

# STRENGTHENING THE INDEPENDENCE AND EFFICIENCY OF THE JUDICIARY

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1. Distinguished guests, ladies and gentleman. I am very honoured this afternoon for the opportunity to address the legal fraternity in ASEAN on this important subject. Judicial independence and efficiency are matters which are at the heart of administration of justice, and crucial for the promotion of civil society founded on the rule of law. It is therefore very appropriate that these matters are dealt with at the inception of this Conference.

2. The independence of the judiciary remains relevant and critical today as it was when King James dismissed Sir Edward Coke in 1616 for failing to bow to his Majesty's wishes<sup>1</sup>. That was the genesis of the concept of judicial independence, which has now become a pillar in all constitutional governments the world over. Recently, the United Nations Special Rapporteur on the Independence of Judges and Lawyers noted as follows :-

**“As will be seen from my reports, threats to judicial independence which began in the latter half of last century continued and are still continuous. Even the developed nations are not spared. Judicial independence remains fragile. It should not be taken for granted. It is the presence of an independent judiciary which distinguishes a democracy from a totalitarian state. Hence, we must continue to be vigilant.”<sup>1a</sup>**

3. Sir Harry Gibbs, who was the former Chief Justice of the High Court of Australia, was once asked how he would define an **“independent judge”** and he replied :-

**“It means that no judge should have anything to hope or fear in respect of anything which he or she may have done properly in the course of performing judicial functions. So neither the parliament nor the executive, nor anyone else, should be able to bring pressure of any kind to bear upon a judge in the performance of judicial duties.”<sup>2</sup>**

This observation is of course of universal application to all judges, irrespective of the legal and political systems under which they function. In

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<sup>1</sup> Cyrus Das and K. Chandra, **“Judges and Judicial Accountability”**, a CLA Publication [2003] at pp. 182 – 183.

<sup>1a</sup> Dato' Param Cumaraswamy, in his acceptance speech of the **“2002 Justice in the World”** Award on 5<sup>th</sup> June 2003, in Madrid, Spain (as reproduced in Infoline, September 2003, at p. 29).

<sup>2</sup> Sturgess and Chubbs **“Judging the World, Law and Politics in the World's Leading Court”**, Butterworths [1980], at p. 353.

essence, an independent judge is an impartial arbiter of disputes, with a good sense of judgment and temperament, and above-all endowed with the virtues of honesty and integrity.

4. In the modern concept of judicial independence, the collective independence of the judiciary is an institution, where the Courts are “**organs of the State, with relative autonomy and a degree of independence. It is in that autonomy and its continual expression that many of the hopes and aspirations of the citizen against the State are reposed**”<sup>3</sup>. But, an independent judiciary is, at once, a formidable protector of individual liberty as well as a very vulnerable institution, a fragile bastion indeed<sup>4</sup>. Professor Griffiths, in his classic thesis, “**The Politics of the Judiciary**”, aptly summed up the principle of judicial independence, when he said :-

**“Judicial independence means that judges are not dependent on Governments in any ways which might influence them in coming to decisions in individual cases. Formally, this independence is preserved by their not being dismissible by the Government of the day.”**<sup>5</sup>

5. It is axiomatic that an independent judiciary is crucial for the promotion of a constitutional democratic government. It exists not for the judges themselves but as an essential protection of equality of everybody before the law. In short, it exists for the “**consumers of justice**”. An independent judiciary ensures that all actors in society, including the judiciary itself, are bound by the law. In a democratic society, this guarantees the supremacy of the constitution, which is the most fundamental representation of the will of the people<sup>6</sup>.

6. The current role of the judiciary in the modern state is however increasingly being questioned. This is particularly so when the Courts are asked to review executive and legislative actions, and strike them down. Is a judiciary any less independent if it refuses to do so? Here, the salutary words of Justice H. R Khanna of the Indian Supreme Court must be borne in mind :-

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<sup>3</sup> Fali. S. Nariman, “**Judicial Independence in India**”, quoted in “**Democracy, Human Rights and the Rule of Law (Essays in Honour of Nani Palkhivala)**”, Venkat Iyer, Butterworths [2000] at pp. 15 – 16.

<sup>4</sup> Sir Ninian Stephen, as quoted in “**Constitutional Conflicts in Contemporary Malaysia**”, H.P. Lee, OUP [1995], at p. 76.

<sup>5</sup> Fontana [1977], at p. 29. See also Lord Denning, “**What Next in The Law?**”, Butterworths 1993 at p. 310:-

**“If I be right thus far – that recourse must be had to law – it follows as necessary corollary that the judges must be independent. They must be free from any influence by those who wield power. Otherwise they cannot be trusted to decide whether or not the power is being abused or misused. This independence, I am proud to say, has been achieved in England. The judges for nearly 300 years now have been absolutely independent – not only of government and of ministers, but also of trade unions, of the press, and of the media. They will not be diverted from their duty by any extraneous influences; not by hope for reward nor by the fear of penalties; not by flattering praise nor by indignant reproach. It is the sure knowledge of this that gives the people their confidence in the judges”**

<sup>6</sup> Dato’ Param Kumaraswamy, “**Parliamentary Action To Ensure The Independence And Good Administration Of Justice**”, *Insaf* Vol. XXX1, No. 2, June 2002, at p. 83.

**“And while talking of Independence of the courts, I must remove a misconception. Independence of courts does not necessarily mean deciding a case against the State. Sometimes a notion prevails that the more a Judge decides cases against the State, the more independent he is. This is a wholly misleading notion and the sooner it is dispelled the better it is for the health of the community. Every Government in a welfare state has to undertake a number of measures with a view to bring about socioeconomic reforms ... The modern approach is that the welfare of the community must have primacy over the private rights of the individual .... We, therefore, should not take a lopsided view of the independence of the judiciary. Independence means dispensation of justice without fear or favour. Independence postulates keeping the scales even in any legal combat between the rich and the poor, the mighty and the weak, the State and the citizen. As such as injustice can be done by keeping the scale weighted in favour of the citizen and against the State, as it can be by keeping the scales weighted in favour of the State and against the citizen.”<sup>7</sup>**

7. In reality, however, the greatest threat to judicial independence is, and is often perceived to be, from the State, as animated by the Executive. It is for this reason that in any discourse on the role of an independent judiciary the common consensus arrived at is that **“the Courts are there to protect the rights of the individual as against the State by ensuring that executive powers are lawfully exercised”<sup>8</sup>**. This is generally regarded as the central role of the judiciary in the Westminster model of government that many of the former English colonies, such as Malaysia, inherited and continue to subscribe to. At the core of this constitutional scheme is the well recognised doctrine of separation of powers, where judicial power is vested in the judiciary, whilst executive power and legislative power is in the hands of the executive and legislature respectively<sup>9</sup>.

<sup>7</sup> H.R Khanna, **“Law, Men of Law and Education”**, Tripathi (Bombay) [1981] at p. 9.

<sup>8</sup> Sir Nicholas Browne – Wilkinson, **“The Independence of the Judiciary in the 1980’s”**, Public Law [1988] at p. 44.

<sup>9</sup> See Lord Hailsham of St. Marylebone’s, **“A Sparrow’s Flight”**, Fontana [1991] at p. 422 :-

**“Over the years, the executive and the legislature in this country have become almost inextricably intertwined as the result of the development of cabinet government and of the party system, and of the sensitivity of both to passing waves of popular emotion. This tempts both ministers and Parliament constantly to encroach on what belongs properly to the judicial process and the judgment of the courts. This means that of the three branches of government recognized at the time of the Glorious Revolution the courts and the judges are far the weakest and the most vulnerable to attack, both from the executive and from individual members of both Houses.”**

See also Tun Salleh Abas, **“The Role of the Independent Judiciary”**, in a paper presented at the Sir John Foster Galaway Memorial Lecture at University College, London on 4<sup>th</sup> November 1988 at p. 4 :-

**“The theory of democratic government and the principle of independent judiciary are linked together with the doctrines of the separation of powers and fundamental liberties. All these principles, concepts and doctrines are themselves based on the assumption that authorities cannot be trusted with unlimited powers. The doctrine of the separation of powers for instance was postulated with a view to preventing tyranny by the conferment of too much power on any person or body and hence arose the necessity of checking one authority by another. Fundamental liberties confer some basic rights on citizens in order to enable them to enjoy their rights as citizens. Such**

8. What then is “judicial power” for an independent judiciary under the Westminster constitutional scheme? Judicial power was broadly defined by Griffiths C.J in the early 20<sup>th</sup> century case of **Huddart Parker Pty Ltd v Moorehead**<sup>10</sup> as “**the power which every sovereign authority must of necessity have to decide controversies between subjects, or between itself and its subjects, whether the rights relate to life, liberty or property**”. In its sweep, judicial power is therefore a potent weapon in the hands of the judiciary, particularly in the face of arbitrary measures or capricious conduct on the part of the other organs of state, which impinge on the fundamental liberties of citizens. I shall very shortly deal with the Malaysian experience on judicial power, within the framework of the Federal Constitution.

9. It is noteworthy that, in the scheme of separation of powers, judicial power has its limits and parameters. It lies in the delineation of the constitutional boundaries between the Courts, on the one hand, and Parliament and the Executive on the other. It has recently been described as “**the doctrine of deference**” and expressed as follows :-

**“It is for Government to govern. That is their role. It is for the courts to check that the government is governing lawfully – that is the Court’s role. But it is not their role to check if the government is governing well – that is for Parliament and the electorate. For the courts to assume such a role would be to usurp the decision-maker, Parliament and the electorate. As former Chief Justice of India, Dr A. S Anand, wisely notes, the function of the judiciary is not to set itself in opposition to the policy and politics of the majority rule.”**<sup>11</sup>

10. The doctrine of deference calls for judicial self-restraint in ensuring that the Courts do not improperly encroach on the territory of the Executive or Legislature. In light of this emerging doctrine of deference, is there a place for the other important feature of a modern independent judiciary in a robust and vibrant democracy; “**judicial activism**”? Judicial activism is broadly defined as using judicial power for an extraneous purpose or simply put “**judge law-making**”. In this regard, it has often been said that when judges yield to the temptation to legislate, the separation of powers is the first casualty<sup>11a</sup>. But, in a paper presented at the Commonwealth Law Conference this year, the following view was expressed by one of the eminent speakers :-

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**rights constitute a limitation upon the power of the authorities. These rights, however, would be illusory if they are merely declaratory and not enforceable. They are also meaningless if the tribunals entrusted with the function of enforcing them are submissive to the commands of the executive. Thus the necessity of independent judiciary is the concomitant result of the interplay between these two concepts: separation of powers and fundamental liberties. A combination of the three constitutes the rule of law.”**

<sup>10</sup> [1908 – 1909] 8 CLR 330 at p. 357.

<sup>11</sup> Peter Goldsmith, “**Governing Within the Rule of Law : the Courts and the Executive**”, *The Commonwealth Lawyer*, Vol. 12 (No.1), April 2003.

<sup>11a</sup> Hon. J. B. Thomas AM, “**Judges Who Play Politics : Two Current Judicial Issues**”, (2003) 77 ALJ 173.

**“Judges should exercise judicial activism. Public expectation demands it. The primary function of the Judiciary is not only to punish wrong doers and to decide disputes between private individuals and the individual against the State but also to interpret the law abreast of the times for social and common good. Judges must have moral fibre to be effectively the guardians of our liberty and fundamental rights.”<sup>12</sup>**

There is definitely a place for judicial activism, as a facet of judicial independence, provided it is not used to defeat executive powers in matters within the domain of the Executive or to usurp Parliamentary powers. But judicial activism is needed, indeed it is compulsory, when the rule of law is threatened and the judiciary is called upon to uphold the law and protect basic human rights, in the face of oppression by the State. Justice Kessler, in a recent decision of United States District Court of Columbia, seemed to be referring to this type of legitimate judicial activism when he said :-

**“Difficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law. The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our Government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship.”<sup>13</sup>**

11. The concept of judicial independence is of course well established. The universality of the principle finds its expression in the following United Nation instruments :-

- (1) the Siracusa Principles 1981 (ie. the United Nation’s Draft Principles on the Independence of the judiciary).
- (2) The Basic Principles on the Independence of the Judiciary, 1985.
- (3) The United Nations Procedures for the Effective Implementation of the Basic Principles on the Independence of the Judiciary 1989.

The manifestation of this concept is also found in instruments such as:-

- (1) the IBA’s Minimum Standards of Judicial Independence 1982.
- (2) The Singhvi Declaration 1989 (ie. the Draft Universal Declaration on the Independence of Justice)<sup>14</sup>.

<sup>12</sup> Karpal Singh, “**The Executive, the Judiciary, the legal Profession and the Common Good**”, *Relevan*, Issue No. 1/3, May 2003, p. 39.

<sup>13</sup> **Center for National Security Studies, et.al v United States Department of Justice** (as quoted by Dato’ Param Kumaraswamy, *Infoline*, September 2003, p. 29).

<sup>14</sup> Dr. Singhvi noted in his Final Report that (as quoted by Fali S. Nariman, see supra no. 3, at p. 14):-

- (3) The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region 1995.
- (4) The Latimer House Guidelines, 1998.
- (5) The Bangalore Principles of Judicial Conduct, 2002.

The list is not meant to be exhaustive, but it is illustrative of how entrenched the principles of judicial independence are today.<sup>15</sup>

12. These instruments and codes provide useful guidelines, basic characteristics and conditions that must exist if a judiciary is to perform its functions independently. They are express, if not implicit, conditions in constitutions based on the rule of law. In this regard, the prominent Indian Advocate, Dr. L.M Singhvi, presciently noted as follows :-

**“Constitutions of all hues and colours either explicitly declare or implicitly recognise the principle of the independence of the judiciary. Their methods of securing the principle of independence may vary, in matters of detail, their modalities may sometimes run counter to the principle; but the object of the independence of the judiciary is, as it were, a part of the universal refrain of the anthem common to all constitutional documents ... What emerges from this is not merely a compilation of a quantitative consensus on the principles of the impartiality and independence of the judiciary, inclusively referred to as independence. There is in fact a coherent world profile of judicial independence and it is not merely a matter of ritual verbiage.”<sup>16</sup>**

13. I wish now to touch on the Malaysian experience in the area of judicial independence. In 1987, Tun Mohamed Suffian, a former Lord President of Malaysia, in his lecture, **“The Role of the Judiciary”**, said:-

**“So far the independence of the judiciary has never been in jeopardy, thanks mainly to the fact that our first three Prime Ministers were lawyers who understood the importance of having a judiciary that enjoys public confidence. But what of the future?”<sup>17</sup>**

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**“The principle of judicial independence grew by historical evolution and became a catalyst in the dialectics of power and its control. It is today as ubiquitous as law itself which is evident from a contemporary survey of the constitutions of the world. Many constitutions of modern States not only contain declarations on the independence of the judiciary but also embody specific machinery provisions to safeguard that independence. Most others postulate the independence of the judiciary as an implicit condition ... There thus exists a world-wide agreement on the principle of [judicial] independence.”**

<sup>15</sup> A useful collation of existing codes and international instruments is found in **“Judges and Judicial Accountability”**, supra, n.1, at pp. 275 – 278.

<sup>16</sup> As quoted in **“Parliamentary Action To Ensure The Independence and Good Administration of Justice”**, supra n. 6, at p. 85.

<sup>17</sup> As quoted in **“Constitutional Conflicts in Contemporary Malaysia”**, H.P. Lee, OUP 1995, at p. 73.

Some four years later, in 1991, Tun Suffian openly lamented: -

**“The judiciary in our country is supposed to be independent. Well you know what the position is today regardless of what individual judges think and feel – and they are honest men. Public confidence in the Judiciary has been seriously eroded and it will take a whole generation before the damage done can be remedied.”**<sup>18</sup>

The Malaysian experience has been, at least since 1988, a rather unhappy one. The judicial crisis of 1988 led to the controversial removal of the then Lord President, Tun Salleh Abas, and two other senior Supreme Court judges.<sup>19</sup> There were then a string of controversial cases decided by our Courts that have raised serious questions on its independence and impartiality.<sup>20</sup> All these have been well documented, and I do not propose to deal with them in detail here.

14. But there is one aspect of the Malaysian experience that merits consideration. I referred to it earlier and it concerns the exercise of “judicial power” by the judiciary in the trinity of government under the Westminster model. Before its amendment in 1988 and 1994, Article 121 of the Federal Constitution of Malaysia vested the judicial power of the Federation in the High Courts and such inferior Courts as provided by federal law.<sup>21</sup> In this connection, the Supreme Court in the case of **Public Prosecutor v Dato’ Yap Peng**<sup>22</sup>, speaking through the late Justice Eusofee Abdoolcader, defined “judicial power” as follows :-

**“Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the rights and liabilities of one or more parties.”**

<sup>18</sup> In his opening address at the 9<sup>th</sup> Malaysian Law Conference, 9<sup>th</sup> October 1991, as quoted in **“Public Law in Contemporary Malaysia”**, Wu Min Aun, Longman (1999), at p. 99. The following statement made in Parliament by lawyer and former Member of Parliament, Wee Choo Keong (at p. 73) in the same work is also to be noted:-

**“There is no denying that the Malaysian judiciary was once one of the most independent and respected. But sadly, it can no longer be described so. At least up to 1988, we can be proud of our judiciary. Since then, however, things have drastically changed for the worse. The events of the past six years, especially, the appointment of judges and certain decisions given by certain judges, all appear to have contributed in bringing the judiciary into disrepute.”**

<sup>19</sup> The events that precipitated this are discussed by Dr. Andrew Harding, **“Law, Government and the Constitution in Malaysia”**, MLJ Publication [1996], at pp. 142 – 143.

<sup>20</sup> For example, see the cases of **Ayer Molek Rubber Co Bhd v Insas** [1995] 2 MLJ 734, [1995] 2 MLJ 833, **Lee Chong Meng v Suruhanjaya Pihlraya and 2 ors** [1995] MLJU 307, **Public Prosecutor v Dato’ Seri Anwar Bin Ibrahim** [1999] 2 MLJ 1, **Dato Seri Anwar Ibrahim v PP** [2000] 3 MLJ 638, **PP v Dato Seri Anwar Ibrahim** [2001] 3 MLJ 193, **Dato Seri Anwar Ibrahim v PP** [2002] 3 MLJ 193 and **Raja Segeran S. Krishnan v Bar Council Malaysia & Ors** [2001] 1 CLJ 680.

<sup>21</sup> Article 121(1), pre-amendment, read as follows:-

**“Subject to clause (2), the judicial power of the Federation shall be vested in the two High Courts of co-ordinate jurisdiction and status – and such inferior courts as may be provided by federal law”.**

<sup>22</sup> [1997] 2 MLJ 211.

The Supreme Court was here referring to the supervisory or curial jurisdiction of the High Court. This jurisdiction, under the traditional notion of judicial power, enables the judiciary to ensure that the executive acts were in accordance to law. By invoking the doctrine of ultra vires, the judiciary (and not the executive or the elected Parliament) was able to have the final say on the validity of laws. The Court was therefore empowered to declare executive actions and statutory provisions invalid in law in judicial review proceedings by granting prerogative remedies, such as certiorari, mandamus and prohibition.<sup>23</sup>

15. The amendment to Article 121 had the effect of removing the phrase “judicial power” from the provision.<sup>24</sup> It was declared in Parliament, when the amendment was tabled, that it was intended to place the judiciary in its proper place in government given that it had gone too far reviewing executive acts.<sup>25</sup> Thus, the amendment was clearly aimed at restricting, if not abolishing, the Courts supervisory jurisdiction by way of judicial review. In the overall scheme, the far-reaching consequences of this amendment was palpably apparent. The equal status enjoyed by the judiciary as the third arm of government was diminished. The amendment also altered the balance of power as enshrined in the Constitution and made a significant inroad into the principle of checks and balances, leaning toward executive absolutism.<sup>26</sup>

<sup>23</sup> In **Dato’ Yap Peng’s** case, the Supreme Court struck down s 418A of the Criminal Procedure Code. Justice Abdoolcader took the following view:-

**“I cannot but conclude in the circumstances that there is in fact by the exercise of the power conferred by s 418A on the Public Prosecutor an incursion into the judicial power of the Federation and that any other view would ex necessitate rei result in relegating the provisions of art 121 (1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper’s will. The power of the Public Prosecutor under s 418A is uncanalized, unconfined and vagrant.”**

<sup>24</sup> Art 121 (1) and 121 (1A) presently reads as follows :-

**“121 (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely :-**

- (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and**
- (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang d-Pertuan Agong may determine;**
- (c) (Repealed).**

**and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.**

**(1A) The Courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.”**

<sup>25</sup> Wu Min Aun, **“Judiciary at Crossroads”**, quoted in **“Public Law In Contemporary Malaysia”**, Longman [1999], at pp. 90 – 91.

<sup>26</sup> See again Wu Min Aun, supra n. 25, at pp. 91 – 92, See also Andrew Harding, supra n. 19, at p. 33 :-

**“This task must start with art. 121 of the Constitution, the most crucial provision. Before it was amended in 1988, art 121 vested the judicial power of Federation in the High Courts and such inferior courts as might be provided by federal law. After the 1988 and subsequent amendments, notably that of 1994, it merely provides for the jurisdiction of the High Courts, the Court of Appeal, and the Federal Court, but adds : (1A) The courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts”. It will be seen that the**

16. The amendment to Article 121 gave new life to existing ouster clauses and led to more of them appearing in the statute books. Accordingly, the Courts have, more often than not, found it difficult to exercise its supervisory jurisdiction. Nevertheless, the Malaysian Courts have continued to invoke the judicial review jurisdiction on the basis of their inherent jurisdiction, albeit in cases where there are no executive decisions insulated by widely drafted privative clauses in statutes.<sup>27</sup> The current sentiment of our Courts may be gleaned from the recent judgment of the Federal Court in the case of **Petronas v Nik Ramli** (Civil Appeal No: 02-01-2001 (W), unreported, at pp. 8 - 9) as follows :-

**“Suffice to say that the progressive views expressed in Rama Chandran have been accepted and adopted by the Malaysian Judiciary at the highest level. Although those views are expressed in the context of decisions from Industrial Courts, they are also applicable, in my view, to decisions of other statutory tribunals or bodies. Here, I am reminded by what Lord Browne-Wilkinson had said that judicial review had become one of the most socially important and legally fertile areas of the law and he went on to make the following observation in his “Foreword to Superstone & Goudie, Judicial Review, London, Butterworths, 1992” :-**

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**amendment removed the exclusive vesting of judicial power in the higher or ordinary courts, and also separated the jurisdiction of these courts and the jurisdiction of the Syariah Court.”**

<sup>27</sup> See for example Section 8B(1) of the Internal Security Act 1960, which was the result of a 1989 amendment to the Act. In this regard, the Court of Appeal took the view that the deletion of the phrase “judicial power” did not have the effect of taking away judicial power from the High Court, see **Sugumar Balakrishnan v Pengarah Immigresen Negeri Sabah & Anor** [1998] 3 AMR 2273 at p. 2405 : (per Gopal Sri Ram JCA) :-

**“In saying this, we do not overlook the amendment to Article 121(1) of the Federal Constitution whereby the words “judicial power of the Federation” were deleted on June 10, 1988 by Act A704. However, in accordance with well-established principles of constitutional interpretation, the deletion does not have the effect of taking away the judicial power from the High Court.**

**The Constitution of Sri Lanka (formerly Ceylon) does not even mention the expression judicial power. Yet, upon high authority it has been held that despite the omission, the provisions in the document :-**

**“manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The Constitution’s silence as to the vesting of judicial power is consistent with it remaining, where it had lain for more than a century, in the hands of the judicature. It is not consistent with any intention that henceforth it should pass to or be shared by, the executive or the legislature.”**  
(per Lord Pearce in **Livanage v The Queen** [1967] 1 AC 259, 287.)

**The Indian Constitution also does not make mention of judicial power being vested in the judiciary. Yet, the same position obtains there as in Sri Lanka. See, Minerva Mills Ltd v Union of India (ibid). Like the Constitutions of Sri Lanka and India, the Federal Constitution preserves the separation of powers between the three arms of Government and evinces no intention that the judicial power of the Federation shall be passed to or shared with the executive or the legislature. It follows that the judicial power of the Federation remains where it has always been, namely, with the judiciary.”** (Please note that the Federal Court reversed the Court of Appeal’s decision in **Sugumar’s** case [2002] 3 MLJ 72) although it did not specifically deal with this part of the Court of Appeal’s judgment)

**“Its social importance is self-evident. Growth in executive interference in the lives of individuals, inevitable in a modern state, has exposed us all to the risk that executive power may be exercised in an unbridled or abusive manner. If, as some thought, the common law has proved so senile and impotent that it could not develop to meet this change in society, the rule of law would not have regulated administrative action. Governments are not notorious for introducing legislation which limits their own powers. Happily, the common law has proved to be fertile not impotent.”**

**Quite clearly, the views expressed by the majority in Rama Chandran are not the product of what some legal commentators described as “judicial excessivism”. On the contrary, they reflect the kind of controlled judicial activism that is needed in order to meet, in a supervisory context, the ever-widening powers conferred upon statutory tribunals or other bodies which have proliferated, in modern times and affecting, quite conceivably, all facets of society.”**

17. The Malaysian experience on “judicial power” and its importance in a constitutional government should not be ignored. It is a power that must be protected, as without it the Courts would be powerless to grant adequate relief to a citizen in a dispute involving the government. It has been said time and again that the independence of the judiciary will be protected and strengthened if this power is vested **“in a mechanism independent of the legislative and executive powers of the government with adequate guarantees to insulate it from political and other influence in order to secure its independence and impartiality”**.<sup>28</sup>

18. Three issues may be considered in the context of the guarantees that serve to strengthen the independence of the judiciary. First, the appointment of judges. It is an issue that is very much in vogue in Malaysia at the moment. The Malaysian Bar Council has called for fair and transparent procedures in the appointment of judges by the setting up of an independent commission<sup>29</sup>. Currently, under the Malaysian Constitution, judges are appointed by the King on the advise of the Prime Minister, after consulting the Conference of Rulers<sup>30</sup>. Also, apart from the appointment of the Chief Justice himself, the Prime Minister is only to consult the Chief Justice on any judicial appointment. The tenure of a judge in Malaysia is up to the age of 65 and a judge cannot be removed from office except on the grounds provided in Article 125(3)<sup>31</sup>. It is important to note that Article 125(3A) provides for a written code of ethics for judges<sup>32</sup> and this

<sup>28</sup> Dato’ Param Kumaraswamy, **“Justice Is Not A Cloistered Virtue : Are Judicial Criticisms Inter-se Permissible”**, Insaf Vol XX1, No. 4, December 2002 at p. 32.

<sup>29</sup> Infoline, July 2003, pp. 1 – 2.

<sup>30</sup> Article 122B(1), Federal Constitution.

<sup>31</sup> The Constitution Amendment Act of 1994 substituted the word **“misbehavior”** with the words **“any breach of any provision of the code of ethics prescribed under Clause 3A”**.

<sup>32</sup> The Judges’ Code of Ethics 1994 lays down nine principles for a Judge to follow and broadly the judge must not

(i) subordinate his judicial duties to his private interests;  
(ii) bring his private interests into conflict with his judicial duties;

code was promulgated on 2<sup>nd</sup> December 1994. It is also to be noted that the salaries and allowances of judges are fixed by law and charged to the Consolidated Fund and cannot be altered to their disadvantage after their appointments<sup>33</sup>. It would appear that the conspectus on the appointment of judges, found in Article 122B, provides for their security of tenure and a fixed provision for their support<sup>34</sup>.

19. Under the proposed reforms, the process of appointment is to be taken out of the hands of the Executive and placed in the hands of an independent judicial appointment commission<sup>35</sup>. This body would comprise of the Chief Justice, Senior Judges, the Attorney General, representatives of the legal community (such as the Chairman of the Bar Council) and perhaps even members of the public. It must comply with the requirements of Article 10 of the United Nations Basic Principles on the Independence of the Judiciary, which states that :-

**“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training and qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives.”**

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- (iii) conduct himself in any manner likely to cause a reasonable suspicion that he has allowed his private interests into conflict with his judicial duties so as to impair his usefulness as a judge or that he has used his judicial position for his personal advantage;
  - (iv) conduct himself dishonestly or in such a manner as to bring the judiciary into disrepute or bring discredit thereto;
  - (v) lack efficiency or industry;
  - (vi) inordinately and without reasonable explanation delay in the disposal of cases, the delivery of decisions and the writing of grounds of judgment;
  - (vii) refuse to obey a proper administrative orders or refuse to comply with any statutory directions;
  - (viii) absent himself from court during office hours without reasonable excuse or without prior permission of the Chief Justice, the President of the Court of Appeal, or the Chief judge, as the case may be; or
  - (ix) be a member of any political party or participate in any political activity

<sup>33</sup> Article 122B(7)

<sup>34</sup> Article 122AB, of the Federal Constitution allows for the appointment of Judicial Commissioners. They are regarded as “**judges on trial, during his probation and without any security of tenure**” (See Raja Aziz Addruse, “**Judicial Appointments : Who Has The Last Say**”, *Insaf*, Vol XXX1, No. 4, at p. 48)

<sup>35</sup> The issue that is closely related to appointments is the promotion of Judges. The relevant principles that must be adhered to may be culled from the following :-

- (1) Principle 13 of the United Nations Basic Principles on the Independence of the Judiciary that provides “**Promotion of judges, whenever such a system exists, should be based on objective factors, in particular ability, integrity and experience**”.
- (2) Principle 17 of the Beijing Statement of Principles of Independence of the Judiciary in the Lawasia Region 1995 that provides “**Promotion of Judges must be based on an objective assessment of factors such as competence, integrity, independence and experience**”.
- (3) The Bangalore Principles of Judicial Conduct 2002, that states “**Judicial independence is a pre-requisite to the rule of law and fundamental guarantee of a fair trial. A judge shall therefore uphold and exemplify judicial independence in both its individual and institutional aspects.**”

Accordingly, the ultimate objective is the identification and appointment of persons of merit. This would greatly reduce any possibility of interference in the judiciary and would serve to strengthen guarantee the independence of the judiciary.<sup>36</sup>

20. Permanency of office is a requisite for an independent judiciary. Thus, guarantee of security of tenure and the fixed income provision in Article 122B are pivotal in strengthening the independence of the judiciary. The removal of security of tenure, or the failure to grant it, can have a chilling effect on the ability of a judge to decide cases independently. Equally, the reduction of the judicial budget may be seen as official disapproval of decisions of the courts and would compromise future decision-making.<sup>37</sup>

21. Discipline and removal are also two important aspects of judicial independence. The threat of disciplinary measures followed by a removal from a case or, even from the judicial body, are regarded as the most basic and fundamental threats to independent decision making. Here, principles 17 – 20 of the United Nations Basic Principles on the Independence of the Judiciary set out the conditions for the exercise of this power. Judges, like anyone else are entitled to the same fair trial protections with respect to any charge against them. However, due to the fact that any accusation made against a judge substantially undermines public confidence in their abilities and their ability to be a legitimate arbitrator, certain other safeguards are required. First, the initial accusation and examination should be kept confidential to reduce the possibility that an allegation, or the threat of such an allegation, will be used as a means of influencing the conduct of a judge. Subsequent stages of the procedure can be public, but it initially must protect against disgruntled litigants or others who make allegations in bad faith. Secondly, judges can be removed only in the most serious of situations, for incapacity or behaviour that renders them unfit to perform their duties.<sup>38</sup>

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<sup>36</sup> An alternative to this is where “the power to appoint members of the judiciary remains with the executive, but perhaps with the advantage of an expert advisory committee. Reforms of the judicial appointment processes in Canada, New Zealand, the United Kingdom and Zimbabwe have embraced the idea of advisory committees. The committees contain lay members as well as representatives of the legal community and the judiciary. There is some evidence to suggest that the advisory committees in these jurisdictions are useful in that competent judges are being recruited from a wider pool of candidates.” (JW Shaw QC, “On the appointment of Judges” ALJ, July 2000, at p. 463)

<sup>37</sup> See again, Dato’ Param Cumaraswamy, *supra* n. 6, at pp. 88 – 90.

<sup>38</sup> See *supra* n. 6, at p. 90. See also *supra* n. 28 at p. 41, where Dato’ Param Cumaraswamy states “This raises once again the need for a separate mechanism to receive complaints against judges. Though Malaysia has a constitutionally entrenched code of ethics for judges, breach of which could result in removal, yet there is not a mechanism to receive complaints, investigate and make appropriate recommendations to the competent authority. Further, the present constitutional procedure, access to which is very restricted, provide only for removal of a judge. But there is no procedure to deal with misconduct falling short of the sanction of removal. A code of ethics without an effective monitoring and enforcement mechanism will remain simply a set of pious platitudes. The Code of Ethics itself needs review.”

22. Finally, on the strengthening the independence of the judiciary, we must also consider the concept of judicial accountability, in the sense of ensuring proper legal conduct. It entails deciding cases expeditiously, fairly and delivering judgments promptly and giving reasons for their decision. It also includes matters such as judicial corruption and any conduct that would impugn the integrity of the judiciary<sup>39</sup>. In a recent judgment, Supreme Court of Canada expounded on the “judicial accountability” as follows :-

**“Public confidence in and respect for the judiciary are essential to an effective judicial system and, ultimately, to democracy founded on the rule of law. Many factors, including unfair or uninformed criticism, or simple misunderstanding of the judicial role, can adversely influence public confidence in and respect of the judiciary. Another factor which is capable of undermining public respect and confidence is any conduct of judges, in and out of court, demonstrating a lack of integrity. Judges should, therefore, strive to conduct themselves in a way that will sustain and contribute to public respect and confidence in their integrity, impartiality, and good judgment.**

**The public will therefore demand virtually irreproachable conduct from anyone performing a judicial function. It will at least demand that they give the appearance of that kind of conduct. They must be and must give the appearance of being an example of impartiality, independence and integrity. What is demanded of them is something far above what is demanded of their fellow citizens.”**<sup>40</sup>

23. Judicial accountability is therefore an integral facet of judicial independence. It enhances judicial integrity and therefore must be embodied in the institution of the judiciary. In the words of Lord Devlin **“the prestige of the judiciary and their reputation for stark impartiality is not at the disposal of any government : it is an asset that belongs to the whole nation”**.<sup>41</sup>

24. We may now consider how the efficiency of the modern judiciary may be enhanced. The answer surely lies in adequate and independent continuing education and training of judges. The importance of judicial development was duly noted by Dato’ Param Cumaraswamy, as follows :-

**“Training in new areas and developments in law keeps members of the judiciary’s knowledge current and improves the quality of their decision making. Training in areas such as court management and case processing improves the efficiency and functioning of the judicial system making it more efficient and responsive to the needs of the consumers of justice. Above all, training should reinforce the**

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<sup>39</sup> Dato’ Param Cumaraswamy noted (see supra n. 1a, at p. 28) that **“Allegations of judicial corruption are quite common. These, if proved, are gross and heinous judicial misbehaviour which should not be tolerated in civil society. The corridors of courts must be kept clean and unpolluted so that what flows from the fountain of justice would remain pure”**

<sup>40</sup> As quoted by Dato’ Param Cumaraswamy, supra n. 28, at p. 34.

<sup>41</sup> As quoted by Professor Griffiths, supra n. 5, at p. 191.

**importance of independent and impartial decision making, and of the ethics and responsibilities of judicial office.”<sup>42</sup>**

25. In a paper presented recently at the Judicial Conference of Australia Colloquium<sup>43</sup>, the current Chief Justice of Australia, Sir Murray Gleeson, spoke on the Australia experience on judicial training and continuing professional development and made the following very telling observation :-

**“Experience in Australia, and in the United Kingdom and North America, has shown that programmes of judicial training and continuing professional development will only be successful under certain conditions. Notwithstanding the enthusiasm of some for sending judicial officers off for re-education with a view to instilling in them ideologically sound habits of thought, the unromantic truth is that it is more important to ensure that new judges and magistrates know the rules of procedure and evidence, and how to write a judgment. And needs for continuing education are largely shaped by the requirements of the particular court to which a person is appointed. Judicial officers, once appointed, cannot be compelled to learn anything. Evaluating their educational needs in itself a skilled task, as is evidenced by the growing class of judicial educators in common law countries, including Australia. Serving and retired judges are major contributors to work in judicial training institutes. They represent a valuable resource upon which governments are able to draw. Judges respond much better where programmes are designed with substantial input from experienced colleagues and former colleagues. At the same time, professional teachers themselves bring a specialist skill to judicial training. The most successful institutes are those which best combine the contributions of judges and professional educators.**

**It is important that the judiciary should accept that continuing education is part of the job. Judges value their independence, and are quick to react against any form of pedagogical influence. They are well aware that there are those who would treat professional development as an opportunity for indoctrination. Much depends upon maintaining their confidence. That requires that institutes of judicial training share the independence of the judiciary.”**

26. It is therefore clear that efficiency of the judiciary can only be strengthened with a proper, and continuing, system of judicial training and development. This is particularly so because litigation is becoming increasingly complex and the range of cases that come before the Court are wide and diverse. Modern judges are often called upon to decide highly complex and technical issues, that leave them at the mercy of experts<sup>44</sup>. Thus, the context in which a

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<sup>42</sup> See supra n. 6, p. 88.

<sup>43</sup> In Darwin on 31<sup>st</sup> May 2003, “Judicial selection and training: Two sides of the one coin” [2003] 77 ALJ 591.

<sup>44</sup> See n. 43, at p. 595.

judge operates is fast changing and it calls for an educational response that would better equip judges<sup>45</sup>.

27. In closing, may I say that the role of an independent Bar is also vital in enhancing the independence and efficiency of the judiciary. The administration of justice cannot effectively function without an independent judiciary which is able to impartially administer justice. In turn, an independent judiciary cannot exist without an independent Bar that is willing to act, without fear or favour, to defend the rule of law and fundamental freedoms that are guaranteed in society. A strong Bar makes a strong Bench<sup>46</sup>. Thus, the administration of justice in all civilised societies require both an independent judiciary and an independent Bar to contribute towards the strengthening of judicial independence and efficiency.

28. I leave you with the following immortal words of Sir Ninian Stephen, a former Governor General of Australia :-

**“What ultimately protects the independence of the judiciary is a community consensus that independence is a quality worth protecting, the citizen being better served if the judiciary is preserved from domination by those more overtly powerful elements of governments, on whose support the judiciary is dependent, yet whose exercise of power the judiciary is charged with keeping within bounds prescribed by law”.**<sup>47</sup>

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<sup>45</sup> See n. 43, at p. 594.

<sup>46</sup> Lord MacMillan, “Law and Other Things” (Cambridge, 1938) at p. 173 :-

**“Ever since the State decreed that men must cease to settle their disputes with the arguments of fist and club, the administration of justice has been the prime concern of the State. In order to enable this primary function of government to be efficiently discharged, the experience of every civilized community has shown that it is indispensable to have a class of men skilled in advising and aiding the citizen in the vindication of his rights before the Courts to which the State delegates the task of dispensing justice in accordance with the law of the land.”**

<sup>47</sup> As quoted in “Constitutional Conflicts in Contemporary Malaysia”, supra n. 17, at p. 76.