

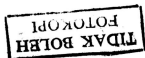
INDEPENDENCE OF THE JUDICIARY

-- A Study of a Recent Trend

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Chapter I

INTRODUCTION

The Judiciary in Malaysia often has to reiterate its independence of the Executive. In other parts of the world this would have been an occasion for serious concern as it would seem to imply that the government is attempting to control the judges. Actually the local Judiciary is continuing a dialogue with sections of the public which feel it has not stood up adequately to protect fundamental rights against executive incursions. Since Independence thirty years ago, the government has detained without trial political prisoners loosely-termed as 'subversives' under the Internal Security Act 1960. Many cases came up for hearing in the courts but few petitioners, if any, were released from detention. The general feeling among lawyers is that the judges could have done more in upholding basic rights.

This writer agrees with the general criticism but is also of the opinion that the judges have the difficult task of balancing public interests against individual's interests. This paper seeks to show that their pro-government decisions are actuated by the interest for the general security of the public, which may be harsh to the individual. This has been the trend since Independence.

In many respects the judges' perception of public interest coincides with the government's, achieving a harmony of outlook that paves the way for smooth administration. However when occasionally there

was a disharmony and a decision went against the government: no judge got removed as a result because the Executive has no power to remove, but the law was changed to over-turn the adverse decision.

Looked at this way, a conflict between the Executive and the Judiciary in Malaysia is not only undesirable but also futile, as the former has the power to impose its decisions even without interfering with the latter. Nevertheless, though the judges exercised caution in the early years to avoid an open conflict with the Executive, they have today displayed increasing restlessness when officials have acted heavy-handedly against the private citizens. This is therefore a study of a judicial trend from the time of Independence and which seems to have taken a new course recently.

The title of this paper, "Independence of the Judiciary -- A Study of a Recent Trend", involves two topics, namely, independence and trend. The writer deals at length with the question of independence because legal circles in Malaysia are not fully agreed on this matter. It is therefore necessary to trace judicial trend to distinguish theory from practice. The conclusion of this paper is that the Judiciary has always been independent but that its inclination has been somewhat pro-Establishment, particularly prone to buttressing the Executive in security and emergency cases. It is respectfully submitted that there is now detected a new trend against this old tendency, but it is still too early to be very certain about it.

In Chapter II: "Recent Statements by Judges", this paper touches briefly on the concept of judicial independence. Extracts of three recent statements by judges are then presented to show the judicial flexing of muscles in recent times.

In Chapter III: "The Judiciary in the Third World", this paper looks at the judiciary in the Third World where Malaysia truly

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belongs. The realities that face the judges are harsh: in many countries they are pitted against the generals. The result of this clash between the Executive and the Judiciary is very unfortunate: in all instances the judges came out the losers.

The writer then discusses a role that is more suitable to the judges of the Third World.

Chapter IV: "The Socio-Political Context", illustrates the environment that sets the mould for Malaysian judicial development. As a young nation, it has its own peculiar problems to be solved in their own specific ways.

Chapter V: "Position under the Constitution", explains the fact that the Constitution, by implication, gives the courts the power of judicial review, which did not exist before Independence. However, this power had been cautiously used in the beginning.

Chapter VI: "Independence from the Legislature", reveals a clear separation of powers between the Legislature and the Judiciary.

Chapter VII: "Independence from the Executive", attempts to show that the Judiciary is independent of the Executive, further reinforced by the former presence of the Judicial Committee of the Privy Council. A special characteristic of the Judiciary is that many of its judges come from the Executive branch, tending voluntarily to temper down its independence.

Chapter VIII: "Independence from Establishment Bias", discusses the subtle relationship of the judiciary that usually exists with the Establishment and goes on to show its ethnic character.

Chapter IX: "Independence of Pro-Government Bias", examines the general criticisms of the Bar that the Judiciary has a bias. The