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WILL THE REAL JUDICIARY PLEASE STAND UP

IRRELEVANT !

Restoring Logic And Reason

The Zainur Zakaria affair: an analysis of judicial independence

by *Raja Aziz Addruse & Malik Imtiaz Sarwar*

Malaysians had, in the last decade or so, come to see the Judiciary as an extension of the Executive, if not in fact, then in appearance. This was hardly surprising when in the last decade or so, a series of events had unfolded which all too sadly seemed to point that way.

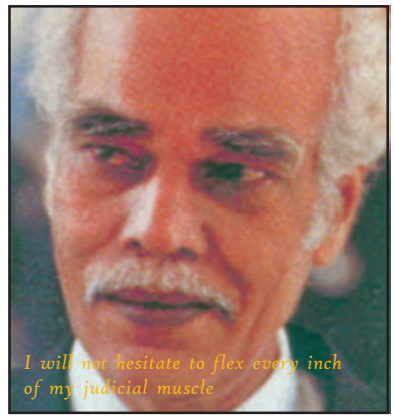
Commencing with the removal of Tun Salleh from office to, more recently:

- the conviction of Zainur Zakaria for contempt for having made the mistake of filing an application in court on the instructions of a client in a *cause celebre*,
- the ruling by the Court of Appeal that no person, body or institution could discuss the conduct of a judge, good or bad, except parliament (even in the face of serious allegations of impropriety against a current Chief Justice), and,
- a retirement address by the outgoing President of the Court of Appeal, in which he talked of long fruitful years (as a judge) of service to the government,

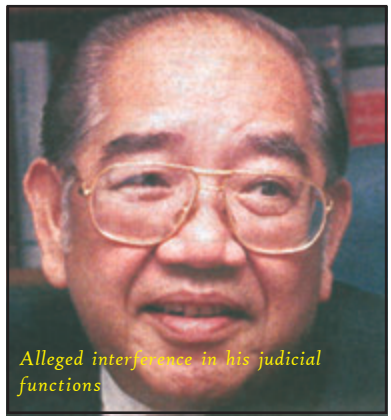
these events had insidiously shaped the mind-set of the average Malaysian to a point where public confidence in the judiciary was at an all time low.

In a speech he made in September

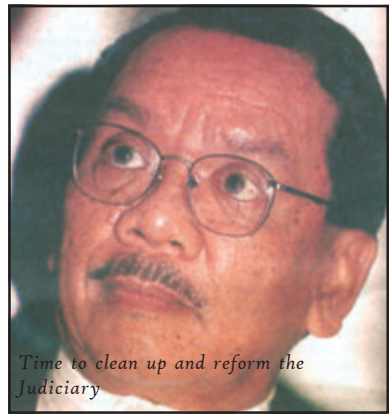
Made an application to disqualify two prosecutors



I will not hesitate to flex every inch of my judicial muscle



Alleged interference in his judicial functions



Time to clean up and reform the Judiciary

EDITOR'S NOTE

Will The Real Judiciary Stand Up?

This isn't a cheeky question to ask of our judiciary. For too long, judicial independence has either been relegated to a memory or destined to remain a dream.

Some recent cases give hope that we may yet break the soporific spell that had been cast by a conservative judiciary, a weak legislature and a manipulative excecutive since 1988.

Raja Aziz Addruse and Malek Imtiaz Sarwar analyse judicial independence by reviewing the case of Zainur Zakaria. It has taken Zainur, a member of Anwar Ibrahim's first team of defense lawyers, three years to get the Federal Court to overturn his conviction for contempt of court. At the heart of the Zainur case were uninvestigated allegations that public prosecutors tried to 'create evidence' against Anwar. We re-enact the 'Zainur Zakaria story' from official documents so that you, dear readers, all members of the Court of Public Opinion can judge the conduct of the parties in this case.

Tommy Thomas reminds us that our system of government is based on the supremacy of the Constitution, and *not* Parliament. He surveys critical cases since Merdeka to show that the meaningful protection of human rights requires the judiciary to defend fundamental liberties enshrined in our Constitution against legislative and executive assault.

Many Malaysians believe the judiciary has arrived once more at a crossroad. But how will the judiciary proceed?. Will the judiciary progress towards an independent, assertive and creative stance in support of human rights and the rule *of* law? Or will it slide into the straitjacketed mould that left citizens at the mercy of the state's hateful rule *by* law?

Hence: Will the real judiciary please stand up?

ALIRAN is a Reform Movement dedicated to Justice, Freedom & Solidarity and listed on the roster of the Economic and Social Council of the United Nations. Founded in 1977, Aliran welcomes all Malaysians above 21 to be members. Contact the Hon. Secretary or visit our webpage.

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1999, at the opening of the Commonwealth Law Conference held in Kuala Lumpur, Mr.R.R. Chelvarajah, the then chairman of the Bar Council of Malaysia, said -

"...In this era of electronic communication, where every case of great interest receives world-wide attention (with every piece of evidence adduced and statement made in court, reported), it is not just the lawyers, judges and the law teachers and students who are competent to make an informed judgment as to the independence of a judiciary or the lack of it. The lay public are equally in as good a position to make their own judgment. Where decisions handed down, even if not always, but too often, challenge logic and reason, or result in injustice, confidence in the judiciary is bound to be undermined.

Of late, a number of decisions of Malaysian courts, given in a number of high-profile cases, have been adversely commented on both locally and internationally. These comments should not be brushed aside or ignored by castigating those who make them as meddlers in internal affairs. They should be seriously considered with a view to taking such remedial measures as may be required. Nothing is more debilitating to a nation than to have a judiciary which does not command the respect and confidence of the public."

What has been equally worrisome is that with the constant bombardment of eyebrow raising judicial events, the public has come to a point where they have been almost completely de-sensitized about the issue and have begun to approach it with the *laissez faire* attitude of true '*Malaysia boleh*' spirit. This is a truly dangerous development for without the questioning minds of discerning citizens, there cannot be said to be true democracy.

It cannot be said enough: in a democracy, the check and balance essential for proper government can only exist if the judiciary is truly independent. The evolution of a society allows for the luxury of taking certain things for granted. We must however never delude ourselves into believing that the existence of one feature presumes the existence of the other. Reviewing the paths that have been taken and reminding ourselves of where we stand is therefore essential. In this context, the Zainur Zakaria affair will stand as a testament to how close to the brink we were.

The Zainur Zakaria Case

Zainur, a former president of the Malaysian Bar, was one of the defence lawyers of Dato' Seri Anwar Ibrahim who, at the material time, was being tried on charges of corrupt practice.

In the course of the trial, Anwar and his lawyers came to know of a Statutory Declaration made by a very senior lawyer. In a letter written to the Attorney-General, which was annexed to the Statutory Declaration, the lawyer had alleged that two of the deputy public prosecutors conducting the prosecution had tried to fabricate evidence against Anwar.

On the basis of these allegations, Anwar decided to make an application to the Court to disqualify the two prosecutors from continuing to be part of the prosecution team . He instructed his lawyers accordingly.

The application and the documents in support of it were filed by Zainur's firm on Saturday, 28 November 1998. Almost immediately after the application was filed, the hearing was fixed for Monday, 30 November 1998.

Significantly, when the court sat on Monday, the judge, instead of dealing with Anwar's application, called Zainur up and began to question him on the contents of the Statutory Declaration and the letter. The judge's opening remark to Zainur was, "This notice of motion has been filed by you and you have to assume full responsibility for it".

His questions to Zainur were put in such a manner as to call for specific answers and to confirm views he appeared to have already formed. When he had finished questioning Zainur, the judge made the following statement –

"This application with its affidavit in support is an interference with the course of justice as it has no basis. It therefore amounts to a pre-emptive step to undermine the integrity of a trial in progress. The object is to project an impression that the prosecution is anchored on fabricated evidence. This is a serious contempt and I have to act on it with all urgency to preserve the integrity of this trial. As I said in the early stage of this trial I will not hesitate to flex every inch of my judicial muscle to ensure that this trial proceeds

smoothly. It is my duty to guarantee that persons who are following this trial are not hoodwinked in any way. .... In the light of the baseless application filed by you which is totally unsupported by the documents exhibited by you I propose to cite you for contempt for having attempted to undermine the integrity of this trial. Before I do so this court will show mercy towards you by dropping all further proceedings if you tender an unconditional apology to this court, to the AG, to [the two prosecutors in question] for filing an application which is absolutely baseless and which is an abuse of the process of court..".

After a short adjournment to enable him to consider whether to tender an apology, Zainur informed the court that he was not able to. Thereupon he was cited for contempt of court.

An application by his lawyer that he be given a day or two to prepare his defence and to call the senior lawyer, who had affirmed the Statutory Declaration and written the letter, as a witness, was refused. Zainur decided to give evidence and went into the witness box. He testified that he had filed the application on Anwar's instruction and in discharge of his professional duty as an advocate and solicitor. He was found by the judge to have committed contempt. In personally addressing the court on the question of sentence, Zainur explained how the application came to be made and said that it was not his intention to commit contempt. The following excerpts from the notes of proceedings recorded by the judge complete the picture –

"Court: You do not wish to tender an apology in the terms that I described earlier?
En. Zainur: I regret I am unable to do that. Convicted."

Zainur Appeals

Zainur was sentenced to three months' imprisonment. An application for a stay of execution was refused by the judge. An interim stay was, however, granted by the President of the Court of Appeal upon an urgent oral application made the same morning. Zainur was later released on bail and did not have to serve his sentence immediately. The interim stay was to have effect pending the hearing of Zainur's appeal to the Court of Appeal against the order of committal and sentence.

To pause and reflect, in essence what had happened was this: a lawyer acting on the instructions of his client and backed by reasonable material, filed an application in court. Taking it to its logical conclusion, this could have been any application: one to amend pleadings, one to seek directions, or something as equally innocuous.

The lawyer was then convicted of contempt for having filed it - for having acted as he was required to do, ethically and legally, as an Advocate and Solicitor. And without having been given the right to be heard.

As a result – and just as significant - the application was never heard, and a litigant was never heard on what he considered to be of crucial effect.

Fairly fundamental, one would think, and reason enough for Zainur not to have been convicted. His conviction defied logic. The Court of Appeal however did not see it this way, and took the same view as the High Court judge. Zainur's appeal was dismissed.

The Federal Court Rules

Zainur appealed further to the Federal Court which, in its recent decision, had no hesitation in setting aside the order of committal made by the High Court. Such was the importance attached by the court to the issues raised in the appeal that each of the three judges delivered separate judgments. In essence, the court found-

- that Zainur had acted properly in filing the application on behalf of Dato' Anwar because "one only needs to read ... the letter and the statutory declaration to appreciate the fact that this cannot be baseless allegation" and that Dato' Anwar was entitled to address his complaint to the court

- that, having regard to the very serious nature of the charge, Zainur should have been given the adjournment he had requested for to enable him to prepare his defence and to call witnesses. In not granting the request the judge had deprived Zainur of the opportunity to present his case fully

- that there has been a blatant disregard of rules of procedure and, considering the frame of mind the High Court judge was in, he should have been the last person to deal with the alleged contempt by Zainur.

- that the High Court judge, by the manner he conducted the proceedings, in particular his interrogation of Zainur and his speedy finding of guilt without even allowing Zainur to call any witness, had given the picture that he was behaving as though he was acting as the lawyer for the two prosecutors.

In dealing with Zainur's appeal, the Federal Court did not consider it necessary to examine in any detail the grounds of decision of the Court of Appeal. In the words of one of the judges of the Federal Court, "It is obvious that the Court of Appeal, in merely agreeing with the trial judge, fell into the same error".

The Bar Council EGM Case

Zainur's case was not the first where a decision of the High Court had been affirmed by the Court of Appeal without much scrutiny.

In the case where the Bar Council and the Malaysian Bar were prevented by an injunction from holding an extraordinary general meeting to discuss serious allegations of acts of impropriety made against the previous Chief Justice of Malaysia, the same thing happened. The Court of Appeal even went so far as to say that within the constitutional framework of this country, no person, body or institution, save parliament or a tribunal empanelled for the purpose of looking into the conduct of a judge, was permitted to discuss the conduct of judges, good or bad. In doing so, the Court of Appeal ignored the right to free speech that citizens of this country are ensured as a fundamental liberty.

While one can accept that judges sometimes fall into error, what was incredible was that the Bar's application for leave to appeal to the Federal Court was subsequently dismissed as 'having no merits' despite that particular issue being included as one of the proposed grounds of appeal.

Notwithstanding, and very tellingly, when Tan Sri Mohamed Dzaiddin was appointed as the Chief Justice of Malaysia late last year, one of the first things he did was to declare that public confidence in the judiciary was at an all time low due to events in the preceding decade.

Restoring Logic And Reason

Turning back to the Zainur affair, the question of the day would be what was it that caused the Federal Court to have decided the matter in a manner diametrically opposed to the positions taken by the High Court and the Court of Appeal. No new issues were canvassed, nor was there any radical change in circumstance, at least in those matters germane to the appeal. There was, however, one significant extra-judicial change: the appointment of Tan Sri Dzaiddin as a replacement to Tun Eusoff Chin. From the outset, Dzaiddin's message was clear: it was time to clean up and reform the judiciary. Could this have been taken as a signal by judges?

Around the same time as the Zainur decision, Justice Hishamuddin delivered his pioneering judgment on issues pertaining to the Internal Security Act. Soon after, Justice Muhammad Kamil delivered his now famous judgment and revealed the fact of alleged interference in his judicial functions.

Clearly, as it ought to be, the Chief Justice is inspiring his judges. Signs are beginning to be seen of a judiciary more ready to exercise judicial discretion based on independent thought and analysis of the law as it stands.

But if we accept this as an apt description of current events, then we are implicitly saying that it was not so prior to Dzaiddin's appointment. There are therefore significant lessons to be learnt.

A last word. Judges will at times err; that is why appellate courts and procedures exist; but they are required at all times to decide in accordance with the law as they see it. As long as they do so, they will have discharged their constitutional function and they cannot be described as being 'anti' one party or 'pro' another.

As Zainur's case shows judicial decisions which are seen to be patently unfair and unjust or which, to quote Chelvarajah, "challenge logic and reason" are not acceptable and, therefore, undermine confidence in the judiciary.

While it is too soon to tell for sure, some are beginning to say that we are in the midst of a renaissance. If that is truly what is happening, then it must be nurtured, for only then can we say that our evolution as a society is on track. q

The Zainur Zakaria Story

A Drama in 4 Acts

Act 1: Manjit Singh Dhillon Writes A Letter

Hand delivered to Attorney-General Tan Sri Mohtar Abdullah, 9.30 am, 12 October 1998

At the very outset let me apologize for writing this letter in English. I would under normal circumstances have arranged for my staff to translate it into Bahasa but there are matters that I am about to set out that for the moment I feel are best left on a p & c basis. Hence the need to keep the letter away from my staff. I have even taken the precaution of hand-delivering this letter myself.

You will recollect that I wrote to you on 1 October 1998 on the above matter citing the recent prosecution of Samsuri Welch Abdullah under the Arms Act 1960 as a comparative basis for you to amend the charge against Nallakaruppan from the Internal Security Act 1960 to one under the Arms Act 1960. I had copied that letter to Dato Gani Patail.

I had expected a response from your office but instead, as in the case of my first letter dated 17 August 1998, I had a call from Dato Gani Patail on 2 October 1998 asking to see me on a very urgent basis. Both Mr. Balwant Singh Sidhu and I saw him at 3.20 p.m. on 2 October 1998. The date & time of this visit is recorded in the police log book maintained outside Dato Gani's office on the 17th Floor of Bangunan Bank Rakyat.

I had gone to this meeting with the expectation that, on the basis of my 1st October letter, there would be some discussion about possible sections under the Arms Act 1960 with a view to an amendment of Nallakaruppan's present ISA charge. To my absolute horror and disappointment Dato Gani Patail used the meeting and the death sentence under section 57 of the ISA as a bargaining tool to gather evidence against Dato Seri Anwar Ibrahim.

He had with him the letter I had written to you and copied to him. He was waving the letter about and kept on saying repeatedly, 'I am not impressed' and suggesting that he would not be impressed with any plea to a charge under the Arms Act but instead wanted more. This 'more', and it came across very loud and clear because Dato Gani laid it out in very clear and definite terms, was:

1. That Nallakaruppan was now facing the death sentence.

2. That there were other charges also under the ISA that he could prefer against Nallakaruppan but that if they (A.G.'s Chambers) hanged him once under the present charge what need would there be to charge him for anything else.

3. That in exchange for a reduction of the present charge to one under the Arms Act he wanted Nallakaruppan to cooperate with them and to give information against Anwar Ibrahim, specifically on matters concerning several married women. Dato Gani kept changing the number of women and finally settled on five, three married and two unmarried.

4. That he would expect Nallakaruppan to testify against Anwar in respect of these women.

I was shocked that Dato Gani even had the gall to make such a suggestion to me. He obviously does not know me. I do not approve of such extraction of evidence against ANYONE, not even, or should I say least of all, a beggar picked up off the streets. A man's life, or for that matter even his freedom, is not a tool for prosecution agencies to use as a bargaining chip. No jurisprudential system will condone such an act.

It is blackmail and extortion of the highest culpability and my greatest disappointment is that a once independent agency that I worked with some 25 years ago and of which I have such satisfying

memories has descended to such levels in the creation and collection of evidence. To use the death threat as a means to the extortion of evidence that is otherwise not there (why else make such a demand?) It is unforgivable and surely must in itself be a crime, leave alone a sin, of the greatest magnitude. Whether his means justify the end that he seeks are matters that Dato Gani will have to wrestle with within his own conscience.

I have agonized over these machinations of Dato Gani's for the last 10 days. I have known you for close to 26 years. I cannot imagine you condoning such an act. And so this third and final letter on this matter and my decision to let you know what transpired on the afternoon of 2 October 1998. How far into your Chambers the corruption has spread I cannot say but that you will have to stop it goes without saying.

Nallakaruppan does not deserve the charge under the ISA bearing in mind what I have set out above and what is tabulated below. The facts relating to the 125 bullets have been set out in my earlier two letters. In my second letter I mentioned the Samsuri Welch Abdullah charges. I have since researched into the Arms Act prosecutions by your Department over the last few years but because of the constraint of time have only been able to pick till 1993, a period well within your tenure as Attorney General. I haye chronologically listed out below all the cases reported in the local papers that I have been able to locate. All that is important at this juncture is to note that even in matters of far greater magnitude you have chosen the Arms Act as the vehicle for your prosecutions.

(Annexures noted)

Samsuri Welch Abdullah had exceptionally large quantities of ammunition that had no relevance to his pistols. Vincent Teo's prosecutions listed above ('E' & 'H') assume even greater significance. He was involved in gun smuggling and the illegal sale and disposal of about 240 guns together with Datuk Alfred Chin (who was related to a senior police officer), a fact highlighted by the Director of the CID, Malaysia in a press release dated 27 May 1996 (please see The Star clipping dated 28 May 1996 annexed to this letter as 'K'). That is by any stretch of the imagination a colossal amount of firearms, enough to equip a small army. If such a matter only warranted the Arms Act, then surely 125 bullets acquired under a licence where the licerice has expired cannot warrant the ISA.

This then makes the last case ('J') listed above very relevant to your deliberations. This was an instance where the gun permit had expired and had not been renewed. The charge that was framed against Datuk Johari under section 8 (a) was for failing to renew his permit between July 1983 and 27 March 1984 when the gun was found in the Regent Hotel toilet.

In the circumstances I will be grateful if you could give this matter your urgent and personal attention. On the available facts a charge under Arms Act 1960, as in Datuk Johari's case above, will be the most appropriate and no extraneous matters should be taken into consideration in the framing of the charge. In the event that your direction is favourable, the matter could be called up at short notice, perhaps even before Deepavail, with a view to a prompt and early resolution. This will free the Court of the earlier trial dates fixed and save considerable time and expense all round.

Act 2: Manjeet Singh Dhillon Makes A Statutory Declaration 9 November 1998

I, Manjeet Singh Dhillon (NRIC No: 0248545), c/o Room 308, 3rd Floor, Bangunan Yayasan Selangor, Jalan Bukit Bintang, 55100 Kuala Lumpur, of full age and a Malaysian citizen, do hereby declare and say as follows:

1. I am an Advocate & Solicitor of the High Court of Malaya with an address for practice at Room 308, Bangunan Yayasan Selangor, Jalan Bukit Bintang, 55100 Kuala Lumpur and the facts deposed to in this Statutory Declaration are within my own knowledge.

2. I am retained as counsel for Dato Nallakaruppan a/l Solaimalai in Kuala Lumpur High Court Criminal Trial No: 45-40-1998 which is scheduled for hearing from 9 No-

vember 1998 onwards.

3. I wrote the letter annexed hereto as MSD-1, the contents of which are self-explanatory, and delivered it personally to the Hon. Attorney-General Tan Sri Mohtar Abdullah on 12 October 1998 at about 9.30 a.m.

4. Pursuant to the letter being delivered and as a result of an invitation from him to do so I met with the Hon'ble A.G. at about 11.00 a.m. on 13 October 1998. This invitation to meet him, alone, was conveyed through his secretary.

5. At the meeting the Hon'ble A.G. never questioned or disputed my allegations against Dato Gani Patall. Instead the conversation covered, among other things, the work that he, the Hon'ble A.G., was doing to improve the set-up and efficiency of his Department. Only at the tailend of our meeting did the Hon'ble A.G. allude to my letter and say that the letter was not very clear as to how my client would plead to an amended charge under the Arms Act. My response to that was that the client would enter a plea of guilty to an amended charge under the Arms Act. He asked for a letter confirming this and said that either he or Azahar would revert to me after that.

6. On 14 October 1998 I wrote a short letter to the Hon'ble A.G. confirming my statement that the client would plead guilty. A copy of this letter is annexed hereto as MSD-2.

7. I telephoned and spoke to the Azahar inculcated by the Hon'ble A.G. This was on 16 October 1998. The 'Azahar' in question is Encik Azahar bin Mohamed, Ketua Bahagian Pendakwaan. Encik Azahar confirmed receipt of my letter dated 14 October 1998 and he knew about my meeting the Hon'ble A.G. on 13 October 1998. He went on, in the same conversation, to state that there would have to 'be something else (i.e. more than just a plea of guilt to an amended charge)' and that he would revert when he had instructions. This 'something else' asked for by Encik Azahar was obviously what Dato Gani had asked for, on 2 October 1998, and confirmed to me a common approach to extracting evidence from Nallakaruppan a/l Solaimalai by using the I.S.A. 'death threat' as their bargaining chip.

8. I had conveyed Dato Gani's demands to my client on the afternoon of 13 October 1998. There was little that Nallakaruppan could have done to satisfy Dato Gani or Azahar since he had nothing to give them that would have matched their demands, short of lying.

9. I did not hear from the Hon'ble A.G. or Encik Azahar and so on or about the 21 October 1998 I telephoned and spoke to the Hon'ble A.G. He said that he had made no decision and asked for a further week.

There was no further response and so on 28th October 1998 I sent the Hon'ble A.G. a reminder. I received a reply dated 29 October 1998 signed by Encik Azahar bin Mohamed rejecting the request for an amendment of the charge. This rejection letter is annexed hereto as 'MSD-3' and I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Statutory Declarations Act, 1960.

Act 3: Zainur Zakaria Is Cited For Contempt (From The Notes Of Evidence)

Court to En. Zainur Zakaria: This notice of motion has been filed by you and you have to assume full responsibility for it.

Court: Please read the Statutory Declaration of Mr. Manjeet Singh and his letter to the AG which form the basis of your application.

En. Zainur: Counsel who is arguing this application is Y.M. Raja Aziz Addruse and Tuan Hj. Sulaiman Abdullah.

Raja Aziz: The course of action Your Lordship is taking is most unusual. We have an application based on a Statutory Declaration which is admissible. It is not right to deal with a solicitor at this stage for filing it unless your Lordship propose to bring charges which we can defend.

Court: I intend to do that.

(Encik Zainur Zakaria reads the

Statutory Declaration and the letter from Mr. Manjeet Singh to AG.)

Court: The basis of your application are these two documents.

En Zainur: Yes.

Court: I believe you are aware of the law relating to accomplice evidence and the right of the Public Prosecutor to reduce a charge or not to charge a person if he cooperates and provides information to the police.

En. Zainur: I am not obliged to answer that question.

(Court reads law from various textbooks.)

Court to En. Zainur : Please read paras 13, 16 and 18 of the affidavit (En. Zainur reads).

Court: Are these allegations made in the affidavit supported by the documents that you are relying on?

En. Zainur: Yes. By reading the Statutory Declaration and the letter, in particular para 2 of letter. In this paragraph Mr. Manjeet says para 3 - the whole of it. En. Zainur reads para 3. En. Zainur reads para 4.

Court: Do you agree that para 4 is Mr. Manjeet's conclusion and has nothing to do with his meeting with Gani Patail?

En. Zainur: From what I understand from para 4 it was the conclusion based on the meeting between Mr. Manjeet and Gani Patail. I agree that para 4 is Mr. Manjeet's own conclusion.

Court: Now I take you to para 3. Which part of para 3 suggests that there was a request to fabricate evidence?

En. Zainur: Para 3 must be read with para 4. In para 3 it is point 3 (he reads: That in exchange for reduction of the present charge to one under the Arms Act he wanted Nallakaruppan to cooperate with them and to give information against Anwar Ibrahim, specifically on matters concerning several married women, Dato Gani kept changing the number of women and finally settled on five, three married and two unmarried. Point No. (4): That he would expect Nallakaruppan to testify against Anwar in respect of these women.

Court: Does item 3 in para 3 suggest that there was a request to fabricate evidence?

En. Zainur: It must be read with para 4,

Court: Do you realize that the detailed questioning that I am embarking is to find out whether you filed an application without much thought in which event this court may be merciful with you?

Court: Where does para 3 suggest that a request was made to fabricate evidence?

En. Zainur: Para 3 and para 4 should be read together and when Mr. Manjeet referred to the 'creation' of evidence he was referring to use of death threat. The use of the words 'creation and collection of evidence which is otherwise not there' suggests that Nalla was requested to give evidence against Dato' Seri Anwar.

Court: You say 'to give evidence' - nothing wrong with that. Where is the evidence to show that there was a request to fabricate evidence?

Raja Aziz: This is unusual procedure.

Tan Sri AG: I agree it is unusual. When I was asked to sit I sat.

En. Zainur: In para 4 the use of the words to create evidence means Nalla is asked to create evidence.

Court: I refer you to para 8 of Mr. Manjeet's Statutory Declaration.

En. Zainur: This shows that Datuk Nalla could not give the evidence and there was no such evidence and would mean he is lying.

Court: Are you satisfied that the two documents in question suggest that there was a request to fabricate evidence?

En. Zainur: Yes

Court: This application with its affidavit in support is an interference with the course of justice as it has no basis. It therefore amounts to a pre-emptive step to undermine the integrity of a trial in progress. The object is to project an impression that the prosecution is anchored on fabricated evidence. This is a serious contempt and I have to act on it with all urgency to preserve the integrity of this trial. As I said in the early stage of this trial I will not hesitate to flex every inch of my judicial muscle to ensure that this trial proceeds smoothly. It is my duty to guarantee that per-

sons who are following this trial are not hoodwinked in any way. With the application of this nature to muddy the smooth flow of justice, I would not be surprised if a similar application is made to have me disqualified from hearing this case. In the light of the baseless application filed by you which is totally unsupported by the documents exhibited by you I propose to cite you for contempt for having attempted to undermine the integrity of this trial. Before I do so this court will show mercy towards you by dropping all further proceedings if you tender an unconditional apology to this court, to the AG, to Dato Gani Patall and to En. Azahar for filing an application which is absolutely baseless and which is an abuse of the process of court. (Court to adjourn for half an hour to enable En. Zainur to think about it).

On resumption:

Court: Guilty. Do you wish to address on sentence?

En. Zainur: It was not the intention to commit contempt. When the defence team studied the application before filing it was based on the documents exhibited. Our instructions were based on the documents. In the interest of justice it was felt this matter must be brought to attention of Court.

Court: You do not wish to tender an apology in the terms I described earlier?

En. Zainur: I regret I am unable to do that.

Convicted.

Sentence – three months' imprisonment.

Act 4: Federal Court Judges Speak

Excerpts From Judgment of Justice Abdul Malek Ahmad

25. The relevant question, as learned counsel put it, would be whether the appellant's client [Anwar Ibrahim], by whom the application was made, had the right to complain to the High Court with regard to the alleged conduct of the two prosecutors and whether he had grounds for making the application. If he had the right to make a complaint and if he had acted properly in making the application, then the appellant's act of filing the application on his client's behalf could not have constituted an interference with the administration of justice and, consequently, contempt of court.

26. What merits consideration first is whether there was evidence to support the application to disqualify the two prosecutors. One only need to read MSD's letter and statutory declaration to appreciate the fact that this cannot be a baseless allegation. In consequence, there is really no basis to find that the appellant had acted in bad faith in filing the application on behalf of his client.

28. Learned counsel [Haji Sulaiman Abdullah] further argued, and this was very important, that the overriding factor in the four charges against the appellant's client was sexual misconduct. The defence, in essence, was that there was no truth in the trumped up charges and that all the evidence was fabricated. Being aware of MSD's letter and statutory declaration, which naturally confirmed the suspicions of the appellant's client, it was natural for the client to be overly anxious about the proceedings against him. In doing what he did, can he be said to be interfering with the administration of justice?

29. Much has been said about accomplice evidence but whether or not Dato Nallakaruppan was an accomplice or otherwise is clearly of no relevance. The main issue is the conduct of two of the prosecutors in the prosecution team striking a bargain to get further evidence, fabricated at that, against the appellant's client in exchange for a reduction for the death penalty charge then levelled at Dato Nallakaruppan.

30. Apart from the fact that the application was filed on Saturday and the hearing took place on the following Monday, the notes of evidence, the reproduction of which earlier in this judgment was for the sole purpose of illustrating the point, clearly showed that the trial judge, despite the intervening day being a Sunday, was quite well prepared for the event. The manner he conducted the proceedings, in particular the interrogation of the

appellant and the speedy finding of guilt without even allowing the appellant to call any witness, gave the picture that he was behaving as though he was acting as counsel for the two prosecutors in the motion.

Excerpts From Judgment of Justice Steve Shim

9. Given this scenario, it was hardly surprising that MSD should have concluded or perceived that there was an attempt to extract or extort evidence from Nalla on the part of AGP. If there was, wherefore can it be said that there had been a full and free disclosure by Nalla? It would have been a clear contravention of the second pre-requisite I spoke of a moment ago that the prosecution has to act properly and fairly in seeking the cooperation and assistance of an accomplice. Furthermore, there is nothing to indicate or suggest that AGP had made any effort to determine whether or not Nalla was in a position to give such evidence. If he (Nalla) was unable to give the sort of information requested to the knowledge of AGP, then quite clearly, this would be asking Nalla to give evidence which never existed - in short, to fabricate evidence. In my view, evidence should have been led to ascertain these matters by calling MSD and/or AGP. They should have been given the opportunity to explain.

10. In the circumstances, the view taken by the learned High Court Judge that the request for information by AGP in this case was an exercise of lawful powers with no undertones of any impropriety is clearly misconceived. It follows therefore that the Court of Appeal's endorsement of that view is equally tainted with the same misconception.

11. I have earlier drawn attention to that part of the judgment of the learned High Court Judge when he said that since the appellant was aware of the contents of Exhibit ID14B in the possession of the prosecution at the material time, he should have been on his guard when he read the letter dated 12th October 1998 written by MSD to the Attorney-General and which should have prompted him as a senior member of the Bar and an officer of the Court to alert MSD as to the folly of his conclusions. With respect, such a stand could not have been tenable as it would conceivably be premised on the wrong assumption that the appellant had accepted or should have accepted the truth of the contents in Exhibit ID14B. It is clear that the accused DSAI had, in the course of his trial, denied and/or disputed the allegation that he had had extramarital affairs with other women. As I said before, whether that denial and/or dispute had any merit or not was beside the point. What was significant was the fact that DSAI had taken such a stand. The learned High Court Judge had apparently failed to consider this material particular and, as a result, had arrived at a conclusion which, in my view, was quite unsustainable in all the circumstances.

12. For the reasons stated, I must, with respect, disagree with the High Court in holding (as did the Court of Appeal) that the appellant had acted recklessly, negligently and in bad faith in filing the disqualification application. In my view, he was prirna facie justified in filing the said application. In the premises, there could not therefore have been any abuse of the process of the court having the effect of undermining the authority and/or integrity of the trial in progress. It must consequently follow, as night follows day, that the charge of contempt against the Appellant has not been proved beyond reasonable doubt.

Excerpts From Judgment of Justice Haidar Mohd. Noor

In short, if the filing of the application was prima facie justified there could be no question of the appellant being liable for contempt of court for acting on the instructions of DSAI. In other words, the appellant could not be said to be reckless and negligent and acted in bad faith in filing the application as held by the learned High Court Judge and upheld by the Court of Appeal.

Hence, the question of undermining the authority and/or integrity of the trial in progress did not arise. I would add that the issue of trying to derail the trial also did not arise as evidence showed that the appellant was merely asking for a short adjournment to prepare his defence, that is, just a few days. Surely justice should be accorded to him to do so as his liberty was as stake and such an application should not be viewed negatively by the court as if to prevent or delay the course of justice. ◻

In Defence Of Justice Muhammad & Judicial Integrity

by *Kim Quek*

Justice Muhammad's courageous Judgment, which exposed a ruling party - inspired massive infusion of illegal immigrants into the electoral roll of Sabah, has won the applause of the whole Nation. His revelation of an illegal attempt to abort the hearing is a landmark judicial act that bodes well for the new Chief Justice's noble vow to restore integrity to the fallen Judiciary.

While the nation jubilates over this latest triumph of the righteous over the corrupt, the uncalled for attacks by Mahathir and Rais appear as a spoke in the wheel of public expectations of judiciary reforms and reveal in stark focus who the real villains are in this controversy.

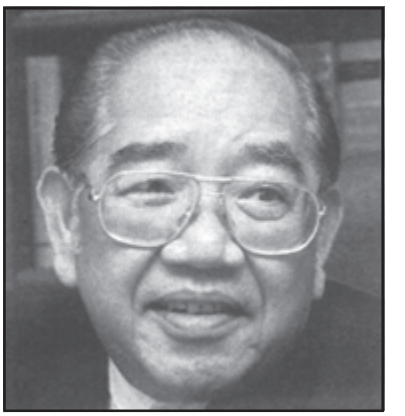
The issues raised by Mahathir and Rais to malign Justice Muhammad are trivial comments in the Judgment, taken completely out of context, and deliberately distorted and blown up to accuse Muhammad of allowing his personal grievances to "tarnish the image" of the entire Judiciary.

In the ending paragraphs of Muhammad's Judgment, he took the opportunity to observe a "worrisome trend or culture" in the Government. He lamented the total non-response of government departments to public's letters and reports. To illustrate his point, he gave two personal experiences, one being his son applying for a temporary work permit, and the other his daughter applying for a scholarship for a one year post graduate course. In both cases, there was no acknowledgement from the government in spite of reminders.

Arrogant Trend To Ignore

Muhammad's motivation to make the above observation must have been obvious, if one reads through his Judgment. Reading through his Judgment, one cannot help but feel the frustration in him, when he gave instance after instance of total non-response from various government departments to numerous written complaints from the public on phantom voters and illegal identity cards. Making these complaints to the Government was like barking up a wall. Under these circumstances, can you really blame anyone for feeling angry and frustrated at such blatant irresponsibility of an elected government? Wouldn't Justice Muhammad be feeling the reprimand of his own conscience, if he were to keep mum (particularly out of timidity) over such a heinous betrayal of public trust by the Government?

It is within this context that Muhammad's personal experiences were cited - not to express a personal loss, but to reinforce his view of an arrogant trend in government to totally ignore public complaints, which trend has precipitated the electoral fraud that forms the subject matter of this case.



Childish And Mischievous

However, Mahathir chose to interpret Muhammad's references to his son and daughter otherwise. Mahathir said:

It was obvious the Judge harboured ill feelings when he commented that his son did not get good treatment from the government. Other similar election petitions in Sabah have been dismissed by other courts except this Likas case. The Judge was obviously not happy with the way he was treated in Sabah.

It is childish and mischievous of

Mahathir to interpret Muhammad's references to his son and daughter as airing his "personal grievances", imputing improprieties into Muhammad's Judgment. It is also equally wrong of Mahathir to implicitly conclude that just because all the other election petitions in Sabah have been dismissed by the courts, Muhammad should also do the same, unless motivated by improper personal reasons (such as personal unhappiness with the government as in Muhammad's case).

Massive Election Crimes In Sabah

Contrary to Mahathir's implicit assertion that the other election petitions in Sabah have been rightly dismissed, Muhammad's Judgment has opened up a new vista of massive election crimes in Sabah whereby tens of thousands of phantom voters consisting of illegal Philippine and Indonesian immigrants uncovered in the trial are merely a "tip of the iceberg", to quote Muhammad. For that reason, all the other election petitions that have been dismissed previously are now suspect and must be fully investigated with a view to uncover irregularities and tampering of justice. This is important, particularly when Muhammad has disclosed that other judges hearing similar election petitions in Sabah had called him for advice regarding similar telephone calls asking them to dismiss their cases.

On the issue of conspiracy, though Muhammad has mentioned there is no legal evidence to show the existence of an agreement between the Prime Minister (or other Minister) and the Sabah Barisan Nasional conspiring to register non-citizens in the electoral roll, nevertheless, witnesses and evidences galore indicate the existence of massive campaigns to issue blue identity cards to illegal Philippine and Indonesian immigrants and the subsequent registration of these phantom voters in the electoral rolls. In these illegal activities, UMNO officials play a heavy role, abetted by the National Registration Department, the Election Commission and the Police.

Involvement of the highest authorities in the National Registration Department and the Election Commission respectively in Kuala Lumpur is indicated when the former ignored completely written complaints from Opposition leaders in Sabah on cases of blue identity cards being issued to illegal immigrants, and the latter gave strict directives to Sabah election officials not to entertain any objection on tens of thousands of dubious voters in the electoral roll that surfaced frequently.

The question is: what motivated these highest civil servants to commit such treasonous acts against the State in unlawfully admitting these tens of thousands of illegal immigrants as citizens and voters? Personal gain can be ruled out, as these are more than offset by the heavy punishment that can be meted out for such high crimes against the country.

UMNO's Recruitment of Phantoms

The only plausible explanation is that this is the political strategy of the UMNO leadership to regain political power in Sabah from the Kadazan dominated PBS. However, there was virtually no chance that the UMNO-dominated Barisan Nasional could unseat the PBS Government, unless there was a drastic restructuring of the ratio of non-Muslim to Muslim voters and a redrawing of the electoral boundaries.

And this is exactly what happened. Through massive infusion of illegal Filipino and Indonesian immigrants (who are all Muslims) and gerrymandering, Muslim majority constituencies in Sabah in the 1999 electoral roll had suddenly and inexplicably increased within a short period of 5 years.

Fooling The Public?

Returning now to Mahathir and Rais' concerted criticism of Justice Muhammad, it is pertinent to note that Rais intimidated that he would take action through current Chief Justice Mohamed Dzaiddin Abdullah to ensure that the Likas case is not repeated. Rais said:

Actually, what he did to me has damaged efforts by my department and the Judicial Department in rehabilitating the image of the judiciary.

Rais, like his master Mahathir, must be taking the Malaysian public as fools, for making such preposterous and laughable comments and still expecting the public to swallow them.

Muhammad's judgment of massive electoral frauds is fully corroborated by witnesses and subtantiated by irrefutable and unchallenged evidence in writing. What has Rais got to say to that? In the eyes of Mahathir and Rais, Muhammad's wrong was that he had exposed the ruling party's unforgivable crime in robbing the people of Sabah of their political rights, and also the former Chief Justice's illegal attempt to tamper with justice.

Mahathir and Rais' naked and clumsy attempts to pressure the new Chief Justice and the Judiciary to toe the line is all too obvious. q

Phantoms On The Roll In Sabah

Judgment by Justice Datuk Hj Muhammad Kamil bin Awang on Election Petition No K11 of 1999

28.1 The Electoral Roll

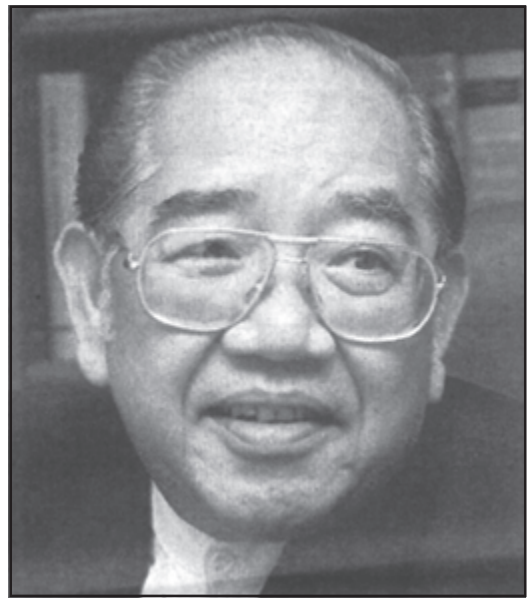
28.1.5. The petitioner, Chong Eng Leong @ Ching Eng Leong (PWS), 54 years old and a surgeon by profession, stood as a PBS candidate in this election, and lost to the 3rd respondent.

28.1.6. The primary contention was that the certification of the 1998 Electoral Roll for Likas Constituency was fraudulent as there were illegal practices in the registration and preparation of the electoral roll....

28.1.7. The electoral roll for Likas Constituency was certified by SPR in Decernber 1998. Prior to that date, there were 4,585 objections raised in respect of List A and 246 objections in List B. List A consists of names of voters in a constituency... List B consists of names of voters who had made applications for transfer of constituency....

28.1.8. The petitioner testified that there was no hearing in respect of the 4,585 objections in List A, and as such he made an appeal against the non-hearing of the objections to SPR, Kuala Lumpur, which drew a blank.

28.1.9. Of the 246 objections in List B, only 10 objectors were present at the inquiry held on 15th November 1998. As a result 19 names were deleted in List B....



28.1.10. There were 4,197 persons having dubious identity cards (Exhibit P15) and the petitioner had written a letter dated 20th April, 1999 to the JPN about them but there was no response. Later his counsel wrote a letter (Exhibit P16) dated 8th September 1999 to JPN on the same subject matter and received the same treatment.

28.1.11. On another occasion he received from the public 36 cases of dubious identity cards (Exhibit P25 (1-36)) which names appeared in the electoral roll for Likas Constituency, and he lodged a report with the police, vide Kota Kinabalu Report No. 1438/1999. It appeared that no investigation had been carried out on the report.

28.1.12. The petitioner's evidence found corroboration in the testimony of the Pegawai Pendaftar Likas, (Registering Officer Likas), Ewol B Muji @ Edward Ewol Muji (PW10).

28.1.13. As a Registering Officer, he registered electors (voters) for the State Election, and he received objections from voters. He testified that he received 4,585 objections to List A and 246 objections to List B, Regarding the objections to List A, there was no public inquiry held. The reason being that there was a strict instruction by SPR that no objection to List A could be entertained except in cases of death or disqualification. The instructions were contained in SPR's letters dated 7th and 8th October 1998 (Exhibits P21 and P22) addressed to Pegawai Pilihanraya Negeri Sabah and all Pegawai Pendaftar. A letter ref. SPR(S)273/(42) dated 7th October 1998 (Exhibit P22) addressed to Pegawai Pilihanraya Negeri Sabah, which stated, inter alia:-

"2. Sukacita dimaklumkan bahawa Suruhanjaya Pilihanraya telah memutuskan bantahan terhadap Senarai "A" 1997 tidak akan diterima melainkan atas alasan kematian atau hilang kelayakan. Ini bermakna bantahan kepada Senarai "A" 1997 yang diterima atas alasan-alasan selain yang dinyatakan tersebut dari mana-mana pembantah ditolak oleh Pegawai Pendaftar" ....

28.1.14. The Pegawai Pilihanraya Negeri Sabah in its letter ref. PPN(O) 1/6(66) dated 8th October 1998 (Exhibit P21) conveyed the decision of SPR to all Pegawai Pendaftar (Registering Officers) including PW10, as follows:-

" ... dimaklumkan bahawa Suruhanjaya Pilihannya Malaysia telah memutuskan bahawa bantahan Senarai A Daftar Permilih 1997 yang telah disahkan pada 31 Disember 1997 tidak boleh diterima kecuali atas alasan kematian atau hilang kelayakan."

28.1.15. As a result, the petitioner and a few others made applications to PW10 appealing against the decision not to hold a public inquiry, whereby the applications were forwarded by PW10 to SPR (HQ) Kuala Lumpur (Exhibit P49). There was no response.

28.1.16. PW10 further testified that he did not verify the identity cards during the registration of voters. It was not a practice that he had to verify identity cards nor the citizenship documents of those people who wish to register in the electoral roll. In other words, PW10 just followed orders of his superiors not to hold a public inquiry to an objection except in cases of death or disqualification. Superior orders or state authority are no defence to an action otherwise illegal....

28.1.18. The SPR has to face the truth. The 4,585 objections in List A were cases of persons having dubious identity cards or persons who had been convicted of having fake identity cards. The people who raised the objections were exercising their rights as citizens, and it is unthinkable that the SPR should shut-off the objections in List A without a public inquiry. It is a constitutional wrong for SPR to have rejected the objections outright. More importantly, it is wrong for SPR to allow non-citizens and disqualified persons to be on the electoral roll as voters. It appears that the certification of the electoral roll for the 1998 Likas Constituency by SPR is ultra vires the Constitution and is in fact illegal.

28.2 Identity Card Not Proof Of Citizenship

28.2.1 The identity card is not proof of citizenship. It appears that the SPR takes the identity card as proof of citizenship and a person who produces a blue identity card will be registered in the electoral roll. PW10 (Pegawai Pendaftar Likas) testified at the trial that it was the normal practice that the Pegawai Pendaftar accepts for registration on the electoral roll persons who have blue identity cards and also those with temporary identity cards, that is form JPN 1/9 and form JPN 1/11. This has been much abused. For example, INDAH MAHIYA BTE ABDULLAH had lost her blue identity card and reported the loss to the police, vide Report No, 2429/98. Based on the police report she was issued with a temporary identity card, form JPN 1/9. It seemed that based on the same police report No. 2429/98; seven other people were issued with form JPN 1/9 (i.e.temporary identity card)...

28.2.3 In another election case, No. K 1/99 before this court, the petitioner had notified the SPR that there were cases of the use of duplicate identity card numbers in the registration of names in an electoral roll [5 cases given]

28.2.5 The Tawau Court had convicted the following persons in 1996 for the offence of possession of fake identity cards:-
(3 names given)...

But their names were not deleted and were still in the 1998 certified electoral roll for Likes Constituency.

28.2.6. How easily many of the immigrants, Filipinos and Indonesians, had obtained citizenships in this maner, i.e. through their applications for identity cards, was well illustrated by the testimony of ASAINAR B IBRAHIM @ HASSAN, (PWll), a former District Chief for Bandar Sandakan from 1982 - 1985. A system which was established before Malaysia Day 1953 where an appointment of District Chief, a parallel appointment (a political appointment), vis-a-vis the District Officer was appointed by the government PW11 was a Pegawai Perbadanan Kemajuan Sabah, later Ahli Lembaga Bandar Sandakan and Ketua Daerah Sandakan in 1985.

28.2.7 He testified that there were two categories of applicants for the blue identity cards.

Those persons under 12 years old and who have birth certificates have no difficulty in obtaining blue identity cards. Those above 12 years old and who have no birth certificates may obtain identity cards by using form HMR 10 (JPN). This form is filled up by the parents and submitted to the District Chief.... When PW11 was first appointed as the District Chief, he had no idea of what was going on and he recommended, without question, the 1,000 and more of such applications that he received from the Native Court and, on his recommendation, they were issued with blue identity cards. He said that "the main factor causing loss to Berjaya Government in 1985 to PBS was because Berjaya leaders sold the rights of Sabahans to foreigners, totaling 40,000 by making them blue identity cards, thus they became citizens." He was a Berjaya Party candidate in Sungei Sibuga Constituency in the 1986 State Election but lost.

In 1998 it was alleged that he was involved in a project to process and distribute blue identity cards to illegal immigrants in Sabah, the Filipinos and the Indonesians. On 9th July 1998 he was detained under the ISA for 60 days and thereafter he was placed under restricted residence for 2 years....

PW13 Mutalib Md Daud, is a former Executive Secretary for Silam Umno Division and is still a member of Umno. Mutalib was born in Kg. Lanai, Kedah and initially held a Malaya identity card. In 1970 he migrated to Sabah under the "Untuk kemajuan Ba" programme and settled down at a village name Kg. Burong, Lahad Datu where he found that a large number of illegal immigrants from Indonesia and Philippines had settled down.

He observed that there were numerous immigrants who had obtained blue identity cards in a relatively short time, 3 months or 3 years, while it took him 23 years to change his Malayan identity card into an identity card of Sabah through the normal process. He testified that of the 43,000 new Umno members recruited at the time, only 14,000 had genuine blue identity cards, the rest he did not know how they got their blue identity cards.

From 21st October 1996 there was an exercise to recruit Umno members for 3 days which attracted 10,211 new Umno members. They applied for identity cards, but only 180 applications for identity cards from these members were approved by Jabatan Pendaftaran Negara, and the rest were rejected.

The instances of non-citizens and phantom voters in the electoral roll as disclosed at their trial may well be the tip of the iceberg....

The failure of SPR to maintain an electoral roll in accordance with the law makes the electoral roll illegal. Such is the case in the 1998 electoral roll for Likas Constituency (N13). I would in the circumstances, uphold the petitioner's petition that the 1998 electoral roll for Likas Constituency (N13) was illegal.

Phantom Voters
Operation Gembeling

Radin Malleh (PW14), a Member of Parliament and the Secretary General of PBS, holds a LLB degree from Kent University, and had served the police force for 20 years, holding the rank of DSP when he left the force in 1990 to join politics. As the Secretary General of PBS he received a lot of information and material of public interest from members of the public, including documents of *pengundi luar* or phantom voters.

In early March 1999 he received via Pos Laju a box containing lists of names and dubious identity card numbers of 40,000 people and he had forwarded them to the police, vide report No. 1061/99 dated 10th March 1999 (Exhibit P60). 31,845 names were found in the 1998 electoral roll, of which 2,975 names were registered in the Likas electoral roll.

He lodged a report with the police, re: *pengundi luar* three times but unfortunately no action was taken. In particular, 12 fake identity cards were sent to the police for investigation, vide report KK 1794/96 dated 18th January 1996, and 10 names appeared in the 1998 electoral roll of Likas Constituency, N13....

Between 1996-1998 several people were arrested under ISA for involvement in the issuing of fake identity cards: Mohd Agjan b Ariff, Jabar Khan, Bandi Pilo and Shamsul Alang - all from Sabah Umno; and Mohd Nasir Sunjit, Asbi b Abdul Karim, Jamah Ariffin, Asli bin Ariffin and Kee Dzulkifli b Kee Abdul Jalil - all were officers in JPN Sabah. They were involved in the *Ops Gembeling*.

This operation called *Ops Gembeling* whereby the JPN officers were asked to collect the names of the illegal immigrants, and with the aid of some political leaders, they were given the blue

identity cards. PW14 had written to JPN in respect of these illegal immigrants who were given blue identity cards (Exhibit P54) and he also wrote to the Ketua Pengarah Pendaftaran Negara Malaysia on 15th December 1998 before the electoral rolls were certified by SPR on 31st December 1998. There was no response.

The target of this operation was the Malays of Bugis origin, and these people formed an association known as Persatuan Kebajikan Bugis Sabah. For example, Pirsing Siraji, 22 years old, was in possession of identity card No. H0481706, and his name was found in the 1998 electoral roll (but with the identity card No. H04817096) for Likas Constituency. It is noted that the Sabah identity card number has 7 digits, Pirsing had an identity card number with 8 digits, and he was convicted by the court on 28th September 1992.

On 15th December 1998 when PW14 wrote to the JPN for verification of the identity cards, there was no response. On 7th October 1999 Hamid b Hassan wrote an open letter (Exhibit P66) to the Deputy Prime Minister - there was no response.

As a Member of Parliament, PW14 raised this issue in Parliament, in a letter addressed to Setiausaha Dewan Rakyat (Exhibit P65) and it was rejected under Rule 23(1)(f) as it was a secret matter which the government could not disclose....

PW14 referred to a letter (ID14) written by the Chief Information Officer Umno (Datuk Hj Karim bin Abd Ghani) PW17, which was sent to 31 State Constituencies .... PW17 in his testimony stated that he did not sign the letter (ID14) and he suggested that the signature was forged. This letter was distributed to all Umno branches in Sabah, and in the trial of three persons (Exhibit P62) in Tawau High Court the Judge had accepted the evidence of the accused that they were just following the directions of a superior as contained in ID14. If ID14 carries a forged signature, therefore it is a forged document. This is a serious allegation, but why is it that PW17 did not publicly disown it as soon as he knew that ID14 had been sent and received by all Umno branches in Sabah? Why didn't PW17 or Umno refute this at the trial in the High Court at Tawau? ... But there is no evidence of this alleged forgery (ID14) and it was never reported to the police. Umno Chief Information Officer thought it fit to ignore and allow ID14 to be made use of extensively, including in court proceedings, without taking any action or step to deny or stop it. As a matter of fact, PW17 had made no mention of ID14 at all in his affidavit in Petition No. K 7/99. The veracity of PW17's evidence here is highly questionable.

Corrupt Practices Or Bribery

The allegations of corrupt practices or bribery made by the petitioner in the petition were too general in nature. PW16 testified that days before the election day, many candidates from various political parties including the 3rd respondent and their supporters, visited the constituency. Some brought and distributed to the people food stuff such as 25 kg rice each, milk, sugar, cooking oil and flour; some were supplied building materials such as zinc roofs, planks, boards and water tanks; the more ambitious, built roads, canals, boats and perahus. Some distributed money. The display of generous concern and care is a very welcome thing to the voters although it happens at a five-yearly interval, as a prelude to each election. It is fast becoming a Malaysian way of life, a tradition as it were, that prior to an election, contesting candidates will visit their constituency with all types of gifts or presents in their endeavour to win or influence the voters to their side. Whatever it is, there is not sufficient evidence before the court to support the allegation of corrupt practices by the BN candidates. There was no specific charge that could be brought against the 3rd respondent in the case. Corrupt practice is quasi criminal in nature and the petitioner has to prove beyond reasonable doubt the offence of corrupt practice. In the case of WONG SING NANG v TIONG THAI KING (1996) 4 MLJ 261, the court held that there was no direct evidence that the voters in the constituency were in any way influenced by the gift. Therefore the petitioner had failed to prove beyond reasonable doubt the offence of bribery or corrupt practices.

Conspiracy?

"The gist of the tort of conspiracy is not the conspiratorial agreement alone, but that agreement plus the overt act causing damage . . . . The tort of conspiracy, however, is complete only if the agreement is carried into effect so as to damage the plaintiff." per Salmon J. in MARRINAN v VIBARI (1962). 1 All ER p. 871.

Continued on page 23

I'm waxing poetic these days. When all else fails in these trying days and frustration gets the better of one's social aspirations, poetry (even bad poetry at that!) provides great solace. String the headings together and you may get something of a poem *sans* rhyme. Invoking poetic licence further, I've used the headings liberally to include all manner of commentaries and stories directly or obliquely connected to their subjects. For actual rhymes, do read the politically "incorrect" ditties, which follow.

Q Q Q Q Q

The Old Man Blows His Fuse

The PM has again put his foot in his not-so-proverbial mouth. I refer to the fire which razed the Dewan Tuanku Canselor (DTC) in Universiti Malaya (UM). Before the Fire and Rescue Department could ascertain the cause of the DTC fire, he was already proffering his two-bit opinion that students were behind the fire. The smoke is now smothering his face after the department suggested that 40-year-old faulty wires in the building were the likely cause of the fire. Of course thickness of face which comes with the years may save the day for the PM together with some future deft work by the police and SB who are now doing their own investigations of the fire.

Whatever these latter findings, many won't believe that university students are today politically attuned to acts of terrorism, let alone have the technical capability of a Timothy McVeigh. This was exactly the opinion of a UM professor who on hearing about the DTC fire straightaway deduced that it had nothing to do with the students nor the fact that the UMNO Puteri leader Azalina Othman and former youth chief Rahim Tamby Chik were about to stage a forum on forging "idealism, blah, blah, blah" among students in the 21st century. Surprise, surprise, they were inviting the PM for the opening ceremony at DTC. The fact that the fire occurred a day before the staging of the event was mere coincidence, averred the professor, or was it an act of God?

Nowhere in campus history has there been a hint that militant tactics were countenanced by student groups. Consider the fact now that the rising number of students being harassed and pilloried by various authorities have had the flimsiest of charges foisted on them. But the regime clearly wants to make a point. Two were detained under the ISA (though one was freed later after the release of the fire department's report). Somehow their mere detention under this repugnant law, in the eyes of some, makes their purported offence grievous. But this time, the tactic won't work as overuse of the ISA makes it lose its stigma. The reverse is probably true for *Reformasi* activists – ISA arrests have become signatures of heroism.

Khairul Anuar Ahmad, the IKM student, makes history as the first student to be taken in under the ISA since promulgation of the Universities and University Colleges Act (UUCA). His alleged crime: being vocal against the ISA. An ironic twist!

Mohamad Fuad Mohd Ikhwan, the UM student, who was a vocal supporter of the VC when UMNO hacks demanded his resignation because of the DTC fire, was put in for being allegedly "involved in a *Reformasi* motivational workshop intended to spur reformists and carry out plans to overthrow the government through street demonstrations." (Malaysiakini, 7/7/2001).

The case of the two USM students facing disciplinary action is even more ludicrous, although less serious because the UUCA is used, not the ISA. Selling a few anti-ISA stickers on campus was the ostensible reason for the potential dis-

missal of the students. Come on!! More insidious was the manner in which one of the students was nabbed. A plainclothes campus security officer posing as a student purchased the stickers from him and this constituted the case for the student's offence. Talk about a police state on campus! It has long been known that informers and SB officers have routinely listened in on lectures to suss out lecturers but when the university's own campus guards take on the job of nabbing politically "incorrect" students, we are sliding into a new world of surveillance altogether.

I think that the regime must be getting really desperate to pick on students this way. But there's method behind the madness, so to speak. Students who since the mid-1970s have not been a significant factor in politics could be said to be the backbone behind *Reformasi* today. They also represent new or future voters. Herein lies the rub. Nip the movement in the bud before it grows. According to Malaysiakini, the pro-government National Malaysian Youth Association identified 10 student bodies with anti-government leanings, including Gamis (Peninsular Islamic Students Coalition) and GMMI (Abolish ISA Student Movement).

There is also the off-campus "Universiti Bandar Utama" (UBU) movement, which stages dramas. Film director Hishamuddin Rais, now in Kamunting, is the alleged inspirer of the UBU.

It's most heartening to see the blossoming of multi-ethnic student movements of all sorts which are socially engaged. But that's not how the BN regime sees it. My guess is that the very actions of the government to douse student activism will galvanise the students to even more protests. Such are the ironies of life and politics.

Ironies I can take but plain vulgarity and sheer bad taste, please spare me! How can anyone with an iota of culture think of celebrating 20 years of reign of our officially uncrowned monarch. (Remember the joke that in the United Kingdom they change their premiers every five years or so and keep their monarchs forever; in Malaysia, we change our monarchs every five years and keep our PM forever!) This sort of sycophantic behaviour has made the old man wax philosophic about "not regretting" his actions of the past. Even prophets and saints regret that they have committed some errors in their lifetimes and for that matter computers and automatons also can get glitches, but not Doctor M. The only glitch he will get is the itch to rule for another 20 years!

Q Q Q Q Q

Puteri Wears The Pants

We return to Puteri UMNO and its brawny leader Ms Azalina. Apparently, the sprouting of a Puteri section of UMNO was to resuscitate the flagging support of youth for the party. True to UMNO double standards, while students have been asked to lay off politics by the authorities, Puteri UMNO was given free reign to sign up members on campus. No doubt the campus authorities will be ever so cooperative.

Azalina's foray into UM to stage the aborted forum on student idealism was part of its campaign to penetrate university students. But to what avail? Few believe UMNO with its archaic philosophy and racial politics can capture youthful imaginations.

Students these days are fired up by two things (besides job prospects, that is): moral outrage and *reformasi*. It's encouraging that non-Malay students have often been active in pointing out the economic excesses of the ruling groups. Islamic groups, for their part, tend to gain support for their criticism of the government's unethical behaviour.

Thus, Puteri UMNO's thrust into the campuses, including its call for the UM VC to step down, and its attempt to steal the limelight (or the pants?) from UMNO Youth will probably yield poor results. Which leads us to what the boys in UMNO may want to do – sing lullabies?

Q Q Q Q Q

Pemuda Sings Its Lullaby

In one of his rare Freudian moments of creativity, UMNO Youth chief Hishamuddin Hussein proposed a remarkable idea. Members should use the UMNO anthem to sing their children to sleep. That way, the love for UMNO will percolate into the subconscious of a new generation of UMNO supporters. Brilliant, Hisham! Was all of this something straight out from Psychology 101 during university days? If so, the psychology professor would have given you an "F" for such an infantile idea. However, we'll be more generous here in Malaysia, given that UMNOcrats are given special grading dispensation, and pass you with a "D".

Actually, the idea will be good for *Reformasi* in the long run. Reverse

psychology teaches us that if you keep telling your children to do certain things again and again, they will react against them. Eventually they will reject both the exhortation and the exhorter himself or herself.

This seems to symbolise the problem with UMNO Youth, loss of political imagination (mind you, this could have happened even eons ago before Hisham). In their desperation they have turned over their pants to Puteri UMNO and now, to make matters worse, want to take on the role of singing lullabies!

By the way, the strategy misfired and hit a most unlikely target, the former UMNO treasurer!

Q Q Q Q Q

Daim Goes To Sleep

The redoubtable erstwhile, second-time finance minister has taken flight and, with all the soothing UMNO lullabies lilting the air, has conveniently retreated into deep slumber in a nowhere land. Where is the man? Now that the economy is tailspinning, with only a 2 percent growth and Renong is being rescued yet again, this time from a RM13 billion debt, where are you Daim?

I find it unconscionable that finance ministers can come and go as they please without a proper accounting of what they have been able to do or not do for the nation during their term. Usually, a finance minister resigns when his ideas and programmes to activate or uplift the economy fails or he has serious policy disagreements with the government of the day. Daim's reasons for resignation remain opaque and inexplicable. Worse, he has left us with several hot potatoes: MAS, Renong, Time dotcom and a declining economy.

The real Houdini in Malaysia is this man, who seems to be able to make himself disappear at the most opportune of times.

Q Q Q Q Q

The MCA Cradles All But Falls

One thing that won't disappear is the MCA and its problems. President Ling is still weathering the storm of the takeover of Nanyang Siang Pau and China Press. Most accounts have it that tycoon Quek, who owned the papers before, was somehow armtwisted into giving away these politically significant economic footholds within the Chinese community. It is also no secret that the hand that rocked this cradle is the same that rules the roost, if you'd allow my mixing of metaphors.

The MCA leadership's split over the takeover speaks volumes for this unpopular move and now that Nanyang Siang Pau sales have plummeted some 20 percent after the takeover, the papers are likely to become economic albatrosses for Huaren, the MCA holding company, rather than cash cows. It would be interesting if MCA, like its political partner, UMNO, ends up in the same predicament of holding on to a string of unprofitable economic undertakings. We have just seen what has happened with Renong. Will Huaren go the same route? And, will this route lead to political collapse? I dream, as always....

Meanwhile, Ling announced that MCA would get a university – UTAR . This came as no surprise, really. Most people knew that TAR College effectively functioned as a sort of university with twinning programmes but the so-called political coup was a good ploy to disarm Ling's detractors in the party.

My concern is less with the fact that we don't have enough national universities to cater for the thousands of eligible Malaysians hungering for knowledge (or is it a paper qualification), but the fact that by most accounts, our national universities continue to slip academically, professionally and socially. Adding to their numbers merely compounds the problems when we don't address fundamental issue of a university's autonomy to make academic decisions and to maintain political independence.

Two newly announced policies, which will ensure the downslide are the proposed differential grading system for Bumiputeras and the political screening of students and lecturers. The former policy will surely turn our universities into pariah institutions of higher learning world-wide. Worse still, it is the most insulting thing yet that could happen to Bumiputeras, namely, a virtual admission of their innate academic inferiority. Affirmative action in providing places for Bumiputeras can always be defended in that once they get in, they are subjected to the same universal academic standards. But when academic standards are adjusted for students for no other reason than the fact they belong to an ethnic group, we are digging ourselves deeper into the bottomless pit of racist policies.

Q Q Q Q Q

Nursery Rhymes For Our Times

And now, in the spirit of UMNO Youth's call for lulling the whole nation into deep slumber, we offer a selection of our own nursery rhymes.

There was a crooked PM
Who had a crooked smile
He hatched a crooked scheme
Against his crooked style
He spawned some crooked cronies
Who bled the country dry
And they all lived together
In his crooked monstrous palace
While all the people cry

Two little judges
Sat on the bench
One named Jaka
One named Paul
Damn him, Jaka!
Damn him, Paul!
Great job, Jaka!
Great job, Paul!

Umno Sprat could eat no fat
His Renong wife could eat no lean
And so between the two, you see
They licked the EPF platter clean

Baa Baa black Petronas sheep
Have you any oil?
Yes sir, yes sir
Three billion barrels all
One for my master
Two for his cronies
And none for l'il Trengganu who didn't go on its knees

Leong Sik had a little boy
Whose bank account was low on dough
And everywhere that Leong Sik went
His boy was sure to go

He followed him to the exchange one day
T'was against the rules, y' know
It made the punters weep and bray
To see the boy's money grow

Crony, Crony quite contrary
How does your fortune grow?
With phoney bonds and bankrupt companies
And insolvent banks all in a row!

Humpty Mock Zany sat on the wall
Humpty Mock Zany had a great fall
All the state's coffers and all the PM's men
Couldn't put Mock Zany together again

Three blind mice
(PAS, DAP, PKN)
See how they run
(for the elections)
They all ran after the farmer's wife(BN)
Who cut off their tails with a carving knife(ISA)
Have you every seen such a sight in your life
As three blind mice?

PAS and DAP went up the hill
To resolve the Islamic state matter
The moon fell down and broke its crown
The rocket came crashing after

Hey diddle diddle
The PM and the fiddle
The MAS debt jumped over the moon
The foreign dogs laughed to see such fun
And the Tajuddin dish ran away with the Daim Spoon

(Take Two)

Hey diddle diddle
The PAS and the fiddle
The DAP jumped over the moon
The big BN laughed to see such sport
And the PKN dish ran away with the PRM spoon

This little MCA went to the stock market
This little Gerakan stayed in Penang
This little MCA had a newspaper stake
This little Gerakan had none
This little Quek laughed
Ha, ha ha
All the way to the bank

Rock-a-bye Bee Ann ruling the tree tops
When the winds of change blow
The cradle of power will rock
When the bough of support breaks
The cradle will fall
And down will come Bee Ann cradle and all!

D. L. Daun

Q Q Q Q Q

Continued from page 18

HALSBURY's LAWS OF ENGLAND, 4th Edition Vo. 45 p. 721 states that:-

"In order to make out a case of conspiracy the plaintiff must establish -

1. an agreement between two or more persons;
2. an agreement for the purpose of injuring the plaintiff; and
3. that acts done in execution of that agreement resulted in damage to the plaintiff."

Warrington LJ in DAVIES v THOMAS (1920) 2 Ch. 189 said:-

''That is to say, to be a conspiracy - that is an unlawful conspiracy, one which gives rise to either an indictment or a right of action - it must have an unlawful object, that is, the act which it is intended to bring about must be in itself unlawful, or, if not in itself unlawful, then it must be brought about by unlawful means."

Lord Dunedin in SORRELL v SMITH & ORS (1925) AC 700 held that an act that is legal in itself will not be made illegal because the motive of the act may be bad.

I can find no evidence that there was a conspiracy between the Government and the Barisan Nasional (BN) at the highest level as suggested by Mr Maringking. Not an iota of evidence to show the existence of an agreement between the Prime Minister or any other Minister with the Saban BN regarding the registration of disqualified persons or non-citizens in the electoral roll. The semblance of an agreement in the *Operation Gembeling* or the 'Mahathir's Project' where blue identity cards were sold to these people at RM300 a piece, evidently has no nexus to connect these to the fake identity cards sold. It is a mere gimmick to lend legitimacy to these operations. It is incredible to say that the government is involved in a conspiracy to register phantom voters especially as no such agreement existed between the government and the BN. It is true that too many politicians and public officials have exercised power and responsibility not as a trust for public good but as an opportunity for private gains.

It has been brought to my attention that the SPR has come up wtih the revised 1999 electoral roll for Sabah in which more than 19,900 names have been dropped there from, presumably the names are those who have died and/or have lost their eligibility to vote as citizens.

No Response

I seize this opportunity to record a few observations that a worrisome trend or culture, not borne out of Malaysian culture, has evolved where public institutions or government departments do not seem to care to respond to letter or reports received from the public. Such letters or reports seemed simply ignored, invariably no response or acknowledgement or receipt whatsoever has been made, for example, from personal knowledge in a few cases; where my son had applied for a temporary work permit which was refused, and I wrote an appeal to the authority concerned; and in another case, my daughter had applied for a scholarship for a one-year post graduate course. In both cases there was no acknowledgement despite reminders, although earlier on, personal assurances of favourable consideration had been given. Rgrettably this is the very antithesis to good governance in as much as a threat to the government's effort to foster good relationship and integration between East and West Malaysia.

It has been said that a government is a trustee of the people, and being elected by the people, it owes a higher responsibility to the people. The government must act honestly and responsibly.

Directive Over the Phone

The only guide to a man is his conscience, the only shield to his memory is the rectitude and the sincerity of his action. In my view, it is an insult to one's intelligence to be given a directive over the phone that these petitions should be struck off without a hearing, and above all, it is with a prescient conscience that I heard these petitions. God has given me the strength and fortitude, as a lesser mortal, to act without fear or favour, for fear of a breach of oath of office and sacrifice justice, and above all to truly act as a Judge and not a 'yes-man".

In conclusion, I would declare that the 1998 Electoral Roll for Likas Constituency (N13) is illegal, and that the election held in March 1999 for Likas Constituency is null and void. I will inform the SPR of this decision in due course.

In Petition No. K.5 of 1999, costs to the petitioner against the 2nd respondent, and in Petition No. K11 of 1999 costs to the petitioner against the 1st and 2nd respondents. In both cases, costs are to be taxed unless agreed. q

Name Justice Muhammad's Caller Establish Royal Commission Of Inquiry

Aliran wholeheartedly applauds Justice Muhammad Kamil Awang for his honesty, courage and sense of public duty.

Justice Muhammad has been admirably honest a'nd courageous in refusing to submit to a directive from someone supposedly his superior in the judicial hierarchy to strike off, without hearing, the Likas election petitions.

Equally Justice Muhammad has demonstrated a high sense of public duty in refusing to cover up that attempt to subvert the course of justice in one of the High Courts of the country.

However, the time for guessing games is past.

While it was entirely proper for Justice Muhammad to inform Chief Justice Mohamed Dzaiddin Abdullah about the 'mysterious caller' first, the caller's identity cannot be allowed to remain a mystery or a matter of speculation.

The fact is, too many unsavoury episodes that have struck at the reputation of our judiciary have been allowed to remain unsolved mysteries.

To take some notable examples:

- The investigation of a *surat layang* purportedly containing a judge's allegations of corruption against other judges was terminated by then Attorney-General Mohtar Abdullah without the public being any wiser as to the truth of the allegations.

- If at all a thorough investigation was conducted into allegations that lawyer V K Lingam's office was responsible for drafting a judgment made in a High Court case, the result of the investigation has not been publicly disclosed.

- The investigation of allegations of improprieties and unethical conduct linking former Chief Justice Eusoffe Chin with lawyer V K Lingam was also inconclusive.

Consequently, the Malaysian public is by now sick and tired of hearing allegations of tampering with the judicial system that lead nowhere – no cases, no culprits and no penalties.

It would therefore make a complete mockery of Justice Muhammad's honesty, courage and sense of public duty if this latest episode of alleged judicial misconduct is allowed to die a quiet death.

That kind of quiet death is the NATO – 'no action, talk only' – kind that the public associates with the Barisan Nasional government's reluctance or inability to deal with the perceived rot within our system of administration of justice.

In the past few weeks, however, several judges have shown that it is possible for politically weak and commercially powerless citizens to obtain redress in our Courts.

For the record, there have been

- Justice Mohd Hishamudin Mohd Yunus's declarations that the use of ISA is unlawful
- Justice Ian Chin's decision protecting native customary rights of marginalized Sarawakian communities, and
- Justice Muhammad Kamil Awang's nullification of the Likas election.

The reputation of the Malaysian judicial system has suffered serious setbacks in recent years. Yet in recent weeks, honest, courageous and impartial judgments have been delivered.

Whichever way the judicial system moves in the near future – towards decline or resurgence – will depend on how much the problems of the judicial system can be resolved, so that the rule of law can operate freely and judges can conduct their cases without fear or favour or directives.

In the light of these developments, Aliran calls for the establishment of a Royal Commission of Inquiry which will comprehensively and without compromise investigate many of the outstanding allegations of impropriety, misconduct and interference in our judicial system.

Only when the results of an independent investigation are made known to the public can we ever hope to lay to rest the suspicion that 'something is rotten in the House of Denmark', to use one High Court judge's warning about the state of our judicial system.

Aliran Executive Committee
12 June 2001

The Judiciary And Human Rights

When judges interpret a Constitution like a will, the Constitution will die

by *Tommy Thomas*

The founding fathers of our Constitution envisaged the Malaysian judiciary to be the bulwark that protects and secures an individual's fundamental liberties as enshrined in Part II of the Federal Constitution.

In their words: 'The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the Courts to annul any attempt to subvert any of the fundamental rights, whether by legislative or administrative action or otherwise.'

Hence, the Court's first duty is to stand between citizen and State. Any citizen aggrieved with any decision of the State should be able to turn to an independent judiciary for justice. Its second duty is to act as the sentinel of the Constitution – to protect, preserve and defend the Constitution from legislative or other attack. Its third duty is to interpret the Constitution.

Constitution Is Supreme

These duties are consistent with Article 4 of the Merdeka Constitution which provides that the Constitution is the supreme law of the land and any law passed by Parliament which is inconsistent with the Constitution is accordingly void.

In other words, we have Constitutional Supremacy, just as in India and the United States, and not Parliamentary Supremacy as in England. Or, as the celebrated remark of Chief Justice Charles Hughes of the United States Supreme Court put it, 'We are under a constitution, but the Constitution is what the judges say it is.'

What have our judges said of our Constitution since Merdeka?

In the early days of Merdeka, the judges of Malaya seemed to have had philosophical difficulties in accepting their new role as the guardians of the Constitution. Perhaps that was because they had been trained in England where Parliament is supreme.

Indeed Rais Yatim, who evidently holds a different view of the Constitution these days, once wrote that 'it was partly because of this initial inability to recognize constitutional supremacy that the deterioration in the protection of rights took hold almost immediately after Merdeka'.

Early Human Rights Cases

In 1958, two cases (*Chia Khin Sze v. Menteri Besar of Selangor* and *Re Tan Kheng Long*) first tested the constitutionality of executive actions of detention and banishment. The court upheld the state action in both cases and set a trend which has continued virtually unabated till today.

In the 1960s, the major human rights cases were *Stephen Kalong Ningkan*, Assa *Singh* and *Karam Singh*. The executive action challenged in each case was based on laws clearly inconsistent with the letter and spirit of Part P of the Constitution. But the executive action was upheld.

The *Karam Singh* case set a dangerous precedent by approving the entirely subjective discretion of a detaining authority. Since such discretion could not be reviewed by the Court, the ruling eroded the liberty of an individual.

Arriving at this judgment, the Federal Court had followed the much criticized majority decision of the House of Lords in *Liversidge v. Anderson* while rejecting the vigorous dissent of Lord Atkin which had been accepted by most courts in the common law.

The Worst Decade

The 1970s were the worst decade for the recognition and protection of human rights by our Courts. In more than 20 reported cases (mostly heard by the Federal Court), every action by the executive was approved and endorsed by the Judiciary. Consequently, by 1980, the Court decisions had collectively rendered illusory the fundamental liberties conferred by Part P of the Federal Constitution.

The most extreme example was the case of *Loh Wai Kong v. Government of Malaysia* in which the Federal Court rejected a citizen's right to have an international passport, notwithstanding his right to liberty and the freedom of movement. Then Suffian LP declared that 'a citizen has no fundamental right to leave the country and travel abroad ... and he does not have a right, not even a qualified right, to a passport'.

The Court's failure to uphold human rights against executive and legislative encroachment continued in the 1980s, as was seen in the cases of *Merdeka University*, *Sim Kie Chuan v. Pudu Prisons*, *Louis Cheah*, *Mark Koding*, *Karpal Singh*, and *Theresa Lim*.

In the case of *Karpal Singh*, the Federal Court overturned a Hight Court decision to grant an order of habeas corpus releasing Karpal from detention under the ISA. Like Karpal, Theresa Lim was a victim of Operation Lallang who did not receive judicial sanctuary.

Nor was there any improvement in the 1990s. Cases like *Yong Teck Lee, Tai Choi Yu, Pung Chen Choon*, and *Liew Ah Kim* did not give value to the Constitution's guarantee of fundamental rights. State action which undermined those rights was upheld in each of these cases.

Meaning Of Judicial Protection

There were a few – too few – reported cases in Malaysian constitutional law that gave meaning to judicial protection of human rights. ISA detainees were released as a result of court decisions in four cases, namely, *Dato' Amar James Wong Min Kee*, *Tan Boon Liat*, *Tan Sri Raja Khalid*, and *Jamalludin Osman*. In three cases (*Teh Cheng Poh*, *Yap Peng*, and *Mamat Daud*), the Court struck down certain statutory provisions as being unconstitutional.

I believe that the case of *Nordin Salleh* has made the single most important contribution to the promotion of human rights in Malaysia. This case, decided by a panel of five judges in the Supreme Court, struck down an anti-hopping provision in the Kelantan Constitution as being contrary to the freedom of association guaranteed under Article 10 (1) (c) of the Federal Constitution.

This was a landmark judgment in which the Supreme Court accepted liberal principles of constitutional interpretation pioneered in India and the Privy Council.

From India came the principle that in testing the validity of any state action which impacts upon any fundamental liberty, the Court's duty is to consider whether such state action '*directly affects the fundamental rights or whether its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory*' .

From the Privy Council came the principle that a constitution should not be construed rigidly or with austerity; instead it should be generously interpreted as befits its special status and character as a living constitution.

Exceptions Not The Norm

The *Nordin Salleh* spurred the Court of Appeal, under the intellectual leadership of Gopal Sri Ram JCA, and in a series of cases, to give expansive meaning to Constitutional expressions like '*right to life and liberty*' and '*equality*' , particularly in employment. Those cases form an impressive body of constitutional law, including fashioning remedies when fundamental rights were infringed.

Yet the wise words of the Supreme Court in *Nordin Salleh* have not been heeded in any of the controversial human rights cases of the past four years.

Cases like *Teh Cheng Poh*, *Nordin Salleh* and *Sugumar Balakrishnan* remain exceptional cases limited to their special circumstances or peculiarities. They are exceptions, not the norm.

And their value as precedents has been diminished because most of our judges prefer the norm ex-

pressed in cases like *Karam Singh*, *Theresa Lim* and *Phang Chin Hock*.

Any student of comparative law will note there is not much difference between the civil and commercial laws of Malaysia and those of, say, England, Australia and Canada, which remain important sources for our laws. But there is a wide divergence between the human rights laws of Malaysia and those of these other countries. And this divergence doesn't arise because those others are 'Western' countries!

The truth is, the fundmental rights in our Constitution were worded very much like those in the 1950 Constitution of India. Yet the Indian courts have gone much further in rejecting attempts by the Indian Parliament to amend the constitution in ways that effectively destroyed the basic structure and features of the Constitution and abrogated human rights.

Creativity And Vigilance

From early on, the pioneer judges of Malaysia rejected this creative and vigilant 'basic structure' doctrine. Instead they gave the judicial imprimatur to Parliament to amend freely the Constitution. The ironic consequence is, Parliament, which is itself a creature of the Constitution, has been remaking its creator, the Constitution, however Parliament chose.

In these times, when people across the world are aware of universal rights and standards, it is useful to remember that the 9 Articles which form Part II of our Federal Constitution are found not only in the Indian Constitution. They are also found in the *European Convention on Human Rights, The Canadian Charter of Rights* and in the human rights laws of England, New Zealand, Australia and South Africa.

Strangely Malaysian judges have yet to show much interest in legal developments in these countries with which we share a jurisprudential and constitutional tradition. Until they do so, the practice of constitutional law in Malaysia will be a lonely practice based upon narrow precedents that yield no joy to any supporter of human rights.

The seeds of the Malaysian judiciary's unfortunate neglect of its constitutional duties to protect human rights were sown in the early days of independence. They have since taken deep root.

But if we are not to continue tasting the bitter fruits of that neglect, our judges must creatively and vigilantly defend human rights as enshrined in a living Constitution. Otherwise, as when judges interpret a Constitution like a will, the Constitution will die. ☐

Tommy Thomas is a leading constitutional lawyer in Malaysia. This article is an abridged and revised version of Tommy Thomas, 'Human Rights in 21st Century Malaysia', *Insaf*, The Journal of the Malaysian Bar, XXX, No. 2, June 2001, pp. 91 – 106. The full text of the original article is available at www.malaysia.net/aliran.

LIBERTY

Liberty lies
in the hearts
of men and
women,
when it dies there,
no constitution,
no law,
no court
can save it

Justice Learned Hand
of the US Supreme Court

Q Q Q Q Q

FUNDAMENTAL RIGHTS AND LIBERTY

Fundamental
rights
may not be
submitted
to the vote;
they do not
depend on the
outcome
of any election.

Justice Robert Jackson
of the US Supreme Court

When Darkness Fears The Light

Police breathe down heavily over an anti-ISA candle-light vigil

by *Our Correspondent*

Outside the Lake Garden entrance to the Bukit Aman police headquarters

8.10 pm, Saturday, 7 July 2001

It was a clear evening when the first candle was lit at about 8.10 pm just outside the Lake Garden entrance to the Bukit Aman police headquarters. About 15 to 20 people were there.

We first sat on the flower-bed ledge on the corner kerb facing the main gate. Some friends came from work and brought their packed dinner. Most people seem to know each other. There were several conversations going on - which just tells you - people are comfortable with the company we keep!

Several plainclothes police personnel took their places in the crowd. They stood out in their leather 'tough guy' jackets. Some tried making small conversation, "*Kenapa lilin kuning?*" ("Why the yellow candles?") or some lame thing.

At about 8.15 pm. a guy with a yellow jacket bearing the initials "DSI" came to the peaceful crowd. I wished him good evening and asked him if he had had his dinner. Why? Because we are all model, polite and civilised vigil-ers *lah*.

"*Datang mahu bakar ke?*" (You've come here to burn something?") he said.

"*Ini bukan bakar, ini menyalakan lilin untuk vigil,*" ("Not to burn something but to light candles for a vigil,") someone patiently explained. "*Kita dah tahu awak nak buat joke ini, jadi tak funny lagi..sorry.*" ("We knew you were going to make this wisecrack, so it's not funny anymore ...sorry.")

He appeared to be more interested in my friend X who was clicking away and spoke in a Chinese dialect to him. X is very friendly and both of them appeared engrossed in some intelligent conversation for a time.

Two people sat at one end to draft a quick speech. Some reporters interviewed several other people. "How come no banners?"

Well, because the notice said only candles and we have to respect the understanding that brought people together.

"How about some songs?"

Nobody remembered much. Two of us knew the first two lines of "*Suara Rakyat*" (the People's Voice). I guess it has been a long while for the non-reformasi vigilers. Someone said that Jonah had all the songs.

A friend gave a short speech in Bahasa explaining to the crowd, which had doubled (mostly news people and their camera crew), why the vigil was being held - for a friend, Khairul Anuar Ahmad Zainuddin, or Jonah as he is known to many. It was very sad that Jonah was not with us in the crowd. Someone began the song, "*Suara Rakyat*" after the speech.

Some FRU police were lined up in front of the gate facing the crowd. They advanced, beating their sticks on their shields. There were about seven to ten of them.

It was most heartening to see that the lyrics of the Suara Rakyat song were known to several of the camera crew/news people who led the singing of the whole song

among the crowd! I had tears in my eyes. This was so amazing. Jonah would have been absolutely thrilled.

We then stood in a line with candles held high facing the gate.

The DSI fellow came with another police chap with some pips on his shoulder. This chap, his finger pointing to the crowd, walked up and down pronouncing, "This is an illegal assembly!" There were the usual threats about arrest and dispersal.

....ZzzZzZZzzz....

Plainclothes police lined up silently behind the line. They stood very close. Excuse me, we were not even related!

The chap with pips and beret separated the line by telling reporters, their crews and vigil-ers to stand away if they did not want to be arrested. He was also very camera shy and shouted that pictures should not be taken.

The DSI then said we had 5 minutes.

"Thirty minutes" I said.

"No, five" he said. "Are you speaking for these people?"

"Ya sure, why not? But hey, why is that other guy harassing us when you said we have five minutes? Who is in charge here? You or him? If you said five, tell him to stop harassing us."

Plainclothes police now stood at the side and at the back of the line. I think there were about five to seven friends in that line. I cannot remember if there were other friends with candles at the back of us.

All this police shouting tires you. It's so uncool because you have to shout to be heard as well. A friend in line 'shouted' politely (we had no choice but to shout, but we shouted politely) that we had every right to stay and that the assembly was not illegal. He repeated this.

The cameras went clicking. The chip (I mean pips) and beret guy pointed fingers everywhere.

"If we have five minutes, are you going to whack us when we are dispersing or are you going to give us time to disperse?"

The DSI didn't answer.

Was that incomprehensible? Okay, let us try again. The question was repeated.

Finally he said that he would give us time to disperse.

"Okay, how much time are you going to give for dispersal? You have to give us time and you cannot go after us when we are dispersing and whack us because there are just too many news people and its going to be bad publicity for the police."

"Don't challenge me and ask me questions," he fumed. "This is an illegal assembly."

"Well you are standing here with us; you are in an illegal assembly as well."

He shouted, "I am in uniform and performing my duty..blah.. blah...blah. Arrest this one first if they don't leave. You have three minutes left."

X had been taking pics all the time. When our time was up according to the police, the guy with the pips and beret said to X, "I want to question you. Who are you?"

Someone shouted, *"Bebaskan (free) Jonah! Bebaskan Fuad!"*

We came around X and our friends refused to allow X to go with the guy. I could have sworn X said 'Never mind' (meaning he would go with the police). I held onto his T-shirt sleeve while a friend decided that the police should know that we knew our rights and proceeded to say so. I can't remember if she quoted sections of the Criminal Procedure Code. That was so impressive.

This went on for some time. *"Matikan lilin! (extinguish the candles!) Matikan lilin!"* the DSI said. But to no avail - because we had to first sort out this matter involving X with the pips and beret police fellow. The plainclothes police stood so close behind us that we could have collided into them as we turned or could have easily tripped over their shoes and broken a hip, man!

So X came away with us unscathed. We got into our modes of transport, with the police close on our heels. The cars then left, some hooting "Re-For-Ma-Si". I looked at my watch. It was 8.55 pm.

Thank you to all friends and supporters who came with us for Jonah and to *all mahasiswa yang digugat oleh ISA dan UUCA* (university students threatened by the ISA and the Universities and University Colleges Act). q

When Two's A Crowd

Candles broken into pieces during vigil for Jonah outside police station

by *Our Correspondent*

Outside the Dang Wangi police station
8.45 pm, Thursday, 12 July 2001

July 12 marked the 7th day of the arrest of student leader Khairul Anwar Ahmad Zainuddin (Jonah) under the Internal Security Act (ISA) which allows for preventive detention without trial.

Jonah was arrested at the Dang Wangi (Jalan Stadium) police station on July 5 at about 9.45 am while accompanying six other students to the station. The six were arrested on June 8 but were released on police bail about 24 hours after their arrest. Police bail requires reporting to the police station periodically until such time when the police decide to release the person from bail or to have him or her charged for a crime.

The second candlelight vigil for Jonah and fellow detainee, M. Fuad M. Ikhwan this evening was rudely interrupted when some 40 police personnel comprising FRU police, plainclothes police (including females) and at least one in uniform (ASP Ng) rushed to those keeping vigil. They grabbed the candles off their hands and broke them into bits and pieces.

There were about 13 people who gathered at about 8.45 pm outside the Dang Wangi police station to commemorate the arrest of Jonah today.

One plainclothes police carried a loudhailer but it was evident that his two superiors (they certainly acted as such) would have no need to use it. Both of them used *the olde worlde* police technique of shouting in your face.

One of the officers who broke all my candles (and hurt my hands in the process) was in plainclothes and shouted incessently about illegal assemblies in an attempt to confuse and scatter those keeping vigil, who were predominantly women. He refused to identify himself at my request.

I did tell him that I found it odd that he was carrying on like this without having the courtesy of introducing himself.

He said, "There is no need."

I found it rude. I said so to ASP Ng whom I called Inspector.

The officer corrected me on that.

I asked him if he knew the plainclothes police officer and ASP Ng confirmed that the person was "my boss."

At some point, my friends and I requested that ASP Ng and his boss be calm and don't panic as they were both talking at once while we were trying to explain to the police what we were doing and to clarify their erroneous impression that we constituted an illegal assembly.

"Do you know, " said the boss, "that five is an illegal assembly? There are more than five of you here."

ASP Ng, who had done more homework this evening, said that three constituted an illegal assembly.

"Yes," I said and volunteered the names of the relevant laws: the Penal Code stipulates five people while the Police Act stipulates three people. We know our law as well.

We could just be meeting to decide whether to have dinner at Bangsar or Brickfields and using candlelight to look up directions on a map and got cited for illegal assembly, right? You see how worrisome this whole police attitude is? My friend told the police duo that there were only two of us and two was not an assembly and not illegal by any means.

"No you cannot do that," the boss said.

"That is not illegal nor an assembly," we said.

"What is the candle for then?" the boss queried.

Now one would think that we did not have to go over this carefully. The point is, if two is not an assembly under any law, whether we have candles or not would be totally inconsequential. But they were not getting it.

"You have damaged my property," I said. "You broke all my candles and I am not in an assembly." (Not by any stretch of imagination.)

"What are the rest doing here with you then?"

My friend replied that they were not in an assembly with us. They were standing apart, if need be two-by-two.

The police duo were not budging.

I said that two of us would stay here to do a vigil and the others could stay across the road (and maybe you guys - police - could go across the road as well?) and allow the two of us our right to gather peacefully on this side of the road?

"How many more times do we need to say that this is illegal," said the plainclothes police with the loudhailer.

"Hey, I know you," I said. "You are from Bukit Aman last Saturday."

"No, this is my station," he said. He was not getting any action tonight as his two bosses were in town today.

I wonder if these were the police personnel responsible for dragging Jonah into the police station on July 5. "I would have to report that both of you claim that two is an assembly and (that it) is illegal. I would have to file a complaint with Suhakam and complain to the Bar Council as this is not so under the law," I said.

The boss said that he did not say that. "That is your right to complain," he said.

"Our right is to gather peacefully," we said.

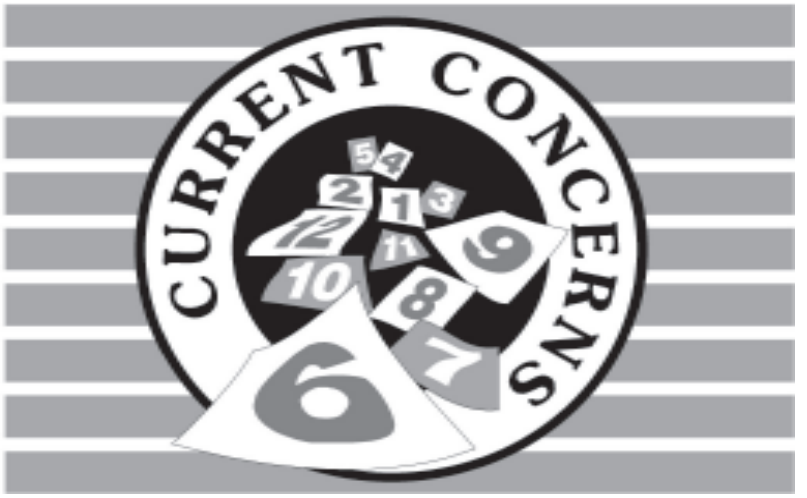
"You guys are a riot," I said.

I believe that friends who had stood away from us were also harassed similarly. The police had surrounded us of course. But the thing is none of us who were there was afraid of this show of force. I think it was because we knew what we were about and police intimidation was not getting anywhere.

I think we managed to light the candles for less than five minutes before we were rushed to end the vigil.

As we were leaving the pavement, there was a shout, "*Bebaskan Jonah! Bebaskan Fuad! Mansuhkan ISA!*"

Next time we have to add, "*Hidup Mahasiswa!*" (Long live the university students!) q



A record of *Aliran's* stand on current affairs.

A Blow For Media Freedom If Star Buys Nanyang Press

Charter 2000 views with concern recent news reports that suggest that Hume Industries may be selling its controlling stake in Nanyang Press Holdings Bhd, the publisher of Chinese-language dailies *Nanyang Siang Pau* and *China Press*, to Star Publications.

These reports are of concern as the Chinese language press has been known for relatively independent reporting that has at times embarrassed the Malaysian Chinese Association (MCA), a ruling coalition partner, and the government. This more independent reporting is in stark contrast to the *Star*, a solidly pro-establishment English daily, controlled by Huaren Holdings Sdn Bhd, the MCA's investment arm. We question the motive for any sale of Nanyang Press, if the media reports on the deal are accurate.

In principle, we are against the monopoly of the media by political parties and commercial interests. We are also concerned about the diminishing space for independent reporting. Even slightly critical or independent publications may find themselves shut down or gobbled up by pro-establishment individuals, firms, or political parties.

Charter 2000 calls for the democratisation of the media in its first principle, which states that the media must not be the monopoly of political parties and commercial interests allied to them.

Instead, the Charter states that "an adequate legal and economic framework must be established to facilitate and reinforce universal access to and ownership of alternative, participatory, democratic, independent media."

The political and civil rights especially those related to the guaranteeing of open discussion, debate, criticism and dissent are central to the process of generating informed and considered choices. These processes are crucial to the formation of values and priorities and can help in assessing and finding solutions to social, economic and political problems.

The Charter also notes that in recent years, "the media have become increasingly corporatised in tandem with greater control by political and economic interests. With the drift towards markets and profits, the interests of sections of society who fall outside the elite's sphere of influence have been increasingly neglected and stifled."

It is therefore crucial to allow for a multitude of independent media to provide for alternative channels for expressing the aspirations of an economically and socially diverse and plural society.

We therefore call on Hume to carefully weigh all factors, including the larger interests of media freedom, before making any decision to sell Nanyang. We also hope that other organisations, including the National Union of Journalists, will raise their voice in defence of media freedom, which appears to be increasingly threatened.

Anil Netto
Joint Coordinator, Charter2000
22 May 2001

All Barisan National Leaders Have The Same Disrespect For Rule of Law

Aliran condemns the two-year detention orders made under ISA against Tian Chua (Parti Keadilan Nasional vice-president), Mohd Ezam Mohd Nor (Keadilan Youth chief), Haji Saari Sungib (Keadilan Supreme Council member) and Hishamuddin Rais (media columnist and social activist).

The detentions of these three Keadilan leaders and one prominent social activist are contemptible. Despite alleging all kinds of threats against national security to justify the arrests that began on 10 April 2001, and despite interrogating the detainees for nearly 60 days, the Police evidently have nothing that they can prove or defend in an open court.

Continued on page 37

A Lifelong Commitment To The Poor

Remembering Prof Ishak Shari (1948-2001), one of Malaysia's leading researchers into poverty and marginalisation in society

Professor Ishak Shari, noted Malaysian scholar and economist, passed away on the morning of 30 June 2001, hardly two weeks after he underwent major surgery for cancer. Born on 4 January 1948, he was only 53 when he died.

Coming from a humble family background, and growing up at the same time as his country did, he entered the world of scholarship with a deep and life-long commitment to a vision of a shared and just future.

Shaped by the intellectual and political ferment of the late 1960s and early 1970s, he became one of the active student leaders who helped define the moral and intellectual horizon of Malaysian student politics in England during that period. That early moral and intellectual integrity and social commitment never left him throughout the course of a long and illustrious career.

His early work on poverty in the traditional fishing sector, the focus of his PhD dissertation, was a reflection of this understanding of Malaysian social science in the service of a developing nation. Throughout his life, this commitment to the poor and the marginalised was to inspire his teaching, research and writing.

Aware of the changing global landscape, he consistently drew attention to issues of inequity and was also concerned, in his later work, with the onslaught of global neo-liberalism and unfettered economic liberalisation.

Ishak obtained his BSc (Hons) and MSc in economics and statistics from the London School of Economics and Political Science (LSE) in 1970 and 1972. In 1985, he obtained his PhD in development economics from Universiti Malaya and moved on to an illustrious career at Universiti Kebangsaan Malaysia (UKM).

Starting as a lecturer in 1972, he rose within the ranks to become Professor of Development Economics in 1991, Dean of the Faculty of Economics (1988-1990), and Dean of the Centre for Graduate Studies (1994-1997).

In 1997, he was appointed Director of the Institute of Malaysian and International Studies (IKMAS), a social science research institute at UKM, a post he held until his untimely death. Ishak's leadership helped turn IKMAS into a respected regional centre for globalisation and transformation studies.

Although trained as an economist, Ishak always transcended the confines of his discipline and embraced the social sciences as a whole. Standing for the integration of the social sciences, he was firmly against their fragmentation and compartmentalisation and translated this stance not only

through his position as IKMAS Director, but also through his involvement in the reform of social-science teaching and research in UKM.

A careful, meticulous scholar who could read statistics, and as importantly, interpret them, with a practised eye sharpened by sustained reading of theoretical literature, Ishak developed into one of Malaysia's finest development economists and a leading authority on national income distribution and social transformation.

In the past few years, and in line with his concern with the whole person, he further broadened his studies to cover cultural issues. Within this framework, he drew attention to questions of culture without divorcing them from economics; in this manner he emphasised the role of civil society in its broadest sense.

In his *Inaugural Lecture* of 1999, he reiterated "*the proper relationship between market, state and civil society needed to realise a world for all humanity has to be thought through by all who desire justice, freedom and peace*." The title he gave to this lecture, *The Earth for All Mankind*, encapsulates the belief which had driven his scholarship and his understanding of scholarship as a form of service to humanity.

When the Kampong Medan disturbances erupted recently, Ishak observed that the attacks took place in one of the most depressed areas around Kuala Lumpur. "These areas are usually oppressive," he said, pointing to the utter lack of amenities and proper housing. He observed that it was easier for the urban underclass to compare their plight with their well-to-do neighbours as they were right next door to them. Such comparisons, he noted, invariably led to resentment and to a heightened sense of deprivation among the underclass and in such depressed settings, all it needed was a small issue to spark off ill-feelings or conflict.

Ishak emphasised the need to develop social safety nets for the poor and other vulnerable groups. Apart from economic development, he believed that "the capacity to bring about a condition which empowers people to raise their creativity is no less important".

This commitment to the marginalised was evident in his role as Director of IKMAS. He constantly guided his colleagues to focus their investigations and writings on IKMAS' central research area - the impact of globalisation on the Malaysian nation and society and how best to manage it to nurture and promote national resilience and social cohesion.

Ishak's work was recognised both within the country and abroad. He was appointed as consultant to many important projects by the government and international agencies such as the World Bank and the United Nations Development Program (UNDP). He was a past president of the Malaysian Social Science Association and was appointed as an expert to the Second National Economic Consultative Council (NECC II).

Ishak was a star in the community of scholars and intellectuals in the region. He was appointed Chairman of the Selection Committee of the Southeast Asian Studies Regional Exchange Programme (SEASREP) and Joint Chair of the Executive Committee of the Asian Public Intellectuals Fellowship Programme (API Fellowship), launched in July 2000. Ishak was also a prime mover of the Southeast Asian Public Intellectuals Fellowship (SEAF) Programme. In 1996, he was awarded a fellowship in the Asia Leaders' Fellowship Programme (ALFP).

It should also be mentioned that Ishak was a member of Parti Rakyat Malaysia. Although he did not hold an official party post, he served as Chairperson of PRM's Congress in recent years. His quiet, but steady contribution to PRM has also been much appreciated.

For all his achievements, Ishak was utterly devoid of any airs. One of the things that struck those who met him was his simplicity and humility. Indeed, he seemed to dislike formal functions and after attending one such function immaculately attired in a business suit, he remarked that he felt uncomfortable in such settings.

He will always be remembered as a true friend and a leader whose gentleness, generosity, patience, cheerfulness, openness, optimism and unfailing concern for the progress and welfare of his colleagues and wards was unparalleled.

He was industrious to a fault, with little care for himself not even

when ill. Ishak leaves behind his wife, Rashidah Md Dali, and five children.

His passing is not only a huge loss to IKMAS and UKM but to society in general. His inspiring academic leadership in analysing the causes of marginalization, poverty and oppression will remain as a shining example of how an academic can promote a deeper understanding of society's woes, and in the process, help in the discovery of fresh solutions.

Ishak chose the following words of Iqbal to conclude his *Inaugural Lecture*. His choice reflects the soul of the man who has departed from us with such suddenness:

The journey of love is a very long journey but sometimes with a sign you can cross that vast desert. Search and search again without losing hope. You may find sometimes a treasure on your way.

May his soul rest in peace. ❑

This piece was largely compiled from three separate tributes paid by:

- The Institute of Malaysian and International Studies (IKMAS), UKM
- Prof Dr Abdul Rahman Embong, President, Malaysian Social Science Association
- Participants of IKMAS' inaugural South-East Asian Fellowship (SEAF) programme, 2000

Continued from page 32

The detentions of Tian Chua, Mohd Ezam, Haji Saari and Hishamuddin are also cowardly. They are merely desperate acts of political persecution ordered by a Barisan Nasional regime that no longer has any just or democratic response to legal and legitimate challenges.

The Malaysian people aren't so stupid or blind as to be distracted by Dr Mahathir Mohamad's latest *sandiwara* just because Dr Mahathir and UMNO are faced with severe internal divisions.

After laughable denials of his resignation as Minister of Finance, Daim Zainuddin has quit either out of unpopularity, or because he no longer serves Dr Mahathir's purposes, or both. With its annual general assembly looming, UMNO has tried to refurbish its shabby image by suspending several divisional chiefs on charges of 'money politics'.

Outside UMNO the pressures have increased. The opposition has grown in strength and sophistication. The post-September 1998 dissent persists because it was never something that was instigated by a few individuals.

There was no visible public support for the ISA arrests. But there was plenty of opposition coming from political parties, NGOs, SUHAKAM and ordinary people who rejected the regime's repressive rule.

The clearest rejection of ISA came from Justice Mohd Hishamudin Mohd Yunus who declared in the Shah Alam High Court on 30 May 2001 that the detention of N Gobalakrishnan and Abdul Ghani Haroon was unlawful, the Police had acted in bad faith, and Parliament should review ISA.

Dr Mahathir's notorious dependence on ISA is already well known. Some people thought, however, Minister of Home Affairs Abdullah Ahmad Badawi was 'different'.

If he was indeed different from his mentor, Abdullah Badawi would have accepted that Justice Hishamudin's judgment had demolished all justifications for ISA's continuing existence. After all, when the arrests were first made, Abdullah Badawi had tried to distance himself by claiming ignorance of the Police moves.

But by signing the two-year detention orders against Tian Chua, Mohd Ezam, Haji Saari and Hishamuddin, Abdullah Badawi has proven to all Malaysians that there is no 'lenient side' to 'Pak Lah'.

By choosing to ignore Justice Hishamudin's historic judgment, Abdullah Badawi has shown that he is no different from Dr Mahathir when it comes to authoritarian rule.

Malaysians should not place any hopes in the supposed differences between one or another BN leader. As the apologetics of dissident-turned-minister Rais Yatim amply demonstrate, BN leaders are all the same in their habitual disrespect for the rule of law.

For the sake of Tian Chua, Mohd Ezam, Haji Saari and Hishamuddin, and all other prisoners of conscience and ISA victims, Malaysians who are committed to Democracy, Justice and the Rule of Law must continue the struggle against ISA and BN's repression.

IMMEDIATELY RELEASE ALL ISA DETAINEES!
ABOLISH ISA!

Aliran Executive Committee
4 June 2001

Zero Tolerance For Domestic Violence

Does a woman have to be bruised and bleeding before her abuse is taken seriously?

by *Prema Devaraj*

The other day a woman went to a police station to make a report. She had been hit her on the head, had had her hair pulled and had been slapped around the face by her husband. This apparently was not the first time. However, when she requested that the police issue an Interim Protection Order (IPO), she alledged that she was informed that her injuries were not severe enough (no bruising) to warrant such an action.

The Domestic Violence Act (DVA), enacted in 1994, at last recognised domestic violence as an issue of public concern. Its main aim is to ensure the safety of victims of violence. Under the DVA, a person can seek assistance from the police by making a report of the assault and specifically asking for an IPO. The IPO is an order from the court which protects the person from further violence while the police carry out an investigation.

The police, the welfare and court authorities' awareness of domestic violence is vital for the implementation of the DVA. While acknowledging police frustrations over workload and women retracting their complaints over domestic violence, one is left wondering about the effectiveness of the DVA when enforcement authorities can hold back an IPO on the (subjective) basis that the injury is not severe. One is also left wondering how enforcers define violence and, more importantly, about the ideology that accepts a certain level of violence in a household.

The attitudes of regarding women as subordinate to men perpetuates widespread violence against women, including family violence and abuse. Such an attitude (which make many men think they have a right to hit their spouse) means violence against women is excused (and even accepted) by society. Some may even argue that 'it's for her own good'. What is implicit in these prejudices and practices is the unspoken acceptance of a certain level of violence in a household. If a few slaps do not amount to violence, how many slaps does it take? Does a woman have to be bruised and bleeding before her abuse is taken seriously?

The Malaysian government is a signatory (albeit with reservations) to the United Nations Convention on The Elimination of All Forms of Discrimination Against Women (CEDAW). In Article 1 of the Convention, 'discrimination against women' is defined as *any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.*

According to the General Recommendation No. 19 (Eleventh Session 1992) Violence Against Women, this definition of 'discrimination of women' in Article 1 of the convention, also includes gender-based violence, that is, *violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering,*

threats of such acts, coercion and other deprivations of liberty.

As a signatory to CEDAW, the Malaysian government is legally bound to put the provisions in this convention into practice. It is so obvious that while having legislation is the first step forward, it is simply not enough. How committed is the government towards truly deterring violence against women? Setting up a Ministry for Women and Family Affairs will be a waste of time, money and effort if there is no clear commitment to, and understanding of, CEDAW and issues relating to gender-based violence.

It is often the case that when there is a horrible rape and murder of a young woman or child, everyone gets upset. Calls for action to stem this violence come from every quarter. But meanwhile, what about all the unreported daily cases of rape, molest and domestic violence? All are part of the daily parcel of violence against women; all contribute to the denigration of women; and yet, the authorities (by their inaction) and society (by their attitudes) allow some of this to continue.

We need to assert that there can be no acceptable level of violence. We need to assert that we will not tolerate violence. We, as a society, must work towards giving our women the security and protection of the law which they, as people and as Malaysian citizens, deserve. We must continue pressurising the Government to fully recognise the basis of CEDAW and the effects of violence against women. The principles and objectives of CEDAW and the DVA must be fully implemented. q

Takeover Of Chinese Newspapers Not Just A Chinese Issue

We, the undersigned organizations, oppose Hume Industries' sale of its controlling stake in Nanyang Press Holdings Bhd, the publisher of Chinese-language dailies Nanyang Siang Pau and China Press, to Huaren Holdings Sdn Bhd.

The takeover of Nanyang and China Press is not just an issue affecting Chinese Malaysians. Rather it is of concern to all Malaysians who cherish freedom of expression. Malaysians of all ethnic and religious groups should oppose this deal, which further undermines what's left of our democracy and its fast disappearing system of checks and balances.

The Chinese language press has been known for its relatively independent reporting in stark contrast to the Star, a solidly pro-establishment English daily controlled by Huaren, the investment arm of the Malaysian Chinese Association, a partner in the ruling coalition. Already we hear that top management and senior editors at Nanyang and China Press have been asked to leave. They are likely to be replaced by pro-MCA personnel.

It is grossly inappropriate to argue that PAS has Harakah and the DAP has the Rocket, hence it is all right for MCA to control two mass circulation Chinese newspapers in addition to a national English daily.

Under the existing law, opposition political party publications like Harakah and the Rocket are only allowed to publish twice a month. Nanyang Siang Pau and China Press are daily, mass circulation newspapers. It is quite unlikely that the Home Ministry will now allow opposition parties to publish a daily newspaper. Second, under existing restrictions, opposition newspapers can only be sold to party members and cannot be sold publicly, again, quite unlike mass circulation newspapers. Third, parties like MCA and UMNO already have their own official party newspapers. Finally, it is extremely difficult for independent publishers to obtain a permit to print.

Despite what we have been told, the takeover is definitely not a pure business deal. It has huge political implications. The MCA is obviously hoping to use the Chinese press to mould public opinion within the Chinese community and to repair the damage done by the ruling coalition's controversial policies and statements. The takeover itself greatly reduces the already little space for independent newspaper reporting.

We call on all Malaysians to oppose the takeover of Nanyang and China Press on the grounds that it demolishes further the notion of press freedom and leads to a further erosion of democracy in Malaysia. Given that much of the mainstream media is already politically owned or linked, it is vital for Nanyang Siang Pau and China Press to remain relatively independent of partisan interests.

Charter 2000/Aliran
Pertubuhan Jemaah Islah
Malaysia (JIM)
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this concentration of political power can have on the issue of property rights involving assets owned by businessmen in the corporate sector.

Simply, the UEM takeover and concentration of political power draws attention to the issue of ownership and control of domestic firms. In Malaysia, even majority ownership of a company means nothing in the face of a strong state determined to push through government policies or corporate restructurings. The point is relevant to the UEM case, but is also evident in the consolidation exercise involving the banking sector.

Transfer of Assets

Those most susceptible to a takeover of their corporate assets are probably those who have also benefited most from state patronage, but were unfortunate enough to be aligned to a political patron who had fallen out with the prime minister. Halim, a protégé of Daim, has been forced to relinquish ownership of his equity in Renong. Despite Halim's long-standing involvement, he is giving up his interests without a fight. It is likely that other businessmen closely aligned with Daim will soon be similarly forced to relinquish their collectively vast control over the corporate sector.

Politically-inspired takeovers are nothing new for Malaysia. Through the ostensible enforcement of corporate governance, politicians in control of the executive have often transferred corporate assets into the hands of their allies. When Deputy Prime Minister and Finance Minister Anwar Ibrahim was ousted from office in 1998, his business allies quickly lost their corporate assets — most of which were then channeled to businessmen aligned to Daim. At the time, he had emerged, along with Dr. Mahathir, as one of the most powerful politicians in the country.

While the selective imposition of regulations on some enterprises has helped create the impression of a well-governed corporate sector, a number of oddities continue to occur — especially in the cases of companies linked to Daim's allies. Apart from the TimedotCom bailout, Tajudin Ramli, another Daim protégé, was well-compensated by the government with public funds when he relinquished control of the debt-ridden and loss-making Malaysia Airlines.

Halim and Daim are now quietly portrayed by the domestic press as being primarily responsible for Renong's debt crisis and the lack of transparency and accountability in government respectively. Dr. Mahathir, however, also has to bear responsibility for Renong's present state of affairs. In the pursuit of his vision of creating Bumiputera entrepreneurs in control of huge conglomerates, Mahathir's government generously bestowed in a non-transparent manner numerous privatized concessions on companies in the Renong Group, as well as other favored businessmen, like Tajudin.

The Renong Group grew rapidly through a spate of acquisitions, funded mainly by loans from government-owned financial institutions. But in spite of its huge size, Renong acquired little expertise in any industry. There was no attempt by the government to discipline or check Renong's unproductive form of corporate development. In fact, government aid in various forms to Renong was justified on the grounds that it served the national interest.

In The Public Interest?

What can we expect from corporate restructurings now that Dr. Mahathir is serving both as prime minister and as finance minister? Government agencies will likely be used to take over the enterprises of Daim's business associates. Eventually, ownership of most of this equity will have to be passed back to the state or to individuals aligned to Dr. Mahathir.

In view of executive hegemony over the state, the nature of corporate – and public – governance henceforth will depend entirely on Dr. Mahathir. The prime minister has asked the public to trust him, promising greater transparency and accountability in government and in the way the Renong Group will be restructured. However, as long as power is centralized in the hands of a dominant executive, investors will be skeptical of corporate deals undertaken in the "public interest." q

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The UEM Takeover:

Bailout Or Accountability?

by *Terence Gomez*

When the Malaysian government announced on July 23, 2001 that it intended to spend 3.8 billion ringgit (US$1 billion) to buy out United Engineers (M) (UEM), it was widely believed Mahathir Mohamad was setting up another bailout. As a key component of the country's deeply indebted Malay-owned conglomerate, Renong, the company looked like a prime candidate for rescue by the government. Until November 1990, companies in the Renong Group had been under the direct ownership of Mahathir's ruling United Malays' National Organization (UMNO).

Naturally Dr. Mahathir denies a bailout. Regardless of the prime minister's position, it is hard to see how public interest alone could justify the UEM takeover. Nor is this takeover part of his government's attempt to create a more transparent and accountable corporate environment, as practically every analyst quoted in Malaysia's docile domestic media has argued.

Deep In Debt

The Renong Group's debt crisis has been around since 1997 following the outbreak of the financial crisis. Since the conglomerate involves businesses as diverse as hotels, expressways, telecommunications, petroleum, power supply and banking, critics had long suggested that to trim down its debts the group divest some its lucrative assets, presently conservatively valued at 25 billion ringgit. Now, suddenly, this is what the government claims it has in mind. The domestic press has also argued that a restructuring of Renong/UEM will help alleviate corporate governance concerns that have affected investor confidence in the Kuala Lumpur stock market. In response to the financial crisis, new institutions and regulations were put in place to help promote greater transparency and accountability in the corporate sector. The Renong Group and its controlling shareholder Halim Saad were seldom subject to these regulations, however.

The scandals were frequent. In March 2001, when the initial public offering of a Renong subsidiary, TimedotCom, was poorly received, much of the company's leftover equity was taken up by a few public institutions. On another occasion in 1997, UEM was used to buy up a massive 32.6% stake in Renong for 2.34 billion ringgit. This acquisition, implemented partly through a 800 million ringgit loan provided by government-owned and politically well-connected banks, upset UEM minority shareholders. The bailout looked like continued abuse of the domestic financial sector for vested interests.

Fallout

But some signs suggest a shift in the political climate. The political falling-out between Dr. Mahathir and his once-influential ally, Daim Zainuddin, who resigned as Finance Minister last June, is part of it. Neither Dr. Mahathir nor Daim has really explained the latter's resignation as Finance Minister. Certainly, few Malaysians concerned about corporate governance and accountability would complain about Daim's departure, or of the fall-out between the two leaders, or even of the UEM takeover by the government. But most Malaysians should be worried about the manner of the takeover and what it reveals about the state of Malaysian politics.

The UEM takeover provides important insights into two key issues. First, it throws light on the structure of the state – how power has increasingly become centered in the hands of Prime Minister Mahathir. (All others arms of the government have become subservient to the office of the executive.) Second, it reveals the impact that

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