Human Rights and the Rule of Law: Memories and Reflections*

*Lord Lester of Herne Hill QC***

After an absence of ten years, it is a delightful pleasure to return to your beautiful and hospitable country of diverse peoples, faiths, languages and cultures, a land of abundant fauna and flora, placed in one of the world's most complex, fascinating and economically dynamic regions.

It is a signal honour to give the Suffian Lecture, because of the eminence of previous Suffian lecturers, and, above all, because Tun Mohamed Suffian is deservedly recognised across the Commonwealth as an outstanding jurist who adorned the office of Lord President of the Federal Court of Malaysia, a judge universally admired as a courageous defender of justice under the rule of law. He has many friends among the senior Bench and Bar across the Commonwealth, including his fellow Benchers of the Middle Temple. His name, whether as Tun Suffian or simply as "Suff", is synonymous with justice wisely administered by the independent judiciary. He is a continuing inspiration to younger generations of judges and lawyers wherever his name and judicial and scholarly works are known.

Lord Ackner concluded a recent powerful lecture on judicial independence[1] by recalling the first international conference of Appellate Judges, held in Manila 20 years ago, when Tun Suffian warned delegates present to be on their guard:

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* Editor's Note: This is a reproduction in its original form (except for slight editorial changes) of the lecture delivered by Lord Lester of Herne Hill QC at the Fourth Tun Mohamed Suffian Public Lecture on 17 December 1996 at the Faculty of Law of the University of Malaya, Kuala Lumpur, Malaysia.

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[1] Lord Ackner, "Does Judicial Independence Really Matter in an Advanced Democracy?", John Stuart Mill Institute Lecture, delivered on 11 November 1996, published as "The Erosion of Judicial Independence" *New Law Journal*, 6 December 1996 at p 1789.

> because ... while all governments publicly endorse the principle [of judicial independence], some quietly work to undermine it, and it behoves judges of the world to be on their guard against the erosion of their independence.

That is a warning that applies to every civil society everywhere, not least – as I shall explain – to my own society, which prides itself on being the mother of parliamentary democracy under the rule of law.

In Tun Suffian's essay on the Malaysian judiciary during the first 20 years of independence, published in 1978, in the book which he edited with Professor H P Lee and Professor Trindade on the Constitution of Malaysia, he recalled the contribution made by the Malaysian judiciary that had, in his words, "quietly maintained the supremacy of the Constitution and the rule of law, and determined the matters that have come up before it fairly and impartially, without fear or favour". He continued: "The reputation it enjoys of being able to decide without interference from the executive or the legislature, or indeed from anybody, contributes to confidence on the part of members of the public generally that should they get involved in any dispute with the executive or with each other they can be sure of a fair and patient hearing and that their disputes will be determined impartially and honestly in accordance with law and justice".

That exactly describes my own experience of the administration of justice in Malaysia a decade ago when I enjoyed the privilege of being admitted to the Bar at the High Court of Borneo in Kota Kinabalu, and of representing the Head of the State of Sabah and Datuk Joseph Pairin Kitingan in an important and hard-fought case brought against them by Tun Mustapha, seeking a judicial declaration that he was the validly appointed Chief Minister.

The case involved a bitter struggle for power between rival political parties. It raised important questions of public law, including the scope of judicial review of the decision of the Head of State, the Yang di-Pertua Negeri, to appoint a Chief Minister; the extent to which he was obliged to respect the democratic will of the people, expressed in free and secret elections, when using his power to nominate up to six

members of the State Assembly of Sabah; the principles applicable to the interpretation of a constitution; and the effect in law of coercive political pressure and threats to induce the Head of State to abuse his public powers.

I greatly enjoyed the warm hospitality for which the peoples of Sabah and of Malaysia are famous. The work was arduous but worthwhile; ~~and I~~ was loyally and ably supported by my dedicated team of lawyers. After several weeks I felt completely at home in Kota Kinabalu and was sad to have to leave so many good friends in what had become one of my favourite parts of the world.

The Sabah case was tried by Mr Justice Tan with conspicuous courtesy, independence and impartiality. It is a measure of the quality of his judgment that there was no appeal. The judgment was sufficiently important to have been fully reported in the 1987 volume of the Law Reports of the Commonwealth.[2]

The Sabah case was marred by civil unrest during the trial and afterwards, before Mr Justice Tan's reserved judgment was given. There were demonstrations causing death in Sandakan, and, in Kota Kinabalu, the stoning of cars, arson to a warehouse, and setting off explosive devices around the courthouse, when an interlocutory injunction was being sought. A curfew was imposed and, at one point, it seemed that emergency powers might be brought into operation.

But what profoundly impressed me was that, despite these and other external coercive pressures, the dispute was ultimately resolved not by lawless mob rule and brutish force or political chicanery but by the rule of law. Mr Justice Tan concluded his judgment with these courageous and magisterial words: "the events which occurred at the Istana ... have undoubtedly brought great shame and dismay to all responsible citizens who sincerely believe in the principles of parliamentary democracy practised in our country. What happened is a blatant travesty of this belief. It is to be hoped that events of such

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[2] *Mustapha v Mohammad & Another* [1987] LRC (Const) 16; *Tun Datu Hj Mustapha bin Datu Harun v Tun Datuk Hj Mohamed Adnan Robert, Yang Di-Pertua Negeri Sabah and Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420.

nature will never ever surface again. The Head of State must be allowed to make his judgment quietly, independently and in a dignified manner, as intended by the Constitution". It was a shining example of what Tun Suffian described as a court quietly maintaining the supremacy of the Constitution and the rule of law, and determining the matters that had come up before it fairly and impartially, without fear or favour.

There are obvious perils in translating concepts from one political and legal culture to another. Mr Justice Sedley, one of our outstanding High Court judges, has recently recalled[3] that in Hong Kong "an attempt in the best colonial tradition of demented heroism to codify the English common law (something nobody has yet done in English) in time for the handover in 1997 has foundered on problems of translation. Initial worries about the Mandarin equivalent of issue estoppel and *certiorari* were overtaken by the catastrophic rendering of barrister and solicitor as 'big lawyer' and 'little lawyer' respectively, giving lasting offence to Hong Kong's solicitors and bringing the project ultimately to a standstill". I hope to avoid similar *faux pas* in what I have to say today; but, if I fail, I hope that you will be forgiving.

Malaysia and the United Kingdom share a common legal heritage of parliamentary democracy under the rule of law, interpreted and applied by the independent judiciary, underpinned by an independent legal profession, with respect for fundamental human rights and freedoms regarded, in the words of the report by Lord Reid's Commission in 1957,[4] as essential conditions for a free and democratic society. Those basic human rights and freedoms, derived from the common law, include the right to personal liberty and freedom from arbitrary arrest and detention; the right to freedom of speech and of expression, and to freedom of religion; the right to equal treatment without unfair discrimination; and the right of effective access to justice fairly administered by the independent judiciary.

The universality of those human rights and freedoms is denied by some governments and groups; but their universality is recognised in

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[3] Sedley, S, "Big Lawyers and Little Lawyers" *London Review of Books*, 28 November 1996.

[4] Report of the Federation of Malaya Constitutional Commission 1957, para 161.

the United Nations Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights and other international human rights codes by which the world's democracies are bound. Judicial independence and access to justice are universal human rights in all societies, and they are universally subject to attack and erosion.

What does judicial independence mean? Archibald Cox defined the concept well a decade ago[5] as implying:

> (1) that judges shall decide lawsuits free from any outside pressure; personal, economic, or political, including any fear of reprisal; (2) that the courts' decisions shall be final in all cases except as changed by general, prospective legislation ...; and (3) that there shall be no tampering with the organization or jurisdiction of the courts for the purposes of controlling their decisions upon constitutional questions.

Professor Cox also pointed out that a judge whose decisions are influenced by politics is putting the independence of the courts at risk, and that the judges' obligation to decide "according to law" requires judgments to be based upon:

> a continuity of reasoned principles found in the words of the Constitution, statute, or other controlling instrument, in the implications of its structure and apparent purposes, and in prior judicial precedents, traditional understanding, and like sources of law ... The judge who persistently confuses law with his or her personal values also invites attacks upon judicial independence. In short, the risk to the independence of the courts is the politicization of the judiciary. It can be created by either side.

Lord Browne-Wilkinson argued similarly in a lecture which he gave when he was Vice-Chancellor,[6] that the rule of law requires

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[5] Cox, A, "The Independence of the Judiciary: History and Purposes" originally published in the February 1986 edition of *The San Francisco Barrister*, republished in a modified form in *University of Dayton Law Review*, Vol 21, Spring 1996 at p 566.

[6] Browne-Wilkinson, N, "The Independence of the Judiciary in the 1980's" [1988] *Public Law* 44.

judicial independence not only in the sense of the independence of **individual** judges being free of any pressure from the Government or anyone else as to how to decide any particular case; the rule of law, based upon another vital constitutional principle, the separation of powers, also requires the independence of the judiciary in a **collective** sense, as a separate branch of government. The Lord Chief Justice, Lord Bingham of Cornhill, found this a persuasive argument, in his own recent lecture on judicial independence.[7] Lord Bingham also observed of the protection of the independence of individual judges that:

> The protection accorded to the judges of the higher courts, that they enjoy office during good behaviour and are removable only by an address of both Houses of Parliament, has over the centuries proved an effective constitutional guarantee, since no English judge has been so removed ... It has meant that no judge, when giving judgment or deciding what judgment to give, need concern himself with the acceptability of his decision to the powers that be.

As I shall later explain, and as Lord Bingham warns, that does not mean that there is room for complacency about the threat to institutional judicial independence in the United Kingdom, not the threat of a frontal assault on judicial independence, but of what he described as:

> insidious erosion, of gradual (almost imperceptible) encroachment.

The independence of the legal profession is part and parcel of the independence of the judges.

In your case, as in the case of almost all other democratic countries of the Commonwealth, fundamental rights are specifically guaranteed by the supreme and paramount law of your written Constitution which takes precedence over ordinary legislation and which your courts have the power and the duty to enforce. Your Constitution was founded upon the same concepts of judicial independence, access to justice, and separation of powers as under the British Constitution, with similar safeguards against Executive interference.

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[7] Judicial Studies Board, 5 November 1996.

In the case of the United Kingdom, our ancient freedoms are protected by the common law principles that everything is permitted except what is expressly forbidden by the law, and that, in accordance with the principle of legality, in the absence of express legal authority, the officers of the State have no greater powers than do the citizens of the State. Parliament is treated by the common law as enjoying absolute sovereignty, and, except where Parliament has given European Community law supremacy over British primary legislation, our courts have no power to strike down Acts of Parliament, even where they grossly offend fundamental human rights and freedoms.

Occasionally British Acts of Parliament positively protect particular fundamental rights, such as the right not be discriminated against on grounds of colour, race, nationality, religion, sex or physical or mental disability. Otherwise, the legal protection of human rights depends upon what is left to the common law by statute law, and upon the continuing independence of the judges and of the legal profession from executive interference.

Traditionally, the main safeguards in the British system against the abuse of power by the Executive and public authorities have not been safeguards of constitutional rights enforceable by the courts. They have been the vital, but softer and more mutable constitutional conventions and understandings, which depend utterly upon the sense of fair play of Ministers and the professional integrity and political neutrality of civil servants; the vigilance of the Opposition and individual Members of Parliament; the influence of a free, independent and vigorous press and a well informed public opinion; judicial and legal professional independence; the periodic opportunity of changing the Government through free and secret elections; and a well-nourished culture of popular liberty.

The conditions of both our countries and their legal systems have changed greatly since Merdeka. When the Federation of Malaysia was originally formed, in August 1963, I was cramming for Bar Finals, about to begin my pupillage. You were about to enter upon a new age as an independent sovereign nation charting your own destiny and shaping the constitutional and legal system based upon the common

law and the constitutional conventions which you had inherited. Less obviously, and largely unknowingly, we British too were about to enter a new age for our system of government according to law.

Remembering what it was like when I began to practice law in 1964 involves recalling a dramatically different legal world. Almost all English judges and most barristers were a small social elite of white men, usually educated at public schools and Oxford or Cambridge, often without a law degree. We wore black jackets, striped trousers and bowler hats and carried tightly furled umbrellas. My pupil master was surprised when I asked him why I had to buy a bowler hat. "To raise to the judges, when you pass them in the Strand", he explained. When I came to the Bar there were lots of restrictive practices, in addition to the exclusion of women and non-white students from most Chambers. Solicitors were treated almost as a lesser breed, deprived of any right of audience in the High Court, or of the opportunity of being appointed to the High Court. A Queen Counsel could be instructed only with a Junior; and his Junior had to be paid a fee equal to two-thirds of the Queen Counsel's fee. I am glad to say that not one of those outmoded rules or practices exists today.

The role of our judiciary in the sphere of public law was also very different at Merdeka Day 1963. English judges, influenced by the exigencies of war, by pervasive government control in the early post-war period of austerity, and by a desire not to be regarded as politically-motivated, needed no reminding of Francis Bacon's magisterial warning on King James's behalf: "let them be lions, but yet lions under the throne; being circumspect that they do not check or oppose any points of sovereignty".

It was the age of deference by one group of old boys to another group: judicial members of the governing Establishment deferring to their fellow clubmen, the mandarins of Whitehall, as judges of the public interest. In 1962, Lord Chief Justice Parker of Waddington saw judicial review as founded on the principle that courts are the mere "handmaidens of public officials", rather than designed to protect the citizen against the misuse of state power.

From late Victorian times until the early 1960s, except in criminal cases and private law disputes, English judicial restraint bordered upon judicial abdication. The judges imprisoned themselves within a doctrine of legal precedent so inflexible that the Law Lords could not overrule their previous judgments, however wrong-headed or outmoded they had become. It required a practice statement by Lord Chancellor Gardiner in 1966 to set them free. Our most senior judges also fettered their powers by adopting literal rules for the interpretation of Acts of Parliament, concentrating on the letter rather than the purpose of the law, making a fortress out of the dictionary, and leaving it to Parliament to clear up the statutory mess.

As part and parcel of this literal-mindedness, the Law Lords maintained an ancient rule forbidding themselves from reading anything other than the words of the statute to discover what the statute meant, even when the text was obscure or would have absurd consequences. Some of them broke their own rule, furtively reading the forbidden contents of white papers and parliamentary debates hidden under the judicial counter.

At the height of the second world war, in a terrible act of judicial abdication, the Law Lords interpreted emergency regulations as empowering Home Secretary Anderson to detain Jack Perlzweig, alias Robert Liversidge, indefinitely at the minister's pleasure on suspicion of being a person of hostile associations. At least the Law Lords acknowledged that *habeas corpus* would lie where a detainee could prove what it is usually impossible to prove, namely, that the Home Secretary had acted in bad faith. Lord Atkin bravely dissented, resisting pressure from Lord Chancellor Simon to amend his speech, in which Lord Atkin described the conclusions reached by the other four Law Lords as "fantastic", and as based on Humpty Dumpty. Atkin was shunned by some of his brother judges and never recovered from their treatment of him before his death three years later. There was nothing in the language of the regulations that compelled this destruction of *habeas corpus* and the right to personal liberty. *Liversidge* became a terrible precedent for the arbitrary detention of prisoners of conscience in South Africa and elsewhere.

In another bleak war time decision, *Duncan And Another v Cammell, Laird and Company, Limited*,[8] seven Law Lords (instead of the customary five) allowed the Crown complete unrestricted power to withhold relevant evidence needed by the relatives of the victims of a disastrous submarine trial. The evidence was needed for a fair hearing of their negligence claims, but their right of access to justice was sacrificed by the Law Lords for unconvincing reasons of State. Lord Chancellor Simon and his judicial brethren treated the Admiralty's objection to the disclosure of relevant documents as a matter falling within the exclusive power of the minister. Power was delightful; absolute power was absolutely delightful!

At Merdeka, English judicial review of administrative action was technical and perfunctory. Ministers and civil servants were able to use the broad discretionary powers, which they had easily persuaded Parliament to give to them, without the inconvenience of effective supervision by the courts to ensure that they used their powers in accordance with modern standards of good administration.

The common law developed by the courts during the first 60 years of this century was, at best, ethically aimless; at worst it was class-conscious, and biased in favour of the strong and against the weak – subservient to the executive, overvaluing property rights, undervaluing freedom of speech, sapping trade unions, and sanctioning the unequal status of women. During the inter-war years, in a series of especially unsightly decisions, the Law Lords, sitting in the Privy Council, over-ruled more courageous colonial courts in Canada, and in East and South Africa, and upheld the legality of the racial exclusion of Asians from the right to vote, to work, to trade, and to own valuable land. The Privy Council even decided, after the war, that Canadian citizens of Japanese descent, born and bred in Canada, and blameless of any unlawful conduct, could lawfully be sent "back" to Japan, as the land of their ancestors. The Law Lords' excuse for condoning this arbitrary racist expulsion was that they were bound to apply the letter of the law, and to ignore the policy implications of their decisions.

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[8] [1942] AC 624.

That reactionary and inglorious period of English legal history has left enduring scars, especially on the life of British politics. Professor John Griffith's powerful polemic – "The Politics of the Judiciary" – provides more recent material to support his thesis that a white, male, Oxbridge, judicial elite are not to be trusted to decide the questions which would arise if we had a modern Bill of Rights, broadly defining in open-textured language, the limits on State power.

There have been, and no doubt will always be, prejudiced, arrogant, pompous, cantankerous judges whose fallible judgments and ignorant dicta can be cited to prove the unfitness of the judiciary as a whole. Popular doubts about the fitness of the judiciary to protect civil rights and liberties are historically understandable. But the judge-bashing indulged in by opponents of judicial review or of a judicially-protected British Bill of Rights is selective and unfair, for the senior judiciary and their case law have changed beyond recognition during the past 30 years. Every one of the outmoded and illiberal decisions to which I have referred, has been reversed by the English courts, sometimes as a result of enlightened judgments by the European Court of Human Rights or by persuasive judgments by courts elsewhere in the Commonwealth.

It cannot any longer fairly be said that British judges are timorous in developing the common law and interpreting legislation in accordance with contemporary ethical and social values, or in standing as impartial arbiters between government and the governed. From the mid-1960s, led by Law Lords Reid, Denning, Wilberforce and Scarman, and by a latter-day convert, Lord Diplock, they breathed new life into English administrative law.

The senior British judiciary have continued to work in that tradition. They have scrapped archaic limits on their jurisdiction; revived ancient principles of natural justice and fairness, and rejected claims of unfettered administrative discretion, or of absolute government immunity from having to disclose relevant documents to the courts, or from ministerial compliance with court orders. They have prevented ouster clauses from excluding judicial review, and, thankfully, overruling *Liversidge v*

having to disclose relevant documents to the courts, or from ministerial compliance with court orders. They have prevented ouster clauses from excluding judicial review, and, thankfully, overruling *Liversidge v Sir John Anderson And Another*[9] also. The judiciary have breathed new life into the writ of *habeas corpus* – the most renowned contribution of the English common law to the protection of personal liberty. Taking free speech seriously, they have prevented government bodies from using libel law to stifle public criticism, and curbed excessive damages awards by juries in libel cases. They have held that the free speech values underlying the First Amendment to the American Constitution are matched by the common law.

In the Privy Council, the Law Lords have interpreted Commonwealth constitutional guarantees generously, having full regard to international human rights standards. The Court of Appeal has recently ruled that the more substantial the interference with human rights, the more the courts will require by way of justification. Our courts have also abolished outdated technical rules of legal standing that prevented pressure groups and public-spirited citizens from bringing important matters to the judicial review courts. And the Law Lords have overturned the ancient exclusionary rule forbidding recourse to parliamentary material to interpret what an ambiguous or obscure statute was intended to mean.

These examples of wise judicial law-making have been based upon three interacting constitutional principles, analysed by Lord Steyn in a lecture three weeks ago on the role of the judiciary in British democracy:[10] (i) the rule of law, (ii) the principle of the separation of powers, and (iii) the principle of constitutionalism. They are principles enshrined in the written constitutions of other Commonwealth countries. As Lord Diplock observed,[11] those constitutions:

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[9] [1942] AC 206.

[10] Lord Steyn, "The Weakest and Least Dangerous Department of Government", The 1996 Annual Lecture of the Administrative Law Bar Association, 27 November 1996.

[11] *Hinds and others v The Queen, Director of Public Prosecutions v Jackson Attorney General of Jamaica (intervener)* [1977] AC 195, at p 212 cited by Lord Steyn, *ibid.*

> of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom.

In developing the law in these ways, British judges have been scrupulously careful to remain within their lawful province, without usurping the sovereign powers of Parliament or the delegated powers of the Executive and administrative bodies. They have also avoided imposing legalistic requirements on civil servants which would stultify the administrative process. There is no risk of government by judges.

In his recent lecture, Lord Steyn answered the question: "How is the exercise of power by unelected judges to be reconciled with the democratic ideal?" as follows:

> The premise is that judges are removed from the pressure of partisan policies. The justification for giving to such judges the power to make judicial decisions is that the judiciary as an arm of the government is intended to buttress the democratic process and not act contrary to it. That is a political premise upon which our democracy is based. But it is far from saying that the public should unquestioningly accept what the judges do and say. Rightly the public view the conduct of all arms of government – and the judiciary is one – with intense scepticism. A sceptical and ever watchful public opinion is the best guarantee of the quality of our democratic process.

Lord Steyn cited Alexander Hamilton's well-known description of the judiciary in a democracy as the "weakest and least dangerous department of government". I respectfully agree with Lord Steyn that, more than two centuries later, Hamilton's statement accurately describes the role of the judiciary in the governance of our country. The judicial branch is indeed the least dangerous branch and the branch best placed to protect minorities against the misuse of power in the name or interests of majorities. One unique and crucial virtue of the judicial process is that judges are independent and impartial, insulated, if not isolated, from the forces of democratic politics and the politics of the bureaucracy, in fairly deciding cases which are brought before the courts. The guarantee of judicial independence is, in Alexander Hamilton's words:

> the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws.

The judicial branch is the least dangerous branch of government, provided that it does not usurp the powers of the other two branches, or confuse the law with partisan political values, or disregard the basic constitutional values upon which the law is based. Judge Pollak's recent compelling cautionary tale[12] warns the American Supreme Court to heed the lessons of the *Dred Scott* case,[13] whose defence of slavery led to the Civil War, and of *Plessy v Ferguson*,[14] which affirmed racial segregation after the Civil War, and of the Supreme Court's misguided attacks upon the New Deal legislation in 1935 and 1936, which provoked President Roosevelt's gravely wrong-headed remedy – legislation to authorise packing the Supreme Court, a plan swiftly rejected by the Senate Judiciary Committee.

On the other side of the coin, Judge Pollak has also given a timely warning[15] on the recent outbreaks of judge-bashing in the United States. In March of this year, the White House joined the anvil chorus of protest against a Federal judge, Harold Baer Jr of the Southern District of New York, soon to be joined by the then-Senate Majority Leader, Mr Bob Dole, who termed Judge Baer "the one in New York who turned loose a drug dealer and is now being reprimanded by the President of the United States. He ought to be impeached instead of reprimanded. If he doesn't resign, he ought to be impeached".

The crime of Judge Baer was that he had granted a motion to exclude evidence from a criminal trial for a drug-distribution conspiracy in which he expressed critical views about the police. The Chairman

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[12] Pollak, LH, "Phildalephia Lawyer: A Cautionary Tale" Owen J Roberts Memorial Lecture, University of Pennsylvania Law School, 13 November 1996, published in 145 *U Pa L Rev* 495 (1997). Judge Pollak is a senior judge of the United States District Court for the Eastern District of Pennsylvania, and former Dean of Yale Law School and of the University of Pennsylvania Law School.

[13] *Dred Scott v Sandford*, 60 US 393, 19 HOW 393, 15 L Ed 691 (1857).

[14] *Plessy v* Ferguson 163 US 537, 41 L Ed 256, 16 S Ct 1138 (1986).

[15] Pollak, LH, "Criticizing judges" *Judicature*, Vol 79, May-June 1996 at p299.

of the Senate Judiciary Committee, Mr Orrin Hatch, also launched a wider attack upon named judges, appointed to the Federal bench by President Clinton, including Judge H Lee Sarokin, a member of the Court of Appeals for the Third Circuit, who was singled out for special attack for having dissented in two death penalty cases.

As Judge Pollak observes, Chief Justice Marshall "told us in 1803 that '[i]t is, emphatically, the province and duty of the judicial department to say what the law is.' It is not the province and duty of the president, or of the majority leader, or of the chairman of the Senate Judiciary Committee. When a court errs, it is the province and duty of a higher court to correct that error. When the highest court errs, it is the province and duty of that same court to revisit the issue in a later case and to rectify the prior error".

Judge Sarokin felt driven by this political campaign to resign. In his letter to President Clinton of 4th June, he wrote:

> I had intended to remain on the court so long as I was physically and mentally able, but the constant politicization of my tenure has made that lifetime dream impossible ... The current tactics will affect the independence of the judiciary and the public's confidence in it, without which it cannot survive. So long as I was the focus of criticism for my own opinions, I was resigned to take the abuse no matter how unfair or untrue, but the first moment I considered whether or how an opinion I was preparing would be used was the moment I decided that I could no longer serve as a federal judge ... Some undoubtedly will cheer my departure, but what they may view as a victory is, in reality, a defeat for our judicial system and its most essential ingredient – an independent judiciary.

In the United Kingdom, the situation is happily less fraught, but I must sadly report that the development of common law principles into a modern system of public law, and a succession of cases in which Ministers have been rightly and necessarily held to have abused their powers, have also resulted in unprecedented political attacks on the judges by Ministers. English judges have not over-reached their powers or confused law with politics. The attacks on the judges have been concerted, populist and unfair, led by the present Home Secretary, Mr

Michael Howard, who went so far as to publicly name and to criticise a judge who had held him to have abused his powers. As Lord Ackner has pointed out, Mr Brian Mawhinney, Chairman of the Conservative Party also exhorted the public to write to judges where they were dissatisfied with sentences:

> thereby seeking to influence or pressurise the judges to adopt tougher line on sentencing, which represented the current philosophy of the Government. When critical questions were raised about this conduct in the House [of Lords], the Lord Chancellor was not prepared to comment adversely on the Chairman's conduct.

Currently there is much controversy about the Home Secretary's proposals, in the Crime (Sentences) Bill to impose minimum sentences and mandatory life sentences. Early this year, Lord Taylor of Gosforth, then Lord Chief Justice, together with Lord Ackner and Lord Donaldson of Lymington, the former Master of the Rolls, vigorously attacked what they rightly preceived as threatened executive interference with their judicial independence, because the imposition by Parliament of mandatory sentences for persistent serious offenders would deny the courts their crucial constitutional power to impose a punishment to fit the particular circumstances of the crime and of the individual offender. Lord Woolf of Barnes, now Master of the Rolls, has also clashed with the Home Secretary, and Lord Steyn has noted that there is:

> a pronounced uneasy relationship between the judges and the Home Secretary ... because judges fear that fundamental values regarding justice are being imperilled.

Last month, Lord Browne-Wilkinson strongly criticised the Police Bill which would empower a chief police officer to authorise the police to plant electronic surveillance devices on private property, including a lawyer's offices, without a judicial warrant. If Parliament is persuaded to pass this obnoxious clause, it will threaten the vital legal professional privilege of individuals and their lawyers, and overturn the constitutional principles declared by Lord Camden CJ, more than two centuries ago, in that monument to liberty, *Entick v Carrington*.[16] Senior judges and

[16] (1765) 19 State Trials 1029, 95 ER 807.

lawyers have expressed their profound concern and the legislative battle continues, but without the benefit of any entrenched constitutional guarantee of personal privacy and private property against trespass or unwarranted intrusion.

Lord Ackner has referred to a worrying episode in 1994 when the Lord Chancellor was alleged to have sought to require the President of the Employment Appeal Tribunal to follow a legal course which that judge considered to be contrary to his judicial oath. However, I am confident that the position remains, in Lord Bingham's words, that:

> no judge, when giving judgment or deciding what judgment to give, need concern himself with the acceptability of his decision to the powers that be.

In his most recent report, of 1 March 1996,[17] that brave human rights advocate and indefatigable defender of the independence of the judiciary and legal profession, Dato' Param Cumaraswamy, the United Nations Special Rapporteur on the Independence of the Judiciary, noted:

> with grave concern recent media reports in the United Kingdom of comments by ministers and/or highly placed government personalities on recent decisions of the courts on judicial review of administrative decisions of the Home Secretary. The Chairman of the House of Commons Home Affairs Select Committee was reported to have warned that if the judges did not exercise self-restraint, it is inevitable that we shall statutorily have to restrict them.

The Special Rapporteur stated that he will be monitoring developments in the United Kingdom concerning this controversy. He added this observation:

> That such a controversy could arise over this very issue in a country which cradled the common law and judicial independence is hard to believe.

To that I say "amen".

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[17] Cited by Lord Bingham of Cornhill, *supra*, n 7.

It is a matter of profound regret that the recent threats to judicial independence in the United Kingdom should need to be monitored by the Special Rapporteur. Our Lord Chief Justice, Lord Bingham, has given reassurance to the Special Rapporteur that, in:

> the country which cradled judicial independence the infant is alive, and well, and even – on occasion – kicking.

But Lord Bingham also recognised the danger of complacency and emphasised that the threat of insidious erosion, of gradual encroachment, "is a process we must be vigilant to detect and vigorous, if need be, to resist". The threat arises, in Lord Browne-Wilkinson's words:

> by reason of the executive's control of finance and administration ... of the legal system [which is] capable of preventing the performance of those very functions which the independence of the judiciary is intended to preserve, that is to say, the right of the individual to a speedy and fair trial of his claim by an independent judge.

Lord Bingham has referred to many judges having:

> resented what they perceived as an administration breathing down their necks, treating them as pawns on a bureaucratic chess board. Decisions directly bearing on the performance of judicial functions and the efficiency of court administration have on occasions been made without consultation and for ill-conceived reasons. While high standards of public administration are necessary in this field as in any other, management concepts quite inappropriate to the unique function of administering justice have been wrongly allowed to intrude.

Lord Steyn argues convincingly that:

> the Lord Chancellor as a Cabinet member represents the voice of reform guided by the Treasury perspective. The view of the judges is rather different. They do not wholeheartedly share the modern adoration of the deity of the economy. On the whole they put justice first. That view can in our system best be put forward by the Lord Chief Justice [rather than by the Lord Chancellor].

His point was illustrated by the report a fortnight ago[18] that senior judges have strongly attacked government plans to reap the entire cost of running the civil justice system – including judges' salaries, from fees charged to litigants for using the courts. Sir Richard Scott, the Vice-Chancellor, was quoted as describing the self-financing plans as "lamentable". Judges, he added, had not been consulted, "just told it was government policy". Lord Justice Saville said that "[i]t puts the independence of the judiciary in jeopardy if judges' salaries are part and parcel of the money available to run the system".

An independent judiciary is one of the most essential characteristics of a free society; another equally essential characteristic is the freedom of speech and freedom of the press, without which there cannot be any genuine democratic system of government. No one has better explained the value of free expression than in the words which Mr Justice Brandeis wrote for his fellow Americans.[19] Brandeis wrote this:

> The men who won our independence believed that the final end of the State was to make men free to develop their faculties; ... they believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people ... They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing

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[18] *The Times*, 2 December 1996.

[19] *Whitney v California* 274 US 357 (1927) at pp 375-376, concurring opinion.

majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Those values are not confined to the United States or to Western civilisation; nor are they the property of any one religious faith or political philosophy. They are values which have constantly to be fought for – everywhere and in each succeeding generation – in the lifelong quest for spiritual and physical freedom.

Like judicial independence and the independence of the legal profession, they are truly **universal** values; and they are **universally** under threat – not only from what Brandeis described as "the occasional tyrannies of governing majorities". The threat to the free communication of information and ideas is more widespread, more mundane and more insidious, and it can be effective without putting a writer in prison. The threat comes not only from the crudely oppressive laws and practices of tyrannical dictatorships and populist parliaments, but from the more subtle and pervasive pressures to conform – emanating from the mass State, mass consumer society, mass communications; from public and private media monopolies abusing their giant strength; pressures to practice self-censorship, to follow the line of least resistance, to ignore diversity and minority tastes; to wander lost in the wasteland of ethical aimlessness.

The right to free speech is fundamental. But it is not of course absolute. As Mr Justice Brandeis made clear, its exercise is subject to restriction if the restriction is required in order to protect the State from destruction or from serious injury; that is, where speech would produce a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent.

Everywhere, even in democratic countries, parliaments, government and courts sometimes restrict free speech even where such restrictions are unnecessary to protect the public interest against a clear and imminent danger of its destruction or serious injury. Yet surely nothing less than necessity should suffice to justify preventing or punishing the exercise of free expression.

Who is to decide when a restriction is necessary? Writers and their publishers in the electronic and print media have a duty to decide according to their conscience and ethical principles how best to exercise their right to free expression with due respect for other vital rights and interests, such as the free speech, personal privacy and good reputation of others, the right to a fair trial by the independent courts rather than by the media, and the protection of what is indispensable for the security of the nation.

Parliaments and governments have to decide when making and executing laws where to draw such difficult lines. Judges have to decide, when there is a conflict between the right to free speech and its restriction how the competing rights and interests should be weighed. An independent judiciary, imbued with the spirit of liberty, is as crucial as is a free press. English judges have not always interpreted the right to free speech in this spirit, but I believe that they now strike a fair balance, authorised in part by the case law of the European Court of Human Rights.

I do not regard the State as the inevitable enemy of free speech. Indeed, sometimes only the State can act effectively to further the robustness of public debate in circumstances where the media or private groups are stifling debate, in pursuit of profit or fanatically believed doctrines. And there cannot be genuinely free expression unless the people as well as their governors share a common culture of liberty.

In the foreword to his book, written in January 1978, Tun Suffian recalled that he had thought, when celebrating the Bicentenary of American Independence in 1976, how lucky Malaysia would be if her Constitution could last fifty years, let alone 200 years. He reflected on the fact that the carefully drafted constitutions of some thirty new Commonwealth countries had been torn up by as many colonels and generals.

Half a century ago, another great jurist, Judge Learned Hand addressed an audience in Central Park, New York, to explain his faith in freedom and his understanding of the spirit of liberty. "Liberty" he

said "lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it. While it lies there, it needs no constitution, no law, no court to save it".

That is an important truth which we neglect at our peril. What matters above all is the spirit of liberty in the hearts of men and women. But, whether they are written or unwritten, good, stable and enduring constitutional principles, respected by the legislative and executive branches of government, and protected by an independent judiciary and independent legal profession, are a necessary condition of a democratic government under law and the protection of human rights.

It is so easy to destroy the ancient trees of liberty; so difficult to replace them once they have been cut down. Like Tun Suffian, I believe that in both our countries we will be fortunate if we are able to preserve and renew our precious constitutional heritage in the next century.

Copyright Law in Malaysia: Does the Balance Hold?*

*Khaw Lake Tee***

I. Introductory Remarks

If we were to take a very simplistic view of the copyright landscape in Malaysia, we could be forgiven for surmising that Malaysia is a country of suppliers, retailers and consumers of pirated VCDs and DVDs of music and films, and software; and that copyright law basically deals with criminal activities. We also could be forgiven for thinking that the question of balance under our copyright law is a non-issue. Indeed, copyright owners may feel, given the proliferation of pirated products, the balance is heavily stacked against them; while consumers may think that enforcement activities have unfairly prejudiced or frustrated their access to cheap and ready supplies of copyright works, and conclude that the balance is most definitely tilted in favour of the copyright owners. For where else is the Government more involved in the protection of a form of private property right, the owners of which are mainly foreign? Granted there is an overemphasis on the portrayal of copyright infringement as criminal activities, thus giving rise to the perception, rightly or wrongly, that copyright law is enforced by the State on behalf of copyright owners. However, while it is tempting to argue that this underscores a leaning towards the copyright owner, it should be made clear that the enforcement of the criminal provisions is quite different from the balancing act that copyright law does.

In its long history from the time of its statutory embodiment in the form of the English Statute of Anne of 1709, copyright law has always attempted to maintain a balance between or among the various com-

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