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Text of Opening Address delivered at
the 14th Malaysian Law Conference,
Kuala Lumpur Convention Centre,
29 October 2007.



Fifty Years of Constitutionalism and the Rule of Law

His Royal Highness Sultan Azlan Shah
Sultan of Perak Darul Ridzuan

This year marks the 50th year of our nation's Independence. It is also the 50th year of our Merdeka Constitution.

Malaysia and its people have every reason to celebrate this joyous occasion as the country prospers as a constitutional democracy with a constitutional monarchy in the form as established by the Merdeka Constitution in 1957.

Not all countries that achieved their freedom at the end of the colonial period are today able to celebrate their independence with pride. Some are under military rule, whilst others have had their institutions undermined or even abolished.

The 50th anniversary of our Independence is therefore an appropriate moment for all of us to reflect upon the strength of our constitutional system. As we rejoice in our success, it is important to be alert to the pitfalls of failure if proper regard is not given to our constitutional mechanisms.



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—the principle of
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¹ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at 188. |

We must ever be mindful that written constitutions are mere parchment pieces. It is important that there must be, in the hearts and minds of those who are entrusted to administer and uphold the Constitution, a belief in the values and principles that animate the august document.

I had occasion to observe when sitting in the Federal Court in 1977 that “the Constitution is not a mere collection of pious platitudes”. I spoke then of the three essential features of our Constitution. I said:

It is the supreme law of the land embodying three basic concepts: One of them is that the individual has certain fundamental rights upon which not even the power of the State may encroach.

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

The third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the Executive, Legislative and Judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.¹

The prescription that “we are a government of laws, not of men” describes the basic principle that runs through our entire Constitution—the principle of the Rule of Law.

The Rule of Law is the defining feature of democratic government. In delivering the 11th Tunku Abdul Rahman



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² “Supremacy of the Law”, in *Constitutional Monarchy, Rule of Law and Good Governance* (2004) at pages 13 – 14.

³ Speech delivered on 13 April 2004, reproduced in *The Official Book Launch: Constitutional Monarchy, Rule of Law and Good Governance & The Sultan Azlan Shah Law Lectures: Judges on the Common Law* (2004), at page 21.

Lecture in November 1984, I again defined it as follows:

“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 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.”²

In a speech delivered in Kuala Lumpur in April 2004, Lord Woolf spoke of the Rule of Law:

The Rule of Law is the rule by the laws that govern a true democracy. They are the laws that provide for a proper balance between the protection of human rights and the interests of the State. Laws which an independent and responsible judiciary can enforce to protect all members of society from abuse of power.³

The reference by Lord Woolf to the role of the judiciary is highly significant. I wish to state with all fortitude that without a reputable judiciary—a judiciary endowed and equipped with all the attributes of real independence—there cannot be the Rule of Law.

All countries, including those that are totalitarian regimes, have courts. But as I observed previously:



In matters concerning
the judiciary,
it is the public perception
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A judiciary loses
its value and service
to the community
if there is no
public confidence in
its decision-making.

⁴ “Supremacy of the Law”, note 2 above, at page 14.

⁵ Patrick Devlin, *The Judge* (OUP, 1981), at page 3.

The [mere] existence of courts and judges in every ordered society proves nothing; it is their quality, their independence, and, their powers that matter.⁴

In matters concerning the judiciary, it is the public perception of the judiciary that ultimately matters. A judiciary loses its value and service to the community if there is no public confidence in its decision-making.

In this regard the principal quality that a judiciary must possess is *impartiality*. Lord Devlin said of “judicial impartiality” that it exists in two senses—the reality of impartiality and the appearance of impartiality. He emphasised that the appearance of impartiality was the more important of the two.⁵

Impartiality also means that judges are not only free from influence of external forces, but also of one another. No judge however senior can dictate to his brethren as to how a decision should be arrived at.

It is of the essence of a judge’s character that he must be a person of unquestionable integrity who brings an unbiased mind to his task. Like Caesar’s wife, he should be above suspicion.

It is said that public confidence in the judiciary is based on four evaluating criteria. They are:

- (1) the principle of independence of the judiciary;
- (2) the principle of impartiality of adjudication;



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⁶ See speech by Lord Hope of Craighead, CMJA Edinburgh 2000 Conference Report, at page 89.

⁷ “The Role of Constitutional Rulers and the Judiciary: Revisited”, in *Constitutional Monarchy*, note 2 above, at page 400.

⁸ NH Chan, *Judging the Judges* (Alpha, 2007), Chapter 5 at pages 115 et seq.

⁹ See Wu Min Aun, “The Judiciary at the Crossroads” in *Public Law in Contemporary Malaysia*, Wu Min Aun (ed), at pages 76 et seq.

¹⁰ “Four Decades in the Law—Looking Back” in *The Constitution of Malaysia: Further Perspectives* (OUP, Singapore, 1986) at page 215.

- (3) the principle of fairness of trial; and
- (4) the principle of the integrity of the adjudicator.⁶

How does our judiciary measure today against these criteria?

Sadly, I must acknowledge there has been some disquiet about our judiciary over the past few years and in the more recent past. In 2004, I had stated that it grieved me, having been a member of the judiciary, whenever I heard of allegations against the judiciary and the erosion of public confidence in the judiciary.⁷

Recently there have been even more disturbing events relating to the judiciary reported in the press. We have also witnessed the unprecedented act of a former Court of Appeal judge writing in his post-retirement book of erroneous and questionable judgments delivered by our higher courts in a chapter under the heading “When Justice is Not Administered According to Law”.⁸ There are other serious criticisms.⁹

I am driven nostalgically to look back to a time when our judiciary was the pride of the region, and our neighbours spoke admiringly of our legal system. We were then second to none and the judgments of our courts were quoted confidently in other common law jurisdictions. As Tun Suffian, a former Lord President of the then Federal Court, said of the local judges who took over from the expatriate judges after Merdeka, that the transformation was without “any reduction in standards”.¹⁰



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Admittedly society is more complex today and the task of the judges may be more difficult than what it was before, but the values I speak of are universal and eternal.

There is no reason why judges with the assured security of tenure they enjoy under the Constitution should not discharge their duties impartially, confidently and competently.

Judges are called upon to be both independent and competent. In these days, judges must be ever mindful that the loss of independence can come from many sources, and not just from the Executive. Therefore, judges must piously resist the lure of socialising with business personages and other well-connected people. They may discover at their peril that they have compromised themselves in the cases that come before them with the unedifying spectacle of recusal applications.

Nothing destroys the confidence the general public or the business community has in the judiciary more than the belief that the judge was biased when he decided a case, or that the judge would not be independent where powerful individuals or corporations are the litigants before him.

Confidence in the judiciary may also be eroded where the business community perceives incompetence in decision-making. A judgment in a banking or commercial transaction that is contrary to established norms or which is incomprehensible in its reasoning is bound to give rise to suspicion and loss of confidence.



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¹¹ Published in the Report entitled “Doing Business 2008”. |

It therefore becomes apparent, that our attempts to establish ourselves as a leading financial and commercial center will fail if we do not have a competent judiciary to decide on complex commercial disputes. In this regard, it is of utmost importance that the foreign investor has faith in the competence and integrity of our judiciary.

The international foreign investor also expects a speedy resolution of their cases before the courts. Delays cause loss of profits to the business community. In the recent World Bank survey on resolution of commercial disputes, Malaysia ranks poorly, 63 amongst 178 economies.¹¹ A similar report by the US State Department warns American businessmen to be wary of the slow process of adjudication of cases before the Malaysian courts. This is indeed a poor reflection on our courts.

Countries such as Singapore and Hong Kong, who have a similar legal system and who share similar laws, and whose judges and lawyers are trained as ours, are ranked in these surveys as amongst the best in the world (Hong Kong is placed first and Singapore ranks as fourth in the world).

The reason is obvious: these countries have undertaken major reforms in their court structure and procedures and have introduced more efficient and transparent commercial courts so as to attract the foreign investor.

Maybe it is also time for us to consider such changes in our legal system and introduce a strong central commercial



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court in Putrajaya as in London, with specially trained judges who are familiar with the new and ever changing commercial laws and their developments, so that we too can become the center for the resolution of commercial disputes in the region.

I should point out that mere cosmetic changes alone would not suffice. If we wish to achieve this goal, it is imperative that major reforms are introduced. Many other countries have taken such steps to establish specialised commercial courts. Recently, the Dubai Commercial Court (where one of our own former Chief Judge has recently been appointed to sit as a judge in this new court), and the Qatar Commercial Court have been established.

I know that judging is an arduous task calling for a good mind and a capacity for hard work. The inevitable consequence of incompetence is delayed judgments and backlog in cases leading to all round dissatisfaction.

Only last week, I read in a latest Malaysian law report that a case of medical negligence involving the death of a lawyer took 23 years to reach the Court of Appeal. Similarly, there have been reports that some judges have taken years to write their grounds of judgments involving accused persons who had been convicted and were languishing in death row.

Surely such a situation cannot be tolerated in any progressive nation. Heavy is the head that is responsible for the administration of justice.



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A Bar that is riddled
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¹² “The Legal Profession and Legal Practice”, in *Constitutional Monarchy*,
note 2 above, at page 315.

It will also be appropriate for me to say a few words on lawyers.

The administration of justice is not just the role of the judiciary. I had said previously in July 1984 on the occasion of a farewell dinner speech to the Bar Council on leaving office as the Lord President, that there cannot be an independent judiciary without an independent Bar. I stated further that the judiciary cannot function without the legal profession.¹²

This symbiosis calls for a proper understanding of the relationship between the Bench and the Bar. The Bar and its leadership must ensure there is a high standard of integrity and ethics among its members. A Bar that is riddled with bad practices cannot assist the administration of justice.

In this respect the relationship between judges and lawyers must be a proper and correct one. As I have said earlier, judges are supposed to be no respecters of persons who appear before them. This rule applies not only to litigants but also to lawyers. It is not just a matter of prudence and good practice, but fundamentally one of ethics.

As is often said, there are good lawyers and bad lawyers. Whilst the majority of lawyers discharge their duties as officers of the court with professionalism and dedication, there have been cases of some others who have brought disrepute to the legal profession. There have been allegations against some lawyers that in clear dereliction of



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their responsibilities, they have either misled the courts, or attempted to choose the judges or courts for their cases to be heard so as to obtain a favourable decision in their client's favour. This is a serious interference with the administration of justice and the process of the court.

There is one further important point that I feel compelled to say.

This deals with a judge's quality in decision-making. We in Malaysia live in a multi-cultural and multi-religious society. Our founding fathers accommodated this diversity into our Constitution that is reflected in the social contract, and saw this diversity as strength.

Judging in a diverse society is not an easy task. Judges in many parts of the world face similar difficulties. Those of you who were present at the lecture delivered by Justice Albie Sachs at the Second Tun Hussein Onn Lecture last week will know how the Constitutional Court of South Africa, as the guardian of the constitution, wrestle to arrive at a just decision when dealing with issues relating to diversity or discrimination.

Judges in Malaysia must be ever mindful that they are appointed judges for all Malaysians. They must be sensitive to the feelings of all parties, irrespective of race, religion or creed, and be careful not to bring a predisposed mind to an issue before them that is capable of being misconstrued by the watching public or segments of them.



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¹³ Tun Suffian, note 10 above, at page 216.

¹⁴ “The Role of Constitutional Rulers and the Judiciary: Revisited”, in *Constitutional Monarchy*, note 2 above, at page 401.

I am reminded of the proud accolade of the late Tun Suffian in his Braddell Memorial Lecture in 1982, when speaking of the Malaysian judiciary to a Singapore audience he said:


In a multi-racial and multi-religious society like yours and mine, while we judges cannot help being Malay or Chinese or Indian; or being Muslim or Buddhist or Hindu or whatever, we strive not to be too identified with any particular race or religion – so that nobody reading our judgment with our name deleted could with confidence identify our race or religion, and so that the various communities, especially minority communities, are assured that we will not allow their rights to be trampled underfoot.¹³

I have found it necessary to speak at some length on these matters because it is my earnest hope that the Malaysian judiciary will regain the public's confidence and it will once again be held in the high esteem as it once was held.

In conclusion, I wish to say, as I have said on a previous occasion, “in the judiciary, people place their trust and hope”.¹⁴

It now gives me great pleasure in officially declaring open the 14th Malaysian Law Conference. I wish all of you a fruitful and meaningful discussion and exchange of ideas. 🍀





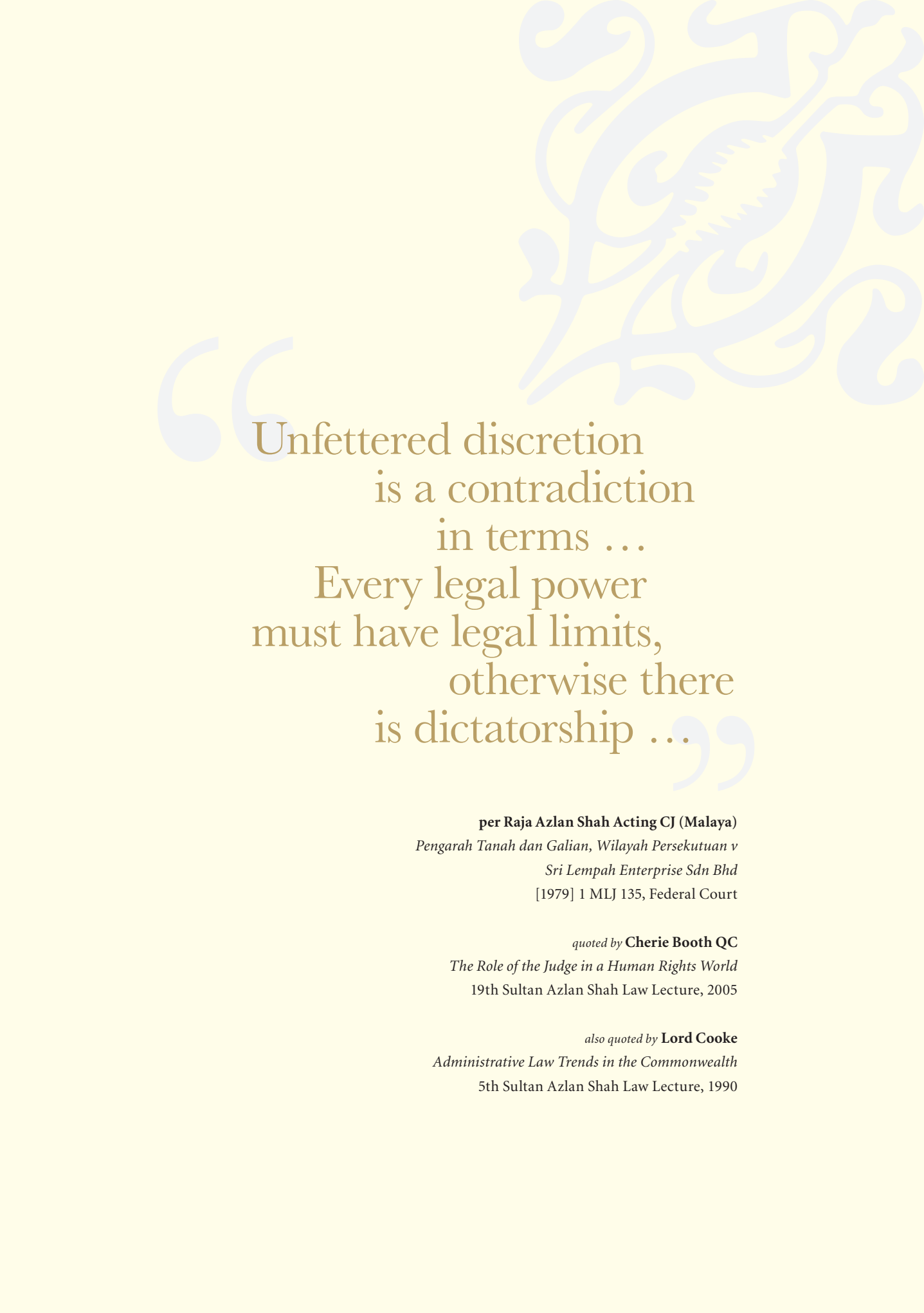
The Conference of Rulers is a constitutional body established under Article 38 of the Constitution with certain executive deliberative and consultative functions.

The executive functions are those of

- (a) electing and removing the Yang di-Pertuan Agong and his Deputy,
- (b) in the matter of religion, agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation as a whole and
- (c) consenting or withholding consent to any law such as a law which affects the privileges, position, honours or dignities [of the Rulers] or a law which alters the boundaries of a state and making or giving advice on any appointment which requires the consent of the Conference ...

Insofar as these executive functions are concerned, the Rulers act in their discretion.

per Raja Azlan Shah Acting LP
Phang Chin Hock v Public Prosecutor (No 2)
[1980] 1 MLJ 213, Federal Court



Unfettered discretion
is a contradiction
in terms ...

Every legal power
must have legal limits,
otherwise there
is dictatorship ...

per Raja Azlan Shah Acting CJ (Malaya)

*Pengarah Tanah dan Galian, Wilayah Persekutuan v
Sri Lempah Enterprise Sdn Bhd*
[1979] 1 MLJ 135, Federal Court

quoted by **Cherie Booth QC**

The Role of the Judge in a Human Rights World
19th Sultan Azlan Shah Law Lecture, 2005

also quoted by **Lord Cooke**

Administrative Law Trends in the Commonwealth
5th Sultan Azlan Shah Law Lecture, 1990

“ 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.

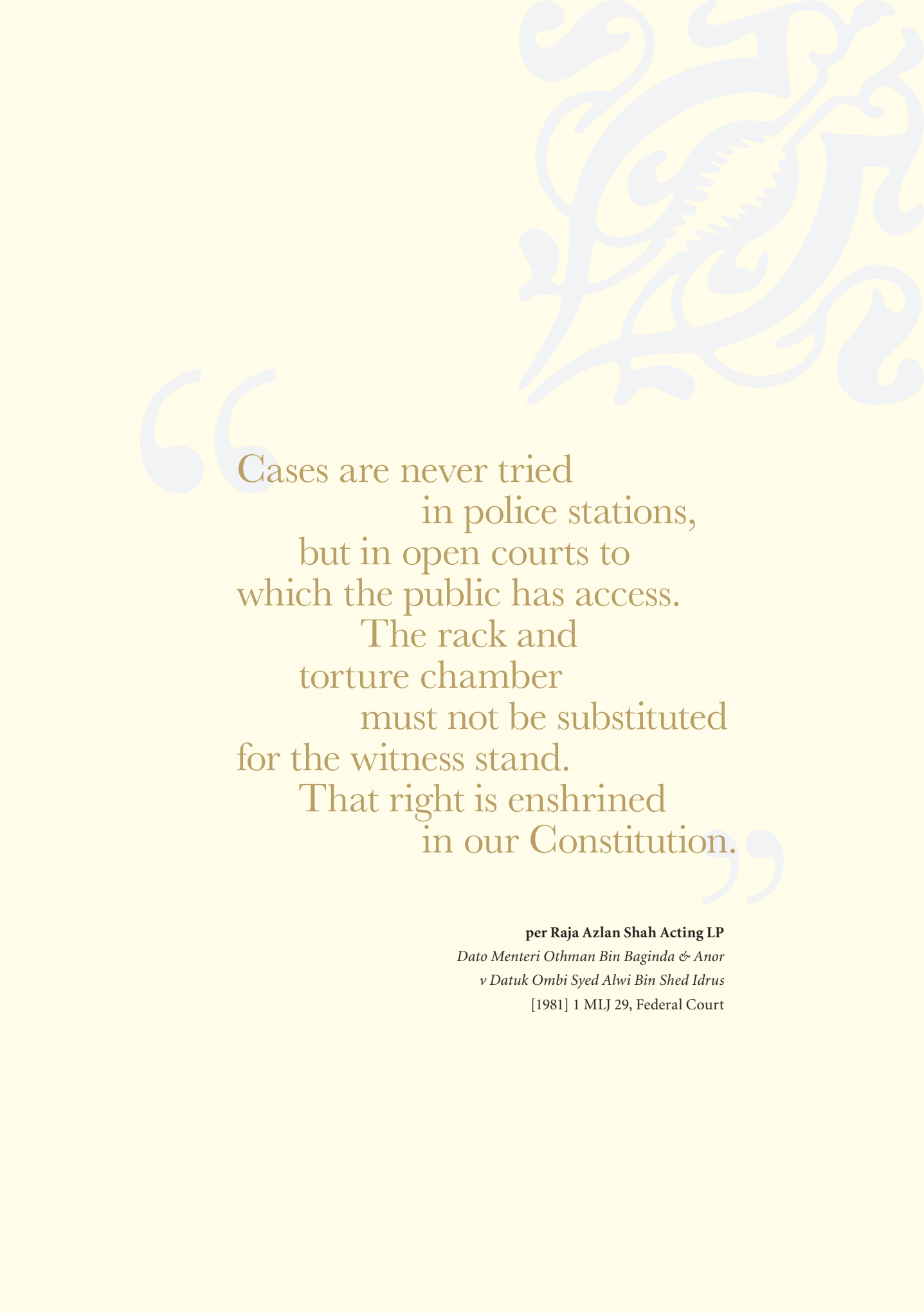
In such countries,
the powers of the three organs
can only exercised
in accordance with
the terms of the constitution
from which such
powers are derived.”

HRH Sultan Azlan Shah

Checks and Balances in a Constitutional Democracy

Harvard Club of Malaysia

19 September 1987, Kuala Lumpur



Cases are never tried
in police stations,
but in open courts to
which the public has access.
The rack and
torture chamber
must not be substituted
for the witness stand.
That right is enshrined
in our Constitution.

per Raja Azlan Shah Acting LP
Dato Menteri Othman Bin Baginda & Anor
v Datuk Ombi Syed Alwi Bin Shed Idrus
[1981] 1 MLJ 29, Federal Court