SPECIAL ADDRESS BY

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

ON THE OCCASION OF

THE 12TH TUN SUFFIAN MEMORIAL – FACULTY OF LAW
GOLDEN JUBILEE LECTURE

"REFLECTIONS & LESSONS OF A CONSTITUTIONAL JUDGE – DECISION MAKING, LAW & POLITICS, LEGITIMACY AND ACCEPTANCE"

9 FEBRUARY 2022

VIA ZOOM

SALUTATIONS

(1) My sister and brother Judges and Judicial Commissioners;

(2) Professor Dr. Dieter Grimm, Professor of Law Humboldt University Berlin;

(3) Tunku Datuk Dr. Hajah Sofiah Jewa, Founder of the Tun Suffian Foundation;

(4) Tan Sri Mohamad Ariff Md Yusof, Trustee of the Tun Suffian Foundation and former Speaker of the Dewan Rakyat;

(5) Dato' Associate Professor Dr. Johan Shamsuddin Haji Sabaruddin, Dean of the Faculty of Law University of Malaya;

Respected lecturers, students, ladies and gentlemen;

Assalamualaikum warahmatullahi wabarakatuhu and a very good afternoon.

INTRODUCTION

[1] It is a great pleasure and honour of mine to deliver this special address on the occasion of the 12th Tun Suffian Memorial Lecture held in conjunction with the 50-year anniversary of the Faculty of Law, University of Malaya. This occasion is special to me for two reasons.

[2] First, the late Tun Suffian Hashim was a towering figure in law and in life and not only for his achievements as Lord President. He was instrumental in the drafting of the Federal Constitution and for the many other legal documents that shaped the nation that we have today. It is therefore a humbling experience for me to be here today to deliver this address in fondness of his memory knowing that I now occupy the very office that he once did.

[3] My second reason is that I am a proud alumna of the Law Faculty and as such, I am very happy to be able to be a part of the celebration of the Faculty's golden jubilee.

[4] The topic that has been selected for this Lecture is an interesting one and, I think, befittingly captures the essence of Tun Suffian who was an outstanding judge and jurist. Our speaker for the event is none other than Professor Dieter Grimm, a former Justice of the Federal Constitutional Court of Germany. Prof. Dieter Grimm is an eminent judge and jurist whose works are well renowned. He is most qualified to speak on the topic and accordingly, I shall not attempt to trespass into his domain.

[5] Nonetheless, allow me to state my brief opinion on the subject with a view to setting the stage for the lecture that Prof Dieter is about to deliver.

DECISION MAKING, LAW & POLITICS

[6] In my humble view, and to an extent, the role of a judge in constitutional adjudication might seem paradoxical to some.

[7] This is because the philosophy behind the notion of judging is that a judge must remain apolitical and free from bias or interference. This remains true to an extent and in this sense, I echo the following words of Tun Suffian who in an essay published in the book on the Constitution of Malaysia, said as follows:

> "The reputation it enjoys of being able to decide without interference from the executive or the legislature, or indeed from anybody, contributes to confidence on the part of members of the public generally that should they get involved in any dispute with the executive or with each other they can be sure of a fair and patient hearing and that their disputes will be determined impartially and honestly in accordance with law and justice.".[1]

[8] Indeed, and I have quoted this before, the four things that belong to a judge as described by *Socrates*, are:

> "[T]o hear courteously; to answer wisely; to consider soberly and to decide impartially" and allow me to add the fifth quality as described by former Chief

[1] Tun Mohamed Suffian, H.P. Lee and F.A Trindade, *The Constitution of Malaysia: Its Development, 1957-1977* (Oxford University Press, 1978), 231.

Justice Tun Dzaiddin Abdullah which is "to discount whatever prejudices, whether they relate to race, religion or politics.".[2]

[9] That said, a judge, while he or she must remain apolitical, cannot afford to ignore politics. Therein lies the paradox to the mind that fails to comprehend the difference behind politics and political context.

[10] The Federal Court of Malaysia affirmed in the *Indira Gandhi* case that a constitution must be interpreted in light of its historical and philosophical context.[3] And in this regard, judges when interpreting the Federal Constitution of Malaysia, are required to appreciate the historical and political context within which that document was drafted. Doing that, in my view, does not make a judge any less apolitical.

[11] I now seek to briefly illustrate this.

[12] The structure and contents of our Constitution contain the concepts of separation of powers and the Rule of Law which form part of the basic features of the Federal Constitution.[4] The other, perhaps primary tenet of the Federal Constitution, is the notion that it is supreme and being supreme, all of us are subject to it, including the three arms of the Government, namely the Legislature, Executive and Judiciary.

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[2] Opening Remarks by Tun Tengku Maimun Binti Tuan Mat, The Chief Justice of Malaysia Induction Programme for Judicial Commissioners 29 March 2021, Palace of Justice, Putrajaya, [2].

[3] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, [29].

[4] *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, FC, at 188, *per* Raja Azlan Shah FJ (as His Royal Highness then was).

[13] The Legislature makes the law and the Executive enforces it. But because in our jurisdiction the two branches are fused, politics will play a huge part in the laws and the nature of the laws that are passed. In this regard, law and politics are inseparable.

[14] In a system such as this, the Judiciary must remain completely independent and free from any form of interference. Judges will naturally take notice of any political overtones or undertones of a given case but they must decide cases fairly.

[15] This is where Articles 4 and 121 of the Federal Constitution take centre stage. Article 4(1) declares the Federal Constitution supreme and further states that any laws passed after 31 August 1957 which are inconsistent with the Federal Constitution, are void to the extent of the inconsistency.

[16] Article 121(1) on the other hand reposes judicial power in the Superior Courts of Malaysia – which means that the Judiciary is the device through which the supremacy of the Federal Constitution is protected.

[17] When the two Articles are read together harmoniously, there can be no question of judicial supremacy because the Executive and the Legislature are also creations of the Federal Constitution and are mandated to act within the terms set out by it. Proper interpretation should reveal that the Judiciary is simply required to perform its primary function as the guardian of the Federal Constitution.

[18] This very notion of judicial power was recognised no less by Tun Suffian himself in his book where he wrote that:

> "If Parliament is not supreme and its laws may be invalidated by the courts, are the courts then supreme? The answer is yes and no – the courts are supreme in some ways but not in others. They are supreme in the sense that they have the right – indeed the duty – to invalidate Acts enacted outside Parliament's power, or Acts that are within Parliament's power but inconsistent with the Constitution. But they are not supreme as regards Acts that are within Parliament's power and are consistent with the Constitution. The court's duty then is quite clear; they must apply the law in those Acts without question, irrespective of their private view and prejudice.".[5]

[19] The dilemma rears itself when a breach of a constitutional provision is politically charged or motivated or is strongly steeped in politics. It then becomes a question of whether the Judiciary is upholding the law or validating political notions.

[20] One example of this is the decision in a case called *Merdeka University.*[6] That case concerned essentially the validity of the establishment of a university which intended to use the Chinese language as the medium of instruction. The petition to establish that university was rejected and hence the filing of the suit. The Government, who rejected the petition, argued that their actions were justified because the university, if allowed to use the language, would contravene Article 152 of the Federal Constitution which stipulates that the medium for official purposes shall be in the National Language. The High Court agreed with the Government and dismissed the suit and this was upheld on appeal.[7]

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[5] *An Introduction to the Constitution of Malaysia* (3rd edition, Pacifica Publications, 2007), at page 18.

[6] *Merdeka University Berhad v Government of Malaysia* [1981] 2 MLJ 356.

[7] *Merdeka University Berhad v Government of Malaysia* [1982] 2 MLJ 243.

[21] The interesting point in this case is that Malaysia has allowed, as a matter of practice, the use of other languages as the media of instruction in primary and secondary education. The case was very heavily charged with racial and political sentiments because it concerned the use of a certain language.

[22] The erudite judge, Justice Eusoffe Abdoolcader issued himself with a stern reminder – a reminder which all judges faced with similar issues ought to bear in mind. His Lordship said as follows:

> "The future of the nation is on trial before me, so I am solemnly told, in this case in which the plaintiff, Merdeka University Berhad, seeks declarations against the defendant, the Government of Malaysia, that the rejection of its petition for the establishment of a private university to be known as Merdeka University is null and void in contravening the Federal Constitution and constituting an unreasonable and improper exercise of the discretion conferred on the Yang di-Pertuan Agong...
>
> Let me immediately reiterate what I said in court at the outset of these proceedings: I am not concerned with the political undertones or overtones or whatever that may affect the questions raised in this action, and in this trial I am moved by no considerations other than that of determining the issues involved purely and strictly within the confines of the Federal Constitution and the law, abjuring any concomitant political or emotional offshoots springing like Athena from the head of Zeus in its wake. The Attorney-General, meaning well no doubt, presents a vision of doom when he speaks of the grim consequences that might ensue if grave circumspection is not exercised in weighing the respective interests involved, but my short answer to this is, as I said in court in anticipating Mr. Beloff for the plaintiff, *fiat justitia, ruat coelum* — let justice be done, though the heavens should fall.".[8]

[8] *Ibid*., at page 357.

[23] In my view, the above passage exemplifies the topic today on how judges ought to approach the various conflicting issues on law and politics.

[24] The other aspect of this, within the Malaysian context, is the debate on the nature of Article 4 of the Federal Constitution and its connection to the basic structure doctrine ('BSD'). The BSD based on earlier cases was not at first considered, but later accepted as a judicial concept that stipulates that the constitution cannot be amended if it alters or distorts its essential features. Meaning, even if the constitution is amended through correct procedure, the amendment may be struck down as being substantively invalid. That said, the judicial philosophy on this doctrine has recently been divided and it remains to be seen how the issue on BSD will be decided in the future.

[25] My personal view is, in short, that the BSD is an externally developed doctrine having been conditioned to meet the context of the written constitution of India under specific circumstances. Recent minority judgments, mine included, have expressed that the BSD is actually contained conceptually within Article 4(1) of the Federal Constitution in the form of the doctrine of constitutional supremacy.[9] There is no importation of anything in that sense.

[26] In this context, you might wonder why Article 4 and basic structure are relevant to the present discussion. In my view, they are relevant because they clearly illustrate the inherent tension between the Legislature (and by extension the Executive branch) and the Judiciary.

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[9] See: *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759.

[27] The inherent tension arises because the Legislature, having been elected to represent the People, is deemed to enact the will of the People. Judges are unelected and are not cloaked with similar privileges as the Executive's such as access to intelligence reports and information. To strike down laws can therefore be deemed to contravene the will of the People. The effect of this is all the more jarring when it concerns amendments to fundamental aspects of the Federal Constitution – the supreme document.

[28] There are reams of academic papers, reports and judicial decisions that have discussed these topics throughout the ages and spanning numerous jurisdictions. Many of these discussions, namely the ones relating to separation of powers and the role played by politics in law and adjudication are also context specific.

[29] A current example of this is the unanimous decision of the United Kingdom Supreme Court in *Miller* (or the prorogation case) in which the world witnessed the Supreme Court having to grapple with the issue of separation of powers and the role of the Courts within the context of the United Kingdom's unwritten constitution.[10] There, the Court was mindful of its role and observed thus:

> "[I]f the issue before the court is justiciable, deciding it will not offend against the separation of powers. As we have just indicated, the court will be performing its proper function under our constitution. Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, the court will be giving effect to the separation of powers.".

[10] *R (on the application of Miller) v The Prime Minister & Other Appeals* [2019] UKSC 41.

[30] I respectfully concur with these views. In Malaysia, the overarching effect of Article 4(1) means that any law which is inconsistent with the Federal Constitution is to the extent of the inconsistency void and I do not see why "law" in this context cannot include constitutional amendments which are unconstitutional.

[31] In this connection, one written constitution that attracts my attention is that of the Republic of Germany which is aptly called the 'Basic Law'. Article 79(3) of the German Constitution provides as follows:

> "3. Amendments to this Basic Law affecting the division of the Federation into Länder, their participation on principle in the legislative process, or the principles laid down in Articles 1 and 20 **shall be inadmissible**.".

[32] The German constitution, to which I think our Article 4(1) is similar, quite clearly provides that certain fundamental aspects of the Constitution cannot be changed. I have attempted to state my views as to why this is the case in *Zaidi Kanapiah*.[11] In short, my understanding is that this is borne out by Germany's history, the World Wars and the fundamental fears that certain aspects of German democracy and way of life should not and cannot be changed. This is also related to Hans Kelsen's pure theory of law.

[33] Thus, in my humble view, when judges interpret a constitution, they must also have regard to the political and social context in which it was drafted. Judicial decisions are subject to public confidence in the Judiciary which in turn relates to public acceptance and legitimacy not just of the decisions but of Legislative and Executive conduct. Judges must

[11] *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases* [2021] 3 MLJ 759.

therefore understand their judicial role and be trusted to carry them out faithfully.

CONCLUSION

[34] The public lecture today is on 'lessons from a constitutional judge'. Having shared my views on the topic, I look forward to hearing our star speaker Professor Dieter on this very important area. Given that the learned Professor is himself a constitutional judge and seasoned in this field, I am certain that we will all leave this forum richer with knowledge.

[35] Before I close, I would like to congratulate the Tun Suffian Foundation founded by my own former lecturer, Tunku Datuk Sofiah Jewa working hand in hand with the Law Faculty specifically Mr Philip Koh and team for their commendable efforts in making this lecture possible. It keeps the name of the late Tun Suffian alive and is a praiseworthy endeavour to commemorate our beloved Faculty's 50th Anniversary.

Thank you.