NATIONAL SECURITY AND THE CONSTITUTION:

Breathing meaning into the right to life, liberty and the pursuit of happiness[1]

By

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I. Tension at the heart of democratic governance

1. Clash of titans & context

An ugly spectre hovers above countries – including the advanced modern democracies. Ushered in by the watershed 9/11 incident, it has provided the justification for measures that curtail the fulfilment of the human spirit. It seems incongruous with an age of super technological advancement: the ability to manipulate and even create life forms not possible in nature through genetic engineering, the development of nano-technology, the creation of thinking machines or artificial intelligence (AI) and the advent of robotics and such like.

All agree that the maintenance of the security of the state is indeed the primary duty of a state. As wrote U.S. Supreme Court Chief Justice Warren Burger in a 1981 decision[2] "*no government interest is more compelling than the security of the Nation"* for the important reason that without such security it is not possible for the state to protect other values and interests.

In other words, security guarantees freedoms. It is for the protection of these “values and interests” that governments institute national security measures. Fundamental amongst these are the right to life and liberty. They form the fundamental construct or “basic features” of any, including our Federal, Constitution.

But then political history is replete with instances of governments using the cloak of “national security” to extend their shelf life. This is preceded, or followed, by a suspension of human rights. Incarceration of citizens, destruction of institutions, suspension of cherished values follows in quick and unabated succession. The citizenry’s human rights are posited against the avowed claim of “national security”; the conflict invariably evolves into what Justice Ian Binnie of the Supreme Court of Canada referred to as “*truly a clash of the titans*".[3]

[2] *Haig v Agee* (1981) 453 US 280 at 307.
[3] Speech to the Hong Kong Conference on the Criminal Law (2004).

An unmanaged "clash" - between the imperatives of the collective interest in security and individual rights[4] – bears the incipient risk of bruising both.

Where, and how, then lies the basis of the reconciliation, the resolution?

For that, the context becomes crucial – and the context is that of a constitutional democracy functioning within the rule of law. The rule of law judges the content as well as the form of 'law', requiring substantive rights to be recognised.[5] Recognising a societal consensus that courts review executive action on grounds not merely of whether the action has a basis in established law, but also on grounds such as reasonableness, fairness, and compliance with certain core of basic rights.

Chief Justice McLachlin of Canada said it best in the opening paragraph of the majority judgment in *Charkaoui v. Canada (Citizenship and Immigration)*:[6]

"One of the most fundamental responsibilities of a government is to ensure the security of its citizens. This may require it to act on information that it cannot disclose and to detain people who threaten national security. ***Yet in a constitutional democracy, governments must act accountably and in conformity with the Constitution and the rights and liberties it guarantees.*** *These two propositions describe a tension that lies at the heart of modern democratic governance. It is a tension that must be resolved in a way that respects the imperatives both of security and of accountable constitutional governance."*

2. National security

Two threshold problems arise. First, how it is defined. Secondly, who decides this situation.

a. Definition

Generally national security is defined in broad and vacuous expressions. Take for example, the Security Offences (Special Powers) Act 2012

[4] This espouses as well communitariasm – which situates individuals in a community-shared values and vision of the good: Amitai Etzioni, 'Communitarianism' in Bryan Turner (ed), *The Cambridge Dictionary of Sociology,* Cambridge University Press, 2006, p. 81.
[5] Tom Bingham, *The Rule of Law*, Allen Lane, 2010, pp. 66-67.
[6] [2007] 1 S.C.R. 350.

(SOSMA) which applies draconian procedures to security offences. It defines national security offences by reference to a schedule; which lists certain offences under the Penal Code. These offences are framed in broad terms such as "*activity detrimental to parliamentary democracy*". As explained by the then *de facto* law Minister when moving the amendment to the Penal Code in Parliament, this phrase drew its inspiration from the UK Security Service Act 1989, section 1(2);[7] which refers to "*undermining parliamentary democracy by political, industrial or violent means*". So, national security is threatened for "undermining parliamentary democracy".

In moving the SOSMA bill in Parliament, the Minister defined threats to national security:

"It (the law) is meant to tackle terrorist activities. Such as the Al Maunah episode – where a group of persons raided an armoury to secure arms with the avowed intention of overthrowing the government. "Unconstitutional" was when it clearly went against the Constitution such as usurping the powers of a sitting Prime Minister".

The definition countenances stifling legitimate political dissent. And SOSMA has indeed been so used against a wide range of subjects and activities: to detain chairperson of *Bersih*, students advocating a vote of no confidence against the Prime Minister and such like. Despite the Court of Appeal ruling that *"From the statements by the Minister it is crystal clear that the purpose and objective of SOSMA is to combat terrorism": PP v Khairuddin Abu Hassan & Anor*.[8]

In the latter case it was used, unsuccessfully, against a lawyer and his client who disclosed documents to the authorities in Switzerland as regards alleged money laundering activities in relation to the 1MDB Sovereign Fund.

b. Who decides?

It appears that the very politically-threatened authority often arrogates to itself the power to determine when a "national security" situation arises.

[7] By any means, directly or indirectly; also if attempts to commit or does any act preparatory to : ss 124B/C.
[8] [2017] 4 CLJ 701 at 714[33].

And effectively suspends all fundamental rights, and thus insulates itself from any political challenge. The government then embarks on an *ex post facto* rationalisation to appease public opinion.

Under the National Security Council Act 2016 the PM invokes the extensive panoply of powers "*if he considers it necessary in the interest of national security*" (s. 18). Under the Public Order (Preservation) Act (POPA) 1958 absolute discretion resides in the minister: "*if in the opinion of the Minister public order in any area in Malaysia is seriously disturbed or seriously threatened*" (s. 3). Under SOSMA and POTA the power is given to the police based on their "*reason to believe*".

c. Judiciary's role

The judiciary's abstention - in deciding whether or not a true emergency situation exists – merely exacerbates the hurt to fundamental rights to life and liberty. For example the Federal Government declared an emergency in 1966 to resolve its dispute with the State government revolving around the dismissal of the Sarawak's Chief Minister.

The case finally reached the Privy Council: *Stephen Kalong Ningkan v Government of Malaysia*[9]. The Council ruled that the existence of an emergency is *"essentially … to be determined according to the judgment of the responsible ministers in the light of their knowledge and experience"*;[10] and that an "emergency" proclaimed under Article 150 of the Federal Constitution to deal with a national security situation is *"…not confined to unlawful use of or threat of force in any of its manifestations…it is capable of covering a wide range of situations and occurrences …". "A state of emergency is something that does not permit of an exact definition: it connotes a state of matters calling for drastic action ….*"[11].

[9] [1968] 2 MLJ 238,

[10] This may be illusory as Ministers have to defer entirely on police 'advice': see the then PM's explanation for Operation Lalang in Mahathir Mohamad, *Doctor in the House: The memoirs of Tun Dr Mahathir Mohamad*, 2011, KL: MPH Group Publishing.

[11] *Bhagat Singh & Ors v The King Emperor* (1931) AIR PC 111, *per* Lord Dunedin. The http://www.indialawjournal.org/archives/volume1/issue_3/bhagat_singh.html. "Thus from the lower court to the tribunal (specially constituted – added) to the Privy Council, it was a preordained judgement in flagrant violation of all tends of natural justice and a fair and free trial".

With such an open licence, our constitutional arrangements risk becoming authoritarian or even totalitarian (despite being 'statistically' democratic), because a government could then exercise executive power unreasonably, unfairly, and contrary to the most fundamental of human rights.

In *Theresa Chin Chin* the Supreme Court (a precursor to the Federal Court), despite proclaiming non-abdication of judicial function in preventive detention cases under the ISA, in fact abstained, reposing complete discretion in the executive. Salleh Abas LP (as he then was) went so far as to say that there was no obligation on any authority to disclose facts, whose disclosure would in its opinion be against the national interest; and that consequently

> "*… it is clear that the court will not be in a position to review the fairness of the decision-making process by the police and by the Minsiter because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they base their decision. Thus, it is more appropriately described as a subjective test".*[12]

But the judiciary has steadily moved away from a hands-off approach. The English courts by then had acknowledged they do not abdicate their judicial function. They have a "*duty to ensure that the essential facts to which the opinion or judgment of those responsible relates are proved to the satisfaction of the court*": *per* Lord Fraser in *CCSU v Minister for Civil Service*,[13] explaining Lord Parker's famous dictum in *The Zamora:* "*Those who are responsible for the national security must be the sole judges of what national security requires"*.[14] Lord Fraser went on to set out the process to follow where a question of the national security interest arises in judicial proceedings.

> *"Once the factual basis is established by evidence so that the court is satisfied that the interest of national security is a relevant factor to be considered in the determination of the case, the court will accept the opinion of the Crown or its responsible officer as to what is*

[12] [1988] 1 MLJ 293, para 6.
[13] [1985] 1 AC 374 at 405G.
[14] [1916] 2 AC 77 at 107 (PC).

required to meet it, unless it is possible to show that the opinion was one which no reasonable minister advising the crown could in the circumstances reasonably have held". (emphasis supplied)

CCSU has been approved several times by our courts. It establishes clearly that the exercise of prerogative power (that is, one that owes its source to the common law as opposed to statute) is subject to judicial review based not on its source but its subject matter, that is justiciability.

Malaysian courts have now affirmed that there is no abdication of the judicial function and that if the matter is justiciable (a matter upon which the courts can adjudicate), it will be amenable to judicial review.[15] In *Dama Suria bin Risman Saleh v Menteri Dalam Negeri and Others* the Federal Court made clear that

> *"… it is insufficient if the Minister thought that he had reasonable grounds to be satisfied that the appellant had acted in a manner prejudicial to public order. The question that a court must ask itself is whether a reasonable Minister apprised of the material set out in the statement of facts would objectively be satisfied that the actions of the appellant were prejudicial to public order".*[16]

Deciding whether the impugned activity was prejudicial to public order, said the Federal Court, "*is a question of law upon which the Minister's view is not conclusive. It is the court that is the final arbiter upon that question*".

More recently, the Court of Appeal in *Government of the State of Penang v Minister of Home Affairs*[17] ruled that the power of the Minister to declare a society unlawful (in this case a voluntary patrol squad) for security grounds was reviewable on an objective basis by the court despite the provision giving the Minister "absolute discretion" – on the authority of a string of cases involving national security, including *Dama Suria*.[18]

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[15] What is 'justiciable 'is discussed later in this text.

[16] [2010] 3 MLJ 307, 311 [5], citing in support *Reg v Secretary of State for the Home Department, ex p. Khawaja and other appeals* [1984] AC 74, *per* Lord Scarman.

[17] Court of Appeal Civil Appeal No. P-01(A)-480-12/2016, p. 17-19, paras 45 – 52.

[18] Including the Federal Court cases of: *Mohamad Ezam v KPN* [2002]; *Titular Roman Catholic Archibishop of KL v Menteri Dalam Negeri & Others* [2014] 4 MLJ 765; *Dama Suria v Menteri Dalam Negeri & Others* [2010] 3 MLJ

The Court endorsed the approach of the Court of Appeal in *Sepakat Efektif Sdn Bhd v Menteri Dalam Negeri* that where an exercise of discretion has a constitutional dimension, the court must examine that exercise more vigilantly, bearing in mind the following: the constitution to be read in prismatic fashion, the state action to be proportionate, measures to be fair and not arbitrary and the fundamental right to be impaired no more than is necessary to accomplish the legislative or administrative objective.[19]

d. Repository of abuse?

These vacuous definitional constructs of "national security", subjective assessment of security and the court's abstention[20] allow for complete subjectivity and flexibility by the executive and the judiciary. Combined with its vital importance to the state, a government is provided with a large potential for abuse of power. Indeed, for a liberal democratic state, or one which claims to be liberal and democratic, it is probably the only excuse which can now be used to justify abuse of power.[21]

e. Terrorism and fundamental rights

It is suggested that the aftermath of the 9/11 incident changes the nature of the threats and the laws response. So that the old cautionary balancing must necessarily tilt heavily in favour of security. In other words, while historically national security may have equated to the defence of the realm, the spectre of terrorism has flung the doors open even wider.

This in fact is not a 'new' challenge. Historical literature is replete with the incidence of terrorism, including state terrorism and that of colonial powers against subject nations and its peoples. And the main cause of "terrorism" may well lie in "*the brutal, corrupt regimes westerners have imposed on the Arab world and Africa. So too the wars we have waged*

307; *PTG Wiliayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135; and another 4 cases to similar effect.

[19] [2015] 2 CLJ 328, 352, *per* Justice Mohd Ariff Yusof.

[20] In fact, it is wrong for courts to abdicate their judicial function. They have a "duty to ensure that the essential facts to which the opinion or judgment of those responsible relates are proved to the satisfaction of the court": *per* Lord Fraser in *CCSU v Minister for Civil Service* [1985] 1 AC 374 at 405G, explaining Lord Parker's famous dictum in *The Zamora* [1916] 2 AC 77 at 107 (PC) "*Those who are responsible for the national security must be the sole judges of what national security requires"*.

[21] Ian Cameron, *National security and the European Convention on Human Rights,* 2000, at p. 62.

in the region to impose our will and economic exploitation. It's blowback, pure and simple".[22]

In the *Air India* trial, Canadian Justices Iacobucci and Arbour stressed that the appropriate judicial response to measures adopted by Parliament to protect a country (in this case, Canada) from terrorist attacks was neither to accept Cicero's maxim "*silent are the laws in the clash of arms*" nor to interpret or apply legislation without regard to the context of national security and its exigencies. They wrote:[23]

> *"The challenge for democracies in the battle against terrorism is not whether to respond, but rather how to do so. This is because Canadians value the importance of human life and liberty, and the protection of society through respect for the rule of law. Indeed, a democracy cannot exist without the rule of law."*

Which brings me to the other titan: the right to life and liberty.

3. Right to life and liberty

The right to life and personal liberty is embedded in Article 5 of our Federal Constitution. What it embraces is left undefined. The Reid Commission which crafted the Constitution chaired by Lord Reid a Scottish Judge and including a Cambridge constitutional expert academic, Sir Ivor Jennings – did not directly seek to resolve the tension that respects the imperatives both of security and of accountable constitutional governance in the context of a liberal democracy.

As regards human rights, rather strangely the Commission said "*it may seem unnecessary to give them special protection in the Constitution"* as they "*are all firmly established throughout Malaya".* Nonetheless in view of vague (unfounded) apprehensions about the future in certain quarters, *"there can be no objection to guaranteeing these rights subject to limited exceptions in conditions of emergency".* This then is the basis of the fundamental rights Part II provision in the Constitution, an approach,

[22] Eric Margolis, 'The Great White Father comes to Saudi Arabia', *the Sun* May 30 2017, p. 12, citing his book, *The American Raj*.
[23] *In the matter of an application under 83.28 of the Criminal Code* [2004] SCC 42.

characterised as "*a lack of real enthusiasm for human rights*" and *"entrusting of human rights to the mercy of the executive power"*.[24]

Nonetheless the underlying assumption remains. That these extant rights would be guaranteed; and that any exceptions would be limited to conditions of emergency. Further, the Constitution is declared supreme; and the governmental powers distributed between the Executive, the Legislature and the Judiciary – thus envisaging the doctrine of the "separation of powers".[25] This encapsulates the doctrine of the rule of law.

Fundamentally, Malaysians have grown up to expect the guarantee to, inter alia, the right to life and liberty - and the concomitant unarticulated right to the pursuit of happiness. This happiness gloss can be traced to the US Declaration of Independence: "*We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.*" The modus was to be achieved through an independent judiciary, open courts, transparent decision-making, political accountability and robust reporting by a free press.

II. The State response

Within this overarching constitutional fabric should be found the resolution of the seemingly disparate interests of legitimate national security interest on the one hand; and the fundamental right to life and liberty of the citizenry. It necessitates a delicate yet crucially critical balancing.

1. A balance?

What is the state of this balance in Malaysia?

First, the fundamental guarantees in Part II of the Constitution lists a series of broad grounds upon which parliament may restrict these rights if it '*deems it necessary or expedient*'. These grounds include security of the Federation, public order, morality and incitement to any offence. The

[24] Andrew Harding, *The Constitution of Malaysia: A contextual analysis*, 2012, Oxford: Hart Publishing, at p. 164-165.

[25] *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*, Federal Court Civil Appeal No. 01(f)-47-11/2013(B).

Constitution came in the midst of the 1948-1960 emergency.[26] This accounts for the inclusion of Articles 149 and 150. The former provides for additional extended powers against subversion. The latter allows the executive to proclaim an emergency.

Cumulatively, these powers gave the executive *carte blanche* authority to jettison the fundamental rights including of life and liberty. The Internal Security Act 1960 enacted under the auspices of Article 149 provided for indefinite detention without trial and related severe, if not crippling, restrictions. A seasoned commentator of the Malaysian Constitution commented rather wryly that over time the guaranteed rights have achieved their opposite: equality in practice becomes discrimination; freedom becomes prohibition. "*The human rights provisions hardly even needed to be amended to achieve this result, so broad were the permissible restrictions*".[27]

A plethora of repressive laws – largely owing their genesis to the preservation of a foreign-colonial rule - were regularised such as the 1933 Restricted Residence Act, the 1948 Sedition Act, and the Societies Act, 1959 Banishment Act and the 1960 Internal Security Act 1960, and many more - over and above the overarching emergency ordinances.

Other laws have been amended over time to secure for the executive far reaching powers. Four emergencies were proclaimed, overlapping each other – in the years 1964, 1966, 1969 and 1977.[28] Astoundingly, only between July 1960 and November 1964 had there been no legal state of emergency. So, 'normality' has been the exception, and the regime of exception the norm. Emergency laws operate in parallel with the regular constitutional and legal system. The upshot is that the full rigour of the regime of exception with its panoply of drastic powers can be invoked at any time.[29]

And so, practically, the entire body of fundamental rights were suspended all these years save for the 52 months. And even more

[26] Arguments, for example in *Ezam's* case and *Theresa Chin Chin* that these laws be confined to the insurgency it was meant to deal with have been rejected by the judiciary.
[27] Andrew Harding, *The Constitution of Malaysia: Contextual analysis*, 2012, Oxford, Hart Publishing, at p. 165.
[28] The last three were officially regarded as still in force until they were revoked by Parliament just 6 years ago in November 2011 – although the government maintains that the 1964 emergency proclamation was revoked by the 1969 proclamation.
[29] Harding, at p. 170.

astonishingly, even after Parliament had sat, the government continued to make wide sweeping regulations under the proclamation of emergency. This was clearly unconstitutional, as ruled the Privy Council in invalidating the Emergency (Securities Cases) Regulations 1975. They were neither authorised by the Constitution itself nor delegated to the Agong by Parliament in whom the legislative authority of the Federation is vested: *Teh Cheng Poh v PP*.[30] These regulations provided radically altered procedures for criminal trials involving national security.

Undeterred, the government promptly overturned the effect of this decision by enacting a law to validate them retroactively. And, in 1981, amended the Constitution to oust the jurisdiction of the courts to challenge or call into question in whatever form on any ground the validity of an emergency proclamation or any ordinances made pursuant to it. This seals the irreparable hurt to the fundamental guarantees to life, liberty and all else.

2. Emergency proclamations end

The emergency proclamations of 1966, 1969 and 1977 were finally lifted on 24 November 2011.[31] This followed the scrapping of the Restricted Residence Act 1933 and the Banishment Act 1959 and the notoriously obnoxious ISA in the preceding month.

Calling the government's act, "monumental", the Prime Minister announced that "*The government is voluntarily giving up extraordinary powers without pressure from any party*." He said he was confident of the maturity of the Malaysian public and hence such repressive laws were repealed.

3. Resurrection: A charter for abuse

But this was not to be for long. The government seized on the US 9/11 incident to enact or resurrect laws that unravel years of assiduously fought-for democratic rights, albeit within the margins of the narrow space. These arm the executive with virtually unbridled powers to deal

[30] [1979] 1 MLJ 50 at 53Er.

[31] Emergency Proclamations Lifted, EO void', 24 November 2011, www.freemalaysiatoday.com/2011/11/24/emergency- proclamations-lifted-eo-void.

with the potential danger of militancy and terrorism. That these dangers persist is real as we witness the horror of intermittent bombings at random places.

But these laws are framed in wide, vague and vacuous language, a charter for potential abuse, as described earlier.

Into this category falls the barrage of newly enacted laws: SOSMA 2012 as made applicable to security offences as set out in the newly minted amendments to the Penal Code, Prevention of Terrorism Act (POTA) 2015 and the National Security Council Act 2016. To this must be added the 2016 amendments to the Public Order (Preservation) Act 1958.

Time does not permit an analysis of the details of these laws. Suffice to say that they clothe the executive with the same extensive, virtually uncontrolled, powers reminiscent of the laws of yesteryear that we discussed earlier. **They are broad in substantive scope and narrow in procedural protection with considerable overlap.** First the PM and/or the Minister can invoke them in their discretion. Second, there is no limit to the 'security' area that they can include. Third, all rights will be suspended in these declared areas. Fourth, the authorities are bestowed extensive powers to impose all manner of controls (curfew, movement, roads, arrest). Fifth, the orders can be extended indefinitely with no capping - at the say so of the Minister/PM. Sixth, the NSC rules by decree – in effect usurping Parliament's legislative powers under Article 44 of the Constitution, as no formal emergency has been declared. Seventh, the powers given to the DG of the NSC – appointed by the PM – are extensive – akin to those under section 2 of the Emergency (Essential Powers) Act 1979. This power is not made under Articles 149 or 150 of the Constitution. The extensive powers (rule by decree, ignoring Articles 149/150) seem to conflict with the Constitution and hence in my view are void.

The use of the draconian SOSMA procedural provisions for extraneous purposes was demonstrated when the head of the influential NGO, *Bersih*, Maria Chin, was incarcerated on 18 November 2016 under SOSMA on the eve of the *Bersih* rally last year, in what many saw as an attempt to dampen, if not thwart, its massive support. She was released on the eve of her habeas corpus hearing. The High Court and the Federal Court refused to deal with the issue of the legality of her arrest on the ground that it was rendered academic with her release – opening, no doubt unwittingly, yet another avenue for executive abuse.

The challenge is how can such laws be restricted to their true purpose?

In essence, how does a country professing democratic rule founded on the cornerstone of the rule of law, strike a balance between the right to a secure environment to enjoy the right to life, liberty and the pursuit of happiness?

III. Role of the Judiciary

This is where the judiciary assumes a critical role. For, in the words of Federal Court Justice Zainun Ali, *"(T)he judiciary acts as a bulwark of the Constitution in ensuring that the powers of the executive and the legislature are to be kept within their intended limit"*[32] - echoing the 1803 judgment of US Chief Justice, John Marshall, in the seminal *Marbury v Madison.*[33] What prompted the Federal Court to state what appears to be axiomatic is a constitutional amendment designed to curtail 'judicial power'. To this we now turn.

1. Judicial power curtailed

a. Decisions that ruffled executive feathers?

For long, the executive was used to cases almost always going their way. Indeed, the general complaint was that the judiciary was too compliant and even timid in matters where there was a challenge to governmental authority. In this context, the flexing of its jurisdiction in what would be fairly normal judicial adjudication process, seemed to irk the executive. Perhaps three cases can be cited in this regard, as examples. First, the *Berthelsen* case[34] which quashed a foreign journalist's revocation of work permit for failure to give him the right to a prior hearing. It injected natural justice requirements into an area where national security was raised as a ground for the cancellation of the permit. Second, the Supreme Court in *Mamat Daud v Government of Malaysia*[35] declared invalid a law enacted by parliament on the ground that it encroached on powers reserved exclusively to the State. Third, in *Dato Yap Peng v PP*[36] the Supreme Court struck down the government's choice of venue for a criminal trial because the provision was a

[32] *Semenyih Jaya Sdn Bhd v PTD Hulu Langat* Federal Court Civil Appeal 47-11/2013, delivered on 20 April 2017.
[33] 5 US 137 (1803).
[34] *JP Berthelsen v Director general of Immigration* [1987] 1 MLJ 134.
[35] [1988] 1 MLJ 119.
[36]

"*legislative incursion to facilitate executive intrusion*" into the judicial power of the Federation; and amounted to "*executive action arrogating to itself functions proper to the courts and usurps or obtrudes on the judicial process*". Any other view, inveighed Justice Eusoffee Abdoolcader, would relegate article 121(1) "*to no more than a teasing illusion, like a munificent bequest in a pauper's will*". Less colourfully, Justice Mohamed Azmi said the impugned section "*confers judicial power on a body which is not a court and as such it is an interference of judicial power of the Federation as enshrined in Article 121(1) of the Constitution"*.

Other cases also seemed to have gone against the preferred outcome by the Federal government, such as the *Tun Mustapha* litigation; and the initial grant of standing to the opposition leader in the *UEM* case.

Notwithstanding other critical decisions in favour of the government, significantly the habeas corpus applications relating to the *Operation Lalang* ISA detentions, *Theresa Lim Chin Chin & Others v Inspector General of Police*[37], the executive feathers remained ruffled.

b. Executive reprisal

Ominously, the then Prime Minister warned[38]

"If we find that a court always throws us out on its own interpretation, if it interprets contrary to why we made the law, then we will have to find a way of producing a law that will have to be interpreted according to our wish".

The executive acted. Its proposed constitutional amendment was passed by Parliament on 10 June 1988.[39] It removed the words "*the judicial power of the Federation shall be vested in* … (the High Courts and such inferior courts as may be provided by Federal law)"; and replaced with "*There shall be two High Courts ... and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law*".

[37] [1988] 1 MLJ 294.
[38] *Time Magazine*, 24 November 1986.
[39] Act A704 Constitution (Amendment) Act 1988.

c. Judiciary responds: Court of Appeal

The judiciary responded, albeit a decade later. In *Sugumar Balakrishnan*[40] Gopal Sri Ram, then judge of the Court of Appeal, said that the deletion of the words 'judicial power' "*does not have the effect of taking away judicial power from the High Courts, in accordance with well-established principles of constitutional interpretation"* citing in support a decision by the Privy Council on the Constitution of Sri Lanka: "*The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature*".[41]as well as the decision of the Indian Supreme Court, *Minerva Mills Ltd v Union of India*[42] which came to the same conclusion despite the absence in the Indian Constitution of any mention of judicial power being vested in the judiciary. The power "…*remains where it has always been, with the judiciary*", declared Justice Gopal Sri Ram speaking for the Court of Appeal.

d. Federal Court resiles

On appeal, although Article 121(1) was not specifically addressed, the **Federal Court** held[43] that judicial review was ousted for all practical purposes, implying that by a mere amendment to an act, Parliament could oust judicial review. A startling result by all accounts as judicial review has been held to be a *sine qua non* of the rule of law and "*a basic and essential feature of the Constitution*" and "*an integral part of our Constitutional system*".[44]

In *Kok Wah Kuan v PP*[45] the Court of Appeal through Justice Gopal Sri Ram adhered to his earlier views. The judicial power remained with the judiciary consonant with the doctrine of separation of power.

On appeal to the Federal Court, a formidable panel of judges[46] gave, what appeared to be, the final 'kiss of death' for judicial power: *PP v Kok Wah Kuan.*[47] Said the court:

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[40] [1998] 3 MLJ 289.
[41] *Liyanage v The Queen* [1967] 1 AC 259, 287. .

[42] AIR 1980 SC 1789.
[43] *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72.
[44] *Minerva Mills Ltd v Union of India,* preceding footnote. Now affirmed in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*, Federal Court Civil Appeal No. 01(f)-47-11/2013(B).
[45] [2007] 5 MLJ 174.

> "*the jurisdiction and powers of the two high courts are now prescribed by federal law and not dependent on the interpretation of the term 'judicial power' as prior the amendment*."

The Court ruled, by a 4-1 majority, that a law could not be struck out if it violated the doctrine of separation of powers; relegating this doctrine to "*a political theory by some thinkers*" which "*is not a provision of the Constitution even though it influenced the framers of the Malaysian Constitution*". A vigorous dissent was delivered by the CJ (Sabah, Sarawak) Richard Malanjun.

e. Federal Court reclaims jurisdiction

Almost a decade was to pass before this decision was soundly repudiated - last month (April 2017) in fact. "*The Judicial power of the court resides in the Judiciary and no one else",* declared, with respect, a more enlightened panel of the Federal Court in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat.* Else, said Justice Zainun Ali, delivering the judgment of the Court, the judiciary would be suborned to Parliament; and by extension, the executive. This would have "*the unfortunate effect of allowing the executive a fair amount of influence over the matter of the jurisdiction of the court*".

In a gracefully gentle, though clear, intellectual rebuke to the reasoning of the previous Federal Court panel, Zainun Ali FCJ reminded that Parliament did not have the power to make any law after Merdeka Day that was inconsistent with the Constitution. And it could not introduce any law which undermined the doctrine of separation of powers; or the independence of the judiciary.

Judicial independence was crucial – to "*assure security of freedom to the judiciary from political, legislative and executive control*". For it is the judiciary's function as a bulwark of the Constitution that provides an effective check and balance against executive and legislative overreach; keeping these other institutions within their constitutional limits and ensuring that they uphold the rule of law. Ultimately, only this can secure public confidence in the judiciary. "*The important concepts of judicial power, judicial independence and the separation of powers are as*

[46] Ahmad Fairuz CJ, Abdul Hamid Mohamad PCA, Alauddin CJ Malaya and Zaki Azmi FCJ.
[47] [2008] 1 MLJ 1.

critical as they are sacrosanct in our constitutional framework", reminded the Federal Court. These concepts have been "*"juxtaposed time and time again in our judicial determination of issues in judicial reviews"*.

In the brink of time, when all appeared lost in terms of judicial independence and the separation of powers, the judicial phoenix rose from the ashes. The decision embedded these concepts as forming the basic features of the Constitution – never ever to be thwarted. This then is a tale of the rise, fall and the rise again of the judiciary in the "separation of power/rule of law" paradigm of the Federal Constitution.

2. The 'realism' of judicial independence

The matter does not rest here. The judiciary as an institution, and individual judges, are constitutionally insulated from external pressures. Theoretically, the judge is bestowed personal independence to decide the case without fear or favour according to law. But how judges and courts actually decide cases in the context of judicial independence is an entirely separate matter, as indeed evident from the vastly divergent outcomes with regard to the two Federal Court decisions interpreting the Constitution regarding judicial power. Are there possible factors that detract from this independence?

a. Influence, mind-set, commitment to justice

Is there 'independence' from fellow judges, judges in the upper judicial hierarchy, officials from other governmental branches? And then we also have to deal with mind sets. To what extent are judges coloured by their pride and prejudices? After all they are only human. As former Singapore CJ says:

> *"In practice, however, all the protective walls in the world would not be sufficient for the maintaining of the independence of the court in judicial proceedings if the judges themselves are unable (or do not wish) to exercise (personal) independence in discharging their judicial duties and functions. The reality is that whether a judge wishes to act and decide without fear and favour depends on, in the main, the judge's own personal ethical and moral values, the strength of the judge's belief in the rule of law, and the judge's commitment to justice and conviction that he or she has an*

indispensable role in society as a judge. Put simply, the judge must believe in and maintain the integrity that the judicial office requires of him."[48]

b. Earning favour – a betrayal?

Lord Bingham, one time de facto head of the UK judiciary, placed the obligation even higher:

> *"A judge who determines a case in a certain manner in order to earn the favour of the Executive for the purposes of future promotion would have betrayed his judicial calling."*[49]

A docile judiciary forever looking for approbation of a government especially of a dominant political party would, to paraphrase Ninian Stephen, suffer the fate of the German judiciary under the Nazi Party over 12 years from 1933 until the collapse of Germany in 1945.[50] Perhaps a bit of hyperbole in our context; but it conveys the drift of the potential harm to the Constitutional edifice of the rule of law.

c. Subconscious partiality

In his lecture to the Cambridge University Law Society in 1920, a great judge, Lord Justice Scrutton, articulated his thoughtful concerns of finding 'impartial' judges as part of a good legal system - accultured as they are in an entirely different social milieu, influenced by their social background and the unconscious premises they acquire,

> *"This is rather difficult to attain in any system. I am not speaking of conscious impartiality; but the habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgments as you would wish. .. It is very difficult sometimes to be sure that you have put yourself*

[48] Chan Sek Keong, 'Securing and maintaining the independence of the Court in Judicial proceedings', in *The Law in his Hands,* loc. cit. at p. 583.
[49] Tom Bingham, *'The Business of Judging'*, Oxford University Press, 2000, p. 60.
[50] Ninian Stephen, 'Judicial Independence – A Fragile Bastion', 13 *Melbourne University Law Review (1981-1982),* 334 at 337.

> *into a thoroughly impartial position between two disputants, one of your own class and one not of your class".*[51]

And what of the erstwhile DPP or Federal Counsel now assigned as Judge to do cases which he or she had rigorously pursued on behalf of the government? Can they shed their subconscious partiality so readily?

There is sometimes perhaps a perception of the subconscious partiality of judges to the government and public authorities. In a spirited defence, the Singapore Chief Justice, Chan Sek Keong beseeched a law student audience to shed the perception that Singapore courts were judicially partial and protected the mistakes of officialdom at the expense of the public. He argued that the fact that some 22% of judicial review cases were successful was really attributable to "… *the rather obvious explanation that the party with the stronger cases on the law and the facts prevailed*".[52] The CJ recounted a lament by the then President of the Law Society of Singapore who refrained from filing a case in court for his client involving the state authorities "But if I am accused of lack of courage, then I would ask *what support I would have received from our courts had I shown courage at that time*."

To what extent all these factors influence our judges in the exercise of their 'personal independence' will, no doubt, be an interesting and significant subject of further sociological research.

d. Politicians in robes

it is not unknown for party politicos to be appointed as justices. While this is not necessary to deprecate, as the Pulitzer prize winning Burns writes

> *"Justices might shed party labels when they take their seats on the bench but, with some notable exceptions, they do not abandon their party doctrines. Instead they become politicians in robes."*[53]

[51] Scrutton, 'The work of the commercial court', 1921, 1 *Cambridge Law Journal* 6. Cited in Wedderburn, *The Worker and the Law,* at p. 26.
[52] Chan Sek Keong, *'Judicial review – From Angst to Empathy,* A Lecture to Singapore Management University Second-Year Law Students, in *The Law in his Hands"*, Singapore Academy of Law, 2012, Academy Publishing, p. 609 at 615.
[53] James MacGregor Burns, *Packing the court,* 2010, Penguin Books, p. 3.

A way out to deflect public misperception is to ensure that they do not sit on cases which may have any political flavour, be it ever so remote.[54]

e. Criticising judges and contempt

An imputation of improper motives to judges or which impugn the impartiality and integrity of judges is not automatically contemptuous. Because *"temperate, balanced criticism allows for rational debate".*[55] It could well enhance the administration of justice. Contempt jurisdiction founded on the need to maintain public confidence in the administration of justice must, however, be balanced against the public interest in rooting out bias and impropriety where it in fact occurs. "*We ought not to be so complacent as to assume that judges and courts are infallible or impervious to human sentiment*"[56] citing in support, the New Zealand case of *Solicitor-General v Radio Avon Ltd*:[57]

> *"If this were the law [that allegations of improper motives, bias or impropriety could not constitute fair criticism] then nobody could publish a true account of the conduct of a judge if the matter published disclosed that the judge had in fact acted from some improper motive. Nor would it be possible, on the basis of facts truly stated, to make an honest and fair comment suggesting some improper motive, such as partiality or bias, without running the risk of being held in contempt."*

f. Inspiring confidence

You will readily realise that this is no across-the-board critique of the judiciary and its justices. There are undoubtedly judges – singly or collectively – who have through their judgments conveyed a sustained sense of bounden commitment to the evolutionary nature of the Constitution and its underpinnings; and the need for law to keep pace with relevant societal needs. In my limited vocabulary parlance - 'an enlightened judiciary'. As a result, our legal jurisprudence and court decisions have been marked by proud pronouncements in favour of human rights and the right to life and liberty.[58] All those associated with

[54] Rather commendably a judge who was a high ranking Minister in the ruling party, recused himself from hearing a case in which the PM was a litigant: *The Star, May 25 2017.*
[55] *AG v Tan Liang Joo John* [2009] 2 SLR 1132 at para 22.
[56] *Ibid.*
[57] [1978] 1 NZLR 225, 231.
[58] See for example: *Abdul Ghani Haroon v Ketua Polis Negara* [2001] 2 MLJ 689, HC (ISA Detention*), Mohd EzamMohd Nor v Ketua Polis Negara* [2001] 2 MLJ 481, FC (ISA Detention), *Muhammad Hilman Idham v*

the world of law, and beyond, respect and pay tribute to this steadily growing coterie of judges, some retired. Some of them stand out as providing "thought-leadership" in matters involving the adjudication of administrative and constitutional matters.

3. 'Rollback' decisions

The *Semenyih* Federal Court decision is a refreshing antidote to some disturbing regressive trends. Somehow some panels of our apex court seemed to have drifted away from the repeated exhortations that the Constitution does not share the interpretation principles applicable to act of Parliament; and that the Constitution must be interpreted dynamically, generously. Raja Azlan Shah then LP described the Constitution as a "*living piece of legislation, its provisions must be construed broadly and not in a pedantic way – with less rigidity and more generosity than other Acts*" citing in support a decision of the House of Lords and the Privy Council.[59] The generic formulations in the Constitution must be fleshed out by the judiciary evolving with the times not harking back to the past; and may yet be different in the future. As these provisions of the Constitution "*necessarily co-opts future generation of judges to the enterprise of giving life to the abstract statements of fundamental rights*": Court of Appeal in *Lee Kwan Woh v PP*[60] citing Lord Hoffman in *Boyce v The Queen*[61]*.* The approach when interpreting fundamental rights, in the graphic expression of Gopal Sri Ram:

> *When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretative approach will reveal to the court the rights submerged in the concepts employed by the several provisions of under Part II."*

Kerajaan Malaysia [2011] 9 CLJ 50, CA (University and University Colleges Act 1971), *Muhamad Juzaili bin Mohd Khamis v Government of Negeri Sembilan* [2015] 3 MLJ 513, CA (Transgenders' Case), *Nik Nazmi bin Nik Ahmad v PP* [2014] 4 MLJ 157, CA (Peaceful Assembly Act), *Teresa Kok Suh Sim v Menteri Dalam Negeri* [2016] 6 MLJ 352, CA (ISA Detention), *Muhammad Safwan Anang v PP* [2017] 4 CLJ 91, CA (Sedition Act).

[59] *Dato Menteri Othman Baginda v Dato Ombi* [1981] 1 MLJ 29 at p. 32.

[60] [2009] 5 MLJ 301 at 312[9].

[61] [2004] UKPC 32.

Courts have also emphasised the need for "indigenisation" of judicial interpretation of the Constitution, meaning country-sensitive contextualisation.[62]

a. Right to life

On this basis, taken cumulatively, for example, the word "life" in Article 5(1) has been interpreted broadly to incorporate all those facets that are an integral part of life itself and those matters which go to form the quality of life.[63] It includes employment, livelihood under native customary land rights, the right to live in a healthy, pollution-free environment, one's reputation and the right to seek judicial review of an administrative decision.[64] Because:

> *"The courts should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution, lest they be left behind while the winds of modern and progressive change pass them by. Judges must not be blind to the realities of life. Neither must they wear blinkers when approaching a question of constitutional interpretation"*[65].

The Federal Court in *Rama Chandran v The Industrial Court of Malaysia*[66] endorsed this broad approach.

Several other decisions tapped into the same vein. Yet this was rolled back by the Federal Court in *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* which said it preferred the narrow definition of life.[67]

A later Federal Court decision reversed this view as "*being without merit"*: *Sivarasa Rasiah v Badan Peguam Malaysia*;[68] because it belied the dynamic nature of the Constitution "*that did not admit of outdated,*

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[62] *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 at p. 188 and 189: *"Each country frames its constitutions according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences, and from a desire to see how their progress and well-being is ensured by their fundamental law". per* Raja Azlan Shah LP.

[63] And 'personal liberty' includes other rights such as the right to travel: at p. 314[14].

[64] *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261. *Nor Anak Nyawai v Borneo Pulp Plantation Sdn Bhd* [2001] 6 MLJ 241. *DG of Ministry of Science, Technology & Environment v Kajing Tubek* [1997] 1 MLJ 418.

[65] *Tan Teck Seng,* at p. 268F.

[66] [1997] 1 MLJ 145, per Edgar Joseph Jr at p. 190D, H.

[67] [2002] 3 MLJ 72, 89I.

[68] [2010] 2 MLJ 333, 344, para 14 (FC).

archaic and arcane provisions of a medieval society to fashion remedies to meet its needs": *Sivarasa Rasiah v Badan Peguam Malaysia*.[69]

The Federal Court went on to state that Article 5(1) that proscribes the deprivation of life and personal liberty save in accordance with the law, embed all freedoms as well that do not fall within the wide scope of Article 10 (freedom of speech, assembly and association) – all varieties of rights which go to make up the 'personal liberties' of man, the residue of all the remaining rights.[70] Any violation of this right by executive or administrative action must not only be in consequence of a *fair procedure* but should also be in *substance* fair, meaning it must meet the test of proportionality as set out in Article 8(1) of the Constitution.[71]

Unfortunately, a later Federal Court reverted to the restricted definition of personal liberty stating that it "*should not import certain other rights*": *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin and another appeal.*[72]

b. Reasonable restrictions

As noted, the fundamental freedoms in Part II of the Constitution may be restricted by executive orders. Restrictions that limit or derogate from a guaranteed right must be read restrictively, ruled the Court of Appeal in *Sivarasa Rasiah v Badan Pegaum Malaysia*[73]. "*Such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality*" requires the word "reasonable" to be read into the provision to qualify the width of the proviso, approving *Dr Mohd Nasir Hashim v. Menteri Dalam Negeri Malaysia*[74] and disapproving the High Court in *Nordin Salleh v. Dewan Undangan Negeri Kelantan*.[75]

> *"The correct position is that when reliance is placed by the State to justify a statute under one or more of the provisions of art. 10(2), the question for determination is whether the restriction that the*

[69] [2002] 2 MLJ 413, 420D.
[70] [2010] 2 MLJ 333, 344 (FC).
[71] Ibid. at p. 346 para 14.
[72] [2016] 2 MLJ 309 [149] following Suffian LP in *Government of Malaysia & Ors v Loh Wai Kong* [1979] 2 MLJ 33, 34-35.
[73] [2010] 3 CLJ.
[74] [2007] 1 CLJ 19.
[75] [1992] 1 CLJ 463.

particular statute imposes is reasonably necessary and expedient for one or more of the purposes specified in that article".

This position was maintained by several appellate decisions: such as *Muhammad Hilman Idham & Ors v. Kerajaan Malaysia & Ors;*[76] *Mohd Juzaili v State Government of Negri Sembilan*.[77]

A year after the last of these litany of cases, the Federal Court declared that requiring the restrictions to be reasonable would be rewriting the provisions of Article 10(2); and swiftly disapproved the cases that had so held: *PP v Azmi Sharom*.[78] The Court harked back to the discussion of the 1957 Reid Commission – ignoring the need for a dynamic and evolving approach to the Constitution; and the 'humanising and all-pervading provisions of Art 8(1)' to ensure that all legislative, administrative and judicial action is objectively fair as set out in *Loh Kwon Woh* and *Barat Estates Sdn Bhd v Parawakan*.[79] This may be described as an "extreme version of originalism" in interpreting the Constitution, confined to the original intention of the framers.[80]

c. Ouster of judicial review

The *Sugumaran* Federal Court decision also suggested that an act of Parliament could oust judicial review. This, with respect, was a major, almost fatal blow to the separation of powers and the rule of law.

There is a preponderance of authority which places judicial review at the heart of the rule of law and the foundational basis for the Constitution. The Federal Court in *Yang Dipertua, Dewan rakyat & Ors v Gobind Singh Deo* referred to judicial review as *"a concept that pumps through the arteries of every constitutional adjudication*.[81] Lord Hope speaks of it as "*the ultimate controlling factor on which our constitution is based*".[82] Others emphasise: "*So long as the power of judicial review exists, the rule of law exists".*[83] This means that Parliament cannot legislate

[76] [2011] 9 CLJ 50.
[77] 7 November 2014, *per* Hishamuddin JCA.
[78] [2015] 8 CLJ 921, 941 [40].
[79] [2000] 4 MLJ 107.
[80] Goldsworthy in 'Originalism in Constitutional Interpretation', (1997) 25 *Fed L.R.* 1.
[81] "[2014] 6 MLJ 812, 816.
[82] *Jackson v AG* [2006] 1 AC 262, 302-303, para 102.
[83] As one example, Chan Sek Keong, Keynote address, New York State Bar Association Seasonal Meeting, 27 October 2009, in *The Law in His Hands, supra*, 563 at 571.

contrary to the rule of law. This includes an Act amending the Constitution that violates the basic structure.[84]

Yet Parliament continues to ignore this. It amended the Immigration Act to insulate the acts of the Director General of Immigration from judicial review: section 59A; and to deny the right to natural justice to those affected by his orders: section 59. Thus fortified, the DG is free to issue travel bans; and detain indefinitely those classified as 'prohibited immigrants'.[85] The Federal Court, in *Sugumar* legalised this ouster. In *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd* the Federal Court through Zakaria (then FCJ) said that the present position obtaining in Malaysian courts had "*moved away from the traditionalist approach that the Crown can do no wrong*"; and "*therefore the courts … have held that the executive arms of the government is (sic) amenable to the judicial review proceedings*".[86] This in effect overruled the earlier cases to the contrary, that the CJ had cited, namely, *Kerajaan Malaysia v Nasharuddin Nasir*[87] which in turn had relied upon *the Federal Court in Sugumar Balakrishnan.* After *Semenyih Jaya* this position has been sealed.[88]

In any event these provisions in the Immigration Act are presently being challenged in a fresh series of court actions.

d. Indigenous rights[89]

A recent majority Federal Court decision dealt a fatal blow to the customary rights of indigenous peoples to freely access the forest for food, medicines and such like. Such a right has existed since time immemorial as universally recognised. Indeed the immense contribution of traditional knowledge associated with the forest resources to modern medicine has been acknowledged by the World Health Organisation.

In the *Bakun Dam* case[90] the Appeals Court pronounced that the forest provided the sustenance of life for indigenous peoples.

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[84] *Semenyih* at para 80-81, approving the Federal Court in *Sivarasa.* In this sense the dictum that the presumption that Parliament did not intend to make laws that conflict with the basic fabric of the Federal Constitution – is rebuttable, cannot be right: *Ketua Pengarah Jabatan Alam sekitar v Kajing Tubek* [1997] 3 MLJ 23, 38C-D.

[85] Gurdial S Nijar, 'The Imprisonment of non-citizens', Law Speak, *SunDaily,* January 10 2017, p. 11.

[86] [2008] 4 MLJ 641, 665[78].

[87] [2004] 1 CLJ 81, 93.

[88] *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1, 14. Also *Minister of Finance & Anor v Petrojasa Sdn Bhd* [2008] 4 MLJ 641, 665.

[89] Adapted from the article in my Law Speak column

All this is now set to be negated. The Federal Court in *Director of Forests v Tuai Rumah Sandah ak Tubau* ruled that such a right – to freely access the forest for such sustenance – does not exist in law. The majority three judges ruled that this customary practice of the indigenous peoples did not have the force of law because – even if shown to exist – it did not fall within the definition of customary laws under Sarawak State Laws.

In the words of Justice Raus Shariff:

> *"Put simply, there are customs which the laws of Sarawak does (sic) not recognise and hence do not form part of the customary laws of the natives of Sarawak and remain merely as practices or usages of the native. They are not integral to the particular community in question and remain incidental. As such they do not come within the definition of law under Article 160(2) of the Federal Constitution. We must not lose sight of an important fact that recognition alone that such custom or practice exist is not enough."*

This conclusion flies in the face of established jurisprudence both here and elsewhere.

By patient and exact analysis, Justice Zainun Ali's dissent identified clear judicial precedents (which have the force of law) which have recognised such rights as those claimed in this case – *menoa* and *pulau* – in addition to the right to *temuda*.

The former is the right to forage the forests for their life-support – gathering medicines, wood and food from time to time; the latter is where the natives have cleared the forest and settled. There is a range or spectrum of customary rights. Where they have settled, they claim title; for the rest – a lesser right – to forage and access.

Our highest courts have acknowledged these lesser rights. In the landmark *Adong Kuwau*[91] case the court said that

> *" ... the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself but*

[90] *DG of Environment v Kajing Tubek* [1997] 3 MLJ 23, CA.
[91] [1997] 1 MLJ 418; affirmed [1998] 2 MLJ 158, CA.

not to the land itself in the modern sense that the aborigines can convey, lease or rent out the land."

Citing high Canadian[92] and Australian judicial authority[93], the court held that the natives were entitled to enjoy rights to the land as their forefathers had lived from time immemorial. So it does not involve the normal concept of property rights; and it requires ascertaining (through evidence) how the forefathers lived.

Later cases are similar. *Sagong Tasi* recognised the native community's customary "user" enjoyment rights.

The Canadian Supreme Court acknowledges rights short of title – non-exclusive uses such as hunting; that is, a site-specific right to engage in a particular activity.

A recent Federal Court decision acknowledges that the government's title is subject to any native rights over such land: *Superintendent of Lands and Surveys Miri Division v Madeli bin Salleh*.[94]

All these judicial precedents crisply merged in Justice Zainun's conclusion:

"Thus the nature and types of rights the natives are entitled to are embodied in their customary practices. There exist circumstances where proprietorship of the lands is not the real issue but the right to engage in specific activities on the land which are critical components of their customary practices ... inextricably tied up with the land."

This the majority missed. They insisted on a formal recognition of the customary "foraging" right through an enacted law.

Ignored were the numerous previous decisions stating that these rights were valid as they pre-existed the enacted law; and were never abrogated explicitly by any state law. The baby was thrown out with the bath water.

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[92] *Calder v AG, British Columbia* (1973) 34 DLR (3d) 145.
[93] *Mabo v State of Queensland* (1992) 66 ALJR 408.
[94] [2008] 2 MLJ 977. See commentary by Gurdial Singh Nijar and others in *Justice Above All,* 2017, Sweet & Maxwell, pp. 44- 59.

4. English judicial approach to national security

It is instructive – in recalibrating the balance between national security and human rights - to refer to a decision of the House of Lords on a provision of the UK Security Service Act 1989, section 1(2): *Secretary of State for Home Department v Rehman*. [95] SOSMA, modelled on this Act, has a parallel provision.

The decision referred to the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information*,[96] as approved on 1 October 1995 which reads as follows:

> "Principle 2. Legitimate national security interests
>
> (a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
>
> (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest."

The House of Lords in *A v Secretary of State for the Home Department*[97] warned against the executive's abuse of national security and emergency powers. Nine law lords heard this case involving detention without trial of suspected international terrorists under Part 4 of the Anti-Terrorism, Crime & Security Act 2001 (UK). Note the pronouncements of the following Law Lords:

Lord Rodger: National security can be used as a pretext for repressive measures that are really taken for other reasons.

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[95] [2003] 1 AC 153.

[96] These Principles were adopted on 1 October 1995 by a group of experts in international law, national security, and human rights. They have been endorsed by the United Nations Commission on Human Rights. https://www.article19.org/data/files/pdfs/standards/joburgprinciples.pdf.

[97] [2005] 2 AC 68.

Baroness Hale: Unwarranted declarations of emergency are a familiar tool of tyranny

Lord Walker: A portentous but non-specific appeal to the interests of national security can be used as a cloak for arbitrary and oppressive action on the part of government; and - national security can be the last refuge of tyrants

In *Karam Singh,* the Federal Court in deciding to opt for decisions of English rather than Indian courts on national security said that their preference was for English courts as "*they take a more realistic view of things"* and that "*England has more in common than India in so far as problems of preventive detention are concerned".*[98]

Perhaps this English House of Lords decision may light up the pathway for a vigilant judiciary to effectively manage the clash of the two titans and rein in the executive's use of national security to abridge human rights.

5. Judicial humility

In some of these cases, different court panels have been so bold as to overrule the earlier cases, restored court of appeal decisions or adopted dissenting judgments. To restore fundamental precepts wrongly shunted by wayward reasoning.

I am reminded of Professor Glanville Williams's critique of the House of Lords decision of *Anderton v Ryan*[99] published in the *Cambridge Law Journal:*

> *"The tale I have to tell is unflattering of the higher judiciary. It is an account of how the judges invented a rule based upon a conceptual misunderstanding; ...of their invincible ignorance of the mess they had made of the law; ...."* [100]

The House of Lords gracefully acknowledged this critique and later rectified their error – (*R v Shivpuri*[101]) – describing Glanville's language as "not conspicuous for its moderation, but it would be foolish, on that

[98] At p. 141.
[99] [1985] AAC 560.
[100] Glanville Williams,, "The Lords and Impossible Attempts*, or Quis Custodiet Ipsos Custodes*? 45 *Cambridge Law.Journal*, (1986) 33.

[101] [1986] 2 UKHL 2.

account, not to recognise the force of the criticism and churlish not to acknowledge the assistance … derived from it".

Abandoning all "pretension to infallibility", the court said that *"If a serious error embodied in a decision of this House has distorted the law, the sooner it is corrected the better".*

May we expect the same admission of human 'frailty' by our highest court to accept the force of the dissent? There is recent precedent for this. In the *Semyenhih Jaya* case, referred to earlier, the Federal Court overruled an earlier Federal Court decision and adopted the force of the dissenting judgment in that case of Justice Richard Malanjun, and restored judicial power.

As was also the posture of Lord Diplock: "*The time has come to acknowledge openly that the majority of this House in Liversidge v Anderson were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right*": *I.R.C. v Rossminster Ltd*.[102] Albeit some 40 years later!

This is what Lord Atkins said:[103]

> *I view with apprehension the attitude of judges who on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive-minded than the executive. Their function is to give words their natural meaning, not perhaps in war time leaning towards liberty, but following the dictum of Pollock C.B. in Bowditch v. Balchin (1850, 5 Ex. 378), cited with approval by my noble and learned friend Lord Wright in Barnard v. Gorman (1941, 3 All E.R., at p. 55), "in a case in which the liberty of the subject is concerned, we "cannot go beyond the natural construction of the Statute." In this country amidst the clash of arms the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the*

[102] [1980] AC 952.
[103] *Liversidge v Anderson* [1941] UKHL 1.

> *executive, alert to see that any coercive action is justified in law. In this case I have listened to arguments which might have been addressed acceptably to the Court of Kings Bench in the time of Charles I.*
>
> *I protest, even if I do it alone, against a strained construction put upon words with the effect of giving an uncontrolled power of imprisonment to the Minister.* (Emphasis added)

This position was repudiated by our highest judiciary in the early years, an eminent judge brushing aside Indian authorities requiring a judicial enquiry into the subjective satisfaction of the Minister in ordering a detention without trial with: "*Indian judges strike me as indefatigable idealists seeking valiantly to reconcile the irreconcilable whenever good conscience is pricked by an abuse of executive power*".[104] Almost a self-indictment that our judiciary lacks the 'good conscience' to react in such situations!

IV. The role of the AG's Chambers re: judicial review

In one noteworthy aspect bearing on the right to life and liberty is the change in the landscape of judicial review. I refer to the rather vigorous objections by the Attorney General's Chambers (AGC) to almost all applications for leave for judicial review.

In the early days, the test for leave for judicial review required no more than a rather swift ascertainment that the matter was not frivolous or vexatious. This has been reiterated by authority on high starting from the oft-quoted dictum of Ajaib Singh SCJ in *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association*:[105]

> *"The guiding principle ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and*

[104] *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129, 141H, per Ong Hock Thye CJ (Malaya).

[105] [1990] 3 MLJ 228 at 229Br. Approved by the Federal Court in *Members of the Commission of Enquiry v Tun Dato Seri Ahmad Fairuz* [2011] 6 MLJ 490, 498 para 20: "*At the leave stage without the need to go into depth of the abundance of authorities, suffice for us to state that the threshold for the granting of such leave is very low. Leave is normally granted if the application is neither frivolous nor vexatious and it suffices further argument on a substantive motion".*

that there is some substance in the grounds supporting the application."

The AG's role as a guardian of the public interest was to intervene primarily at the stage of the arguments on the substantive hearing. At the leave stage, the AGC's role is confined, said the Court of Appeal in *Teh Guat Hong v PTPTN,* to appraising the court of

> "*any particular features of the case that would disqualify any leave being granted … and not to embark upon substantive submission of the jurisdiction of the court to entertain such an application.* ***The Chambers should not jump the gun by embarking upon a pre-emptive strike to dismiss the complaint at such a preliminary stage, unless of course the decision was inherently not susceptible to judicial review…****".*[106]

This refers to the non-justiciability of issues[107] – which recognises institutional autonomy and specialist competence as a facet of the separation of powers. Hence matters of "high policy" that are within the exclusive purview of the executive are not justiciable, such as making treaties, recognising foreign governments, dissolving parliament, the conduct of foreign policy and international boundary disputes. Nonetheless a prima facie non-justiciable issue may be justiciable if it implicates domestic law involving "low policy" exercise of administrative discretion.[108] Now it appears that almost invariably the AGC is instructed to abort any leave through prolonged and strenuous arguments – without discerning the implication of a denial to have the matters ventilated fully on a substantive hearing.[109] And the judiciary seems to have bought into this process. At least some judges, at any rate. Some leave applications take an entire day to argue, only for leave to be ultimately denied! This does not appear to square with the object of a

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[106] [2015]3 AMR 35 at 55, per Varughese George JCA.

[107] *"The word 'justiciable'… is legitimately capable of denoting any question. That is to say, the questions are few which are intrinsically incapable of submission to … an adjudication from which practical consequences in human conduct are to follow":* Melville Fuller Weston, 'Political questions', 1924-25 38 *Harvard Law Rev 296, 299.*

[108] *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR® 453 at para 91.

[109] Courts can adjudicate on Canadian government's decision to allow the US to test cruise missiles in Canada on whether it violates Canada's Charter of Rights and Freedoms which sets out 'the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice": *Operation Dismantle v The Queen* [1985] SCR 441.

filtering 'leave' stage – to keep out obviously unwanted, non-arguable and frivolous cases that would needlessly take up the court's time.

This appears especially ominous in the light of the recent *Semenyih Jaya* Federal Court pronouncement by Justice Zainun - embedding 'judicial review' within the conceptual framework of judicial power, judicial independence and the separation of powers; and as the foundation of the rule of law.

…….

There are naturally many other important issues that require reflection such as: locus standi, public interest litigation, the use and the reach of the vast panoply of repressive criminal and security laws, the prohibitive provisions of labour laws and the denial of trade union representation, the discrimination on the basis of gender and transgender, the role of SUHAKAM, student rights and academic freedom. All of these have a direct interface with the topic at hand. And have been the subject of judicial comment and adjudication. But alas, time and your generous but wearing patience, necessitates that these be reserved for another full discourse.

V. Conclusion

Our human rights architecture has a proud record; and also terrible disappointments, as this discourse shows. It is the latter that I have highlighted. In the fashion of Oliver Stone & Peter Kruznick who, in their introduction to *The Untold Story of the United States,* state[110]

> *"We are more concerned with focusing a spotlight on what the US has done wrong – the ways in which we believe the country has betrayed its mission –with the faith that there is still time to correct those errors as we move forward into the twenty-first century."*

It is that same abiding faith that underpins my presentation – the faith that fresh and new waves of enlightened jurisprudence will wash away the set-backs. Perhaps there is a broader need to identify and dismantle structures of legal authoritarianism as well because its domination constrains human development.

[110] Oliver Stone & Peter Kruznick, *The Untold History of the United States,* 2012, USA: Simon & Schuster, at p. xi.

Taken together they spell the compelling need to breathe meaning to the cardinal twin rights to life and liberty – and, ultimately, our pursuit of happiness.

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