

KEYNOTE SPEECH

**SAFEGUARDING AND STRENGTHENING THE
INDEPENDENCE OF THE JUDICIARY**

DELIVERED BY

**THE RIGHT HONOURABLE THE CHIEF JUSTICE OF MALAYSIA
TUN TENGKU MAIMUN BINTI TUAN MAT**

ON THE OCCASION OF

THE 23RD COMMONWEALTH LAW CONFERENCE

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SALUTATIONS

Mr. Brian Speers

President of the Commonwealth Lawyers Association

The Honourable Sir Declan Morgan

Former Chief Justice of Northern Ireland (Retd)
Chair of the Plenary Session

Plenary Panellist

The Honourable Sir Dennis Byron
Former President of the Caribbean Court of Justice

The Rt Hon Justice Martha Koome EGH (Kenya)
Chief Justice and President of the Supreme Court of Kenya

The Hon'ble Mrs Justice Nagarathna
Judge of the Supreme Court of India

Distinguished guests, ladies and gentlemen,

Assalamualaikum wbt. wbth. and a very good morning.

INTRODUCTION

1. I would like to begin by thanking the organisers for giving me the honour and privilege of participating in this Plenary Session at the 23rd Commonwealth Law Conference and to share Malaysia's perspective and experience on safeguarding and strengthening the independence of the judiciary.
2. May I take this moment to express my heartfelt congratulations to the Commonwealth Lawyers Association for their exceptional efforts in bringing together this biennial conference. It is a

testament to the enduring spirit of collaboration and mutual respect that binds the Judiciary and the legal profession throughout the Commonwealth.

3. At a time when the rule of law and the independence of the judiciary are under attack in many parts of the world, it is imperative that we come together to reaffirm our commitment to safeguard and strengthen the independence of the judiciary.
4. I stepped in as the Chief Justice of Malaysia at a challenging time when the courts' image has been battered with disgraceful allegations of abuse of power and also controversies involving top judges. The allegation against the Judiciary then was that the Judiciary was subservient and beholden to the Executive. I therefore made it my mission, upon my appointment in 2019, to defend the independence of the Malaysian Judiciary. I am grateful for this opportunity to offer some reflections on this subject and to share some perspectives from the Malaysian context.

Safeguarding and Strengthening the Independence of the Judiciary: The Malaysian Perspective

5. The starting point on safeguarding and strengthening the independence of the Malaysian Judiciary is the constitutional and legal framework contained in the Federal Constitution and the Judicial Appointments Commission Act 2009. In the interest of time, I will focus my speech firstly on the constitutional safeguard of judicial independence and its sub-topics of judicial power and judicial review; secondly on the process of appointment and

promotion of judges; and thirdly on challenges to judicial independence.

Constitutional Safeguard of Judicial Independence

6. Coming from a country with a written constitution, I can attest to the crucial role that constitutionalism plays in our work. While constitutionalism connotes in essence limited government or a limitation on government, one important characteristic or feature of constitutionalism is an independent judiciary. The spirit of constitutionalism in Malaysia safeguards judicial independence through the following two aspects: first, the separation of powers doctrine; and second, judicial review.

Separation of Powers/Judicial Power/Judicial Review

7. Like most Commonwealth jurisdictions which are based on the Westminster model of Government, the approach to separation of powers that the Malaysian Federal Constitution takes is that there is some degree of fusion between the executive and the legislature on the one side, and complete separation of the judiciary on the other. The crucial significance of the separation of powers doctrine is entrenched in Article 4(1) of the Federal Constitution which stipulates that the Federal Constitution is the supreme law of the Federation of Malaysia and that all laws passed after Merdeka (Independence Day) shall, if inconsistent with the Federal Constitution, be void. Because the Federal Constitution is not self-executing and cannot protect itself proactively from breach, it relies on the Judiciary to ensure that

Article 4(1) is given effect to. The Judiciary undertake to exercise this role and function through Article 4(1) read with Article 121 of the Federal Constitution which vest the Judiciary the judicial power.

8. Recently, in *Dhinesh Tanaphill v Lembaga Pencegahan Jenayah & Ors* [2022] 5 CLJ 1 and in *SIS Forum (Malaysia) v Kerajaan Negeri Selangor* [2022] 3 CLJ 339, the Federal Court reaffirmed that the doctrine of separation of powers is part and parcel of our Federal Constitution and that the doctrine is also housed in Article 4(1). Thus, by constitutional design, the Judiciary is completely independent of the Executive and the Legislature.
9. Further, in *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors and Other Appeals* [2018] 3 CLJ 145) judicial independence and separation of powers are recognised as features in the basic structure of the Federal Constitution. This means that the concepts of judicial power, judicial independence and separation of powers are sacrosanct in our constitutional framework. And inextricably linked to the concept of judicial power is the concept of judicial review.
10. The power of the Malaysian Judiciary to review the legitimacy of Legislative and Executive actions is an essential component of its independence from these other branches of Government. It is a power that enables the Judiciary to perform its inherent function of checks and balances in a system which critically observes the operation and application of the separation of powers doctrine.

11. The power of constitutional judicial review is ingrained in Article 4(1) of the Federal Constitution of Malaysia. If a law is found to be unconstitutional, the Judiciary has a duty to strike it down as being void to ensure that the Malaysia's Federal Constitution remains the supreme law of the land¹.
12. My discussion on judicial review naturally brings me to the topic of "ouster clauses". An "ouster clause" is a provision included in a legislation which seeks to limit or exclude judicial review of acts or measures undertaken by the Executive. The power of the Judiciary to independently review Government actions or measures can be severely curtailed or even entirely eliminated by means of an "ouster clause" in a legislation. Last year, the Malaysian Federal Court handed down two important judgments declaring "ouster clauses" to be unconstitutional.² Both of these decisions observed that "ouster clauses" sought to limit the exercise of the Judiciary's essential function or power to check and balance the exercise of Executive's actions, measures, and power. This was found to have amounted to an incursion into the very essence of the judicial power itself, which was found to be in violation of Article 4(1) of the Malaysia's Federal Constitution. The "ouster clauses" were accordingly struck down as being void by the Malaysian Federal Court.
13. The principles that I have discussed so far clearly reflect the constitutional safeguard of the independence of the Malaysian

¹ SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener) [2022] 2 MLJ 356

² *Nivesh Nair v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [05(HC)-7- 01/2020(W), 25 April 2022] and *Dhinesh Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 1 LNS 583

Judiciary in relation to its judicial power. I now move to the other aspects of constitutional safeguard.

14. Undeniably, one of the main factors to safeguard and strengthen the independence of the judiciary is that there must be security of tenure of office and remuneration of judges. In Malaysia, this security is prescribed in Article 125 of the Federal Constitution. Malaysian judges shall hold office until he attains the age of sixty-six years or such later time, not being later than six months after he attains that age, as the King may approve (see Article 125(1)). Grounds of removal prior to retirement age is based on well-defined circumstances under the law. The Judges Remuneration Act 1971 established salaries and pensions of judges. By clause (7) of Article 125, the remuneration and other terms of office (including pension rights) of a judge shall not be altered to his disadvantage after his appointment.
15. The next constitutional safeguard is specified in Article 126 of the Federal Constitution. This relates to the power conferred on the courts to punish for contempt any person who, by word or deed, interferes with the administration of justice or challenges the dignity or independence of the courts.
16. Another safeguard is provided by Article 127 of the Federal Constitution which stipulates that the conduct of a judge of the Federal Court, the Court of Appeal or a High Court shall not be discussed in either House of Parliament except on substantive motion of which notice has been given by not less than one quarter

of the total number of members of that House, and shall not be discussed in the Legislative Assembly of any State.

17. An important aspect of judicial independence is judicial immunity. Several legislations conferred immunity to judges from the law of torts. Section 5 of the Government Proceedings Act 1956 provides for the liability of the Government in tort for any wrongful act done or neglect or default committed by any public officer. Under section 6(3), no proceedings shall lie against the Government by virtue of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him; or any responsibilities which he has connection with the execution of judicial process. And pursuant to section 14 of the Courts of Judicature Act 1964, no judge or any person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty. Also, reports of judicial proceedings including judgments, sentences or findings enjoy absolute privilege under section 11(1) of the Defamation Act 1957 (Revised 1983).

Appointment and promotion of judges

18. Objectively speaking although the executive arm plays a vital role in the appointment of judges of the superior courts in Malaysia, there are constitutional safeguards. Article 122B of the Federal Constitution sets out a comprehensive and multitiered process of consultation between the Prime Minister, top judges, the Judicial Appointments Commission, the King and the Conference of Rulers preceding every judicial appointment.

19. To safeguard the independence of the Malaysian Judiciary, the Judicial Appointments Commission was established vide the Judicial Appointments Commission Act 2009 (the Act). Essentially, the Act was promulgated to improve and complement the constitutional method of appointing judges of the superior courts. The Act ensures that only those with proper qualification, integrity and calibre are appointed to the judiciary. The process and criteria for selection of candidates are enumerated. It is worth mentioning that section 2 of the Act speaks of upholding the independence of the Judiciary, where it states inter alia that the Prime Minister must uphold the continued independence of the Judiciary and must have regard to the need to defend that independence.
20. As set out in the Act, appointments to the Judiciary are based on identified criteria (see section 23 of the Act), namely –
- (i) integrity, competency and experience;
 - (ii) objective, impartial, fair and good moral character;
 - (iii) decisiveness, ability to make timely judgments and good legal writing skills;
 - (iv) industriousness and ability to manage cases well; and
 - (v) physical and mental health.

In addition, a serving judge will not be eligible for promotion if he has three or more pending judgments or unwritten grounds of judgments that are overdue by sixty days or more from the date they are deemed to be due.

21. To strengthen the independence of the judiciary in terms of appointment of judges, the Act requires that the Judicial Appointments Commission takes into account the need to encourage diversity in the range of legal expertise and knowledge in the judiciary.
22. Another pertinent provision in the Act which serves to safeguard and strengthen the independence of the Judiciary is section 34 which provides that any person, who otherwise than in the course of his duty, directly or indirectly by himself or by any other person in any manner whatsoever influences or attempts to influence any decision of the JAC or any member thereof, commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding two years or to both.
23. That said, the proposed changes to the JAC Act and the Federal Constitution to remove the role of the Prime Minister in the appointment of judges would, in my view, further strengthen the independence of the Judiciary.
24. If I may also add that continuing legal education to the judges is crucial in ensuring that the Judiciary safeguard its independence. To achieve this, although we have yet to establish a properly structured institution to train the judges, the Malaysian Judiciary has set up a Judicial Academy in 2012 under the Judicial

Appointments Commission to inter alia, plan, organise and conduct training programmes for the superior court judges.

25. We all accept that standards of judicial conduct affect the independence of the Judiciary. In this regard, Malaysia's measure in safeguarding and strengthening the independence of the Judiciary is encapsulated in the Judges Code of Ethics 2009 (the Code) which governs the conduct of all judges and the establishment of Judges' Ethics Committee under the Judges' Ethics Committee Act 2010.
26. Paragraph 5 of the Code provides that a judge shall exercise his judicial function independently on the basis of his assessment of the facts and in accordance with his understanding of the law, free from any extraneous influence, inducement, pressure, threat or interference, direct or indirect from any quarter or for any reason. The Code requires that a judge shall act at all times in a manner that promotes integrity and impartiality of the Judiciary. There is also a provision requiring a judge to declare his asset to the Chief Justice and to adhere to the administrative directions issued by the Top 4 in the hierarchy of the Malaysian Judiciary, i.e. the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Court in Malaya and in Sabah and Sarawak respectively.
27. At this juncture, I would like to share my reminder to the Malaysian judges that the top judges are only the first among the equals and that judges are not expected to display their loyalty to these

‘bosses’ but only to the law. It is my hope that this reminder will assist in safeguarding and strengthening the independence of the Malaysian Judiciary.

Challenges to judicial independence

28. The year of 1988 has been dubbed as the eclipse of the Malaysian Judiciary as it marks the most devastating attack on the independence of the Malaysian Judiciary. The 1988 episode began when several important decisions of the Court were seen to go against the Government of the day.³ The tension in the relationship between the Executive and the Judiciary led to the climax of the episode, which resulted in the unprecedented removal of the then Lord President, the late Tun Salleh Abbas and the suspension of five Supreme Court Judges. Two of the five suspended judges were subsequently dismissed.
29. Judicial independence and public confidence in the Judiciary suffered greatly after the 1988 constitutional crisis, which is often analysed as an institutional struggle between the Executive and the Judiciary. Judicial prestige and independence were also eroded by several constitutional amendments which attempted to circumscribe the judicial power, to which judges acquiesced it until recently.

³ The decisions included: *Berthelsen v Director General of Immigration, Malaysia* [1987] 1 MLJ 134; *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 27; *Public Prosecutor v Yap Peng* [1987] 2 MLJ 311 at 316; *Mohamed Noor bin Othman v Mohamed Yusof Jaafar* [1988] 2 MLJ 129.

30. In recent years, there have been further attempts to undermine the independence of the Judiciary through unwarranted criticism and intimidation towards judges. Today innocent and honest judges who diligently perform their duty are targeted by criminals and their cohorts. With the advent of technology, more damage has been done through social media by people out to advance their own interest at the expense of judicial independence.
31. For me, each attack on a judge for a decision delivered by him is a direct attack on the independence of the Judiciary because it represents an attempt on the part of those in the guilty abode to navigate and coerce judicial conformity with their own preconceptions.
32. It must be remembered that judges, by the nature of their work, do not respond to criticisms or engage in public debates of their decisions. Judges only speak through their judgments. This convention is intended to preserve judicial dignity and impartiality.

CONCLUSION

33. To conclude, I would postulate that the duty to safeguard and strengthen the independence of the Judiciary does not lie solely on the Judiciary but the stakeholders of the justice system, in particular the Attorney General's Chambers and the Bar. While I would work to ensure the independence of the Judiciary, in the event that spurious allegations are made against the judges and by extension the Judiciary, it falls on the Attorney General and the Bar to come to its defence. Thank you

