

Federal Constitution (cont'd)	
Article 10(1)(a)	54
Article 10(4)	277
Article 34(1)	252
Article 34(3)	251
Article 38	252, 277, 390
Article 38(2)	390
Article 38(2)(c)	391, 395
Article 38(4)	386, 388, 391
Article 38(5)	391
Article 38(6)	274, 277
Article 39	401
Article 40(1A)	389, 398, 394, 395
Article 40(2)	258
Article 40(2)(b)	265
Article 42	273
Article 43(2)	259
Article 43(3)	107
Article 43(6)	26
Article 44	109, 272
Article 55(3)	265
Article 59(1)	27
Article 61(1), (3), (4)	110
Article 63(4)	277
Article 66	20, 401
Article 66(3)	272
Article 66(4)	272, 386, 389
Article 66(4A)	389

xxx Constitutional Monarchy, Rule of Law and Good Governance

Federal Constitution (cont'd)	
Article 67	111
Article 68(1)	111
Article 70	277
Article 71(1)	277
Article 72(4)	277
Article 105(1)	392
Article 107	111
Article 114	392
Article 121	33, 120, 400, 402, 403
Article 121(1)	401, 402
Article 122B	276, 392, 393, 396
Article 122B(1)	394
Article 124	27
Article 131	282
Article 131(4)	273
Article 140(4)	394
Article 150	386, 387
Article 152	277
Article 153	277
Article 159	21, 22, 30
Article 159(5)	277, 331, 393
Article 160	19
Article 182(2)	281
Part II	85
Part III	277
Schedule V, sections 3, 7	253
Schedule VIII, section 1	272

table of legislation xxxi

Federal Constitution (cont'd)	
Schedule VIII, section 1(2)(b)	265
Schedule VIII, section 1(2)(d), (e), (f), (g)	259
Schedule VIII, section 1A	389
Schedule VIII, section 2A	389
Schedule VIII, section 19A(i)	252
Human Rights Commission of Malaysia Act 1999 (Act 597 section 2) 331
Internal Security Act 1960 (Act 82)	84
Islamic Family Law (Federal Territories) Act 1984	
(Act 303)	323
Law Reform (Marriage & Divorce) Act 1976	
(Act 164)	322
Limitation Act 1953 (Act 255, Revised 1981)	186
Members of Parliament (Remuneration) Act 1980	
(Act 237)	114
Mental Disorders Ordinance 1952	239
National Language Acts of 1963 and 1967	
(Act 32, Revised 1971)	323
Official Secrets Act 1972 (Act 88)	55, 61, 84
Printing Presses and Publications Act 1984 (Act 301)	84

xxxii Constitutional Monarchy, Rule of Law and Good Governance

MALAYSIA (*cont'd*)

Registration of Engineers Act 1967	
(Act 138, Revised 1974)	180, 185
section 7	180
section 10A	183
section 25	180
Registration of Engineers (Amendment) Act 1987	
(Act A662)	180, 185
Securities Industries Act 1983 (Act 280)	129
Securities Industry (Central Depositories) Act 1991	
(Act 453)	129, 139
Sedition Act 1948 (Act 15)	55, 84
Telemedicine Act 1997 (Act 564)	372
Universities and University Colleges Act 1971	352

AUSTRALIA

Freedom of Information	Act 1982	66

66

CANADA

Access to Information Act 1982	
--------------------------------	--

table of legislation xxxiii

NEW ZEALAND

Official Information Act 1982 66

SINGAPORE

Companies Act	320
Legal Profession Act (Cap 217) section 18	182
Professional Engineers Act (Cap 225)	181
Securities Industry Act 1986	320

UNITED STATES OF AMERICA

Freedom of Information Act 1966	66
Computer Fraud and Abuse Act 1986	139

UNITED KINGDOM

Computer Misuse Act 1990	143
--------------------------	-----

xxxiv Constitutional Monarchy, Rule of Law and Good Governance

UNITED KINGDOM (*cont'd*)

Data Protection Act 1984	84
Data Protection Act 1998	84
Freedom of Information Act 2000	83
Official Secrets Act 1889	60
Official Secrets Act 1911	60
section 2	83
Official Secrets Act 1989	83
Supply of Goods and Services Act 1982	
section 13	188

TREATIES

United Nations Declaration of Women's Rights 1948	
Article 16	228

Biography of His Royal Highness Sultan Azlan Shah

- 13-

Sultan Azlan Shah 7

Judge, Ruler, Monarch	11
Education	35
Judicial Career	47
Contribution to Higher Education in Malaysia	87
National and International Recognition	97
The Sultan Azlan Shah Law Lecture Series	123
Sultan Azlan Shah Scholarships and Awards	149
As Royal Patron	169
The Royal Family	215
What Others Say	
Tun Hussein Onn	247
Tun Mohamed Suffian	285
Professor JC Smith	307


* Introduction

B

is Royal Highness's contribution to the development of Malaysian law is often traced to the large body of judgments delivered by him during his tenure, of some 20 years, in the Malaysian judiciary.¹ The publication of this volume stands as a testimony to His Royal Highness's contribution to the development of Malaysian law in an extra-judicial capacity.

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As a Judge, Chief Justice and Lord President of the then Federal Court, and subsequently as the Sultan of Perak and the King of Malaysia, His Royal Highness Sultan Azlan Shah was called upon on numerous occasions to deliver public lectures or speeches. Though many of these were to audiences that were predominantly from the legal fraternity, His Royal Highness often also addressed other professionals, organisations and institutions.

1 See Judgments of HRH Sultan Azlan Shah with Commentary, edited by Visu Sinnadurai, Professional Law Books, Kuala Lumpur, 1986.

As the various chapters contained in this book will indicate, His Royal Highness expressed his opinion on a wide variety of issues related to law. Whatever the occasion, and whoever the audience, His Royal Highness never failed to address at least one of the following issues: the proper execution of duties and responsibilities in accordance with law by all concerned, be it King, Ruler, government, politicians, judges or professionals; the independence of the judiciary; checks and balances against the excessive use of powers; and the need for transparency. Hence the title *Constitutional Monarchy, Rule of Law and Good Governance* is merely an attempt to trace some of the major themes found in the lectures, essays and speeches ("lectures" hereafter) compiled in this volume. In each of these lectures, one can readily discern His Royal Highness's concern, commitment and passion for justice, truth, the proper exercise of powers and due respect for the Rule of Law.

Good governance

The promotion of the Rule of Law, together with transparency, accountability and equity, amongst others, are the attributes of good governance. His Royal Highness discusses the workings of these attributes in society in one of his early lectures, *The Right to Know*,² boldly advocating the need for the right to know; for more transparency, particularly of executive and administrative actions; for the freedom of the press; and the need for legislation, similar to the Freedom of Information Acts in other Commonwealth countries.

The Rule of Law is thus, in His Royal Highness's view, a cardinal pillar of good governance which entails equal protection

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introduction

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for all citizens, including against arbitrary state action, and ensures that all citizens are subject to law. Respect for the Rule of Law and human rights are, after all, a *sine qua non* for democracy and good governance. Nowhere is this more clearly seen than His Royal Highness's lectures touching upon the Rule of Law and constitutional supremacy.

Rule of Law and Constitutional Supremacy

The Federal Constitution declares that the Constitution is the supreme law of the country and spells out the powers and limits of each organ of the government and the other constitutional institutions. But what does constitutional supremacy really mean? His Royal Highness in his lecture on *Supremacy of Law in Malaysia*³ answers this question clearly:

Supremacy of law is thus seen as a noble principle and a yardstick by which government acts can be evaluated to ascertain whether they conform to those various important democratic values enshrined in the written Constitution.

The Rule of Law is deeply embedded in our Constitution. His Royal Highness constantly emphasised the need to recognise the importance of the Rule of Law and the sanctity of the Constitution. In the lecture, *Checks and Balances in a Constitutional Democracy*,⁴ he eruditely presents the basic principles governing the restraints upon the abuse of power, be it that of the executive, legislature, or the judiciary. What he once said in a judgment of the Federal Court is now regarded as the *locus classicus* on the matter: "Every legal power must have legal limits ..."⁵ The same principles are

3 Chapter 1.

4 Chapter 5.

5

Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC, at 148, quoted in chapters 1 and 12, at pages 29 and 331 respectively.

6 Chapter 4.

4

7

See chapter 2, *Climates* of Freedom, and the speech "Evolving a Malaysian Nation" in chapter 12, *The Legal Profession and Legal Practice*.

8

Per Raja Azlan Shah Ag LP in Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC at 32.

9 Chapter 2, at page 44.

10 [1977] 2 MLJ 187, FC at 188.

11 Referred to in chapter 1, at page 16.

12 Chapter 4.

13 Chapter 2. further adumbrated in *Parliamentary Democracy*,⁶ where His Royal Highness reiterates: "The mandate to govern is distinct from any mandate to make arbitrary decisions."

To His Royal Highness, the Federal Constitution is a special document that incorporates the unique features of the Malaysian society. At the time it was drafted, there was active participation by all members of the Malaysian people—the Rulers, the leading Malay political party, with representations from the other ethnic groups. In short, it was a document which spelt out the aspirations of all Malaysians, irrespective of status, class, race or religion.⁷

His Royal Highness views the Constitution as sacrosanct and should, therefore, not be tampered with freely. He once observed: "the constitution is a living piece of legislation".⁸ Again, in *Climates of Freedom*⁹ he observes: "Imperfect as our Constitution may be, it represents basic ideals to which we must hold fast."

In the Federal Court decision in *Loh Kooi Choon v Government* of Malaysia¹⁰ he said: "The Constitution is not a mere collection of pious platitudes ... it is the supreme law of the land."¹¹ In the lecture on *Parliamentary Democracy*¹² he observes: "Constitutional amendments ought not to be made too frequently. Parliamentary government envisages constitutionalism. Constitutional restraints on the exercise of power must not be diluted unduly."

At the same time, His Royal Highness is mindful that with time and changes in society, the Constitution must change. In *Climates of Freedom*,¹³ he explores the limits within which amendments should be made to take into account the changes in the society. He observes: "Amendment should not solely be in reaction to developments, such as judicial decisions thought to

5

be unfavourable, but should be founded on a positive approach,

reviewing the philosophy behind the principles of the Constitution and the social objectives that the Constitution is designed to serve."

The independence of the judiciary

His Royal Highness, having served on the Bench, and having once been the Head of the judiciary, not surprisingly views the judiciary as the stalwart of any democratic form of government. Whether a country subscribes to the Rule of Law or democratic principles is always measured by the status of the judiciary. Without a free and independent judiciary, there can be no freedom, liberty, accountability, or equality, all of which, as stated earlier, are yardsticks of good governance and the Rule of Law. Whilst elected members of the government serve for a limited period of time, the members of the judiciary remain for a much longer period as their tenure in office is protected by the Constitution. It is the one organ of the government in which all citizens, irrespective of political ideologies, or beliefs, place their faith.

In several lectures, His Royal Highness emphasises the importance of the judiciary, the role of the judges as guardians of the Constitution, and as the final arbiter of disputes in a fair and just manner. The creative and interpretative role of the judges in developing and shaping the laws, are often stressed in these lectures. This, His Royal Highness points out, can only be achieved by judges writing judgments in all cases.

It is this theme that is encapsulated in the several speeches contained in chapter 11 on *The Judiciary: The Role of Judges*. Just as

he had done in the judgments he delivered as a judge, these speeches also reflect the commitment and passion he has for the quest for justice: to seek the truth, and to arrive at a decision without fear or favour. These speeches display a deep and passionate desire on his part to ensure that the independence of the judiciary is always safeguarded.

Constitutional monarchy

Like many countries in the world—Britain, Japan, Jordan, Thailand—Malaysia has a constitutional monarchy. Constitutional monarchy is a system of government in which the monarch shares powers with a constitutionally elected government. The constitution in all constitutional democracies then allocates the power of the government to the three organs of government: the executive, the legislature and the judiciary. The monarch is the symbolic head, or the de facto Head of the State, and the Prime Minister and his Cabinet of Ministers govern the country. Two fundamental principles apply to all constitutional monarchs:

Constitutional monarchy means that the highest office in the land is above politics. It denies ultimate power to politicians and helps to keep political power under check. "Constitutional monarchs are the impartial umpires."

Secondly, though the exact powers of the constitutional monarchs are circumscribed by certain conventions, they play a significant role in providing advice to the government. Walter Bagehot, the leading writer on *The English Constitution*,¹⁴ put it this way:

6

introduction

[T]he sovereign has, under a constitutional monarchy such as ours, three rights—the right to be consulted, the right to encourage, the right to warn. And a king of great sense and sagacity would want no others.

Although Malaysia is a constitutional monarchy with a constitutional democracy, it has a unique system of monarchy. There are nine Rulers, one of whom becomes the King for a period of five years under a rotation system. The Rulers are Sovereigns in their respective States, but collectively play an important role as the Conference of Rulers under the Federal Constitution. The Federal Constitution spells out the powers of the King and the Conference of Rulers, whereas the various State Constitutions deal with the powers of the respective Rulers.

The Federal and State Constitutions prescribe the powers of the Yang di-Pertuan Agong and the Rulers. It is the exercise of these powers under the Federal and State Constitutions that makes the Yang di-Pertuan Agong and the Rulers constitutional monarchs.

Like all powers, the parameters of the powers of the monarchy have to be defined. This, our Federal and State Constitutions attempt to do. The Rulers, and collectively as the Conference of Rulers, retain certain constitutional powers. The scope of these powers, as spelt out in the Constitutions, has not always been clearly defined, and sometimes this has led to misunderstanding. The chapters on *The Role of Constitutional Rulers*,¹⁵ and *The Role of Constitutional Rulers and the Judiciary: Revisited*¹⁶ provide an incisive analysis of the precise powers of and limits on the Rulers, and the delicate balance between the Rulers and the Executive.

15 Chapter 10.

16 Postscript.

17 UNDP: Programme on the Governance in the Arab Region.

18 Chapter 6.

8

19 Chapter 7.

20 Chapter 8.

21 Chapter 9.

22 Chapter 12.

23 Chapter 13.

24 Chapter 14.

Corporate governance and professional ethics

As is often said, governance is the exercise of political, economic and administrative authority to manage a country's affairs at all levels. The government is one of the actors in governance. Governance transcends all levels of the society, including the private sector, civil servants, professionals and civil society. It is the combined effects of all these actors that build a truly democratic and just society.¹⁷ Corporate governance and professional ethics are facets of good governance.

Where the opportunity arose, His Royal Highness emphasised the importance of corporate governance: *Corporate Activity: Law and Ethics*,¹⁸ and *Corporate Misconduct: Crime and Accountability.*¹⁹ The need for self-regulation in corporate activities; moral and ethical issues confronting directors of companies; and white collar crimes, such as insider trading, oppression of minority shareholders rights, and computer crimes are raised in these two chapters.

On a similar vein, the issues of professional ethics are addressed in *Engineers and the Law*;²⁰ *Medicine, Ethics and the Law*;²¹ and to members of the legal profession in *The Legal Profession and Legal Practice*.²² His Royal Highness's commitment to these principles is similarly reflected in the many speeches that he delivered to students at the institutes of higher learning, particularly, to law students. The need to inculcate young minds with good values and morals, and the need for them to be ever conscious of their future role as exemplary leaders, are reflected in the speeches contained in *Law and Globalisation: Some Perspectives*²³ and *The New Millennium: Challenges and Responsibilities.*²⁴

Sultan Azlan Shah Judge * Ruler * Monarch

19



1965	Elevated as Judge of the High Court, Malaya
1973	Appointed as Federal Court Judge, Malaysia
1979	Appointed as Chief Justice of the High Court, Malaya
1982	Appointed as Lord President (now renamed Chief Justice)
	of the Federal Court, Malaysia
1984	Ascended to the Throne as the 34th Sultan of the State of Perak
1984–1989	Timbalan Yang di-Pertuan Agong of Malaysia (Deputy King of Malaysia)
1989–1994	The Ninth Yang di-Pertuan Agong of Malaysia (King of Malaysia)



" The Rule of Law means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by the law and be subject to it.

The ideal of the Rule of Law in this sense is often expressed by the phrase 'government by law and not by men'. "

—**HRH Sultan Azlan Shah** Supremacy of Law in Malaysia

Supremacy of Law in Malaysia

Tunku Abdul Rahman Lecture XI Malaysian Institute of Management Kuala Lumpur, 23 November 1984

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uring the past decade, we have seen people in high places being convicted of criminal offences under our law. These people thought they could flout the law with impunity.

They were mistaken.

In the present decade, the situation is no different. Abuse of power occurs at all levels of society. It is a part of life today. The extent to which that abuse has been held to tolerable levels is because we have an independent judiciary which can assert the Rule of Law over these people.

The Rule of Law means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrow sense, that the government shall be ruled by the law and be subject to it. The ideal of the Rule of Law in

this sense is often expressed by the phrase "government by law and not by men".

Let me mention the independence of the judiciary very briefly, lest we forget its significance. The existence of courts and judges in every ordered society proves nothing: it is their quality, their independence, and their powers which matter. Attacks on the independence of the judiciary have been numerous. In some countries, such as Chile and Uruguay, the jurisdiction of the ordinary civilian courts has been curtailed so that they are unable to hear certain classes of criminal offences, and they are deprived of jurisdiction to hear challenges to government decrees or actions. Certain remedies such as writs of habeas corpus are made unavailable. Special courts and military tribunals are created and their jurisdiction supplants that of the ordinary civilian courts.

The existence of courts and judges in every ordered society proves nothing: it is their quality, their independence, and their powers which matter.

> At times, judges are harassed for rendering decisions unpopular with the government. In Pakistan, the judges of the High Court of Baluchistan received notice of tax investigations ten days after the court had unanimously declared of no effect several government decrees which radically altered the system of justice. In the Central African Republic three examining magistrates were arrested because they ordered the release of several pre-trial detainees after reviewing their files and determining that the evidence was insufficient to justify their continued detention.¹

See (1980) 10 CLB 1370.

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The rules concerning the independence of the judiciary—the method of appointing judges, their security of tenure, the way of fixing their salaries and other conditions of service—are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the Rule of Law.

> The rules concerning the independence of the judiciary are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law. They are, therefore, essential for the preservation of the Rule of Law.

In Malaysia, fortunately, we still have wise men around us today who subscribe to the Rule of Law. Without it, to my mind, civilised life would be very soon reduced to a state of chaos.

However, to those men in high places let me use Thomas Fuller's words spoken over 300 years ago:

Be you ever so high, the law is above you.

It is these factors which provoked me to choose "supremacy of the law" as my subject in this Tunku Abdul Rahman Lecture XI.

While sitting on the Federal Court I have myself had occasion to pronounce on the consequences of supremacy of the law. In delivering the judgment of the court in the case of *Loh Kooi Choon v Government of Malaysia*,² I stated that:

2 [1977] 2 MLJ 187, FC at 188.

16

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 men.

And if I may add, that right to be governed by laws and not by arbitrary officials is the most precious right of democracy—the right to reasonable, definite and proclaimed standards which we as citizens can invoke against both malevolence and caprice.

That right to be governed by laws and not by arbitrary officials is the most precious right of democracy—the right to reasonable, definite and proclaimed standards which we as citizens can invoke against both malevolence and caprice.

> The term "supremacy of law" was first introduced by Professor Dicey, one of the most outstanding constitutional lawyers. Dicey in his *Introduction to the Study of the Law of the Constitution* in 1885 explained the concept of the Rule of Law to mean:

(1) the absolute supremacy or predominance of the law as opposed to arbitrary exercise of power;

- (2) the fact that every man is subject to the ordinary law of the country; and
- (3) a system where the principles of the constitution pertaining to personal liberties are a result of judicial decisions determining the rights of private persons in particular cases brought before the courts.

Dicey, when he was referring to this third aspect was of course, referring to the British Constitution which is an unwritten constitution and not to a written constitution like the Malaysian Constitution.

> The term "supremacy of law" is also sometimes used in contradistinction to supremacy of Parliament.

The term "supremacy of law" is also sometimes used in contradistinction to supremacy of Parliament. In countries like England, where as pointed out earlier, there is no written constitution, it is a fundamental principle of English constitutional law that the British Parliament is supreme and that it may do anything it wishes. Parliament, therefore, may pass any law it so wishes, so long as it conforms to the necessary legislative procedure.

However, in Malaysia, where there is a written constitution, the Constitution itself provides that it is the Constitution, and not Parliament, which is supreme. Article 4(1) of the Federal Constitution provides:

This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Tun Suffian echoed this Article as follows:

The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures is limited by the Constitution, and they cannot make any law they please.³

In my lecture this evening, I shall use the term "supremacy of law" to mean that the Constitution as law is the supreme authority in the country. This would mean that as enshrined in the Malaysian Constitution, it is supreme over Parliament, the executive or even the judiciary.

Written laws have not only bestowed power upon institutions and individuals charged with duties under our system of government, but in so doing have explicitly laid down limits upon the exercise of any such power.

> It also needs to be emphasised that written laws, in particular the provisions enshrined in the Constitution, have not only bestowed power upon institutions and individuals charged with duties under our system of government, but in so doing have explicitly laid down limits upon the exercise of any such power.

> Whereas Parliament is empowered to enact Federal legislation, it cannot transgress the boundaries of its own defined jurisdiction. It is quite powerless, for example, to make laws on matters which have clearly been reserved for the State legislatures. Neither can Parliament make any laws that contravene the fundamental rights guaranteed for citizens and other individuals.

See Ah Thian v Government of Malaysia [1976] 2 MLJ 112, FC at 113.

When one talks of law in Malaysia one tends to refer to statute law, that is laws which have been passed by Parliament. But this is only one aspect of law. Law as defined by the Federal Constitution is much broader. Article 160 defines law to include:

... written law, the common law of England insofar as it is applicable in Malaysia and any custom or usage having the force of law.

Written law includes the Federal Constitution and the Constitutions of the various States of the Federation.

Sometimes judges in interpreting a statute law in a particular manner may, or may not, give effect to the true intention of Parliament. In such cases, it is not unknown for Parliament to subsequently amend the written law so as to override case law.

Therefore, the term "law" is capable of a much wider meaning than merely statute law. There is, in fact, one other source of law which is often overlooked by the layman. This is case law or judge-made law. Courts in countries which have their origin in the English system follow the doctrine of precedent. It is a basic principle of this doctrine that like cases should be decided alike. Therefore a judge will decide a particular case in the same way as that in which a similar case was decided by another judge in an earlier case. Therefore, a decision made by a judge in a particular case becomes law in the sense that it has binding effect. Sometimes, under the guise of interpreting an earlier case, a judge may give his own interpretation to it and then make new law. Some branches of our law are almost entirely the product of the decisions of the judge. This is particularly true, for example, with the law of torts.

It should also be pointed out in this connection that sometimes judges in interpreting a statute law in a particular manner may, or may not, give effect to the true intention of Parliament. In such cases, it is not unknown for Parliament to subsequently amend the written law so as to override case law.

The role of the judiciary is to interpret the law and not to usurp the function of Parliament by making laws. It is ultimately Parliament which has the major power to make laws.

> The importance of case law should not, however, be overemphasised. After all, the role of the judiciary is to interpret the law and not to usurp the function of Parliament by making laws. It should be emphasised that it is ultimately Parliament which has the major power to make laws.

> Over the recent years, with more and more laws being passed by Parliament, the role of the judge as a law-maker is gradually being reduced. When we talk of law, we necessarily mean a law that has been passed by Parliament in accordance with the provisions of the Federal Constitution. Hence the term "supremacy of law" broadly read refers first, to the Constitution itself as a higher law and second, to such laws which conform with the Constitution.

> The procedure for making laws is spelt out in detail by the Federal Constitution. Article 66 provides that the power to make laws shall be exercised by Bills passed by the Dewan Rakyat and the Dewan Negara and assented to by the Yang di-Pertuan Agong. A Bill when passed by both Houses is presented to the Yang di-Pertuan Agong for his assent. Before the recent amendment to

the Constitution in 1984,⁴ it was not expressly provided that the Agong must signify his assent to all Bills presented to him. With this amendment, it is now provided that the Yang di-Pertuan Agong shall, within 30 days after a Bill is presented to him, either assent to the Bill or return the Bill to the House with a statement of the reasons for his objection to the Bill. Where such a Bill has been returned to either House of Parliament, and it is again passed by both Houses, with or without any amendments, the Bill shall again be presented to the Yang di-Pertuan Agong for his assent and he shall then give his assent within 30 days.

The Federal Constitution sets out in the Ninth Schedule, the various matters which the Federal Parliament and the State Legislative Assemblies may legislate upon. Article 159 also provides for a more stringent procedure to be complied with for any amendment of the Constitution itself. On certain matters affecting the Conference of Rulers or the National Language, for example, no amendment may be made to the Constitution without the consent of the Conference of Rulers.

> Parliament is duty-bound to ensure that the Constitution is dynamic in nature, and does not remain static in the face of social change and progress.

The various State Constitutions also make provisions for the exercise of legislative powers by the respective State Legislative Assemblies. No Bill passed by a State Legislative Assembly shall become the law of that State unless it has been assented to by the Ruler of that State.⁵

Editor's note: See Postscript, below.

5 *Editor's note:* See Postscript, below.

However, it cannot be denied that Parliament can make changes to the written provisions of the Federal Constitution by exercising the power of amendment under Article 159. Such power has in fact been entrusted to it as the supreme law-making authority in the country, in order only to ensure that our supreme law keeps up with the ever-changing needs of the people and the times. Parliament is thus duty-bound to ensure that the Constitution is dynamic in nature, and does not remain static in the face of social change and progress.

Yet even in the exercise of this significant socio-political power, Parliament's freedom to act merely on its own whims and fancies has been curbed. The framers of the Federal Constitution in their wisdom have outlined stringent procedures that cannot but be followed. Though it may seem rather easy to abide by these procedures, that fact does not derogate from the principle that the amendment process is quite distinct from the ordinary legislative process. Perhaps that is also why our Constitution has so far been amended at an average of only less than once per year since Independence. Changes that have thus far been introduced cannot at all be said to have drastically altered the various basic features of our system of government.⁶

Constitutional conventions serve to ensure that actions undertaken are not just lawful according to the letter of the supreme law, but are also practical, viable and have the support of society in general.

> So the executive itself cannot just act as it pleases, for its own powers are also subject to precise restrictions. Even where limits

6 *Editor's note:* See further notes at the end of chapter.

23

do not appear to be sufficiently clear, there are rules of unwritten law which dictate the courses of action that may be followed. These rules are called constitutional conventions. They serve to ensure that actions undertaken are not just lawful according to the letter of the supreme law, but are also practical, viable and have the support of society in general. That point was perhaps illustrated by events in late 1983 when controversies raged throughout this land over the propriety of certain proposals made by the government [pertaining to certain amendments to the Federal Constitution]. Ultimately the outcome was one which met with the approval of all parties affected, reflecting the wishes of the people.⁷

> Supremacy of law is a noble principle and a yardstick by which government acts can be evaluated to ascertain whether they conform to those various, important democratic values enshrined in the written Constitution.

So the spirit of the Constitution and of laws need also to be given attention, especially in a country aspiring towards democracy. Power that is held in the hands of some and the laws that enable them to act in exercise of such power all ultimately depend on acceptance by the general public. After all, the powers wielded by representatives are based on the final authority of the people. To quote from the celebrated American case of *Marbury v Madison*⁸ Chief Justice Marshal's words ring true in many a country:

[It is] ... the people [who] have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness ... [this] ... is the basis on which the whole [social] fabric has been erected. *Editor's note:* See Postscript, below.

8 (1803) 5 US (1 Cranch) 137.

Properly understood, a Constitution consists not of static laws, but of laws reflecting a certain agreed content chosen by the people. In our system of government, that content includes chosen democratic values.

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 principal actors in the governmental process view and implement it.

> Supremacy of law is thus seen as a noble principle and a yardstick by which government acts can be evaluated to ascertain whether they conform to those various, important democratic values enshrined in the written Constitution. As promulgated, these values are sometimes necessarily skeletal, since the Constitution 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 principal 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.

> It is thus of utmost importance that a strong political tradition supportive of these values be inculcated. Where such political tradition lies deeply embedded in a particular society, perhaps nurtured through centuries of political development, the principle of supremacy of law receives its due accolade in actuality.

Few countries, if at all, can claim to reach this level of achievement. In most countries, the Constitution retains its function as a primary force in developing a mature, democratic society founded on justice through law.

By way of digression, let me relate to you a little bit of English constitutional history.

In the old days the Kings of England exercised supreme executive power in the land. The courts were historically the King's courts and the judges were always the King's judges. The King appointed them and the King at one time could remove them at his pleasure. On one occasion King James I summoned all the judges before him and told them that he proposed to take any case he pleased away from the judges for decision and to try them himself. But Chief Justice Sir Edward Coke⁹ told the King that he had no power to do so, and that all cases ought to be determined in a Court of Justice and according to the law and custom of the realm. King James replied:

I always thought and I have often heard the boast that your English law is founded upon reason. If that be so, why have not I and others reason as well as you the Judges?

The Chief Justice replied:

True it is, please your Majesty, that God had endowed your Majesty with excellent science as well as great gifts of nature; but your Majesty will allow me to say so, with all reverence, that you are not learned in the laws of this your realm of England ... which is an art which requires long study and experience before that a man can attain to the cognizance of it. The law is the golden met-wand and

9

measure to try the causes of your Majesty's subjects, and it is by that law that your Majesty is protected in safety and peace.

King James, in a great rage, said:

Then I am to be under the law—which it is treason to affirm.

The Chief Justice replied echoing the words of Bracton¹⁰ that the King is under no man, but under God and the law. His refusal to place King James I above the law declared the independence of judges from royal dictation.

I have told you this piece of history because it has its modern counterpart. Whilst it had served as a limitation on King James, it has come to stand for a limitation on Rulers and ministers alike. That is expressed in the oaths and affirmations taken by the various participants in the governmental process in Malaysia.

His Majesty the Yang di-Pertuan Agong, in assuming office, subscribes to the oath listed in the Fourth Schedule of the Federal Constitution, whereby His Majesty "solemnly and truly declare that We shall justly and faithfully perform (carry out) our duties in the administration of Malaysia in accordance with its laws and Constitution".

Under Article 43(6), government ministers have to take and subscribe in the presence of the Yang di-Pertuan Agong the oath of office listed in the Sixth Schedule. Ministers swear or affirm that they "will faithfully discharge the duties of ... office to the best of [their] ability", to "bear true faith and allegiance to Malaysia" and to "preserve, protect and defend its Constitution".

10 Editor's note: Henry de Bracton, English Judge and writer on English law. See Bracton's Laws and Customs of England 1240-1260.

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The oath to "preserve", "protect" and "defend" the Constitution of Malaysia has also to be taken by Members of Parliament under Article 59(1).

Under Article 124, Judges of the Federal Court (Supreme Court) and the High Court have likewise to subscribe to the same form of oath.¹¹ Properly speaking, all the major participants in government are placed in the role of "guardians of the Constitution", but a special pride of place is reposed in the judiciary by the very nature of the judicial function.

Basic to the doctrine of separation of powers is the elaborate system of checks and balances whereby it is ensured that power is not concentrated in any one body, but dispersed and mutually checked.

Based on the doctrine of separation of powers, the legislature makes the law, the executive administers the law, and the judiciary adjudicates on disputes which may result from the first and second processes. Basic to this doctrine is the elaborate system of checks and balances whereby it is ensured that power is not concentrated in any one body, but dispersed and mutually checked. Thus, for instance, power reposed in the legislature is moderated by the power placed in the judiciary, and vice versa.

The Constitution of Malaysia grants the power of judicial review¹² to our courts. The courts are enabled to control and correct laws passed by Parliament as well as actions undertaken by the executive if such laws and actions violate the Federal Constitution. Article 4(1) is clear on this general power in relation to laws passed

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Editor's note: Now the Judges of the Court of Appeal also.

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Editor's note: The expression "judicial review" in this context should not be confused with the power of the courts to review administrative actions in administrative law. See also further notes at the end of chapter.

by Parliament. Where a law passed after Merdeka Day is inconsistent with any provision of the Constitution, that law is void to the extent of the inconsistency.

The courts are enabled to control and correct laws passed by Parliament as well as actions undertaken by the executive if such laws and actions violate the Federal Constitution.

> The judiciary is singled out as the organ of government with this power of correction. As Chief Justice Marshall of the United States Supreme Court once explained it, the power of judicial review flows from the province and function of the courts to interpret the law, and decide what it is on a given point. Where an Act of Parliament is clearly repugnant to the Constitution, the choice is between upholding the Act or the Constitution. Under our Federal Constitution, the choice is made plain: the Act is void.

> It has been said that in conducting the business of democratic government the easiest way is seldom the best way. But it is a regrettable truth that whilst politicians in opposition loudly clamour for the best way, politicians in power seem irresistibly drawn to the easiest way. In pursuing the easiest way to govern they may act in a manner violative of the Constitution. This is inevitable in a system of government such as ours where the intervention of the State into the lives of the citizen can only be described as massive. The good faith of the democratic system to represent the aspirations of its electorate is not in issue, but its execution is. The power of judicial review can also be called in aid to invalidate excess of executive action.

With regard to excess of executive power I had occasion to say in Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd:¹³

Every legal power must have legal limits, otherwise there is dictatorship ...; where it is wrongly exercised, it becomes the duty of the courts to intervene. 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 influence are exercised in accordance with law ...

> Where a law passed after Merdeka Day is inconsistent with any provision of the Constitution, that law is void to the extent of the inconsistency. The judiciary is singled out as the organ of government with the power of correction.

The power of judicial review is not a feature which is invariably found in all countries professing a written constitution. Even where judicial review exists, one can detect differences in approach between countries. Occasionally, too, this power of judicial review is misunderstood and, where this is so, can only lead to a dislocation of the balance of moderating influences which is supposed to pervade the Constitution.

Even though the courts in Malaysia have the power to challenge laws passed by Parliament, they are not thereby positioning themselves in active competition with that representative body. The

13 [1979] 1 MLJ 135, FC at 148.

legislature, and in particular the Dewan Rakyat, embodies the majoritarian principle, as it should surely be in a democracy. The Dewan Rakyat represents the wishes of the people through their elected representatives, and ordinarily laws passed through proper procedure by a majority vote have to be accorded due recognition and validity.

Democracy means more than just simple majority rule, for even the majority has to abide by the dictates of the Constitution. There are some matters, notably fundamental rights, which are regarded as so paramount that they ought not be varied merely by the transient wishes of a majority in Parliament.

> Nevertheless, democracy means more than just simple majority rule, for even the majority has to abide by the dictates of the Constitution. There are some matters, notably fundamental rights, which are regarded as so paramount that they ought not be varied merely by the transient wishes of a majority in Parliament. This qualification on the majoritarian principle is indeed recognised by the amendment procedure prescribed under Article 159, under which in general a two-thirds majority of the total number of members of each House is required. Courts, following from their function to declare what the law is, merely test the legality of an Act of Parliament when they exercise review power, and are thus reinforcing the supremacy of law and, ultimately, the democratic ideal. Upon this mantle of legality, difficult problems needing definitive judicial resolution will arise.

> Over the last 27 years since Independence, Malaysian courts have faced up to the challenge posed by review power, always

31

declining to judge on the merits of legislative decisions and have confined themselves to questions of legality. The merits of such decisions as to whether the mandatory death penalty ought to be imposed for drug trafficking, or unlawful possession of firearms or ammunition; whether preventive detention laws ought to be upheld; whether emergency laws ought to continue in force; and so forth, are best left to Parliament. Ultimately, the electorate through the power of the ballot box is the final authority, not the courts of law. The harshness or otherwise of laws is beyond the jurisdiction of the courts, unless a question of legality arises. As is sometimes said, just as politicians ought not be judges, so too judges ought not be politicians.

> Parliamentarians, politicians and judges have to act in accordance with the Constitution and are subject to the limitations placed on their actions by law, since ours is a government of laws, not men.

As I have said in the Sri Lempah case:¹⁴

Government by judges would be regarded as an usurpation of legislative authority.

Nevertheless, parliamentarians, politicians and judges are all expected to take their cue from the Constitution. They have to act in accordance with the Constitution and are subject to the limitations placed on their actions by law, since ours is a government of laws, not men.

In the final analysis, when we make determinations on supremacy of laws, we can never forget that the various injunctions

and commands are but man-made ones. Right or wrong, good or evil—these value decisions are as perceived through man's own faculties of reasoning. They are indeed subject to man's strengths, and also his innate weaknesses. They may perhaps be based on correct moral foundations, or otherwise. Man can therefore not lay claim to perfection, and ought therefore to constantly seek guidance from some higher source of universal and immutable spiritual values.

Man is and always remains a mere trustee of God's will. Should that truth be forgotten, laws and legal systems would always fail to approach the ideal, the perfect and the best for mankind.

> That is undoubtedly an area in which man continuously seeks and aspires to achieve—to be in consonance with the laws of nature and the revelations of the Almighty. For the Muslim faithful, as with followers of many other major religions, man is and always remains a mere trustee of God's will. Should that truth be forgotten, laws and legal systems would always fail to approach the ideal, the perfect and the best for mankind.

Editor's notes

Amendments to the Constitution: There have been a number of amendments to the Federal Constitution since this lecture was delivered. Some of the major changes that were introduced by these amendments include: (i) the removal of the immunities of the

Rulers; (ii) the abolition of appeals to the Privy Council; (iii) the establishment of the new Court of Appeal; (iv) the establishment of the Special Court; and (v) the removal of the provision relating to judicial powers in Article 121. Some of these are dealt with in the notes at the end of chapter 10 and the Postscript, below.

For a full list of the Constitutional Amendment Acts, and the various provisions of the Constitution which have been amended from 31 August 1957 to August 2003, see *Reprint of the Federal Constitution*, 2003, published under the authority of the Commissioner of Law Revision, Malaysia.

Judicial review of unconstitutional laws: This power of judicial review to declare laws to be unconstitutional if they conflict with the Constitution may be said to be similar to the powers of the United States Supreme Court. See also chapter 5, *Checks and Balances in a Constitutional Democracy*, below.



* Equality

"There is only one kind of law in the country to which all citizens are amenable. With us, every citizen, irrespective of his official or social status, is under the same responsibility for every act done without legal justification.

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This equality of all in the eyes of the law minimises tyranny. "

---Raja Azlan Shah J (as he then was) Public Prosecutor v Tengku Mahmood Iskandar & Anor [1973] 1 MLJ 128, HC at 129

Sultan Azlan Shah



Education

is Royal Highness received his early education at the Government English School in Batu Gajah and at the Malay College in Kuala Kangsar. Thereafter, His Royal

Highness read law at the University of Nottingham and was conferred the degree of Bachelor of Laws in 1953. In the following year, His Royal Highness was called to the English Bar by the Honourable Society of Lincoln's Inn.



"There should be within the Constitution a resonance: the Constitution must be in harmony with existing law, yet vibrate with the demands of the humanity it is designed to serve. Not only in the rights it guarantees, but also in the institutions and offices it creates, there must be a consistency with the aspirations of all citizens. "

—**HRH Sultan Azlan Shah** *Climates of Freedom*

Climates of Freedom

Conference on the Malaysian Constitution University of Malaya Kuala Lumpur, 22 August 1987

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oday it is my pleasure to address you, to open a conference celebrating the thirtieth anniversary of the Malaysian Constitution. Three decades have passed since the colonial yoke was amicably cast off, and this country set out on the difficult path of independence. It is an auspicious moment, then, for us to look back, to assess our own position, and to seek to define our future objectives.

In order to do this, I should like to compare the climate of opinion in which independence was obtained with that obtaining at present, so that we may perhaps understand ourselves and our Constitution the better. Some of you will know (from my lecture at Universiti Sains Malaysia, on *The Right to Know* in December 1986)¹ that I have a passionate concern for that truth which is the object of the historian. It is this truth I seek to explore in endeavouring to

1 See chapter 3, below.

describe the climate of opinion in 1957: for it was in that climate that the Constitution was born.

Of course, that Constitution was not conjured up out of thin air. The Constitutional Commission was headed by that great judge, Lord Reid; it was given the task of outlining a draft constitution and it did more, and gave us a complete draft, one to a large extent derived from the Constitution of India.

Yet Malaysia (to use the term of our time) is not India. The constitutional history of Malaysia had different origins, and was subject to different pressures. We here were not unfamiliar with the principles of constitutional government—indeed, in the Malay States the traditional pattern of government was based upon seasoned concepts of sovereignty and we knew the wisdom of a division of the supreme power in the State. In Perak, over a hundred years ago, we had a State Council. The concept of federation here is almost a hundred years old. So the problems of 1957 lay, not in the creation of constitutional principles, but in their application to the circumstances of a mixed, democratic society: a society in which the Malays were, and remain, a dominant group, but within which are evolving other cultures, other races, all merging into one Malaysian nation.

"A nation is," to quote Disraeli, a great British Prime Minister,

a work of art and a work of time. A nation is gradually created by a variety of influences—the influence of original organisation, of climate, soil, religion, laws, customs, manners, extraordinary accidents and incidents in their history, and the individual character of their illustrious citizens. These influences create the nation—these form the national mind.²

The Spirit of Whiggism, 1836.
It is that national mind that is still in the course of formation. To create a sense of nationhood in 1957 was no easy task, considering that the problems of independence required for their resolution political skills of a high order.

I hope that it is not amiss for me to mention in this regard the statesmanship of two men in particular, both of them having personal knowledge of the difficulties of kingship, and both of them lawyers. I refer of course to Tunku Abdul Rahman, the first Prime Minister, and Tuanku Abdul Rahman, Yang di-Pertuan Besar of Negeri Sembilan. The latter was the first holder of the office of Yang di-Pertuan Agong, and, alas, died in office. Without their skills in administration, in understanding the structure of government, the complex psychologies of the various peoples of the Federation, and in particular the deep sense of history and tradition within the Malay community, independence and its first few years would not have been the happy period for all communities, that in fact it was.

Compromise was at the heart of this success. Moderation in demands, coupled with a mutual understanding of the situation of our neighbours: these made for an auspicious opening to our independence. There was an air of freedom within and around Government as energies, long suppressed under a colonial regime, were released, public works and institutions established. It was a time of great hope, great promise, and the wind seemed to be set fair for a safe voyage into the future.

Almost 12 years later, this idyll was shattered. Even now, we have not recovered from the trauma of that time — as witness the prohibition on the discussion of sensitive issues, embodied in an Emergency Ordinance of 1970. Yet out of the tragedy of May 13 emerged the Rukunegara, proclaimed by the Yang di-Pertuan

Agong on 31 August 1970. Greater unity: this was the theme, and it remains valid to this day. To maintain our democratic way of life, to use that as a foundation for the creation of a just society in which the wealth of the nation is equitably shared, and to ensure a liberal approach to the varied cultures and traditions of the unique mixture that constitutes modern Malaysian society: these were the objectives of the Rukunegara. That they remain valid is evidenced by the peace and harmony we have enjoyed since the terrible days of 1969. People of all races came together in friendship, the wounds of the past were healed, and we faced the future with a confidence based on the successful fashion in which we had overcome the troubles of the past. My regret is that the Constitution itself does not echo the philosophy of the Rukunegara. I know that our legislators are distrustful of grandiose declarations of policy which, all too often, mean little or nothing: yet something of the spirit of the Rukunegara could and should be implanted in our most important law.

Something of the spirit of the Rukunegara could and should be implanted in our most important law.

> An American poet, Whitman, said that "It is provided in the essence of things, that from any fruition of success, no matter what, shall come forth something to make a greater struggle necessary." This seems to be one of the laws of life, and one we should welcome. We should not rest on our laurels, but persevere constantly in furthering the ends so vividly illustrated in the Rukunegara.

> As I have observed before,³ "the justice of the common law will supply the omission of the legislature". This principle is true even in relation to the Constitution. Yet the common law is

3 Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152 at 154. effective only if the assistance of the judiciary can be invoked, for the judges are themselves powerless to initiate action. This defect, if defect it be, of the common law system means that the written law, and especially the Constitution itself, must be kept under constant review.

The common law is effective only if the assistance of the judiciary can be invoked, for the judges are themselves powerless to initiate action.

For there should be within the Constitution what I can only describe as a resonance: the Constitution must be in harmony with existing law, yet vibrate with the demands of the humanity it is designed to serve. Not only in the rights it guarantees, but also in the institutions and offices it creates, there must be a consistency with the aspirations of all citizens. When Tunku Abdul Rahman proclaimed our independence, he did it in the name of God, invoking the blessing of God on our country as "a sovereign, democratic and independent State, founded upon the principles of liberty and justice, and ever seeking the welfare and happiness of its people and the maintenance of a just peace among all nations". These are high ideals, and we must strive for them constantly.

This being so, the Government of the day as one of the guardians of the Constitution, but better equipped than the judiciary to keep it in good repair, should from time to time establish a well-informed and representative committee to review its operation. Amendment should not solely be in reaction to developments, such as judicial decisions thought to be unfavourable, but should be founded on a positive approach, reviewing the philosophy behind the principles of the Constitution and the social objectives that the Constitution is designed to serve. And I believe that the time

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has come for such a review, and that, in making it, the views of all individuals and organisations who desire to submit information or opinions should be invited. Such a move would release much of the tension within our society, and channel popular energies into fruitful and constructive channels.

The Constitution must be in harmony with existing law, yet vibrate with the demands of the humanity it is designed to serve.

We can look back, then, and see that independence brought political freedom, with all the heady excitement of the achievement of 30 years ago. Yet there is another aspect to independence, that of economic liberation, and this raises more complex and profound issues: issues so involved, indeed, that we can only hope to resolve them with the active support of our neighbours and others within the so-called Third World. A constitution can offer a solution to the problems of political independence, but it can do no more than create, and then be adapted to, the conditions in which economic liberation is possible: and on this economic front we have far to travel.

For, the future we and our children face is a difficult one. The problems posed by an expanding population, urbanisation, depletion and destruction of natural resources, pollution, transport, the polarisation of society, a developing technology: all these raise difficulties not readily resolved. To work to harmonious ends within our society, a free and a critical spirit manifest in a free and responsible press is essential: without this, the spirit of the nation will languish, or could even perish.

Out of my own experience, I believe that much can be done in the way of refining the basic principles on which the Constitution itself is based. That process of refinement is in general, of course, entrusted to the judiciary and (I must be careful here, I do not wish to be accused of immodesty) I believe that our judiciary has proved worthy of the trust the founding fathers of the Constitution saw fit, in their wisdom, to confer upon the Bench.

Yet more can be done. That there are dangers in a judicial imperialism I know only too well; judges have one function, politicians another, and each is essential to the harmonious application of the Constitution. As some may know, I have felt for some time the need for an affirmation of the right to know that which is essential to a healthy democratic society. Even that is not enough. It is pleasant to speak of constitutional guarantees of life and liberty: but what do these mean to a family denied a roof over their heads, fresh water for drinking and washing, sufficient food, and adequate income, sometimes even fresh air?

> That there are dangers in a judicial imperialism I know only too well; judges have one function, politicians another, and each is essential to the harmonious application of the Constitution.

It is often said that "justice is open to all". Our Constitution guarantees many rights, but they need refinement, explanation, study: so that out of our Constitution may emerge a more just and happy society, of the kind envisioned in our Proclamation of Independence.

Much, then, can be achieved when those twin lawmakers, Parliament and the Judiciary, work in harmony, united by that common philosophy reflected in the Constitution. It is not for one to trespass into the realm of the other, and improper for the judge to raise expectations that cannot be fulfilled. Between these two essential pillars of the Constitution there must be harmony.

Much can be achieved when those twin lawmakers, Parliament and the Judiciary, work in harmony, united by that common philosophy reflected in the Constitution.

> Yet neither the courts nor Parliament can any longer live in the laisser-faire world of the past. The needs, the demands of society are too insistent, crying out for remedy: and here the courts can, in their own way, by refining the basic principles of our Constitution, play a vital role in the progress of our society. From India came many of the features of that Constitution, and from India has come, of late, a refreshing stream of jurisprudence in which the Indian judiciary has sought to assist in the eradication of poverty, albeit in a modest way. Of course, as I have said, Malaysia is not India: but our judges are no less lacking in conscience and compassion than their Indian brethren, and can play an equally effective and constructive role. The goals we all share are set out, clearly enough, in that very Proclamation I have mentioned.

> Our Constitution has to be the basic instrument by which all these perplexing issues are to be solved, for without the discipline imposed by a sound political and legal structure, chaos and injustice will reign. Imperfect as our Constitution may be, it represents basic ideals to which we must hold fast. It has served us well through the

past 30 years, and survived many shocks, many changes. That it can be improved, I have no doubt, and in this Conference I trust that wise and constructive proposals to that end may emerge, and that these will not be overlooked by those in authority.

> Imperfect as our Constitution may be, it represents basic ideals to which we must hold fast.

With this wish, then, I declare this Conference open, and hope that all involved will benefit from its papers and deliberations.

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* Constitution: The Supreme Law

" …TheConstitution[is]theSupremeLaw,unchangeable by ordinary means, … distinct from ordinary law …

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It is the Supreme Law because it settles the norms of corporate behavior and the principles of good governance ... It is thus the most vital working document which we created and possess. "

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---Raja Azlan Shah FJ (as he then was) Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC at 190

Sultan Azlan Shah



Judicial Career

n His Royal Highness's return from England after his studies, he joined the Judicial and Legal Service of the then Federation of Malaya and served as the Assistant State

Secretary of Perak, First Class Magistrate, and as President of the Sessions Court. His Royal Highness was subsequently appointed to the following offices: Federal Counsel and Deputy Public Prosecutor; Legal Adviser of the State of Pahang, and later of Johore; Registrar of the High Court of Malaya; and subsequently the Chief Registrar of the Federal Court of Malaysia. In 1965, at the age of only thirty-seven years, His Royal Highness was elevated to the Bench of the High Court of Malaya. In 1973, His Royal Highness was made a Federal Court Judge and six years later in 1979, His Royal Highness was appointed the Chief Justice of the High Court of Malaya, an office that he held until his appointment as the Lord President of the Federal Court of Malaysia on 12 November 1982.

The judgments delivered by His Royal Highness on the Bench have now been published in separate volume: *Judgments of His Royal Highness Sultan Azlan Shah with Commentary*, 1986, edited by Professor Dato' Visu Sinnadurai, Professional Law Books Publishers, Kuala Lumpur.

Independence of the judiciary

"The rules concerning the independence of the judiciary—the method of appointing judges, their security of tenure, the way of fixing their salaries and other conditions of service—are designed to guarantee that they will be free from extraneous pressures and independent of all authority save that of the law.

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They are, therefore, essential for the preservation of the Rule of Law. "

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---HRH Sultan Azlan Shah Supremacy of Law in Malaysia



"A free democratic society requires the law to recognise and protect the right of the public to the information necessary to make their own choices and decisions on public and private matters, to express their own opinions, and to be able to act to correct injustice to themselves and their family.

None of these rights can be fully effective unless the public can obtain information. "

—HRH Sultan Azlan Shah *The Right to Know*



Public Lecture, Universiti Sains Malaysia Penang, 19 December 1986

deem it a great privilege to be invited to deliver this lecture which is part of the Public Lecture Series of Universiti Sains Malaysia. When I was first invited to deliver this lecture early this year, I decided that I would speak to you on the topic "The Right to Know", a subject which has been of great interest to me since the time I was on the Bench.

At that stage, I was of the view that the topic would be one which most of you would not have been very familiar with. However, since the time I prepared this lecture, certain events in the country have made the subject of my lecture most topical and they have contributed towards the realisation that an individual's right to know should always be safeguarded. At the same time, under certain circumstances, a certain degree of non-disclosure may be justifiable for the protection of the interests of the State and that of the public. It is this delicate balance between the interests of the

State and that of the individual that one always has to bear in mind when any action is taken to limit the accepted scope of the right to know.

Ladies and Gentlemen, as this lecture was prepared well before the recent events with which all of you are now most familiar, I do not propose to address you on these matters. Some years ago, in 1978, when delivering the judgment of the Federal Court in the important case of *BA Rao v Sapuran Kaur*¹ I said:

It is best that truth should be out and that truth should prevail.²

The main theme, therefore, of my lecture this evening will be on the importance of truth and the process by which an individual may have access to the truth. After all, it is truth and the protection of individual rights which constitute the important aspects of a democratic society.

It is truth and the protection of individual rights which constitute the important aspects of a democratic society.

> The term "right to know" is generally used in the context of the right of the general public to have access to information of governmental actions. I shall in this evening's lecture use the term in a wider sense. The term "right to know" is also relevant to an individual when his rights are affected by executive or administrative actions. I propose to deal with the topic to cover two main aspects:

[1978] 2 MLJ 146. Ibid at 151.

- (i) the rights of the general public to information; and
- (ii) the rights of an individual to have information on matters affecting his own rights and interests.

Rights of the public

It was at one time thought that the public should not be informed of all actions, deliberations and decisions made by the executive or other administrative authorities. It was felt that the data which was held by the Government was too important to be entrusted to ordinary people. However, in recent years there has been a growing awareness throughout the democratic world that the general public do have a right to have access to information which is of public interest.

At this juncture, it must be borne in mind that the right to such information cannot be an absolute right. There are certain kinds of information which the Government cannot possibly disclose to the public. These are mainly those affecting the security of the nation which may be to the prejudice of other members of the public. In deciding how much information the State may withhold from the public and how much may be disclosed, a balance has to be drawn between two main principles: on the one hand the disclosure of certain kinds of information may hinder the efficient functioning of the executive and administrative machinery, whilst on the other, the rights of the general public may be restricted if access to certain information is withheld from them.

Though the Federal Constitution does not expressly provide that all persons have the "right to know" (it does not mention the right to information), the fundamental right of expression as

embodied in Article 10(1)(a) will be meaningless if the public do not have the necessary information on which they can express their views.

Though the Federal Constitution does not expressly provide that all persons have the "right to know", the fundamental right of expression as embodied in Article 10(1)(a) will be meaningless if the public do not have the necessary information on which they can express their views.

> However, the right to know is not confined to public affairs alone. It arises also in private and family life, employment, the education of children, the health and social security of the family. In short, a free democratic society requires the law to recognise and protect the right of the public to the information necessary to make their own choices and decisions on public and private matters, to express their own opinions, and to be able to act to correct injustice to themselves and their family. None of these rights can be fully effective unless the public can obtain information.

Freedom of the press

Many read the daily newspapers or weekly journals for news or entertainment. The press in any country is the primary means by which the ordinary citizen is able to obtain information. It is through what is reported in the press that one is able to know what is generally happening in the country. The press is the main means of knowing the laws which are being debated in Parliament; the press is the main means of knowing how these laws, when passed,

are being administered; and it is through the press that the decisions of the courts are made known to the public. The role of the press, therefore, cannot be underestimated.

For the ordinary citizen, therefore, if the right to know is to be of any meaning, society must have access to an independent and responsible press. The English courts have over recent years attempted to maintain the freedom of the press. In a number of significant decisions the courts have emphasised the importance of a free press. It must however be pointed out that it would be wrong to think that in its efforts to play such an important role in the dissemination of information to the general public, the press should have absolute freedom to report or comment on any item which it so desires. Some restrictions are necessary and they are bound to grow as society becomes increasingly developed and has more regard for the protection of others, for example the right to privacy.³

Society, for example, accepts that the reporting of certain matters, particularly those affecting the security of the country, should be closely guarded. In a country like Malaysia, we have accepted the fact that it is not only the reporting of items affecting the security of the nation, but also those affecting the peace and harmony of its citizens which should possibly be controlled.⁴

However, in an attempt to maintain peace and security, the controls imposed on the press should be reasonable. Too much control will not only muzzle the press, but also affect the society's right to know. On the other hand, of course, an unfettered freedom of the press may lead to abuse. For example, newspapers are tempted from time to time to increase their readership by indulging in sensational news items. Some of these reports are the writings of journalists who have not researched the report. In every country

Editor's note: See the Seventeenth Sultan Azlan Shah Law Lecture, "Right to Privacy: The Impact of the Human Rights Act 1998", by Lord Phillips of Worth Matravers, reproduced in The Sultan Azlan Shah Law Lectures: Judges on the Common Law, 2004, Professional Law Books and Sweet & Maxwell, chapter 17.

Editor's note: For example the Official Secrets Act 1972 (Act 88), discussed below. See also the Sedition Act 1948 (Act 15).

you have such newspapers. However, the irresponsible acts of a few journalists should not be used as an excuse to curb the freedom of the press. As it is often said, "one swallow does not make a summer".

In an attempt to maintain peace and security, the controls imposed on the press should be reasonable. Too much control will not only muzzle the press, but also affect the society's right to know. Unfettered freedom of the press, however, may lead to abuse.

> It should not be forgotten that there are other laws, particularly the laws of libel and slander and sedition, which may be used to place a check on irresponsible reporting. In fact in certain countries like France, West Germany, Austria, Sweden, Denmark and Canada, the law expressly provides that an individual has a legal right of reply to any false report published by a newspaper. Maybe, we too in Malaysia should have a similar law. To the Government in power, the press is, of course, a convenient vehicle for the propagation of information which it would like the electorate to have. At the same time, the temptations for placing tighter controls on the press are most appealing to the administration. Governments in certain countries therefore prefer to place some form of direct or indirect control over the press.

> Very recently I read a book which was published early this year entitled *Britain, An Unfree Country.*⁵ The authors of the book are of the view that the British society over the recent years has become "less open and less free than ... other Western nations"

Terrence Du Quesne and Edward Goodman, 1986, Hetrodox Books.

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and that "at the European Court of Human Rights, Britain has been the worst offender". The authors attribute the lack of access to information as one of the main reasons. One of the conclusions reached by the authors is that:

Because the management of news by government and bureaucracy is now so sophisticated and effective, the media give a deliberately distorted picture ... Information is power, and control of the flow of news provides a potent weapon. It is one which has been exploited by every [British] prime minister in memory.⁶

In certain countries, the editors of newspapers are appointed by the Government in power; in others the issuance of an annual licence may be used as a lever of control. Such controls, when they are not applied for the reasons of public order, public health or national security, should be sparingly used, if need be. Without a free press, as I have said earlier, the right of free expression and the right to know, will mean nothing. To quote Lord Denning:

It is better to have too much freedom than too much control: but it is better still to strike the happy mean.⁷

It is the responsibility of the press not to abuse the freedom which it has. It is the duty of editors and reporters to maintain a high standard of journalism, so as to give fair and balanced reports.

At this juncture, I should also like to emphasise that it is also the responsibility of the press not to abuse the freedom which it has. It is the duty of editors and reporters to maintain a high standard

Ibid at pages 17 and 28.

Lord Denning, "The Free Press" published in *The Road to Justice*, pages 64–87.

of journalism, so as to give fair and balanced reports. Journalists who use the investigative technique of reporting must ensure that the facts as reported are verified as much as possible. It is, of course, difficult in certain cases for the journalist to confirm every fact as he may not have the means to do so. In such cases, so long as the good faith of the journalist is maintained, executive interference should be minimal.

Bringing to light the abuses and dangers of certain actions, be it of the executive or of the private sector, will not only benefit the public, but also the Government in general.

The right to know and the right to free expression are as basic and important as any other fundamental right enshrined in the Federal Constitution.

> In maintaining the balance between freedom of the press and the control of it by the executive, judges should not overlook their duty. It is, after all, to them that the citizen turns, to ensure that his rights are upheld. For this reason the judges should always maintain their independence, to ensure that the rights of the individual are upheld. They should be bold enough to strike at and to declare unlawful any interference on the freedom of the press or of the right to know which is not in accordance with the law. Except where they themselves are clearly satisfied that a particular act of the executive which restricts these rights is necessary for the maintenance of the security and peace of the nation, they should always aim to protect these rights. It should not be overlooked that the right to know and the right to free expression are as basic and important as any other fundamental right enshrined in the Federal Constitution.

It should further be pointed out that neither the executive nor even Parliament should attempt to curb the course of justice. Judicial independence is a cornerstone in any democratic country, as every lawyer and politician knows. The judges are independent of all—the executive, Parliament and from within themselves—and are free to act in an independent and unbiased manner. No member of the Government, no Member of Parliament, and no official of any Government department has any right whatever to direct or influence the decisions of any of the judges. It is the sure knowledge of this that gives the public their confidence in the judges.

> Judicial independence is a cornerstone in any democratic country, as every lawyer and politician knows. The judges are independent of all—the executive, Parliament and from within themselves—and are free to act in an independent and unbiased manner.

The judges are not beholden politically to any Government. They owe no loyalty to Ministers. They have longer professional lives than most Ministers. They, like civil servants, see Governments come and go. They are "lions under the throne" but that seat is occupied in their eyes not by Kings, Presidents or Prime Ministers but by the law and their conception of the public interest. It is to that law and to that conception that they owe their allegiance. In that lies their strength.

There is now a widespread disquiet about excessive secrecy of Government and a call for proper information and democratic consultation and participation. Without reasonable access to information, the people cannot participate or play an effective role

in a country which subscribes to the principles of government of the people, by the people, for the people. To quote Lord Denning again:

[The] great institutions, Parliament, the Press and the Judges are [the] safeguard of justice and liberty; and they embody the spirit of the Constitution.⁸

Official Secrets Act

There is no denying that even in the most democratic country, there must be certain restrictions on access to certain kinds of information relating to the security of the country. Legislation in the form of the Official Secrets Act, therefore, is in force to restrict the communication of information relating to certain matters usually classified as official secrets.

The origin of the Official Secrets Act lies in the need, particularly during wartime, for restrictions to be imposed on information affecting the security of the nation. The English Parliament was prompted to enact the Official Secrets Act of 1889⁹ to prevent spying and "leaks" to enemies. The 1911 Act made not only the communication of certain official information an offence. but also the receipt of such information. Though from its inception, the legislation in England on official secrets has been severely criticised, the Act still remains on the statute book.

The Franks Committee which reviewed the Official Secrets Act of England in 1971–1972 expressed great dissatisfaction with the Act. The Committee pointed out that as the Act was worded, "over

See generally, Jowell, Lord Denning: The Judge and the Law, 1984.

9

This Act was radically revised and extended in 1911, and further amended in 1920.

2,000 differently worded charges" could be brought under it. The Committee said:

[The Act] catches all official documents and information. It makes no distinction of kind, and no distinction of degree. A blanket is thrown over everything; nothing escapes.

In his book, *The Right to Know: The Inside Story of the Belgrano Affair*,¹⁰ Clive Ponting, who himself was charged under the Official Secrets Act for giving certain information relating to the 1982 Falklands War to an opposition politician well after the Falklands War, discusses in detail the scope of the Act, its history and the debate on freedom of information.

In this particular case, Ponting had disclosed certain information which showed that the British Government had suppressed certain facts regarding the sinking of the Argentinian cruiser, *The General Belgrano*. The Government had asserted that *The Belgrano* was sunk because it was a threat to the British ships. The information which Ponting had, indicated that far from *The Belgrano* intending to attack the British ships, it was in fact heading home, back to Argentina. I only need to say at this point that the jury acquitted Ponting.

In Malaysia, the Official Secrets Act of 1972¹¹ is based on the English Act of 1911. When the Act was introduced in Parliament in 1972 it was said that the object of the then proposed Bill was to equip the Government with adequate powers to deal with spies of foreign countries. The Malaysian Act does not define what may amount to "secret information". It is therefore left to the executive to decide what information may be classified as "official secret". It grants a wide discretion to the Minister concerned to determine what should

11 Act 88. See also Official Secrets (Amendment) Act 1986, Act A660.

be classified as official secrets. Whether, in any particular case, any document or information the Government requires is to be kept from public knowledge or from the knowledge of specified persons depends on the manner the Government treats that document or information. As pointed out by a leading constitutional writer:

Thus the government is the sole judge of what information is to be kept secret. It is within the sole discretion of the executive to classify information \dots^{12}

The scope of the Malaysian Act and the absolute discretion given thereunder to the executive to determine what may amount to an official secret is indeed very wide and far-reaching. It is in fact, so widely drafted that little leeway is even given to the courts to check any excessive exercise of these powers by the Government.

In *Lim Kit Siang v Public Prosecutor*¹³ in delivering the judgment of the Federal Court, I, as the then Chief Justice, had to concede that the courts, on the interpretation of the Act, had no power "to create a right for any person to ignore the provisions of the Official Secrets Act".¹⁴ The Federal Court pointed out that it was for Parliament, if it deemed it necessary, to restrict the scope of the Act.

The decision of the Federal Court, however, should not be taken to mean that any person once charged under the Act will in all cases be convicted of the offence. The courts still have the power, limited though it may be, in cases where no offence is clearly committed under the provisions of the Act, to acquit a person. I would at this stage like to emphasise that as such wide powers are given to the executive under the Act, and as little discretion is given to the courts in the interpretation of these provisions, it is left to

12

Professor MP Jain, "Official Secrets Act and Right to Information", a paper presented at the 1985 Malaysian Law Conference, Kuala Lumpur.

13 [1980] 1 MLJ 293, FC.

14 Ibid at 297.

the Attorney-General to ensure that prosecution is brought only if he is clearly satisfied that the security of the nation is prejudiced by the communication of any such information. A careful and sparing exercise of this power given to the Attorney-General is the only check on the wide powers given to the executive. As the Franks Committee pointed out:

... the catch-all provision of [the English] Act is only saved from absurdity in operation by the sparing exercise of the public prosecutor in prosecuting.

That the Official Secrets Act makes serious inroads into the individual's right to know, few would deny. Yet, fewer still would deny that the Government in power must have the power to restrict the communication of information affecting the security of the country. The difficulty then is in seeking a delicate balance between these two interests. In a free and democratic country like ours, where fundamental rights are guaranteed under the Constitution, executive encroachment on these rights should be closely guarded.

> The three branches of the Government the legislature, the executive and the judiciary —should ensure that the means of obtaining information is made available to the people, so that they can play a meaningful role in the participation of an open Government.

In upholding these rights, the three branches of the Government—the legislature, the executive and the judiciary—should ensure that the means of obtaining information is made available to the people, so that they can play a meaningful role in

the participation of an open Government. It should not be forgotten that members of the legislature are representatives of the people, who have been elected to legislate on their behalf, and that the responsibility of the executive (which is usually made up of elected representatives) is to administer the country on the people's behalf. The executive possesses no other power except that which has been given to them by the people themselves. Therefore in the exercise of these powers, the executive should ensure that they do not clothe themselves with excessive powers which in turn may be invoked by them to curb the rights provided for by the Constitution.

Whatever ought to be done by the Government, ought to be guided by the opinion of the people. That is the greatest strength of our democratic system. But once the majority is omnipotent, it becomes an absolute farce.

> The same caution should also be displayed by the members of the legislature. In a country where the Constitution may be amended by a two-thirds majority, members of the legislature (both of the Dewan Rakyat and Dewan Negara) should always bear in mind the interests of the people over and above the interests of their political party, or I may add, even their own. Whatever ought to be done by the Government, ought to be guided by the opinion of the people. That is the greatest strength of our democratic system. But once the majority is omnipotent, it becomes an absolute farce.

> Therefore, any amendment to the Constitution or any proposed law should be carefully deliberated. The interests of the State and the rights of the individual should always be maintained.

I have no doubt in my mind that sometimes this is not an easy task. But, however difficult it may be, Members of Parliament should never forget the fact that they are merely representatives elected by the people with a duty to protect the interests of the State and the people. I hope we shall never forget that we created this nation which we call Malaysia, not to serve ourselves, but to serve certain ideals of mankind. They should therefore not lose sight of this fact, especially when they are weighing the interests of the State and individuals' rights. They should provide adequate checks on any powers given to the executive under a proposed legislation, and more importantly, members of the legislature should resist the temptation of introducing legislation which has far-reaching consequences on the individual's rights no matter how expedient it may seem.

> I hope we shall never forget that we created this nation which we call Malaysia, not to serve ourselves, but to serve certain ideals of mankind.

Ladies and Gentlemen, in this regard, I must point out to you the development as to the right to know in other countries.

There is a trend in many countries over the recent years for the introduction of legislation which expressly gives the people the right to have more access to information, especially to documents which are in the possession of Ministers, Government departments and public authorities.

In 1966, the Freedom of Information Act was introduced in the United States of America. The enactment of this Act was regarded

as a "landmark event" in the history of American administrative law. The Act entitles anyone to have access to any identifiable document. A positive duty is imposed on the Government to supply such information as may be required by the public. The Act imposes a general duty on the Government to supply all information except those falling within the specified categories. The exempted categories are mainly those relating to national defence or foreign policy. It must be stressed that the Freedom of Information Act makes disclosure the general rule and not the exception.

In 1982 the Canadian Parliament passed the Access to Information Act. This Act specifically provides for the right to request and to be given access to any record under the control of a Government institution. The Act also provides for every Minister to publish on a periodic basis information on the activities of his ministry. Certain information, however, is exempted from disclosure. This relates mainly to international affairs and defence, information obtained in confidence, and that concerning the economic interests of Canada.

In 1982 also, the Australian Freedom of Information Act, and the Official Information Act of New Zealand were introduced by Australia and New Zealand respectively.

An open Government must be the hallmark of a truly democratic country.

> The Australian Act provides that all persons have a legally enforceable right of access to documents of an agency and of official documents of a Minister. However, to this general rule a number of

documents are exempt from access, for example, those which are regarded as contrary to the public interest to disclose, that is, such documents affecting security, defence or international relations.

The New Zealand legislation gives both New Zealand citizens and permanent residents a right to request official information. Except in certain cases, the appropriate authority is under a duty to disclose such information as requested. Besides reasons of security, defence and international relations, the New Zealand Act, like the Canadian Act, expressly provides that any disclosure of information which would be damaging to the economy of the country need not be disclosed.

You will therefore notice that positive steps have been taken by the legislatures in these countries which I have mentioned to introduce laws which specifically confer on their citizens a right to know. It is to be hoped that similar legislation will be introduced in Malaysia. As I have stated, the legislation in these countries not only gives citizens the right to the disclosure of information, it at the same time spells out expressly the circumstances under which the executive need not disclose information affecting the security and interests of the country. The rationale behind this legislation is, of course, to enable citizens to participate in the affairs of the Government. If I may quote the words of our first Prime Minister, Tunku Abdul Rahman, from his latest book, *Political Awakening*:

... every body has political rights under the Constitution to participate in the government business \dots^{15}

An open Government must be the hallmark of a truly democratic country.

15 At page 96.

The more information that is available to the public, the less are the rumours and suspicions relating to the conduct of Government. The more the lid is kept firmly on the pot, the hotter the steam that escapes. The more the information, the greater the credibility and confidence. A carefully drafted law in Malaysia should give citizens access to certain official information, and at the same time give the executive the right to withhold such information only if it affects security, national interest or the economy of the country.

The more information that is available to the public, the less are the rumours and suspicions relating to the conduct of Government. The more the lid is kept firmly on the pot, the hotter the steam that escapes. The more the information, the greater the credibility and confidence.

Rights of the individual

Right to be heard

I now move on to the second aspect of my lecture dealing with the right of an individual to have information on matters affecting his rights and interests. Many administrative actions are taken by government departments or agencies affecting an individual's right. It is not unheard of for action to be taken against a citizen to deprive him of a licence, his citizenship, his liberty or property. In these circumstances, does the citizen have a right to know the basis of the action taken against him? Should he be told of the reasons for the purported decision?

In these cases, the citizen will not be in a position to defend his affected rights unless he has a right to know the reasons. It is only when he is able to defend himself effectively that he can challenge the arbitrary exercise of a power given to the relevant authority.

Cardinal in Administrative Law are the rules of natural justice: the rule against bias and the right to be heard.

The Privy Council in the case of *B Surinder Singh Kandha v Government of Malaya*¹⁶ observed:

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him.¹⁷

In this area of the law, usually called Administrative Law, where individuals' rights are affected, I am happy to say that the development of the law in Malaysia has generally been towards the protection of the individual. The recent Supreme Court decision¹⁸ involving the *Asian Wall Street* journalist clearly indicates this. It must also be emphasised that it is in this area of the law that the courts have played an effective role to establish that a person has a right to know the reasons or grounds upon which executive action is based. Cardinal in Administrative Law are the rules of natural justice: the rule against bias and the right to be heard. In delivering the judgment of the Federal Court in *Ketua Pengarah Kastam v Ho Kwan Seng*¹⁹ I observed:

The principles of natural justice ... play a very prominent role in Administrative Law ... In my opinion, the rules of natural justice

16 [1962] AC 322.

17 Per Lord Denning, ibid at 337.

18 John Peter Berthelsen v DG of Immigration, Malaysia & Ors [1987] 1 MLJ 134, SC.

19 [1977] 2 MLJ 152, FC.

that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action ... The silence of the statute affords no argument for excluding the rule, for the "justice of the common law will supply the omission of the legislature".²⁰

The right to be heard manifests itself in a number of ways: the right to be informed of the grounds of arrest, and the date, place, and time of the hearing, time to prepare one's case in answer, the right to be represented by counsel and the right to have access to all relevant materials and information relating to one's case.

It is, of course not feasible nor in fact, desirable for administrative bodies to follow all these various aspects of the right to be heard in every case where a decision is made affecting an individual's rights. A strict adherence to the various procedural aspects of the right to be heard tantamounts to a full hearing as in a court of law. If every administrative action, therefore, has to be preceded by such a procedure, the entire administrative system in any country will come to a virtual standstill. It will not only be expensive but the time factor involved in conducting a full hearing will result in chaos in the bureaucratic procedure. For example, it would not be possible for an immigration officer at the airport to conduct a full scale hearing before admission into the country is refused to any immigrant.²¹ All that an immigration officer should do is to inform the immigrant the reasons for refusing entry. It is then the duty of the immigrant to satisfy the officer as to why he should be granted entry.

For this reason, the courts have attempted over the recent years to strike a compromise between the need to protect an individual's right against abuses by administrative bodies and the

20 Ibid at 153–154.

21 See *Re HK (an infant)* [1967] 2 QB 617.

need to maintain the efficiency of the administration. The courts have been conscious of the fact that greater injustice may be caused by inefficient administrative actions. There is over the recent years a growing body of cases on this important aspect of the law.²²

If I may summarise the present position, it seems to be as follows: the right to be heard is not an absolute right given to every individual who claims that he has been adversely affected by an administrative decision.

Though the important decision of the House of Lords in *Ridge* v *Baldwin*²³ seems to suggest that any body having the power to make decisions affecting rights of individuals is under a duty to give a fair hearing, the recent trend appears to be that this rule should not only be extended to decisions affecting vested rights, but also to decisions affecting the legitimate expectations of individuals.

Ministers and public bodies are expected to live up to the legitimate expectations which they have aroused in others by their statements or conduct.

The legitimate expectations doctrine²⁴ is new, the precise limits of which have yet to be worked out. But it is an interesting development. In essence it is to the effect that Ministers and public bodies are expected to live up to the legitimate expectations which they have aroused in others by their statements or conduct. Therefore, a person who has a legitimate expectation relating to a benefit which is discretionary in nature, should be given a right to be heard if in the exercise of the discretion the decision-maker refuses to grant the benefit.

22 Editor's note: See generally de Smith, Woolf and Jowell, Judicial Review of Administrative Action, 5th edition, 1995, and First Supplement, 1998.

23 [1964] AC 40, HL.

24 *Editor's note:* See further notes at the end of chapter.

Cases on legitimate expectations are usually those where a person applies for the renewal of a licence or permit.²⁵ But in *Attorney-General of Hong Kong v Ng Yuen Shiu*²⁶ the Privy Council pointed out that illegal immigrants who had entered Hong Kong from Macau had a right to be heard. They had a legitimate expectation to be allowed to stay in Hong Kong based on an assurance given by the Hong Kong immigration department that they would be treated as if they were illegal immigrants from anywhere other than China.

In *Council for Civil Service Unions v Minister for the Civil Service*, commonly referred to as the *GCHQ* case,²⁷ the House of Lords held that members of a trade union who had been deprived of their right to belong to their union, would have had a legitimate expectation of consultation before the ban was imposed by the Government, especially since they had always been consulted before changes in working conditions were made.

These cases suggest that legitimate expectations may be created as a result of:

... establishing a known [lawful] policy guideline, or of consistently following a particular [lawful] course of conduct, or of giving [a lawful] undertaking or assurance which leads citizens dealing with it reasonably to believe that they will be treated in that way.²⁸

In such cases, failure to comply with these policies, guidelines or undertaking without first giving the applicant a right to be heard as to "why he ought to be treated in the way he expected" would render the administrative action illegal.

I should perhaps also point out that though in many of the cases dealing with legitimate expectations, judges tend to say that

See Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149; R v Gaming Board, ex parte Benaim and Khaida [1970] 2 QB 417. See also R v Wear Valley DC, ex parte Binks [1985] 2 All ER 699.

26 [1983] 2 WLR 735.

27 [1984] 1 WLR 1174.

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Cane, Introduction to Administrative Law, OUP, 1986, page 73. See also Westminster City Council v Greater London Council [1986] 2 All ER 278, 288. the decision maker is under a duty to act fairly and not necessarily under a duty to comply with the rules of natural justice, both these concepts clearly embody the principle that the individual has a right to know the reasons as to why he is being deprived of his legitimate expectation.

Since the preparation of this lecture, I am pleased to note that the Supreme Court of Malaysia has now delivered the judgment in the *Berthelsen* case.²⁹ The Supreme Court held that the action by the executive to cancel the work permit of the *Asian Wall Street* journalist before the time limit expired was unlawful as the journalist was not given a right to be heard. The Supreme Court held that the journalist had a "legitimate expectation" of being heard.

It is an activist decision by a pragmatic court whose fidelity to judicial enforcement of a fundamental right gave a clear signal to judges, officials and the public. That important decision reiterates the court's commitment to safeguard the rights of an individual under the Constitution. It provides an interesting insight into what constitutes abuse of power by the executive.

As the twentieth century witnessed the increasing influence of Government decisions on the lives of many individuals, abuse of power is inevitable, and the extent to which that abuse has been held to tolerable levels is because we have an independent judiciary which can assert the Rule of Law against such abuse.

Therefore, Ladies and Gentlemen, once again the courts have clearly established the principle that an individual has a right to know when his vested rights to legitimate expectations are adversely affected by administrative actions.

29 John Peter Berthelsen v DG of Immigration, Malaysia & Ors [1987] 1 MLJ 134, SC.

For fear that I may have given you the impression that the courts have established the rule that there is always a right to be heard before any administrative action is taken against every individual, I should point out that in a number of circumstances, the application of the principle of the right to be heard has been excluded by the courts.

As the twentieth century witnessed the increasing influence of Government decisions on the lives of many individuals, abuse of power is inevitable, and the extent to which that abuse has been held to tolerable levels is because we have an independent judiciary which can assert the Rule of Law against such abuse.

> For example, in the *GCHQ* case the House of Lords in pointing out that the members of the trade union whilst having a legitimate expectation of consultation before the ban was imposed, did not, in the circumstances of the case, have a right to know because information relating to national security was involved.

> Furthermore, it does not necessarily mean that in cases dealing with legitimate expectations of the exercise of discretionary powers, there can be no change of policy or practices. The very nature of a discretionary power must entail the power to change. Therefore so long as such changes are not an abuse of power or unreasonable, and so long as the applicant is given the opportunity
75

to show why such changes should not be implemented, any change in such policy or practice will not be held to be unlawful.

The cases have also established the rule that even though a decision may affect an individual adversely, so long as they do not relate to rights or legitimate expectations, a strict compliance with the rules of natural justice is not necessary. It has, therefore, been said that in cases where an individual applies for a licence or office which he has not held before, a strict compliance with the rules of natural justice is not necessary. In such cases it is said that as the applicant has no right or a legitimate expectation to a licence or office, the administrative authority need not inform him of the reasons for its refusal. The administrative body, however, must act fairly.

In conclusion it may therefore be said that the rules of natural justice apply to forfeiture cases, that is where an individual is deprived of a right or position which he already holds, or to legitimate expectation cases, that is where an individual applies for a renewal or confirmation of a licence or post which he already holds. In the third category of cases, the "application cases", the individual who applies for a licence or post which he does not already have is not entitled to a hearing.³⁰

I would like to emphasise that this classification of cases into forfeiture, legitimate expectation and application, though useful and convenient, should not, however be used as a conclusive test for the application of the rules of natural justice. In certain cases, public interest may demand that certain information, especially that affecting the security of the nation should not be disclosed. This is particularly so in cases where prerogative powers are exercised, for example, the granting of pardons by Rulers of any State.³¹

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This classification was enunciated by Megarry VC in *McInnes v Onslow Fane* [1978] 1 WLR 1520 and was followed in *R v Secretary of State for the Environment, ex parte Brent London BC* [1983] 3 All ER 321.

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See de Smith, Constitutional and Administrative Law, 5th edition, page 592. See also Superintendent of Pudu Prison & Ors v Sim Kie Chon [1986] 1 MLJ 494.

Crown or Government privilege

I now turn to another area of the law in which the courts have made significant contribution towards the establishment of the right of an individual to have access to certain information or documents which are within the sole knowledge of the Government.

In certain proceedings brought by an individual (usually but not necessarily against the Government) challenging certain executive actions and where the disclosure of certain information held by the executive is most relevant for the success of the action brought by the individual, it is not uncommon for the executive to refuse the disclosure of such information, mainly on the ground that the disclosure of the information sought affects the interests of the State.

This common law rule is embodied in sections 123, 124 and 162 of our Evidence Act 1950³² which provide that certain unpublished official records relating to affairs of State or any information the disclosure of which would be detrimental or prejudicial to the public interest cannot be disclosed as evidence in court. This wide protection given to the executive against nondisclosure in the interest of the public was in certain situations capable of abuse by the executive. In cases where the disclosure of certain information held by the Government would cause the Government some embarrassment, the executive could apply for protection against disclosure on the grounds that the information would be prejudicial to the public.

In a number of reported cases, particularly in England,³³ the Government attempted to take refuge by refusing the disclosure of certain information on the ground that the disclosure was against

32 Act 56.

33 Editor's note: See further notes at the end of the chapter.

77

the public interest. In some of these cases, the Government was merely attempting to conceal certain information which would reveal the Government in a bad light. To curtail such abuses, the courts have now said that the issue as to whether the disclosure of certain information would be prejudicial to the State or not will be decided not by the executive itself but by the courts.

The House of Lords in the case of *Conway v Rimmer*³⁴ unanimously held that the Minister's assertion as to the effect of disclosure was not to be accepted as conclusive and that it was for the courts to inspect the documents in question privately in order to determine whether public interest in suppressing them outweighed the interests of the parties to the proceedings and the general public. In that particular case, the House of Lords having inspected the documents overruled the Minister's claim for Crown privilege. The Court ordered the disclosure of the documents.

The Malaysian courts, too, have adopted a similar attitude: In *BA Rao v Sapuran Kaur & Anor*³⁵ in delivering the judgment of the Federal Court which was concurred by Gill CJ and HS Ong FJ, I observed:

In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence. This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim. Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced. This strikes a legitimate balance between the public and private interest.³⁶

34 [1968] AC 910, HL. 35 [1978] 2 MLJ 146, FC.

36 Ibid at 150.

I then further observed:

Where there is a danger that disclosure will divulge, say, State secrets in military and international affairs or Cabinet documents or departmental policy documents, private interest must give way. It is for the court, not the executive, ultimately to determine that there is a real basis for the claim that "affairs of state is involved", before it permits non-disclosure.³⁷

It is for the court, not the executive, ultimately to determine that there is a real basis for the claim that "affairs of state is involved", before it permits non-disclosure.

> In that case the respondents had claimed damages on behalf of the estate of the deceased for the death of the deceased as a result of the negligence of the medical officers of a district hospital. A committee of inquiry had been held into the death of the deceased and the respondents had issued a notice to produce the reports and findings of the committee of inquiry. The appellants objected on the ground that the notes and findings of the committee were unpublished official records and therefore privileged from disclosure under section 123 of the Evidence Act 1950.

> The trial judge disallowed the objection and ordered production of the reports and findings of the committee. The Federal Court dismissed the appeal and held that the objection as to production and the question of admissibility under sections 123 and 162 of the Evidence Act 1950 should be decided by the court on the consideration of all available evidence. It was for the court, not the executive, ultimately to determine that there was a real basis for the claim that "affairs of State were involved" before it could

79

permit non-disclosure, and a mere assertion of confidentiality and that affairs of State were involved without evidence in support could not shut out relevant evidence. The court, however, held in that case that the documents in question were not unpublished documents relating to affairs of State.

Consequently where the Government or the doctor was sued for negligence, the Government could not screen the alleged wrongful act from the purview of the court on the ground that it was an affair of State demanding protection.

This is a landmark decision insofar as the power of the Government to refuse the production of documents in the court has been subjected to judicial review. The significance of that case lies in the fact that an antiquated provision (section 123 of the Evidence Act 1950) has been interpreted so as to bring the relevant law in Malaysia in line with the law in England, India, the United States, Australia and New Zealand.

Ladies and Gentlemen, I should perhaps point out to you that one of the arguments which has often been relied upon by the State or the executive against disclosure of certain documents is that such disclosure will hamper the day to day administration of the civil service. It is said that if certain documents are subject to disclosure, civil servants writing reports on certain matters will not have the "freedom and candour of communication" with and within the public service. This argument, however, has not gained the favour of the courts. It was scorned at by the House of Lords in *Conway v Rimmer* and in *BA Rao*'s case I observed:

[If] this unsound argument is allowed to run riot, free rein would be given to the tendency to secrecy which is inherent in the public

service. Freedom and candour of communication is not a factor in itself that will persuade the court to order that information be not disclosed.³⁸

The world of secrets would make us feel less free and less democratic than we like to believe.

Furthermore, I do not think that public servants would shirk from giving honest opinions just because there is a distant chance that their report may one day happen to be disclosed in open court. I am sure that you would agree with me that our civil servants are "made of sterner stuff".

Finally, Ladies and Gentlemen, I would like to emphasise a point—a point which I have consistently emphasised during my tenure on the Bench:

In the administration of justice nothing is of higher importance than that all relevant evidence should be admissible and should be heard by the tribunal that is charged with deciding according to the truth. To ordain that a court should decide upon the relevant facts and at the same time that it should not hear some of those relevant facts from the person who best knows them and can prove them at first hand, seems to be a contradiction in terms. It is best that truth should be out and that truth should prevail.³⁹

Conclusion

The right of access to information has assumed greater importance in recent years as one of the steps in achieving the concept of open government. In our country the movement towards open

38 Ibid at 151. 39 Ibid at 151.

81

government has started to take form and shape, but progress has been somewhat slow.

I believe that we need a Freedom of Information Act, under which members of the public have a right of access to specifically requested public records, and that these should be made available, as of right, within a reasonable time. A Freedom of Information Act will greatly improve the climate of trust in this country.

> The right to know expresses, then, much more than mere curiosity. It is based upon a natural human desire for the truth, insofar as mortal man isable to achieve that truth.

The right to know expresses, then, much more than mere curiosity. It is based upon a natural human desire for the truth, insofar as mortal man is able to achieve that truth.

Two thousand years ago, a Roman judge asked, in a notable trial, "What is truth?" We are told that he did not wait for an answer. To discover the truth of any matter, whether within a civil or criminal trial, in investigative journalism or historical research is not, as many of us know, an easy task.

Editor's notes

This lecture is referred to in MP Jain, *Administrative Law of Malaysia and Singapore*, 3rd edition, Malayan Law Journal, 1997, at page 611.

Legitimate expectations: As to legitimate expectations, generally, see 1(1) *Halsbury's Laws of England*, 4th edition, paragraphs 90 and 92; and MP Jain, *Administrative Law of Malaysia and Singapore*, 3rd edition, Malayan Law Journal, 1997, pages 527–538. See also de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th edition, Sweet & Maxwell, 1995, paragraphs 8-037 to 8-066, and 13-026 to 13-035; and the *First Supplement to the Fifth Edition*.

Public interest immunity: The doctrine of crown privilege is now more commonly known as public interest immunity. In recent years, there has been tremendous development under English law in the area of public interest immunity.

In a paper prepared in 1996 by the Treasury Solicitor's Office entitled "Paper on Public Interest Immunity", it was said:

2.1 The law on PII [public interest immunity] has changed significantly since the time of *Matrix Churchill*. In 1992, it was understood by those advising ministers that where a document attracted PII it was the duty of ministers, according to the judicial authorities, to identify and advance to the court the public interest in the document being withheld from disclosure. Ministers were not permitted to waive PII or to decide that the document should be disclosed notwithstanding its PII status The only exception to this was where it was clear that no realistic balance of competing public interests by the court could come down otherwise than in favour of disclosure. Ministers were advised that in all but that exceptional case the task of deciding whether the document should be disclosed was one for the court and not for them. Their PII certificates were the means of putting the issue to the court.

83

2.2 Since then the subject has moved on. The major change in the law has been the case of $R \ v$ Chief Constable of West Midlands, ex parte Wiley in 1994 [[1994] 3 All ER 421, HL, reversing [1994] 1 All ER 702, CA]. Lord Woolf made it clear that a minister could discharge his responsibility regarding material which is subject to PII by making his own judgment on whether the overall public interest favoured its disclosure. If he thought that it did, he could make disclosure without asserting PII. If he thought that it did not, or if he was in doubt, he should put the matter to the court.

See also The Right Hon Sir Richard Scott, "The Use of Public Interest Immunity Claims in Criminal Cases", The Earl Grey Memorial Lecture, University of Newcastle upon Tyne, 29 February 1996, first published in *Web Journal of Current Legal Issues* in association with Blackstone Press Ltd; and also Adam Tomkins, "Public Interest Immunity After *Matrix Churchill*" [1993] PL 650.

See generally, de Smith, Woolf & Jowell, Judicial Review of Administrative Action, 5th edition, Sweet & Maxwell, 1995, paragraphs 1-130 to 1-159; and 8(1) Halsbury's Laws of England, Reissue (2003), paragraph 501, as to the disclosure of medical reports, police reports and cabinet discussions.

Access to information and open government: See the discussion under English law, particularly on the repeal of section 2 of the English Official Secrets Act 1911, by the Official Secrets Act 1989 in de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 5th edition, Sweet & Maxwell, 1995, paragraphs 1-123 and 1-126.

Freedom of Information Act 2000 (UK): This Act was introduced in 2000, though many of the provisions will only come into effect on

30 November 2005. See generally 8(1) Halsbury's Laws of England, Reissue (2003), paragraphs 583–617.

Data Protection Act 1998 (UK): This Act was introduced to replace the Data Protection Act 1984. The purpose of this new Act is "to harmonise data protection legislation throughout the European Union in order to protect the fundamental rights and freedom of the individual, in particular the right to privacy with respect to the processing of personal data ... ": see 8(1) Halsbury's Laws of England, Reissue (2003), paragraph 503. As to the right to privacy, see the lecture by Lord Phillips, "Right to Privacy: The Impact of the Human Rights Act 1998", published in The Sultan Azlan Shah Law Lectures: Judges on the Common Law, Professional Law Books and Sweet & Maxwell, 2004, chapter 17.

Laws relating to press freedom: Some of the laws affecting the freedom of the press in Malaysia are: Printing Presses and Publications Act 1984, Act 301; Official Secrets Act 1972, Act 88; Sedition Act 1948, Act 15; and Internal Security Act 1960, Act 82. But see section 3 of the Communications and Multimedia Act 1998. Act 588, where it is provided that "Nothing in this Act shall be construed as permitting the censorship of the Internet".

Contempt of court proceedings against journalist: See the Court of Appeal decision in Murray Hiebert v Chandra Sri Ram [1999] 4 MLJ 321, CA, where a Canadian journalist, Murray Hiebert, of the Far Eastern Economic Review, was charged for contempt of court, and sentenced to six weeks' imprisonment for a story he wrote that was critical of the Malaysian judicial process.

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* Fundamental rights

"As fundamental rights are not the same as ordinary rights, they can only be suspended or abridged in the special manner provided for it in the Constitution ...

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The framers of our Constitution have incorporated fundamental rights in Part II thereof and made them inviolable by ordinary legislation. "

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---Raja Azlan Shah FJ (as he then was) Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC at 189

* Equality

" I repeat what I had said before. The law is no respector of persons."

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— Raja Azlan Shah FJ (as he then was) Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15, FC at 32

Sultan Azlan Shah



Contribution to Higher Education in Malaysia

is Royal Highness was appointed as the Pro-Chancellor of Universiti Sains Malaysia (USM) in 1971 and the Chairman of the Higher Education Advisory Council in

1974. His Royal Highness was an external examiner of the Faculty of Law, University of Malaya, from the time the Faculty was established until 1986, when he was appointed the Chancellor of the University of Malaya.

Since 1986, His Royal Highness Sultan Azlan Shah has been the Chancellor of the University of Malaya, the oldest University in the country.



"A parliamentary democracy ensphering an elected legislature as one of its fundamental facets is one in which the representative of the people are not only entitled to make basic decisions but in which they actually make such decisions.

It is the possession of the entitlement and the ability to make basic determining decisions which constitutes supreme power and is the essence of democracy. "

---HRH Sultan Azlan Shah Parliamentary Democracy

Parliamentary Democracy

Aliran Seminar on Parliamentary Democracy Kuala Lumpur, 14 July 1985

am very pleased to be here today to open this seminar on Parliamentary Democracy organised by Aliran. The proceedings of this seminar will no doubt generate considerable interest with the manifestation of diverse viewpoints and constructive suggestions and ideas in relation to the topic of discussion.

Parliamentary democracy as a term would ex facie require no definition and one would take it immediately as a reference to the form of democratic government originally evolved in England, and subsequently borrowed by other countries, under which the powers of the State are vested in three different organs of government. The crux of the matter however is the connotation that "democracy" as a political system does not become a democracy merely because it is given that appellation. Without however pre-empting the theorists of the concept, it would suffice for me to say that the true meaning

of democracy can be summed up in the phrase "government by the people".

"Democracy" as a political system does not become a democracy merely because it is given that appellation. The true meaning of democracy can be summed up in the phrase "government by the people".

> A parliamentary democracy ensphering an elected legislature as one of its fundamental facets, and which is the political system we are fortunate to be endowed with in this country, is one in which the representative of the people are not only entitled to make basic decisions but in which they actually make such decisions. It is the possession of the entitlement and the ability to make basic determining decisions which constitutes supreme power and is the essence of democracy. The distinguishing and outstanding feature of a parliamentary democracy is that the relationship between the legislative and executive powers is one of parliamentary supremacy over the executive.

> The system of government I have just adumbrated reflects a polity in which the people in effect govern themselves but which yet copes with the basic problem of politics-to allow government to control the governed and yet be itself controlled.

> In concrete terms, parliamentary democracy therefore means a number of things:

> First, as I have said, there must be a right for the people to choose their own government whom they will entrust to govern

91

them. This can only be achieved by having a process which guarantees to its people a right to exercise their free will to choose the government. Such a right must also mean that the people must be free to organise in opposition to the government in office. Any form of pressure or arbitrary limits imposed on the people in their free exercise of the right to choose their own government will be a clear abrogation of any parliamentary system of government. A single party system of government has only a semblance of a parliamentary democracy.

> The elected government is not free to exercise governmental power in any manner it chooses, for in a parliamentary democracy, the exercise of governmental power is bounded by rules: the rules as spelt out in the Constitution and conventions.

Secondly, though it is through a process of free election that a government is elected, the elected government is not free to exercise governmental power in any manner it chooses, for in a parliamentary democracy, the exercise of governmental power is bounded by rules: the rules as spelt out in the Constitution and conventions which prescribe the procedure according to which legislature and executive acts are to be performed and which delimit their permissible context. These rules must necessarily circumscribe the arbitrary exercise of any discretion which the elected government may be bestowed with.

It is fundamental to such a system of government (that is parliamentary democracy) that the government in power had been elected to govern the people in accordance with the wishes of the

people. Such a government should not clothe itself with such powers that in their exercise, does not reflect the true wishes of the people.

It is not unheard of for certain elected governments to assume the role of the custodian of the people by the mere fact that they had been given the mandate to govern. The mandate to govern is distinct from any mandate to make arbitrary decisions.

Thirdly, parliamentary democracy must also necessarily mean that any powers granted by the Constitution to the elected government to suspend the application of the parliamentary system of government in the interest of the security of the nation should be sparingly exercised. A frequent exercise of such powers by the elected government may demonstrate a weakness on the part of the government to govern the country in accordance with the wishes of the people.

Fourthly, constitutional amendments ought not be made too frequently. Parliamentary government also envisages constitutionalism and so the constitutional restraints on the exercise of power must not be diluted unduly.

Parliamentary government envisages constitutionalism. Constitutional restraints on the exercise of power must not be diluted unduly.

Fifthly, the right to information and the right of being consulted are very important. The theory that it is the people who decide will fall to the ground if the government keeps the people uninformed. Similarly, major bills must not be rushed through Parliament. The people should have an opportunity to express their views. Last, but not the least, in a parliamentary democracy, the right to free speech is sacrosanct. A parliamentary democracy which curbs the right of the people to speak freely is no parliamentary democracy. This right of free speech must embrace not only a right to agree but a right to dissent from the majority view. A practical concomitant of this is the existence of a free press. A fettered press is an anomaly in a parliamentary system of democracy.

> The right of free speech must embrace not only a right to agree but a right to dissent from the majority view. A fettered press is an anomaly in a parliamentary system of democracy.

In so saying that there must be free speech, I am not, however saying that it should be an unqualified right; for no constitution in any country can grant such an absolute freedom. But then it should not also be only a symbolic right. What must be borne in mind is that the right to free speech ought not be subject to qualifications or to limits which are so far-reaching as to make the right devoid of any meaningful content.

It might be that this system requires some variations or modifications in line with the needs and requirements of different countries and peoples and perhaps also against the changing context of the political background as times change and the years go by.

This seminar will no doubt discuss this important topic from various aspects and perspectives and formulate suggestions for improvement and reform in areas where this might be called for. I have therefore no doubt that this seminar will provide useful discussion and fruitful conclusions and generate deep thinking not

only amongst the participants but also by the public generally on the theme of its proceedings.

I have accordingly great pleasure in formally declaring open this seminar. I wish it all success and am confident that its proceedings will prove to be of great benefit and worthy of its organisers.

Editor's note

See also chapter 5, *Checks and Balances in a Constitutional Democracy*, below.

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***** The Constitution

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

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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. "

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---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.

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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. "

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—**HRH Sultan Azlan Shah** The Legal Profession and Legal Practice

Sultan Azlan Shah



National and International Recognition

n 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. "

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--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*

Checks and Balances in a Constitutional Democracy

Harvard Club of Malaysia Kuala Lumpur, 19 September 1987

emocratic 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:

 \dots 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:

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

checks and balances in a constitutional democracy 103

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.

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

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

checks and balances in a constitutional democracy 10

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 USA⁶ 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:

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

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

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

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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 intrusion¹²

I should, however, point out that in this particular case, the Supreme Court was divided in its views. Three¹³ 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 two¹⁴ 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

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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.

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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.

checks and balances in a constitutional democracy 107

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.

checks and balances in a constitutional democracy

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).
checks and balances in a constitutional democracy

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.

checks and balances in a constitutional democracy 113

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.

> 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.

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.

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

checks and balances in a constitutional democracy

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.

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. 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

checks and balances in a constitutional democracy 117

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

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

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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* case³⁰), 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* case³¹), 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.

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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



* Legal power and legal limits

" Unfettered discretion is a contradiction in terms ... Every legal power must have legal limits, otherwise there is dictatorship ...

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In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the court to intervene.

The courts are the only defence of the liberty of the subject against departmental aggression. "

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--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

Sultan Azlan Shah



The Sultan Azlan Shah Law Lecture Series

n 10 April 1985, the then Vice Chancellor of the University of Malaya, Royal Professor Ungku Abdul Aziz, announced that in appreciation of His Royal

Highness's enormous support and guidance given to the Faculty of Law, University of Malaya, an annual series of law lectures to be named The Sultan Azlan Shah Law Lecture will be established. Since 1986, when the first Sultan Azlan Shah Law Lecture was delivered in Kuala Lumpur, distinguished Lord Chancellors, Masters of the Rolls, Lords of Appeal in Ordinary, a President of the New Zealand Court of Appeal, an Associate Justice of the Supreme Court of The United States of America and academics from the Commonwealth have been invited to partake in the premier law lecture series of Malaysia.

The series of lectures have yielded brilliant insights on an extensive range of legal issues, and the expert and contemporaneously salient opinions of legal luminaries from around the Commonwealth.

These authoritative, stimulating and thought-provoking lectures have now been published in a single volume: *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, edited by Professor Dato' Seri Visu Sinnadurai, Professional Law Books and Sweet & Maxwell, 2004.

M Judges: Development of the law

" 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.

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For this reason, their decisions must be based on the law, with sufficient authorities and reasoning. "

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



" Laws alone are incapable of regulating the conduct of every aspect of business transactions. No amount of ingenuity on the part of legal draftsmen will suffice to anticipate every form of improper dealing or the various means of deception or fraud which may be perpetrated by persons in control of companies.

Should not businessmen be made to realise that besides compliance with the law, there are also moral obligations? Though corporations exist to maximise profits, they also have a social responsibility to partake in the general development of society. Corporations operate not in a vacuum but in a socio-political environment. The tendency among certain corporations to ignore these responsibilities and their failure to uphold pristine ethical values may prove to be self-destructive in the long run. "

> —**HRH Sultan Azlan Shah** *Corporate Activity: Law and Ethics*

Corporate Activity: Law and Ethics

Malaysia Institute of Management Silver Jubilee Dinner Kuala Lumpur, 21 June 1991

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onight's function marks the beginning of the year-long activities planned by the Malaysian Institute of Management to commemorate its 25th Anniversary. I congratulate the Institute for its accomplishments.

Of late, there has been an increasing awareness over the relevance of ethics in the conduct of business. It is a truism that corporate activity has to be regulated both by law and ethics. Sound business decisions may be reached through an ethical-oriented analysis as through a self-interest approach. As it is said, the ethical solution—the right solution—is also the practical solution. Ethics, after all is united with utility and reason, and this is what makes ethics an important factor in personal, institutional, business, sports and national decision-making. We are all the product of the accumulation of our decisions.¹

1 Myers, "Ethics in International Affairs", (1991) 92 *Dialogue* 3.

In two of my earlier public lectures, I spoke on a similar theme: to the Academy of Medicine Malaysia, I addressed the doctors on *Medicine, Ethics and the Law*,² and to the Institution of Engineers Malaysia, I emphasised the ethical issues pertaining to engineers.³ This evening, I am happy to have the opportunity to address the business community in Malaysia on the role of ethics in corporate activities.

Corporate activity has to be regulated both by law and ethics. The standards and values that management adopts reflect the socio-cultural milieu of society and have a significant effect in shaping the values of the nation.

> There is no denying that management and business conduct have direct and indirect impact on all sectors of society. The standards and values that management adopts reflect the sociocultural milieu of society and have a significant effect in shaping the values of the nation.

> Whilst the conduct of professionals in many fields is governed both by law and a code of ethics pertaining to the particular profession, businessmen do not have any formalised code of ethics. More often than not, it is the law which controls their activities. But laws alone are incapable of regulating the conduct of every aspect of business transactions. No amount of ingenuity on the part of legal draftsmen will suffice to anticipate every form of improper dealing or the various means of deception or fraud which may be perpetrated by persons in control of companies. This evening, I hope to draw your attention to certain aspects of the conduct of business which highlight the inter-play between law and ethics.

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The Eighth Tun (Dr) Ismail Oration organised by the Academy of Medicine of Malaysia on 5 October 1989. See chapter 9, below; also published in Sinnadurai (Editor), *His Majesty Sultan Azlan Shah*, 1989, Professional Law Books, pages 127–144 and 1990 *Supreme Court Journal* pages 1–18.

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Second Public Lecture organised by the Institution of Engineers, Malaysia on 31 March 1989. See chapter 8, Engineers and the Law: Recent Developments, below; also published in His Majesty Sultan Azlan Shah, above, pages 99–125.

129

Corporate law

The area in which there is a clear display of the inter-relationship between law and ethics is in the field of company law: insider trading, securities fraud, minority rights, criminal breach of trust, and more generally, breach of fiduciary duties, are merely few illustrations of this.

With the increase in trade and foreign investment and as a consequence of the economy of the country progressing steadily, there has been a marked increase in the number of companies being incorporated in Malaysia and many seeking listing on the stock exchange. What was once family-owned companies or small companies have now grown in size both physically and in terms of capitalisation. As a result, the public have also taken a keener interest in participating in the ownership of these companies.

Company law in Malaysia has become one of the most rapidly developing areas of the law. The country has now reached such heights, that in the fields of securities, takeovers, mergers, reverse takeovers, and the like, the position is comparable to that existing in the other so-called advanced nations. In so achieving this position, some of the attendant problems associated with these corporate activities have also surfaced. The most common of these is, of course, corporate fraud, in whatever form it may take. New laws had to be introduced to keep pace with changing times. The Companies Act 1965 has been amended several times,⁴ and new legislation, ie the Securities Industries Act 1983⁵ and the Securities Industry (Central Depositories) Act 1991,⁶ were enacted. About the same time, it is interesting to note that new regulatory bodies, like the Foreign Investment Committee (FIC) and the Capital Issues Committee (CIC), were established. Guidelines, not in the form of

4 Act 125, Reprint 1988 and Amendment Act A720.

5 Act 280.

6 Act 453.

legislation, were also introduced. The Regulations on Acquisition of Assets, Mergers and Take-Overs is an example of such guidelines.

Self-regulations

The question which may be asked is whether such self-regulations, and the body itself which administers it, especially since these bodies have no statutory powers to punish offenders who contravene their code or regulations,⁷ are effective in instilling a certain degree of ethical values in the conduct of such corporate transactions.

In countries like England, these self-regulations have been well received by the business community, and the bodies regulating them have achieved a great deal of success.⁸ Likewise, I am confident that with the introduction of similar self-regulations, a more ethical and responsible corporate image may gradually appear. This, in turn, would prove to be an attractive attribute of the corporate sector in Malaysia.

Company directors

Another important aspect of corporate activity which has come under close scrutiny is the role of company directors, and the image portrayed by them.

Company directors continue to consider their companies as their own, and in the process, appear to have lost sight of the fact that they are merely trustees of the general public who are the shareholders. Being trustees, they are, as a general rule, accountable to the shareholders. Yet the number of cases of abuse of power by

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As to whether the decisions of such bodies are subject to judicial review, see *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 and *R v Panel on Take-overs and Mergers, ex parte Guinness plc* [1989] 1 All ER 509.

See also Lord Woolf, "Judicial Review of Financial Institutions" in *The Sultan Azlan Shah Law Lectures: Judges on the Common Law*, 2004, Professional Law Books and Sweet & Maxwell, chapter 12.

8 See generally

Whittaker, "Legal Technique in City Regulation", (1990) 43 CLP 35; Weinberg and Blank on *Take-over and Mergers*, 4th edition, pages 216–217. directors reported over the recent years is a clear manifestation as to how those in power perceive their roles.

Such practices seem to suggest that some directors in an attempt to enrich themselves seem to lack an understanding of their moral, if not their legal obligations.

In most of these areas, the existing laws may provide some kind of a protection to the general public. But, as we know, the long arm of the law alone may not in every case provide the protection that is required. Most cases of corporate offences do not surface as the perpetrators of such crimes often conceal or camouflage their acts. Even in the cases which are brought to the attention of the relevant enforcement authorities, due to lack of evidence or other related matters, the offenders are able to get away scot free.

> Company directors consider their companies as their own, and have lost sight of the fact that they are merely trustees of the general public who are the shareholders. Being trustees, they are, as a general rule, accountable to the shareholders.

The same question again comes to one's mind, that is: Should not businessmen be made to realise that besides compliance with the law, there are also moral obligations? Though corporations exist to maximise profits, they also have a social responsibility to partake in the general development of society. It needs to be emphasised that corporations operate not in a vacuum but in a socio-political environment. The tendency among certain corporations to ignore these responsibilities and their failure to uphold pristine ethical values may prove to be self-destructive in the long run.

It is true that in certain circumstances, the law has not kept pace with the changes in the corporate sector. This is not because the law has inherent shortcomings or that it has inadvertently fallen behind: the role of the law is not to regulate the minute details of every aspect of corporate activity. Its only function is to help define the parameters of corporate activity, and generally to ensure that such activity is within the limits set by society.

Besides compliance with the law, are there also moral obligations? Though corporations exist to maximise profits, they also have a social responsibility to partake in the general development of society.

Another reason for the widespread instances of abuse of power is the fallacy in thinking that as a corporation is not a human being, moral values and ethics are inapplicable. A corporation, in law, is a legal entity.⁹ Each subsidiary of a holding company is a separate legal entity.¹⁰ A corporation, like a human being, has a brain and a nerve centre which control what it does: the employees being the hands and the directors being the mind of the company. This feature was lucidly explained by Lord Denning in *HL Bolton* (*Engineering*) *Co Ltd v TJ Graham & Sons Ltd*:¹¹

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these

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Lord Macnaghten in the classic case of Salomon v Salomon [1897] AC 22, 51 said: "at law a [company] is a different person altogether from the subscribers to the memorandum of association." See generally Palmer's Company Law, Volume 1, 22nd edition, chapter 18.

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See Charterbridge Corp v Lloyds Bank Ltd [1970] Ch 62 and generally Palmer's Company Law, chapter 67.

11 [1957] 1 QB 159. managers is the state of mind of the company and is treated by the law as such.¹²

It appears that this basic feature of companies is often, if not deliberately, overlooked.

Insider trading

An example of such abuse is that relating to insider trading. The subject of insider trading became increasingly lively in the late 1980's and has been heightened now by the recent Guinness/Distillery affair in England and the Boesky conviction in the United States.¹³

I should perhaps also point out that studies have indicated that such activities are frequently carried out by non-residents of a country. However, the existing instruments for international co-operation are not designed to facilitate the obtaining of information of such facts and for the punishment of such offenders. As there are deficiencies in international law with respect to the phenomenon of insider trading, certain countries, for example, in Europe, have established a Convention on Insider Trading for the Exchange of Information between the countries.¹⁴

Conventions of this nature enable countries to supervise the securities market effectively and to establish whether the participants of certain financial transactions on the stock markets are insiders. This would in turn reveal whether the transactions were fraudulent or proper. Maybe, the time has come for our country to consider the implementation of such agreements with other countries to combat such operations in Malaysia. As pointed out by Professor Loss of Harvard University, who is regarded as the leading authority on securities:

12 Ibid at 172.

13

See generally, Ashe and Counsell, *Insider Trading, The Tangled Web*, 1990, Fourmat Publishing, London.

133

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Lowry, "The International Approach to Insider Trading: The Council of Europe's Convention", [1990] Journal of Business Law 460.

... the very preservation of any capital market depends on liquidity, which rests in turn on the investor's confidence that current quotations accurately reflect the objective value of his investment.¹⁵

Insider trading is a classic case of abuse of power; there are many more. Directors, because of their special position, are often confronted with the difficulty of coping with questions flowing from conflict of duties and interest, an area which is rich in litigation.

Directors may be faced with numerous opportunities whereby the temptations to enrich themselves are compelling, for example, where a director uses his position to obtain a profit for himself. The director, in such a situation is, of course, accountable to the company for the profits made by him. A director, like an agent who receives a bribe, will otherwise be in breach of his fiduciary duty. The well-known dictum of Lord Herschell in *Bray v Ford*¹⁶ still holds good as can be seen in its application in all its rigour by the House of Lords recently in *Guinness plc v Saunders*:¹⁷

It is an inflexible rule of a court of equity that a person in a fiduciary position ... is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and duty conflict.¹⁸

A strict application of the rule of equity that a director of a company, as a trustee of the shareholders, cannot make any profit from his trust, or even obtain remuneration for services rendered by him to the company, except as expressly provided in the trust deed, is clearly illustrated in the well-known recent case of *Guinness plc v Saunders*.¹⁹ In this case, the House of Lords refused to allow a

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Louis Loss, "The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States," (1970) 30 Modern Law Review 34 at 36

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[1896] AC 44 at 51–52.

17 [1990] 1 All ER 652, HL.

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Ibid at 660. See also dictum of Cairns LJ in Ferguson v Wilson (1866–67) LR 2 Ch App 77 at 89–90 which was approved by the Privy Council in the recent case of Kuwait Asia Bank EC v National Mutual Life Nominees Ltd [1990] 3 All ER 404 at 420 (on appeal from New Zealand).

19 [1990] 1 All ER 652, HL director of Guinness to retain the £5.2 million paid to him for his assistance in a takeover bid made by Guinness. The court held that he was in breach of his fiduciary duty to avoid a conflict of personal interest and a duty to the company.

> A director of a company, as a trustee of the shareholders, cannot make any profit from his trust, or even obtain remuneration for services rendered by him to the company, except as expressly provided in the trust deed.

Likewise, to quote merely one well-known Malaysian case, Mahesan v Malaysian Government Officer's Co-operative Housing Society,²⁰ Mahesan, a director of the Housing Society, decided to buy land for the Society but came to a clandestine arrangement with a third party in exchange for a bribe, so that the third party bought the land at the asking price and sold it to the Society for twice the original amount. The Privy Council held that the Housing Society could recover the amount of the bribe, as money had and received, or sue Mahesan for fraud and loss, in excess of the amount of the bribe.

Protection of minority shareholders

Another aspect of corporate activity where law and ethics play an important role is in the area of minority shareholders rights. The general rule, of course, is that members of a company are bound by the decisions made by the majority of members. As was pointed out by Lord Wilberforce in the Malaysian case of Kong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung:²¹

20 [1978] 2 All ER 405; (1977) 3 PCC 323. See Goff and Jones, The Law of Restitution, 2nd edition, pages 490-511 and generally the Law Commission, Working Paper No 104 on Criminal Law, Conspiracy to Defraud, HMSO, 1987.

21 (1978) 3 PCC 388.

Those who take interest in companies limited by shares have to accept majority rule.²²

Therefore, as the actions of the majority bind all members, it is the duty of those in charge of the management of the company to ensure that the interests of all members are protected. Though they may have the support of the majority, they should ensure that no unlawful act or an act which may amount to a fraud should be implemented. As pointed out earlier, there is a tendency on the part of those who control companies to regard companies as a mere machinery or vehicle to further their own interests, and in the process to overlook the fact that the company is made up of individuals who are the shareholders.

As the actions of the majority bind all members, it is the duty of those in charge of the management of the company to ensure that the interests of all members are protected.

> The law, of course, provides certain rights and remedies to minority shareholders. In cases where a member of a company feels that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members, or that some act of the company has been done or threatened or that some resolution of the members has been passed which unfairly discriminates one or more members, such person may apply to the court for an order to seek certain redress. In such a situation, if the court is satisfied with the merits of the application, the court may, under section 181 of the Companies Act 1965, inter alia:

137

- (a) direct or prohibit any act or cancel or vary the transaction or the resolution;
- (b) regulate the conduct of the affairs of the company in future; and
- (c) in certain circumstances, provide that the company be wound up.

The circumstances under which the court may grant any of the reliefs set out in section 181 of the Companies Act 1965 was dealt with in detail by the Privy Council in the case of *Kong Thai Sawmill*, which I have referred to above. Again, to quote Lord Wilberforce:

It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. There must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which a shareholder is entitled to expect before a case of oppression can be made.²³

In this case, a minority shareholder (the respondent) brought an action against the company and two directors seeking relief under section 181 of the Companies Act 1965. The respondent claimed 60 separate claims for relief concerning a large number of separate matters. The main allegation of the respondent was the misuse or misappropriation of company funds by the two directors. The Privy Council in refusing to grant the relief sought, rejected the respondent's claims on the ground that none of the allegations of the respondent was substantiated. The respondent's case for winding up the company was also rejected.

As can be seen, it is not always easy for a minority shareholder to succeed. In *Smith & Ors v Croft & Ors (No 2)*,²⁴ the court again

23 Ibid.

24 [1987] 3 All ER 909.

considered the circumstances under which a minority shareholder may bring an action against the directors for having received excessive remuneration and making unauthorised payments. The court in this case held that the minority shareholders, who were the plaintiffs, had no locus standi to bring the action as it was the company and not the plaintiffs who should have brought the action. The court drew a distinction between the personal right of a shareholder and a loss which was caused to the company. Knox J said:

When a minority shareholder seeks to enforce a right of the company to claim compensation for a past ultra vires transaction, there are two separate rights involved. First, there is the minority shareholder's right to bring proceedings at all and, second, there is the right of recovery which belongs to the company but is permitted to be asserted on its behalf by the minority shareholders.²⁵

It is the management's paramount duty always to act in the best interests of the company as a whole and not merely their own or that of the majority.

Cases of fraud exercised by those in control of the company against the minority are situations like:

- (a) appropriation of the company's money or property;
- (b) the majority obtaining a benefit at the expense of the company; or
- (c) the majority's attempt to prevent an action from being brought.

25 Ibid at 945. See also 7 Halsbury's Laws of England, 4th edition, paragraph 713. Whilst it is true that in many instances of such oppression an action is not brought by minority shareholders either because the fraudulent acts are not known or because of other technicalities involved in the law, those in charge of the management of a company should not take advantage of such situations. It is their paramount duty always to act in the best interests of the company as a whole and not merely their own or that of the majority.

Computer misuse

Time does not permit me to delve into many other aspects of corporate abuse. I, however, wish to discuss briefly a recent development, which may be of particular interest to many of you. The arrest of a medical computer consultant in Ohio by FBI agents on behalf of Scotland Yard, and the conviction of a Cornell University undergraduate early last year in the United States,²⁶ are mere illustrations of the rapid spread of computer technology, the ever changing computer vocabulary and the growing global concern about computer misuse.²⁷

With the advent of electronics and other technological development, especially in the area of computers, a number of legal and ethical issues have arisen and continue to arise. Computers are now a common feature of the financial and insurance sectors, particularly in the stock markets, money markets and electronic fund transfers, and many more. In the field of financial services, the introduction of on-line computer systems has replaced the physical trading floor in the stock exchanges in several countries. Even in Malaysia, with the advent of scripless securities to be introduced under the Securities Industry (Central Depositories) Act 1991,²⁸ the reliance on computers will increase.

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This was the first conviction under the United States Computer Fraud and Abuse Act 1986. See page 143, below.

27

McConnell, "Global Warning in Computer Law", (1990) 140 *New Law Journal* 287.

28 Act 453.

The magnitude of business transactions conducted through computers can be seen from the following fact: it is said that US\$250 million pass in and out of the City of London every day by electronic means.²⁹

There is also no doubt that the banking industry has been radically changed with the extensive use of computers. As many of the banking transactions involving huge sums of money may be transacted by the mere keying in of certain numbers on a computer, the opportunities for the commission of computer related crimes, particularly fraud, have also increased.

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Previously, one read with horror the staggering loss of £6 million by a British bank or of an employee of another bank using the bank's computers to transfer £1 million into a friend's bank account.³⁰ In Malaysia, we too have had our fair share of losses by our banks: recently a young employee of a local bank was alleged to have transferred over RM4 million into his own account so as to enable him to purchase luxury cars. In 1989, the Banking Ombudsman in Britain reported that "phantom" cash withdrawals from automated cash dispensers, where customer accounts had been wrongly debited for using ATMs, was the public grievance which occupied the bulk of his staff's time. Complaints to banks are running in the region of 50,000 a year.

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See generally Wasik, *Crime and the Computer*, 1991, Oxford University Press, page 10.

See also for example the recent case of *Agip* (*Africa*) *Ltd v Jackson Bowers* [1991] 1 *Banking Law Review* 23, CA; [1991] Ch 547; [1991] 3 WLR 116; [1992] 2 All ER 451.

30 Wasik, Crime and the Computer, pages 10–11.

141

Computer fraud

Computer fraud has become so widespread in recent years that it now falls within the category of white-collar crimes.³¹

Any manipulation of a computer by whatever method in order to dishonestly obtain money, property or some other advantage of value, or to cause any loss is broadly termed as computer fraud. Such fraud may either be in-put fraud, or out-put fraud. There is also programme fraud, that is, the dishonest alteration of computer programmes, though such cases are less frequent than out-put or in-put fraud.

> Any manipulation of a computer by whatever method in order to dishonestly obtain money, property or some other advantage of value, or to cause any loss is broadly termed as computer fraud.

I am sure you are aware of several cases of such computer fraud. The question, however, is whether the existing laws relating to criminal liability are sufficient to impose liability on offenders of such fraud. Whilst it is now clear that certain cases of in-put fraud, for example, to obtain money from a cash dispenser machine by either using a forged cash card or another's card, may amount to theft,³² there are many other acts which fall within the grey area of the law. The point which I wish to stress is not so much whether the existing laws are adequate, but whether, wider ethical considerations should also apply.

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See chapter 7, *White Collar Crime*, below. A number of books have now been published on this area of the law.

See generally Wasik, Crime and the Computer; Comer, Corporate Fraud, 2nd edition, 1985, McGraw-Hill.

See also Sutherland, *White Collar Crime*, 1949, Holt, Rinehart & Winston, New York.

32

See generally the Law Commission (UK) Report on *Criminal Law: Computer Misuse*, (1989) Cm 819, HMSO, London.

See also the Australian case of *Kennison v Daire* (1987) 160 CLR 129.

Unauthorised access to computers

I do realise that some of the ethical problems relating to computer misuse are far from straightforward. For example, the extent to which unauthorised access to computers, or to use the computer jargon, "hacking" or "time theft" should arouse condemnation or criminalisation is far from obvious. In some cases, a person does not intend to obtain a personal benefit by such computer misuse. More often than not, such a person is motivated solely by curiosity and the intellectual challenge of overcoming computer security devices, and feels a sense of achievement insofar as he feels that he has been able to outsmart the computer.³³

Some of the ethical problems relating to computer misuse are far from straightforward. The extent to which unauthorised access to computers should arouse condemnation or criminalisation is far from obvious.

> Furthermore, whilst stealing from a person may involve a certain amount of remorse or guilt, a hacker may in fact, command a certain element of envy and admiration from his peers or even the public.

> In the leading case relating to hacking—R v Gold and Schifreen,³⁴ the House of Lords had to consider whether under the relevant laws of England, the hackers could be charged with forgery. As this case reveals the modus operandi of hackers and illustrates certain ethical issues, I shall expand on it.

33 See "Hacking into Computer Systems", (1990) 64 Australian Law Journal 105.

[1988] 2 All ER 186; [1988] 2 WLR 984.

In this case, a freelance computer journalist and an accountant, by taking advantage of some slack security procedures, were able to gain unauthorised access to material contained in the Prestel computer system, a public information service, and to use files containing all the identification numbers and passwords of subscribers. By an obvious password (1234), they obtained access to the account of a British Telecom employee, which contained confidential numbers of Prestel computers not available to the public. They altered the files. They even found codes belonging to the Duke of Edinburgh, amongst others.

The identity of the hackers became well-known when the defendants talked of their exploits on a BBC television programme and were interviewed by the computer news magazines. One of them gave a demonstration of the method of computer access to one reporter after which, apparently, he encouraged the reporter to inform British Telecom of the security lapse. Even after Prestel had been informed, the defendants continued with their unauthorised accessing of the system. Clearly, they did not expect to be prosecuted, but, in the event, they were charged with forgery. In fact, the court found that the persons accused of hacking were "carrying on these activities not so much to gain any profit for themselves as to demonstrate their skill as 'hackers'".

It was held by the House of Lords that the defendants had committed no offence. I hasten to add that changes to the law were introduced soon after this decision: the Computer Misuse Act 1990³⁵ now makes it a criminal offence to secure an unauthorised access to a computer.

In the case relating to the Cornell University undergraduate, which I alluded to earlier,³⁶ Morris was the perpetrator of the most

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As to the position in Australia, see generally Greenleaf, "Information Technology and the Law", (1990) 64 *Australian Law Journal* 284.

36 See page 139, above.

spectacular act of computer abuse yet seen. He created a "worm" program which distributed itself across the world's largest computer network, the Internet, replicating itself and consuming computer resources so that it made over 5,000 computers on the network unusable within a few hours, many of them in major scientific and industrial establishments. The program is called a "worm" rather than a "virus", because it did not attempt to corrupt existing programs or data.

It may be of further interest to you to know that a "Hackers Conference" was held in Amsterdam with some of the delegates expressing an intent to make all computers and the information they hold to be "freely accessible to the people". Another group in the United States, known as "the Cyberpunks" has promoted a "charter of irresponsibility" with regard to accessing and opening up computer systems.

In a recent article, the following startling observation was made:

Perhaps the most devastating loss a company can sustain is the theft of private corporate data. As the international marketplace expands, competition among industries has become more fierce. Businesses are seeking the competitive edge like Crusaders sought the Grail, and in the process ethics are sometimes wounded.³⁷

Before, we in Malaysia reach a similar position, certain ethical attitudes to computer misuse have to be formulated. We cannot ignore these activities. We may not be able to wipe them out completely, but we can begin to make an attempt.

37 Wathen, "The Background Checks: The Backbone of Business", (1991) 14 *Leaders* 82, (New York).

Conclusion

Though this evening I have generally made reference to the role of directors, much of what I have said is equally applicable to managers, chief executive officers and others occupying top management positions in corporations.³⁸ I also hasten to add that these observations are not merely restricted to large companies. It is apparent from recent trends that ethical values have to be incalculated in all persons at all levels whose actions and decisions affect the general public. In this regard, senior and experienced management must realise that the younger managers in their own corporations will invariably look to them for guidance. If the senior managers will also emulate them.

Ethical standards will determine the shape of the emerging new world of corporate activity. That is why morality and ethics matter.

Other than the strict enforcement of more stringent laws, a comprehensive code of ethics needs to be introduced to regulate commercial morality in the hope of achieving what is sometimes called "market egalitarianism". This, I believe will help to regain the public confidence in corporate activities which now appears to be swiftly eroding. Bodies like the Malaysian Institute of Management, and the newly founded Malaysian Business Council, may wish to undertake such a study so as to make recommendations for the implementation of such a code.³⁹ The underlying philosophy for such a code should be, as pointed out by the *Justice Report on Insider Trading*⁴⁰ that:

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As to the position of managers and directors, especially in a take-over scheme, see generally Bradley, "Corporate Control: Markets and Rules", (1990) 53 *Modern Law Review* 170.

39

See for example the Cooney Report in Australia which is discussed by Professor Baxt in "Reforming the Law Relating to Company Directors", (1990) 64 Australian Law Journal 345. The article's main thrust is the need to improve the image of the Australian corporate scene.

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For a summary of the Report, see (1973) 36 *Modern Law Review* 185.

... good business ethics ought to be supported and reinforced by legal sanctions.

At the end of the day, it must be accepted that ethical standards will determine the shape of the emerging new world of corporate activity. That is why morality and ethics matter.

Editor's note

See also chapter 7, *Corporate Misconduct: Crime and Accountability*, below.

Computer crimes: See notes at the end of chapter 14 and the references mentioned therein.

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* Constitutional conventions

"The executive itself cannot just act as it pleases, for its own powers are also subject to precise restrictions. Even where limits do not appear to be sufficiently clear, there are rules of unwritten law which dictate the courses of action that may be followed.

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These rules are called constitutional conventions. They serve to ensure that actions undertaken are not just lawful according to the letter of the supreme law, but are also practical, viable and have the support of society in general. "

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—**HRH Sultan Azlan Shah** Supremacy of Law in Malaysia

* Interpretation of the Constitution

" In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation.

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Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way—'with less rigidity and more generosity than other Acts'.

A constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. "

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---Raja Azlan Shah Acting LP (as he then was) Dato Menteri Othman bin Baginda & Anor v Datuk Ombi Syed Alwi bin Shed Idrus [1981] 1 MLJ 29, FC at 32

Sultan Azlan Shah



Sultan Azlan Shah Scholarships and Awards

number of prizes and scholarships awarded by several institutions of higher learning in Malaysia and England have been named after His Royal Highness Sultan

Azlan Shah. Amongst these are the Sultan Azlan Shah Scholarship awarded by Davies College; the Sultan Azlan Shah-HLT Bar Finals Scholarship awarded by the Holborn Law Tutors Group, London; and the Sultan Azlan Shah Book Prize awarded by the Faculty of Law, University of Nottingham.



"The importance of morals, ethics and discipline in overcoming white collar crime must not be scoffed at. In our efforts to eradicate white collar crime, it is vitally important that we are disciplined and hold true to the values emphasised by our religion. "

> —**HRH Sultan Azlan Shah** *Corporate Misconduct: Crime and Accountability*

Corporate Misconduct: Crime and Accountability

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Harvard Business School Alumni Club of Malaysia Kuala Lumpur, 7 April 1987

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am greatly honoured to be asked to address you on the occasion of the Gold Medal Award of the Harvard Business School Alumni Club of Malaysia.

I understand that this is one of the major events organised by your Club every year for the purpose of providing encouragement and giving due recognition to the student from among the three universities—Universiti Pertanian Malaysia, University of Malaya and Universiti Kebangsaan Malaysia—who has achieved outstanding excellence in the pursuit of business studies. It would appear that this award has generated intense rivalry between the universities.

While I compliment the winner of this year's Gold Medal Award and wish him further glory and achievements in his future sphere of activities, I must also congratulate your Club for taking the

initiative in providing this excellent incentive to students of business studies to high performance both in their final examinations and during the course of their studies, also taking into account the extra mural activities of these students. This is most becoming and worthy of an alumni of the oldest institution of higher learning in the United States of America.

When I was conferred the Honorary Fellowship of the Malaysian Institute of Management last August, I intended to include some aspects of white collar crime in my acceptance speech, but the subject being an exhaustive one, I thought it wiser to leave it to some other occasion when I would deal with it in some length. The occasion is at hand and I am pleased to have this opportunity of addressing you on this subject of great current interest.

First of all, I shall attempt to deal with the intricate task of defining crime, both the white-collared variety as well as the other common type that is generally known to us.

Put simply, a crime is an act committed or omitted in isolation of a law forbidding or commanding it, and for which punishment is imposed upon conviction.

Within each society or culture, the line between normal and criminal, or merely deviant behaviour, differs by varying codes or bodies of criminal law. Hence in any society or culture, a criminal act would depend, by and large, on two sets of related norms: the legal and moral codes prevailing within that society or culture. For example, what is normally an act of social misconduct leading, at worst, to a matrimonial dislocation, an act of adultery committed in some of the inherently conservative Muslim countries of the Middle East would be regarded as a crime of such magnitude as

corporate misconduct: crime and accountability

to warrant the extreme penalty executed under most humiliating circumstances, as such conduct transgresses their moral code of ethics.

Hence, a person's behaviour and sense of ethics play a crucial role in avoiding acts of crime. As Marshall Clinard and Peter Yeager state in their publication *Corporate Crime*¹ in 1980:

The inculcation of ethical principles forms the basis of crime prevention and control, whether we are discussing ordinary crime or white collar crime.

Although it was comparatively unknown in earlier times until the infamous South Sea Bubble burst upon the otherwise quiet English scene in 1720, it was really at the beginning of this century that white collar crime reared its ugly head with some prominence and society was made sufficiently aware to pay serious attention to it. Various sociologists began publishing on the subject beginning with Edward Ross in *The Criminaloid*² in 1907. Matthew Josephson followed with a publication known as *The Robber Barons*³ in 1934 and Albert Morris with *Criminology*⁴ in 1940, generally emphasising that not only were these "crimes of the other world" a social problem, but they do fall within the confines of criminology.

It was in 1940 when Edwin H Sutherland published *White Collar Criminality*,⁵ that catchy and apt phrases like "white collar crime", "white collar criminality" and "white collar criminal" were used. Today, white collar crime is also given other appellations like "occupational crime", "business crime" and "corporate crime".

But how does one really define white collar crime? Because it was never properly defined, it was given various names and terms.

Free Press, 1980.

Chapter 3 in Sin and Society: An Analysis of Latter-Day Iniquity, Houghton Mifflin Company, 1907.

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Now published by Harvest/Harcourt Brace & Co, 1995.

4 Longmans & Green, 1934

5 American Sociological Review, 5:1–12, 1940.

What appears to be the simplest, yet authentic, definition is given by Edwin Sutherland in *White Collar Criminality*. He defines it as:

"crime in the upper or white collar class, composed of respectable or at least respected business and professional men" as compared with "crime in the lower class, composed of persons of low socio economic status".

The Presidential Commission on Law Enforcement and Administration of Justice in 1967 came out with a publication called *The Challenge of Crime in a Free Society* and it defines white collar crime as:

those occupational crimes committed in the course of their work by persons of high status and social repute.

It has become all too familiar that professional and ostensibly "highly successful" business men with respectable handles to their names have been exposed for their predilection to white collar crimes.

> Here in this country in recent times, it has become all too familiar that professional and ostensibly "highly successful" business men with respectable handles to their names have been exposed for their predilection to white collar crimes.

Impact of white collar crimes on society

White collar crime covers every facet of our economy and society; neither rich nor poor is able to escape its clutches as it does not discriminate among its victims. Regretfully, I have to refer again to recent cases in Malaysia.

White collar crime covers every facet of our economy and society; neither rich nor poor is able to escape its clutches as it does not discriminate among its victims.

Thousands of people from the lower income group became victims to 24 deposit-taking co-operatives as a result of fraud, executive incompetence or mismanagement.⁶ The managing director of one such co-operative was recently sentenced to 12 years' imprisonment. Hearings of many cases of similar nature are pending in our law courts and, therefore, cannot be the subject of discussion here.

White collar crime differs from traditional crimes in two aspects: (i) impact; and (ii) modus operandi.

August Bequai in his book *White Collar Crime: A Twentieth Century Crisis*,⁷ published in 1978, says:

In terms of injury, white collar crime affects more individuals. In terms of money or lost property, these crimes are costlier than traditional offences.

It is understandable that there is a limit to what robbers can physically carry away when they hold up a bank, but perpetrators of white collar crimes can cause the loss of unlimited sums running into hundreds of millions of dollars, as the recent co-operative scandal in this country indicates. 6 See for example the case of Ng Chin Swee v Koperasi Belia Bersatu Bhd [1987] 2 MLJ 510, HC.

7 Lexington Books, 1978.

White collar criminals rely on deceit and concealment; they play on the naïvety of their victims and the near universal greed of the individual. It is a common feature of fraud in this country that victims fall easy prey to it because of the greed of the individual for highly usurious rates of interests on money lent. Often, when the borrower absconds with huge sums of money, many of the victims are too scared even to report their losses to the police for the obvious reason that they will be victimised a second time—only this time, they have to answer the grueling queries of the Income Tax Department. The gullibility of depositors in a recent case in Kedah is a case in point.

White collar criminals rely on deceit and concealment; they play on the naïvety of their victims and the near universal greed of the individual.

In 1974, the US Chamber of Commerce, in its *Handbook on White Collar Crime*, estimated that white collar crime in North America alone exceeded US\$41 billon falling in these categories:

Bankruptcy fraud, bribery kickbacks, computer related fraud, consumer fraud on private, business and government victims, credit cards and cheques fraud, embezzlement, pilferage, receiving stolen property, insurance fraud, securities fraud.

Michael Comer in *Corporate Fraud*,⁸ published recently states that:

Losses from fraud in most organisations are estimated at between 2-5% of gross turnover and approximately 50% of the workforce

McGraw-Hill Books Co Ltd, 1986.

corporate misconduct: crime and accountability

is regularly engaged in fraudulent activity against the employer. Thirty per cent of US companies' liquidation is the result of fraud or embezzlements. However, less than 15% of discovered cases are reported to the police.

The October 1985 issue of *The Executive* states that the number of white collar crime cases reported to the Commercial Crime Bureau, Hong Kong increased from 826 in 1980 to 1,552 in 1984 involving HK\$108 million in 1980 to HK\$620 million in 1984.

The greatest fraud ever perpetrated in our history was the loss incurred over the BMF affair which cost the nation RM2.1 billion. The deposit taking co-operatives scandal came a close second, affecting the interests of well over 500,000 depositors.

In Malaysia, figures given by Bank Negara show that the number of fraud cases rose progressively from 36 cases in 1984 involving US\$1.7 million to 202 cases in 1986 involving RM146.1 million. However, the greatest fraud ever perpetrated in our history was the loss incurred over the BMF affair which cost the nation RM2.1 billion. The deposit taking co-operatives scandal came a close second, affecting the interests of well over 500,000 depositors, not to mention the severe adverse effect on the nation's economy at a time when we could least afford such reverses.

The publication of the US Department of Commerce *Crime in Service Industries* issued in 1977 states as follows:

There is little doubt that white collar crime will continue to rob society as it has in the past, that modern technology has aggravated an already serious situation.

Overcoming white collar crime

There is no doubt whatsoever that white collar crime is growing at an alarming rate and threatens the foundations of society. It is of utmost importance that we, as loyal employees and citizens, act now to put a stop to the perfidious growth of white collar crime. Thomas Kauper, Assistant Attorney-General, made a clarion call to the business community in a address to the American Bar Association. He said:

In these times, when important and far-reaching questions are being raised about the ethics of the business community, strong and eloquent voices urging responsible business behaviour are vitally needed.

White collar crime is growing at an alarming rate and threatens the foundations of society. It is of utmost importance that we, as loyal employees and citizens, act now to put a stop to the perfidious growth of white collar crime.

> The importance of morals, ethics and discipline in overcoming white collar crime must not be scoffed at. Clarence Walton in his book, The Ethics of Corporate Conduct⁹ published in 1977 emphasised:

Prentice Hall Direct, 1977.

corporate misconduct: crime and accountability 159

In any field, ethics is a discipline that deals with what is good or bad, right or wrong and the principles of what constitutes a moral duty or an obligation. Ethics in business stress the importance of truth and justice in all spheres of business activity.

In our efforts to eradicate white collar crime, it is vitally important that we are disciplined and hold true to the values emphasised by our religion. Volume 5 of the 1978 edition of *Encyclopaedia Britanica* has a message for us:

It is a well established canon among many social scientists that one's values may influence an individual's tendency towards criminal acts. In America, research has suggested that unsound discipline may be related to about 70% of criminal men.

Yet another suggestion that religion influences ethics is emphasised by Geoffrey Lantos, Assistant Professor of Marketing, Stonehill College, Massachusetts in a letter which was published in the 5 January 1987 issue of *Fortune Magazine*. He wrote:

Traditional religion holds the key to ethical decision making ... Only with a focus on absolute traditional values will the forces of light prevail. Without it, all that remains is a moral vacuum.

In 1973, J Paul Getty gave this piece of valuable advice in *How* to be a Successful Executive:¹⁰

Be scrupulously honest. An honest man will scorn any dubious scheme, no matter how great the promised profit. In short, the person who is himself open and honest and takes time to examine all proposals made to him in the bright light of day, will never fall prey to the gyps that pass in the night.

Aristotle in *The Nicomachean Ethics*¹¹ stated that, "Moral virtue comes about as a result of habit. Men become builders by building, lyre players by playing the lyre; so do we become just by doing just acts."

Ills of banking

Confining ourselves, for the moment, to matters that are local, I observe that commercial banks in this country were confronted with the growing problem of non-performing loans last year.

The country's economic slump has triggered off many financial problems and it has caused borrowers to default and has slashed values of stock and property held as collateral. In some instances, there is also the problem of poor credit evaluation and loan documentation which should never have happened in the first place if strict compliance of the guidelines was observed.

However, increasing attention and resources of the commercial banks were devoted to intensive monitoring of loans, credit supervision and the rehabilitation of ailing clients.

The more disturbing aspect of our financial world is the propensity in recent times of banks and financial institutions going bust, a tendency which neither augurs well nor inspires confidence in the minds of the public.

It is my observation that Bank Negara has taken the right and laudable step of preventing the near collapse of two banks in this country and has confirmed that it is closely monitoring the situation of another bank, Sabah Bank Berhad. Datuk Jaffar

11 Clarendon Press edition, 1908.

corporate misconduct: crime and accountability

Hussein, the Governor of Bank Negara, is reported to have said that the Central Bank is in fact also looking at the health of all the 38 banks as well as the 47 finance institutions. The two banks whose shares were bought over by Bank Negara are United Asian Bank and Perwira Habib Bank. Another bank, Bank Bumiputra, was taken over by Petronas, the national oil company, because of the BMF fiasco. If Bank Negara had not acted in this manner, then the banks' depositors and shareholders would have faced severe losses, and there would have been a disastrous loss of confidence in the nation's banking system.

> One of the ways to prevent the further collapse of banks and financial institutions in this country is to expose such institutions, especially smaller local commercial banks, to a greater degree of public shareholding, so that shareholder pressure on management could be maintained.

One of the ways to prevent the further collapse of banks and financial institutions in this country is to expose such institutions, especially smaller local commercial banks, to a greater degree of public shareholding, so that shareholder pressure on management could be maintained. At the present moment, only three of such banks are public listed but when the present economic climate changes for the better and as soon as circumstances permit it, more banks and financial institutions with good profit records should go public. Banks that are restructured or going public are subjected to the rule of the 20% limit on bank equity for any single group and this is also likely to intensify stockholder vigilance. With new and more shareholders to answer to, management should shape up. Sole

owners or majority owners answerable only to themselves will be forced to share control and run the banks on less secretive lines.

The business section of *The Star*¹² gave a commendable synopsis of the current difficulties facing commercial banks in Malaysia and offered some suggestions which I now quote:

Placing money in the hands of irresponsible managers is a sure formula for disaster. Good laws alone cannot make honest bankers. There must be a system of check and balances.

The problems faced by some banks clearly demonstrate that attention must be paid to raising the question of managers.

Thirty years of banking history has shown that no matter how perfect banking laws may be, good behaviour cannot be legislated. Honesty must be given a premium in the social value system. All staff in the banking industry should remember two fundamental principles—they are custodians of other people's money and they must safeguard the integrity of all money entrusted to them. Lending money for speculation, however well intended, is speculating money held in trust.

The article goes on to say:

The complexity of the banking world has given rise to many opportunities for insider trading and fraud, and white collar crime can cost society much more than petty theft and armed robbery. Criminal breach of trust and fraud poses a real threat to the integrity of financial markets. All the regulatory authorities, including the police and the courts, will need to act quickly to stamp out CBT and fraud within the system.

Bank Negara has sought to put in place time-tested internal checks and balances into the system, including more frequent

corporate misconduct: crime and accountability 16

inspections, controls over lending limits by bank staff, lending to directors and self-interested companies and the establishment of internal audit units, and audit and examination committees.

Another lesson learnt is that over-exposure to any single sector, however attractive at the time, is always risky. There is no substitute for down-to-earth banking, where funds are made available to honest, hard-working entrepreneurs who carry out genuine projects which add value to products and provide jobs.

Over the longer term, there remains the urgent need to instil still a greater sense of discipline, responsibility and ethics into all bank staff.

Conclusion

White collar crime is not exclusive to any nation and, like a virulent disease, it is widespread in many countries. Malaysia is not immune to the infection. On the contrary, our recent times were characterised with an inordinate spate of white collar crimes, too numerous and close for our liking. The commercial crime branch of the police is coping well under the circumstances, but one must not be naïve as to think that they have licked the system.

White collar crime is not exclusive to any nation. Our recent times were characterised with an inordinate spate of white collar crimes, too numerous and close for our liking.

First of all, I would like to suggest, if I may, that in the light of the recent phenomenon, the Police Department should send more

talented officers abroad for specialised training in the detection of white collar crime. In this aspect, it is gratifying to note that Tan Sri Haniff Omar, the Inspector-General of Police, has already indicated in his recent Police Day message that this step is being contemplated by his department.

Secondly, it seems to me that it would not be an absolutely bad idea if the Police Department were to recruit experts like qualified accountants or even business graduates, including some with a Masters degree, into their ranks so that they could tackle all aspects of commercial crime in a more professional and sophisticated manner, and be able to match cunning with skill, slyness with intelligence and wily deceit with astute strategy. This step, no doubt Bank Negara has already adopted. We cannot afford to lose the war against the invidious white collar crime and allow it to ruin or set back our national economy.

It is also perhaps time that the Government put into effect its much vaunted policy of adopting moral education in our schools. This must be regarded as one of its sound measures to instil a strong sense of discipline and comprehensive values in our efforts to build a fair and honest society. Let there not be too long an interval between the conception of a good idea and its implementation and allow it to fall by the wayside.

If there is much concern shown in high quarters of the Government about the prevalence of dishonesty and irresponsibility in the country, then firm and drastic measures against corruption in all ranks from the top to the lowest in the public, private and the corporate sectors should be taken relentlessly. I quote from the remarks of a letter which recently appeared in a publication of *The Star*:¹³

corporate misconduct: crime and accountability 165

Too many people are rushing to jump aboard the bandwagon to take a quick buck by hook or by crook, prepared to sacrifice principles, honour and integrity. However, with a high standard of moral values, with genuine steps to reduce corruption and a bold change to a meritocratic system, we should be on the right path to stopping the rising trend of fraud.

The adage that *crime does not pay* has stood the test of time and is perhaps the best principle to adhere to at all times.

The adage that *crime does not pay* has stood the test of time and is perhaps the best principle to adhere to at all times.

Here, I must not omit to mention that insider trading is perhaps the most invidious form of fraud perpetrated in the labyrinths of stock exchanges and it has provoked fresh concern in both the United States as well as in Britain about the spreading abuse of inside information, which now appears to be virtually a way of life in a growing list of financial institutions. The Securities and Exchange Commission took such a serious view of the Ivan Boesky case for insider trading that it imposed the inordinately high penalty of a US\$100 million fine on him. The recent crop of such cases included Merrill Lynch's merger specialist Nahum Vaskevitch and his frontman David Sofer. The Securities and Exchange Commission hopes to force the suspects to disgorge their profits and pay triple damages, all of which could amount to US\$16 million.¹⁴

The exponents of white collar crime will still be losers even if they are lucky to escape conviction in a court of law, for their 14 *Time* magazine, 23 March 1987.

careers will be shattered, their employers scandalised and their friends will shun them. I cannot see how they can ever hope to regain their self respect under such circumstances.

Editor's note

See also chapter 6, Corporate Activity: Law and Ethics, above.



Written constitution

"In my opinion, the purpose of enacting a written Constitution is partly to entrench the most important constitutional provisions against repeal and amendment in any way other than by a specially prescribed procedure."

---Raja Azlan Shah FJ (as he then was) Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC at 189

* Judges: "Lions under the throne"

"The judges are not beholden politically to any Government. They owe no loyalty to ministers. They have longer professional lives than most ministers. They, like civil servants, see Governments come and go.

NO ____

They are "lions under the throne" but that seat is occupied in their eyes not by Kings, Presidents or Prime Ministers but by the law and their conception of the public interest.

It is to that law and to that conception that they owe their allegiance. In that lies their strength. "

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—HRH Sultan Azlan Shah *The Right to Know*

* The courts and Rule of Law

" 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. "

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

Sultan Azlan Shah



His Royal Highness as Royal Patron

is Royal Highness Sultan Azlan Shah is the Royal Patron, amongst others, of the following student, graduate or professional associations: The Malaysian Law Society in Great

Britain and Eire; The British Graduates Association of Malaysia; and The Academy of Medicine of Malaysia.

Recently, in 2004, His Royal Highness became the Royal Patron of LawCare, a benevolent fund to help members of the Bar Council and their families.



"A doctor's duty to prevent the spread of contagious diseases may outweigh his duty to a particular patient. An accountant, certifying the accounts of a firm of solicitors or auditing the accounts of a public company may find himself obliged to act contrary to the immediate interests of his clients. Similarly, a lawyer is under a professional obligation to draw the court's attention to relevant authorities, even if they are adverse to his client's case. Architects have a responsibility for public safety and environmental considerations, which go beyond their immediate duty to the client. "

Engineers and the Law: Recent Developments

Second Public Lecture Institution of Engineers, Malaysia Kuala Lumpur, 31 March 1989

am indeed honoured to be invited by your Institution to deliver this Second Public Lecture this evening. I am given to understand that the speaker for your First Public Lecture was Tun Hussein Onn. For your Second Public Lecture, you have again invited another member of the honourable profession. This seems to suggest that engineers have a high regard for the law and therefore speaks well for the future of the profession.

I was asked to address you tonight on the topic "Engineering and Law" but on reflection, I have decided to change the topic slightly to "Engineers and the Law: Recent Developments" as some of the points which I wish to address this evening are not only current but topical.

Ethical conduct

Every professional practising his profession is expected to comply with certain standards or norms which are regarded as the proper conduct expected of him in the discharge of his duties as a member of a profession. These standards and norms are the basis for the ethics of the profession. These so-called ethics are however different from statutory rules and regulations in force which regulate the practice of a profession and the conduct of the professional. Whilst a breach of these rules or regulations results in some form of sanction which are normally spelt out in the rules or regulations, the breach of a particular ethical conduct does not. This is so because a particular conduct by a member of the profession, which may be regarded as improper by others in the profession, may not amount to a misconduct as it does not contravene any of the specified rules and regulations.

Every professional practising his profession is expected to comply with certain standards or norms which are regarded as the proper conduct expected of him in the discharge of his duties as a member of a profession.

> Unlike rules and regulations, the parameters of ethical conduct are not capable of being clearly defined. Ethics depend on the good conscience of an individual. This, of course, means that in most cases, what conduct amounts to a breach of ethics become a matter of subjective interpretation.

> This uncertainty invariably results in the formulation by professional bodies of guidelines which are regarded as the proper

engineers and the law: recent developments

basis for the conduct or exercise of the profession. However, there are major limitations in the formulation of these codes of ethics. It is indeed difficult to define in detail every act or conduct of the practice of the profession which is to be regarded as unethical. The variegation and complexities of human behaviour and conduct often prove incapable of being ascertained with certainty. No sooner is a set of conduct spelt out as being unethical than new situations which were not anticipated arise.

> It is difficult to define in detail every act or conduct of the practice of the profession which is to be regarded as unethical. The variegation and complexities of human behaviour and conduct often prove incapable of being ascertained with certainty. No sooner is a set of conduct spelt out as being unethical than new situations which were not anticipated arise.

Furthermore, changes in circumstances, values and more recently the rapid development of technology have contributed to the difficulty in the formulation of a comprehensive code of ethics to govern any profession. Professional bodies have therefore to be content with drafting codes of ethics in broad terms. Most of them stipulate, without spelling out the details, that every member of the professional body should conduct himself in an ethical manner so as not to bring disrepute to the profession.

I notice that the Institution of Engineers Malaysia has also made Regulations on Professional Conduct,¹ and whilst admitting that the Regulations are "written in general terms expressing broad ethical principles", it enumerates 15 different situations which all

¹ The Institution of Engineers, Malaysia, Constitution and Bylaws (1984), pages 23 and 24.

engineers need to comply with. It points out that these 15 situations are those which are "frequently encountered". In situations not covered by the Regulations, the Regulations provide that:

Members are required to order their conduct in accordance with the principle that, in any conflict between a member's personal interest and [the] fair and honest dealing with other members of the community, his duty to the community must prevail.

Tonight, I wish to emphasise on two important aspects of ethical conduct, particularly relating to engineers:

- (a) engineers' personal interest and his duty to others; and
- (b) conflict between engineers' interest and his duty to the community.

Engineers' personal interest and his duty to others

The Regulations rightly point out that many ethical issues are a consequence of conflict between "a member's personal interest and his duty to others". This duty, of course, is not limited to that of a fellow engineer or to his employer. Such a duty, I would add, extends to all others whom the engineer knows or is likely to know would be affected by his particular conduct in the particular situation.

For example, of some concern in recent years has been the infringement of the copyright laws in connection with plans and drawings. Though the Copyright Act 1987² makes it an offence to infringe a copyright belonging to another, there may arise situations which, though not amounting to an infringement under the Act,

affect the rights of the owner of the copyright or some third party adversely. In such cases, the engineer or the architect should adopt a course of action which does not adversely affect the rights of the copyright owner, although such person is not his employer or fellow engineer.

> Many ethical issues are a consequence of conflict between "a member's personal interest and his duty to others". Such a duty, I would add, extends to all others whom the engineer knows or is likely to know would be affected by his particular conduct in the particular situation.

In this connection the decision of the Privy Council in the recent case of *Interlego AG v Tyco Industries Inc* $& Ors^3$ may be of particular interest to you.

In this case, the appellant company owned the intellectual property rights for a well-known children's model-building system consisting of interlocking plastic bricks called *Lego*. The appellant had purchased those rights from the estate of the originator of the system and its associate companies manufactured and marketed the system throughout the world. In 1983 the respondents, by a process known as reverse engineering, copied elements of the appellant's system with the aim of manufacturing and marketing a compatible but competing system. The respondents' reverse engineering indirectly copied the drawings from which the appellant's bricks were made. The respondents, through a subsidiary, notified the appellant of their intention to manufacture their competing system in Hong Kong and the appellant brought an action in Hong Kong seeking an injunction restraining the respondents from infringing copyright in its design drawings.

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[1988] 3 All ER 949. See also *Dronpool Pty Ltd v Hunter* (1984) IPR 310, decision of the Supreme Court of New South Wales;

Manfal Pty Ltd v Longuet (1983) 3 BCL (Australia) 105, decision of the Supreme Court of Queensland; and

British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd [1986] AC 577, HL.

Leaving aside the technical issues relating to the Copyright Act, one of the issues which the Privy Council had to consider was whether a copy of a design was capable of attracting copyright. Lord Oliver of Aylmerton who delivered the judgment of the Privy Council, after considering a number of leading cases, pointed out that:

Originality in the context of literary copyright has been said in several well-known cases to depend on the degree of skill, labour and judgment involved in preparing a compilation.⁴

He however cautioned that:

To apply that, however, as a universal test of originality in all copyright cases is not only unwarranted by the context in which the observations were made but palpably erroneous. Take the simplest case of artistic copyright, a painting or a photograph. It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy, painting or enlargement was an "original" artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality.⁵

The Law Lord therefore concluded that copying per se, however much skill or labour may be devoted to the process, could not make the copy an original work. "A well executed tracing", he added, "is the result of much labour and skill but it remains what it is, a tracing".⁶

This case illustrates the point that a copy of another's design does not attract copyright. In other words, by making a copy of a

[1998] 2 All ER 949 at 971.

Ibid.

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Ibid at 972.

engineers and the law: recent developments

design or drawing, one cannot claim originality. It still remains the work of another and not the copier's, though for purposes of the relevant copyright laws applicable in the instant case, the owner of the copyright was held, for technical reasons, not to hold the copyright any longer.⁷ However, the case raises certain important ethical issues: whether it is ethical for another to copy an original design merely on the grounds that no copyright exists. Is it ethical for someone else to exploit the fruits of labour of another?⁸

This situation is merely one example of a conflict which an engineer may probably face. I am sure that you may think of numerous other situations where an engineer is put in conflict between his own interest and that of not only his employer or fellow engineer but of some other third party whom the engineer concerned may not even have a link with. Such issues are of course ethical ones which can only be resolved by the exercise of fair and honest judgment on the part of the engineer. I believe that every engineer in the exercise of his profession should always be conscious of the consequences of any course of action which he chooses to adopt in any particular situation. Through such efforts, he will be able to make a rational decision which may not transgress on the rights or interests of other parties.

Conflict between engineer's interest and his duty to the community

Sometimes the conflict which the engineer encounters may not be a conflict of his own interest to that of the interests of some defined third party. It may also arise against the State or the community. I have in mind the interest of the nation in the preservation of its natural resources. The wasteful destruction of the natural

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See also "Copyright and Architecture", (1987) 3 *Building and Construction Law* (Australia) 94.

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See generally, Flint, Thorne and Williams, *Intellectual Property: The New Law*, chapter 7, "Moral Rights", 1989, Butterworths; and Hodson, *The Ethics of Legal Coercion*, 1983, Reidel Publishing Company, Holland.

resources, the destruction of wild life and the damage to the environment which inevitably affects the enjoyment of life of the people of the nation should also be borne in mind. Sometimes in the name of development, we tend to lose sight of some of these aspects of the environment. I know that in certain cases, some fine old buildings which have been part of our national heritage had been destroyed to make way for a multi-storey modern building. With such destruction, we lose a part of the nation's heritage. We are not living in a country where land is regarded as scarce. We are blessed with plentiful land which can be developed without the destruction of its natural beauty or of our own heritage.

The wasteful destruction of the natural resources, the destruction of wild life and the damage to the environment which inevitably affects the enjoyment of life of the people of the nation should also be borne in mind. Sometimes in the name of development, we tend to lose sight of some of these aspects of the environment.

> Let me give you another example on how the actions of certain professionals have affected the enjoyment of life of many others. I have in mind the pollution of the sea in certain popular holiday seaside resorts. I understand that as a result of the designs and plans of the hotels constructed on the seaside resorts, the waste from these hotels is discharged into the sea. As a consequence, the beaches and the sea around it have become so polluted that families are no longer able to enjoy the clean and clear water which formed part of the natural beauty of the place. Professionals who are involved in the construction of such hotels by the sea owe a duty to ensure that no such damage is caused to the environment.

engineers and the law: recent developments 179

They should not always take a particular course of action merely because it is expedient or because it reduces the construction costs. The long term effects have always to be taken into consideration.

I chose to give these examples because I regard these as important ethical issues. We tend to associate ethical issues only with those situations in which a person has a conflict as to whether to take a certain course of action which would either directly or indirectly be of immediate benefit to him alone, or with cases where the conflict has been resolved by the exercise of a judgment which results in a personal monetary gain to the person concerned. But as we know, the obtaining of a personal benefit is only one aspect of the ethical issues involved in the conduct of your profession.

In this regard, I may point out that many of the ethical issues encountered by doctors relate to the question of values rather than one of personal benefit. The conflict as to whether to conduct an abortion, switch off the life-support machine or the issue of euthanasia and many others relate to the question of society's attitude towards life and the importance of it. These issues do not pertain to any conflict encountered by doctors as to their own personal interests, but rather one of the patient and society.

> All professionals, be they engineers, doctors, lawyers and others, should be committed to certain moral principles which go beyond the general duty of honesty.

Therefore in conclusion, I would emphasise that what I have said is applicable not only to engineers but to all professionals, be they engineers, doctors, lawyers and others who should be

committed to certain moral principles which go beyond the general duty of honesty. They are expected to provide a high standard of service for its own sake. They are expected to be particularly concerned about the duty of confidentiality. Their wider duty to the community may on occasions transcend the duty to a particular client or patient. For example, a doctor's duty to prevent the spread of contagious diseases may outweigh his duty to a particular patient. An accountant, certifying the accounts of a firm of solicitors or auditing the accounts of a public company may find himself obliged to act contrary to the immediate interests of his clients. Similarly, a lawyer is under a professional obligation to draw the court's attention to relevant authorities, even if they are adverse to his client's case. Architects have a responsibility for public safety and environmental considerations, which go beyond their immediate duty to the client.⁹

Registration

Let me now move on to another area of the law relating to engineers. That is the requirement of registration of engineers.

Like many other laws relating to the practice of professionals, the Registration of Engineers Act 1967¹⁰ provides that only registered professional engineers may practise or carry on the business as an engineer.¹¹ This, of course, means that any person who is not registered under the Act cannot render any service for remuneration in his professional capacity as an engineer. A person who practises as an engineer but who is not registered as an engineer under the Act commits an offence under section 25 of the Act.

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Examples taken from Jackson and Powell, *Professional Negligence*, 2nd edition, 1988, Sweet & Maxwell.

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Act 138, Revised 1974, as amended by the Registration of Engineers (Amendment) Act 1987, Act A662.

11 See section 7.

engineers and the law: recent developments

One of the problems which has arisen relating to nonregistered engineers has been the practice of employing foreign engineers during the rapid expansion of the construction industry, especially the construction of multi-storey buildings. Foreign engineers having wide expertise in the construction of such buildings were appointed by certain owners as consultant engineers to these projects. These engineers were employed in addition to the local engineers. In some other situations, some professionals were employed from abroad particularly to deal with mechanical and electrical works of preparing plans and drawings.

The question arises as to the effect of such contracts of employment: is the contract of employment between the foreign engineer (or for that matter any person who is not registered as an engineer under the Act), and the employer illegal such that the engineer is not entitled to recover his fees from the employer?

Two cases from Singapore appear to provide the answers to these questions. In *Raymond Banham & Anor v Consolidated Hotels Ltd*,¹² the plaintiffs, partners of a firm of consulting mechanical and electrical engineers practising in Hong Kong, rendered professional services in respect of the construction of the Hotel Sheraton project owned by the defendants. This was pursuant to a contract made between the plaintiffs and the defendants. The plaintiffs, the engineers, brought the present action claiming the sum of about \$110,000 being 85% of the value of the work completed by them. The defendants refused to pay the said sum and contended that the said contract was illegal and unenforceable as the plaintiffs were not registered under the Professional Engineers Act of Singapore.¹³

The court held that though the drawings and plans were prepared in Hong Kong, the plaintiffs must be regarded as having 12 [1976] 1 MLJ 5, HC.

13 Cap 225.

been engaged to provide professional engineering work in Singapore. The Hong Kong engineers, not having been registered, were held to have contravened the Professional Engineers Act and as such, it was held the services performed by the plaintiffs under the said contract were illegal and the contract unenforceable, notwithstanding the defendants' own participation in the illegal contract. The court accordingly held that the plaintiffs were not entitled to recover the said sum of money. The court in delivering the judgment pointed out:

... to hold that the contract is illegal ab initio may appear to be harsh but such is the position with regard to illegal contracts where both parties have contravened the law and the plaintiffs ... are left without remedy. Ignorance of the law or even innocent participation in such a contract cannot avail the plaintiffs ... It should be remembered that even an overseas lawyer who intends to appear in one case only in Singapore has to be admitted to practise as an advocate and solicitor under section 18 of the Legal Profession Act (Cap 217).¹⁴

Similarly in *John B Skilling & Ors v Consolidated Hotels Ltd*,¹⁵ the Singapore Court of Appeal also held that the agreement between the respondent, a registered company incorporated in Singapore and the appellants, a firm of consultant engineers practising in the United States of America and who were not registered under the Singapore Professional Engineers Act, was illegal. As such, the claim of the appellants for their fees for professional services rendered to the respondents was dismissed as it was based on an illegal contract.

There is no doubt that these decisions may appear to be harsh decisions. However, it appears that the plaintiffs in these two cases

14 [1976] 1 MLJ 5 at 8.

15 [1979] 2 MLJ 2. See comments on this case in (1988) Mal LR 420.
should have succeeded on a quantum meruit claim. It may be said that though the contract was made in contravention of the Act, the plaintiffs had conferred on the defendants some benefit for the services rendered and such benefits were of considerable value. Whilst the plaintiffs were rightly allowed not to profit from the contract by its enforcement, a claim in quantum meruit, which is essentially a restitutionary claim for the work done, should have been allowed.

Harsh as it may seem to be, the cases should be considered as a warning to engineers who are not registered under the Registration of Engineers Act. In this regard, the provisions of section 10A of the Registration of Engineers Act which was introduced in 1987 by an amendment¹⁶ providing that foreign engineers may obtain temporary registration under the Act before providing professional services, should be brought to the attention of foreign engineers who intend to provide services on an ad hoc basis to employers in Malaysia.

Professional negligence

I would now like to move on to another aspect of the law which I think is of growing importance. This is the question of professional negligence and liability generally.¹⁷

Unlike doctors or lawyers who are often given prominence in the media for any professional misconduct, one rarely hears or reads of an engineer who is being sued for professional negligence. You would agree with me that this is not because engineers are never negligent but more so because of the very nature of the profession: the services of an engineer become part of the services of a team

16 Act A662.

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See generally Partlett, *Professional Negligence*, 1985, Law Book Company Ltd (Australia);

Jackson and Powell, Professional Negligence, 2nd edition, 1987, Sweet and Maxwell, London;

Buckley, The Modern Law of Negligence, 1988, Butterworths, London; Dugdale and Stanton, Professional Negligence, 2nd edition,

1989, Butterworths.

of other professionals, like architects, surveyors, contractors. An individual who needs the services of a doctor or a lawyer usually enters into a one-to-one relationship with the other. However, especially in construction contracts, where an engineer's services are required, the employer would necessarily have to employ the services of architects, surveyors and contractors all at the same time for the same project.

One rarely hears or reads of an engineer who is being sued for professional negligence. You would agree with me that this is not because engineers are never negligent but more so because of the very nature of the profession: the services of an engineer become part of the services of a team of other professionals.

> This does not mean that there is no individual liability imposed on any one of these professionals who form the team. Besides a separate contractual relationship which exists amongst the parties, there is also the general duty of care imposed on each of the parties. However, in reality, where for example there has been a defect in a building, the client would have been advised (by his lawyers, no doubt) that the client should sue all parties concerned so that if liability cannot be established against one, there may be the likelihood that he may succeed against the others. It is for this reason that in building contracts, the owner does not institute legal proceedings against the engineer alone.

> In order to determine the liabilities of the various parties to a construction contract, it is necessary to analyse in detail the entire

contractual matrix in a construction operation, and to determine the intentions of the various parties, to decide whether a duty of care is owed by one person in the matrix to another who has no contractual relationship with him. I shall, however, restrict our discussion in the main to consider the liabilities of the engineer alone. What are the circumstances under which an engineer may be held liable?

The term engineer as provided for in the Registration of Engineers Act 1967¹⁸ refers to a civil, electrical, mechanical or structural engineer who is registered under the Act. The contract of employment of each of them would, of course, be different, depending on the nature of the services to be rendered. For example, the duties of a civil engineer under a building contract would be different from that of an electrical engineer employed by a computer company.

I do not propose to deal with the liability of engineers under the various types of contracts which they may possibly enter into. However, what I propose to do is to spell out the broad principles of law which are generally applicable to most of these contracts.

The professional liability of engineers falls into two categories:

- (i) liability in contract; and
- (ii) liability in tort for negligence.

The main difference between these two types of liabilities is that whilst the liability in contract is limited only to the contracting parties, a liability in tort is wider in that any person who has suffered damage as a consequence of the engineer's negligence may have a cause of action against him.

18 Act 138, Revised 1974, as amended by the Registration of Engineers (Amendment) Act 1987 (Act A662).

Another difference which may have important practical consequences between liability in contract and liability in tort is the application of the period of limitation. There are specific rules applicable to the law of limitations. As these tend to be rather technical, I only wish to draw your attention to the Limitation Act 1953¹⁹ which contains the different periods of limitation for the various causes of action.²⁰ For purposes of convenience, I shall consider the liability of an engineer, first towards his client and secondly to other third parties.

Liability to client

An engineer's duty to his client may arise in contract or independent of contract. Usually the rights and obligations (duties) will be spelt out expressly in the contract entered into between the engineer and the employer. Clearly, any breach of these duties will give rise to a claim. Therefore where an engineer had been engaged to advise, examine the site, prepare designs, drawings and plans and to supervise the project, any failure on the part of the engineer to perform any of these duties will enable the employer to sue him for breach of contract.

Implied duties

Though, of course, most of the duties will clearly be spelt out in the contract, I would like to stress that the engineer's duties may not always be restricted to those expressly provided for in the contract. Other duties may be implied through the application of the common law rules for the implication of the terms of a contract. For example, in the absence of a provision to the contrary, there may be an obligation upon the engineer who contracts to design and supervise the execution of his design, to review his design as

19 Act 255, Revised 1981.

See also the important case of *Pirelli General Cable Works Ltd v Oscar Faber & Partners* [1983] 2 AC 1, HL, a case dealing with the liability of a firm of consulting engineers.

and when necessary until the works are completed.²¹ A further term which is commonly not expressly provided for in contracts but which is always implied in contracts where professionals are employed for a specific purpose is that the professional will achieve the result for which he has been engaged for. As Lord Scarman, relying on *Samuels v Davis*,²² pointed out:

One who contracts to design an article for a purpose made known to him undertakes that the design is reasonably fit for the purpose.²³

The engineer's duties may not always be restricted to those expressly provided for in the contract. Other duties may be implied through the application of the common law rules for the implication of the terms of a contract.

In *Independent Broadcasting Authority v EMI and BICC Construction Ltd*,²⁴ a television aerial mast, which had been designed by the defendant structural engineers, collapsed. Three members of the House of Lords were inclined to the view that the designers, who were held liable for negligence, would still have been liable even if they had not been negligent. The clearest statement to this effect was again made by Lord Scarman. He referred with approval to Samuels *v Davis* and expressed himself as follows:

The extent of the obligation is, of course, to be determined as a matter of construction of the contract. But, in the absence of a clear, contractual indication to the contrary, I see no reason why one who in the course of his business contracts to design, supply, and erect a television aerial mast is not under an obligation to 21 See Chelmsford DC v Evers (1983) 25 BLR 99.

22 [1943] KB 526.

23

Independent Broadcasting Authority v EMI and BICC Construction Ltd (1980) 14 BLR 1 at 48.

24 (1980) 14 BLR 1, HL.

ensure that it is reasonably fit for the purpose which he knows it is intended to be. 25

The law also implies a term in every contract entered into by a professional that he will exercise reasonable skill and care. Though this common law principle has now been embodied in section 13 of the Supply of Goods and Services Act 1982 in England, it still remains a term implied by the common law of Malaysia. In the case of *Greaves & Co v Baynham Meikle*²⁶ (a claim against consulting engineers) Lord Denning MR stated:

Apply this [principle] to the employment of a professional man. The law does not usually imply a warranty that he will achieve the desired result, but only a term that he will use reasonable care and skill. The surgeon does not warrant that he will cure the patient. Nor does the solicitor warrant that he will win the case.²⁷

Malaysian common law

At this stage, I wish to digress from the main topic under discussion to say a few words on the common law.

It is often thought that any reference to the common law in Malaysia especially in the field of commercial transactions still means the common law of England. I would like to point out that such a view is erroneous. It must be stressed that in the present day context, any reference to the common law in Malaysia must mean the common law of Malaysia—that is the body of law which over the years since a structured legal system was introduced in Malaysia has been applied in Malaysia as part of the laws of Malaysia.

25 Ibid at 47–48.

[1975] 1 WLR 1095, CA.

Whilst it may be true to say that in the early days of the development of Malaysian law, reliance was placed, by virtue of the Civil Law Act, on English law, this is no longer the position. When the Civil Law Act was first introduced in 1878 to the Straits Settlements,²⁸ the courts were then compelled in some situations to rely on English law as there was no local law applicable on that particular aspect of the law. Even then, English law was not applied in toto. English law was relevant only to the extent that it was made subject to modifications and adoption to suit local conditions. Once applied through this process, it became Malaysian law. Therefore, over the past hundred years or so, through the judicial process, almost every branch of the law in Malaysia was developed. In some areas, legislation was introduced.

In the present day context, any reference to the common law in Malaysia must mean the common law of Malaysia—that is the body of law which over the years since a structured legal system was introduced in Malaysia has been applied in Malaysia as part of the laws of Malaysia.

In the light of the above, it may now be said that sections 3 and 5 of the Civil Law Act 1956 are of limited application. As pointed out earlier, many aspects of Malaysian law which remain unwritten ought to be regarded as the Malaysian common law and not the English common law. It may be similar to English law, but the important point to bear in mind is that it is Malaysian law and not English law which is applicable.

This is also the position in all the other countries whose legal systems are based on the common law. Though they share 28 See now Civil Law Act 1956, Act 67, Revised 1972.

a common heritage, that is their legal systems were similar to the English legal system, it cannot be said that English law continues to apply in these countries. In the United States, India, Pakistan and Australia, the law applicable in these countries is now regarded as their own laws and not the English law. For example, Lord Devlin in the Privy Council decision of *Chan Cheng Kum v Wah Tat Bank Ltd*²⁹ on an appeal from Singapore in determining whether certain customs relating to mercantile law were applicable in Singapore first considered whether such customs were in fact part of the common law of Singapore. He correctly pointed out:

The common law of Singapore is in mercantile matters the same as the common law of England, this being enacted in the [Civil Law Act], section $5.^{30}$

A fortiori by virtue of section 5 of the Malaysian Civil Law Act 1956, the common law of Malaysia on certain aspects of mercantile law is the same as the common law of England.

Let me give you an illustration of the application of common law in the context of the law relating to implied terms.

Implied terms

As a general rule, the terms of a contract will be expressly incorporated in a written contract. However, some important terms which are not expressly provided for may be implied by:

- (a) custom and usage pertaining to a particular type of transaction;
- (b) by the courts, based on the intention of the parties; and

29 [1971] 1 MLJ 177, PC.

30 Ibid at 179. (c) certain provisions in statutes.

Where a particular custom is well accepted, such custom or usage will be implied to be part of the agreement even though there is no express mention of it. The basis for such implication is that the parties did not intend to express in writing these customs and usages at the time the contract was entered into but were willing to be bound by such custom or usage which were accepted in transactions of that nature.

However, such customs or usage which are inconsistent with the express terms of the contract will not be implied. For example in the case of *Hamzah & Yeang Sdn Bhd v Lazar Sdn Bhd*,³¹ the Federal Court refused to accept the existence of a custom that building plans belonged to the architect and not to his employer.

Similarly, in the case of *Cheng Keng Hong v The Government* of the Federation of Malaya,³² I pointed out, whilst sitting as a High Court judge, that:

The incorporation of a trade usage is, however, subject to well defined principles of law which must be reasonable and not so as to contradict the tenor of the contract as a whole.³³

In this case, I held that there was no custom that if any work was done by an architect according to drawings which were not set out in the specification, the architect was entitled to extra payment. This I held on the interpretation of the said agreement. In so doing, I further stated:

In my judgment the alleged custom was not only a blind confidence of the most unreasonable description but also repugnant to the 32 [1966] 2 MLJ 33, HC.

33 Ibid at 37.

See also the Privy Council decision in *Chan Cheng Kum v Wah Tat Bank Ltd* (on appeal from Singapore) [1971] 1 MLJ 177.

terms and tenor of the contract and as such was not a trade custom but merely a long established irregularity.³⁴

Once a particular aspect of the law has been applied in Malaysia, it becomes Malaysian law.

This case which I decided has now become part of the common law of Malaysia insofar as it establishes the principle of law that a custom or trade usage which is inconsistent with the written terms of a contract will not be implied by the courts.³⁵ The Malaysian courts in applying this principle of law in subsequent cases no longer apply the English common law. Through a case like this, this aspect of the law on implied terms has now become part of the common law but quite clearly it cannot be said that on this aspect of the law, we still apply the English common law.

Furthermore, certain terms of a contract may be implied where parties have expressly made reference to such implication in their contract. For example, it is not uncommon in building contracts for parties to refer to the Scale of Charges as prescribed by the Institute of Surveyors for payment for the work to be done by a firm of quantity surveyors or to the Conditions of Engagement and Scale of Professional Charges prepared by the Malaysian Institute of Architects for a contract engaging a firm of architects for their professional services.³⁶

In Udachin Development Sdn Bhd v Datin Peggy Taylor,³⁷ the Federal Court implied a term in the contract between an architect and the employer for professional services to be rendered

34 [1966] 2 MLJ 33, HC at 38.

35 See also Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd

[1986] 2 MLJ 30, SC.

36

See Udachin Development Sdn Bhd v Datin Peggy Taylor [1985] 1 MLJ 121, FC and KC Lim & Associates Sdn Bhd v Pembenaan Udarama Sdn Bhd [1980] 2 MLJ 26, FC.

37 [1985] 1 MLJ 121, FC.

by the architect, that the architect was entitled to remuneration in accordance with the Scale of Professional Charges prepared by the Malaysian Institute of Architects when the employer abandons the project.³⁸

In KC Lim & Associates Sdn Bhd v Pembenaan Udarama Sdn Bhd,³⁹ one of the issues raised in the Federal Court to resist an application for summary judgment was whether in the absence of an express term in the contract between the architect and the developer, there was an implied term in the architect's employment that the developer would be able to carry on with the project at or reasonably near the architect's estimated cost.

The implication of terms is only one aspect of the application of the common law. There are many areas of the law where there are no written laws applicable but which over the years have become the established law (unwritten) of Malaysia. One such area, of course, is the law of torts where much of it is unwritten as there is no specific legislation dealing with most aspects of this law.

It does not, therefore, follow that whenever there is no written law in existence on a particular aspect of the law, the Malaysian courts continue to rely on the English common law. The courts merely apply the law of Malaysia as interpreted by the Malaysian courts in some earlier decisions on this aspect of the law. Once a particular aspect of the law has been applied in Malaysia, it becomes Malaysian law and the Malaysian courts when called upon to determine certain new issues relating to this aspect of the law merely apply and develop the already existing laws of Malaysia. This the Malaysian courts do by considering not necessarily the position under English law but also the law in other jurisdictions where the common law applies.⁴⁰

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See also the Singapore case of Soon Nam Co Ltd v Archynamics Architects [1979] 1 MLJ 212, CA.

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[1980] 2 MLJ 26, FC.

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In the case of *The* Chartered Bank v Yong Chan [1974] 1 MLJ 157, FC at 160, in delivering the judgment of the then Federal Court, I observed: "In arriving at this view I have been greatly assisted by two Commonwealth cases which seem actually to cover the point. I realise that both these cases do not bind this court, but I know of no reason why I should not welcome a breath of fresh air from the Commonwealth.'

In Raja Mokhtar bin Raja Yaakob v Public Trustee, Malaysia [1970] 2 MLJ 151 HC, I also observed: "Although decisions of Commonwealth courts are not binding, they are entitled to the highest respect."

For this matter, even the English courts consider the decisions from other jurisdictions in determining certain aspects of the law. For example, the House of Lords, in the recent case of D & F Estates Ltd & Ors v Church Commissioners for England & Ors⁴¹ which I shall refer to later, considered American, Canadian, New Zealand and Australian decisions.⁴²

Thus is the genius and the strength of the common law—it can adapt to changes to suit the needs without having the constraints which are attached to written laws.

> This is how the common law of every country works. Until statutory laws are introduced, in certain areas of the law, a corpus of unwritten laws continue to co-exist. The broad principles of law on a particular aspect of the law, once applied by the Malaysian courts, become part of the common law of Malaysia. These broad principles are then, by judicial development of the law through adaptation and application, extended to situations to which they had not previously been applied. The process involves the gradual distilling of principles from the facts of concrete cases. In a strict sense, it is not new law but merely the application of established principles adapting to the changing circumstances in any country.

> Thus is the genius and the strength of the common law—it can adapt to changes to suit the needs without having the constraints which are attached to written laws. It is for this reason too that for the development of the laws in Malaysia, we need wellreasoned, written judgments of the court, especially the final court of appeal which is bestowed with the duty of developing the laws of our nation.

41 [1988] 2 All ER 992.

42 See notes 72 and 73, below.

Concurrent liability

Reverting to the liability of an engineer towards his client, some uncertainties prevail in the law as to whether the fact that there is an existing contractual liability on the part of the engineer precludes the existence of a concurrent duty of care in tort independent of the contractual duties being owed by the engineer to the client. In this connection, it is important to bear in mind that the limitation period, particularly as to the accrual of the cause of action, may be of particular importance to a plaintiff in determining whether to pursue a cause of action in tort or in contract.⁴³ Therefore in some cases, the employer's claim against the engineer or any other professional in contract may be defeated by a defence of limitation but if, however, tortious liability exists independent of contact, the client may still be able to institute proceedings in tort.⁴⁴

The existence of a contract between the professional and his client does not preclude a concurrent duty of care in tort independent of contract being owed by a professional, like an architect or an engineer to the client.

Some of the older cases decided that a professional was only liable in contract and that no other liability existed in tort. However, about ten years ago, this view was swept aside and the liability in tort was expanded and developed so as to impose a concurrent duty on the professional in tort independent of contract. It may be said that the factor alluded to earlier, namely the limitation period, may be the driving force in influencing the courts to extend the liability of the professional. These cases firmly established the principle of law that the existence of a contract between the professional and his client does not preclude a

43 See Midland Bank Trust Co Ltd v Hett Stubbs and Kemp [1979] Ch 384.

See generally Jackson and Powell, *Professional Negligence*, 2nd edition, paragraphs 1.17 and 2.12–2.18, and Buckley, *The Modern Law of Negligence*, 1988, paragraphs 11.28 and 15.17.

44

See, for example, London Congregational Union Inc v Harriss and Harriss [1985] 1 All ER 335; Kensington and Chelsea and Westminster AHA v Wettern Composites Ltd [1985] 1 All ER 346.

concurrent duty of care in tort independent of contract being owed by a professional, like an architect or an engineer to the client.⁴⁵ It therefore became the standard practice for clients to institute actions both in contract and tort in a single action by pleading the breach in the alternative.

Retreat from concurrent liability

Over the past three years a new judicial trend seems to be emerging: the courts, since the decision of the Privy Council in *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd*,⁴⁶ appear to be moving away from the concurrent liability theory back to the contractual liability theory.

In *Tai Hing*, Lord Scarman cautioned against "searching for a liability in tort where the parties are in a contractual relationship". It is said that the liabilities of both the parties should necessarily be limited to those contained in the contract alone.

The position now appears to be unclear on this point though the better opinion seems to be that a concurrent liability exists.⁴⁷ The Malaysian courts have not had the opportunity to decide on this issue as yet. Whether they will adopt the approach of a broader liability of a professional or one based only on contract remains open. The contractual basis may be restricted in its application to situations where the contract incorporates precise and detailed terms, whereas the concurrent liability principle may be made applicable to others where a detailed contract has not been made. For example, the terms of a contract entered into by an engineer or an architect tend to be more precise and detailed than one entered into by a doctor or a lawyer.

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See generally Jackson and Powell, *Professional Negligence*, 2nd edition paragraphs 1.17 and 2.12.

46 [1986] AC 80.

47

See Buckley, The Modern Law of Negligence, 1988, paragraph 15.17; Dugdale and Stanton, Professional Negligence, 2nd edition, 1989, paragraphs 5.04–5.05 and 9.

Liability to third parties

An architect or an engineer cannot be held liable to a third party in contract, as the contract between the professional and the client is not binding on the third party. This is generally so because of the rules pertaining to privity of contract. However, more so than in any other profession, the works executed by an architect or an engineer affects third parties. The construction of a block of flats affects all subsequent purchasers of the flats. Likewise, the construction of a bridge or a road affects all users. It is therefore not surprising that the liability of an architect or an engineer towards third parties has been the subject matter of much litigation.

> An architect or an engineer cannot be held liable to a third party in contract, as the contract between the professional and the client is not binding on the third party. However, more so than in any other profession, the works executed by an architect or an engineer affects third parties.

Over the past few years particularly, the liability of builders (contractors), architects, engineers and surveyors has come to the forefront. This liability which I am talking of here is, of course, based on the law of negligence. That professionals involved in the construction business owe a duty far beyond that owed to their immediate clients alone is well-established.⁴⁸ Lord Denning MR in *Dutton v Bognor Regis United Building Co Ltd*⁴⁹ made this observation:

If he [an architect or engineer] designs a home or a bridge so negligeably that it falls down, he is liable to everyone of those who are injured in the fall ... Beyond doubt, the architect or engineer would be liable.⁵⁰

48 But see discussion below.

49 [1972] 1 All ER 462, CA.

50 Ibid at 473.

But see views of Lord Oliver in D & F Estates Ltd v Church Commissioners for England [1988] 2 All ER 992 at 1010(g).

In *Rimmer v Liverpool City Council*,⁵⁰ the defendants were held liable when a panel of excessively thin glass, which had been negligently incorporated by their architects into the design of a council flat, broke and injured the plaintiff.

That professionals involved in the construction business owe a duty far beyond that owed to their immediate clients alone is well-established.

> Though I had earlier said that the contract between the professional and his client is not binding on third parties, the terms of the contract may be relevant in determining the responsibilities of the professional towards third parties. The nature of the duty of care owed by the professional to a third party may depend on the responsibilities undertaken by the professional under the contract with his client. The contract may indicate whether a particular responsibility fell on the engineer or on some other who was also involved in the project. For example, in the case of Clayton v Woodman & Sons (Builders) Ltd⁵² and Oldschool v Gleeson (Contractors) Ltd,⁵³ which involved claims against architects and consulting engineers respectively, the defendants were absolved from liability on the ground that their alleged carelessness amounted to no more than a legitimate refusal to interfere with responsibilities which had been allocated not to them but to the building contractors themselves.

> However, the extent to which the law imposes such a liability on these professionals has now been considered in some important cases. It should be emphasised that when one talks of third parties, one is not necessarily referring to an innocent bystander. The third party in the context of the law relating to construction may

52 [1985] QB 1. 53 [1962] 2 QB 533.

be the employer, the contractor and employees of the contractor, or subsequent purchasers and users. A structural engineer, for example, who is engaged and paid by the architect owes a duty of care to the employer. Likewise, an engineer or an architect even in the absence of a contract may owe a duty of care to the contractor or his employees. This duty of care to a contractor may relate to the design and supervision of the work. Though a contractor cannot seek to pass blame or responsibility for incompetent work on to the consultant engineer, it has been said that if the design was so faulty that a competent contractor in the course of executing the works could not have noticed the resultant damage, then on principle the consultant engineer responsible for that design must bear the loss.⁵⁴

An illustration of the duty of care owed by an engineer to a contractor or his employees can be seen in the case of *Driver v William Willet (Contractors)* Ltd^{55} where the engineers employed by building contractors as safety and inspecting consulting engineers were held to owe a duty of care to the plaintiff, a labourer employed by the contractors, who was injured by the collapse of a scaffold board from a hoist. He fell within the class of persons whom the engineers should reasonably have foreseen would be injured if they failed to advise the contractors as to the safety precautions to be taken. They were in breach of that duty in failing to advise the contractors to have the hoist enclosed by wire mesh. The contractors were also held liable and responsibility was apportioned in the ratio of 40% to the contractors and 60% to the engineers.

Finally, a contractor or engineer, as seen earlier, owes a duty of care to subsequent purchasers and users of a building arising out of his design or supervision of its construction. 54 See Stabb J in Oldschool v Gleeson Construction Ltd (1976) 4 BLR 103.

55 [1969] 1 All ER 665.

It is not possible for me within the purview of this lecture tonight to explore these developments in any great detail. What I propose to do is to highlight only some aspects of the law in the light of recent developments. I should, perhaps, also draw to your attention that in most cases involving liability of a professional in the construction industry, the loss suffered by the injured party is economic loss⁵⁶ rather than personal injury. It is important to bear in mind this point as it was the basis for some of the decisions of the courts on the question of liability in the cases which I shall revert to shortly.

The modern law of negligence can be said to have its origin in the case of *Donoghue v Stevenson*,⁵⁷ a decision of the House of Lords made in 1932. The House of Lords in this case, which arose all because of a snail in a ginger beer bottle, decided that the manufacturer of the ginger beer was liable in negligence for any damage caused to the ultimate consumer. It should be noted that as there was no contract in existence between the manufacturer and the consumer, no cause of action could arise in contract. Therefore, until the decision of the House of Lords in this case, the consumer who suffered personal injury was without legal redress. The rule in Donoghue v Stevenson was subsequently extended to all manufacturers of goods. Soon after this case, the principle was applied by the Privy Council to hold a manufacturer of under-garments liable for the injury caused to the consumer who contracted dermatitis.⁵⁸

The basis for such liability was that the manufacturer of such products owed a duty of care to the ultimate consumer. Such manufacturer, it was said, should have foreseen that any defect in the manufacture of the products would lead to personal injury to the ultimate consumer. The law was soon extended by giving a broader definition to the term "manufacturer". It was held to cover repairers, suppliers of goods and more recently to builders.

56

See discussion below. See also the recent cases of Greater Nottingham Co-op Society Ltd v Cementation Ltd [1988] 2 All ER 971, CA and Department of Environment v Thomas Bates & Sons Ltd [1989] 1 All ER 1075, CA.

57 [1932] AC 562, HL.

58 Grant v Australian Knitting Mills Ltd [1936] AC 85, PC.

Of particular relevance to us this evening is the liability of professionals, be they architects, engineers, surveyors or builders, to third parties for defective construction. The question which arises is whether any of these professionals is liable in negligence, for example to a purchaser of a flat or house for any defects in the construction. Defects in construction, particularly of houses, may have two effects:

- (i) as a result of the defect, the owner, a visitor or any third party may suffer physical damage, for example if he has a fall or if the ceiling collapses, or
- (ii) though there may be no physical injury caused because the defect was discovered before any damage was caused, the owner would either incur pecuniary loss insofar as the cost of repairs is concerned or the defect may cause diminution in the resale value.

The latter situation is, of course, pure economic loss.⁵⁹

Over the past decade, a number of cases were brought before the courts in which owners of houses brought actions against the builder, surveyor, engineer and in most cases, the local authority for defects in the construction of the houses. For example, in the case of *Dutton v Bognor Regis United Building Co Ltd*,⁶⁰ to which I have already referred earlier, the plaintiff who had purchased a house from the previous owner brought an action against the local council for having passed the foundations of the house as being adequate even though it was built on the site of an old rubbish tip. In this case the foundations were proved to be inadequate and the plaintiff had to spend a large sum of money on repairs and underpinning. She successfully sued the council for negligence claiming that the public duty imposed on the council by statute also imported a

59 *Editor's note:* See further notes at the end of chapter.

60 [1972] 1 All ER 462, CA.

private duty to protect individual members of the public against loss which would not have occurred if the powers had been properly exercised.

Similarly in the leading case of *Anns v Merton London Borough Council*,⁶¹ an action was brought by lessees of seven flats against the local authority for damages for negligence. The lessees claimed that there was structural movement which resulted in cracks in the walls and the sloping of the floors of the flats, and that the appellants were negligent in allowing the builders to construct the block of flats upon foundations which were only two feet six inches deep instead of three feet or deeper as required by the deposited plans, or alternatively in failing to carry out the necessary inspections carefully.

The House of Lords took the opportunity in this case to consider in detail the basis and extent of liability in negligence of the local authority in such cases.

The House of Lords approved the decision in *Dutton*'s case and further held that though the council was under no obligation to exercise its powers to inspect the foundations before or after the building was constructed, if it did exercise such powers before the building was constructed, it was under a legal duty to the plaintiff to use reasonable care and skill in making the inspection.

The effect of cases like *Dutton* and *Anns* was far reaching. It is said:

Its first practical effect was to produce a significant increase in public authority insurance premiums but also, and more

61 [1978] AC 728; [1977] 2 All ER 492, HL. See further notes at the end of chapter.

importantly, in building costs. Local authorities up and down the country became so alarmed at the prospects of incurring liability for carelessly passing building plans that they took to imposing more and more stringent, and in many cases excessive, requirements for foundations of buildings, strengthening of roofties and so on, the cost of which, in the end, was inevitably passed on to the consumer.⁶²

It should again be pointed out that the loss in *Anns*' case was economic loss.

However, from a study of the recent cases, a new trend appears to be emerging. This trend may be referred to as the "retreat from *Anns*' case".⁶³ In $D \notin F$ *Estates Ltd* $\notin Ors v$ *Church Commissioners for England* $\notin Ors^{64}$ Lord Oliver of Aylmerton observed:

The decision of this House in *Anns v Merton London Borough Council* introduced, in relation to the construction of buildings, an entirely new type of product liability, if not, indeed, an entirely novel concept of the tort of negligence. What is not clear is the extent of the liability under this new principle.⁶⁵

The cases I have referred to mainly concern the liability of statutory bodies. They are, however, indicative of the recent attitude of the courts towards the expansion of the law of negligence relating to the liability of third parties. That such a similar approach will be adopted by the courts even in cases not concerning statutory bodies may be seen in the most recent House of Lords decision concerning the liability of contractors to purchasers of houses. This is the case of $D \notin F$ Estates Ltd \notin Ors v Church Commissioners for England \notin Ors,⁶⁶ decided in 1988.

62

Lord Oliver of Aylmerton, *Judicial Legislation: Retreat from Anns* [1988] 1 SCJ 249, 267.

Now see The Sultan Azlan Shah Law Lectures: Judges on the Common Law, 2004, Professional Law Books and Sweet & Maxwell, chapter 3.

63

Editor's note: See Lord Mustil, "Negligence in the World of Finance", in The Sultan Azlan Shah Law Lectures: Judges on the Common Law, 2004, Professional Law Books and Sweet & Maxwell, chapter 6.

64

[1988] 2 All ER 992, HL.

65

Ibid at 1010. See Duncan Wallace, "Negligence and Defective Buildings: Confusion Confounded", (1989) 105 LQR 46–78.

66

[1988] 2 All ER 992. See also the following recent cases: Greater Nottingham Co-operative Society Ltd v Cementation Piling and Foundations Ltd
[1988] 2 All ER 971, CA;

Department of Environment v Thomas Bate & Sons Ltd [1989] 1 All ER 1075, CA; Norwich City Council v Harvey (1989) 139 NLJ 40, CA; Pacific Associates Inc v Baxter (1989) 139 NLJ 41, CA.

At this juncture, it may also be relevant to consider the liability of a professional for the negligence of a third party. We have thus far considered the liability of a professional to a third party, for example, the liability of an engineer to a house buyer. But what is the consequence to the engineer or contractor of the negligence of a sub-contractor? This issue is pertinent especially in construction contracts where it is normal practice to sub-contract the work to specialist sub-contractors. Does the main contractor remain liable for the negligence of the sub-contractors? This issue was also decided in $D \notin F$ Estates Ltd \notin Ors v Church Commissioners for England \notin Ors.

In D & F Estates Ltd, the builders (third defendants) were the main contractors for the construction of a block of flats which were owned by the first defendants. The builders engaged a subcontractor to carry out the plastering work on the block. The builders reasonably believed the sub-contractor to be skilled and competent but in fact the sub-contractor carried out the work negligently. The plaintiffs were the lessees and occupiers of a flat in the block. Some 15 years after the flats were constructed, and again some three years later, the plaintiffs found that the plaster in their flat was loose. The plaintiffs brought an action against, inter alia, the builders claiming the cost of the remedial work already done and the estimated cost of future remedial work.

The House of Lords held:

 (i) that in the absence of a contractual relationship between the parties, the cost of repairing a defect in a chattel or structure which was discovered before the defect had caused personal injury or physical damage to other property was not recoverable in negligence

by a remote buyer or hirer or lessee of the chattel or structure from the manufacturer of the chattel or the builder of the structure responsible for causing the defect, because the cost of repair was pure economic loss which was not recoverable in tort. It followed that since the cost of repairing the plaster was economic loss the builders, whatever their vicarious liability, were not liable for the cost of the remedial work; and

(ii) the builders were not liable for the negligence of their sub-contractor in carrying out the plastering because the builders' only duty was to employ a competent plasterer, which they had done, and any further liability could not accrue under a general and non-delegable duty to all the world to ensure that the building was free from dangerous defects, and the law did not recognise any such duty.

The effect of this House of Lords decision is as follows:

(a) Actual damage

As pointed out earlier, the House of Lords in the leading case of *Donoghue v Stevenson* had said that a manufacturer owed a duty of care to the consumer to ensure that the goods manufactured can be used in the manner intended without causing physical damage to persons or their property. This decision was based on the wider principle of law which provided that when a person can or ought to appreciate that a careless act or omission on his part may result in physical injury to other persons or their property, he owes a duty to all such persons to exercise reasonable care to avoid such careless act or omission.⁶⁷

67

See Lord Brandon's dissenting speech in Junior Books Ltd v Veitchi Co Ltd [1983] 1 AC 520, 549 which was approved and applied by the House of Lords in D & F Estates Ltd v Church Commissioners for England [1988] 2 All ER 992 at 1003.

The point which must be stressed at this stage is that a wrongdoer is liable in negligence to pay damages if the innocent person had suffered physical injury to persons or their property. The House of Lords in D & F Estates Ltd clarified two important aspects of this injury.

It was not sufficient merely to establish that the product was defective and had the potential of causing injury. In other words, the existence of danger or the threat of danger to physical damage to persons or their property was insufficient.

First, the innocent party must have suffered actual injury. It was not sufficient merely to establish that the product was defective and had the potential of causing injury. In other words, the existence of danger or the threat of danger to physical damage to persons or their property was insufficient. Neither could an action be brought to recover the cost of repairing the defect if the defect in the product had been discovered before it had actually caused any injury. Lord Bridge, in dealing with this aspect of the law observed:

> But if the hidden defect is discovered before any such damage is caused, there is no longer any room for the application of the Donoghue v Stevenson principle. The chattel is now defective in quality, but is no longer dangerous. It may be valueless or it may be capable of economic repair. In either case the economic loss is recoverable in contract by a buyer or hirer of the chattel entitled to the benefit of a relevant warranty of quality, but is not recoverable in tort by a remote buyer or hirer of the chattel.⁶⁸

68 [1988] 2 All ER 992 at 1006.

Applying these principles to consider the liability of a builder for the construction of defective buildings, Lord Bridge further observed:

If the same principle applies in the field of real property to the liability of the builder of a permanent structure which is dangerously defective, that liability can only arise if the defect remains hidden until the defective structure causes personal injury or damage to property other than the structure itself. If the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic.⁶⁹

Lord Oliver in considering the same issue said:

For my part, therefore, I think the correct analysis, in principle, to be simply that, in a case where no question of breach of statutory duty arises, the builder of a house or other structure is liable at common law for negligence only where actual damage, either to person or to property, results from carelessness on his part in the course of construction. That the liability should embrace damage to the defective article itself is, of course, an anomaly which distinguishes it from liability for the manufacture of a defective chattel but it can, I think, be accounted for on the basis that, ... in the case of a complex structure such as a building, individual parts of the building fall to be treated as separate and distinct items of property.⁷⁰

In so deciding, the House of Lords expressed doubts on the correctness of its own previous decision on this point in Anns' case.⁷¹

69 Ibid.

70 Ibid at 1012.

71 See [1988] 2 All ER 992 at 1006 and 1010. See also further notes at the end of chapter.

The second clarification relates to product liability. It was clarified that any injury to property must be to some other property and not to the defective property itself. In other words, the phrase injury to persons or their property was qualified to mean property other than the defective property, in most cases chattels. An injury to the product itself only has the consequence of the owner suffering economic loss, that is, the injury only affects the value of the product or the cost of repair of the product (monetary loss).

The House of Lords also pointed out that a similar view had been adopted by the US Supreme Court in *East River Steamship Corp v Transamerica Delaval Inc*⁷² and the Supreme Court of Canada (majority decision) in *Rivtow Marine Ltd v Washington Iron Works.*⁷³

The Law Lords did point out that the application of this principle of law may cause some difficulties in cases dealing with complex chattels or complex structures, particularly so if a product comprises many different parts or elements, for example the construction of a house.

In D & F Estates Ltd itself, the only hidden defect was in the plaster which only resulted in the cost of cleaning the carpets and "other possessions damaged or dirtied by the falling plaster: £50". The defective plaster by itself could not be said to have caused damage to "other property". However, their Lordships did not rule out the possibility that in certain situations, a defect in the construction of part of a building which causes other damage or "injury" to the same building may be regarded as damage being caused to "other property" even if the defective part and the damaged part of the building related to the same building. Lord Bridge said:

72 (1986) 106 S Ct 2295. 73 [1974] SCR 1189.

However, I can see that it may well be arguable that in the case of complex structures, as indeed possibly in the case of complex chattels, one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to "other property", and whether the argument should prevail may depend on the circumstances of the case.74

However, his Lordship said that "it would be unwise and it is unnecessary for the purposes of deciding the present appeal to attempt to offer authoritative solutions to these difficult problems in the abstract".⁷⁵ Lord Oliver in his speech pointed out:

The proposition that damages are recoverable in tort for negligent manufacture when the only damage sustained is either an initial defect in or subsequent injury to the very thing that is manufactured is one which is peculiar to the construction of a building and is, I think, logically explicable only on the hypothesis that in the case of such a complicated structure the other constituent parts can be treated as separate items of property distinct from that portion of the whole which has given rise to the damage, for instance, in Anns' case, treating the defective foundations as something distinct from the remainder of the building. So regarded this would be no more than the ordinary application of the Donoghue v Stevenson principle.76

Lord Oliver then gave the following illustration:

... damage caused to other parts of the building from, for instance, defective foundations or defective steel-work would ground an 74 [1988] 2 All ER 992 at 1006-1007.

Ibid at 1007.

76 Ibid at 1010.

action but not damage to the defective part itself except in so far as that part caused other damage, when the damages would include the cost of repair to that part so far as necessary to remedy the damage caused to other parts. Thus, to remedy cracking in walls and ceilings caused by defective foundations necessarily involves repairing or replacing the foundations themselves.⁷⁷

(b) Liability of builder for acts of sub-contractor

As seen earlier, the House of Lords held that the builder was not liable for the negligence of their sub-contractor in carrying out the plastering. The basis for reaching this decision was that the builder, as employer was under no liability in law for the negligence of the sub-contractors. Lord Bridge said:

It is trite law that the employer of an independent contractor is, in general, not liable for the negligence or other torts committed by the contractor in the course of the execution of the work. To this general rule there are certain well-established exceptions or apparent exceptions.⁷⁸

The law is not always clear nor comprehensive on every issue. The duty is then imposed upon us to conduct ourselves with certain self-restraints.

However, the employer may be held liable for the negligence of the sub-contractors if the employer had been in breach of some duty which he personally owed to the plaintiff. In the instant case, it was held that the employer was under no such duty as there was no legal principle to which such an assumption of duty can be related.⁷⁹ However, Lord Bridge gave the following possibility:

77 Ibid at 1012.

78 Ibid at 1008.

79 Ibid at 1008. If in the course of supervision the main contractor in fact comes to know that the sub-contractor's work is being done in a defective and foreseeably dangerous way and if he condones that negligence on the part of the sub-contractor, he will no doubt make himself potentially liable for the consequences as a joint tortfeasor.⁸⁰

The House of Lords further pointed out that as no liability could be imposed on the builder for the negligence of the subcontractor under the common law, legislation was necessary to extend the liability of the builder.⁸¹

Conclusion

I have this evening attempted, within the constraints of a public lecture, to highlight certain current legal issues relating to engineers. These are issues which not only affect engineers in the practice of their profession but more broadly, they affect the general 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, be it lawyers, doctors, engineers, architects or others. However, as we have seen, the law is not always clear nor comprehensive on every issue. The duty is then imposed upon us to conduct ourselves with certain self-restraints. We should maintain standards by observing certain ethics—ethics which are either of general application or which are peculiar to our particular profession. But whatever they are we must, at all times, aspire to serve the community with dignity and integrity.

81 But see the New Zealand case of Mount Albert BC v Johnson [1979] 2 NZLR 234, a decision which was not followed in D & F Estates Ltd v Church Commissioners [1988] 2 All ER 992, 1009.

Editor's notes

Anns' case: This case was overruled by the House of Lords in *Murphy v Brentwood District Council* [1990] 2 All ER 908, HL.

Dutton v Bognor Regis United Building Co Ltd: This case was also overruled by the House of Lords in *Murphy v Brentwood District Council* [1990] 2 All ER 908, HL.

Position in other common law jurisdictions: Courts in some other common law countries like in Australia, Canada and New Zealand have refused to follow the more recent trend of the English courts. For example, the Privy Council, on appeal from New Zealand in the case of *Invercargill City Council v Hamlin* [1996] 1 All ER 756, PC, held that the law as stated by the English courts was "unsuited to a single solution applicable in all common law jurisdictions regardless of differing local circumstances". In so holding, the Privy Council refused to follow *D* & *F Estates Ltd v Church Commissioners for England* [1988] 2 All ER 992, and *Murphy v Brentwood District Council* [1990] 2 All ER 908.

Economic loss: As to the position on economic loss in Malaysia, see the Court of Appeal decision in *Arab-Malaysian Finance Bhd v Steven Phoa Cheng Loon & Ors and other appeals* [2003] 1 MLJ 567, CA. See generally, Norchaya Talib, *Law of Torts in Malaysia*, 2nd edition, pages 115-137 where other Malaysian cases are discussed.

As to economic loss generally, see 4(3) *Halsbury's Laws* of *England*, 4th edition, paragraph 254, and 33 *Halsbury's Laws of England*, 4th edition, paragraph 613. See also *McGregor on Damages*, 17th edition, 2003, paragraph 4-004; *Chitty on Contracts, General Principles*, Volume 1, 28th edition, paragraphs 1-112 to 1-119; and

Chitty on Contracts, Third Cumulative Supplement to the Twenty-Eighth Edition, 2003, where some of the more recent cases are discussed.

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The right to choose

" Any form of pressure or arbitrary limits imposed on the people in their free exercise of the right to choose their own government will be a clear abrogation of any parliamentary system of government. "

---HRH Sultan Azlan Shah Parliamentary Democracy

* Certainty of law

" ... the law must aspire at certainty, at justice, at progressiveness. That is so only if the courts from time to time boldly lay down new principles to meet new social problems. "

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---Raja Azlan Shah J (as he then was) Public Prosecutor v Masran bin Abu & Ors (1971) 4 MC 192, HC at 193

Sultan Azlan Shah



The Royal Family

is Royal Highness Sultan Azlan Shah married Her Royal Highness Tuanku Bainun Mohamad Ali in 1955. Her Royal Highness Tuanku Bainun is often described

as "an epitome of serene and dignified grace". A qualified teacher, trained at Kirkby Teachers' College, England, she is currently the Chancellor of Universiti Pendidikan Sultan Idris.

Their Royal Highnesses have five children, all with outstanding academic qualifications. "The personal achievements of each child is much attributed to the wisdom and nurturing care of Their Royal Highnesses."



The eldest, His Royal Highness Raja Nazrin Shah, who is also the Raja Muda of the State of Perak (Crown Prince), received an undergraduate degree from Worcester College, Oxford University. He then obtained a Masters and Doctor of Philosophy (PhD) in

Political Economy and Government from the Kennedy School of Government, Harvard University.

Their second child, Her Highness Raja Dato' Seri Azureen is a graduate of the Syracuse University of the United States, and also holds a Masters degree from the London Business School. She is married to Dato' Seri Mohamed Salleh bin Dato' Mohd Ismail.

Their third child is His Highness Raja Dato' Seri Ashman Shah who is the Raja Kechil Tengah of the State of Perak. He is a holder of a Masters degree from Cambridge University, having done his undergraduate studies at Nottingham University. Like his father, he is a Barrister-at-Law at Lincoln's Inn. He is married to Dato' Seri Noraini Jane bt Tan Seri Kamarul Ariffin.



Her Highness Raja Dato' Seri Eleena, the fourth child, graduated from the School of Oriental and African Studies, University of London. She is also a Barrister-at-Law from Lincoln's Inn, and is currently in private practice. She is married to Dato' Seri Ismail Farouk bin Dato Abdullah.

The youngest, Her Highness Raja Dato' Seri Yong Sofia, is a holder of a Masters degree in Business, and was working as a senior executive in a leading bank. She is married to Tungku Dato' Seri Kamel bin Tunku Rijaludin.



"The doctor is ethically bound to disclose all necessary information of a particular treatment so as to allow the patient to make his own decision as to whether he wishes to accept that treatment. However, it is felt that a compromise has to be struck between 'medical paternalism' and 'patient sovereignty'. "

> —**HRH Sultan Azlan Shah** *Medicine, Ethics and the Law*
Medicine, Ethics and the Law

The 8th Tun (Dr) Ismail Oration The Academy of Medicine, Malaysia, *Kuala Lumpur, 5 October 1989*

he medical profession, more so than any other profession, has always been held in high esteem by society. The relationship between a doctor and his patient is quite different from that of a lawyer and his client or that of any other professional and his client. A client dealing with a lawyer, an accountant or even an engineer does not place such trust as he would, if he were a patient, in his doctor. In most cases, a patient places complete trust in his doctor. The fundamental reason for this unique relationship is that generally, society has always regarded doctors as samaritans who are always there to provide services to the sick.

In many countries, medical services are available to the public as a social service provided for by the government. Therefore, in most cases, a patient who sees a doctor need not negotiate the

fees or even entertain any doubt as to whether he would obtain the best available service from the doctor. The trust is so great that a patient readily "puts his life into the hands of a doctor". The public perception of the medical profession is such that they know that doctors are the only ones who would provide a service night or day and who would make all sacrifices to treat the sick. Furthermore, doctors are the only ones who are able to perform "miracles"—to create life and to prolong it.

This special relationship, of course, meant that there was little necessity to have regulations to control the practice of medicine. The doctor's high sense of integrity and dedication was deemed sufficient. The Hippocratic oath and a code of medical ethics were in themselves regarded as sufficient to regulate the practice of the profession. It was for this reason that the practice of medicine has always been self-regulatory.

Unfortunately, this perception of the medical profession has now begun to change. Not only has the number of legal actions against doctors for medical negligence increased over the years but with recent medical advances and discoveries, society has begun to question some of these practices. With the establishment of a number of interest or pressure groups, there has now begun to emerge a trend to question some aspects of medical practice and research. It is no longer felt that certain practices concern the patient alone but rather that they affect society as a whole.

Let me give an obvious example: the question of abortion. Like in many other areas of medical development, an abortion may now be performed with hardly any risk to a woman. A doctor may therefore argue that if a woman so desires to have an abortion and that if there is no attendant risk, there should be no reason why the abortion shall not be performed. A prudent doctor, however, will consult a book on the law and would soon learn that (if there is no legislation on the point) only the killing of a human being or a person is an offence. The foetus, he may argue, is by no definition a human being or a person and therefore no wrong is being committed in the performance of the abortion. Well, this may be true this far. However, a moralist will be quick to point out that though the foetus is not a human being or a person as the term is commonly understood to mean, yet it has all the features of becoming a human being within a couple of weeks. Therefore, he would say that an abortion tantamounts to murder.¹

It is clear that legal and ethical issues now govern the practice of medicine. A doctor has now to consider not only the medical aspects of a particular issue but also the legal and ethical issues relating to it.

Furthermore, whilst previously it was thought that it was the absolute right of a woman to have an abortion, the question of abortion has now aroused such great public interest that the position in many countries presently is that such a right is no longer vested in a woman alone. Society in general claims a right on the issue of abortion and therefore demands that it be regulated by legislation. It is therefore clear from this example alone that legal and ethical issues now govern the practice of medicine. A doctor has now to consider not only the medical aspects of a particular issue but also the legal and ethical issues relating to it.

A few years ago, an address or a talk by a lawyer on the practice of medicine or a talk by a doctor on the practice of law Kennedy, "The Moral Status of the Embryo" in Treat Me Right: Essavs in Medical Law and Ethics, 1988, Oxford University Press, pages 119-139. See also Report of the Law Reform Commission of Canada, Crimes Against the Foetus, Working Paper 58, (1989); Report of the Committee Of inquiry Into Human Fertilisation and Embryology, Cmnd 9314 (1984) (the Warnock Report); and The White Paper on Human Fertilisation and Embrvology: A Framework for Legislation, Cm 259.

would have been viewed with suspicion. The practice or the study of either of these two disciplines was so independent that it was generally believed that there was no relation between these two professions: the doctor's duty was to treat the sick whereas the lawyer's duty was to protect the rights of his client. It was further thought that questions of ethics were within the domain of the philosopher. However, there is now a general awareness of the interdisciplinary nature of the practice of law and medicine. Certain medical practices have highlighted the interface not only between law and medicine but also philosophy.

There is now a general awareness of the inter-disciplinary nature of the practice of law and medicine.

> Much of the current uncertainties in the law in the area of medicine have been due to the rapid advancement of medical research. This has further been accelerated by technological developments. Whilst the ethical issues may be clear, the legal issues remain blurred. In almost all new medical developments, the legal implications have only been tested after the event. New laws, if introduced by the legislature, were enacted only after there had been adverse public response to a particular medical treatment on ethical grounds. Therefore, where there was no specific legislation on a particular aspect of medical treatment, the legality of such treatment remained in the "grey" area of the law.

> In certain cases, however, where the common law system was applicable, judges were able to adopt and extend the existing common law to meet new situations. For example, in the most recent decision² on medical practice reported just a couple of months ago,

2 F v West Berkshire Health Authority & Anor [1989] 2 All ER 545, HL. the House of Lords applied the common law rules as expounded way back as early as 1704. But in some cases, without the intervention of Parliament, a lacuna in the law prevailed. The development of the common law in these areas of medical practice, together with the enactment of new legislation on the practice of medicine, has now contributed to the development of a new branch of jurisprudence, which is now termed medical law.³

The closest most of you as doctors would have probably come in contact with the study of law would have been in a subject introduced in some universities on medico-jurisprudence. I may add that if you have had the opportunity, you may be better off than a lawyer who throughout his course of studies is not introduced to any course in the study of medicine (not even forensic medicine). The proliferation of literature⁴ on the legal and philosophical aspects of medical practice over the last couple of years is a clear manifestation of the interest generated amongst doctors, lawyers and philosophers in some areas of medical practice. Even the most conservative of legal writers have now acknowledged the existence of a separate branch of the law called, as I have said, medical law.⁵ Universities in many countries have recognised the importance of this development and have established departments and have introduced special courses on medical jurisprudence or medical law.

In delivering a lecture on Medicine, Ethics and the Law, I have some apprehension. I profess to be no doctor or philosopher. However with that caveat, I hope this evening to highlight to you certain issues which are not only current but which also demonstrate the inter-disciplinary nature of these three professions (though some may take issue with me for referring to philosophy as a profession). Furthermore, what I intend to address you on are

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Kennedy, Treat Me Right. See also All England Law Reports Annual Reviews 1987 and 1988.

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Kennedy, Treat Me Right;

Freeman, Medicine, Ethics and the Law, 1988, Stevens & Sons;

Skegg, Law, Ethics and Medicine: Studies in Medical Law, 1988, (paperback, revised edition), Oxford University Press;

Mason & McCall Smith, *Law and Medical Ethics*, 1983, Butterworths;

Brazier, *Medicine*, *Patients and the Law*, 1987, Penguin.

For an excellent bibliography on the subject of 'Law, Medicine and Ethics', see Kennedy, *Treat Me Right*, pages 365–370.

5

For example, see *The All England Law Reports*, *Annual Review*.

certain wider issues affecting society as a whole: issues like abortion, sterilisation, the mentally handicapped, care of the terminally ill, euthanasia, suicide, surrogate mothers, and others. Though these issues generally reflect the economic and religious mores of a particular society, more often than not, the ethical considerations involved in these issues apply to every society—after all, all of these issues relate to basic human values.

I should perhaps, at this stage, remind you what Lord Coleridge CJ said over a hundred years ago:

It would not be correct to say that every moral obligation involves a legal duty, but every legal duty is founded on a moral obligation.⁶

This observation remains true even today. Therefore, until these ethical issues are translated into legal issues, they remain ethical issues. Where legislation has been introduced in certain countries on any of these issues, other countries may be able to learn something from their experiences.

Birth and death

In all societies, irrespective of their religious and cultural backgrounds, the phenomena of birth and death of a human being have always been shrouded by mystery. Whilst scientists, theologians and philosophers debated on the issues relating to the birth and death of a human being, they were unable to provide any rational conclusion to the creation of a human being and the ultimate death of it. The theologians, however, seem to have had an edge in solving this mystery: they held the view that man is the creation of God. Only He is able to bring life and to end it by way of death.

R v Instan [1893] 1 QB 450 at 453.

Though this premise seems acceptable to most communities, the diversity of religious and cultural perspectives, however, raised other conflicting issues. The values and beliefs of a community generally tended to reflect the particular religious principles which that community subscribed to. Where laws were deemed necessary to regulate certain conduct, the laws introduced merely gave effect to these particular beliefs and values.

You, therefore, as doctors may have dealt with patients with diverse beliefs. Some believe that a foetus is the creation of the Almighty and therefore is a living being from the time of its conception. Therefore, any attempt to tamper with it is a wrong committed against the Creator. There are others who paradoxically accept this view, but take a different view to capital punishment. In certain societies, there are people who strongly believe that any form of medical treatment is against the Creator's design. Based on such a belief, they even refuse blood transfusion, an operation or any form of treatment.⁷

I should perhaps also point out that it is not only the creation of a human being which has caused so much uncertainties but also the termination of it. The definition or meaning of "death" continues to be a difficult question, not only to the philosopher but to the lawyer as well as the doctor.⁸

The point which I wish to stress is that the questions relating to the creation of life and of death have in most communities been treated as sacrosanct. The more relevant question to be addressed now is how then these communities, who hold such strong beliefs, have reacted to new medical technologies, such as in vitro fertilisation, or freezing of embryos or to womb-leasing (now commonly called "surrogate motherhood").⁹

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Skegg, *Law, Ethics and Medicine*, pages 106–110, 112–114, 156 and 157.

8

Skegg, Law, Ethics and Medicine, pages 183– 227; Brazier, "Defining Death" in Medicine, Patients and the Law, pages 297–304.

9

Kennedy, *Treat Me Right*, page 119; New South Wales Law Reform Commission, *Surrogate Motherhood*, Discussion Paper 3, 1988;

Report of the New South Wales Law Reform Commission on Surrogate Motherhood, 1988 (LRC 60); New South

Wales Law Reform Commission, *In Vitro Fertilization*, *Discussion Paper 2*, 1987;

Report of the New South Wales Law Reform Commission on In Vitro Fertilization, 1988 (LRC 58).

10

Paton v Trustees of BPAS [1978] 2 All ER 987. See views of Kennedy in *Treat Me Right*, pages 42–51 on this case.

11

Grubb, "Conceiving— A New Cause of Action" in *Medicine, Ethics and the Law,* 1988, Stevens, and the cases referred to therein.

12

McKay v Essex Area Health Authority [1982] 2 All ER 771. The essence of such an action is that the doctor negligently deprived the mother of the opportunity of an abortion so that a child has to live a life of suffering. See also Grubb, Medicine, Ethics and the Law.

13

Grubb, *Medicine*, *Ethics and the Law*, pages 121–146. Whilst at one stage of medical development, the main issue relating to the unborn was whether a woman had a right to have an abortion, now a number of other ethical and legal issues relating to the foetus have been raised, the answers to which still remain unclear. Does a husband have a right to prevent his wife from having an abortion?¹⁰ Does a woman have a right to sue the doctor for an unwanted birth of a child?¹¹ Can an action be brought by a handicapped child for "wrongful life" on the ground that he should never have been born?¹² Far-fetched as these examples may seem to be, yet such actions have been instituted not only in the United States but also in the United Kingdom.¹³

Artificial insemination and surrogate motherhood

The current debate concerning reproductive technologies has raised a number of ethical and legal issues. The development of in vitro fertilisation (IVF) and womb-leasing (surrogate motherhood) would seem to be medical responses to human infertility. These new reproductive technologies, whilst performing "miracles" to infertile couples, have raised other difficult issues. One major difficulty has been in the area of enacting laws to regulate these technological discoveries and the practice of such methods of artificial conception. To what extent should laws be introduced? Should the law prohibit all forms of artificial insemination? If not, should such practices be regulated, and if so to what extent?

Whether laws should be introduced depends on a particular community's attitude towards such forms of reproductive processes. Is it ethical? Is it forbidden by the religion? The question as to whether laws should be introduced, of course, depends on a particular community's attitude towards such forms of reproductive processes. Is it ethical? Is it forbidden by the religion? Furthermore, there are other wider issues such as: should the law interfere with an individual's right to choose a particular treatment which causes no harm to others? Or should the law take into consideration public opinion?

Should the law interfere with an individual's right to choose a particular treatment which causes no harm to others? Or should the law take into consideration public opinion?

Some argue by saying that legislation is the most effective means of subjecting scientists and doctors to the values subscribed by the community. However, difficulties are also caused to the lawmaker. He knows that no sooner has he drafted a piece of legislation on a particular medical practice, that law would be outdated with the invention of further new techniques and discoveries. Moreover, even the attitudes of a community may change with time, especially so when the public becomes more familiar with certain of these new techniques. The difficulties faced by legal draftsmen in keeping abreast with scientific advances have been aptly described as follows:

Scientific material is always provisional and is constantly becoming out of date, so that yesterday's truth is today's error. Unfortunately, however, in the law, yesterday's belief ... becomes authority for today.¹⁴

On the question of in vitro fertilization and womb-leasing a compromise has to be struck between the rights of individuals Brett, "Implications of Science for the Law" (1972) 18 McGill Law Journal, 170 and 184.

"to marry and found a family" as stated in Article 16 of the United Nations Declaration of Women's Rights 1948, and society's responsibilities to ensure the welfare of a child born through a technological process. Whilst there is no doubt that in vitro fertilisation is a technique which enables an infertile couple to have a child, which may be regarded by some as a private matter for the couple, yet religious, moral, social and legal sentiments may be put forth against such an argument. Opponents of IVF and other biotechnological processes of fertilisation regard such forms of conception as unnatural and dehumanizing.¹⁵ One major fear, as pointed out by the Law Commission of New South Wales, is that:

... acceptance of IVF inevitably leads to acceptance of the notion of "manufacturing" replacing natural procreation. When these technologies are viewed as tools to achieve eugenic designs, there must necessarily be consideration of their potential for interfering with evolutionary processes ...¹⁶

On the question of in vitro fertilization and womb-leasing a compromise has to be struck between the rights of individuals "to marry and found a family" and society's responsibilities to ensure the welfare of a child born through a technological process.

Others raise objections on religious grounds. For example, the attitude of the Catholic Church is that the use of IVF by married couples is "illicit".¹⁷

Those who support these new medical practices argue that such methods result in a planned and wanted pregnancy which has

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New South Wales Law Reform Commission, *In Vitro Fertilization*, *Discussion Paper 2*, 1987, paragraph 4.16.

16 Ibid a

Ibid, at paragraph 4.34.

17

Instruction on Respect for Human Life in its Origin and on The Dignity of Procreation - Replies to Certain Questions of the Day, given at Rome from the Congregation for the Doctrine of the Faith on 22 February 1987. The Instruction was approved by Pope John Paul II and published by his Order: referred to by the New South Wales Law Reform Commission, In Vitro Fertilization, Discussion Paper 2, 1987, paragraph 4.13.

previously been denied through infertility. They further contend that in any case, "every medical intervention is a disturbance to the cause of nature and a departure from the normal course of events".¹⁸

In communities which share a common social, religious and cultural background, such problems may be alleviated. However, in a multi-racial and multi-cultural community where the morality of one group of the community is not necessarily shared by the others, the determination of public opinion becomes more difficult.

One strong argument which has been used against legalising such practices has been the concern of society towards the welfare of not only the child born of the IVF process (or any other technological process) but also of the emotional and psychological implications for the parties to the IVF. It is probably too early to state with any certainty the extent of the mental and psychological implications on the parents and the child born through the process of artificial insemination. In cases of surrogacy it has, however, been argued that the degradation and trauma suffered by the surrogate mother in carrying the child and transferring custody places great emotional pressure on the surrogate mother.

Furthermore, concern has been expressed that undue influence may be exercised by a husband over his wife to get her consent on the use of a surrogate. Finally, others have argued by saying that by these processes, nature's way of dealing with childbearing and motherhood and the bondage of the child and its mother are completely demolished.

Besides the ethical issues, there are also a number of legal issues arising from IVF and surrogate motherhood. The law has generally regarded the woman who bears a child as the child's 18 New South Wales Law Reform Commission, In Vitro Fertilization, Discussion Paper 2, 1987, paragraph 4.17.

19

Morgan, "Technology and the Political Economy of Reproduction" in Medicine, Ethics and the Law, note 11 above, page 32 and The New South Wales Law **Reform Commission** Report on In Vitro Fertilization, 1988 (LRC 58), page 85. See also the recent English Court of Appeal decision in Re C (a minor) (wardship: medical treatment) (No 1) [1989] 2 All ER 782.

genetic parent (mother). With the advent of IVF technology, it is now possible for the "birth" mother (the woman who carries the child and gives birth to it) not to be the child's genetic mother (the donor of the reproductive tissue). Under some legal systems, a woman who gives birth to a child through a donation from a man who is not her husband, is said to commit adultery. Such a child born is also regarded in law as illegitimate.

Even in other legal systems which do not take such a stand, other legal problems arise: who is the father of a child born through such a process-he need not necessarily be the husband of the woman who carried the child. This is relevant for purposes of registration of the birth of the child under any relevant law.

Under some legal systems, a woman who gives birth to a child through a donation from a man who is not her husband, is said to commit adultery. Such a child born is also regarded in law as illegitimate.

> Further, legal problems are raised by the posthumous use of stored gametes or stored embryos.¹⁹ Is a child born through the use of such processes entitled to inheritance? How does the law of inheritance and succession apply in such cases?

> Two particular legal problems have already arisen in some countries where surrogate motherhood has been practised, especially under a surrogacy agreement-first, the question as to who the legal mother of such a child is: is she the surrogate mother (that is the woman who bears the child) or is she the woman (the wife of the donor) who commissions the surrogacy? Secondly, what is the effect

of a surrogacy agreement? Is it enforceable in a court of law? Is there any distinction to be drawn between a surrogacy agreement entered into by a woman to carry the child for no reward and an agreement where the woman does so purely for purposes of reward?

These are amongst the two main legal issues drafters of any legislation on surrogacy have to address their minds to. This has been no easy task for legal draftsmen in England, Australia and other countries, especially when members of the legal and medical professions, psychologists, family planners, brokers, commissioning parents, the surrogate mother and finally the child, are all affected by such arrangements.

I have stated earlier that actions have been brought by parents and children against doctors for wrongful birth or wrongful life. Though so far these actions have been brought by parents or children born through the natural process, doctors should be aware that they may equally be made liable for such actions in cases of birth through the biotechnological process. It is possible in the case of an unexpected multiple IVF pregnancy, the parents might bring a wrongful birth action in respect of their "excess" offspring.

The New South Wales Law Reform Commission on *In Vitro Fertilization*²⁰ gives the following possibility: In October 1985 in California, a woman who had been treated with infertility drugs gave birth to seven babies from the same pregnancy, three of whom lived. She and her husband claimed damages of Australian \$4.5 million from the medical practitioners who prescribed the drugs, alleging negligence and wrongful death. Had all the children survived, perhaps the couple could have brought a "wrongful birth" action, claiming that by reason of the doctor's negligence more babies had been born than were wanted.

20 New South Wales Law Reform Commission, *In Vitro Fertilization*, *Discussion Paper 2*, 1987, paragraph 10.26, note 31.

Such are the ironies of life—in assisting in the conception of infertile couples, you as doctors may be sued for "too many babies"! This may not be the end of the story:

Even if the IVF child has not suffered physical injury as a result of the IVF process, he or she might claim that a person necessarily suffers damage by being born as a result of IVF. It is possible, by means of the same reasoning, to envisage a claim by an IVF child against its parents alleging that it should not have been conceived.²¹

Consent and the right to know

I now move on to address you on another familiar aspect of medical practice which has recently been considered by the courts. This is the question of consent. Two main issues, both relating to law and ethics which have plagued doctors for a long time, have been the questions:

- (i) When and under what circumstances can a doctor give treatment to a patient without the express consent of the patient? and
- (ii) How much of information, both as to the treatment to be given, and to the medical condition of the patient, should the doctor disclose to the patient?

Regarding the first issue, it is of course the standard medical practice for doctors to obtain the express consent of a patient whenever possible before any medical treatment is given to the patient. But as you probably know better, it is not always possible

21 Ibid, at paragraph 10.26. to get a patient to sign a document giving his express consent in every situation before an operation may be performed on him, for example, as in the case of an unconscious victim of a road accident. In such a situation, what does the doctor do?

> Two main issues have plagued doctors for a long time: When and under what circumstances can a doctor give treatment to a patient without the express consent of the patient? How much of information, both as to the treatment to be given and to the medical condition of the patient, should the doctor disclose to the patient?

Ethically, of course, the doctor will feel compelled to give whatever treatment, including performing an operation, which he feels ought to be given to ease the pain and agony of the patient or, in some cases, even to save his life.

The question which often confronts the doctor in such circumstances is to determine the extent of treatment which a doctor may give to such a patient who is not in a position to give his express consent. Is the doctor only under an obligation to give that much of treatment as is necessary so as to make the patient well enough to give his express consent for any further treatment which he may need? For example, if in treating an accident victim, the doctor performs an emergency operation to save the life of the victim, is the doctor under a duty to perform some other operations on the victim for some other ailments which the doctor comes to know of during the course of the first operation? Or, is the

22 Kennedy, *Treat Me Right*, page 177. See also Skegg, *Law*, *Ethics and Medicine*, pages 75–117.

23

Per Lord Goff in *F v West Berkshire Health Authority* [1989] 2 All ER 545 at 563. doctor under a duty to postpone the second operation until after the patient has regained consciousness so that his consent for the second operation may be obtained?

The whole question of consent in the context of medical care is both a legal and ethical issue. Every person has a right to his own autonomy, his power to make his own decisions and to act on them.

> Generally speaking, of course, the whole question of consent in the context of medical care is both a legal and ethical issue. The basis for this is that every person has a right to his own autonomy, his power to make his own decisions and to act on them:

Consent is one aspect of respect for autonomy. In the context of medical ethics, it means that a doctor may not touch or treat a person without his consent, always assuming that the person is competent to make an autonomous decision.²²

Such a theory is, of course, based on the assumption that the person is competent to make an autonomous decision. Therefore the unconscious person, the immatured, the mentally ill, may by definition be incompetent.

From a legal point of view, the basis for obtaining consent before medical treatment is as follows. The fundamental principle which the law recognises is that:

Every person's body is inviolate; [therefore] everybody is protected not only against physical injury but against any form of molestation.²³

In fact, as early as 1914, the famous American jurist, Cardozo J recognised that:

Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent, commits an assault.²⁴

However, the law recognised certain exceptions to this general rule—particularly as regards persons of unsound mind. The basis for this exception was clarified only early this year by the House of Lords in the case of F v West Berkshire Health Authority & Anor.²⁵ The House of Lords rejected the earlier accepted view that the exception was based on the principle of emergency. It pointed out that: "The principle is one of necessity, not of emergency." ²⁶

A doctor who assists another without the consent of the latter, will commit no wrong if the assistance is provided in a case of emergency or in a case where a person, because of permanent or semi-permanent inability, becomes incapable of giving consent.

Based on this doctrine, a doctor (or for that matter any other person) who assists another (the assisted person) without the consent of the latter, will commit no wrong if the assistance is provided in a case of emergency or in a case where a person, because of permanent or semi-permanent inability, becomes incapable of giving consent. For example:

... in a railway accident in which injured passengers are trapped in the wreckage. It is this principle which may render lawful the

24 Schloendorff v Society of New York Hospital (1914) 211 NY 125 at 126.

25 [1989] 2 All ER 545, HL.

26 Ibid at 565.

actions of other citizens, railway staff, passengers or outsiders, who rush to give aid and comfort to the victims; the surgeon who amputates the limb of an unconscious passenger to free him from the wreckage, the ambulance man who conveys him to hospital; the doctors and nurses who treat him and care for him while he is still unconscious. Take the example of an elderly person who suffers a stroke which renders him incapable of speech or movement. It is by virtue of this principle that the doctor who treats him, the nurse who cares for him, even the relative or friend or neighbour who comes in to look after him will commit no wrong when he or she touches his body.²⁷

The extent of the assistance would depend on whether the necessity arose from an emergency or from physical inability. In cases of emergency:

Where, for example, a surgeon performs an operation without his consent on a patient temporarily rendered unconscious in an accident, he should do no more than is reasonably required, in the best interests of the patient, before he recovers consciousness. I can see no practical difficulty arising from this requirement, which derives from the fact that the patient is expected before long to regain consciousness and can then be consulted about longer term measures.²⁸

The question as to what a doctor should do when he, in the course of an operation, discovers some other condition which, in his opinion, requires operative treatment for which he has not received the patient's consent—whether he should operate forthwith or should he postpone the further treatment—was left open by the House of Lords. This question, it was admitted was a "difficult matter".

27 Ibid at 566.

28 Ibid. The Law Lords pointed out that in cases of permanent or semi-permanent disability, there was no need for a doctor to wait for the patient's consent:

The need to care for him is obvious: and the doctor must then act in the best interests of his patient, just as if he had received his patient's consent so to do. Were this not so, much useful treatment and care could, in theory at least, be denied to the unfortunate.²⁹

The House of Lords, however, cautioned that though in such cases, there was no need for the patient's express consent:

The doctor must act in accordance with a responsible and competent body of relevant professional opinion, on the principles set down in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582. No doubt, in practice, a decision may involve others besides the doctor. It must surely be good practice to consult relatives and others who are concerned with the care of the patient. Sometimes, of course, consultation with a specialist or specialists will be required; and in others, especially where the decision involves more than a purely medical opinion, an interdisciplinary team will in practice participate in the decision.³⁰

Doctors and others involved in the decisionmaking process should always act in the "best interest of the person".

Furthermore, it was pointed out that the "overriding consideration" is that the doctors and others involved in the decision-making process should always act in the "best interest of the person".

29 Ibid at 567.

30 Ibid.

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[1987] 2 All ER 206, CA and HL. See Freeman, "Sterilising the Mentally Handicapped" in *Medicine, Ethics and the Law*, Stevens, 1988, pages 55–84 and the cases referred to therein;

Grubb and Pearl, "Sterilisation and the Courts" (1987) 46 CLJ 439–464.

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The appeal was heard by the House of Lords just a few days before she attained the age of majority.

In this case, as the girl was both a minor and incompetent, she was a ward of the court.

As such, only the court was in a position to give its permission for the sterilisation.

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[1989] 2 All ER 545, HL.

See the views expressed by Grubb and Pearl, "Sterilisation and the Courts" (1987) 46 CLJ 456–464.

It should be noted that this article was written before the decision of the House of Lords in F v West Berkshire Health Authority & Anor. See also Grubb, "Medical Law" [1988] All ER Rev 206–214.

34 [1989] 2 All ER 545 at 551. Over the past two years, the courts have had to battle with the difficult and delicate question as to whether, in the case of a mentally retarded girl or woman who is unable to give a valid consent, abortions or sterilisation may be performed on her. It should be noted that these procedures were deemed necessary, not because of any imminent damage to the health of the girl or woman but because those who had care of her considered the procedures to be in her best interest.

In the much publicised case of *Re B (a minor)*,³¹ the court was asked to authorise a sterilisation operation upon a 17-yearold severely mentally retarded girl.³² The House of Lords gave the consent to the sterilisation as it was clear from the evidence that the girl's "best medical interests" justified the operation.

What then is the position if the girl is no longer a minor but an adult? Again, this question was dealt with by the courts in the recent case of *F v West Berkshire Health Authority & Anor.*³³

The House of Lords pointed out that under the common law:

A doctor can lawfully operate on, or give other treatment to, adult patients who are incapable for one reason or another, of consenting to his doing so, provided that the operation or other treatment concerned is in the best interests of such patients.³⁴

Any operation or other treatment will be considered to be in the best interest of such persons if the operation or other medical treatment concerned was carried out either to save the lives of such persons or to ensure improvement or prevent deterioration in their physical or mental health. The basis for such a rule is, as I have pointed out earlier, based on the doctrine of necessity. Two further questions arise from this principle of law: first, is the rule applicable also to other treatments which are not necessarily needed for the purposes of improvement of the patient's physical or mental health, eg a treatment for sterilisation; secondly, who decides whether an operation for sterilisation is in the best interest of the person.

In some countries, like the United States, Canada and Australia,³⁵ the courts have the power with respect to persons of unsound mind to grant permission for such treatment. In other countries, like England, no such power is given to the courts. However, despite the lack of such powers, the English courts have said that:

Although involvement of the court is not strictly necessary as a matter of law, it is nevertheless highly desirable as a matter of good practice.³⁶

Lord Goff, another Law Lord said this:

The operation of sterilisation should not be performed on an adult person who lacks the capacity to consent to it without first obtaining the opinion of the court that the operation is, in the circumstances, in the best interests of the person concerned, by seeking a declaration that the operation is lawful.³⁷

His Lordship then gave the following assurance to the doctors:

I recognise that the requirement of a hearing before a court is regarded by some as capable of deterring certain medical practitioners from advocating the procedure of sterilisation; but

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See position in Malaysia under the Mental Disorders Ordinance 1952 and the Courts of Judicature Act 1964 (Act 91, Reprint No 3 of 1988), section 24(d) and (e). See also Hoggett, "The Royal Prerogative in Relation to the

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Mentally Disordered: Resurrection, Resuscitation, or Rejection?" in Medicine, Ethics and the Law, Stevens, 1988, pages 85–102.

36

Per Lord Brandon in *Re F v West Berkshire* [1989] 2 All ER 545, HL at 552.

37 Ibid at 568.

I trust and hope that it may come to be understood that court procedures of this kind, conducted sensitively and humanely by judges of the Family Division, so far as possible and where appropriate in the privacy of chambers, are not to be feared by responsible practitioners.³⁸

Because sterilisation involves an irreversible interference with the patient's organs which affects "one of the fundamental rights of a woman, namely the right to bear children",³⁹ the courts take a serious view of the matter—not only for the protection of the woman alone but also for the protection of the doctor—to ensure the lawfulness of the procedure.

Right to know (informed consent)

I now move on to the other issue which I raised earlier: how much of information is a doctor under a duty to disclose to the patient before any medical treatment is undertaken. This is commonly referred to, especially in the United States, as the doctrine of informed consent.

For consent to be effective, it must be voluntary, as well as informed. To be informed, a person needs to know not only about the risks involved in the particular medical treatment but also about alternatives.

> Generally, of course, for consent to be effective, it must be voluntary, as well as informed. To be informed, a person needs to know not only about the risks involved in the particular medical treatment but also about alternatives. For example:

38 Ibid at 569.

39 Per Lord Brandon, ibid at 552. A woman with breast cancer is entitled to know not only what radical mastectomy may do to her, and its attendant risks, but also that other forms of treatment exist, such as chemotherapy, radiation therapy, or lumpectomy. Without knowing this, she is not sufficiently informed to make a reasoned and comprehending decision. As regards the amount of information the doctor is obliged to give, the ethical principle can only be that she be given that information which she would regard as material in reaching a decision consistent with her views and values.⁴⁰

A compromise has to be struck between "medical paternalism" and "patient sovereignty".

What has been the attitude of the courts towards this doctrine, bearing in mind that the basis of informed consent is a wider ethical aspect of the nature of the relationship between the doctor and patient. As it is said, it is about respect for the person (the patient) and about power (by the doctor):

It seeks to transfer some power to the patient in areas affecting her self-determination, so as to create the optimal relationship between doctor and patient, which is the same as that between any professional and his client—namely, a partnership of shared endeavour in pursuit of the client's interests.⁴¹

The basis of the doctrine is that the doctor is ethically bound to disclose all necessary information of a particular treatment so as to allow the patient to make his own decision as to whether he wishes to accept that treatment. However, it is felt that a compromise has to be struck between "medical paternalism" and "patient sovereignty".

40 Kennedy, *Treat Me Right*, page 178.

41 Ibid.

The scope of this doctrine was considered by the House of Lords for the first time in the now well known case of *Sidawav v* Board of Governors of the Bethlem Royal Hospital.⁴² The issue which the House of Lords had to decide was spelt out by Lord Scarman in the following words:

It raises a question which has never before been considered by your Lordships' House: has the patient a legal right to know and is the doctor under a legal duty to disclose the risks inherent in the treatment which the doctor recommends? If the law recognises the right and the obligations, is it a right to full disclosure or has the doctor a discretion as to the nature and extent of his disclosure? And, if the right is to be qualified, where does the law look for the criterion by which the court is to judge the extent of the disclosure required to satisfy the right? Does the law seek the guidance of a medical opinion or does it lay down a rule which doctors must follow, whatever may be the views of the profession?⁴³

The House of Lords held that though there was a duty under the law for the doctor to warn his patient of risks inherent in the proposed treatment, and especially so if the treatment is surgery,⁴⁴ such a duty as expounded by the American courts was not applicable under English law.

The effect of the decision, therefore, seems to be that the English courts only recognise a qualified right of the patient to be informed. The test they seem to suggest is not whether there has been sufficient disclosure which will be sufficient for the patient to make a decision but whether the doctor had given such relevant information:

[1985] 1 All ER 643, HL. For a critical analysis of the decision of the House of Lords, see Kennedy, Treat Me *Right*, pages 193–212.

43 Ibid at 646.

42

44 Per Lord Scarman, ibid at 652.

... in accordance with the practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice. In short, the law imposes a duty of care; but the standard of care is a matter of medical judgments.⁴⁵

The decision of the House of Lords in *Sidaway* has been much criticised.⁴⁶ However, the present position appears to be as follows: The doctor must disclose whatever information is requested by the patient, except when the doctor perceives, and if other doctors would perceive similarly, that any such disclosure may not be in the best interest of the patient.

This statement of the law may create certain difficulties for the doctor in determining with any degree of certainty the extent of his legal obligation. This uncertainty however, I may add, is not only faced by doctors but also lawyers who advise doctors—for the truth of the matter is that the law on this point is still unclear.⁴⁷

> These are issues which we, particularly as doctors and lawyers, have to face in fulfilling our roles in society—a role which has been placed upon us through trust by the general public. We, therefore, cannot and should not abdicate from these responsibilities.

Conclusion

Many of the legal and ethical issues I have raised so far should not be viewed as issues which are merely restricted to those areas of medical practice alone. These are common issues which are equally applicable to many other areas of medical practice. Within the constraints of time of an oration of this nature this evening, I am

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The Bolam test [1957] 1 WLR 582 as explained by Lord Scarman in *Sidaway* [1985] 1 All ER 643 at 649.

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See for example Kennedy, *Treat Me Right*, at pages 175 and 194, and [1985] All ER Rev 301.

47

See for example the views of the House of Lords in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, HL.

unable to discuss other areas of medical practice which are equally important. These issues are now faced not only by the doctors but also lawyers and philosophers—these are much wider ethical and moral issues, issues which we, particularly as doctors and lawyers, have to face in fulfilling our roles in society—a role which has been placed upon us through trust by the general public. We, therefore, cannot and should not abdicate these responsibilities.

Editor's note

Right to know: See also chapter 3, *The Right to Know*, above.

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* Upholding justice

" I shall endevour to do justice, not only to the accused but also to the State. Lest we forget, justice not only means the interests of the accused but also the interests of the State. I would give the assurance that in the exercise of my judicial function I would uphold the absolute independence of my judgment.

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The independence of the judiciary remains a cornerstone in the structure of our system of government today. It not only guarantees that justice will be done and judgments firmly based on truth; it is also an indispensable condition of the rule of law.

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-Raja Azlan Shah J (as he then was) on his elevation as a High Court Judge in 1965

* Freedom of speech

" It is said, of course true, as a general statement, that the greatest latitude must be given to freedom of expression. It would also seem to be true, as a general statement, that free and frank political discussion and criticism of government policies cannot be developed in an atmosphere of surveillance and constraint. But as far as I am aware, no constitutional state has seriously attempted to translate the 'right' into an absolute right.

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Restrictions are a necessary part of the right and in many countries of the world freedom of speech and expression is, in spite of formal safeguards, seriously restricted in practice. "

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---Raja Azlan Shah J (as he then was) Public Prosecutor v Ooi Kee Saik & Ors [1971] 2 MLJ 108, HC at 111

Sultan Azlan Shah

What others say ...

Tun Hussein Onn, former Prime Minister of Malaysia:

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

s an exemplary legal officer, His Majesty Sultan Azlan Shah has always been regarded as one of the most outstanding judges in the Malaysian judiciary. His Majesty is well known for his firmness in upholding justice. As far as His Majesty is concerned, no person is above the law, nor is anyone entitled to any special consideration. He firmly believes that everyone is equal before the law and that no one should be accorded special treatment. This principle he upheld both in words and in deeds and he was determined to do justice both to the accused and to the State.

His Majesty contributed a lot to the development of Malaysian law. Although a member of the Perak Royal family, as a legal officer he was very much in touch with both the elite and the masses. It is his ability and willingness to understand, appreciate and be aware of the problems of the ordinary citizens that has enabled him to make a substantial contribution to the development of Malaysian law since independence. He was conscious of the changes that were taking place in the country and was keen and flexible enough to modify and adapt the laws to suit local conditions and circumstances. As a Ruler, His Majesty takes great pains to keep abreast with affairs of the State. He has made attempts to meet, to know and to understand State officials and to learn the problems that the State is faced with. Despite his responsibilities and busy schedule, he takes a keen interest in education and sports. He has been the Pro-Chancellor of Universiti Sains Malaysia since 1971 and Chairman of the Advisory Council on Higher Education since 1974.

In sports, his main interest lies in hockey. His Majesty is the President of the Hockey Federation of Malaysia, President of the Asian Hockey Federation and Vice-President of the International Hockey Federation. He is also a very keen golfer.

I am sure that Malaysians in general are indeed proud to have a Sultan who has served the country with great distinction. The people of Perak in particular will undoubtedly benefit from the wisdom of a Ruler who has vast experience in the Malaysian judiciary.

Truly, His Majesty not only possesses leadership qualities but also has demonstrated those qualities with excellence. He is a man who practices what he preaches. This is another important hallmark of a great leader who has lived up to the principles that he professes. I am proud to say that he is one of the few models of leadership by example.

* Written and unwritten constitutions

" 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.

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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. "

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



"A King is a King, whether he is an absolute or constitutional monarch. The only difference between the two is that whereas one has unlimited powers, the other's powers are defined by the Constitution. But it is a mistake to think that the role of a King, like a President, is confined to what is laid down by the Constitution. His role far exceeds those constitutional provisions. "

> —**HRH Sultan Azlan Shah** *The Role of Constitutional Rulers*

The Role of Constitutional Rulers

YAM Raja Tun Azlan Shah Lord President, Federal Court of Malaysia (as he then was)



alaysia has one elected King (Yang di-Pertuan Agong), nine hereditary Rulers and four appointed Yang di-

Pertua Negeri (Governors).

Malaysian Monarchy: a unique institution

The King is elected but he is a hereditary Ruler in his own State. He is elected not by universal suffrage as in the case of Members of Parliament, but by the other hereditary Rulers.² His term of office is five years. He can be removed.

Each of the nine Malay States has a hereditary Ruler who reigns for life. In Perlis the Ruler is known as the Raja and in Negeri Sembilan he is called the Yang di-Pertuan Besar. In other States they are known as Sultans. The rights of succession to the throne

This article was first published in [1982] JMCL 103-118, and subsequently reprinted in Trindade & Lee, The Constitution of Malaysia, Further Perspectives and Developments, Essays in Honour of Tun Mohamed Suffian, Oxford University Press, 1986, pages 76-91. For more recent views on some of the observations in this chapter, see Postscript,

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2 Federal Constitution, Article 34(3).

below.

vary from State to State. The Yang di-Pertuan Besar of Negeri Sembilan is elected by the four Ruling Chiefs (Undangs) and the Tunku Besar of Tampin. In Perak the succession rotates amongst the heads of three families. In other States the Rulers are succeeded by their eldest surviving sons.

Four States, Malacca, Penang, Sabah and Sarawak have Yang di-Pertua Negeri or Governors. A Governor is appointed for four years. Appointment is made by the Yang di-Pertuan Agong after consultation with the Chief Minister of the State concerned.³ Unlike Rulers, a Governor may be a commoner and need not be a Malay. Political considerations may enter in the appointment of a Governor but not in the case of a Ruler. He may be removed from office. He may also be re-appointed for a second or subsequent term.

The jurisdiction of the Yang di-Pertuan Agong extends to the whole Federation. He cannot exercise his functions as Ruler of his State while in office except those as Head of the religion of Islam.⁴As the Yang di-Pertuan Agong, he is also the Head of the religion of Islam in four other States, namely Malacca, Penang, Sabah and Sarawak.⁵

A Ruler's jurisdiction is confined to his State only. Yet as a member of the Conference of Rulers, he deliberates and decides on matters affecting the whole Federation.⁶

In many ways, the functions of the Governors are similar to those of the Rulers. Yet there are some differences. A Governor is not the Head of the religion of Islam in his State. He is a member of the Conference of Rulers, but not for the purpose of any proceedings relating to the election or removal of the Yang di-Pertuan Agong or the election of the Timbalan Yang di-Pertuan Agong or relating

Ibid, Schedule VIII, section 19A(i).

Ibid, Article 34(1).

5 Ibid, Article 3(3).

6 Ibid, Article 38. solely to the privileges, position, honours and dignities of Their Royal Highnesses or to religious acts, observances or ceremonies.⁷

Historical background

Traditional role

Malay Kingship can be traced to the Hindu period. However, as very little is known of the role of Malay Rulers during the Hindu period and as it has little or no relevance to the present role of the Rulers, that period is omitted. I begin with the role of the Malay Sultans during the Malacca period. It was during that period that Malay Kingship was at its apex.

A Malay Sultan during the Malacca period held absolute power and his subjects give him absolute loyalty.⁸ The *Hikayat Hang Tuah* and the *Sejarah Melayu* give numerous accounts of unquestioning loyalty of the Malay subjects to their Rulers. The Sultan declared war, decided on life and death of his subjects, administered justice and maintained law and order.⁹ According to the *Sejarah Melayu*, Sultan Alauddin Riyat Shah even went out at night in disguise to ensure law and order was maintained and justice done.¹⁰

Islamic influence

Islam did not introduce monarchy but merely tolerated it. In Islam, the Head of State is the Head of the Government as well as the Religion. He is regarded as a successor to the Prophet. He must be learned in the teaching of the religion.¹¹ He is elected by consensus. He has the final say in matters of State as well as religion. He determines the law where it is not clear, in consultation with other scholars. He leads the prayers.

Ibid, Schedule V, sections 3 and 7.

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Zainal Abidin Wahid, Glimpses of Malaysian History, 1970, chapter 4; See also Chandra Muzaffar, Protector?, Aliran, 1979, chapter 1.

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Zainal Abidin Wahid, *Glimpses of Malaysian History*, page 19.

10

WG Shellabear, *Sejarah Melayu*, 3rd edition, 1977, pages 127–128.

11

A Hasjmy, Di mana Letaknya Negara Islam, 1970, pages 151–177.

12 Chandra Muzaffar, *Protector*? page 31.

13

Ibid, pages 31–32; See also Professor Dr Ahmad Shalaby Djajamurni, *Sejarah dan Kebudayaan Islam*, 1970, page 273.

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Suffian, Lee and Trindade, *The Malaysian Constitution: Its Development: 1957– 77*, Oxford University Press, 1978, page 47. However he has no absolute power. He is responsible to Allah and subject to the principles of Islam. "A Muslim Ruler cannot expect loyalty from his subject if in carrying out the royal command he is required to violate the moral values of his religion. For as Muhammad is reported to have said, 'there is no obedience in sin. It is only in virtue.'" ¹² When Abu Bakar As-Siddiq succeeded the Prophet as the first Caliph, he told the community:

Behold me, behold me, charged with the care of government. I am not the best among you; I need all your advice and all your help. If I do well, support me; if I make mistake, counsel me ... As I obey God and His Prophet, obey me; if I neglect the Laws of God and His Prophet, I have no more right to your obedience.¹³

Of course, during the latter part of Islamic history, the office of the Caliph became a hereditary institution. In some cases, the title of "Sultan" was adopted. Since hereditary Sultans were normally not men of learning and did not possess the qualities of earlier Caliphs, their role, at least as far as the head of religion, became nominal. Their functions were taken over by their officers.

As regards the Malay Sultanate, Professor Ahmad Ibrahim said:

The Sultanate was the result of the assimilation of the spiritual and religious traditions originally associated with the institution of the Caliphate with the purely temporal authority that was the Sultan; the latter thus in addition to being a sovereign prince in the secular sense also came to maintain a close association with and responsibility for the Shariah.¹⁴
British influence

The British did not conquer the Malay States in the tradition of Alexander the Great or Kublai Khan. They colonised the States through intervention. They needed the power to rule the States. But they realised the usefulness of the Rulers and the sensitivity of the subjects regarding the position of their Rulers and the loyalty of the subjects to them. So, the British made use of the Rulers to rule the subjects. They stripped the Rulers of their powers but allowed them to retain those relating to their religion and customs. Religious matters were interpreted to refer only to ceremonies, rituals and personal law. Thus there was no conflict between religious matters which were within the powers of the Sultans and other matters taken over by the British. The British too had fought many wars for hundreds of years to curtail the powers of their Kings. So they extended the concept of constitutional monarchy to this country to suit their interests.

> The British colonised the States through intervention. They needed the power to rule the States. But they realised the usefulness of the Rulers and the sensitivity of the subjects regarding the position of their Rulers and the loyalty of the subjects to them. So, the British made use of the Rulers to rule the subjects.

The Merdeka Constitution

The British introduced to Malaya their system of Government and their principles of constitutional law. They were also responsible for the influx of the Chinese and the Indians. So, by the time Malaya was ready for independence, Malaya was saddled with opposing

interests. The Rulers "were frightened about what might happen to them if the people had control of the country. They feared to share the fate of Heads of States as happened in India, Pakistan, Indonesia and elsewhere, where the people had chosen self-rule."¹⁵ The Malays "fear(ed) the domination especially by the Chinese who are economically stronger as happened in Singapore only a mile or two away."¹⁶ The Chinese and the Indians feared Malay domination and wanted a share in the Government of the country in which they had made their homes.

The Merdeka Constitution became a masterpiece of compromise. Every group gives something and gets something in return. The same applies to the Rulers. They agreed to independence and to hand over their powers to the people, but they had their positions and privileges secured.

> As a result, the Merdeka Constitution became a masterpiece of compromise. Every group gives something and gets something in return. The same applies to the Rulers. They agreed to independence and to hand over their powers to the people, but they had their positions and privileges secured. Their functions were defined by the Constitution. In fact additional roles were assigned to them.

Constitutional role of the Rulers

Sir Ivor Jennings, writing on the British monarchy, made the following observations:

15 Tunku Abdul Rahman, *Looking Back*, Pustaka Antara, 1977, page 27.

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Tun Mohd Suffian, Malaysia and India — Shared Experiences in the Law, All India Reporter Ltd, 1980, page 43. The difficulty of explaining the process of government lies in the fact that it depends so much on intangible relationships which are more easily felt than analysed. This is particularly true of the Crown. On the one hand it is easy to exaggerate the influence of the monarchy by adopting a legalistic attitude and emphasising the part played by the Crown in the theory of constitutional law. On the other hand it is easy to minimise the royal functions by stressing the great trilogy of Cabinet, Parliament and People. The truth lies somewhere in between, but it is not a truth easily demonstrated, nor is it constant in its content. So much depends on private interviews which political scientists do not attend, and so much on the personalities of those who do attend.¹⁷

The same is true in the case of the Malaysian monarchy. Even though the role of the Malaysian monarchy is more clearly defined in the Constitution, one cannot deny the role played by the Rulers behind the scene.

> Even though the role of the Malaysian monarchy is more clearly defined in the Constitution, one cannot deny the role played by the Rulers behind the scene.

According to Sir Ivor Jennings the "Queen [of England] has one, and only one, function of primary importance. It is to appoint a Prime Minister." ¹⁸

That may be so in England. As England has no written constitution, Parliament is supreme. It is definitely not so in Malaysia. This is because in Malaysia there is a written Constitution 17 Sir Ivor Jennings, *The British Constitution*, Cambridge University Press, 4th edition, 1961, page 109.

18 Ibid.

19 *Editor's note:* See Postscript, below.

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See Article VII, Second Part, Laws of the Constitution of Johore; Article 39 (Kedah); Article XI, First Part (Kelantan); Article XL (Negeri Sembilan) Article 6, Part II (Pahang); Article XVIII, First Part (Perak); Article 39 (Perlis); Article LV (Selangor); Article XIX, First Part (Terengganu). which lays down the powers of the Rulers and provides that in specific matters, the Rulers may act in their discretion.

As England has no written constitution, Parliament is supreme. It is definitely not so in Malaysia. This is because in Malaysia there is a written Constitution which lays down the powers of the Rulers and provides that in specific matters, the Rulers may act in their discretion.

Let us examine these provisions. Article 40(2) of the Federal Constitution¹⁹ provides:

The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that it to say—

- (a) the appointment of a Prime Minister;
- (b) the withholding of consent to a request for the dissolution of Parliament;
- (c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of their Royal Highnesses, and any action at such a meeting,

and in any other case mentioned in this Constitution.

Similar provisions, with necessary modifications, are to be found in the State Constitutions. Thus in paragraph (a) the words "Prime Minister" should be read as "Menteri Besar" [Chief Minister] and in paragraph (b) "Parliament" should be read as "Legislative Assembly" [Dewan Undangan].²⁰ However the various State Constitutions contain the following additional provisions as to their discretionary powers:

- (i) any function as Head of the Muslim religion or relating to the custom of the Malays;
- (ii) the appointment of an heir or heirs, consort, Regent or Council or Regency;
- (iii) the appointment of persons to Malay customary ranks, titles, honours and dignities and the designation of the functions appertaining thereto; and
- (iv) the regulation of royal courts and palaces.²¹

Appointment of the Prime Minister

Even in appointing the Prime Minister, the Yang di-Pertuan Agong is not completely free. The Constitution requires him to appoint a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that House.²²

> When a party chooses its leader, it is always with the understanding that if the party comes to power, he would be the Prime Minister.

Since Independence 25 years ago there has not been any problem regarding the appointment of the Prime Minister. This is because, first, the same party has remained in power and has always won the General Elections by a big majority. Secondly, when a party chooses its leader, it is always with the understanding that if the party comes to power, he would be the Prime Minister. So, at Federal level, the role so far played by the Yang di-Pertuan Agong

21 Ibid. See also Federal Constitution, Schedule VIII, section 1(2)(d), (e), (f) and (g).

22 Federal Constitution, Article 43(2).

in appointing the Prime Minister has been no more than giving constitutional endorsement to the decision of the party in power. "Party" here must be read to mean the major party in the governing coalition.

However at State level things have not been so smooth sailing. It was well known that the [then] Sultan of Perak and his former Menteri Besar, Tan Sri Ghazali Jawi, were not on good terms. However as the Menteri Besar had the confidence of his party, there was nothing that the Sultan could do to replace him with another Menteri Besar. The Sultan "refused to attend any functions where Tan Sri Ghazali was present. The matter got so bad that the Sultan finally decided to sport a beard, and vowed that he would only shave it off after Tan Sri Ghazali had left the office of Menteri Besar."²³ The crisis was solved when the Menteri Besar, on the advice of his party leaders, resigned from office. Another name was submitted to the Sultan and the Sultan appointed him as Menteri Besar.

A similar incident occurred in Pahang. The [then] Regent of Pahang could not get along with his Menteri Besar, Datuk Abdul Rahim Abu Bakar. It was solved in the same way as in Perak.

There was another interesting incident in Pahang which happened in 1978. The Tengku Ariff Bendahara, a younger brother of the Sultan announced that he intended to enter politics and allowed himself to be considered for appointment to the post of Menteri Besar. The Sultan then made it known that he would not have his brother as a Menteri Besar and claimed "that he had the right under State Constitution to oppose the appointment."²⁴ The statement of the Sultan was severely criticised by Tunku Abdul Rahman, the first Prime Minister.²⁵ However a crisis was avoided as the Tengku Ariff Bendahara did not go into politics.

23 Tun

Tunku Abdul Rahman, *As a Matter of Interest*, Heinemann Educational Books (Asia) Ltd, 1981, page 30.

24 Ibid, page 28.

25 Ibid, chapter 4.

261

Another incident involved the [then] Sultan of Johore and Menteri Besar, Datuk Haji Othman bin Saat. From reports in the press it seems that the Sultan could not get along with the Menteri Besar. His Royal Highness even ordered the Menteri Besar to vacate his office premises as he (the Sultan) wanted to occupy the premises. The Menteri Besar vacated the premises. But as the general election was just round the corner, the Menteri Besar stayed on in his position. However he did not seek re-election.

The Tunku also recalled an incident when the first Yang di-Pertuan Agong, Tuanku Abdul Rahman was requested by an emissary of a Middle East country to sack him from the office of Prime Minister of Malaya. The emissary was astonished when the Yang di-Pertuan Agong replied "Oh, I cannot, for he is appointed by the people and not by me. On the other hand he can sack me." ²⁶ Of course the last sentence is an over-statement, legally speaking.

It is well-known that in submitting a candidate for appointment as Menteri Besar the party always takes into consideration his acceptability to the Ruler. This shows how important the role played by the Rulers is even in matters in which he has no absolute discretion

The Perak and Pahang incidents mentioned above were not protracted and did not lead to any serious constitutional crisis because the ruling party gave in. One could imagine the consequences if it had not. In fact it is well-known that in submitting a candidate for appointment as Menteri Besar the party always takes into consideration his acceptability to the Ruler.²⁷ This shows how important the role played by the Rulers is even in matters in which

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Tunku Abdul Rahman, *Looking Back*, Pustaka Antara, 1977, page 205.

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See "How Candidates in Selangor were chosen," interview of Datuk Harun bin Haji Idris, Barisan Nasional Director of Elections for Federal Territory and Selangor by Dr Tan Chee Khoon, *The Star*, 12 April 1982, page 6 and *The Star*, 13 April 1982, page 4.

he has no absolute discretion, even though at times their actions are difficult to justify.

Party leaders should be complimented for their willingness to give in to avoid and to solve major constitutional crises with the Rulers. The Rulers too should reciprocate. As the Tunku puts it:

Loyal people have accepted the institution, and, what is more, the Rulers have been given more rights than they had once enjoyed in British colonial days, at least as far as the Sultans of the former Federated Malay States are concerned. It is for the Rulers to reciprocate, to show their appreciation, and to play the role they are expected to, and have played so admirably well since our Merdeka.²⁸

As I was writing this article another incident occurred in Selangor. The General Election was held on 22 April 1982. The Barisan Nasional won 31 out of 33 seats in the State Legislative Assembly. Datuk Haji Ahmad Razali was one of the successful Barisan Nasional candidates. On 26 April 1982, the Press²⁹ reported that Datuk Haji Ahmad Razali had been nominated by the party as the next Menteri Besar of Selangor. The report also said that the Sultan would have to decide whether to accept or reject the nomination and quoting sources in UMNO (one of the component parties of the Barisan Nasional) went on to say that it was highly unlikely that the Sultan would reject the nomination as Datuk Haji Ahmad Razali had close ties with the Sultan.

The report also quoted Datuk Haji Harun, the Selangor Barisan Nasional Director of Elections as saying that the State Assemblymen had unanimously agreed to Datuk Ahmad's nomination and that he (Datuk Haji Harun) would present the

28 Tunku Abdul Rahman, As a Matter of Interest, Heinemann Educational Books (Asia) Ltd, 1981, page 31.

29

New Straits Times, 26 April 1982, page 2; Utusan Malaysia, 26 April 1982, page 7.

name to the Sultan the following day. "Datuk Harun also said that he would not be able to decide whether the Sultan would accept or reject the proposal as the decision is the prerogative of the Sultan." ³⁰ The news was also carried by the Malaysian television, a Government agency.

The Sultan of Selangor was upset over the television news, it being a part of the Government mass media. His Royal Highness cancelled the scheduled meeting with Datuk Haji Harun. The State Secretary told the press that the Sultan would leave for a holiday in Australia on the following day and would deal with the appointment of the Menteri Besar on his return. "He (the State Secretary) would not say when the Sultan would return."³¹

> It is true that appointment of a Menteri Besar is a prerogative of the Sultan. However the Ruler is not free to appoint anybody he likes. He must appoint a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly.

At 10.30 am, on the day the news of the Sultan's displeasure was carried by the Press (27 April 1982), the Prime Minister [Tun Hussein Onn] had an audience with the Sultan. At the meeting, the Sultan agreed to appoint Datuk Haji Ahmad Razali as Menteri Besar. According to the State Secretary, the Sultan "appeared happy" after the meeting with the Prime Minister.³²

In this incident, it is interesting to note that, first, there appears to be a misconception on the part of Datuk Haji Harun

30 Ibid.

31 New Straits Times, 27 April 1982, page 2; Utusan Malaysia, 27 April 1982, page 1.

32 New Straits Times, 28 April 1982, page 1.

with regard to the "prerogative" of the Sultan in the appointment of a Menteri Besar. It is true that appointment of a Menteri Besar is a prerogative of the Sultan. However the Ruler is not free to appoint anybody he likes. He must appoint a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly.³³ When the party which obtains the majority of seats in the general election decides to nominate one of its members of the Assembly for appointment as Menteri Besar, in my view the Ruler has no discretion but to appoint him. To disregard the wishes of the party and to appoint another member who cannot command the confidence of the majority of the members in the Assembly could lead to a vote of no confidence against him in which case the Ruler will have to either appoint another member or dissolve the Assembly.

Secondly, the existence of "close ties" between the Sultan and the nominee is not relevant. It is not a factor to be considered. The only consideration is whether he is likely to command the confidence of the majority of the members of the Assembly.

Thirdly, I see nothing wrong for the Press or even the Government controlled mass media to report the decision of the party.

However, it appears that the real reason behind His Royal Highness' displeasure was the decision of the party to send Datuk Haji Harun to submit the name of the nominee to His Royal Highness. Datuk Haji Harun, though one of the Vice Presidents of UMNO, held no Government post. It would have been polite and proper if the incumbent Menteri Besar or the Prime Minister or his Deputy were to seek audience with the Royal Highness to submit the name of the new Menteri Besar, as was done in other States.

33 Article LIII(2)(a), Laws of the Constitution of Selangor 1959. It was fortunate that the Prime Minister took quick remedial action to settle the misunderstanding.

Dissolution of Parliament

The Yang di-Pertuan Agong may also act in his discretion in withholding consent to a request for the dissolution of Parliament.³⁴ The Rulers of the Malay States have a similar discretion in respect of the dissolution of State Legislative Assemblies.³⁵

Here again, there had not been any occasion when the Yang di-Pertuan Agong in his discretion has withheld his consent to a request by the Prime Minister to dissolve Parliament. This is because no Prime Minister has ceased to command a majority in the Dewan Rakyat. Furthermore, even though the Constitution is silent, the Prime Minister, following the British convention is entitled to choose his own time to hold the general election within the statutory five-year limit prescribed by Article 55(3) of the Constitution. "No Sovereign could constitutionally refuse to grant a dissolution of Parliament at the time of his choice." ³⁶

Though the Constitution is silent, the Prime Minister, following the British convention is entitled to choose his own time to hold the general election within the statutory five-year limit prescribed by Article 55(3) of the Constitution.

The 1982 general election was held one year ahead of time. In fact rumours of an early general election had started since the middle of 1981. The Press were even making predictions as to the 34 Federal Constitution, Article 40(2)(b).

35 See Federal Constitution, Schedule VIII, section 1(2)(b).

36 Wade and Philips, *Constitutional Law*, Longman, 6th edition, 1960, page 79.

37 Subky Latiff, "Pilihanraya 24th April", *Watan*, 2 February 1982.

38

The columnist is a PAS member and stood for the Parliamentary Constituency of Kemaman.

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The Kalong Ningkan affair is omitted as it involves a Governor even though the powers of a Governor on this aspect are the same as a Ruler. See *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119, FC; [1968] 2 MLJ 238, PC. exact date. One columnist³⁷ was wrong by only two days and that was because, for the first time the election was held on a Thursday, the week-end of the former Unfederated Malay States, instead of on a Saturday, the week-end of the other States. Of course, the columnist did say in jest in the same article that the Prime Minister might choose a different date, just to prove that he was wrong.³⁸

In fact, as the election fever was hotting up, the focus was only on the Prime Minister: which date would be most favourable to his party. There was no evidence, at least in the Press, that anybody ever thought of the possibility that the Yang di-Pertuan Agong might withhold his consent.

Under normal circumstances, it is taken for granted that the Yang di-Pertuan Agong would not withhold his consent to a request for dissolution of Parliament. His role under such a situation is purely formal.

> This clearly shows that under normal circumstances, it is taken for granted that the Yang di-Pertuan Agong would not withhold his consent to a request for dissolution of Parliament. His role under such a situation is purely formal.

> Only one incident has so far occurred at State level where a Ruler was requested by the Menteri Besar to dissolve the State Assembly because he had lost the support of the majority of the members. It happened in Kelantan in 1977.³⁹

> The Federal Government was in the hands of the Barisan Nasional. The Government of the State of Kelantan was under the

control of PAS, once, and again now, an opposition party and a bitter enemy of the Barisan Nasional. Even though, at the time of the incident, PAS was a component party in the Barisan Nasional, it was an open secret that UMNO, the strongest member of the Barisan Nasional wanted to wrest control of Kelantan from PAS.

There was a crisis within PAS in Kelantan. The Menteri Besar, Datuk Haji Mohamed Nasir, fell out of favour with his colleagues in the Legislative Assembly. On 15 October 1977, they passed a vote of no confidence against the Menteri Besar and later expelled him from the party, hoping thereby that he would resign and another PAS member would be appointed Menteri Besar. But the Menteri Besar did not resign. Instead he advised the Regent to dissolve the Assembly. There was considerable political confusion in the State.

The Regent made no decision. On 9 November 1977, the Yang di-Pertuan Agong, who was incidentally the father of the Regent, on the advice of the Federal Government proclaimed a State of Emergency in the State. On the same day, Parliament passed the Essential Powers (Kelantan) Act 1977. All executive and legislative powers in the State were placed in the hands of the Prime Minister. However, the Menteri Besar remained in office though not in power. In the meantime with the blessings of UMNO he formed a new political party, Berjasa.

About three months after the Emergency was proclaimed, on 12 February 1978, the Yang di-Pertuan Agong, again on the advice of the Federal Government, lifted the Emergency and restored the power of the Menteri Besar. The following day the Regent dissolved the State Assembly, opening the way for a general election.

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See Tun Mohd Suffian, Malaysia and India — Shared Experiences in the Law, All India Reporter Ltd, 1980, pages 80–83.

41

Article LVIIA, First Part, Laws of the Constitution of Johore; Article 33B (Kedah); Article VI, First Part (Kelantan); Article V (Negeri Sembilan); Article 24 Part 1 (Pahang); Article VI, First Part (Perak); Article 5 (Perlis) [Added by Enactment No 2 of 1964]; Second Part, Article XLVIII (Selangor); Article IV, First Part (Terengganu).

42

Federal Constitution, Article 3(3).

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Article 5, Constitution of the State of Malacca; Article 5, Constitution of the State of Penang; Article 4A Constitution of Sarawak (added by O 9/76).

There appears to be no such provision in Sabah, although Islam is stated to be the religion of the Sate — See, Article 5A of its constitution(added by E 8 of 1973).

44

Federal Constitution, Article 3(5). *Editor's note:* which now includes Labuan and Putrajaya.

45 See note 21, above. In this election UMNO won 23 seats, Berjasa 11 seats and PAS which by then had been expelled from the Barisan Nasional won only two seats. Thus ended 18 years of PAS control of the State of Kelantan.⁴⁰

In this incident, it appears that the Federal Government had some influence over the State Ruler in the exercise of his discretion with regard to the dissolution of the State Legislative Assembly.

Head of the Religion of Islam

Article 3(2) of the Federal Constitution, inter alia, provides:

In every State other than States not having a Ruler the position of the Ruler as Head of the religion of Islam in his State in the manner and to the extent acknowledged and declared by the Constitution of that State, and subject to that Constitution, all rights, privileges, prerogatives and powers enjoyed by him as Head of that religion, are unaffected and unimpaired ...

The Constitutions of the various States contain provisions that the Ruler of the State is the Head of the Religion of Islam in that State.⁴¹ The Federal Constitution also requires that provision be made in the Constitution of the States of Malacca, Penang, Sabah and Sarawak conferring on the Yang di-Pertuan Agong the position of Head of the religion of Islam in that State.⁴² Such provisions have been made.⁴³ The Yang di-Pertuan Agong is also the head of the religion of Islam in the Federal Territory.⁴⁴

The various State Constitutions also provide that the Ruler of the State may act in his discretion in the performance of any functions as Head of the religion of Islam.⁴⁵ A similar provision is not to be found in the Federal Constitution. Professor Ahmad Ibrahim is of the view that unlike the Ruler of the State, the Yang di-Pertuan Agong may only act on advice in performing his functions as Head of the religion of Islam in Malacca, Penang, the Federal Territory, Sabah and Sarawak.⁴⁶ Professor FA Trindade supports his view.⁴⁷

In practice, however, there seems to be no significant difference in the role of a Ruler as the Head of the religion of Islam in his State and the role of the Yang di-Pertuan Agong as the Head of the religion of Islam in the States not having a Ruler.

The role is actually confined to matters provided for by the State laws, in particular the Administration of Muslim Law Enactments of the various States. A Ruler may not, for example, play the role of the early Caliphs in the religion of Islam even though reciting sermons at Friday prayers is definitely proper.

In some States the prerogative of appointing the Mufti is exercised by the Ruler.⁴⁸ In other States he is appointed by the Ruler on the advice of the Ruler in Council or of the Council of the Religion.⁴⁹ The Ruler is also required to consult the Council of Religion with regard to the appointment of other religious officials.⁵⁰

In practice, appointments are made on the recommendation of the Council of Religion and the Ruler in Council. However the fact remains that the Ruler "does have a great deal of influence on the appointment of religious officials".⁵¹

The Ruler does continue to play a role in the issue of fatwas or rulings on the Islamic religion and law. Under the various State 46 Suffian, Lee and Trindade, The Constitution of Malaysia: Its Development: 1957–77, Oxford University Press, 1978, page 50.

47 Ibid, page 114.

48 See, for example, section 9, Administration of Muslim Law Enactment 1964 (Perlis).

49

See, for example, section 39(1), Administration of Muslim Law Enactment 1965 (Perak).

50

See, for example, section 10, Administration of Muslim Law Enactment, 1964 (Perlis); section 43 (Perak).

51

Suffian, Lee and Trindade, The Constitution of Malaysia: Its Development: 1957–77, 1978, page 59.

the special sanction of the Sultan.⁵² However, as the Rulers are not normally learned in Islamic Law one would not expect them to do more than to endorse the views of the Mufti, Fatwa Committee or the Council as the case may be.
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However, as the Rulers are not normally learned in Islamic Law one would not expect them to do more than to endorse the views of the Mufti, Fatwa Committee or the Council of Religion.

Some Rulers are very jealous of their role as Head of the religion of Islam so much so that we find that, through the influence of the respective Rulers, Kedah and Pahang have not participated in the National Council of Religious Affairs. This is most unfortunate as the Council was established with a view to, inter alia, advise the Conference of Rulers, State Governments, and State Religious Councils on matters concerning Islamic Law or the administration of Islam and Islamic education with a view to standardising and encouraging uniformity in Islamic Law and administration.⁵³

Enactments relating to the Administration of Muslim law the power to issue fatwas is given to the Mufti, Fatwa Committee, or the Council of Religion. In issuing such fatwas the person or body issuing them is required ordinarily to follow the orthodox tenets of the Shafie school, but where the public interest so requires the fatwa may be given according to the tenets of other schools, but only with

The supreme prerogative of a Ruler as the Head of the religion of Islam in his State was illustrated recently in connection with the determination of the date for Hari Raya Idilfitri. This date which

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For example, see section 42, Administration of Muslim Law Enactment, 1965 (Perak); section 38 (Kedah).

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Suffian, Lee and Trindade, The Constitution of Malaysia: Its Development: 1957–77, Oxford University Press, 1978, page 60; See also Othman Haji Ishak, Fatwa Dalam Perundangan Islam, 1981, page 58. marks the end of the fasting month of Ramadan and the beginning of the following month of Syawal is determined according to Islamic Law by the alternative methods of falak, ie astronomical computation, or rukyah, ie by the sighting of the new moon.

The convention in this country has been to use the rukyah method and as the new moon was not sighted on Wednesday, 21 July 1982, the Yang di-Pertuan Agong with the concurrence of the Conference of Rulers determined that Hari Raya would fall on Friday, 23 July, but the State of Perak celebrated Hari Raya on Thursday, 22 July, on the decree of the [then] Sultan of Perak.

Islamic Law and procedure contained in the Administration of Muslim Enactments vary from State to State. Even fatwas on many issues vary from State to State. The latter have not only confused the public but also affected the authority of the fatwas.

It is true that the second limb of Article 3(2) of the Federal Constitution provides that in any acts, observances or ceremonies with respect to which the Conference of Rulers has agreed that they should extend to the Federation as a whole, each of the other Rulers shall in his capacity of Head of the religion of Islam authorise the Yang di-Pertuan Agong to represent him, but the [then] Sultan of Perak had in fact in the exercise of his inherent and constitutional power and prerogative as the Head of the religion of Islam in his State decreed the date for Hari Raya as 22 July well before the announcement on the evening of 21 July by the Keeper of the Rulers'

54 For full discussion, see Othman Haji Ishak, Fatwa Dalam Perundangan Islam, 1981.

55 Federal Constitution, Article 44.

56 Ibid, Article 66(3).

57 Ibid, Article 66(4).

58

Article XIV, Second Part, Laws of the Constitution of Johore; Article 44 (Kedah); Article XXVIII, First Part (Kelantan); Article XLVII (Negeri Sembilan); Article 17 (Pahang); Article XXVIII, First Part (Perak); Article LXI (Selangor); Article LXI (Selangor); Article XXVI, First Part (Terengganu).

59

Wade and Phillips, *Constitutional Law*, 6th edition, 1960, page 125.

60 Federal Constitution, Schedule VIII, section 1.

61

Editor's note: As to the current position, see Postscript, below. Seal that Hari Raya would fall on Friday, 23 July. A few years back a similar situation arose when the State of Kedah celebrated Hari Raya on a different day from the rest of the country.

It is a fact that Islamic Law and procedure contained in the Administration of Muslim Enactments vary from State to State. Even fatwas on many issues vary from State to State.⁵⁴ The latter have not only confused the public but also affected the authority of the fatwas.

Ruler and Parliament

The Yang di-Pertuan Agong is a component part of Parliament.⁵⁵ When a Bill is passed by both Houses, "it shall be presented to the Yang di-Pertuan Agong for his assent".⁵⁶ The Yang di-Pertuan Agong shall signify his assent to a Bill by causing the Public Seal to be affixed thereto.⁵⁷ Similar provisions are also to be found in the State Constitutions regarding the Ruler and the State Legislative Assembly.⁵⁸

In England it is only by convention that assent is not withheld. The right of veto has not been exercised since the reign of Queen Anne. It may be said to have fallen into disuse as a consequence of ministerial responsibility.⁵⁹

In Malaysia, the role of the Rulers is specifically provided for in the Constitutions and the Rulers have no power to refuse.⁶⁰ It is most unfortunate, therefore, that the Regent of Pahang, as reported in the Press recently, because of differences with the Menteri Besar, refused to signify his assent to a Bill passed by the State Legislative Assembly. Such refusal is clearly unconstitutional.⁶¹

Role of the Rulers in matters where they are required to act on advice⁶²

In matters where the Rulers are required to act on advice, the role of the Rulers varies from mere formality to influencing the decision.

As the fountain of justice, appeals from the Federal Court in non-constitutional civil matters lie to the Yang di-Pertuan Agong. By agreement between the Governments of Malaysia and the United Kingdom, such appeals are heard by the Judicial Committee of the British Privy Council. On receiving the advice of the Privy Council the Yang di-Pertuan Agong is obliged by the Constitution to make such order as may be necessary to give effect thereto.⁶³ Here the role of the Yang di-Pertuan Agong is purely formal.⁶⁴

With regard to the power of pardon, the Yang di-Pertuan Agong or the Ruler acts on the advice of the Pardons Board.⁶⁵ Allow me to draw your attention to two cases which are of special interest.

The first shows the influence of the Prime Minister. During the Indonesian confrontation, 11 Chinese were convicted and sentenced to death for consorting with the enemy. Some Chinese carried out a campaign to obtain a pardon for them. The then Prime Minister, Tunku Abdul Rahman publicly supported it. They were pardoned. This incident was one of the factors that led to the unpopularity of the Prime Minister amongst the Malays at that time.

Yet another incident shows the influence of the Sultan. The then Crown Prince of Johore was convicted of a number of offences. The feelings of the public were strongly against him. The public did not expect him to be pardoned. The Sultan however pardoned him. 62 *Editor's note:* See also Postscript, below.

273

63 Federal Constitution, Article 131(4).

64 *Editor's note:* See further notes at the end of chapter.

65 Federal Constitution, Article 42.

Even though the Crown Prince and heir to the throne was demoted because of the incident, just before his death the Sultan reinstated him to his former position. He became the Sultan after the death of his father.

These incidents show that in the exercise of the power of pardon, the Ruler may be influenced by other factors, personal or political.

Conference of Rulers

Article 38(6) of the Federal Constitution provides:

The members of the Conference of Rulers may act in their discretion in any proceedings relating to the following functions that is to say—

- (a) the election or removal from office of the Yang di-Pertuan Agong or the election of the Timbalan Yang di-Pertuan Agong;
- (b) the advising on any appointment;
- (c) the giving or withholding of consent to any law altering the boundaries of a State or affecting the privileges, position, honours or dignities of the Rulers; or
- (d) the agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole.⁶⁶

The role of the Rulers in electing a Yang di-Pertuan Agong is of utmost importance. They, and they alone, in their discretion elect a Yang di-Pertuan Agong according to the procedure laid down by the Constitution. To elect a Yang di-Pertuan Agong who

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Editor's note: Article 38(6) now also includes paragraphs (e) and (f), respectively dealing with appointment of members of the Special Court and the granting of pardons, reprieves, etc. cannot work with the Government within the framework of the Constitution can lead to a constitutional crisis and seriously affect the peace and stability of the country.

> The role of the Rulers in electing a Yang di-Pertuan Agong is of utmost importance. They, and they alone, in their discretion elect a Yang di-Pertuan Agong according to the procedure laid down by the Constitution.

As elections of the Yang di-Pertuan Agong are by secret ballot and proceedings of the Conference of Rulers are confidential, it is not known whether any Ruler has been passed over.

Professor Jayakumar⁶⁷ tells us of two instances, the first in 1957 and the second in 1970, where the most senior Ruler was not elected the Yang di-Pertuan Agong. He observed that "if these two Rulers did not voluntarily stand down they must have been passed over …".

However, Tunku Abdul Rahman seems to suggest that the Sultan of Pahang, in 1957, was passed over. He gives the following account:

People have asked me from time to time as to why the Sultan of Pahang, who was one of the senior Rulers of the country, had not been appointed Yang di-Pertuan Agong. Perhaps I might answer it in these terms. It was a question of either taking the Throne or winning the love of a woman, and I hope his descendants, particularly the present incumbent, will forgive me for saying so. When the late Sultan of Pahang expressed a wish to marry his fifth

67 Suffian, Lee and Trindade, *The Malaysian Constitution: Its Development: 1957–77*, Oxford University Press, 1978, page 104.

wife, Tun Abdul Razak and I went to see him in Istana Pahang in Kuala Lumpur and pleaded with him not to go through with it, because that would turn the people against him. He would, in our mind, make a very good Yang di-Pertuan Agong as he was close to the people and very friendly and sporting. After some time with him he agreed to accept our advice. However, a few days afterwards, to my astonishment, we read a report in the newspapers that the Sultan had gone through with his marriage and was having his honeymoon in Hong Kong.⁶⁸

It is not known whether the Prime Minister [Tunku Abdul Rahman] and his Deputy [Tun Abdul Razak] were acting as emissaries of the other Rulers when they went to see the Sultan to "plead" with him not to go through with the marriage. If they were, we cannot impute their influence on the Rulers in deciding not to elect the Sultan. It would be different if they acted on their own initiative.

The Conference of Rulers must be consulted for appointments of the Lord President, Chief Justices, Judges, the Auditor General, Members of the Public Services Commission, members of the Armed Forces Council, etc ... The views of the Rulers play a very important part in such appointments.

The Conference of Rulers must be consulted⁶⁹ for appointments of the Lord President [Chief Justice of the Federal Court], Chief Justices [Chief Judges of the High Court], Judges,⁷⁰ the Auditor General, Members of the Public Services Commission, members of the Armed Forces Council, etc.

68 Tunku Abdul Rahman, *Viewpoints*, Heinemann Educational Books (Asia) Ltd, 1978, pages 72–73.

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Editor's note: See Postscript, below.

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Editor's note: The list should now also include the President of the Court of Appeal: see Federal Constitution, Article 122B.

277

It is not known whether any appointment has been aborted because of disagreement by the Conference of Rulers. Legally, such appointment may be made even in the face of opposition by the Conference of Rulers. However, one can safely say that the views of the Rulers play a very important part in such appointments.

Regarding the matters under paragraphs (c) [laws altering the boundaries of a State or affecting the privileges, position, honours or dignities of the Rulers] and (d) [extension of any religious acts, observances or ceremonies to the Federation as a whole] of Article 38(6) of the Federal Constitution, it appears that the discretion of the Rulers is absolute, though no doubt a strong and popular Prime Minister might be able to influence the Rulers in the exercise of their discretion.

The consent of the Conference of Rulers is required for any law making an amendment to Article 10(4), any law made under Article 10(4), the provisions of Part III of the Constitution, Article 38, Article 63(4), Article 72(4), Article 70, Article 71(1), Article 152 and Article 153.⁷¹

Article 152 deals with the national language and the use of other languages. Article 153 deals with the special position of Malays and natives of Borneo and the legitimate interests of other communities. It is in these aspects, at least to the Malays and the Natives of Borneo, that the role of the Rulers is most important.

As stated earlier, the Malays feared that with many of the non-Malays becoming citizens after Merdeka, the importance of the Malay language would be lost, and that they would be dominated by the non-Malays, especially the Chinese who were economically stronger. Hence the two Articles were inserted. But

71 Federal Constitution, Article 159(5).

they felt that the guarantees would not be strong enough if they could be repealed easily. This was particularly so as they envisaged a large number of non-Malays would become citizens after Merdeka and have a right to vote and be elected to the Dewan Rakyat. In order to entrench these guarantees, the consent of the Conference of Rulers was made a condition precedent to any amendment to them. With that condition the Malays felt safe. It is to the Rulers that the Malays entrust the role of protecting their rights as the Rulers must necessarily be Malays and are above politics. It is true that the Conference of Rulers acts on advice in this matter. But one will not expect that the consent of the Rulers could be obtained easily in these matters. Any government trying to force these issues on the Rulers would be courting trouble as the Malay masses would definitely back the Rulers when it comes to the question of preserving their special privileges.

It is to the Rulers that the Malays entrust the role of protecting their rights as the Rulers must necessarily be Malays and are above politics.

Conclusion

A King is a King, whether he is an absolute or constitutional monarch. The only difference between the two is that whereas one has unlimited powers, the other's powers are defined by the Constitution. But it is a mistake to think that the role of a King, like a President, is confined to what is laid down by the Constitution. His role far exceeds those constitutional provisions.

Professor Groves, writing in 1964 commented that the Yang di-Pertuan Agong is "a visible symbol of unity in a remarkably diverse nation".⁷² Professors FA Trindade and S Jayakumar, also in 1964, wrote that "it [the office of the Yang di-Pertuan Agong] has provided for the first time a living national symbol to a society whose peoples differ racially, culturally and linguistically".⁷³

Writing again in 1978, Professor Trindade described Professor Groves' statement as fair.⁷⁴

We, Malaysians, living in Malaysia since the office of the Yang di-Pertuan Agong was created 25 years ago, seeing the crowd at the Palace "open house" on Hari Raya days, seeing the crowd that line the streets to see the Yang di-Pertuan Agong and the Raja Permaisuri Agong pass by on their installation day, seeing the reactions of the crowd whether at a football or hockey match, at a National Day parade or at the National Mosque when the Yang di-Pertuan Agong is present cannot help but agree with the statement.

Malaysians do not only differ racially, culturally and linguistically, but, prior to Merdeka and the creation of the office of the Yang di-Pertuan Agong, even the Malays did think regionally, as Kelantanese, Kedahans and so on. Their sentiments lay with their home States and their loyalty lay with their State Rulers. Such feelings appear to be on the decline now. Now, when they think of their Sultan, they also think of the Yang di-Pertuan Agong who takes precedence over their Sultan. In fact they are proud when their Sultan becomes the Yang di-Pertuan Agong. For those in States without Rulers, for the first time they felt that there was a Ruler who filled the vacuum in their States.

It may be that the sentiments of Malaysians as regards the Yang di-Pertuan Agong may not as yet be as strong as that of the British towards their Queen. This is quite understandable as the

72 Groves, The Constitution of Malaysia, MPH Ltd, 1964, page 42.

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FA Trindade and S Jayakumar, *The Supreme Head of the Malaysian Federation*, (1964) Vol 6 No 2 Mal LR 302.

74

Suffian, Lee and Trindade, The Constitution of Malaysia: Its Development: 1957– 1977, Oxford University Press, 1978, page 101.

office of the Yang di-Pertuan Agong is barely 25 years old, as the Yang di-Pertuan Agong changes every five years and there are eight other Rulers to share those sentiments of loyalty. It may be that because of these factors, Malaysians may not as yet be able to say "we can damn the Government and cheer the King" as Englishmen are apt to say. But there is no denying that the office is the symbol of unity, the fountain of justice, mercy and honour—a role which neither the President of the United States, nor Napoleon, could ever dream of playing.

There is no denying that the office of the Yang di-Pertuan Agong is the symbol of unity, the fountain of justice, mercy and honour.

In his book published in 1978 Tunku Abdul Rahman said:

Never once did I have any occasion to regret my role as the man who suggested the institution of Kingship in Malaysia, as I was convinced that this institution would have great influence on the well-being, peace, and glory of this nation.⁷⁵

Editor's notes

1993 Constitutional Amendments: For some background to the Constitution (Amendment) Act 1993, see the judgment of Haidar FCJ in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Shah v Dikim Holdings Sdn Bhd & Anor* [2002] 2 MLJ 11, FC. See also the

75 Tunku Abdul Rahman, *Viewpoints*, Heinemann Educational Books (Asia) Ltd, 1978, page 72. judgment of Dennis Ong JCA in the same case reported in [2002] 4 MLJ 289, FC.

Special Court: The setting up of the Special Court became a major turning point in the legal system in Malaysia.

Article 182(2) of the Federal Constitution states that "[a]ny proceedings by or against the Yang di-Pertuan Agong or the Ruler of a State in his personal capacity shall be brought in a Special Court established under Clause (1)" of Article 182.

Before this amendment was made, no proceedings can be brought in any court against the Yang di-Pertuan Agong or the Ruler of a State in his personal capacity.

The Special Court has exclusive jurisdiction to try all offences committed in the Federation by the Yang di-Pertuan Agong or the Ruler of a State and all civil cases by or against the Yang di-Pertuan Agong or the Ruler of a State, notwithstanding where the cause of action arose.

As to whether a Regent is a "Ruler" so as to fall within the ambit of Article 181, see the judgment of the Federal Court in *DYTM Tengku Idris Shah Ibni Sultan Salahuddin Abdul Shah v Dikim Holdongs Sdn Bhd & Anor* [2002] 2 MLJ 11 (decision of Haidar FCJ, concurred by Ahmad Fairuz CJ (Malaya)) and [2002] 4 MLJ 289 (decision of Dennis Ong JCA). See also the Federal Court decision in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, FC, as to the definition of "Ruler". In this case, a five-member panel of the Federal Court dealt with the issue of the election of an Undang of Jelebu. All five judges delivered separate judgments (Suffian LP (dissenting); Raja Azlan

Shah CJ (Malaya), Ag LP; Salleh Abas FJ; Ibrahim Manan FJ; and Hashim Yeop Sani J).

Thus far only one civil case has been brought against a Ruler in the Special Court: see *Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah (Sultan of Pahang)* [1996] 1 MLJ 617, Special Court.

Abolition of appeals to the Privy Council: The first step towards the abolition of appeals from Malaysia to the Judicial Committee of the Privy Council was taken in 1975. The Essential (Security Cases) (Amendment) Regulations 1975 (PU(A) 362/75, amending PU(A) 320/75, in force from 4 October 1975) provided that:

(2) There shall be no right of appeal by either the accused or the Public Prosecutor to the Yang di-Pertuan Agong under Part IV of the Courts of Judicature Act 1964, in respect of a security case.

In 1976, by virtue of an amendment (Act A328) to the Courts of Judicature Act 1964, appeals relating to criminal and constitutional matters were abolished.

In 1985, Article 131 of the Federal Constitution was repealed. Section 18 of the Constitution (Amendment) Act 1983 (Act A566) provided that the repeal of Article 131 would only take effect on a date to be appointed by the Yang di-Pertuan Agong. The Yang di-Pertuan Agong, by *Gazette Notification* (PU(B) 489/84) appointed 1 January 1985 as the date of coming into force of the amendment. At the same time, the Courts of Judicature Act 1964 was also amended by the Courts of Judicature (Amendment) Act (Act A600), by virtue of which all appeals to the Privy Council were completely abolished. **Rulers and Islam:** As to the historical position of the Rulers with regards to Muslim law in the States, see the observations of Salleh Abas LP in the Supreme Court decision in *Che Omar bin Che Soh v Public Prosecutor* [1988] 1 SCR 73, SC (a case dealing with the issue as to whether the mandatory death sentence was unconstitutional on the grounds that it contravenes Islamic principles).

Further references: See also the following articles on the constitutional amendments affecting the Rulers: Professor Mark Gillen, "The Malay Rulers' Loss of Immunity", *University of Victoria, Canada, Occasional Paper #6*, 1994; Hari Singh, "UMNO Leaders and the Malay Rulers: The Erosion of a Special Relationship", (1995) 68 *Pacific Affairs* 187; Barraclough and Arudsothy, "The 1983 Malaysian Constitutional Crisis: Two Views and Select Documents", 1985, *Griffith University, Centre for the Study of Australia-Asian Relations, Research Paper No* 32; and Rawlings, "The Malaysian Constitutional Crisis of 1983", (1986) 35 ICLQ 237.



* 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.

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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. "

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

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.

his 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*



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

he 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
291

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

295

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.

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.

297

***** 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.

299

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.

> 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 the law itself is unconstitutional.

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

[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 1984³) 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.

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Disclosure of documents:Balancing public and private interests

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" In this country, objection as to production as well as admissibility contemplated in sections 123 and 162 of the Evidence Act is decided by the court in an enquiry of all available evidence.

This is because the court understands better than all others the process of balancing competing considerations. It has power to call for the documents, examine them, and determine for itself the validity of the claim.

Unless the court is satisfied that there exists a valid basis for assertion of the privilege, the evidence must be produced.

This strikes a legitimate balance between the public and private interest. "

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---Raja Azlan Shah FJ (as he then was) BA Rao v Sapuran Kaur & Anor [1978] 2 MLJ 146, FC at 150

& Rule of Law:

Government by laws and not by men

"We must steadfastly keep on reminding ourselves all the time that we are a government by laws and not by men.

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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. "

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

Sultan Azlan Shah

What others say ...

Professor JC Smith, former tutor of HRH at Nottingham University:

> Oration by Professor JC Smith, CBE, QC, MA, LLD, LLD, FBA for the Conferment of the Degree of Doctor of Laws *honoris causa* on His Majesty Sultan Azlan Shah at the Congregation of the University of Nottingham for the Conferment of Degrees Nottingham, 11 July 1986.

hancellor, thirty-three years ago a young Malayan student stood before your predecessor to receive the degree of Bachelor of Laws. Today, he returns after a career in which he reached the very pinnacle of the legal profession in Malaysia. He returns as Sultan of Perak, as Deputy to the King of Malaysia and as himself, the Chancellor of a great University, the University of Malaya.

Azlan Shah was a cheerful and popular undergraduate in our Department of Law who took his legal studies seriously—but not too seriously. He was renowned for his athletic prowess, especially hockey, at which he represented not only the University but also the Northern Counties. After graduating he was called to the English Bar by Lincoln's Inn. On his return to Malaya he rapidly made his mark in the legal profession in a variety of offices—as a magistrate, a prosecutor and a legal adviser to governments. So successful was he that he was appointed to the High Court Bench at the early age of 37. Indeed it is believed that no one, before or since, anywhere in the Commonwealth, has been made a High Court judge at—for that office—so tender an age. On the Bench the youthful judge's reputation grew. In 1979 he became Chief Justice of the High Court and in 1982 he attained the highest judicial office, Lord President of the Federal Court of Malaysia. He had the important judicial quality of being a good listener with almost infinite patience who rarely interrupted evidence or argument and then only when it was necessary to do so. But he listened with a percipient and critical mind, as became clear when—sometimes to the discomfiture of those appearing before him—he pronounced judgment on the facts of the law. The breadth and depth of his learning in the law as it appeared in the law reports astonished—and greatly gratified those who taught him in his student days. We like to think that, at least, we sowed the seeds which, in time, produced so rich a harvest.

In 20 years on the Bench he tried cases and heard appeals involving a great range of law and many of his learned judgments are reported in the law reports. It is a remarkable tribute to his judicial work that those judgments have been collected and published as a separate volume: *Judgments of His Royal Highness Sultan Azlan Shah With Commentary*, edited by Professor Dato Dr Visu Sinnadurai, Professional Law Books Publishers, 1986. They constitute a great contribution to the development of the law in Malaysia at a crucial time in its history. A study of these judgments reveals how much of the common law is indeed common to both England and Malaysia. We invoke the same principles and frequently rely on the same authorities. It is remarkable that we find a Malaysian judge, towards the end of the twentieth century, quoting the words of the great Lord Chief Justice of England, Sir Edward Coke, to King James the First; and Coke himself was quoting Bracton who wrote in the 13th century. "The King", he said, "is under no man, but is under God and the Law."

In Azlan Shah, Malaysia has a stout defender of the rule of law, of the independence of the judiciary, of the presumption of innocence and of those principles of natural justice and of equity which we value so highly. He has earned respect and admiration for his absolute impartiality. The rich and powerful who came before Mr Justice Azlan Shah soon learnt that, in his court, their wealth and power counted for nothing. The corrupt were told in forthright terms of the abhorrence in which he held their conduct.

Throughout his career he has maintained a close interest in University education and particularly legal education. Even as Chief Justice and Lord President, he continued to act as an external examiner for the degree of Bachelor of Laws in the University of Malaya. Today's law graduands may reflect that this would be rather like having Lord Denning as one of their examiners. His work has been recognised in many ways: by the establishment of an annual series of lectures, the Sultan Azlan Shah Law Lectures, to be given in the Faculty of Law of the University of Malaya; by the conferment on him of honorary degrees, of Doctor of Literature by the University of Malaya and of Doctor of Laws by the Science University of Malaya. Most recently he has been elected Chancellor of the University of Malaya.

His succession to the throne of Perak necessarily brought his judicial career to an end and that was a great loss to the law in Malaysia. But there is counterbalancing gain for he brings to his present role as a constitutional Ruler unrivalled knowledge and experience of the functioning of the Malaysian Constitution and of the powers and duties of Parliament, the executive, the courts and the Ruler himself.

He no longer plays hockey but is still very active on various national and international bodies concerned with the administration and encouragement of that game; and it is said that he is now as proficient with a golf club as he formerly was with a hockey stick. At a recent gathering of Malaysian students in London, the respect and affection in which he is held by the young people of his country was manifest.

Chancellor, I present to you His Royal Highness, Sultan Azlan Shah, as eminently worthy to receive the degree of Doctor of Laws, *honoris causa*.

* Common law of Malaysia

" This is how the common law of every country works. Until statutory laws are introduced, in certain areas of the law, a corpus of unwritten laws continue to co-exist. The broad principles of law on a particular aspect of the law, once applied by the Malaysian courts, become part of the common law of Malaysia.

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These broad principles are then, by judicial development of the law through adaptation and application, extended to situations to which they had not previously been applied. The process involves the gradual distilling of principles from the facts of concrete cases.

In a strict sense, it is not new law but merely the application of established principles adapting to the changing circumstances in any country.

Thus is the genius and the strength of the common law—it can adapt to changes to suit the needs without having the constraints which are attached to written laws. "

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



" The judiciary is only a part of our administration of justice. The fact is that the true responsibility for the effectiveness of judicial control lies with the legal profession which fosters and nurtures it. There cannot be an independent judiciary without an independent Bar. The judiciary cannot function without the legal profession and for the judiciary to remain independent, so must the profession. "

> —**HRH Sultan Azlan Shah** *The Legal Profession and Legal Practice*



A Selection of Speeches

***** Integrity and independence of the Bar

Bar Council farewell dinner Kuala Lumpur, 19 July 1984

he past one and a half years have seen many changes. It was only on 12 November 1982 that I was appointed Lord President. And 14 months later, by a twist of fate, I had to relinquish the post. It was with a feeling of sadness that I did it. I do miss the Bench and the lawyers, though not very much the law, as I still keep abreast with the law.

Indeed, not having to sit long hours listening or pretending to listen to you, not having to write judgments for which you always waited anxiously, not being saddled with the problems of missing files and burnt down court houses, I can now afford the luxury

of reading the law at my leisure and of reading the newspapers in greater detail especially on matters pertaining to law and lawyers.

Complaints against lawyers

Sad to say, there appears to be an alarming increase of complaints against lawyers, of lawyers being charged in court, of lawyers showing disrespect to the court, of lawyers flouting the rules of practice and etiquette. Indeed it appears that the indiscipline amongst lawyers have grown rather than abated. Of this, I am very much concerned, as I was before. I will not elaborate on this tonight, nor will I embark on any review of the complaints concerning the decline in the standards of professional services. Such complaints are almost entirely based upon individual cases and in most cases are made without hearing what the persons complained against has to offer by way of explanation. Be that as it may, in my view whilst these complaints remain unresolved, the lawyers will continue to be suspect. Rid yourselves of that criticism. I am satisfied that the Bar Council is aware of the complaints; it has an established machinery for the enforcement of professional standards and discipline.

I do not consider the legal profession in this country as overcrowded. In fact there is a shortage of lawyers both in the private and public sectors. No lawyer in this country is so poor as to be able to afford only a table under a tree as in some countries. In fact, young lawyers have posh offices in ultra-modern office complexes. It is the senior lawyers who continue to practice from the top floor of some double storey rent-controlled shophouses. I have no doubt that there is enough work for everybody to earn a decent living in an honest way. The competition, if it really exists, is not for survival but for luxuries. The race is to get richer quickly — no matter how. There is indeed no necessity for any lawyers in this country to be dishonest. There is no excuse for anybody to flout the rules of practice and etiquette.

Role of an independent Bar

I like to say something, if I may, on the role of an independent Bar in controlling the abuse of power.

As we all know running a government today is becoming increasingly complex. In its attempt to provide essential services to the public, abuse of power is inevitable in a system of government such as ours where the intervention of the State into the lives of the citizens can only be described as massive. It occurs at all levels, Federal, State and local. The fact that it attempts in good faith to represent the aspirations of its electorate only compounds the problem. The good faith of the democratic system is not in issue; its execution is. I can say with conviction that the extent to which that abuse has been held to tolerable levels is because we have an independent judiciary which can assert the rule of law over the agencies of government.

The judiciary, however, is only a part of our administration of justice. The fact is that the true responsibility for the effectiveness of judicial control lies with the legal profession which fosters and nurtures it. There cannot be an independent judiciary without an independent Bar. The judiciary cannot function without the legal profession and for the judiciary to remain independent, so must the profession. ...

* Close link between Malaysia and Singapore

Law Society of Singapore Dinner Singapore, 5 September 1987

I must begin by saying how regrettable it was for us not to be able to attend your function here last year due to an unprecedented spate of public engagements.

The Raja Permaisuri and I are delighted to be present at your function tonight and to have this opportunity of meeting old friends and making new acquaintances. I like to thank you for the warm welcome and kind hospitality extended to us and also to your President for the kind words said about me.

I realise that both our countries are emerging from a rather stressful period, but happily the relationship between Singapore and Malaysia is getting back on the right track. Historically, our two countries are inexorably entwined and it is inconceivable that the leaders of both countries will seriously embark on divergent, much less antagonistic, ways over any thing which concerns our vital interests.

Geographically, we are as inseparable as Siamese Twins and we all realise that any disorders in one would automatically threaten the other. If social order breaks down in Singapore or she is absorbed by a system of government alien to us, Malaysia will suffer; the same holds true the other way round.

We have both inherited the common law from the British and practise it with an attainment that vindicates that reputable system of law. The peoples of both countries observe cultures, and practise religions that have been agreeable and acceptable to them for generations.

In matters of trade and industry, we are not unmindful of the fact that Singaporeans ranks the foremost as foreign investors in Malaysia, which is of special significance in our present-day quest for foreign participation in our industries. We hope your entrepreneurs will continue to lead in the investment stakes in Malaysia for a long time yet to the mutual benefit of both countries. We must, therefore, allow good will and good sense to prevail at all times and in all matters that concern the peoples of both countries.

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The annual Bench and Bar Games between Singapore and Malaysia, held alternatively at Singapore and Malaysia, is an indication that we both desire the strengthening of that bond of friendship between ourselves and it augurs well for our future that this annual event is looked forward to with much enthusiasm by the legal fraternity on both sides of the causeway.

The more frequent exchange of visits by leaders and notable personalities of both countries will, I believe, contribute greatly towards improving and enhancing the trust and receptivity of the peoples of Singapore and Malaysia one towards another. Your

insistence and the special effort made to invite us to this important function of the year are also fully appreciated by us.

The more frequent exchange of visits by leaders and notable personalities of both countries will, I believe, contribute greatly towards improving and enhancing the trust and receptivity of the peoples of Singapore and Malaysia one towards another.

> Singapore has not diverted from its historical role as the busiest trading centre in this part of the world. You are placed in the strategic position on the busiest crossroads of Asia, and with an excellent harbour you have developed a most lucrative entreport trade. Well, those are your traditional assets. But it is your aim and desire to be the centre of high finance, investment and banking in the Asian region, and the efforts made to achieve this aim that is most praiseworthy and of tremendous significance. It is right that proper and stringent laws are passed to cope with this development.

Integrity, ethics and honour

As members of the legal profession, you have an important part to play in the new development of this renowned commercial centre. Those of you who specialise in the technicalities of corporate law, banking and high finance are equipped with the special knowledge of the law which this branch of the practice entails, but you should not forget, even for a moment, the basic requirements of integrity, ethics and honour which the profession requires of you.

You are fortunate, too, in having an excellent Bench, for which I have the highest regard, to back up a robust practice of the Bar, and I am pleased to observe that you are acquitting yourselves creditably to the challenges that are now before you and in the days ahead.

Corporate failures

In the past couple of years or so, both our countries have seen spectacular corporate failures due in great measure to the brutal and savage recession. In my home State of Perak, once the biggest producer of tin, the closure of tin mines on a gigantic scale never encountered before in past history has caused government revenue to drop drastically to an all-time low and brought about colossal unemployment.

However, some corporate failures were not entirely due to the recession but rather the handiwork of muddled management, spendthrift directors and irresponsible and dishonest executives who caused dramatic losses with disastrous consequences. Many had invariably gone down the road of fraud in their desperation to save themselves and, in the process, lost not only their own money but other people's money, especially those of the banks and other financial institutions. ...

Responsibilities as lawyers

As lawyers, you are vulnerable in a manner that calls for the greatest vigilance in your dealings with your clients, eg in your role as solicitors. If you make improper use of any information acquired by virtue of your position with a view to gaining an advantage for yourselves or for any other person, you are liable to the company

for any profit made by you, not to mention the criminal liability you are exposed to. The provisions of the Companies Act and the Securities Industry Act 1986 are quite clear on these matters. The fact that there are no prosecutions so far does not mean there are no Ivan Boeskys among us nor should this lead us to a presumption that insider trading is non-existent, as one speaker suggested at the Seminar organised by the Institute of International Research at Kuala Lumpur last April.

The Malayan Law Journal has deemed fit to give prominence to this subject by publishing two articles on it recently. In the March 1987 issue, an article was written by two enterprising lecturers of your National University on a comparative study of the laws pertaining to insider trading in Singapore, Malaysia, Australia, England and the United States,¹ while the May 1987 issue contained an article written by another member of your university dealing extensively with insider trading.²

The adage that honesty is the best policy has stood the test of time and should always be rigidly followed by everyone, both at the Bar as well as in corporate bodies.

> The adage that honesty is the best policy has stood the test of time and should always be rigidly followed by everyone, both at the Bar as well as in corporate bodies.

> In the context of Singapore as a centre of the business and financial world, the country's reputation for financial integrity is of paramount importance and, as members of the Singapore Bar, it is incumbent on you to maintain, or even enhance her image.

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See Ter Kah Lang and Catherine Tay Swee Kian, "Comparative Study of the Regulation of Insider Trading in Singapore, Malaysia, Australia, England and the United States", [1987] 1 MLJ *ciii*.

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See, Walter Woon, "Insider Trading and the Abuse of Corporate Information", [1987] 1 MLJ cxc. One way to do this is to help suppress the incidence of corporate crimes. By exemplary conduct, you can demonstrate clearly that the likeness of such crimes have no place in the repertoire of your daily practice.

I must apologise for having addressed you on the depressing subjects of crime and recession on an amiable and pleasant occasion such as this. I must admit that a discourse of this nature is hardly conducive to good digestion after such an excellent meal. You must, however, agree that, with these twin subjects hitting the headlines almost everyday, they must necessarily command our serious concern.

However, looking broadly at the economic horizon, I see that the revival of growth is becoming more apparent day by day in Singapore as well as Malaysia and I share the optimism of pundits in this field that the abominable recession will gradually work its way out as the ill-wind Typhoon Thelma dissipates itself. ...

* Changes in the Malaysian legal system

Official launch of the books Hickling, *Malaysian Law*, and Salleh Abas and Sinnadurai, *Law*, *Justice and the Judiciary: Transnational Trends Kuala Lumpur*, 12 January 1988

Since Independence in 1957, Malaysia has undergone several changes. There has been much development not only in areas of trade, commerce and education but also in the field of law. Over

the past few years, we have seen not only the establishment of law schools in the country for the training of lawyers but also some changes in the Malaysian legal system.

This is particularly so with the abolition of appeals to the Judicial Committee of the Privy Council in London and the establishment of the new Supreme Court of Malaysia, making it the final court of appeal. Legislation has also been introduced by Parliament in many cases to keep abreast with these developments and in certain cases to reflect the local conditions prevailing in the country. Laws which were found not suitable to the Malaysian people have been replaced by new laws.

It is no doubt true that to a very large extent, the Malaysian legal system and the laws applicable in Malaysia particularly before Independence were based on the English model. There can be no denying that 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 (and I may add in legal education as well), to ensure that steps are taken towards the development of a corpus of law which reflects these aspirations.

It is on this ground that the basic law of the country, the Constitution of Malaysia, has in the past 30 years been amended 30 times by Parliament to take into account certain changes which have been deemed to be expedient and necessary.³

In the area of personal laws, the Law Reform (Marriage & Divorce) Act 1976⁴ has provided a uniform law to be made applicable

Editor's note: See the notes at the end of chapter 1.

4 Act 164.

the legal profession and legal practice 323

to all persons not professing the Muslim faith. Polygamous marriages by persons not professing the Muslim religion have now been abolished. Likewise, legislation similiar to the Islamic Family Law (Federal Territories) Act 1984⁵ has also been introduced by some States of Malaysia in an attempt to unify the Islamic family law particularly in respect of marriage, divorce, maintenance and guardianship.

These are merely two illustrations which I cite to indicate the changes in the laws introduced by Parliament to reflect the identity of the nation. Government policy, through the National Language Acts of 1963 and 1967,⁶ to unify the various races in the country through the medium of a common language, the National Language, and its use in the area of the law, is yet another incidence of this change.

> It is not only the duty of members of Parliament and academics to contribute towards the development of Malaysian law but also that of the judges. After all it is only through written judgments of the courts which are made available to lawyers and to the public that the present position of the law on a particular issue is stated or clarified.

It would, however, be naive to think that changes to the law or the legal system may be made with great speed. Lawyers generally are regarded as a conservative lot: this may be a hangover from their training. All law students are taught to analyse and critically

5 Act 303.

6 Revised 1971, Act 32.

examine a problem before a suitable solution may be found. I should, however, caution that this should not be used as an excuse for not wanting to adapt to changes.

One major obstacle which most Malaysians have encountered, be they lawyers or lay persons, has been the lack of legal materials on Malaysian law. This has proved to be a great handicap for the proper understanding of Malaysian law.

However, I am happy to note that over the recent years, and particularly lately (as this present occasion indicates), there has been a steady progress in the writing and publication of books on Malaysian law. Furthermore, the efforts made by institutions like the Dewan Bahasa dan Pustaka to publish books in Bahasa Malaysia is a step in the right direction.

I would also like to point out that it is not only the duty of members of Parliament and academics to contribute towards the development of Malaysian law but also that of the judges. After all it is only through written judgments of the courts which are made available to lawyers and to the public that the present position of the law on a particular issue is stated or clarified. ...

In the ultimate analysis, it is the judgments of the courts, rather than the views of textbook writers, that state the current position of the law. In *Henry v Geopresco International Ltd*,⁷ Roskill LJ observed: "However distinguished the authors and editors of these textbooks, the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of great distinction." ...

/ [1975] 2 All ER 702, CA, at 718.

***** Changing face of legal research

Official launch of Lawsearch Kuala Lumpur, 14 April 1989

Today is indeed a red-letter day for all persons involved in the development of Malaysian law. This evening we witness the arrival in Malaysia of computer technology in the field of law. With the rapid advancement of computer technology in almost every other profession, it is inevitable that such progress should spread to what is commonly regarded as the most conservative of all professions, the legal profession.

> Computers are only a tool for legal research and should not be regarded as a substitute for diligent and thorough research on the part of the lawyers.

Legal research conducted by the conventional methods of indices and texts is tedious and time-consuming. It involves an enormous consumption of a lawyer's most valuable asset—time. The need for a speedy and accurate information retrieval system was often lagging in the area of law. The introduction of *Lawsearch*, a computerised on-line research facility, will indeed enable lawyers now to gain access to a vast repository of the texts of statutes and judicial opinions within a much shorter time. A particular point of law which may otherwise take a few hours of research may now be obtained within a few minutes.

It should, however, be borne in mind that computers are only a tool for legal research and should not be regarded as a substitute

for diligent and thorough research on the part of the lawyers. One has heard of stories of lawyers who have relied solely on computers and have made submissions with great confidence in court that there were no legal precedents on a particular point of law as the lawyer was unable to obtain any case from his computer. There are others who have submitted well over 200 cases, the names of which have all appeared on the screen of their computers in support of a simple proposition of law. Such slavish (some would say "hooked") and indiscriminate reliance on the computer alone is no substitute for the lawyers' duty to the court to present well prepared arguments supported by relevant authorities through proper research. As all of us know, good arguments presented by lawyers in court make good law through the judgments of the court.

Good arguments presented by lawyers in court make good law through the judgments of the court.

Decisions of other Commonwealth countries

One major advantage of legal research through the electronic database system is the accessibility of case law from other common law jurisdictions. With electronic legal research, American, English and New Zealand case law are available to lawyers through *Lexis*. With the introduction of *Lawsearch* and its link-up with *Clirs*, lawyers now can have access to Australian case law as well. The law must develop and grow. We should not be insular but expand our horizon by looking at case law of other common law jurisdictions as well. We should then adopt what is most suitable to us in the Malaysian context.
the legal profession and legal practice 327

In the case of *Raja Mokhtar bin Raja Yaacob v Public Trustee*, *Malaysia*,⁸ I observed:

Although decisions of Commonwealth courts are not binding, they are entitled to the highest respect.

In that case I pointed out that the court should apply the law relating to pensions in quantum of damages claims as stated in an English and an Australian case so that the common law and its development would be homogenous in the various parts of the Commonwealth.

> The law must develop and grow. We should not be insular but expand our horizon by looking at case law of other common law jurisdictions as well. We should then adopt what is most suitable to us in the Malaysian context.

Again in *The Chartered Bank v Yong Chan*,⁹ in delivering the judgment of the Federal Court, I observed:

I have been greatly assisted by two Commonwealth cases which seem actually to cover the point. I realise that both these cases do not bind this court, but I know of no reason why I should not welcome a breath of fresh air from the Commonwealth.

In this particular case, too, the Federal Court relied on two English and Australian cases. ...

8 [1970] 2 MLJ 151 at 152.

9 [1974] 1 MLJ 157, FC at 160.

***** Integrity and ethics

Bar Council Dinner Kuala Lumpur, 15 December 1989

Although I am no longer actively involved in the daily administration of justice, yet all matters relating to it are of immense interest to me. I have, therefore, observed with disquietude and concern for some time now that, in the pursuit of material wealth, there has been a regrettable tendency on the part of some lawyers to not only violate the ethics of the profession, but also to indulge in downright criminal activities, fraud and criminal breach of trust being the most prevalent.

These twin evils, dealt with under the Penal Code, pose the greatest danger and temptation facing the profession today, obviously, for the simple reason that practitioners are placed in such vulnerable propinquity to these crimes. It must be distressing to open the newspapers to find the commission of crimes by members of the Bar in roaring headlines often enough these days.

Apart from knowledge, integrity is the most valuable trait of a lawyer and it must remain steadfast with you in the face of constant bludgeoning from temptation.

> Apart from knowledge, integrity is the most valuable trait of a lawyer and it must remain steadfast with you in the face of

constant bludgeoning from temptation. In the words of the notable English scholar, Samuel Johnson, "Integrity without knowledge is weak and useless, but knowledge without integrity is dangerous and dreadful." The adage that honesty is the best policy has stood the test of time and should be rigidly followed at all times.

The profession must openly condemn the criminal conduct of their errant members and indicate to the public that it is greatly concerned with the rapid derogation of its good name as an honourable profession. It should have been clear to the profession and a timely warning to would-be lawyers that there are no short cuts to success and it is not a profession for those whose sole aim is to gain material wealth.

> The profession must openly condemn the criminal conduct of their errant members and indicate to the public that it is greatly concerned with the rapid derogation of its good name as an honourable profession. It is not a profession for those whose sole aim is to gain material wealth.

There is also a need to be vigilant against the tendency among yourselves to violate the ethics of the profession by placing priority of your own interests over your clients', of accepting more work than you can handle, of being overtly concerned over your fees, instead of expeditiously handling your clients' affairs, or by acquiescing to or ignoring the delaying tactics employed by the other side without caring or showing concern for your clients' interests. ...

***** Evolving a Malaysian Nation

Official Opening, 12th Malaysian Law Conference Kuala Lumpur, 10 December 2003

The theme of the Conference "Evolving a Malaysian Nation" provides an opportunity for all present today to reflect on the essential features of our system of government, and what we had decided upon as our constitutional system, 46 years ago in August 1957.

The Federal Constitution: A foundation for the future

We then embarked on a journey as a constitutional democracy with the full realisation that we were a multi-racial people with different languages, cultures and religion. Our inherent differences had to be accommodated into a constitutional framework that recognised the traditional features of Malay society, with the Sultanate system at the apex as a distinct feature of the Malaysian Constitution.

Thus there was produced in August 1957 a unique document without any parallel anywhere. It adopted the essential features of the Westminster model and built into it the traditional features of Malay society.

This Constitution reflected a social contract between the multi-racial peoples of our country. Thus matters of citizenship for the non-Malays, the Malay language, and special privileges for the Malays and the indigenous peoples of Malaysia were safeguarded

the legal profession and legal practice 331

and given the added protection of requiring the consent of the Conference of Rulers before changes could be effected to them.¹⁰

Further, there was afforded to the peoples of Malaysia certain fundamental rights as embodied in Part II of the Federal Constitution, which now is officially referred to by the Human Rights Commission of Malaysia Act 1999¹¹ as the human rights provisions of Malaysia.

By checks and balances in our Constitution we had sought to establish a system of government based on laws and not of men. This is the essential characteristic of the rule of law, that all powers are subject to laws.

By these checks and balances in our Constitution we had sought to establish a system of government based on laws and not of men. This is the essential characteristic of the rule of law, that all powers are subject to laws. As I had previously observed in the *Sri Lempah* case,¹² "every legal power must have legal limits, otherwise there is dictatorship ... every discretion cannot be free from legal restraint; where it is wrongly exercised it becomes the duty of the courts to intervene".

It is fundamental in this regard that the Federal Constitution is the supreme law of the land and constitutes the grundnorm to which all other laws are subject. This essential feature of the Federal Constitution ensures that the social contract between the various races of our country embodied in the independence Constitution of

10 See Article 159(5).

11 Act 597. See section 2.

12 [1979] 1 MLJ 135 at 148.

1957 is safeguarded and forever enures to the Malaysian people as a whole for their benefit.

The Judiciary: Cornerstone of our legal system

The cornerstone of our legal system is the judiciary. Much has been said about the judiciary and the role of judges. But it deserves repetition that the essential quality of any judiciary is its independence, integrity and strength.

The essential quality of any judiciary is its independence, integrity and strength.

I had occasion to observe in a public lecture entitled *The Right to Know*¹³ in 1986 on the independence of the judiciary as follows:

Judicial independence in any democratic country is an existing fact as every lawyer and politician knows. The judges are independent of all—the executive, Parliament and from within themselves and are free to act in an independent and unbiased manner. No member of the Government, no Member of Parliament, and no official of any Government department has any right whatever to direct or influence the decisions of any of the judges.

Judges are not beholden politically to any government. They owe no loyalty to ministers. They have longer professional lives than most ministers. They, like civil servants, see governments come and go. They are "lions under the throne" but that seat is occupied in their eyes not by Kings, Presidents or Prime Ministers but by the law and their conception of the public interest. It is to that law and to that conception that they owe their allegiance. In that lies their strength.

13 At Universiti Sains Malaysia in Penang. See chapter 3 above. Judges have to be accountable for their conduct on and off the Bench. The fact that judges sit in public and give reasons for their decisions distinguishes them from mere administrative officials. Thus the proceedings of every court are exposed to public and professional scrutiny. It is this transparency that inspires confidence in the public. In this regard, I agree with what was said by Lord Atkinson on this subject so many years ago: "the public trial is the best security for the pure, impartial and efficient administration of justice [and] the best means of winning public confidence. It is a sacred trust entrusted to the judges to do justice.

> Our justice system is rooted in public confidence. It is a sacred trust entrusted to the judges to do justice.

Legal profession: Need for integrity, professionalism and dedication

As regards the legal profession, I wish to emphasise that in our rapid growth to attain developed status, the public is entitled to be served by competent and skilled lawyers. Malaysian lawyers must be second to none in their professionalism and competence. They must increase their skills, and acquire further knowledge, especially in the area of finance and corporate affairs, if they are to compete on an equal footing with foreign lawyers.

Further, lawyers must at all times ensure that they discharge their duties with a high level of integrity, professionalism, and dedication. I am confident that our lawyers will rise to the occasion and meet these challenges.

14 Scott v Scott [1913] AC 417 at 463.

Lawyers must at all times ensure that they discharge their duties with a high level of integrity, professionalism, and dedication.

> Ladies and Gentlemen, it now gives me great pleasure to officially declare open the 12th Malaysian Law Conference. I wish all participants a happy three days of deliberation at the Conference.

> > 00

No man may be condemned unheard

" In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labeled judicial, quasijudicial, or administrative or whether or not the enabling statute makes provisions for a hearing. "

> -Raja Azlan Shah FJ (as he then was) Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC at 154

* Head of State and Islam

" Islam did not introduce monarchy but merely tolerated it. In Islam, the Head of State is the Head of the Government as well as the Religion.

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He is regarded as a successor to the Prophet. He must be learned in the teaching of the religion. He is elected by consensus. He has the final say in matters of State as well as religion. He determines the law where it is not clear, in consultation with other scholars. He leads the prayers. "

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—HRH Sultan Azlan Shah *The Role of Constitutional Rulers*



" It is your duty, having been trained as lawyers to ensure that at all times the supremacy of the Malaysian Constitution is maintained. No matter how expedient it may be to anyone in power to follow a certain course of action, at no time should any action be taken which is inconsistent with the provisions of the Constitution, or I may add, against the spirit of the Constitution. "

> —**HRH Sultan Azlan Shah** *Law and Globalisation: Some Perspectives*



Selected Speeches as Royal Patron of Malaysian Students' Law Society in the United Kingdom and Eire 1986–1997

***** Challenges to law students

1986

ndeed it is a great honour to me to be invited this evening to attend the Annual Dinner of KPUM.¹ May I also take this opportunity to thank your Society for inviting me to be your Royal Patron. With both Tun Suffian and I being the patrons of your Society, your Society may soon have all the retired Lord Presidents of the Federal Court of Malaysia (now called Supreme Court) as your members. Maybe, now that all appeals to the Privy Council have been abolished, your Society, it would seem, by appointing retired Lord Presidents could be considering the setting up a new court to replace the Privy Council in London.

It not only gives me great pleasure to be here with Malaysian law students, some 8,000 miles away from home but also to have amongst us my friends, Lord Bridge and Lord Ackner from the

l Kesatuan Penuntut Undang-Undang Malaysia.

House of Lords. Many of you here will probably know that Lord Ackner has recently been appointed as a Lord of Appeal in Ordinary to join Lord Bridge in the House of Lords. I am sure that all of you will join me in extending our felicitations to His Lordship and wish him many happy years in the House of Lords. With Lord Ackner and Lord Bridge in the House of Lords, Malaysia now has two close friends in the House of Lords.

Many a time I have been asked whether I have had any regrets on leaving the law to become a Sultan. In all honesty I can tell you that it is on occasions like this, where I am amongst distinguished jurists and among law students, that I have my moments of regret. It is for this reason, too, that I cherish a gathering like this where I am given the opportunity to be with law students, judges and lawyers.

Legal training: Bond between Malaysia and England

The United Kingdom and Ireland have been the training ground for most of the judges and lawyers in Malaysia. Presently, all the judges in the High Court and Supreme Court of Malaysia, except for two, had received their legal training in England. So, too, the present Attorney-General of Malaysia. The first three Prime Ministers of Malaysia have all been lawyers trained in England. The 200 most senior practising lawyers in Malaysia have all been from one of the Inns of Court including two from Ireland. Even with the establishment of law schools in Malaysia, especially so with the limited number of places available, Malaysian students still need to resort to British institutions for their legal training.

In this respect, the contribution provided by the British Government, and in particular the British law schools towards the development of legal training of Malaysians cannot be denied.

Relevance of English Law

I may also like to point out that it is essentially in the field of law that the greatest bond between England and Malaysia remains. It is for this reason that even though certain laws in Malaysia have been modified to suit local needs, English law, particularly case law, continues to play an important role in the legal system of Malaysia. Hence, judges, lawyers and students in Malaysia eagerly await the arrival of the *London Times* or the *All England Law Reports* to find out what judges like Lord Bridge or Lord Ackner have decided in a recent case. To many of you, of course, any recent decision of the House of Lords, especially just before your examination may cause a certain amount of trepidation. A recent decision would mean an extra case for you to analyse, digest and to remember for your examinations. For as you very well know, the chances of an examination question being set on a recent important decision by the examiner is very likely.

Career options

Most of you here on completion of your studies would, within a year or two, be returning to Malaysia. I am also certain that the majority of you have plans to go into practice. I would personally implore some of you to consider joining the Judicial and Legal Service or the universities as academicians. I understand that both the Judicial and Legal Service and the universities are encountering great difficulties in filling their vacancies, especially since the lure for practice amongst young lawyers is great. The country needs the services of many of you, especially either as magistrates to overcome the backlog of cases or as law teachers to train the future lawyers of the country.

Changes in the legal profession

For those of you who will be practising law, may I remind you that the legal profession in Malaysia is facing some of its greatest challenges in recent years. Much have been written and spoken about the conduct of some lawyers in the profession. Whatever it is, you should always bear in mind that the legal profession has always been regarded as a noble profession, comprising men and women of high integrity and bound by the high standards of professional code and conduct. The long-tested traditions of the English Bar, which most of you are familiar with, should be emulated when you become a member of the Malaysian Bar.

The legal profession has always been regarded as a noble profession, comprising men and women of high integrity and bound by the high standards of professional code and conduct.

Duty to society

Furthermore, you should always bear in mind, that as a member of the legal profession you have a duty towards society. By the very nature of your training and as a member of the legal profession you have the duty to ensure that the rule of law is always upheld.

Duty to uphold the Rule of Law

You should always remember that in Malaysia where we have a written Constitution, unlike England, it is the Constitution which is supreme and not Parliament. The Constitution in bestowing certain powers upon individuals and institutions charged with duties under our system of government expressly provides certain limits upon the exercise of any such power.

> The Constitution in bestowing certain powers upon individuals and institutions charged with duties under our system of government expressly provides certain limits upon the exercise of any such power.

It is therefore your duty, having been trained as lawyers to ensure that at all times the supremacy of the Malaysian Constitution is maintained. No matter how expedient it may be to anyone in power to follow a certain course of action, at no time should any action be taken which is inconsistent with the provisions of the Constitution, or I may add, against the spirit of the Constitution.

It is your duty, as expressly provided for in the Legal Profession Act to uphold the cause of justice without regard to your own interests, uninfluenced by fear or favour. ...

Democracies

20 February 1988

The Raja Permasuri and I would like to express our appreciation for your kind invitation to attend this function here tonight. For the second time in three years, it gives us great pleasure to be with you

at this annual event of your Society. We have travelled a long way to be present for this occasion and, as Patron of your Society, I hope I have succeeded in manifesting more than a passing interest in its affairs.

Much water has flowed under the bridges of the Thames since I addressed you two years ago. At home in Malaysia, we have passed through a rather distressing period as far as the country's economy is concerned and the recession about which I spoke to you then has not abated, at least not as far as the tin industry is concerned. The share market, which is an indicator of the health of the country's economy, has remained dismal for the greater part of this period.

The Rukunegara maintains our democratic way of life. It is a foundation for the creation of a just society and to ensure a liberal approach to the varied cultures and traditions of the unique mixture that constitutes modern Malaysian society.

> Entrepreneurs, investors and other hopefuls are setting great store by the Year of the Dragon and, as one born under the benign influence of the Dragon myself, I earnestly hope that the mythical creature will be able to draw them out of the doldrums.

> Elsewhere on the Asian continent, many countries preparing to enter the last decade of the century are finding democracy a goal as difficult to attain as economic success. From countries as far apart as Pakistan and South Korea and regimes as different as Mainland China and the Philippines, the people of Asia are fighting to achieve or maintain democracy in ways as varied as the nations.

That Malaysia is able to find peace and stability in a continent of chaos and instability is to a large extent due to the smooth running of our governmental machinery under the aegis of the Rukunegara to maintain our democratic way of life. It is a foundation for the creation of a just society and to ensure a liberal approach to the varied cultures and traditions of the unique mixture that constitutes modern Malaysian society.

System of government in Malaysia

We have a system of government where the legislature, executive and judiciary are each given their own powers in their own demarcated spheres of activities. The Constitution requires that the legislative, executive and judicial powers be separated to the extent necessary to prevent the emergence of tyranny from the concentration of too much power in a single person or institution.

> The Constitution requires that the legislative, executive and judicial powers be separated to the extent necessary to prevent the emergence of tyranny from the concentration of too much power in a single person or institution.

It is unnecessary for me to dwell at length on this principle of power sharing by the three components of government but it is worth emphasising that the three branches of State were never designed to compete with one another, but rather to complement each other. The best results are derived by the three branches of government running harmoniously alongside like the forces of a troika.

Each is essential to the structure of the State in the same way each side is essential to the structure of a triangle. Without the three branches working in harmony, a modern state such as ours cannot exist, much less function. Within its own sphere of authority, each branch is free to carry out its function but subject to the Constitution and the law.

The three branches of State were never designed to compete with one another, but rather to complement each other, running harmoniously alongside like the forces of a troika.

I have had the opportunity, at another occasion, to mention that much can be achieved when the twin lawmakers, Parliament and the judiciary, work in harmony, united by that common philosophy reflected in the Constitution. It therefore behoves the judiciary to be ever sensitive to the paramount need to refrain from trespassing upon the province of Parliament and that Parliament would be similarly sensitive to the need to refrain from trespassing upon the province of the judiciary. It would be a breach of convention for the one to express a view on the wisdom or otherwise of proceedings taking place in the other.

Sultanate in Malaysia

En passant, I might also mention that the history of the Sultanate has been a long and illustrious one, and in view of the Sultans' contribution to the many facets of life in the country, their position and role has been reinforced in the Constitution and they are regarded as the bulwark and guardians of the Rakyat.

law and globalisation: some perspectives 345

Sir Ian Gilmour, politician and author, in his book, *The Body Politic*,² regarded as one of the best books written in modern times on the British Constitution, says this about the British monarchy:

Legitimacy, the acceptance by the governed of the political system, is far better aided by an ancient monarchy set above the political battle than by a transient president, who has gained his position through that battle Modern societies still need myth and ritual. A monarch and his family supply it. There is no magic about a mud-stained politician.

Sir Ian was probably echoing the sentiments of Walter Bagehot,³ godfather of the English Constitution, who expressed this long ago about the British monarchy:

Above all things our royalty is to be reverenced, and if you begin to poke about it you cannot reverence it... Its mystery is its life. We must not let in daylight upon magic.⁴

Anglo-Malaysian relationship

As I have observed before, the strongest bond of Anglo-Malaysian relations lies in the field of education. This is the result of a process of nurture begun at the dawn of the present century, for at the moment more than 30,000 young Malaysians are enrolled in British schools, colleges and universities, the greatest number of Malaysian students in any country. With this obvious preference on the part of students for a British tertiary education, it would be a source of considerable support and encouragement to the students if the fees could be maintained at a competitive level, thereby also ensuring

2 Hutchinson, London, 1969.

3 1826–1877

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The English Constitution, 2nd Edition, 1873, page 76; now republished by Cambridge University Press, 2001, edited by Paul Smith.

for these institutions themselves a continuous enrolment, with the distinct possibility of an increase in numbers, in the years to come.

The message that I wish to impart to you already appears in the official programme. But I would like to add, if I may, that you should avail yourselves to the opportunities of education in this country to your best advantage, achieve your academic goals by passing your examinations regularly and returning home at your earliest opportunity. There is much to be done at home for the country and, I feel certain that the establishment of your own individual careers must be of particular importance to you as well.

***** Strengthening links

10 February 1989

The Raja Permaisuri and I are delighted once again to be here with you this evening. As the Patron of your Society, I am indeed very pleased to see so many of you here. I understand that some of you have travelled quite a distance to attend this function in London tonight.

I do appreciate that it is no easy task for a Society like yours to organise a function like this or for that matter to cater for the needs of your members when so many of you are dispersed throughout the country. Yet, I am pleased to note that despite the distance and in most cases, the cost involved, so many of you are present here this evening. This gives me the added pleasure of being present here tonight. As most of you would know, the Raja Permaisuri and I have travelled from Malaysia specially to attend this annual function of your Society. May I at this stage take the opportunity to congratulate your President, the members of the Organising Committee and the many others who have put so much effort in organising this evening's function.

Student organisations like yours play a very important role in fostering close ties and relationships. This is specially so when such organisations are established to cater for students who are studying abroad. Through the activities of such societies, you are able to identify yourselves or to have a sense of belonging with your country. It further helps you to maintain and strengthen your links with your country. In some cases, too, these societies give you the opportunity to share the problems, anxieties and joys encountered by you as an overseas student. I myself have experienced such a feeling when I was an overseas student (like you) studying in England.

I must, however, caution that you should not confine yourselves to a society which only caters for Malaysian students. Most of the universities and colleges in which you are studying also have their own student organisations. You should also participate in some of their activities. Only in this way would you be able to exchange ideas on a transnational basis. Otherwise, there is the danger that you may become too insular in your general outlook.

Cross-cultural exposure

It should not be forgotten that one of the major advantages of studying abroad is that it provides you with an opportunity to meet other students from different parts of the world. This provides an

excellent opportunity for you to understand the various cultures, beliefs and aspirations of other peoples. This understanding, in future years, will help you to foster closer relationships between the nations of the world. Through your discussions with students from abroad, you may also learn of their legal systems. In this way, you may in future years adopt certain aspects of other people's laws which may be suitable to us in the Malaysian context. As you know, law is not static but changes with time and circumstances. There is always a need for us to expand our horizons by looking at the laws from other jurisdictions. Therefore, considering other people's laws is the usual way to see ourselves as others see us.

One of the major advantages of studying abroad is that it provides you with an opportunity to meet other students from different parts of the world. This provides an excellent opportunity for you to understand the various cultures, beliefs and aspirations of other peoples.

> Mr President, let me now say a few words on the practice of law and the legal profession in Malaysia which most of you would be involved with on your return to Malaysia after completion of your studies here.

Relationship between Bar and Bench

In England as in many other countries, there is a close relationship between the Bench and the Bar, though each maintains its own independence. We all know too well about the independence of the judiciary. Yet the independence is taken for granted, whilst the role of the other is often ignored or misunderstood. Let us not forget the fact that the true responsibility for the effectiveness of the judiciary lies with the legal profession which fosters and nurtures it. There cannot be an independent judiciary without an independent Bar. This tradition has been fostered so that the Bench and the Bar may play their respective roles towards the common goal of ensuring the proper administration of justice. Where there is no respect by one for the other or where the relationship between the Bench and the Bar is strained, the public perception of the profession would be tainted. I do hope that on becoming a member of the Bar, you will always continue to uphold this noble tradition.

The true responsibility for the effectiveness of the judiciary lies with the legal profession which fosters and nurtures it. There cannot be an independent judiciary without an independent Bar.

New trends in legal practice

The practice of law in Malaysia has until recently been confined to the practice of criminal law and the run-of-the-mill type of civil cases. However, with the rapid growth of the economy, the changes in technology and the general rise in the standard of living, lawyers are now called upon to advise their clients on certain branches of the law which have been developed only in recent years.

The increase in commercial activities in Malaysia, particularly in the corporate and banking sectors, has emphasised the need for lawyers with special skills in company law, banking law, syndicated loan documentation and international finance law. The efforts by the government to make Kuala Lumpur an

international commercial centre and to encourage more foreign investors to come into Malaysia have further contributed towards the need for specialised lawyers. Many lawyers are now called upon to advise their clients on shipping law, aviation law, petroleum law and generally on international trade law.

The increase in commercial activities in Malaysia, particularly in the corporate and banking sectors, has emphasised the need for lawyers with special skills in company law, banking law, syndicated loan documentation and international finance law.

> You should not therefore whilst studying here be content in obtaining only a basic knowledge of the law. You now have the opportunity which many others before you did not have: most universities where you are studying now offer courses in many of the branches of the law which I have just mentioned. Some of you have the further advantage of being taught by some of the leading experts on these branches of the law. Many a successful lawyer will tell you that the practice in these particular branches of commercial law is not only interesting but lucrative as well.

> I am also pleased to learn from some of you that you are studying subjects like administrative or public law, consumer law or civil liberties. These are equally important areas of the law which are also rapidly developing in Malaysia and the recent spate of applications for judicial review is an indication of the growth of administrative law in Malaysia.

351

Ethics

Speaking of a lucrative practice and of the desire on the part of some lawyers to be successful, I observe with disquietude that in the pursuit of material wealth, there has been a regrettable tendency in recent times on the part of some lawyers not only to violate the ethics of the profession but also to misplace the trust placed upon them by their clients by indulging in dishonest activities like cheating, committing fraud or criminal breach of trust. Such activities of these lawyers, albeit a small number, is a cause for great concern not only to the Bar Council but also to the general public. Only last month, there was the startling discovery of a lawyer who, with his conspirators, fraudulently siphoned off some RM20.2 million from Bank Negara. Then early this year, the profession suffered a further setback and damage to their reputation when one of its members was sentenced to six years' imprisonment and fined RM300,000 on a charge of criminal breach of trust.

> There has been a regrettable tendency in recent times on the part of some lawyers not only to violate the ethics of the profession but also to misplace the trust placed upon them by their clients by indulging in dishonest activities.

The profession must openly condemn such criminal conduct of their members and thereby show the public its great concern with the rapid derogation of its good name as an honourable profession.

Mr President, to some of you here, I may probably have dampened your sprits by some of the observations I have made tonight. However, as these are matters which will concern you as future lawyers, I thought I will share my concern with you. ...

***** Developments in the field of education

19 January 1995

Rapid developments are taking place in Malaysia in the field of education, as part of the government's objective to achieve a fully industrialised nation by the year 2020.

Besides the local institutions of higher learning, a large number of private institutions, through their various twinning programmes, now provide Malaysians an opportunity to further their higher education. Many private institutions offer courses leading to a degree from reputable universities in the United Kingdom.

In yet another move to promote higher education in the country, the government has recently announced that the Universities and University Colleges Act 1971 will be amended, so as to pave the way for the establishment of branch campuses of foreign universities. I understand the University of London will be amongst the first to do so.

Legal practice in Malaysia has also become increasingly competitive. It is estimated that in 1995, over 1,000 Malaysian students will graduate with a law degree from the local institutions and several universities in the United Kingdom, Australia and New Zealand. A large percentage of these students are presently undergoing their course of studies through the various external degree programmes offered by universities in the United Kingdom, or through the twinning programmes run by local private institutions.

Last year alone, over 700 students sat for the Certificate in Legal Practice course (CLP). This figure, of course, does not include those who have obtained their professional qualifications from local universities, or from other institutions, like the Council of Legal Education.

As a consequence, new law graduates are increasingly finding it difficult to obtain places for chambering. The Qualifying Board is currently reviewing the chambering requirement under the Legal Profession Act, so as to find other alternatives to professional training. One possible alternative is a structural professional course, similar to that conducted by several institutions in Australia.

In a separate exercise, the Qualifying Board and the Bar Council are also currently conducting studies to review the academic and professional aspects of legal education. The recognition of foreign degrees, minimum academic qualifications, and the course content of all universities are under review, so as to streamline the entry qualifications to the Malaysian Bar.

> The emphasis in the future will be on the quality of the members of the Bar, and not the quantity.

The wider aim of this review is to ensure that the standard of the Malaysian Bar is maintained. The emphasis in the future will be on the quality of the members of the Bar, and not the quantity. I must point out, however, that these changes will not affect those of you currently studying here, as it will take a number of years before these proposals are implemented.

With that brief overview of the present and future changes to higher education in the country, I take this opportunity to wish all students here, every success in your studies in the United Kingdom and Eire. As Malaysia is facing an acute shortage of professionals and technocrats, I hope that on the completion of your studies, you will return home to serve the nation, equipped with the necessary skills and knowledge to meet the challenges of the twenty-first century.

I congratulate the KPUM for once again organising this year's event successfully. This Annual Dinner, which has now become a tradition amongst Malaysian students in the United Kingdom, provides a unique opportunity for the students, not only to rekindle their friendships, but also to meet leading legal luminaries, like the Lord Chancellor of Great Britain, Law Lords, judges and leading professors.

I also commend KPUM, and the other Malaysian students for their initiative and enthusiasm in their participation in "The Children of the World Appeal". I am confident that under the Royal Patronage of Her Royal Highness, the Duchess of York, this worthy and noble project will be a success.

***** Legal training

23 November 1995

I am conscious that tonight I am addressing some of the future members of the legal profession in Malaysia. No doubt, some of you

may venture into other professions, but, I am confident that you will find your legal training an advantage.

Most of you will return to Malaysia, do your pupillage, and gain admission to the Bar. You will then become part of the legal system, and be in a position to contribute towards the development of Malaysian law. In your own way, you will be able to ensure that the administration of justice in the country works efficiently, and that it brings justice to the society which it serves. As has been said "There is no virtue so truly great and godlike as justice."

Being a part of this system would indeed be both enriching and fulfilling. It will be a well respected role and I, for one, am indeed proud of being a part of it.

I believe that a law degree is one of the most versatile of degrees you could obtain from any university. With it, you may not only enter the legal profession, but also join any one of a number of other vocations. Many opportunities will be open to you.

In this fast changing world, with the greater acceptance of the oneness of man, countries are beginning to lose their individual importance, and are coming together in groups for economic and political reasons. It is envisaged that the countries of South East Asia are destined, as a region, to receive the largest influx of foreign capital and skill, which would in turn result in the region becoming a highly developed and industrialised one. It may not, therefore be coincidental that, at this juncture, several countries, including Australia, New Zealand, and Papua New Guinea, are making overtures to the countries of South East Asia to be regarded as part of the region. I, therefore, foresee the coming into existence in this region of many multi-national and multi-purpose corporations

which would bring in tow tremendous opportunities for lawyers in Malaysia to provide legal services on an international level.

Global legal services

With particular reference to Malaysia, it may interest you to know that with international trade and investment growing at a tremendous pace in the country, legal issues are no longer confined to domestic problems. It is now not uncommon for many lawyers to deal with transactions which involve cross-border problems. These legal issues touch upon more than one legal system, especially if they relate to multi-national companies.

With international trade and investment growing at a tremendous pace in the country, legal issues are no longer confined to domestic problems. It is now not uncommon for many lawyers to deal with transactions which involve cross-border problems.

> With the Malaysian government's acceptance of the General Agreement on Tariffs and Trade (GATT) and its membership to the World Trade Organisation (WTO), foreign lawyers will soon be able to provide legal services in Malaysia. Malaysian lawyers, therefore, have to be more competitive in their services, not only to compete with these foreign lawyers, but also to provide legal services in foreign countries. International trade and corporate law, international finance law and intellectual property are some of the areas which will therefore become increasingly important.

Malaysian businessmen are also now investing in many countries outside Malaysia, including China, Vietnam, Cambodia, Laos, South Africa, South America, and many others. Our lawyers should therefore be well-equipped to provide advice on a global basis with respect to the many transnational transactions entered into by these Malaysian businessmen. I am confident that our lawyers will meet these challenges and achieve an international reputation for their services.

> Our lawyers should be well-equipped to provide advice on a global basis with respect to the many transnational transactions entered into by Malaysian businessmen.

Though the number of lawyers has increased in recent years, the country is facing severe shortage of qualified and skilled personnel and professionals. With the country moving towards developed nation status, the manpower needs of the country is becoming even more acute. I therefore urge all of you present here this evening to return to Malaysia to serve the nation's needs. Tremendous opportunities await you.

Public perception of lawyers

Having said that, there is one aspect of the legal profession that is causing some concern to many. This relates to the manner in which the legal profession all over the world appears to be slipping in the estimation of right-thinking people whom it purports to serve. This is a global problem and is not restricted to Malaysia or Britain. Some lawyers, entrusted by their clients with funds and assets, breach

that trust, and by so doing bring loss and misery to their clients. Other lawyers break the law in other ways, or engage in sharp and unethical practices. Some of you may have seen people wearing Tshirts which ask the question: "What do you call a thousand lawyers at the bottom of the ocean?" The answer: "A good start!"

Of course, there have always been jokes about lawyers. Shakespeare, in *Henry VI*, urges that "The first thing we do, [is for us to] kill all the lawyers". And those of you who have read *Bleak House* will know that Dickens himself was not enamoured of the old Courts of Chancery.

If the legal profession, ancient as it is, and serving society as it does, is so honourable, why is it then attracting such an increasing amount of disdain from the general public?

I believe that part of the disenchantment of the public with lawyers is because of the increasing use of the media.

Advertising of legal services

Since 1977, American lawyers have been allowed to advertise. Surveys carried out by some of the State Bars in the United States show that the proportion of people who believe lawyers to be honest, has fallen from 65% to 14% after lawyers began to use television commercials.

Advertising has always been the province of business rather than professions. There is danger in treating law as a business, rather than a profession.

law and globalisation: some perspectives 359

With the advent of the Internet, there is more advertising amongst lawyers. The reputation of the entire profession suffers as a consequence. Unfortunately, it is not easy for the "man on the Clapham Omnibus" to distinguish between a good lawyer and an unethical one, and I fear that a blot on the reputation of some lawyers becomes a stain on the reputation of the legal profession world-wide.

Malaysia is now facing calls from some members of the profession to permit advertising by lawyers. We must learn from the experience of other countries. On the one hand, lawyers wish to advertise so as to reach their potential clients, but on the other hand, there is a cost to the profession if it is done irresponsibly.

> It is not easy for the "man on the Clapham Omnibus" to distinguish between a good lawyer and an unethical one, and I fear that a blot on the reputation of some lawyers becomes a stain on the reputation of the legal profession world-wide.

Advertising has always been the province of business rather than professions. There is danger in treating law as a business, rather than a profession. I cannot help feeling that public perception of the profession would be enhanced if lawyers are seen more as professionals, rather than businessmen.

Therefore my advice to you this evening is this: When you return to Malaysia to practise at the Bar, become lawyers who know about business; not businessmen or businesswomen who know little about the law. ...

***** Legal education: Looking to the future 28 February 1997

Occasions like the KPUM Annual Dinner give me the opportunity not only to meet Malaysian students studying in this country, but also to meet some of my own friends, like the Lord Chancellor of Great Britain, the Law Lords, Judges and Professors, including my own tutor at the University of Nottingham, Professor Sir JC Smith. Your Society is indeed fortunate to have the continued support of these leading legal luminaries in this country.

As Royal Patron of this Association, I thank the Lord Chancellor, the Law Lords, other Judges and the Professors for giving their support and encouragement to the Society, and particularly to the many law students studying in this country.

Another year has swiftly gone by-for some of you, you have successfully advanced to another year in your course of studies. To others, you are a year closer to returning home. But, for all of us, the dawn of the new millennium brings about new challenges. As the future leaders of the country, you should be well-equipped to meet some of these challenges.

Malaysia in the past few years has achieved great prominence, largely because of its dynamic economic growth and policies. In the area of international affairs and international trade, Malaysia continues to play a prominent role. The chairmanship of the United Nations General Assembly is now occupied by a Malaysian. In the recent World Trade Organisation (WTO) meeting in Singapore, an important role was played by Malaysia. Malaysia also continues to play a significant role in ASEAN.

Technological advances in Malaysia

The twenty-first century will also see the country attaining developed nation status and the hundredth year of Independence. Amongst the other developments will be the establishment of the Multimedia Super Corridor, the setting up of the new administrative capital at Putrajaya, and the completion of one of the tallest buildings in the world—the Petronas Twin-Towers.

The establishment of the Multimedia Super Corridor has attracted much global attention, as can be seen from the positive response to the Prime Minister's recent visit to the United States and Japan. Leading personalities in the world of multimedia, including Bill Gates, have agreed to serve in the high-powered International Advisory Panel established by the Prime Minister to monitor the development of the Super Corridor and to provide ongoing guidance. The Multimedia Super Corridor is intended as a catalyst to bring together world class multimedia companies to Malaysia to establish their businesses, their hi-tech operations and their research and development units.

Cyber laws

To give full effect of the implementation of the Multimedia Super Corridor, new cyber laws need to be formulated. Laws will have to be enacted to control computer crimes, illegal access, commercial espionage and theft. The Multimedia Super Corridor which hopes

to bring about a borderless trading environment and a paperless administration will result in some of the existing laws and principles being revised to accommodate these technological advances. The law of theft and the law of defamation will have to be redefined; the contractual principles relating to the signing of contracts will have to be modified; and the law relating to the registration of professionals providing services in Malaysia will have to be reviewed.

You, as the future members of the legal professions in Malaysia, will have to prepare yourselves to face these changes and challenges by acquainting yourselves with this gamut of newly promulgated cyber laws.

> These are only a few of the areas of the traditional laws which will require modifications. In fact, the new cyber laws will replace many other established principles of law. The law relating to intellectual property will play an even more important role. You, as the future members of the legal professions in Malaysia, will have to prepare yourselves to face these changes and challenges by acquainting yourselves with this gamut of newly promulgated cyber laws.

> Leaving aside cyber laws, I now move on to address you on two other matters which may be of interest to you.

Foreign universities in Malaysia

Recently several new legislation have been introduced in Malaysia for the establishment of branch campuses of foreign universities,
and even for the establishment of certain approved private universities. With the rapid growth in the economy of the country, the need for skilled and professional personnel has become even more acute. It is in line with this requirement that the establishment of private institutions of higher learning is being encouraged by the Government. It is my hope that in the not-too-distant future, some of the established universities in England will set up branch campuses in Malaysia.

Professional training

The final point which I would like to raise is the question of professional training. I am given to understand that because of some changes in the regulations of the Council of Legal Education, there is some concern by our students regarding their professional training, particularly in pursuing the Bar Finals. It is hoped that the Qualifying Board in Malaysia will soon resolve this matter by having further discussions with the Council of Legal Education in this country so that the present confusion prevailing over this matter maybe resolved. In this regard, the Attorney General of Malaysia, who is the Chairman of the Qualifying Board, has requested the Director of the CLP course to be present here this evening to advise you on the current status of the CLP course, as well as to the recognition of law degrees conferred by certain universities in this country.



* The final court of appeal

" 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.

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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. "

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

* Early disposal of cases

"Efforts must constantly be made to speed up the disposition of cases.

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Litigants have the legitimate expectations to not only a just resolution of their affairs but also an expeditious resolution.

It is the responsibility of lawyers, be they members of the Bar, or the legal and judicial service, to help meet this expectation of society. "

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—HRH Sultan Azlan Shah The New Millennium: Challenges and Responsibilities



"Globalisation of the economy inevitably means globalisation of the legal services. The next generation of lawyers will need to understand not only their own legal system but also the legal systems of other countries, and in particular, those of the nation's trading partners. Legal problems will increasingly know no frontiers, and lawyers will have to acquire the requisite knowledge to cope with this. "

> **—HRH Sultan Azlan Shah** The New Millennium: Challenges asnd Responsibilities



Universiti Kebangsaan Malaysia Bangi, Selangor, 23 August 1997

he next millennium is just round the corner. Many of you may have the privilege of practising law then. No doubt, some of you may venture into other professions and not become lawyers just as not all graduates in philosophy will become philosophers.

Law is a very versatile subject. It is relevant everywhere. Even though the law which a student reads at the university is too little, too superficial to be of much use in real life situations, the training—to research, to read, to understand, to apply, to distinguish—is a very useful training. That training is applicable to every decision-making process, whatever it may involve. Perhaps it is for this reason that even in a country where science and technology is very advanced, like the United States, most of her Presidents and Vice-Presidents have been lawyers. So, do not worry, if you are unable to obtain a job — be a politician!

By the time Malaysia enters the next millennium, the country would have celebrated 43 years of independence. Forty-three years is but a drop in the ocean of time. Yet during that period remarkable changes have occurred.

In 1957, independent Malaya was a nation of just six million people relying mainly on the export of primary products based on agriculture and mining. Our principal concerns then were the survival of the nation, threatened as it was by an insurgency, and the maintenance of inter-communal harmony. By the grace of God, the wisdom of our leaders and the efforts of each and every Malaysian, our nation has weathered those challenges.

If the defining idea for the first generation of Malaysians was "Merdeka" then the defining idea for you, the second generation of Malaysians is the creation of a Malaysian race, the "Bangsa Malaysia" in the context of Vision 2020.

> The Malaysia you are inheriting is very different from what it was in 1957. The population now is close to 22 million. Instead of relying almost entirely on primary products, it now has a diversified industrial and manufacturing economy, ranging from textiles, electronics and pharmaceuticals, to petroleum products and automobiles. Malaysia is the 18th largest trading nation, and Malaysians have investments in many parts of the world. The nation's development has been highly commended, and it is a role model for other developing countries. Malaysia now plays an active part in regional and international affairs and is an acknowledged leader of the developing world. This is the legacy that the first generation of Malaysians has bequeathed to you, its children.

If the defining idea for the first generation of Malaysians was "Merdeka" then the defining idea for you, the second generation of Malaysians is the creation of a Malaysian race, the "Bangsa Malaysia" in the context of Vision 2020.

> The vision of a Malaysian race will be realised when each and every Malaysian thinks of himself or herself as a Malaysian, rather than as a member of a particular race, religion, culture, creed or class.

The vision of a Malaysian race will be realised when each and every Malaysian thinks of himself or herself as a Malaysian, rather than as a member of a particular race, religion, culture, creed or class. That ideal does not entail the eradication of these sectional sources of personal identity; rather it envisions these as being relegated to a secondary role.

Vision 2020 states the aims of our Nation and charts your future. Briefly stated, Vision 2020 has a single goal: the transformation of Malaysia from its present status as a "developing country" into a "fully developed nation" by the year 2020.

If a developed country is one which is at home with, and able to keep abreast of, the latest developments in all fields of human endeavour, then that must be the goal of Vision 2020. Yet, an integral component of Vision 2020 is the retention of our unique Malaysian identity. Malaysia must become a fully developed country by 2020 but not at the expense of those attributes which make us uniquely Malaysian. So while we adopt the useful elements from abroad, we must at the same time not abandon the valuable elements of our own rich and diverse heritage.

You must enter the next millennium confident of the nation's abilities and future. You must not allow that confidence to blind you to the challenges that the rapidly changing world thrusts upon you. The challenges have to be identified and the responsibilities fully assumed.

Lawyers are privileged members of society. Their training and membership to an honourable profession imposes on them special responsibilities—responsibilities to their clients, to the legal profession, to the judicial system and to society at large.

Lawyers are privileged members of society. Their training and membership to an honourable profession imposes on them special responsibilities—responsibilities to their clients, to the legal profession, to the judicial system and to society at large.

> As future lawyers, law students must strive to achieve at least two goals: first, the acquisition of knowledge and skills necessary to practise law in a rapidly changing environment; secondly and more importantly, the nurturing of their ethical being, so that even as they face the challenges of their profession, they accept the responsibilities which go with it.

Globalisation

More than three decades ago, communication guru Marshall McLuhan remarked that the world was shrinking into a "global village".¹ Even McLuhan could not have anticipated how completely

The Gutenberg Galaxy: The Making of Typographic Man, University of Toronto Press, 1962.

the new millennium: challenges and responsibilities 371

the world would be globalised. In this fast and changing world, with the greater acceptance of the oneness of man, countries are beginning to lose their individual importance, and are coming together in groups for economic and political reasons. It is envisaged that the countries of South East Asia are destined, as a region, to receive the largest influx of foreign capital and skill, which would in turn result in the region becoming a highly developed and industrialised one. The recent increase in the membership of ASEAN is a clear testimony of this.

I, therefore, foresee the coming into existence in this region of many multi-national and multi-purpose corporations that would bring in tow tremendous opportunities for lawyers to provide legal services on an international level.

Globalisation of the economy inevitably means globalisation of the legal services. The next generation of lawyers will need to understand not only their own legal system but also the legal systems of other countries, and in particular, those of the nation's trading partners. Legal problems will increasingly know no frontiers, and lawyers will have to acquire the requisite knowledge to cope with this.

> Lawyers should be well equipped to provide advice on a global basis with respect to the many transnational transactions.

Lawyers should therefore be well equipped to provide advice on a global basis with respect to the many transnational transactions. I am confident that our lawyers will meet these challenges and achieve an international reputation for their services.

Information technology

The new millennium will undoubtedly be "The Age of Information Technology". Malaysia has not lagged behind in the information technology revolution as the Government's efforts to establish the Multimedia Super Corridor² (MSC) testify.

The MSC will permit Malaysians to gain access to the most advanced information and communication technologies and to apply those technologies in a systematic manner to Malaysia's own economic, social and intellectual development. Amongst other things, the MSC will provide business opportunities for the creation of hardware, software and contents, the development of electronic commerce, the re-engineering of the public sector, and the fostering of a wide array of new services.

Making the new information technology (IT) available to all is one of the major challenges facing the Malaysian society. Mastering it is a major challenge for each and every Malaysian.

Developments in information technology will have a tremendous impact on legal education. IT will permeate all aspects of the law and even the very basis of the legal system. To give full effect to the implementation of the MSC, new cyber laws need to be formulated. Laws will have to be enacted to control computer crimes, illegal access, commercial espionage and theft. ...

In fact, new cyber laws, such as the Digital Signature Act 1997,³ Computer Crimes Act 1997,⁴ and amendments to the Copyright Act 1987,⁵ have already been introduced by the Malaysian Parliament.⁶

Richard Susskind in a recently published book entitled *The Future of* Law,⁷ considers the role IT might play in facilitating

2 Editor's note: See the Communications and Multimedia Act 1998, Act 588, and the Malaysian Communications and Multimedia Commission Act 1998, Act 589.

3 Act 562.

4 Act 563.

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5 Act 332. See, for example, Copyright (Amendment) Act 1997, Act A994.

6 See also the Telemedicine Act 1997, Act 564.

1996, Oxford University Press. See further notes at the end of chapter. change to the legal system so that they will work far more effectively. The author also explains the power of IT and the benefit it can and will bring to the practice of law and the administration of justice. The message in this book for lawyers is clear: in order to guarantee a stake in the legal system of the future, lawyers must adapt, and take responsibility for changing their working practices.

> In order to guarantee a stake in the legal system of the future, lawyers must adapt, and take responsibility for changing their working practices.

I would recommend this book to you, as the book deals with the IT revolution and its impact upon law reform, upon the role of law in society, and upon legal practice in the new millennium. Is the law to be the linchpin of society, or is it destined always to be regarded as an ass?

To adequately prepare students for practice in the next millennium, law schools must adapt their curricula and their instructional and assessment modalities to take into account information technology and the enormous responsibilities that accompany its use. The law schools need to energize their students to keep pace with a global information society ...

Environmental degradation

It is also necessary that you be aware of the environmental crisis that besets the world.

Environmental degradation affects not merely human health, but the ecological and natural resource foundations of civilization as well. A major challenge Malaysia faces as it enters the next millennium is to make development sustainable and to ensure continued prosperity without jeopardising the prosperity of future generations.

Law is an essential component of every conservation strategy. Legal principles and rules help convert our knowledge of what needs to be done into binding rules that govern human behaviour. Law is the bridge between scientific knowledge and political action.

> Law is an essential component of every conservation strategy. Legal principles and rules help convert our knowledge of what needs to be done to protect the environment and conserve biological diversity and natural resources into binding rules that govern human behaviour. In other words, law is the bridge between scientific knowledge and political action.

> A legal adviser to a corporation can no longer afford to ignore his environmental duties as a responsible corporate citizen. You as law students can no longer ignore the study of environmental law.

Upholding fundamental rights

At the end of the Second World War, there were fewer than 60 countries gathered at the United Nations. Today the membership exceeds 160. Those nations that won their independence in the

the new millennium: challenges and responsibilities 375

past 50 years have reason to thank members of the legal profession. Lawyers were the vanguards for the struggle of independence in most countries. The newly emergent nations were often led by lawyers and in all, lawyers helped create a respect for law and justice. Where the law fails, nations disintegrate.

It was Aristotle who wrote, "At his best, man is the noblest of all animals: separated from law and justice, he is the worst."

Justice, in particular, the achievement of social justice, is a basic and fundamental element of society that cannot be eroded or diluted, for to do so would demean the nobility of man.

> The Malaysian Constitution guarantees certain fundamental liberties to its citizens. The architects of the Malaysian Constitution recognised the inalienability of certain basic rights and freedoms as being representative of a civilized society.

The Malaysian Constitution guarantees certain fundamental liberties to its citizens. The architects of the Malaysian Constitution recognised the inalienability of certain basic rights and freedoms as being representative of a civilized society. Hence, "No person shall be deprived of his life or personal liberty save in accordance with the law";⁸ "No person shall be held in slavery";⁹ "All persons are equal before the law and entitled to the equal protection of the law".¹⁰

These are some of the fundamental and inalienable rights that must be extended to all the members of any civilized society. Without these fundamental rights, without the ideals of justice, o Federal Constitution, Article 5(1).

9 Ibid, Article 6(1).

10 Ibid, Article 8(1).

a society, no matter how technologically advanced, will remain arbitrary and barbaric.

As law students in particular, it is your obligation to ensure that the next millennium will not be remembered as one in which the rule of law is diminished in its application, and one in which the guiding principles of our Constitution are emasculated.

Civil society

You are, by virtue of your training and powers of advocacy, particularly qualified to uphold the rule of law. The rule of law calls for debate and the expression of all views, no matter how repugnant they may be to the majority of those in authority. Lawyers can and must play an important role in this exchange of views. By expressing all ideas without fear or favour, they contribute to the creation and maintenance of a civil society.

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> Active participation in the creation of a civil society calls for a sense of restraint. Civility is an essential feature of a civil society, an indispensable ingredient of an ordered society under law. Each of you must endeavour to be a paradigm of civility. The law is a

healing profession; "to make whole" is more than a term of art. It is a standard of behaviour inspired by idealism and compassion, informed by rules of fairness.

Chief Justice Warren Berger of the United States Supreme Court¹¹ constantly urged lawyers to become "healers" rather than "gunslingers". Never discourage debate and dissent, nor exceed the bounds of legitimate debates, counselled Warren Berger. To borrow his words, "Civility is indispensable, we cannot abandon it ourselves and expect it to be practised by others."

Improving the justice system

In the next millennium, the administration of justice must keep pace with the needs of change. However, rather than attempt to predict the adjustments that must be made in response to change, I shall address you on an existing problem which is bound to persist.

It is an oft repeated axiom that "justice delayed is justice denied". The problem of delay is by no means new or by any means confined to the Malaysian judicial system. As far back as the 17th century, Shakespeare's *Hamlet* lists "the law's delay" as one of the factors that weigh in favour of suicide.

Prolonged and often unjustified delay is the major weakness of the court system.

Shakespeare in his inimitable way crystallizes what is the major shortcoming of the justice system from the point of view of those who must use the court as litigants: "the law's delay". Since

11 Chief Justice of the United States Supreme Court, 1969–1986.

Shakespeare's time, numerous enquiries into the functioning of the courts in many countries, both developed and developing, identify the same flaw: the inordinate lapse of time between the institution of suits and their final disposition. Prolonged and often unjustified delay is the major weakness of the court system.

The caseload that the courts are expected to handle invariably grows faster than the population growth. Urbanisation, increased educational levels, and in particular, rapid economic growth tend to substantially increase the number of cases the courts are called upon to resolve.

Litigants have the legitimate expectations to not only a just resolution of their affairs but also an expeditious resolution.

> Efforts must constantly be made to speed up the disposition of cases. Litigants have the legitimate expectations to not only a just resolution of their affairs but also an expeditious resolution. It is the responsibility of lawyers, be they members of the Bar, or the legal and judicial service, to help meet this expectation of society.

> In the United Kingdom, certain recommendations have already been made in a report submitted by Lord Woolf¹² to the Lord Chancellor's office to reduce the elapsed time of the dispute resolution process by lessening unnecessarily combative behaviour by parties, by simplifying the court procedures, and by generally encouraging the cost of dispute resolution to be proportionate to the value of any claim at issue. These recommendations are worth considering in the Malaysian context.

12 Lord Woolf, Access to Justice Final Report, Department for Constitutional Affairs, London, 1996.

Moral character

Finally, I address you on your greatest responsibility – the development of character.

It is far easier to develop intellectual qualities than to foster the moral virtues that are fundamental for the wholesome development of the individual and society.

Integrity, justice, courage, temperance and prudence — these are virtues that constitute the moral character of a good professional, indeed that of a good man.

Integrity, justice, courage, temperance and prudence — these are virtues that constitute the moral character of a good professional, indeed that of a good man.

Integrity is a fundamental requirement of justice. Without integrity there can be no rule of law. It is the responsibility of every lawyer not only to have integrity but to strenuously ensure that the dishonest and corrupt do not have a place in our system of law and justice.

One of the most stinging indictments about American legal education was written by Professor Charles A Reich of Yale Law School. In his influential book called *The Greening of America*,¹³ Professor Reich wrote:

Finding themselves in law school ... (students) discover that they are expected to become "argumentative" personalities who listen to what someone else is saying only for the purpose of disagreeing;

"analytic" rather than receptive people, who dominate information rather than respond to it; and intensely competitive and selfassertive as well. Since many of them are not this sort of personality before they start law school, they react initially with anger and despair, and later with resignation ... In a very real sense, ... the range of their imagination is limited, their ability to respond with sensitivity and to receive impressions is reduced, and the scope of their reading and thinking is progressively narrowed.

The educated individual is a wholesome individual, not merely knowledgeable, but mindful of duties and responsibilities, to God, the family, society, and the state. The educated person is respectful of other human beings and the environment.

Law students must not become "argumentative personalities" with an "adversarial turn of mind".

Law and justice call for conduct between contending parties with stringent and meticulous observation of the rules and ethics of the game.

The educated individual is a wholesome individual, not merely knowledgeable, but mindful of duties and responsibilities, to God, the family, society, and the state. The educated person is respectful of other human beings and the environment. You must endeavour to become truly educated. In conclusion, I believe that in the next millennium, the demands for legal services will be more intense and complex. That is your real challenge.

Editor's note

Richard Susskind: In 1998, Professor Richard Susskind was appointed IT Adviser to the Lord Chief Justice of England and Wales, then Lord Bingham and now Lord Woolf. In this capacity, he worked closely with the senior judges in England and Wales in helping them identify and articulate the most promising applications of IT for the judiciary

Over the years, Professor Susskind has advised on various UK government inquiries and initiatives, including Lord Woolf's *Access to Justice Inquiry* (1995-1996), the Court of Appeal (Civil Division) Review (1997-1998), the Review of Tribunals (2000-2001), the Criminal Courts Review (2000-2001), the Lord Chancellor's Department Civil Justice IT Strategy Group (1997-2001) and, since 1990, the Information Technology and Courts Committee (ITAC).

As well as numerous articles in the academic, trade and popular press, he has written five books: *Expert Systems in Law*, Oxford University Press, 1987; paperback, 1989; *Latent Damage Law—The Expert System*, Butterworths, 1988 (with PN Capper); *Essays on Law and Artificial Intelligence*, Tano, 1993; *The Future of Law*, Oxford University Press, 1996; revised paperback, 1998; *Transforming the Law*, Oxford University Press, 2000; paperback, 2003.

He has also edited two collections of papers: *Focus on IT in the City*, Worshipful Company of Information Technologists, 1995, (with John Carrington, Tricia Drakes, Brian Jenkins, and Mike Warburg); and *Essays in Honour of Sir Brian Neill*, Butterworths, 2003 (with Lord Mark Saville).

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Certainty of law

" ... Consistency makes for certainty, and this court being at the centre of the legal system in this country, is responsible for that stability, the consistency and the predictability of the administration of law. "

—**Raja Azlan Shah Acting LP (as he then was)** Land Executive Committee of Federal Territory v Harper Gilfillan Bhd [1981] 1 MLJ 234, FC at 237

Integrity

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It is the responsibility of every lawyer not only to have integrity but to strenuously ensure that the dishonest and corrupt do not have a place in our system of law and justice. "

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—HRH Sultan Azlan Shah The New Millennium: Challenges and Responsibilities



" The views of the Conference of Rulers are, strictly speaking, given to the Prime Minister. It is then for him to consider these views before he makes the final recommendation to the Yang di-Pertuan Agong. Only when such a procedure is followed can the Conference of Rulers play an effective role in the 'advising' process. "

—HRH Sultan Azlan Shah *The Role of Constitutional Rulers and The Judiciary: Revisited*

POSTSCRIPT

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The Role of Constitutional Rulers and The Judiciary *Revisited*

eferences were made in Supremacy of Law in Malaysia;¹ Checks and Balances in a Constitutional Democracy;² and The Role of Constitutional Rulers,³ to the following matters:

- the position of the Yang di-Pertuan Agong and the Rulers with regard to Royal Assent of Bills passed by Parliament, or the State Legislative Assemblies;
- (2) the requirement for consent or consultation of the Conference of Rulers on certain matters under the Constitution;
- (3) the status of the judiciary; and
- (4) constitutional amendments.

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In this chapter, I wish to make a few general observations on each of these matters, especially in the light of certain developments that have taken place since I first expressed my views on them.

Rulers and Royal Assent

Under the Merdeka Constitution, a Bill passed by Parliament only became law when it was assented to by the Yang di-Pertuan Agong.⁴ Similarly, at the State level, a Bill passed by the State Legislative Assembly became law when assented to by the Ruler concerned.

In 1983, a Bill was introduced in Parliament to amend this Constitutional procedure. Under this Bill, it was initially proposed that new provisions be made in the Federal and State Constitutions whereby a Bill, if not assented to by the Yang di-Pertuan Agong or the Ruler concerned within 15 days, will be "deemed" to have been assented to by the Yang di-Pertuan Agong or the Ruler concerned.

Further, in an attempt to amend Article 150 of the Constitution, dealing with the Proclamation of Emergency by the Yang di-Pertuan Agong, the 1983 Bill also made certain provisions: It was proposed that a Proclamation of Emergency should only be issued by the Yang di-Pertuan Agong when "the *Prime Minister* is satisfied that a grave emergency exists ...". The amendment, therefore, proposed to substitute the "satisfaction" of the Yang di-Pertuan Agong with that of the Prime Minister.

The reasons for these proposed amendments to the Constitution were unclear. However, the Conference of Rulers was of the view that these amendments made significant changes "affecting ... the Rulers" and as such, the consent of the Conference of Rulers had first to be obtained as required under Article 38(4) of the Federal Constitution. The then Yang di-Pertuan Agong (Sultan of Pahang), when presented with the Bill, refused, on the advice of the Rulers, to assent to the Bill.

the role of constitutional rulers and the judiciary: revisited 387

What ensued subsequently were lengthy negotiations between the Rulers and the Government. The views that I had expressed in my article on *The Role of Constitutional Rulers*, especially as to the right of the Rulers to refuse Royal Assent,⁵ was widely published and publicised. As one writer had put it:

National attention was focused on the article, "The Role of Constitutional Rulers" written by [Raja Tun Azlan Shah (as he then was)] \dots^{6}

Happily, the stalemate was resolved, and a major constitutional crisis was averted. The Rulers and the Government struck a compromise. The outcome: A new Bill was introduced in Parliament by the Government, and under this Bill, the Yang di-Pertuan Agong shall "within 30 days assent to the Bill", or "return the Bill (other than a Money Bill)" to Parliament with a statement of the reasons for his objection to the Bill. Parliament would then consider the objections, and if after consideration, the Bill was again passed by Parliament, it would be sent to the Yang di-Pertuan Agong for assent. In such a situation, the Yang di-Pertuan Agong "shall assent to the Bill within thirty days after the [reconsidered Bill] is presented to him".⁷

The proposed amendments to the Eighth Schedule of the Constitution relating to the assent by a Ruler of Bills passed by the State Legislative Assembly were withdrawn. Likewise the amendment to Article 150 was also withdrawn.⁸

Regrettably, what was thought to be an amicable resolution of the issues, however, did not last for long. As will be seen below, some of the same issues were resurrected in 1993.

The 1993 amendments

In 1993, the Government again introduced a Bill in Parliament that affected the rights and privileges of the Rulers. By far, this was the most radical piece of legislation affecting the Rulers that has been introduced since Independence. The Bill proposed to take away from the Rulers the immunities that the they had always enjoyed. The 1993 Bill again attempted to take away the rights of the Yang di-Pertuan Agong and the Rulers to withhold assent to a Bill. One other amendment that the Bill attempted to make was to restrict the exercise of the discretion of the Yang di-Pertuan Agong and the Rulers in certain matters under the Federal and State Constitutions.

The Rulers initially refused to accept these amendments, especially so since no prior consent of the Conference of Rulers, as required under Article 38(4), had been obtained before it was passed by Parliament. There was then a major constitutional impasse. However, this was subsequently resolved. What happened subsequently has now been well documented.⁹

I need not delve into the details, as most of you are familiar with the entire episode. Suffice to say, the status of the Rulers was fundamentally affected. The effect: the Rulers' immunities were taken away, and a Special Court was established to hear cases affecting the Rulers.¹⁰

As to the rights of the Yang di-Pertuan Agong and the Rulers regarding Royal Assent, the 1993 amendments achieved what was not fully accomplished by the 1983 amendments. The Constitution was amended in 1993 to provide that "The Yang di-Pertuan Agong shall within thirty days after a Bill is presented to him assent to

the role of constitutional rulers and the judiciary: revisited 389

the Bill ... If a Bill is not assented to by the Yang di-Pertuan Agong within the [thirty days] ... it shall become law ..."¹¹

A similar amendment was also introduced to the Eighth Schedule to the Constitution. Under this amendment, all State Constitutions shall contain provisions that provide that the Ruler shall assent to a Bill passed by the State Legislative Assembly within 30 days. Like the position of a Bill submitted to the Yang di-Pertuan Agong, if any Ruler were to refuse assent within this period, the Bill shall become law.¹²

As stated earlier, one further change that the 1993 amendments brought about was the removal of the discretionary powers of the Yang di-Pertuan Agong and the Rulers on certain matters under the Federal and State Constitutions. A new Article 40(1A) was inserted into the Federal Constitution. This provides as follows:

In the exercise of his function under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.

At the State level, the Eighth Schedule was amended to include a new section 1A. This read as follows:

In the exercise of his functions under the Constitution of this State or any law or as a member of the Conference of Rulers, where the Ruler is to act in accordance with advice or on advice, the Ruler shall accept and act in accordance with such advice.

Consent and consultation of the Conference of Rulers

The Federal Constitution expressly provides that on certain matters, the Conference of Rulers is to play an important role in the constitutional process. It must be remembered that the Merdeka Constitution was formulated with the participation of the Malay Rulers, and as such a constitutional role was prescribed to them. Furthermore, when the Reid Commission made its Report, the Commission was of the view that the Rulers, collectively to be known as the Conference of Rulers, should serve as a check and balance in some of the constitutional processes under the Federal Constitution. For this purpose, in several important matters under the Constitution, it was provided that the Conference of Rulers was to participate in the process.

The Federal Constitution expressly provides that on certain matters, the Conference of Rulers is to play an important role in the constitutional process. They should serve as a check and balance in some of the constitutional processes.

> We have seen that Article 38 of the Federal Constitution makes express provisions for the role to be played by the Conference on certain matters. For example, Article 38(2) provides as follows:

The Conference of Rulers shall exercise its function of-

- (a) electing, in accordance with the provisions of the Third Schedule, the Yang di-Pertuan Agong and Timbalan Yang di-Pertuan Agong;
- (b) agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole;

the role of constitutional rulers and the judiciary: revisited 391

- (c) consenting or withholding consent to any law and making or giving advice on any appointment which under this Constitution requires the consent of the Conference or is to be made by or after consultation with the Conference;
- (d) appointing members of the Special Court under Clause (1) of Article 182;
- (e) granting pardons, reprieves and respites, or of remitting, suspending or commuting sentences, under Clause (12) of Article 42,

and may deliberate on questions of national policy (for example changes in immigration policy) and any other matter that it thinks fit.

Furthermore, it is provided by Article 38(4) that no law directly affecting the privileges, position, honours or dignities of the Rulers shall be passed without the consent of the Conference of Rulers. Similarly, Article 38(5) provides that:

The Conference of Rulers shall be consulted before any change in policy affecting administrative action under Article 153 [relating to special privileges of the Malays and natives of Sabah and Sarawak] is made.

I wish to make some observations here on only one aspect of the role of the Conference of Rulers that in recent years has caused some concern. This relates to the role of the Conference of Rulers in "making or giving advice on any appointment" as provided for under Article 38(2)(c).

The Constitution provides that in the appointment of certain key posts under the Federal Constitution, the Conference of Rulers will be involved in the appointment process. Sometimes different

terms are employed in the Constitution to describe the precise role to be played by the Conference of Rulers. For example under Article 105(1) the Auditor General shall be appointed "after consultation with the Conference of Rulers"; similarly with the appointment of the Election Commission (Article 114).

Article 122B also provides that the appointment of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judges of the two High Courts, all judges of the Federal Court, Court of Appeal, and the High Courts, shall be made "after consulting the Conference of Rulers".

Though the actual deliberations of the Conference of Rulers are generally secret, certain of these appointment processes were in the public eye after the decision of the Court of Appeal in *In the Matter of an Oral Application by Dato' Seri Anwar bin Ibrahim to Disqualify a Judge of the Court of Appeal.*¹³

The facts of the case as reported in *The Malayan Law Journal* are as follows:

During the course of the hearing of the appeal before the Court of Appeal, the appellant requested for permission to address the court himself. The appellant claimed that in his capacity as the Deputy Prime Minister, he had represented the Prime Minister to the Conference of Rulers in which the appointment of Mokhtar Sidin J (as he then was) to the bench of the Court of Appeal was in question, as the Conference of Rulers were not in agreement with the Prime Minister's advice with regard to the appointment. In light of that, the appellant made an oral application to disqualify Mokhtar Sidin JCA from the quorum hearing the present appeal on the ground that there might be a likelihood of bias on the judge's part.

the role of constitutional rulers and the judiciary: revisited 393

Without making any detailed study as to the scope of Article 122B, nor as to the rationale behind it, Lamin PCA, in a very brief judgment came to the following conclusions on this important area of constitutional law:

The intention of this Article [122B(1)] is clear, ie the Yang di-Pertuan Agong must act on the advice of the Prime Minister. *However, the Yang di-Pertuan Agong is required to consult the Conference of Rulers before making the appointment.* To consult means to refer a matter for advice, opinion or views.¹⁴

He added:

To "consult" does not mean to "consent". The Constitution uses the words "consent" and "consult" separately. For example the word "consent" is used in Article 159(5) of the Constitution which states that the amendment to certain provisions of the Constitution cannot be passed by Parliament without the "consent" of the Conference of Rulers.¹⁵

On the role of the Conference of Rulers specifically on the appointment of judges, Lamin PCA declared:

So in the matter of the appointment of judges, when the Yang di-Pertuan Agong *consults* the Conference of Rulers, he does not seek its "consent". He merely consults. So when the Conference of Rulers gives its advice, opinion or views, the question is, is the Yang di-Pertuan Agong bound to accept? Clearly he is not. He may consider the advice or opinion given but he is not bound by it. But Article $40(1A)^{16}$ of the Constitution provides specifically as to whose advice the Yang di-Pertuan Agong must act upon ... Clearly

therefore the Yang di-Pertuan Agong must act upon the advice of the Prime Minister.¹⁷

He then concluded:

So in the context of Article 122B(1) of the Constitution, where the Prime Minister has advised that a person be appointed a judge and if the Conference of Rulers *does not agree or withholds its views or delays the giving of its advice* with or without reasons, legally the Prime Minister can insist that the appointment be proceeded with.¹⁸

It is pertinent for me to point out that the above views expressed by Lamin PCA on the role of the Conference of Rulers in the appointment process of judges is, of course, merely obiter dicta, since the main issue before the court was the disqualification of the judge. Whilst this is not a proper forum for me to discuss in detail the correct constitutional role of the Conference of Rulers in the appointment process, I would, however, like to make a few general comments:

(1) It must be stressed that in most cases, it is the executive, namely the Prime Minister, who actually nominates candidates for these important constitutional positions. In some cases, besides the Conference of Rulers, the Prime Minister is also required to consult or seek the views of other parties before the nomination. In the appointment of judges, for example he must "consult" the Chief Justice, and in some cases the President of the Court of Appeal, or the two Chief Judges. In the case of the appointment of the Inspector General of Police, or the Deputy Inspector General of Police, the recommendation of the Police Service Commission is required.¹⁹

the role of constitutional rulers and the judiciary: revisited 395

(2) Secondly, only after complying with the prescribed constitutional process should the Prime Minister submit the names of the candidates to the Yang di-Pertuan Agong, who will then make the final appointments. In such cases, especially since the constitutional amendments in 1993, it is generally said that the Yang di-Pertuan Agong has no discretion on the matter, but must accept the nomination as submitted by the Prime Minister.²⁰

To say that appointments can be made even if the "Conference of Rulers ... withholds its views or delays the giving of its advice" clearly goes against the grain and spirit of the Constitution. The entire process of consultation with the Conference of Rulers cannot simply be relegated to a mere formality.

(3) Whatever strict legal distinction may exist between the terms "consult" and "consent" (or even "advise"), the role played by the Conference of Rulers cannot be diminished by drawing such slight distinction in terminology.²¹

To say that appointments can be made even if the "Conference of Rulers ... withholds its views or delays the giving of its advice" ²² clearly goes against the grain and spirit of the Constitution.

The entire process of consultation with the Conference of Rulers cannot simply be relegated to a mere formality. The key words here, as stated in Article 38(2)(c), are "giving advice on any appointment".

This is a constitutional role that was contemplated by the drafters of the Constitution—a role of checks and balances

that ensures the appointment of the best persons to important constitutional positions. It was also clearly intended to prevent any abuses of power by not giving the appointing authority the sole discretion in the appointment process of key positions under the Constitution.

(4) Lamin PCA's statement that in the appointment of judges, only the views of the Prime Minister are important, even if no views are expressed by the Conference (either because it had withheld its views for further consideration, or delayed the giving of its advice), seems to suggest that the Prime Minister may also dispense with the requirement under the Constitution to seek the views of the Chief Justice.²³

Just as the Prime Minister is duty-bound to consult the Chief Justice, he is equally bound to consult the Conference of Rulers. In such cases, the Prime Minister must consider the views expressed by both the Chief Justice and the Conference of Rulers.

> Clearly, this cannot be the correct interpretation. Just as the Prime Minister is duty-bound to consult the Chief Justice, he is equally bound to consult the Conference of Rulers. In such cases, the Prime Minister must consider the views expressed by both the Chief Justice and the Conference of Rulers. Only after a careful consideration of both their views should the Prime Minister make a final selection. Otherwise, the Prime Minister will have a free hand as to whom he can appoint, without an effective mechanism of checks and balances. So any negative views expressed by the parties (the Chief Justice or the Conference of Rulers) on a particular

the role of constitutional rulers and the judiciary: revisited 397

candidate must be taken seriously. The Prime Minister is dutybound to give serious consideration to such advice.

Furthermore, it is generally accepted as good practice that whenever an appointing body receives from another independent and respected body an adverse report on a candidate, such advice should be given serious consideration. In most cases, the advice will provide sufficient and compelling reasons as to why the candidate should not be appointed to the post. If this procedure were complied with, the appointing authority will be in a position to avoid any accusations of bias or favouritism. This mechanism, thus, protects the appointing authority from any allegations of impropriety.

Therefore, in this regard, it is generally difficult to rationalise why a Prime Minister would not want to consider, or even abide by the views of nine Rulers and four Governors who constitute the Conference of Rulers. These are independent persons, with vast experiences, and with no vested interest in the nominated candidates. Their duty is to fulfil their constitutional role in ensuring that only the best and most suited candidates are selected for the posts.

(5) Finally, the statements made by Lamin PCA in this case seem to suggest that the Conference of Rulers gives its advice directly (and only) to the Yang di-Pertuan Agong, and not to the Prime Minister.

In practice, this is not the case.

The Prime Minister submits the names of the candidates to the Conference of Rulers. The Conference then submits its views to the Prime Minister before he tenders his advice to the Yang

di-Pertuan Agong. Therefore, the views of the Conference are, strictly speaking, given to the Prime Minister. It is then for him to consider these views before he makes the final recommendation to the Yang di-Pertuan Agong. Only when such a procedure is followed can the Conference of Rulers play an effective role in the "advising" process.

To suggest that their advice is given directly to the Yang di-Pertuan Agong will render this entire constitutional process meaningless, since, when the Prime Minister submits the name to the Yang di-Pertuan Agong, the Yang di-Pertuan Agong is duty-bound, under Article 40(1A), to accept the advice of the Prime Minister.

Judiciary

Public confidence in the judiciary

When reviewing the state of the Malaysian judiciary after 25 years of independence, Tun Mohamed Suffian said:

Judiciary Still Unpoliticised: ... since Independence ... it [the judiciary] has remained completely unpoliticised ... The judiciary ... in determining the disputes that come before them is under a duty to do so impartially without fear or favour and the Constitution forbids the executive and the legislature from telling them how a case should be decided. In fairness to the executive and the legislature, it must be said that they have never at any time tried to influence the judiciary.²⁴

I, too, on several occasions before, have expressed the same view. In 1987, I observed: "I believe that our judiciary has proved
the role of constitutional rulers and the judiciary: revisited 399

worthy of the trust the founding fathers of the Constitution saw fit, in their wisdom, to confer upon the Bench." $^{\rm 25}$

During the period when I was on the Bench, there were fewer judges (in 1983, there were 36 Federal and High Court Judges), and we wrote judgments on all important cases that we decided upon. These were all reported in the only local law journal then, *The Malayan Law Journal*.

Sadly, over the past few years there has been some disquiet about the judiciary. Several articles have been written, and many opinions expressed, both internationally and locally, that the independence of our judiciary has been compromised. It has been said that there has been an erosion of public confidence in our judiciary.²⁶

Concerns have been expressed that some judges were not writing judgments, or that there were long delays in obtaining decisions or hearing dates in certain instances. Further, the conduct of certain judges was being questioned in public. Allegations of "forum shopping" prompted a Court of Appeal Judge to say: "Something is rotten in the state of Denmark",²⁷ an obvious reference to Denmark House, the building which houses the law courts. Some lawyers complained of excessive awards of damages for defamation cases, and the liberal use by some judges of contempt of court charges. In the appeal to the Federal Court in the now infamous *Ayer Molek* case,²⁸ even the panel of judges who sat to hear the case was unconstitutionally constituted.

Professor Wu Min Aun in his article, "Judiciary at the Crossroads",²⁹ explains some of the events that led to the so-called erosion of public confidence in the judiciary:

Public confidence in the judiciary started to slide when the executive commenced its attack as a result of several decisions which went against the government. Political rhetoric surrounding the amendments to Article 121 of the Federal Constitution merely exacerbated it. It deteriorated further when the Lord President and two Supreme Court Judges were dismissed.

Whether these allegations are true, is not for me to say. However, having been a member of the judiciary for many years, it grieves me when I hear of such allegations. Since Independence, the early judges had always cherished the notion of an independent judiciary and had built the judiciary as a strong and independent organ of government. The public had full confidence in the judiciary and accepted any decision then made without any question. Unfortunately, the same does not appear to be the case in recent years.

A judiciary may only be said to be independent if it commands the confidence of the public. Statements made as to its independence by the judges, or even the politicians, do not measure public confidence in the judiciary. At the end of the day, it is this public perception that ultimately matters.

> Whatever the situation, a judiciary may only be said to be independent if it commands the confidence of the public—the very public it seeks to serve. After all, statements made as to its independence by the judges, or even the politicians, do not measure public confidence in the judiciary. At the end of the day, it is this public perception that ultimately matters.

the role of constitutional rulers and the judiciary: revisited 40

It is my earnest hope that the Malaysian judiciary will regain the public's confidence, and that it will once again be held in the same esteem as it once was held. In democratic countries, it is an independent judiciary that brings pride to the nation. Members of the executive and the legislature come and go, but an independent judiciary remain steadfast forever, fulfilling the aspirations and ideals of the people. In the judiciary, people place their trust and hope.

Judicial power

For an effective system of checks and balances to be in place, the three organs of government must be vested in three different constitutional bodies. Under the Malaysian Constitution, the executive organ is vested in the Yang di-Pertuan Agong and the Cabinet,³⁰ and the legislative powers in Parliament.³¹

For an effective system of checks and balances to be in place, the three organs of government must be vested in three different constitutional bodies.

In the lecture on *Checks and Balances in a Constitutional Democracy*, delivered in 1987, I spoke of the vesting of the judicial power in the judiciary. I also referred to the Supreme Court decision in *Public Prosecutor v Dato' Yap Peng.*³² I now wish to state briefly some developments relating to judicial powers in Malaysia.

Article 121(1) of the Federal Constitution provided as follows:

Subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status, namely—

- (a) one in the States of Malaya ... and
- (b) one in the States of Sabah and Sarawak ...

and in such inferior courts as may be provided by federal law ...

The scope of judicial powers was considered in detail in the Federal Court case of *Public Prosecutor v Dato' Yap Peng*. In that case, the validity of section 418A of the Criminal Procedure Code was challenged on the ground that it contravened Article 121 of the Constitution. In gist, this section provided that the Public Prosecutor may, at any time before a decision was given by a subordinate court, issue a certificate requiring the subordinate court to transfer a case from the subordinate court to the High Court, without the subordinate court first holding a preliminary inquiry.

By a majority of three to two (Salleh Abas LP and Hashim Yeop Sani SCJ dissenting) the Supreme Court held that section 418A of the Criminal Procedure Code was void as being an infringement of Article 121 of the Constitution. Abdoolcader SCJ³³ delivered the leading majority judgment. He said in his judgment that, "any other view would ... result in relegating the provisions of Article 121 vesting ... judicial power ... in the curial entities specified to no more than ... a munificent bequest in a pauper's will." ³⁴

Soon after this decision was delivered, the Federal Constitution was amended in 1988 by the Constitution (Amendment) Act 1988.³⁵ Article 121 was amended so as to take away the judicial power from the two High Courts. It was further provided that "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law".³⁶

the role of constitutional rulers and the judiciary: revisited 403

The precise reasons for this amendment remain unclear. But the consequences may be severe. With this amendment, it would appear that the judicial power is no longer vested in the courts, and more importantly, the High Courts have been stripped of their inherent jurisdiction. Their powers are now only to be derived from any federal law that may be passed by Parliament.

The effect of this change may have far-reaching consequences on the separation of powers doctrine under the Federal Constitution. In commenting on this amendment, the International Commission of Jurist, based in Geneva had this to say:

The formulation of [Article] 121 of the Constitution makes the High Courts' jurisdiction and powers dependent upon federal law, ie the court has no constitutionally entrenched original jurisdiction. This undermines the separation of powers and presents a subtle form of influence over the exercise of judicial power. This makes the operation of the High Court dependent upon the legislature and is a threat to the structural independence of the judiciary.³⁷

Though it may be said that despite this amendment, following the Privy Council decision in *Liyanage v R*,³⁸ which I referred to in my lecture,³⁹ the judicial power still vests in the judiciary, it is my hope that Article 121 will be reviewed to reinstate the position as it was before the amendment in 1988.

Notes

- 1. Chapter 1, above.
- 2. Chapter 5, above.
- 3. Chapter 10, above.
- 4. Article 66(4).
- 5. See chapter 10, page 272, above.
- 6. HP Lee, *Constitutional Conflicts in Contemporary Malaysia*, Oxford University Press, 1995, at page 28.
- 7. See Constitution (Amendment) Act 1984, Act A584.
- 8. See generally, HP Lee, 'The Malaysian Constitutional Crisis: King, Rulers and Royal Assent', *Lawasia*, 22-44. This article was reprinted in (1986) *INSAF* (Journal of the Malaysian Bar) and in Trindade & Lee (eds), *The Constitution of Malaysia: Further Perspectives and Developments*, Oxford University Press, 1986.
- 9. See, HP Lee, "Hereditary Rulers and Legal Immunities in Malaysia" (1993) *University of Tasmania Law Review* (Law School Centenary Volume: Constitutional Issues) 323-336.
- 10. See Constitution (Amendment) Act 1993, Act A848.
- 11. See now Article 66(4) and (4A) of the Federal Constitution.
- 12. See section 2A of the Eighth Schedule.
- 13. [2000] 2 MLJ 481, CA.
- 14. Ibid at 484. Emphasis added.
- 15. Ibid.
- 16. See page 389, above.
- 17. [2000] 2 MLJ 481 at 484. Emphasis added.
- 18. Ibid. Emphasis added.
- 19. Article 140(4).
- 20. See Article 40(1A).

the role of constitutional rulers and the judiciary: revisited 405

- 21. As to the principles governing the interpretation of the Constitution, see the views which I expressed in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, FC, at 32.
- 22. Per Lamin PCA in *In the Matter of an Oral Application by Dato'* Seri Anwar bin Ibrahim to Disqualify a Judge of the Court of Appeal [2000] 2 MLJ 481 at 484.
- 23. Article 122B also provides that the Prime Minister, before tendering his advice to the Yang di-Pertuan Agong, shall "consult" the Chief Justice.
- 24. Tun Mohamed Suffian, "The Judiciary—During the First Twenty Years of Independence", in Suffian, Lee & Trindade, *The Constitution of Malaysia: Its Development 1957-1977*, at page 241.
- 25. Chapter 2, at page 43, above.
- See generally: Harding, AJ "The 1988 Constitutional Crisis in Malaysia", (1990) 39 International and Comparative Law Quarterly, 54; Wu Min Aun, "Judiciary at the Crossroads", in Public Law in Contemporary Malaysia, Longman, Petaling Jaya (Malaysia), 1999.
- 27. Per NH Chan in *Ayer Molek Rubber Co Bhd v Insas Bhd* [1995] 2 MLJ 734, CA, at 744.
- 28. Insas Bhd & Anor v Ayer Molek Rubber Co Bhd & Ors [1995] 2 MLJ 833, FC.
- 29. Above, note 26.

See also:

HP Lee, "The Judiciary Under Siege", in *Constitutional Conflicts in Contemporary Malaysia*, Oxford University Press, 1995, pages 43-85 (Foreword by Justice Michael Kirby). This article was first published as "A Fragile Bastion Under Siege—The 1988 Convulsion in the Malaysian Judiciary", (1990) 17 *Melbourne Law Review* 386-417;

RH Hickling, "The Malaysian Judiciary in Crisis", (1989) *Public Law* 20;

FA Trindade, "The Removal of the Malaysian Judges", (1990) 106 *Law Quarterly Review* 51;

(Note 29 cont'd) Malaysia: Assault on the Judiciary, 1990, New York, Lawyers Committee for Human Rights.

- 30. Article 39.
- 31. Article 66.
- 32. [1987] 2 MLJ 311, SC.
- 33. With whom Lee Hun Hoe CJ concurred. Azmi SCJ gave a separate concurring judgment.
- 34. [1987] 2 MLJ 311 at 319.
- 35. Act A704, with effect from 10 June 1988.
- 36. Article 121(1).
- 37. *Report on Malaysia, International Commission of Jurist,* 13 August 2001.
- 38. [1966] 1 All ER 650, PC.
- 39. See chapter 5, at pages 105–106, above.

ats Index

P

Abdul Rahman, Tuanku first Yang di-Pertuan Agong, 261 Yang di-Pertuan Besar of Negeri Sembilan, 39 Abdul Rahman, Tunku, 275–276, 280 first Prime Minister, 39, 260 proclamation of independence, 41 pardons, position on, 273 quotation from Political Awakening, 67, 280 Abdul Razak, Tun, 276 Abuse of power administrative bodies, by, 70-71, 76-77 basic principles governing restraints on, 3-4, 74, 99 reasons for, 101

1

Abuse of power (cont'd) company directors, by, 130-132, 133-134 court powers to curtail, 77 extent of, 13, 74 misuse of power, 119-120 press, by, 57-58 Ackner, Lord, 296, 337-339 Acton, Lord, 119 Administrative law cardinal rules, 69 natural justice, 69-70, 73, 334 protection of individual rights, 52-53, 68-73 right to be heard, 54, 68-75, 334 Ahmad Ibrahim, Professor, 254, 269

Appeals, 273, 299, 364 abolition of, to Privy Council, 33, 282, 322, 337 Court of Appeal. See Court of Appeal Architects professional negligence. See Professional negligence professional obligations, 170, 179-180, 211 implied terms, 191-193 third parties, to, 197-211 Aristotle, 104, 160, 375 **ASEAN, 371** Azlan Shah, His Royal Highness Sultan contribution to development of law, 1-8, 247-248, 299, 308-311 contribution to higher education, 87, 248 scholarships and awards, 149, 310 series of law lectures at University of Malaya, 123-124, 310 education, 35, 98, 286, 307 family, 215-217 interest in education and sports, 248, 307, 310, 345-346 judicial career, 1, 47-48, 285-287, 297, 307-308 national and international recognition, 97-98, 123, 149, 310 publications and quotations, 1 Checks and Balances in Constitutional Democracy, 100, 249, 306, 385, 401 Climates of Freedom, 36

Azlan Shah, His Royal Highness Sultan (cont'd)publications and quotations (cont'd) Corporate Activity: Law and Ethics, 126, 166 Corporate Misconduct: Crime and Accountability, 150 Engineers and the Law: Recent Developments, 121, 170, 311 Judgments of HRH Sultan Azlan Shah With Commentary, 1, 48, 285, 308-309 Law and Globalisation: Some Perspectives, 336 Medicine, Ethics and the Law, 128, 218 Parliamentary Democracy, 88, 213 Role of Constitutional Rulers, 250, 335, 384, 385, 387 Supremacy of Law in Malaysia, 12, 287, 385 The Judiciary: The Role of Judges, 288, 364, 384 The Legal Profession and Legal Practice, 312 The New Millennium: Challenges and Responsibilities, 366, 383 The Right to Know, 50, 332 Royal Patron, as, 169

Bagehot, Walter, 6–7, 345 Bahasa Malaysia. See National language

index 409

Bangsa Malaysia, 368-369 Bank Negara, 160-162, 351 Banks computer related fraud, 140-141 difficulties facing, 160-163 ethical management, need for, 161-163 non-performing loans, 160 trends in legal practice, 349-350 Bar. See also Lawyers independence of, 312-315 legal education, 353, 355 relationship with Bench, 348-359 traditions of, 340 Bar Council, 169, 351, 353 Berger, Warren, 377 Boesky, Ivan, 133, 165 Borneo, 277 Bracton, Henry de, 26, 309 Bridge, Lord, 206-207, 210-211, 337-339 Budget, 111, 115 Building contracts, 180–186 professional negligence. See Professional negligence

Case law doctrine of precedent, 19 overriding of, 20 Case management expedition of cases, 378 backlog of cases, 298, 378

Case management (cont'd) expedition of cases (cont'd) delay, 296, 377-378 dispute resolution, 378 lawyers' role, 365, 377-378 Central African Republic, 14 China democracy in, 342 Civil society, 376-377 Clirs, 326 Coke, Sir Edward, 25-26, 309 Coleridge, Lord CJ, 224 Common law application in Malaysia, 188, 190, 193-194, 294, 311 commercial transactions, effect on, 188-190 English law, relevance of, 188-189 justice of, 40-41 medical practice and, 222-223, 238 privilege, 76 **Company directors** abuse of power, by, 130-131, 133-134 fraud against minority shareholders, 138-139 insider trading, 133-135, 165, 320 accountability of, 130-139 breach of fiduciary duties, 129, 134 moral obligations, 131-132 Company law, 129-130, 136-137, 349. See also Corporate misconduct and Corporations

Computer crime, 146 computer fraud, 141 computer misuse, 139-144 criminality issues, 142-143 hacking, 142-144 legislation, 143, 372 cyber laws, 361-362, 372 unauthorised use, 142-144 **Conference of Rulers** constitutional provisions, 274, 390-391 amendment of Constitution, 277, 385, 386-389 consulting and advising role, 274, 277, 384, 385, 390-398 advising on judicial and executive appointments, 274, 276-277, 391 constitutional amendment to, 388-389 election of Yang di-Pertuan Agong, 274-276 general functions and powers, 7, 21, 252, 271 Constitution amendment of. See Constitutional amendment basic concepts, 16, 26, 119, 375-376 basic ideals, 4, 44-45, 65 birth of, 37-38, 330 checks and balances. See Constitutional democracy definition of "law", under, 19

Constitution (*cont*'d) entrenching provisions, 166 fundamental rights under, 16, 30, 54, 85, 374-376 government under, 6-7, 36-42, 103, 119 guardians of, 5, 27, 41, 289 harmonisation of politicians and judiciary, 43-44, 343-344 harmony with existing laws, 36, 41-42 historical background, 4 implementation and interpretation of, 24, 148 constitutional conventions. See Constitutional conventions laws void under, 17, 28, 29 limitation on Rulers and ministers, 26-27.256 national independence. See National independence oaths to protect, 26-27 principles, 3-5, 17-18, 35, 41 procedure for making laws under, 20-21, 385 recommendation for review of, 41-43, 45 right of free expression under. See Freedom of speech spirit of, 23, 39-40, 42, 60, 117, 336 supremacy of, 3-5, 17-18, 20, 31, 46, 119-121, 249, 306, 331 duty of lawyers to maintain, 336, 341 written, 166

Constitutional amendment, 4, 21-23, 30, 32-33, 41, 64, 92, 277, 385 Amendment Acts, 33, 280-281, 402-403 background, 33, 280 details of specific amendments, 32-33 Article 40(1A), 389, 398 jurisdiction of courts, 402-403 1993 amendments, 388-389 numbers of, 322 procedure for, 21, 277 consent of Rulers for. See Conference of Rulers proposal concerning Emergency powers, 386-387 Constitutional conventions, 22-23, 147 Constitutional democracy, 7, 100 checks and balances, 2-4, 7, 27, 65, 100-120, 331, 385, 396, 401 collective responsibility of Cabinet ministers, 107-109 consultation with electorate, 114-115 dismissal of Government by Parliament, 112 doctrine of separation of powers, 27, 43, 103-112, 117, 120, 343-344, 403 distribution of powers, 16, 26-27, 110-112, 343 limitation of Parliament's and State Legislatures' powers, 18, 22, 26-27 majority, rule by, 100, 112-113, 115 ministerial responsibility, 107-109

Constitutional democracy (cont'd) misuse of power, 119-120 Parliament. See Parliament party system, 112-114 role of opposition, 113-114 Westminster model, 119-120, 249, 322, 330 **Constitutional monarchy** fundamental principles, 6-7, 251-253 system of rotation of Rulers, 7 historical background, 4, 253-256 British influence, 255, 272 Islamic influence, 253-254 traditional role, 253 Merdeka Constitution, 255-256, 386, 390 role and powers of monarch. See Yang di-Pertuan Agong Contempt of court, 84 Copyright amendments to legislation, 372 copying plans and drawings, 174-177 literary, 176 Corporate activity, 127-128, 132, 145-146 breach of fiduciary duties, 129, 134 company law, 129-130, 136-137 corporate governance, 8 directors, accountability of, 130-139 ethics. See Ethics failures of, 319 international finance law, 356-357 misconduct. See Corporate misconduct regulation of, 127-130

Corporate activity (*cont'd*) self-regulation, 130 Corporate law, 129-130 **Corporate misconduct** cost of, 155-157 fraud and deception, 126, 128, 129, 135, 138-139, 155-156, 164-165 computer related. See Computer crime insider trading, 133-135, 165, 320 minority shareholders, against interests of, 135 - 139offences, 131 white collar crime, 150, 152-166 concepts and definitions, 152-154 examples of, 134-135, 140-141, 153, 165 impact on society, 154-158 increase in, 156-158, 163, 164 strategies for overcoming, 158-160, 163-164, 320 Corporations corporate law, 129-130 directors, accountability of. See Company directors ethics and law, 126, 127-128, 133, 135, 145-146 legal entity, as, 132 misconduct. See Corporate misconduct social responsibility, 126, 131-132, 145 **Court of Appeal** appointments to, 392-398 establishment of, 33, 194, 299 function, 299, 364

Court of Appeal (cont'd) hearing of Dato' Seri Anwar Ibrahim case, 392-393 Courts appointments, 15, 49, 276, 392-398 control and correction of laws, 28, 106, 116-118, 214, 284, 306 defence against aggression of public authorities, 99, 122 functions of, 168, 299, 311 independence and powers. See Judiciary judicial review. See Judicial review jurisdiction of, 402-403 Rule of Law, 168, 295, 306, 309 Special Court. See Special Court Crime definition, 152 lawyers, by, 328-329, 351 white collar. See Corporate misconduct **Criminal offences** computer crime. See Computer crime convictions for, 13 curtailment of jurisdiction of civilian courts in Chile and Uruguay, 14 white collar crime. See Corporate misconduct **Criminal Procedure Code** unconstitutional provision, 106, 402 Crown privilege. See Public interest immunity (PII) Cyber laws. See also Computer crime formulation of, 361-362, 372

Data protection laws, 84, 144 Securities Industry (Central Depositories) Act 1991, 139 de Bracton, Henry, 26, 309 Democracy, 16, 23, 88, 102 checks and balances. See Constitutional democracy equality. See Equality freedom of information in. See Freedom of information government by laws, right to, 16, 50 meaning of, 30, 88 parliamentary. See Parliamentary democracy supremacy of law and democratic values, 3-4, 24, 30, 46 workings of, 23, 28, 30, 64-65, 89-94, 342-343 **Democratic society** constitutional principles in, 38, 42 constitutional monarchy, 6-7 development of, 25, 43, 50, 103, 342-343 right of public to information, 50, 53-54, 63-68 Denning, Lord, 57, 60, 69, 132-133, 188, 197, 309 Detention preventive laws, 31 Devlin, Lord, 190 Dewan Bahasa dan Pustaka, 324 Dewan Negara arrangements under Constitution, 109

Dewan Negara (*cont'd*) arrangements under Constitution (cont'd) passing of legislation, 20-21, 111 obligations to interests of people, 64 Dewan Rakyat arrangements for constitutional democracy, 109-112, 344 consultation with electorate, 114 party system and opposition, 112 legislation passed by, 20-21, 272 majoritarian principle, 30, 64, 112-113 obligations to interests of people, 64, 114 Dewan Undangan, 258 Dicey, Professor, 16-17 Disraeli, Benjamin, 38 Doctors acting in best interests of person, 237-238 doctrine of necessity, 235-236, 238 patient consent to treatment, 232-240 disclosure of necessary information, 218, 232, 240 doctrine of informed consent, 242-243 refusal of treatment, 225 professional obligations, 170, 179-180, 183, 219 special relationship between doctor and patient, 219-220, 237 specific ethical issues. See Medicine Documents. See also Public interest immunity (PII) disclosure of, 305 non-disclosure of government, 51, 76-80

Documents (cont'd) non-disclosure of government (cont'd) affairs of state, 78 Cabinet discussions, 78, 83 medical reports and police records, 79, 83 unpublished official records, 76 Drug trafficking mandatory death sentence, 31

Economic issues, 42, 368–369 Education

Anglo-Malaysian relationship, 345-346 developments in tertiary courses, 352-353 foreign universities in Malaysia, 362-363 information technology, impact on, 372 - 373interest of Sultan Azlan Shah in, 87, 248, 307, 310, 345 professional training, questions concerning, 363 training of lawyers. See Legal training **Election Commission**, 392 Electronic legal research. See Legal research Emergency Ordinance, 39-40, 386-387 Engineers conduct of, 211 ethical, 172-174, 179-180 regulations on professional conduct, 173 - 174duty of care, 198-199, 205

Engineers (*cont'd*) duty to client, 186, 197 implied duties, 186-188, 211 duty to community, 177-180, 211 duty to others, 174-177, 211 employment contracts of foreign engineers, 181-183 implied terms, 191-193 plans and drawings, copying of, 174-177 product liability, 208-210 professional negligence, 183-186, 187, 201, 206 actual damage, 205-210 Anns' case, 202-103, 207, 212 concurrent liability, 195-196 defective construction, 201–205, 207 - 210economic loss, 203, 205, 212-213 law of, 200-201 liability of builder for acts of subcontractor, 204, 210-211 liability to third parties, 197-201 retreat from concurrent liability, 196 registration of, 180-183, 185 remedial work, 204-205 third parties, negligence of, 203-211 English constitutional law, 17, 345 history of development, 25-26, 255-256 relevance to Malaysian law students, 339, 345 Westminster system, 119-120, 249, 322, 330 Environmental concerns, 177-178, 373-374

Equality

citizens, of, 34, 36 climates of freedom, 37-45 national independence. See National independence Ethics, 8 business, importance in, 126, 150, 158-160 banking institutions, 161-163 corporations, 127-128, 133, 135, 145 codes of, 128, 145-146, 173 computer misuse, ethics to prevent, 144 engineers. See Engineers lawyers. See Lawyers medical issues, 179-180, 218, 221-244 abortion, 220-221, 224, 226, 238 birth and death, 224-226 euthanasia, 179, 224 handicapped child, 226 in vitro fertilisation (IVF), 225, 226-232 mentally handicapped people, 224, 235 sterilisation, 224, 238-239, 240 suicide, 224, 377 surrogacy, 224, 225, 226-232 terminally ill people, 224, 225 Evidence admissibility of, 77-78, 305 common law rule, 76 non-disclosure of government documents. See Public interest immunity (PII) privilege under Evidence Act 1950, 76-79

Executive, 6, 16, 112, 276 doctrine of separation of powers, 27, 95, 103–110, 117, 120, 343 excess of power, 28–29, 62, 64–65 restriction of, 58–59, 65, 90, 296 ministerial responsibility, 107–109 obligations to ensure open government, 63–64, 110–111 official secrets powers, 62–63 classification of certain matters, 61–62 parliamentary control of, 90, 112 press, controls on freedom of, 56–57, 58–59 security and peace of nation, 59

Federal Constitution. See Constitution Federal Territory, 268, 269 **Financial matters** banking. See Banks development in Malaysia, 368-369 growth of international finance law, 356 regulation by government, 111, 126 company law, 129-130, 136-137 trends in legal practice, 349-350 **Financial services** computers, reliance on, 139 misuse of on-line computer systems. See Computer crime Firearms unlawful possession of, 31 Franks Committee, 60-61, 63

Fraud and deception business, in, 126, 128, 129, 135, 138-139, 156, 164-165 computer related, 140-141 corporate misconduct. See Corporate misconduct cost of, 155-157 insider trading, 133-135, 165, 320 Free speech. See Freedom of speech Freedom of information, 50-54 access to information, 52-55, 59-60, 63, 79 - 81balance between interests of State and individual, 51-52, 76-77 Official Secrets Act. See Official secrets public interest immunity. See Public interest immunity (PII) legislation, 50, 67, 81 Australia, in, 66 Canada, in, 56, 66, 67 need for in Malaysia, 2, 50, 67, 81 New Zealand, in, 66-67 United Kingdom, in, 83-84 United States of America, in, 65–66 press. See Freedom of press right to know, 43, 50-53, 58, 63, 92, 332 meaning of term, 52-53 rights of public, 50, 53-54, 63-68 rights of individual, 53, 58, 68-75, 84 legitimate expectations doctrine, 71-75,82 truth, access to. See Truth

Freedom of press, 2, 54-60, 84 abuse of, 57–58 attempts by English courts to maintain, 55 contempt of court, 84 controls on, 56-57, 58-59 investigative reporting, 58 irresponsible reporting, 55–56 laws relating to, 84 legal right of reply, 56 Official Secrets Act. See Official secrets role of press, 54-55 duty of editors and reporters, 57-58 unfettered freedom, effect of, 55-56 Freedom of speech, 246, 284 free expression, right of, 54, 57-58, 93, 246 press. See Freedom of press right of free speech, 93, 284 right to be heard, 54, 68-75 Fuller, Thomas, 15 Fundamental rights Constitution, under, 16, 23-24, 30, 63, 85, 375-376 protection of personal data, 84 right of free expression. See Freedom of speech right to know. See Freedom of information upholding, 3, 18, 84, 374-376

General Agreement on Tariffs and Trade (GATT), 356 Getty, Paul J, 159 Gibbs, Professor Harry, 295-296 Gilmore, Sir Ian, 345 Globalisation challenges of, 337-341, 370-372 cross-cultural exposure, 347-348 education, of, 352-356, 371 information technology, 372-373 on-line legal research, 325-326 legal services, 356-357, 371 advertising of, 358-359 strengthening relationships, 345-347 God, 224, 225 authority for making laws, as, 32 lawyers' responsibility to, 380 proclamation of independence in name of, 41 status of King James I under, 26, 309 Goff, Lord, 135, 239 Governance corporate governance and professional ethics, 8 definition, 8 good governance, 2-3 mandate to govern, 92 role of Cabinet ministers, 7, 108-109 Government Constitution, under. See Constitution checks and balances. See Constitutional democracy constitutional monarch, role of. See Constitutional monarchy

Government (*cont'd*) democratic. See Parliamentary democracy dismissal by Parliament, 112 election of, 90-91, 213 federal systems, 105 federation of States, 38-39, 105 general elections, 265-266 intervention into lives of citizens, 28 laws, of, 31, 95 majority, rule by, 100, 112-113, 115 oaths, 26-27 open government, 66-67, 80-81, 83 obligations of legislature, executive and judiciary to ensure, 63-64 privilege. See Public interest immunity (PII) suspension of, in interests of national security, 92 Governors functions of, 252-253 term of appointment, 252 Groves, Professor, 278

Habeas Corpus availability of remedy, 14 Hari Raya celebrations, 279 date for, 270–272 Human rights, 3 fundamental. See Fundamental rights Hussein Onn, Tun, 247

Immunities of Rulers removal of, 32-33, 388 Independence. See National independence judiciary, of. See Judiciary Information technology, 372–373, 381 Insider trading, 129, 133-135, 165, 320 abuse of power, 134-135 Convention on, 133 international co-operation, 133 receiving bribes, 134-135 Integrity business, 164 independence of Bar and, 312-314 lawyers. See Lawyers Intellectual property, 356 Islam fatwas, issue of, 269-272 Head of Religion of, 252, 268-269 extent of role, 253-254, 269 Islamic family law, 322–323 monarchy, tolerance of, 253, 335 Mufti, power of, 269-270 National Council of Religious Affairs, 270 Rulers, role in, 254, 269-271, 283

Jain, Professor MP, 62, 81 Jennings, Sir Ivor, 256–257 Johnson, Samuel, 329 Johore, 261 Ruler and Parliament, 272 **Johore** (*cont'd*) Sultan's grant of pardons, 273-274 Judges. See also Judiciary allegiance of, 167 appointment, method of, 15, 49, 276, 392-398 creativity of, 292-296 criticism of, 294 doctrine of precedent, 19, 288 doctrine of separation of powers. See Constitutional democracy freedom from extraneous pressures, 15, 49 independence of, 5-6, 14-15, 26, 31, 49, 58-59, 167, 245, 392 natural justice, 73, 82 oath to protect Constitution, 27 power of, 14, 20, 25-26, 31, 41, 401-403 extent of, 106-107, 116-118, 290, 296, 401-403 judicial review. See Judicial review law-maker, as, 5, 20, 27-31, 125, 288 role of, 288-304, 332-333 defender of Rule of Law, 295, 309 expedition of cases, 296, 298-299, 365 interpretative, 300-304, 306 salaries and conditions of service, 15, 49 security of tenure, 15, 49 written judgments, 291, 298, 324 Bahasa Malaysia, in, 299, 323 **Judicial review** control and correction of laws, 28, 105-107, 116-118, 289

index 419

Judicial review (*cont'd*) meaning of term, 27 misunderstanding of power, 29 power of, 27-30, 33, 105, 116 nature of, 33, 41 origins of, 28 production of documents, 79 test of legality of laws, 30-31 Judiciary, 6, 16, 116–118, 332–333. See also Judges doctrine of separation of powers, 27, 43, 95, 103-107, 110, 117, 120, 343 undermining of, 403 extent of judicial power, 106-107, 116-118, 290, 296, 401-403 interpretative role, 300-304, 306 harmonisation of politicians and, 43-44, 343-344 independence of, 2, 5-6, 14-15, 26, 49, 58-59, 74, 105, 116, 245, 290, 309 legal profession and, 312, 348-349 obligations to ensure open government, 63-64 public confidence in, 398-401 purpose of rules, 15, 49 quality of, 14 role of judges. See Judges Iustice, 247, 289, 379, 383 administration of, 377-378 meaning of, 245 social justice, 375, 379

Kauper, Thomas, 158 Kedah, 270, 279 Ruler and Parliament, 272 Kelantan, 279 elections in, 266–268 Ruler and Parliament, 272 King. See also Constitutional monarchy and Yang di-Pertuan Agong fundamental principles, 6, 278 historical background, 253–256 role and powers, 2, 6–7, 250–251, 277–280 rotation of Rulers, 7 term of office, 251 King James I of England, 309 power of, 25–26

Lamin, PCA, 393–397 Lantos, Geoffrey, 159 Law accessibility, 290–292 certainty, 382 common. *See* Common law concept of, 19 authority for, 32 cyber laws, 361–362, 372 definition in Constitution, 19 development of corpus of law, 96 environmental law, 374 equality of citizens under. *See* Equality ethics. *See* Ethics

Law (cont'd) general public, acceptance by, 23-24 globalisation and. See Globalisation government of laws, 31, 95, 306 importance of, 25-26 international finance law, 356 interpretation of, 19-20, 293-296, 300-304 judge-made law, 5, 19-20, 27-31, 125, 214, 288 judicial review. See Judicial review law reform, 322-324, 372-373 procedure for making, 20 statute, 19, 20 supremacy of. See Supremacy of Law trends in legal practice, 349-350 value decisions, 32 versatility of, 367 void, where inconsistent with Constitution, 17, 28, 29 written laws, 18-19, 102, 249, 257-259 Lawyers complaints against, 314-315 criminal offences by, 328-329, 351 ethics, 318, 328-329, 351 expedition of cases, 365, 377-378 globalisation, effects of. See Globalisation legal services, 356-357 advertising of, 358-359 professional obligations, 170, 180, 183, 219, 329, 333-334, 370 duty to maintain supremacy of Constitution, 336, 341

Lawyers (cont'd) professional obligations (cont'd) integrity, 211, 313-315, 318-321, 328-329, 333-334, 379, 383 moral character, 379-381, 383 public perception of, 357-358 research of cases. See Legal research responsibilities as, 319-321 Lawsearch, 325, 326 Legal profession Bar, independence of, 312-315, 340, 348-349 changes in, 340, 356-357, 370, 377 duty to society, 340, 376-380 duty to uphold Rule of Law, 340-341, 376 global legal services, 356-357 integrity, professionalism and dedication, 333 law reform, 322-324, 372-373 Singapore, effect of link to, 316-318 training of. See Legal training trends in legal practice, 349-350, 377-378 Legal research, 325-326 Clirs, 326 decisions of other Commonwealth countries, 326-327 Lawsearch, 325, 326 Lexis, 326 Legal training, 338, 360, 370 challenges to law students, 337-340, 354-356, 363, 379-381 career options, 339

index 421

Legal training (*cont'd*) challenges to law students (cont'd) chambering requirements, 353 developments in tertiary courses, 352-353 English Law, relevance of, 339, 345 foreign universities in Malaysia, 362-363 information technology, 326, 372-373 professional training, 363 Legislature, 6, 16, 88, 105 doctrine of separation of powers, 27, 95, 103-112, 110, 117, 120, 343, 403 fundamental facet of parliamentary democracy, 90-91 judiciary, supremacy of, 105-107, 116-118, 403 harmonisation of politicians and, 43 - 44obligations to ensure open government, 63-64, 110-111 Legitimate expectations, 82 doctrine, 71-75 exercise of discretionary powers, 74 Lego copyright case, 175 Lexis, 326 Libel, slander and sedition laws of, 56, 284 Locke, 104 Loss, Professor, 133–134

Malacca, 252 Head of Religion of Islam in, 268–269 Malays, 278, 330-331, 391 dominant group, 38 history and tradition, 39, 277-279 Malaysian society Bangsa Malaysia, concept of, 368-369 composition of, 38, 40, 255-256, 277-279, 330 democracy in, 342-343 incorporation of unique features in Constitution, 4, 7, 277-278, 330-331 Marriage law reform, 322-323 Medicine. See also Doctors disclosure of necessary information, 218, 232, 240 doctor acting in best interests of person, 237 - 238doctrine of necessity, 235-236, 238 ethical issues, 179-180, 218, 221-222, 232-244 abortion, 220-221, 224, 226, 238 birth and death, 224–226 euthanasia, 224 handicapped child, 226 in vitro fertilisation (IVF), 225, 226-232 mentally handicapped people, 224, 235 sterilisation, 224, 238-239, 240 suicide, 224, 377

Medicine (*cont'd*) ethical issues (cont'd) surrogacy, 224, 225, 226-232 terminally ill people, 224, 225 law, relevance to, 221-224, 227, 234 medical negligence, 220, 226, 231-232 patient consent to treatment, 232-240 doctrine of informed consent, 232, 242 - 243refusal of treatment, 225 right to know. See Freedom of information special relationship between doctor and patient, 219-220 Menteri Besar functions as Chief Minister, 258, 272 discretionary powers, 259 Kelantan, in, 267 prerogative role of Sultan in appointment of, 263-264 problems regarding nominations and appointments, 260-265 Datuk Abdul Rahim Abu Bakar, 260 Datuk Haji Ahmad Razali, 262-265 Tan Sri Ghazali Jawi, 260 Tengku Ariff Bendahara, 260 Merdeka Constitution, 255-256, 279, 386, 390 Monarchy. See Constitutional monarchy Montesquieu, 104, 110 Multimedia Super Corridor (MSC) concept of borderless trading environment, 362

Multimedia Super Corridor (MSC) (*cont'd*) functions of, 361–362, 372 Muslim faithful, 32. See also Islam

National Council of Religious Affairs role, 270 National independence, 321, 368, 400 creation of Malaysian Constitution, 38-39, 41 economic liberation, 42-43 formation of national mind, 38-39 liberal approach, 40-42 political difficulties, 39-40 population, pollution and other social problems, 42, 44 proclamation of independence, 41, 43 National language, 21, 277-278, 323, 330 books published in, 324 judgments in, 299, 323 Natural justice. See also Justice rights of individuals to, 68-75, 334 rules of, 69 application to forfeiture cases, 75 legitimate expectations doctrine, 71-75,82 Natural resources environmental degradation, 177-178, 373-374 preservation of, 177-179, 374 Negeri Sembilan Abdul Rahman, Tuanku, 39

Negeri Sembilan (*cont'd*) Ruler and Parliament, 272 Yang di-Pertuan Besar of, 251–252 Negligence. See Professional negligence

Oaths

government ministers, by, 26 Yang di-Pertuan Agong, by, 26 members of government, by, 27 Official secrets, 60–68, 83 classification of certain matters as, 60, 61–62, 76 Franks Committee, 60–61, 63 legislation, 60–63 scope of Malaysian Act, 61–63 scope of English laws, 60–61, 63 restrictions on access to information, 55, 60 Oliver of Aylmerton, Lord, 176, 207, 209–210

Pahang, 260, 270 Ruler and Parliament, 272 Sultan of, 275–276, 386 Pakistan democracy in, 342 taxation of judges, 14 Pardons, 75, 273, 391 Parliament dissolution, 265–268 functions and role, 17–18, 21–22, 31, 90, 109–112, 386

Parliament (*cont'd*) functions and role (*cont'd*) control of national expenditure and taxation, 111 dismissal of Government, 112 jurisdiction of, 18, 21, 31, 403 obligations, 63-65, 110 powers, 18, 20-22, 90-92, 107, 109-112, 344 constitutional, 17-18, 21-22, 31, 109-115, 386, 403 executive, over. See Executive legislative, 20-22, 27, 110 mandate to govern, 92 procedure for making laws, 20-21, 110, 386 Rulers and Royal assent, 386-387 Parliamentary democracy, 89-94, 109-115 choice of government, 213 distinguishing feature, 90 evolution in England, 89 general elections, 265-266 meanings, 89-94 party system and opposition, 112-114 Pearce, Lord, 105-106 Penang, 252 Head of Religion of Islam in, 268-269 Perak, 38, 252, 260, 271, 285, 287 economy, 319 Ruler and Parliament, 272 Perlis, 251 Ruler and Parliament, 272 Personal injury, 200, 204–206

Personal injury, (*cont'd*) actual injury, 206 Philippines democracy in, 342 Phillips of Worth Matravers, Lord, 55 **Police Department** crime detection strategies for, 163-164 Ponting, Clive, 61 Poverty issues, 43 judicial attempts to eradicate, 44 **Prime Minister** appointment of, 259-265 role of Yang di-Pertuan Agong, 258-260 first, 39, 260 functions, 6, 386, 394-398 legal training, 338 Privacy right to, 55, 84 Privilege, 305 common law rule, 76 Crown. See Public interest immunity (PII) **Privy Council** abolition of appeals to, 33, 282, 322, 337 judgment in Housing Society case, 135 judgments on minority shareholders' rights, 137 Lego copyright case, 175-176 observations of ---right to be heard, 69

Privy Council (cont'd) observations of (*cont'd*) separation of powers in Sri Lankan constitution, 105-106 Professional negligence, 183–186 basis of law, 200-201 concurrent liability, 195-196 retreat from, 196 damages for, 202, 206 actions for defective construction, 201-205, 207-210 cost of future remedial work, 204-205 duty of care, 198-199, 202 economic loss, 203, 205, 212-213 liability to third parties, 197-203 actual damage, 205-210 Anns' case, 202-103, 207, 212 medical negligence. See Medicine negligence of third parties, 203-211 liability of builder for acts of subcontractor, 210-211 product liability, 208-210 Professional obligations, 121 accountants, architects, doctors and lawyers, 170, 179-180, 211, 219, 328-329 ethics of engineers. See Engineers ethics of lawyers. See Lawyers Public Accounts Committee, 111 **Public interest** concept of, 59, 77 general public's right to access information in, 53–54, 305

Public interest (cont'd) non-disclosure in, 67, 75–77, 82–83 professionals and, 121 Supreme Court appeals in, 364
Public interest immunity (PII), 82 Crown privilege, 76, 80, 82 claim for, 77 non-disclosure of government documents, 51, 67, 76–80 court powers, 77 recent developments under English law, 82–83

Queen Anne, 272 Question of law, 31

Raja Nazrin Shah, His Royal Highness, 216 Raja of Perlis, 251 Reich, Professor Charles A, 379–380 Reid Commission, 38, 390 Reid, Lord, 38 Rukunegara objectives, 40, 342, 343 proclamation, 39–40 Rule of Law concept of, 12–14, 120, 306, 379 courts and, 168, 295, 303, 306 good governance, 2–3 ideal of, 2–3, 12, 13–14, 49, 379 **Rule of Law** (cont'd) ideal of (*cont'd*) duty of legal profession to uphold, 340-341, 376, 379, 383 Malaysia, adherence in, 15, 74, 118, 119-121, 331 Rulers. See also Sultan arrangements for, 7, 251-253, 272, 280 hereditary aspect, 251-252 rights of succession, 252 Conference of. See Conference of Rulers discretion, 258 historical background, 253, 255-256 immunities powers, removal of, 32-33, 388-389 number of, 251 powers, 7, 26-27, 75, 251-253, 256-258, 261-262, 272, 281, 386-389 advising role, 273-274, 384-385, 390-398 Conference of. See Conference of Rulers consent, 21, 388, 390-398 election of monarch, 251 granting of pardons, 75, 273, 391 limitation by Constitution, 26-27 proper execution of duties, 2 religious role, 254, 269-271, 283 Royal assent, 386-387

Sabah, 252, 391 Head of Religion of Islam in, 268 - 269Sarawak, 252, 391 Head of Religion of Islam in, 268-269 Scarman, Lord, 187-188, 196 Sedition. See Libel, slander and sedition Selangor Menteri Besar, nomination of Datuk Haji Ahmad Razali, 262-265 Ruler and Parliament, 272 Separation of powers. See Constitutional democracy Shakespeare, William, 377 Shareholders pressure by, 161 protection of minority, 135-139 rights and remedies of minority shareholders, 136-138 situations of fraud against, 138-139 **Singapore**, 316–318 Sinnadurai, Professor Dato' Seri Visu, 1, 48, 285, 308-309, 321 Slander. See Libel, slander and sedition Smith, Professor JC, 307, 360 Sofer, David, 165 South Korea democracy in, 342 Special Court, 388 appointment of members to, 391 establishment of, 33, 281-282, 388

State Constitutions, 258, 386 Chief Minister. See Menteri Besar provisions for legislative powers of Assemblies, 21 Ruler, power of, 272, 386-387, 389 State Legislatures, 18 Dewan Undangan, 258 jurisdiction, 18-19 legislative, 21 Kelantan, dissolution in, 267-268 State Rulers, See Rulers Suffian, Tun Mohamed, 18, 251, 269, 285, 337, 398 Sultan. See also Rulers historical background, 253, 254-256, 330 roles. See also Yang di-Pertuan Agong prerogative role in appointment of Menteri Besar, 263-264 sanctioning of fatwas, 270 Sultanate system, 280, 330, 344-345 title, use of, 251, 254 Sultan Azlan Shah. See Azlan Shah, His Royal **Highness Sultan** Supremacy of law, 13-33, 46, 120, 306, 331 concept of, 3-5 15-17, 31-32 consequences of, 15-16, 20, 24 democratic values and, 3, 24 meaning of term, 20 Parliament, limitation of powers of, 17-18, 26, 31

Supremacy of law (cont'd) spiritual basis for, 32 Susskind, Richard, 372–373, 381–382

Technological advances, 361 effects of, 361-362 information technology, 372-373 Terengganu Ruler and Parliament, 272 Timbalan Yang di-Pertuan Agong, 274, 390 Torts law of, 19 liability in, 185, 195-196 negligence. See Professional negligence Transparency need for, 2, 333 Truth access to, 52, 79-81 concept of, 80-81 importance of, 32, 52, 80 quest for, 6 Tunku Besar of Tampin, 252

Undangs, 252 United Nations, 374 United Nations Declaration of Women's Rights 1948, 228 United Nations General Assembly, 360 Vaskevitch, Nahum, 165 Vision 2020, 368–369

Walton, Clarence, 158

Westminster model of government, 119–120, 249, 322, 330 White collar crime. See Corporate misconduct Whitman, Walt, 40 Wilberforce, Lord, 135, 137 Woolf, Lord, 378, 381 World Trade Organisation (WTO), 356, 360–361

Yang di-Pertua Negri (Governors) functions of, 252–253 term of appointment, 252 Yang di-Pertuan Agong. See also King constitutional arrangements, 109, 272–276, 281, 384, 386, 397–398 assent to legislation passed by Parliament, 20–21, 272, 385, 386–389 oath by His Majesty, 26 constitutional monarch, powers as, 7, 251–252, 278–280, 384 discretion in withholding consent for dissolution of Parliament, 265–268 discretion regarding appointment of Prime Minister, 259–260, 386

Yang di-Pertuan Agong (cont'd)

election or removal of, 251, 252, 274–276 Head of Religion of Islam, 252, 268–269 jurisdiction, 252 oath by government ministers to, 26 office, 272, 278–280 first holder of, 39, 261 Yang di-Pertuan Agong (cont'd) office (cont'd) term of, 251 proclamation of Rukunegara, 39–40 Yang di-Pertuan Besar of Negeri Sembilan, 39, 251 appointment by Governors, 252