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Malaysia:
Assault on the Judiciary

Lawyers Committee for Human Rights
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Lawyers Committee for Human Rights

Since 1978 the Lawyers Committee has acted to promote international human rights law and legal procedures in the United States and abroad. The Chairman of the Lawyers Committee is Marvin E. Frankel; Michael H. Posner is the Executive Director; William G. O'Neill is the Deputy Director; and Arthur C. Helton is the Director of the Lawyers Committee's Refugee Project.

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PREFACE

This report examines the series of events that has led to the undermining of judicial independence in Malaysia.

The report is based on a fact-finding mission to Malaysia from October 14 to October 29, 1988. The Lawyers Committee delegation consisted of George Shenk, a partner from the New York office of the Coudert Brothers law firm, and Lawyers Committee staff attorney James Ross. During its visit to Malaysia, the delegation met with the dismissed Lord President of the Supreme Court, Tun Salleh Abas; members of the Malaysian Bar Council, including then President Raja Aziz Addruse, who represented Tun Salleh in the legal proceedings discussed in this report; and past Bar Council President Param Cumaraswamy. The delegation also met with the attorneys for the Supreme Court judges charged with misbehavior in July 1988; the judges involved declined to meet with the Lawyers Committee.

The delegation also met with members of the political opposition, including Tunku Abdul Rahman, the first Prime Minister of Malaysia and a critic of the current government, and leaders of the Democratic Action Party, many of whose colleagues had been detained since October 1987 without charge or trial. The delegation met with a number of social activists who had been detained in October 1987. These included Dr. Chandra Muzaffar, President of Aliran, a leading reformist organization in Malaysia; members of the Consumers Association of Penang; the National Organization for Human Development of the Catholic Church; and ex-detainees and families of current detainees. A number of persons interviewed by the Lawyers Committee asked not to be quoted for attribution.

The Lawyers Committee made repeated attempts to meet with various officials of the Malaysian government, particularly in the Ministry of Justice. Requests for official meetings were initially made in a letter to the government on October 3, 1989. Further communications were made through various channels both prior to the trip and after the delegation had arrived in Kuala Lumpur. The Prime Minister's office did not respond to Lawyers Committee requests. The Minister of Justice's office orally declined a meeting with the delegation and provided no assistance in arranging meetings with other Justice Ministry officials. A representative from the Muslim Lawyers Association, which was supportive of the government's position in the dispute with the judiciary, also declined a request for a meeting. The delegation did meet with other lawyers who were supportive of the government's position. Prior to the

October visit, Mr. Ross met with First Secretary Dennis Ignatius at the Malaysian Embassy in Washington.

The delegation also met with then U.S. Ambassador to Malaysia, John C. Monjo, in Kuala Lumpur. In Washington, the delegation met with Gene Christy, Deputy Director of the State Department's Bureau of East Asian and Pacific Affairs.

A note on the usage of titles and names: Many of the individuals discussed in the report have titles of royalty or rank, such as *Tan Sri* and *Datuk*. To avoid confusion, these titles are provided only when an individual is first mentioned in the report.

This report was written by James Ross. Nabeel Sarwar, a lawyer from Pakistan who worked for the Lawyers Committee from late 1988 through early 1989, wrote Section III of this report.

I. INTRODUCTION

Malaysia has long enjoyed a reputation for political stability and respect for the basic rights of its citizens. But events since 1986 have fractured that image. Four institutions of democratic society in Malaysia have come under attack by the government of Prime Minister Mahathir Mohamad: the political opposition, social and political reform groups, the press and, most recently, the judiciary.

In a series of actions since 1986, the government of Malaysia has interfered with the proper functioning of the courts. Prime Minister Mahathir has responded harshly to judicial decisions unfavorable to the government or his political standing. He has done so by launching verbal attacks on the nation's judges, by introducing legislation and constitutional amendments in Parliament that weaken the power of the courts, and finally, by initiating the dismissal of six Supreme Court judges, including the head of the Malaysian judiciary. These actions have greatly reduced the power of the judiciary in relation to the other branches of government and have seriously undermined judicial independence in Malaysia.

Malaysia's constitutional system of government provides for checks and balances among the three branches of the government. Since the country's independence in 1957, the judiciary has developed a reputation for impartiality and professionalism. Nonetheless, it historically has been conservative on questions of state power, very rarely finding against the government or questioning the constitutionality of legislation. However, starting with the *Berthelsen* decision in December 1986 (concerning the government's power to expel a foreign journalist), the high courts have issued a number of rulings that have gone against the government. The Prime Minister has on numerous occasions spoken out publicly against what he has viewed as the judiciary's usurpation of the power of the legislature and the executive.

For much of 1987, the issue of the judiciary's proper role was collateral to the political struggle occurring within the ranks of the ruling party, the United Malays National Organization (UMNO). An economic downturn and several financial scandals nearly led to Prime Minister Mahathir's defeat in intraparty elections in April 1987. The political threat to Mahathir, coupled with rising ethnic tensions partly attributable to government policies, resulted in the gov-

ernment's decision on October 27, 1987 to implement a large-scale security operation called Operation Lallang.

In a matter of days, the security forces arrested more than 100 persons, including important members of the political opposition and social activist groups. Detainees were held without charge or trial under the Internal Security Act (ISA), ostensibly for promoting racial unrest. Roughly half of the detainees were released towards the end of 1987; the rest were conditionally released through 1988 and early 1989. The government also closed down several newspapers critical of the government and placed new restrictions on the freedom of assembly.

The resolution of the financial scandals, the struggle for control of UMNO and the continuing detention of many of those detained since Operation Lallang, raised legal issues that quickly found their way to the courts. While some key decisions were in favor of the government, the government lost several high court rulings of considerable political importance. These cases included: *Raja Khalid*, *Theresa Lim Chin Chin* and *Karpal Singh*, each concerning judicial review of ISA detentions; *United Engineers Malaysia*, concerning a financial scandal implicating UMNO; the so-called UMNO 11 case, concerning a challenge to the lawfulness of UMNO; and *Aliran*, concerning judicial review of decisions to withhold publishing licenses.

These cases had three important implications for the judiciary. First, beginning in late 1987 and continuing through 1988, Prime Minister Mahathir intensified his public criticism of the judiciary. In a number of speeches, given primarily in support of pending legislation, he questioned the integrity of the nation's judges for handing down decisions that he believed infringed on the constitutional authority of the other branches of government. These statements caused considerable consternation on the part of the country's judges.

Second, the Prime Minister introduced legislation in Parliament that severely curtailed the power of the courts in important matters concerning state powers. Specifically, he initiated changes in the Printing Presses and Publications Act in December 1987 and the Internal Security Act in July 1988 and June 1989 that effectively eliminate judicial review of press regulations and judicial review of detentions under national security legislation. In March 1988, Prime Minister Mahathir pressed for the passage of two amendments to the Constitution that shifted the power to determine jurisdiction from the courts to the legislative and executive branches. The first amendment limits judicial review of current law and provides a constitutional basis for future statutes containing provisions that circumscribe judicial review. The second amendment provides the executive branch substantial powers to determine which court will hear a specific criminal case.

Third, the Prime Minister called for the suspension and dismissal of the Lord President of the Supreme Court (the nation's highest judge), and later,

supported the suspension and dismissal of five Supreme Court judges. In May 1988, Prime Minister Mahathir suspended Lord President Tun Salleh Abas and ordered the creation of a tribunal to investigate allegations of judicial misbehavior. In July 1988, after the Supreme Court in an emergency session ordered a stay of the tribunal, the five judges who ordered the stay were themselves suspended and called to appear before a second tribunal. The first tribunal examined five charges, ranging from public statements Lord President Salleh had made in defense of the judiciary to an allegedly improper ruling in a case regarding religious conversion. The tribunal found that he had acted improperly on each count and recommended his dismissal to the King, who acted on the recommendations. The second tribunal determined that two of the five judges had acted improperly by cancelling a scheduled hearing of the court to attend the emergency session. In October 1988 they too were dismissed.

Since the dismissal of the three judges, the government has filled the open positions on the Supreme Court with persons who played key roles in the tribunals. The new Supreme Court decided in favor of the government in pending cases that had led to Lord President Salleh's dismissal. The government has recently shifted its criticism of the courts to the Malaysian Bar Council, which has been a vocal advocate of judicial independence and highly critical of the government's actions against the judiciary. In May 1989, the government filed charges against the secretary of the Bar Council. The government sought a finding of contempt of court for statements the secretary made in a prior lawsuit brought by the Bar Council against the newly appointed Lord President.

This report will examine the Malaysian government's actions in light of precepts of international law concerning the independence of the judiciary. This analysis, summarized in conclusions below, portrays a government intent on undermining judicial independence.

II. SUMMARY OF CONCLUSIONS

Since late 1986, a series of actions by the Malaysian government have violated basic principles of judicial independence established under international human rights law. The Universal Declaration of Human Rights requires that an "independent and impartial tribunal" determine an individual's rights and obligations and adjudicate criminal charges at a fair and public hearing.[1] This basic concept was reiterated in the International Covenant on Civil and Political Rights, which sets out the need for criminal and civil cases to be heard by a "competent, independent and impartial tribunal established by law."[2]

The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held from August 26 to September 6, 1985 in Milan, Italy, adopted the Basic Principles on the Independence of the Judiciary (the UN Basic Principles). On December 13, 1985, the United Nations General Assembly endorsed the UN Basic Principles and called upon governments "to respect them and take them into account within the framework of their national legislation and practice.[3]

The cumulative effect of the government's actions has been to deprive the nation's judiciary of its independence in matters affecting state power. These actions, in conjunction with the government's 1987 crackdown on opposition politicians, social and political activists and the press, have greatly weakened the rule of law in Malaysia.

1. Since late 1987, Prime Minister Mahathir has issued a series of public statements critical of the judiciary. He has not only questioned the judiciary's prerogative in adjudicating cases concerning state power, but has publicly ques-

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1. Article 10, Universal Declaration of Human Rights, adopted and proclaimed by General Assembly resolution 217 A (III), Dec. 10, 1948.

2. Article 14, International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI), Dec. 16, 1966, entry into force, March 23, 1976.

3. United Nations, Basic Principles on the Independence of the Judiciary, endorsed General Assembly, Dec. 13, 1985 [hereinafter UN Basic Principles].

tioned the integrity of judges who have ruled against the government in such cases. These statements have created improper pressures on judges with respect to cases concerning public policy issues. This is contrary to standards of international law, including the UN Basic Principles, which set out that the judiciary shall decide matters before them "without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[4]

2. Prime Minister Mahathir initiated and pressed for legislation and constitutional amendments greatly limiting the power of the courts. He introduced legislation, later enacted, that virtually eliminates judicial review of challenges to the press law and the internal security law. He sought and gained amendments to the Constitution that shift the power to determine jurisdiction of issues from the judiciary to the legislature and that allow the executive branch to determine the court in which a criminal case will be tried. These amendments threaten further restrictions on the scope of judicial review and thus undermine the independence of the judiciary.

3. In May 1988, Prime Minister Mahathir suspended the Lord President of the Supreme Court. The government charged the Lord President with, among other things, making public statements that: showed "prejudice and bias against the government"; sought to "undermine public confidence" in the government; and contained "untruths" that sought to "discredit" the government. The Lord President was also accused of writing a letter to the King that affected the "good relations between the Malay Rulers and the Government." The UN Basic Principles provide that judges, like other citizens, are entitled to freedom of expression, so long as they conduct themselves in a manner consistent with the dignity of their office.[5] The Basic Principles also provide that judges are free to protect their judicial independence.[6] The government's accusations have had a chilling effect on the right to freedom of expression of judges in Malaysia and have made it difficult for judges to protect their judicial independence.

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4. *id.*, principle 2.

5. UN Basic Principles, principle 8, states:

> In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.

6. UN Basic Principles, principle 9, states:

> Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

4. The tribunals established by the Prime Minister to hear the allegations against the Supreme Court judges were not impartial bodies and the procedures that they adopted failed to meet international standards for proceedings againstjudges. The Lord President and the five Supreme Court judges were suspended without a hearing. The Salleh tribunal in particular conducted its proceedings in a suspect manner. As is discussed in Section VIII of this report, the composition of the tribunal was irregular, the tribunal was unwilling to have a public hearing despite the Lord President's request for one, and the tribunal failed to examine adequately the evidence before it. The Salleh tribunal deemed itself a fact-gathering body yet only considered the evidence presented by the Attorney General, who acted as a prosecutor. The UN Basic Principles require that suspension or removal proceedings meet "established standards of judicial conduct."[7]

5. Based on its investigation of the dismissal of the Lord President and two Supreme Court judges, the Lawyers Committee concludes that the tribunals hearing those cases improperly determined that the three judges had committed misbehavior that rendered them unfit to discharge their duties. The UN Basic Principles allow for the suspension or removal of judges only for "reasons of incapacity or misbehavior that renders them unfit to discharge their duties."[8] The Federal Constitution of Malaysia similarly provides for removal of a judge only for "misbehavior or inability."[9] It is the view of the Lawyers Committee that the allegations, even if proved to be true, do not make a prima facie case for misbehavior or incapacity as required for dismissal under the UN Basic Principles or the Malaysian Constitution.

6. The actions of the Mahathir government have sent a message to the judiciary that judicial decisions deemed likely to impinge upon the powers of the government, including the ruling coalition, may result in retribution taken against the judiciary or against specific judges. In short, the Malaysian government purposely sought to deny the nation's judiciary of its independence.

7. Since the dismissals of the three Supreme Court judges in 1988, the government has not taken steps to restore confidence in the Malaysian judiciary. Instead, key judicial posts have been filled by judges who participated in the

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7. UN Basic Principles, principle 19, states:

> All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

8. UN Basic Principles, principle 18, states:

> Judges shall be subject to suspension or removal only for reasons of incapacity or misbehavior that renders them unfit to discharge their duties.

9. Constitution, art. 125(3).

government's administrative actions against the judges. Recent legislation has eliminated judicial review of important national security legislation. The government has been openly critical of the Malaysian Bar Council, which has sought to defend judicial independence in Malaysia. This criticism, in conjunction with a recent action for contempt of court against the Secretary of the Bar Council, indicates a continued willingness to maintain pressure against the judiciary and those who seek to defend it.

III. MALAYSIA: AN OVERVIEW

A. The Struggle for UMNO

Malaysia is governed as a constitutional monarchy. It has a bicameral English-style Parliament and a written constitution similar to that of India. The executive head of the government is the Prime Minister. The monarchy, whose power is more symbolic than genuine, consists of nine regional Rulers, led by the Yang di-Pertuan Agong (the King), who is selected by the Rulers on a rotating basis.[10]

Malaysia has an estimated population of seventeen million, most of whom fall into three main ethnic groups. Roughly fifty percent of the population is Malay, who along with indigenous minorities make up the group known as *bumiputras*, literally "sons of the soil." Ethnic Chinese make up approximately a third of the population, and ethnic Indians about ten percent. Ethnic consciousness is highly pronounced in Malaysia, and has assumed vital political and social importance.[11]

Since Tunku Abdul Rahman, the leader of the United Malays National Organization (UMNO), negotiated independence from Great Britain in 1957, Malays have dominated national politics.[12] UMNO, along with the smaller Malaysian Chinese Association (MCA) and the Malaysian Indian Congress (MIC) are the main parties of the ruling coalition in Parliament, known as the Barisan Nasional (or National Front).

Every Prime Minister since independence has been a member of UMNO. UMNO members currently make up two-thirds of the Prime Minister's

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10. For a general study of Malaysian government, see G. Means, *Malaysian Politics*, (Hodder & Stoughton, London: 1976).

11. For two views of the ethnic question in Malaysia, see Mahathir Mohamad, *The Malay Dilemma*, (Asia Pacific, Kuala Lumpur: 1970); Tan Chee Beng, "Rejecting Racialism: Towards a Malaysian Consciousness," *Aliran Monthly*, no. 3, 1988, p. 18.

12. Peninsular Malaya achieved independence from Britain in 1957. In 1963 Sabah and Sarawak on Borneo along with Singapore joined Malaya to form the Federation of Malaysia, which Singapore left in 1965.

Cabinet, with the crucial posts virtually their exclusive preserve. UMNO representation in the legislature has also increased sharply since the redrawing of electoral boundaries in 1974 and 1984, and now accounts for about 55 per cent of the total Parliament. The Chinese MCA and the Indian MIC, while formally members of the ruling coalition, generally follow the lead of UMNO with respect to policy and legislation.[13]

Although dominated by ethnic Malays, Malaysian politics has always admitted a degree of pluralism. The main opposition party is the Democratic Action Party (DAP), which controls 24 of the 177 seats in the House of Representatives and won 21 per cent of the vote in the last general election. Unlike the other main parties, the DAP campaigns on a multiracial platform, though it is largely dominated by ethnic Chinese. The Parti Islam *Se* Malaysia (PAS), an Islamic fundamentalist party, controls only one seat in the Parliament, but received 17 per cent of the vote in the last general election and is a significant political force in rural areas. There are a number of smaller opposition parties without significant constituencies.

In May 1969, ethnic tension exploded into riots between the Malay and Chinese communities, resulting in approximately 200 deaths.[14] Those riots are etched into the consciousness of all Malaysians, and the danger of their recurrence is constantly raised as a warning, most recently during the ethnic tensions of October 1987.

There were two immediate effects of the 1969 riots. The first was the departure of Tunku Abdul Rahman from the post of Prime Minister and the resulting imposition of two years of emergency rule. The second was the implementation in 1971 of the New Economic Policy (NEP), which sought to give practical effect to the "Special Position" of *bumiputras* formally recognized in the Constitution. The NEP was designed to improve the economic position of *bumiputras*, who are primarily rural-based and poor, lifting them to essential parity with the economically dominant and largely urban-based Chinese community. This was attempted by the introduction of such programs as low-cost housing, share preference schemes in Malaysian corporations, special loan facilities from banks, and reserved quotas in the professions and in education. Partly as a result of the NEP, UMNO controls a complex maze of financial and industrial institutions, including at least 10 publicly owned companies, thousands of private companies and at least 150 buildings throughout the country.[15]

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13. See e.g. "The gathering storm," *Far Eastern Economic Review*, Oct. 13, 1987, p. 14; "A question of identity," *Far Eastern Economic Review*, Nov. 8, 1988, p. 31.

14. See Gibney, "Mahathir's Dilemma," *Wilson Quarterly*, Winter 1987, p. 70.

15. See Emergency Committee For Human Rights in Malaysia (New Zealand), Update [hereinafter ECHRIM Update], No. 6, June 10, 1988, p. 10.

In 1982, Datuk Seri Dr. Mahathir Mohamad, incumbent Prime Minister and head of UMNO, led the Barisan Nasional to a sweeping victory at the polls.[16] His campaign slogan was "Clean, Efficient and Trustworthy," but by 1984, Mahathir was facing criticism for a series of scandals that raised questions of government impropriety.[17] These highly publicized incidents, plus an economic downturn caused by government deficits and a drop in the price of tin and other important export commodities, led to a struggle within UMNO for the party leadership. At the end of a long and bitter campaign in April 1987, Prime Minister Mahathir edged out rival Trade and Industry Minister Tengku Razaleigh Hamzah in the internal UMNO elections by a mere 43 votes out of 1,479 cast. The Prime Minister promptly removed his challengers and their allies from the Cabinet and other government posts.

Efforts to resolve the UMNO dispute through the legal system in part led to Mahathir's criticism of the courts and, eventually, his suspension of the Lord President of the Supreme Court. Razaleigh's supporters, commonly known as "Team B" (and later as Semangat '46), filed a suit in the High Court petitioning that the UMNO election results be declared illegal because some branch offices of UMNO were not properly registered and thus their votes were invalid. In February 1988, the High Court unexpectedly ruled that since several of UMNO's branches had not complied with the registration procedure under the Societies Act, the whole of UMNO was illegally constituted. Mahathir responded by registering a new party called UMNO (Baru) -- that is, New UMNO. His supporters campaigned to enlist old UMNO party members and also brought a series of lawsuits in order to gain control of old UMNO's assets.[18] In the so-called UMNO 11 case, supporters of Team B unsuccessfully went to court to force the re-registration of the old UMNO. Since late 1988, it

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16. The Barisan Nasional took 140 seats out of a possible 154 in the House of Representatives.

17. Among the major incidents were the following: The M$2.5 billion ($1 billion) corruption scandal concerning fraudulent loans in 1984 made by the Bumiputra Malaysia Finance Corporation, the Hong Kong subsidiary of the government-controlled Bank Bumiputra Malaysia. This was followed closely by the United Engineers Malaysia scandal where it emerged that a M$3.42 billion ($1.35 billion) contract for the planned North-South highway in peninsular Malaysia (the largest single public sector project undertaken by the government) was awarded to a company owned by UMNO itself. In 1987, opposition leaders initiated contempt proceedings against the Asian Rare Earth Corporation, a government-approved organization that refused to comply with a 1985 injunction to stop dumping radioactive waste near inhabited village sites. Abuse of position appeared pervasive: between 1981 and 1986, the governmental Anti-Corruption Agency found 973 government officials guilty of corruption. See "A Question of Trust," *Far Eastern Economic Review*, April 2, 1987, p. 17.

18. See Section V, infra.

has also contested UMNO (Baru) in several hard-fought regional by-elections, winning one of them.

The significance of this political struggle reached beyond UMNO and Malaysian politics generally. The various UMNO lawsuits forced the courts to rule on what had originally been questions of internal party politics. Rulings adverse to the government could have resulted in Mahathir's fall from power. Thus, the fact that these cases were pending, combined with perceived trends of recent rulings actually handed down by the courts, were crucial factors leading to the government's efforts to undermine judicial independence.

B. Operation Lallang

The political struggle within UMNO took on an ethnic character as both factions sought to gain the support of the Malay constituency by stressing Malay concerns and by questioning the economic and social position of non-Malays. Ethnic Chinese politicians, both from inside and outside the Barisan Nasional coalition, sought to defend the economic and social status of their community. A restive situation was exacerbated by an October 1987 decision by the Minister of Education to appoint non-Mandarin Chinese speakers to administrative positions in Chinese primary schools. Members of the Chinese community, the Chinese MCA and the opposition DAP publicly criticized the policy and held meetings to raise their concerns.[19]

On October 17, 1987, the UMNO Youth, a youth organization within UMNO, staged a rally sharply denouncing the response of the Chinese community and calling for the expulsion of the MCA from the Barisan Nasional. Banners were raised calling for the death of leading public figures, including the president of the Bar Council. The advocacy of violence during the UMNO Youth rally focused attention on a planned UMNO anniversary rally scheduled for November 1. Originally set for the southern town of Johor Baru, the adverse reaction of the Chinese community to the Chinese schools issue prompted the UMNO leadership to move the rally to Kuala Lumpur. An estimated half million people were expected to turn up at a football stadium with a capacity of only 60,000. The specter of ethnic violence was raised when a soldier went on a shooting spree in Kuala Lumpur, falsely rumored to be ethnically motivated, that left one person dead and two others wounded.[20] Perhaps

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19. See Amnesty International, *Malaysia, "Operation Lallang": Detention Without Trial Under the Internal Security Act*, pp. 2-3 (Dec. 1988) [hereinafter Amnesty International].

20. See International Commmission of Jurists, *Report to the New Zealand Section of the International Commission of Jurists, on the Mission to Malaysia, 22-29 November, 1987*, pp. 3-6 (Jan. 1988) [hereinafter ICJ Report].

to defuse the ethnic tension or quiet his opponents within UMNO, on October 27, 1987, Prime Minister Mahathir cancelled the UMNO anniversary rally. Early that morning, the security forces had already begun to carry out the first stage of "Operation Lallang."[21]

Within hours, members of the police and the Special Branch, the internal security force, arrested 55 persons under authority of the Internal Security Act of 1960 (ISA), a law with colonial-era antecedents designed to provide the government with wide-ranging powers to arrest and detain those deemed a threat to national security.[22] The following day, four newspapers were shut down and all public meetings were banned.[23] By mid-November 1987, at least 106 persons were being held in police custody.

Most of those arrested fell into one of two broad categories: politicians or members of social reform groups. Among the politicians arrested were seven members of the opposition DAP, including the party's Secretary General, Lim Kit Siang, Deputy Secretary General P. Patto, and Deputy National Chairman Karpal Singh, a prominent lawyer. Ten members of PAS, the opposition Islamic fundamentalist party, were also arrested, among them persons with important positions in the party. Sixteen members of the ruling Barisan Nasional were arrested as well, including several persons associated with the Team B faction of UMNO.[24]

The government also arrested members of social reform organizations, including women's groups, consumer organizations and environmental groups. Christian church workers were arrested, as were Chinese educators and trade unionists. Several were prominent members of society, such as Chandra Muzaffar, the president of Aliran, a leading social reform organization whose monthly magazine had been highly critical of the government.

These arrests have been well-documented.[25] In many instances the police confiscated the papers and other property of those arrested. The police were

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21. Operation Lallang was the code name given to the operation by the Malaysian security forces. Lallang is a kind of tall grass.

22. For an account of the arrests, see generally, Amnesty International, supra note 19.

23. The four papers closed were the English-language *The Star* and *The Sunday Star*, the Bahasa Malaysia *Watan*, and the Chinese *Sin Chew Jit Poh*. *The Star* played a major role in bringing to light the United Engineers Malaysia scandal, supra note 17. See generally, Committee to Protect Journalists, "Press Abuse in Malaysia and Singapore," statement before the Subcommittee on Human Rights and International Organizations of the House Foreign Affairs Committee, Sept. 1988; see also "Give and take for press," *Far Eastern Economic Review*, Mar. 10, 1988, p. 14.

24. See generally Amnesty International, supra note 19.

25. See generally Amnesty International, supra note 19; ICJ Report, supra note 20.

also slow to notify relatives of the arrests of family members and made family visits difficult. The treatment of the detainees in police custody varied, but several detainees reported psychological and physical torture, including: solitary incommunicado detention; confiscation of papers and other property; physical threats; actions intended to humiliate the detainees; forced, prolonged exercise; beatings; and threats of torture with electric shock.[26]

The ISA permits the arresting authorities to hold an individual for up to 60 days. The Minister of Home Affairs may then issue a detention order for up to a two-year period, renewable indefinitely.[27] By the end of the 60 day period, 71 of the detainees had been released, including all the members of the Barisan Nasional. Eleven of those released had restrictions placed on their freedom of movement and employment. The remaining Operation Lallang detainees were served with two-year detention orders and were transferred to the main ISA detention facility at Kamunting, Perak State.

Most of the detainees served with detention orders were released over the course of 1988. One year after the start of Operation Lallang, 16 remained in custody, mostly leaders of the DAP and members of PAS. In January 1989, 14 more Operation Lallang detainees were released; all but one had severe restrictions placed on their freedom of movement and association. DAP Secretary General Lim Kit Siang and his son, member of Parliament Lim Guan Eng, the last of the Operation Lallang detainees held, were released unconditionally on April 19, 1989.[28]

On March 14, 1988, five months after the initial arrests, the government released a White Paper entitled "Towards Preserving National Security," which

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26. See generally Amnesty International, supra note 19.

27. Under sections 73 and 8 of the ISA, any police officer may without warrant arrest and detain any person he has reason to believe has acted in any manner prejudicial to national security, or to the maintenance of essential services or to the economic life of the country. If the Minister of Home Affairs is satisfied that the detention of any person is necessary for the above reasons, he may issue a detention order directing that the person be detained for any period not exceeding two years. A detention order may be renewed indefinitely. The Home Affairs Minister may also place restrictions on the person's activities, freedom of movement, residence and employment. A detainee can appeal a detention order to a special Advisory Board appointed by the executive. This Advisory Board's power is just that, advisory, not binding on the Home Minister. In practice most detainees have refused to appear before the Advisory Board, believing that it merely legitimates the government's detention order. See Amnesty International, supra note 19, p. 11.

28. In February 1989, Deputy Prime Minister Ghafar Baba said that there were still 150 ISA detainees in the country, many arrested after the Operation Lallang arrests, who could not be released because they were a threat to society. Ghafar said that the government was willing to abolish the ISA and release all the detainees if there was an assurance that no one would be a threat to the country. *The Star*, Feb. 19, 1989.

provides the official version of the Operation Lallang arrests. The primary justification for the arrests was that "members of certain political parties and pressure groups... exploited various sensitive issues and inflamed communal sentiments."[29] The report also cites as reasons for the crackdown the "Christianization of Malays" by church groups,[30] the "manipulation of the Islamic religion" by "deviationist groups,"[31] and the "activities of the Marxist group" which "aimed to replace the existing national social and political structures with a communist system."[32] Formal criminal charges were never brought against any of the detainees.[33]

In the months after Operation Lallang, legal challenges were brought against the government for the detentions under the ISA. As with the UMNO lawsuits, these legal actions placed the judiciary in the position of ruling on highly politicized government policies. One such ruling provided impetus for the government's efforts to curtail the independence of the Malaysian judiciary.

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29. Government of Malaysia, "Towards Preserving National Security," Mar. 14, 1988, p. 6.

30. *Id.* p. 18.

31. *Id.* p. 21.

32. *Id.* p. 22.

33. Prime Minister Mahathir later defended the arrests as necessary to protect the government: "People had the feeling that the government was weak, that I was very weak, and there they thought that they could push me around.... Naturally I had to take action to protect the government. If they have the impression that it can be pushed around, we will not only have problems running the government. Democracy itself is threatened." See "Mahathir Accuses Opponents," *The Daily Telegraph* (London), Mar. 16, 1989.

IV. ORIGINS OF THE CONTROVERSY

A. The Malaysian Judiciary

The Malaysian judiciary, like the legal system, is derived from that of England and Wales. In 1985 a salient connection to the Commonwealth was severed when the government abolished appeal to the Privy Council in London as the final arbiter of legal disputes in Malaysia.[34] The Privy Council was replaced by a Supreme Court (formerly the Federal Court) with special jurisdiction in matters of constitutional law and appellate or primary jurisdiction in other matters.[35] Directly below the Supreme Court are two High Courts: the High Court of Malaya, which has jurisdiction for peninsular Malaysia, and the smaller High Court of Borneo, for the states of Sabah and Sarawak. The Chief Justices of the High Courts usually sit with the Supreme Court alongside the Lord President (equivalent to the Chief Justice of the U.S. Supreme Court) and seven Supreme Court judges.

Traditionally, Malaysians have studied law in the United Kingdom and other Commonwealth countries. While a class of Malaysian-educated lawyers has developed since the opening of the first of four law schools in Malaysia in the early 1970s, training at a respected British university or the Inns of Court still carries great prestige, particularly among those lawyers who aspire to the ranks of the judiciary.[36] Judges are thus often trained in a tradition where parliamentary supremacy, not adherence to a written constitution, is the norm. According to one Malaysian legal scholar, since the country gained its independence in 1957, the courts in Malaysia "have shown extreme reluctance to

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34. The Privy Council, Britain's highest court of appeal, at one time had final appellate jurisdiction throughout the Commonwealth.

35. The court has special jurisdiction in interpretation of the Constitution. The court's primary jurisdiction is limited to cases involving disputes between states of the federation and between the states and the federal government. There is a limited right of appeal to the King.

36. See "Divided at the bar, united on the bench," *Far Eastern Economic Review*, July 21, 1988, p. 15. About 400 lawyers are admitted to the bar each year, of whom 150 are graduates of the three Malaysian law schools. *Id.*

invalidate parliamentary legislation on grounds of constitutionality. Our judges seem to be steeped in the British tradition of parliamentary supremacy which has no legal basis here."[37] There have been only a handful of cases in which legislation has been invalidated by the courts.[38]

A number of lawyers in Malaysia say that the judiciary has undergone a transformation since 1986, resulting in a more assertive judiciary, which has shown greater respect for individual rights in the face of state power.[39] Important decisions of the courts during this period seem to support that conclusion, although it would be difficult to demonstrate that this represents a genuine shift in jurisprudential thought, rather than unrepresentative decisions of a few prominent judges. Former Lord President Tun Salleh Abas, whose outspoken positions on behalf of judicial independence were among the charges that brought about his removal, had long been considered a conservative judge on questions of state power and national security.[40]

The executive branch has interpreted certain decisions by the Malaysian judiciary as indicating a greater willingness by the courts to scrutinize actions by the government and the ruling party. The Prime Minister's blunt responses to these decisions, initially reflected in public statements and legislative initiatives, have been crucial factors in undermining judicial independence in Malaysia. This was first evident in the Prime Minister's reaction to the *Berthelsen* case.

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37. Shad S. Faruqi, "Role of the Judiciary: The Courts and the Constitution" in Aliran, *Reflections on the Malaysian Constitution*, p. 110 (Penang: 1987). Article 4(1) of the Constitution proclaims the principle of constitutional supremacy. According to DAP opposition leader Lim Kit Siang, "Malaysian judges have proved to be too executive or establishment-minded, ...following strictly the formalistic requirements of legality and justice, without giving sufficient corresponding attention to the spirit of the Constitution." Lim sees the judiciary, along with the legislature, as being responsible for permitting the "subversion of the constitutional guarantees on fundamental liberties." See speech by Lim Kit Siang, "Human Rights -- Role of Parliament and the Future," in Democratic Action Party Human Rights Committee, *Human Rights in Malaysia*, (Petaling Jaya: 1986).

38. See, e.g., Public Prosecutor v. Datuk Yap Peng, [1987] 2 M.L.J. 311 (criminal procedure statute unconstitutionally vested judicial power in executive). For a discussion of Malaysian judges, see Chang Min Tat, "Judging the Judges," at the Seminar on the Independence of the Judiciary, Bar Council of Malaysia, Kuala Lumpur, Nov. 4-5, 1988.

39. Interviews by the Lawyers Committee for Human Rights, Penang and Kuala Lumpur, Oct. 15-23, 1988.

40. See, e.g., Salleh's rulings in Raja Khalid, [1988] 1 M.L.J. 182, and Theresa Lim Chin Chin, [1988] 1 M.L.J. 293, in which a 1942 British case, Liversidge v. Anderson, [1942] A.C. 206, long since overruled in England, was the basis for holding that ISA detentions were subject to minimal judicial scrutiny.

As recently as November 1985, Prime Minister Mahathir spoke highly favorably of the nation's judges: "We are very fortunate that our judiciary is straight and honest. We are fortunate that it is independent of the Executive.... We are fortunate in having, on the Bench, men of high professional competence and high moral integrity."[41] Within the year, his positive view of the judiciary changed dramatically.

B. The Berthelsen Case

The conflict between Malaysia's executive branch and its judiciary has its origins in the Supreme Court decision in *Berthelsen v. Director General of Immigration*, which raised issues of individual rights of due process versus the power of the state on questions of national security.[42] On August 26, 1986, the Malaysian government invoked a three-month publishing ban on the *Asian Wall Street Journal* (the *Asian Journal*). The same day, the government cancelled the work permits and ordered the expulsion of *Asian Journal* correspondents John Berthelsen and Raphael Pura. Earlier in the week, the Asian Journal had run articles that examined the business dealings of the finance minister and the deputy home affairs minister, and attempts by the Malaysian government to corner the world tin market in the early 1980s.[43] According to Berthelsen's notice of cancellation, he had failed to comply with immigration regulations and conditions placed on his pass, and his continued presence in Malaysia would be "prejudicial to the security of the country."[44]

Berthelsen sued to prevent his deportation. On October 1, 1986 Justice Harun Hashim of the High Court of Malaya upheld the cancellation of Berthelsen's employment pass. He determined that since national security was invoked by the government, and that in such a case "a Court should not go behind the decision of the Executive," it would be futile to stop the deportation order.[45]

The case was appealed to the Supreme Court and was heard by a three-judge panel whose members would figure prominently in later events: Lord

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41. Speech of Prime Minister Mahathir on November 14, 1985, Kuala Lumpur, cited in ECHRIM Update, supra note 15, No. 6, June 10, 1988, p. 7.

42. J.P. Berthelsen v. Director General of Immigration, Malaysia & Ors. [1987] 1 M.L.J. 134.

43. See Committee to Protect Journalists, "Update," Jan.-Feb. 1987, p. 6. Prime Minister Mahathir stated that the newspaper had published articles "in order to undermine our economy." "Mahathir Charges Asian Journal Tried to 'Undermine' Malaysia's Economy," *The Wall Street Journal*, Oct. 1, 1986.

44. See *Berthelsen*, [1987] 1 M.L.J. pp. 134-35.

45. *Id.* at 135 (citing High Court ruling).

President Salleh, Judge Tan Sri Eusoffe Abdoolcader and Judge Mohamed Azmi. On November 3, 1986, the Supreme Court overturned the High Court's decision in a ruling that had important implications for state power. The Court held that in accordance with "the rules of natural justice" (roughly equivalent to the notion of due process in the United States), an employment pass could not be cancelled without a hearing, even if the grounds for the revocation were based on national security.[46]

Prime Minister Mahathir responded to the court's decision by making public statements critical of the judiciary and by initiating legislation to limit judicial review. These two reactions to court decisions adverse to the government were to be repeated on several occasions in the course of the ensuing eighteen months.

Three weeks after the Supreme Court handed down its decision in *Berthelsen*, an interview with Prime Minister Mahathir appeared in *Time* magazine. Questioned about the courts, Mahathir answered:

> The judiciary says [to Parliament], "although you passed a law with a certain thing in mind, we think that your mind is wrong, and we want to give our interpretation." If we disagree, the court will say: "We will interpret your disagreement." If we go along, we are going to lose our power of legislation. We know exactly what we want to do, but once we do it, it is interpreted in a different way, and we have no means to reinterpret it our way.[47]

He went on to say that if the courts always interpret the laws in contradiction to the intentions of Parliament, "then we will have to find a way of producing a law that will have to be interpreted according to our wish."[48] The interview was reprinted in the Malaysian press and received wide publicity.

DAP Secretary General Lim Kit Siang, who later was among those arrested during Operation Lallang, brought an action in the High Court of Malaya to find Prime Minister Mahathir in contempt of court for his *Time* statements. On December 3, 1986, Justice Harun, who had decided for the government in *Berthelsen*, held in the Prime Minister's favor, citing freedom of speech. In extensive dicta, however, Justice Harun chastised Mahathir for his statement in

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46. Id. pp. 137, 138. On November 14, 1986, the government withdrew its three-month suspension of the publishing permit of the *Asian Journal*. The home affairs ministry withdrew its expulsion of Raphael Pura and revoked the cancellation of his employment pass. Berthelsen departed Malaysia when his original work permit expired November 3, 1986. See "Publishing ban lifted," *Far Eastern Economic Review*, Nov. 27, 1986, p. 22.

47 "I Know How the People Feel," *Time*, Nov. 24, 1986, p. 18.

48. *Id.*

Time, saying that it reflected a misunderstanding of the function of the judiciary and demonstrated "confusion" on the subject of the separation of powers.[49]

Justice Harun's decision was upheld by the Supreme Court in a December 11, 1986 decision by Lord President Salleh.[50] He too found that the statement did not amount to an attack on the courts constituting contempt, but "stems, in our view, from a misconception of the role of the courts."[51] The court went on to set out in basic terms the role of the judiciary under a system of constitutional supremacy: "If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act... in accordance with the law."[52]

After *Berthelsen*, there followed in 1987-88 a series of cases that exacerbated the tensions between the executive and the judiciary. The basic issue of judicial review of state power raised by the *Berthelsen* case and later litigation continued to be the focus of political debate and, eventually, political action.

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49. Lim Kit Siang v. Dato Seri Dr. Mahathir Mohamad, [1987] 1 M.L.J. 383, pp. 383-85 (Decision of High Court, December 3, 1986).

50. Lim Kit Siang v. Dato Seri Dr. Mahathir Mohamad, [1987] 1 M.L.J. 383, p. 386.

51. *Id.*

52. *Id.* p. 387.

V. CASES LEADING TO THE CONTROVERSY

The following cases addressed important issues affecting state power and the continued governance of the ruling coalition. The political uncertainty resulting from these cases was crucial in bringing about the government's attacks on judicial independence in Malaysia. The decisions in some of these cases led to intense official criticism of the scope of judicial review and the integrity of the judges, and subsequently the introduction of legislation and constitutional amendments that curtail judicial review. Ultimately, this led to the suspension of the Lord President and five Supreme Court judges.

A. Aliran

Persatuan Aliran Kesedaran Negara (Aliran) is a social reform group that publishes the *Aliran Monthly*, an English-language magazine often critical of the government.[53] In November 1986, Aliran applied for a permit under the Printing Presses Act to publish a magazine in Bahasa Malaysia, the national language. On April 27, 1987 the Home Minister (Prime Minister Mahathir) denied the application on 11 separate grounds, asserting that the Printing Presses Act grants the minister "absolute discretion" to refuse an application.[54]

Aliran sought relief in the High Court. On December 19, 1987, Justice Harun ruled that the Home Minister "had no good reasons" for refusing the application and granted Aliran's petition for mandamus.[55] Justice Harun's opinion focused on judicial review of government actions: "It is common ground that although [under the Printing Presses Act] the discretion is absolute it is not

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53. Dr. Chandra Muzaffar, the president of Aliran, was among those detained during Operation Lallang.

54. See Persatuan Aliran Kesedaran Negara v. Minister of Home Affairs, [hereinafter *Aliran*] [1988] 1 M.L.J. 440, 441. The Printing Presses Act, sec. 12(2) states: "The Minister shall have the absolute discretion to refuse an application for a license or permit or the renewal thereof." Mahathir denied the application "in the interest of the applicant and the public at large" after consideration of the information supplied by the applicant. See *Aliran*, [1988] 1 M.L.J., p. 442.

55. *Aliran*, [1988] 1 M.L.J., p. 442.

unfettered. It follows that the exercise of discretion is subject to judicial review." Aliran, in his view, had complied with all the requirements for a permit and there was no evidence that the granting of the permit was against the public interest. Such permits should be granted, concluded Justice Harun, "as a matter of course."[56] However, the Home Ministry immediately appealed the 1987 High Court decision, which was eventually reversed by the Supreme Court in late 1989. Hence, Aliran remains enjoined from publishing a Bahasa Malaysia magazine.

B. Raja Khalid and Theresa Lim Chin Chin

In November 1987, lawyers for eight of the political detainees arrested during Operation Lallang brought actions for writs of habeas corpus in which they questioned the legality of their arrests under the ISA. As a result, the courts were led to examine the permissible extent of judicial scrutiny of government decisions to impose the ISA.

The scope of judicial review of the ISA had arisen earlier in the year in a case with little political significance, but which proved to have great precedential importance. In February 1987, the High Court heard the habeas corpus petition of Raja Khalid, who had been detained by the police under the ISA for illicit financial dealings.[57] Justice Harun ordered Khalid released on the grounds that the arresting officer provided no credible evidence that Khalid's actions threatened national security.[58] This was a rare occasion in Malaysia when a writ of habeas corpus gained the release of an ISA detainee.[59] Although Khalid was released immediately, Justice Harun's decison was not published until October 30, 1987, during the wave of Operation Lallang arrests. After the decision was made public, the government promptly appealed to the Supreme Court.

On November 17, just days before the habeas corpus petitions of the Operation Lallang detainees were to be heard, the Supreme Court issued its opinion in *Raja Khalid*.[60] While upholding the lower court's decision, the court greatly

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56. *Id.*

57. Raja Khalid was a bank officer with the Perwira Habib Bank who between 1975 and 198- issued loans that resulted in substantial losses to the bank. The arresting officer claimed that Khalid was arrested under the ISA on the basis that the losses sustained hurt members of the armed forces, many of whom held an interest in the bank, and thus threatened national security. See generally, Re Tan Sri Raja Khalid bin Raja Harun, [1988] 1 M.L.J. 182.

58. See *id.* pp. 183-84.

59. See ECHRIM Update, supra note 15, No. 3, Dec. 2, 1987, p. 1.

60. Inspector-General of Police v. Tan Sri Raja Khalid bin Raja Harun, [1988] 1 M.L.J. 184.

narrowed the scope of judicial review in ISA cases. Lord President Salleh, writing for a three-judge panel, distinguished between "security cases" and "ordinary" cases for purposes of judicial review. According to the court, the officer in ISA arrests, unlike in ordinary criminal arrests, need not disclose the reasons for the arrest. Only when the arresting officer proffers reasons, as occurred in *Raja Khalid*, could they be examined by the courts.[61]

On November 23 and 24, Chief Justice of Malaya Tan Sri Abdul Hamid Omar heard the habeas corpus petitions of the eight ISA detainees. Normally such matters are heard by High Court judges, although it was not unprecedented nor outside the Chief Justice's authority to hear the case.[62] In a ruling issued on November 24, Chief Justice Hamid held that the arrests were valid. Only three of the detainees appealed their cases to the Supreme Court. On December 22, 1987, in *Theresa Lim Chin Chin*, the Court followed the narrow reading of the scope of judicial review in ISA cases adopted in *Raja Khalid* and dismissed the appeal.[63]

The *Raja Khalid* and *Theresa Lim Chin Chin* cases added to the politically charged atmosphere of the Operation Lallang detentions and forced the courts to address these detentions. They also set the stage, legally and politically, for the pivotal Karpal Singh case, discussed below.

C. United Engineers Malaysia

During a parliamentary debate in June 1987, a government minister revealed that United Engineers Malaysia, a contractor, had been awarded the M$3.42 billion ($1.35 billion) North-South Highway project in peninsular Malaysia, was owned by a holding company controlled by UMNO.[64] The highway project was the single largest public sector project ever undertaken by the government. Lim Kit Siang, Secretary General of the DAP, and other critics of the government alleged that there was a conflict of interest because Prime Minister

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61. See *id.* p. 188. The court, while upholding the outcome of the High Court's decision because the reasons given for detaining Khalid were without basis, criticized Justice Harun's opinion for its "errors" and "unfortunate statements." *Id.* The Supreme Court's decision has been subject to criticism for, among other things, encouraging law enforcement authorities not to give reasons for making an arrest, since only then can the arrests come under judicial scrutiny.

62. ICJ Report, supra note 20, p. 5.3.

63. Theresa Lim Chin Chin & Others v. Inspector General of Police, [1988] 1 M.L.J. 293.

64. According to public records, all but one of the shares of the holding company, Hatibudi, were held by Halim Saad, who testified that he hid his Hatibudi shares in trust for UMNO. See *Aliran Monthly*, no. 7, 1988, p. 7.

Mahathir and other cabinet members were trustees of the holding company at the time the contract was awarded to United Engineers Malaysia.[65]

A series of complex legal maneuvers ensued. A suit brought by Lim Kit Siang in the Penang High Court to obtain an order restraining United Engineers Malaysia from entering into a contract with the government was dismissed for lack of standing to bring the action. On appeal, a three-judge panel of the Supreme Court reversed the standing ruling and issued an interim restraining order against United Engineers Malaysia.[66] United Engineers Malaysia promptly sought to remove the restraining order in the Kuala Lumpur High Court, but on October 5, 1987, the High Court rejected its application, upholding Lim's right to seek an order. United Engineers Malaysia and the government then appealed the High Court ruling to the Supreme Court.

On January 15, 1988, the Supreme Court ruled 3 to 2, with Lord President Tun Salleh in the majority, that Lim Kit Siang had no judicial standing.[67] The court dismissed the suit and lifted the interim injunction that had prevented the company from signing the highway contract. The contract was signed.[68]

The Supreme Court's disposition of the case prior to a trial was significant politically. The case had already bolstered Prime Minister Mahathir's opposition within UMNO and had caused dissension within the Barisan Nasional. Even if Lim had lost on the merits, the information on UMNO finances that a trial would have elicited might have been very damaging to the Prime Minister. Lim, however, would not have been able to participate in a trial: both he and his lawyer, Karpal Singh, were among those arrested in October 1987 during Operation Lallang. They were among the last of the Operation Lallang detainees to be released -- Karpal Singh in January 1989; Lim in April 1989.

D. The UMNO 11 Case

Eleven members of UMNO who had opposed Prime Minister Mahathir during the April 1987 party elections filed a lawsuit against the UMNO General Secretary and several divisional secretaries. They contended that the party elections were invalid because some branch offices of UMNO were

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65. *Id.* Lim Kit Siang further alleged that the terms of the contract were unfavorable to the state.

66. Lim Kit Siang v. United Engineers (Malaysia) Berhad & 3 others (No. 2), [1988] 1 M.L.J. 50.

67. See Gov't of Malaysia v. Lim Kit Siang, United Engineers (Malaysia) Berhad v. Lim Kit Siang, [1988] 2 M.L.J. 12.

68. See *id.*; see also Bernama news service, Jan. 15, 1988, reprinted in Foreign Broadcast Information Service, *Daily Report* (East Asia) [hereinafter FBIS], Jan. 19, 1988, p. 29.

improperly registered under the Societies Act.[69] The plaintiffs sought a court order directing new party elections.

On February 4, 1989, High Court Justice Harun found, as the plaintiffs had alleged, that branches of UMNO at the time of the elections were illegal under the Societies Act. But he unexpectedly dismissed the suit on the grounds that this made the whole of UMNO an illegal organization. Thus, although UMNO office holders elected in 1984 continued to be officers, the April 24 elections were a nullity. New elections could not be ordered until UMNO was legally reconstituted as a lawful organization in accordance with the Societies Act.[70]

Justice Harun's decision had wide implications, foremost among them being the control of UMNO's considerable economic assets, which included holdings in properties, hotels, the print and broadcast media, insurance and banking.[71] Some observers believed the court ruling created considerable uncertainty over the future of the country's top leadership.[72]

On February 15, Prime Minister Mahathir registered a new party, UMNO (Baru) -- meaning New UMNO. The new party sought to be the legal successor to UMNO and thus gain control of all of old UMNO's assets.[73] On February 19, the UMNO 11 plaintiffs filed an appeal in the Supreme Court.[74]

The case was extremely important to the government. A successful appeal by the UMNO 11 would have forced UMNO to hold new party elections, which, in light of the close 1987 intraparty vote, Mahathir had no certainty of winning. The Supreme Court's handling of the case, discussed below,[75] was an

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69. See Section III, supra. There were initially twelve plaintiffs in the suit, but one dropped out.

70. Bernama news service, Feb. 4, 1988, reprinted in FBIS, Feb. 4, 1988, pp. 24-25.

71. See Hong Kong AFP, Feb. 16 1988, reprinted in FBIS, Feb. 16, 1988, p. 25.

72. See Hong Kong AFP, Feb. 5, 1988, reprinted in FBIS, Feb. 5, 1988, p. 21.

73. On February 8, several members of "Team B," Mahathir's opposition in UMNO, had applied to the Registrar of Societies to register a new party, UMNO Malaysia. The following day, Mahathir's faction submitted an application for UMNO '88. On February 10, the Registrar of Societies rejected both applications on the grounds that the registration of UMNO had yet to be cancelled. It was cancelled two days later and on February 15, the Registrar notified the Prime Minister that it had approved his application for UMNO (Baru). The Barisan Nasional promptly accepted UMNO (Baru) as the successor to UMNO. On March 19, 1988 the Barisan Nasional-controlled Parliament enacted changes in the Societies Act that, *inter alia*, empowers the official assignee to apply to the court that the assets of a society declared unlawful be transferred to a successor party. See Bernama news service, Mar. 14, 1988, reprinted in FBIS, Mar. 15, 1988, p. 23.

74. See Bernama news service, Feb. 19, 1988, reprinted in FBIS, Mar. 22, 1988, p. 42.

75. See Section VIII, infra.

immediate cause leading to the dismissal of the Lord President by the Prime Minister.[76]

E. Karpal Singh

Karpal Singh, Deputy Chairman of the opposition DAP and a prominent human rights lawyer, was arrested under the ISA on October 27, 1987 during the first wave of Operation Lallang arrests. He had joined with other DAP leaders in challenging Prime Minister Mahathir and UMNO for corruption and conflict of interest in the United Engineers Malaysia case. On January 12, 1988, after the habeas corpus petitions of the other ISA detainees had been denied, he filed a petition for his release.

On March 9, 1988, following an eight-day hearing in which he appeared as his own lawyer, the High Court ordered his release from detention.[77] Justice Peh Swee Chin determined that one of the six charges against him, that he had incited racial sentiments at an October 10, 1987 gathering in Penang, was factually not true and outside the scope of the ISA.[78] The judge said that the government's "casual and cavalier attitude in issuing the detention order led to Karpal Singh's successful application for a writ of habeas corpus as the attitude was tantamount to *mala fides*."[79]

That day, Karpal Singh was released and with his family left for his home in Penang State. Nine hours later, he was rearrested at a police roadblock in Nibong Tebal, Penang, and served with a new ISA detention order. In announcing Karpal Singh's re-arrest, the Deputy Home Minister said that he was still facing another five charges.[80] Karpal Singh, once again detained, appealed the new order to the Supreme Court.

Like the UMNO 11 appeal, the Karpal Singh appeal was highly significant politically. Were the Supreme Court to decide in Karpal Singh's favor, it might have opened the way for judicial review of the other ISA detentions. And it would have implicitly lent support to the critics of Operation Lallang. The Lord President's role in this appeal was another factor that led to the actions taken against him by the government.

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76. See "Objections overruled," *Far Eastern Economic Review*, July 21, 1988, p. 13.

77. See Karpal Singh s/o Ram Singh v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1988] 1 M.L.J. 468.

78. See Bernama, March 9, 1988, reprinted in FBIS, March 9, 1988, p. 19.

79. *Karpal Singh*, [1988] 1 M.L.J. p. 473. According to Justice Peh, *mala fides* "does not mean at all a malicious intention. It normally means that a power is exercised... for a purpose other than the purpose for which it is professed to have been exercised." *Id.*

80. RTM Television Network 1, March 10, 1988, reprinted in FBIS, March 11, 1988, p. 25.

VI. PUBLIC CRITICISMS OF THE JUDICIARY

Beginning in late 1987, Prime Minister Mahathir put pressure on Malaysia's judiciary by subjecting the courts to repeated official criticism. These public attacks served to undermine the judiciary's constitutional prerogative in defining jurisdiction and to cast aspersions on the integrity of the judges.

On September 5, 1987, High Court Justice Harun gave a speech on law and society at the University Kebangsaan. He suggested that the Constitution be amended so that Senators would be elected rather than appointed.[81] The speech was reported in the following day's *Sunday Star*.[82]

Over the next several days, Prime Minister Mahathir responded publicly and critically to Justice Harun's remarks. On September 6, he said that certain judges were interfering with the political process by voicing their views on political issues outside the courtroom. He went on to assert that "judges were no longer adhering to their rightful role of administering but had instead encroached on the roles reserved for the other branches of government."[83] The following day the Prime Minister publicly called on the Lord President "to admonish judges who made public their political views."[84] When questioned about this by the press, Lord President Salleh declined to comment, stating that the "best thing to do was to keep quiet and let the matter rest."[85]

Public criticism of the courts intensified after Justice Harun's December 19 decision in the *Aliran* case.[86] As sole judge on the Appellate Division of the High Court, Justice Harun had been scheduled to hear the habeas corpus petitions of the eight ISA detainees, but Chief Justice Hamid decided to hear them instead. In January 1988, Chief Justice Hamid transferred Harun, along with

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81. *The Sunday Star*, Sept. 6, 1987. This was not the first time Justice Harun had spoken out on public policy questions. On previous occasions, he had suggested that the country's emergency legislation, enacted in the 1950s to combat an insurgency, be repealed.

82. *Id.*

83. See *The Star*, Sept. 7, 1987.

84. *Id.*

85. *New Straits Times*, Sept. 11, 1987.

86. See section V.

eight other judges, to new judicial assignments. Justice Harun was moved from the prestigious and powerful Appellate Division to the less politically significant Commercial Division. Hamid said that the changes were made to increase efficiency within the various divisions.[87] Although some lawyers felt that Justice Harun had often been slow in producing written opinions, many felt that his transfer was more for political reasons related to his recent rulings. Said one lawyer, "Rightly or wrongly, Harun was painted as a symbol of the judiciary's independence. This is partly because the head of the Appellate Division gets to hear a lot more public interest cases. They are hearing cases that the newspapers would like to report on and that the intelligentsia takes interest in."[88]

Shortly after his transfer, the Lord President recommended Justice Harun's elevation to the Supreme Court. Critics charged that this was not a genuine promotion for Harun, but a way of minimizing his impact in important cases. At the High Court level, judges sit alone and have sole discretion in their rulings; Supreme Court cases are heard by at least three judges.

In a January 1, 1988 interview in *Malaysian Business*, Prime Minister Mahathir levied several criticisms of the judiciary that local lawyers believed were directed at Justice Harun.[89] He stated:

> There are black sheep in every group who want to be fiercely independent.... When you want to be fiercely independent, you are implying that you'd forget your duty to be just and fair.... You stretch things a bit. You have to prove that you can hammer the government.[90]

Prime Minister Mahathir added that in the past he had never questioned court decisions, but "when people say... [that] in order to get a judgment against the government, you go to this particular court, then that court is no longer regarded as a fair court. It has already been labeled."[91]

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87. See "A Separation of Powers," *Asiaweek*, Jan. 22, 1988, p. 20. Also transferred was Justice V.C. George, who had ruled against the government in the United Engineers Malaysia case. See Section V, supra.

88. See *id*.

89. Lawyers Committee interviews, Kuala Lumpur and Penang, Oct. 15-23, 1988.

90. *Malaysian Business*, Jan. 1, 1988.

91. *Id*. In a statement two months later, Mahathir again stressed this idea:

> When a judge feels he has first to prove his independence, then justice takes a back seat. That is why we see some judges, when delivering judgments, making unfounded statements as if they want to vent their frustrations. They make such statements because of the belief that judges cannot be ticked off. If they are criticized, then they say it is contempt of court. If there is an appeal, then it is sub-judice to make any comments on a case. In other words, judges can say what they want of a person because that person does not have the right to defend himself. (*New Straits Times*, Mar. 8, 1988.)

The Prime Minister's position was reiterated by Attorney General Abu Talib Othman. Commenting specifically on the question of judicial independence, he said, "Sometimes a notion prevails that the more a judge decides against the state, the more independent he is. This is a wholly misleading notion."[92]

On January 9 and 12, Lord Salleh gave speeches which, in his words, he hoped would "clarify those aspects of the functions of the Judiciary touched upon by the Prime Minister in his speeches without entering into a debate with the Prime Minister on his criticisms."[93] However, Salleh responded sharply to the statements from Attorney General Talib's office: "We need no reminders from the Attorney General, or anyone else, as to our responsibilities and duties." The recent remarks about the judiciary, he said, "not only questioned our neutrality and independence but the very value of [the judiciary] as an institution."[94]

The Prime Minister's verbal assaults on the judiciary continued during the parliamentary debates in March 1988 over constitutional amendments on judicial power.[95] He stated: "We [the government] go by the law in discharging our duties, likewise the judges should also abide by the law.... That is all we want." He then criticised the ruling in the Berthelsen case, contending that the press regulation clearly gave the Minister the right to grant or reject the request for an extension of a foreigner's stay: "Therefore anyone permitted to stay in this country for a year actually can stay for a lifetime." Mahathir said the judge was not free to do as he liked as "he too was bound by the law."[96]

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92. "A Separation of Powers," *Asiaweek*, Jan. 22, 1988, p. 20.

93. Affidavit of Tun Dato' Haji Mohamed Salleh bin Abas, June 28, 1988 [hereinafter Salleh Affidavit], p. 14.

94. "A Separation of Powers," *Asiaweek*, Jan. 22, 1988, p. 20.

95. See Section VII, infra.

96. See Bernama news service, Mar. 18, 1988, reprinted in FBIS, March 21, 1988, p. 24.

VII. RESTRICTING JUDICIAL REVIEW

Beginning in late 1987 the government of Prime Minister Mahathir has been able to curb the power of the courts by enacting legislation and constitutional amendments that curtail the scope of judicial review. These actions appear to be direct responses to the appellate court decisions adverse to the government. Speaking before Parliament in March 1988 in support of two constitutional amendments, Prime Minister Mahathir said that the divisions between the branches of government posed a threat to the country:

> Lately, there have been indications that matters that are thought to be the prerogative of the executive branch are considered encroachable by the judiciary. If the duties of an arm are encroached upon by other arms, the administration of the country will be threatened and become weak, and the weak administration will not be able to guarantee the stability and welfare of the country.[97]

On December 3, 1987, 13 months after the *Berthelsen* decision, Prime Minister Mahathir introduced a bill in Parliament to amend the Printing Presses and Publications Act of 1984 (the Printing Presses Act). The revised law, enacted in early 1988, empowers the Home Affairs Minister (a portfolio held by Prime Minister Mahathir) to reject a request for, cancel or suspend a license or permit. The decision cannot be challenged in the courts, effectively preventing a repeat of *Berthelsen*. Furthermore, the law stipulates that no hearing will be given with regard to a request for a license or permit or to a cancellation of a permit.[98]

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97. RTM Television Network 1, Mar. 17, 1988, reprinted in FBIS, Mar. 18, 1988, pp. 24-25.

98. See Printing Presses and Publications Amendment Act of 1987, art. 9, adding section 13(a) to the Printing Presses Act. Under the amended act, the government may suppress for up to six months any publication where an offense had taken place, *id.* sec. 8(b); or suspend it pending a court case or until the acquittal of the accused, *id.* sec. 8(c). In addition, the amended law presumes published material to be malicious if the writer cannot prove having taken "reasonable measures to verify the truth of the news." *Id.* sec. 8(a). The law also permits the government to stop the distribution of local or foreign publications. See *id.* secs. 8(b)-(c).

After Prime Minister Mahathir had introduced the December 1987 amend ments to the Printing Presses Act, he informed Parliament that plans wer underway to introduce legislation to define the boundaries of the executive legislative and judicial branches of the government. On March 15, 1988, h introduced amendments to two constitutional provisions that accomplishe just that.[99]

Article 121 of the Malaysian Constitution vests judicial power in the Su preme Court and the High Courts.[100] The appellate courts since independenc have determined whether they have jurisdiction over a particular matte subject to the Constitution. The amendments proposed by the Prime Ministe shifted questions of jurisdiction to the legislature by making the high court subject to "federal law" instead of the Constitution.[101] Thus, Parliament coul enact legislation limiting or even prohibiting judicial review. And laws alread enacted that limit judicial review could not be overturned on that basis.

Prime Minister Mahathir also sought to amend the Constitution to give th Attorney General greater power to decide in which court to prosecute crimina cases. Under the amendment to Article 145, Parliament could enact laws tha "confer on the Attorney General power to determine the courts in which or th venue at which any proceedings which he has power... to institute shall b instituted or to which such proceedings shall be transferred."[102] Under th amendment, Parliament could enact a law granting the Attorney General th power to try cases before any court or judge the Attorney General desire Morever, the Attorney General could be empowered to move a partly hear case to a different court if he or she were dissatisfied with the proceeding

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99. See "Mahathir and the Judiciary," *Asian Wall Street Journal*, Mar. 16, 1988.

100. Article 121 states: "[T]he judical power of the Federation shall be vested in two high courts and in such inferior courts as may be provided by federal law."

101. Amended Article 121 reads: "There shall be two High Courts and such inferior courts as ma be provided by federal law; and [the courts] shall have such jurisdiction and powers as ma be conferred by or under federal law." Constitution, art. 121(1)-(2). An additional clau states that these courts shall not have juridiscation in any matter which falls within the juri diction of the Syariah (Islamic) courts.

102. Constitution, art. 145(3). The immediate impetus for this amendment was a criminal cas *Public Prosecutor* v. *Datuk Yap Peng*, in which the Attorney General, under section 418(A of the Criminal Procedure Code, bypassed a preliminary enquiry in a lower court to hav the case tried in the High Court. The Supreme Court disallowed the Attorney General action, holding that section 418(A) unconstitutionally vested judicial power in the Attorn General contrary to Article 121 of the Constitution. See Public Prosecutor v. Datuk Ya Peng, [1987] 2 M.L.J. 311. The amendments to Article 145 directly addressed the issues *Datuk Yap Peng*.

including appeals in politically sensitive cases.[103]

In seeking support for the amendments to Article 121 and Article 145, Mahathir stated that his intention was to define more clearly the jurisdiction of the three branches of the government to prevent "interference of one branch by another." He insisted that the amendments would "not affect the independence of the judiciary; and neither is the judiciary required to side with the government."[104]

On March 18, 1988, three days after the Prime Minister introduced the constitutional amendments, Parliament adopted them by a vote of 142 to 18, with all members of the opposition voting against the amendments. Seventeen members of Parliament were absent, including members of the Team B faction and the seven DAP parliamentarians under ISA detention.[105]

The opposition DAP, the Bar Council and social reform groups were very critical of the amendments. According to social activist Chandra Muzaffar, the amendments to Article 121 are:

> tantamount to destroying the very basis of the Judiciary's authority and independence.... This means that Parliament, in reality the Cabinet (since the Cabinet dominates the decision-making in Parliament) will determine the scope and extent of power and authority of the Courts.... It would be difficult for the Judiciary to perform its role as an impartial arbiter if it is stripped of the power and jurisdiction vested in it.[106]

Former Bar Council President Param Cumaraswamy was equally pessimistic: "Once the judicial power is removed from our courts, the road to

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103. See generally "Mahathir and the Judiciary," *Asian Wall Street Journal*, Mar. 16, 1988. Mahathir argued in Parliament that the Attorney General was not empowered to select a "friendly" judge to hear certain cases, but only had the power to transfer cases from one court to another for the purpose of speeding up the proceedings. See Bernama news service, Mar. 18, 1988, reprinted in FBIS, March 21, 1988.

104. *New Straits Times*, Mar. 18, 1988.

105. The Constitution, Article 159, provides for amendments with a two-thirds vote of the Parliament. Since the ruling party has held a two-thirds majority since independence, amending the Constitution has not proven difficult: to date, approximately 1000 amendments have been made to the Constitution. See Lim Kit Siang, "Human Rights -- Role of Parliament and the Future," in Democratic Action Party Human Rights Committee, *Human Rights in Malaysia*, p. 27 (Petaling Jaya: 1986).

106. Chandra Muzaffar, "The 1988 Constitutional Amendments," in Committee Against Repression in the Pacific and Asia, *Tangled Web* (Haymarket, New South Wales, Australia: 1988).

dictatorship will be wide open.[107]

The amendments to Article 121 paved the way for changes in the Internal Security Act that limit judicial review. The question of judicial review of ISA detentions had become a controversial political topic since the Operation Lallang arrests. The changes in the law followed several highly-publicized court cases, in particular the High Court's order to release opposition leader Karpal Singh. On July 15, 1988, Parliament amended the ISA to prohibit challenges of ISA detentions on grounds of procedural errors.[108] Similar restrictions on the jurisdiction of the courts were to apply to individuals arrested under the Emergency (Public Order and Prevention of Crime) Ordinance of 1969 and the Dangerous Drugs (Special Preventive Measures) Act of 1985.[109]

Members of the judiciary took note of Mahathir's criticism of the judiciary and the passage of the Constitutional Amendment Act. Complaints from judges regarding the Prime Minister's actions led Lord President Salleh to call a meeting of judges in Kuala Lumpur on March 25, 1988, which resulted in a letter being sent to the Rulers. Since he was soon to be leaving Malaysia for medical treatment and a pilgrimage abroad, Salleh directed the Supreme Court clerk that the upcoming UMNO 11 and Karpal Singh appeals should not be listed for hearing until after his return. Soon after his return in May 1988 and the formal listing of the two cases, Salleh learned that he was the subject of an official investigation.

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107. "Mahathir and the Judiciary," *Asian Wall Street Journal*, March 16, 1988. Replying to charges that the amendments were rushed through Parliament, Prime Minister Mahathir noted that the DAP had consulted legal scholars from Australia who were critical of the amendments: "How can they say there was not enough time if they could get opinions from Australia? I received telegrams from Australian experts who want to interfere in our affairs." *New Straits Times*, March 19, 1988.

108. *See* Amendments to the Internal Security Act (1988), clause 3. Further amendments were made to the ISA in June 1989. See Section X, infra.

109. The former has been used to detain those suspected of having committed or intending to commit criminal offenses; the latter has been used to apprehend drug traffickers.

VIII. REMOVAL OF THE LORD PRESIDENT

In May 1988, the Mahathir government suspended Lord President Tun Salleh Abas, the head of the Supreme Court and the highest ranking judge in the country, and brought charges of misconduct against him. During the course of the proceedings against Lord President Salleh, five more Supreme Court judges were suspended for alleged misconduct. As discussed below, the allegations made against the Lord President and the five Supreme Court judges did not justify a case for dismissal. Rather, the allegations constituted a further attempt by the government to undermine judicial independence.

The tribunals convened by the government conducted hearings and recommended the dismissal of the Lord President and two of the Supreme Court judges. The composition, procedures adopted and reasoning of the tribunals as set out in their reports raise serious questions about their impartiality. Instead of providing an independent basis for investigating the allegations, the tribunals only increased concerns of governmental infringment of judicial independence.

A. The Suspension

On the morning of May 27, 1988, Lord President Salleh met with the Prime Minister at the latter's request. The meeting was brief. Mahathir told Salleh that the King, Tunku Mahmood Iskandar, had objected to the letter sent by Salleh two months earlier and was asking for the Lord President's removal.[110]

Prime Minister Mahathir was referring to the letter written on March 25, after Salleh had summoned a conference of judges in Kuala Lumpur. According to Salleh, he called this meeting after he received letters from high court judges who felt the Prime Minister's statements on the judiciary were making it difficult for the judges to work.[111] By his own account, he too was disturbed by the broad-ranging attacks directed against the judiciary by the Prime Minister,

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110. Report of the Tribunal Established under Article 125 (3) and (4) of the Federal Constitution, Aug. 8, 1988, p. 8 [hereinafter Tribunal Report].

111. See Salleh Affidavit, supra note 93, paras. 27-28.

in particular, the speeches in support of the Constitutional Amendment Bill of 1988.[112]

Twenty judges, all from Kuala Lumpur, attended the meeting, including the Chief Justice of Malaya, Tan Sri Abdul Hamid.[113] The judges raised concerns about the Prime Minister's statements which they felt were aimed at weakening the nation's judiciary. It was decided that a private letter be sent to the King and each of the Rulers. According to Salleh, Supreme Court Judge Tan Sri Hashim Yeop Sani "expressed caution" with respect to the undertaking, but the decision to send a letter was unanimously approved.[114]

Four judges, including the Lord President, agreed to draft the letter. The letter, which was sent the next day, stated that the Lord President and all of the judges of the country were "disappointed with the various comments and accusations made by the Honourable Prime Minister against the judiciary not only outside but within Parliament." Saying that they did not want to reply publicly because "such action is not compatible with our position as judges" and not in "keeping with Malay tradition and custom," they felt it their duty as judges appointed by the Rulers "to preserve, protect and defend the Constitution." The letter asserted that the Prime Minister's accusations and comments had "brought shame to all of [the judges] and made them unable to discharge their functions orderly and properly." The letter concluded with the hope that "all those unfounded accusations will be stopped."[115]

According to Prime Minister Mahathir, he learned of the King's displeasure with the judges' letter at a May 1 meeting when the King told him to take appropriate action against the Lord President. Mahathir said that he later wrote the King and advised him that the Constitution permitted only the Prime Minister to initiate action against the Lord President. He wrote that he would investigate the matter and take action were it warranted.[116]

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112. See *id.*, paras. 23-25.

113. According to Salleh, "outstation judges" (those not in the Kuala Lumpur area) were not called about the meeting because of the short notice of the meeting. *Id.*, para. 26.

114. *Id.*, para. 27.

115. See Letter from Tun Salleh to Sultan Haji Ahmad Shah, Mar. 26, 1988, reprinted in the Tribunal Report, supra note 110, vol. II, annexure 2. The government has never produced the original letter sent to the King.

116. See Letter from the Prime Minister to the King, May 5, 1988, reprinted in the Tribunal Report, supra note 110, vol. II, annexure 3. This sequence of events was the basis for charges by attorneys for Lord President Salleh that his dismissal was unconstitutional because it originated with the King, not the Prime Minister, as set out in the Constitution. Constitution, art. 125(3). Attorney General Abu Talib later testified before the High Court that "no doubt the complaint came from the King, but that is not the sole basis of this reference." See "Judges in the Firing Line," *Far Eastern Economic Review*, July 14, 1988, p. 10.

On May 23, a week after his return from abroad, Lord President Salleh announced that the UMNO 11 appeal would be heard on June 13 by a bench of nine judges and the Karpal Singh appeal would be heard on June 15 before five judges. Under the Courts of the Judicature Act, the Lord President determines the number of Supreme Court judges to hear a particular case. While three judges is considered suitable for most cases, the Lord President may increase the number depending upon the importance of the case. According to Salleh, he ordered the UMNO 11 appeal to be heard by a full-bench of nine judges "because the case was so momentous, I decided all the judges were needed to make a decision."[117] Similarly, the Karpal Singh appeal was to be reviewed by five judges because it affected the capacity of the executive branch to order detentions under the ISA.[118]

Putting a full panel on the UMNO 11 appeal dramatized the importance of the case for the future of UMNO and Prime Minister Mahathir. Similarly, placing the Karpal Singh appeal before five judges had the effect of ensuring that greater attention would be given to the case. Some Malaysian lawyers contend that by increasing the bench in the cases, particularly the full nine-member bench in the UMNO 11 case, the Lord President created greater uncertainty about the outcome of the case and made it easier for judges to rule against the government. According to one senior attorney, "The Lord President's statements were used as the basis for his removal, but it was not the reason. The UMNO 11 case was the reason."[119]

Two days before the May 27 Mahathir-Salleh meeting, Mahathir had written to the King with four allegations of misconduct against the Lord President. He also recommended that the Lord President be suspended pending a determination by a special tribunal to be convened. The King agreed.[120]

At the May 27 meeting, the Prime Minister informed Salleh that the King had taken exception to the letter sent to him by the Lord President and that the King had asked that Salleh step down as Lord President.[121] According to Salleh, the Prime Minister then said that the Lord President had made

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117. Lawyers Committee for Human Rights interview with Tun Salleh Abas, Oct. 22, 1988. Although there are ten Supreme Court judges, court rules require that only an odd number sit on a particular panel.

118. See Salleh Affidavit, supra note 93, paras. 29-30.

119. Lawyers Committee Interview, Kuala Lumpur, Oct. 21, 1988.

120. Copies of these letters, though never the originals, were later produced in court. A fifth allegation of misconduct, concerning actions taken after the suspension, was made to the King on June 9. Tribunal Report, supra note 110, p. 13.

121. Statement of the Prime Minister's Department, May 31, 1988, reprinted in Tribunal Report, supra note 110, vol. II, annexure 12.

speeches that indicated that he (Salleh) was biased and was thus not qualified to sit on the UMNO cases. This version is disputed by Mahathir, who said that the UMNO cases were never mentioned.[122]

According to Salleh, the Prime Minister then called on him to resign or face a constitutionally-mandated tribunal.[123] Under the Constitution, the Prime Minister may request the King to establish a tribunal to hear charges "of misbehavior or inability, from infirmity of body and mind or any other cause, properly to discharge the functions of the office."[124] The King may on recommendation of the tribunal order a judge removed from office.[125] Salleh said he would not resign and left the meeting. He returned home, where shortly after noon he received a letter from the Prime Minister informing him that he had been suspended indefinitely, effective the previous day.[126]

Within the hour of Salleh's suspension, Chief Justice of Malaya Hamid, acting as ranking judge, had without Salleh's knowledge ordered that the UMNO 11 and the Karpal Singh appeals be taken off the hearing list. The suspended Lord President quickly called a meeting of judges from Kuala Lumpur. A small number of judges attended, including Chief Justice Hamid. Salleh drafted, but did not send, a letter to the Prime Minister explaining that

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122. *Id.*

123. See "Stunning Accusations," *Aliran Monthly*, Aug. 1988; see also, Statement of the Prime Minister's Department, May 31, 1988, reprinted in Tribunal Report, supra note 110, vol. II, annexure 12.

124. Constitution, art. 125.

125. *Id.* The relevant parts of article 125 read:

> Clause (2): A judge of the Federal Court may at any time resign his office by writing under his hand addressed to the Yang di-Pertuan Agong [King] but shall not be removed from office except in accordance with the following provisions of the article.
>
> Clause (3): If the Prime Minister, or the Lord President after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a judge of the Federal Court ought to be removed on the ground of misbehavior or inability, from infirmity of body and mind or any other cause, properly to discharge the functions of his office, the Yang di-Pertuan Agong shall appoint a tribunal in accordance with Clause 4 and refer the representation to it; and may on the recommendation of the tribunal remove the judge from office.

126. See Salleh Affidavit, supra note 93, para. 6. The suspension was in accordance with Constitution, art. 125, clause (5):

> Pending any reference and report under Clause 3 the Yang di-Pertuan Agong may on the recommendation of the Prime Minister and, in the case of any other judge after consulting the Lord President, suspend a judge of the Federal Court from the exercise of his function.

he was not going to resign.[127]

The following morning, Saturday, May 28, Attorney General Talib visited the Lord President. According to Salleh, on the Attorney General's request, he agreed to retire from the bench. Salleh later said he agreed to this because of the effects the threatened tribunal would have on his family and "the embarrassment which such proceedings could cause the judiciary."[128] In the Attorney General's presence, he drafted a new letter, agreeing to an early retirement "[t]o avoid embarrassment all round."[129] Two hours after the Lord President's letter of retirement was dispatched, a messenger returned with Prime Minister Mahathir's acceptance of the offer.

The following day, May 29, Salleh wrote to the Prime Minister and withdrew his decision to retire. Stating that he had made his decision "after being confronted suddenly... that a tribunal was being appointed" by the King, upon reconsideration he decided that it "would be detrimental to the standing of the judiciary and quite adverse to the interest of the nation" should he go on early retirement.[130]

Two days later, the Prime Minister's office officially announced the Lord President's suspension and the decision to set up a tribunal to examine the allegations of judicial misconduct. This was the first time that any judge had been referred to a tribunal in Malaysia.[131] That day the Prime Minister appointed Chief Justice Hamid as acting Lord President.[132] The mechanism to remove a

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127. Interviews by the Lawyers Committee for Human Rights, Oct. 1988, Kuala Lumpur.

128. Salleh Affidavit, supra note 93, para. 5.

129. Letter from Salleh to Prime Minister Mahathir, May 28, 1988, reprinted in Tribunal Report, supra note 110, vol. II, annexure 6. According to Salleh, at the Attorney General's suggestion, the letter was changed to say that he was retiring in the "Kepentingan Negara" ("National Interest"), instead of in the "Public Interest." The Attorney General, according to Salleh, viewed this as necessary for Salleh to secure the payment of his pension as if he had retired at age 65 and to receive a post at the International Islamic Bank at Jeddah, which had been offered him. See Salleh Affidavit, supra note 93, para. 6. The Tribunal Report's accounting of events makes no mention of the Attorney General's visit, although the Statement of the Prime Minister's Department, supra note 121, alludes to it.

130. Letter from Salleh to the Prime Minister, May 29, 1988, reprinted in Tribunal Report, supra note 110, vol. II, annexure 8.

131. See Bernama, May 31, 1988, reprinted in FBIS, May 31, 1988, p. 26.

132. The Courts of the Judicature Act, the relevant statute, does not use the term "Acting Lord President," though it is commonly used to describe the person officiating as Lord President when that post is vacant.

judge was now set into motion.[133]

B. The Allegations Against Tun Salleh

On June 14, 1988, the Attorney General at the behest of the Prime Minister served formal charges on Lord President Salleh. However, the charges were not made public until June 21, 1988.[134] There were five main allegations against the Lord President, several of which contained multiple sub-charges. None of the accusations involved criminal wrongdoing. Rather, the government asserted that Lord President Salleh's "conduct... has clearly shown lack of dignity, judicial propriety and impartiality expected of a Lord President and renders [him] unable properly to discharge the functions of the office of Lord President."[135]

Allegation 1 charged that in a speech given by Salleh on August 1, 1987 at the University of Malaya, he had "made several statements criticizing the Government which displayed prejudice and bias against the Government," and that these statements were "incompatible" with his position as Lord President of the Supreme Court. Specifically, Salleh allegedly accused government officers

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133. There remains a great deal of speculation as to the role played by the King and the Rulers in the Salleh affair. Most observers feel that the King, Tunku Mahmood Iskandar, was genuinely unhappy with the letter from the judges. According to several accounts, there was a long history of ill-feeling between the King and Salleh. In the 1970s, Salleh successfully prosecuted Tunku Mahmood for assault, though he was later reinstated as crown prince shortly before his father's death. See CARPA, *Tangled Web* (Kuala Lumpur: 1988), p. xiii. More recently, the Lord President and the King had a dispute over the use of properties in which each had an interest. There is less agreement as to whether the King's request that Salleh step down reflected this unhappiness or, instead, his well-known support of Prime Minister Mahathir.

    There was apparently dissension among the Rulers as to the King's role in the affair: Some were unhappy about what they viewed as political exploitation of the monarchy by the Prime Minister. See "A judge as king," *Far Eastern Economic Review*, Jan. 26, 1989, p. 20. The Raja of Perlis, with the support of the Sultan of Kelantan, reportedly telexed the King asking that no action be taken against Salleh until after the Rulers could be convened, sometime after the return of two of the Rulers from trips abroad on July 21. The Rulers are known to have held at least one private meeting to discuss Salleh's resignation. See "Objections overruled," *Far Eastern Economic Review*, July 21, 1988, p. 12. According to another account, Salleh met with the King in late June to apologize for any affront he may have caused. The King reportedly would accept the apology only if Salleh agreed to step down from the Court after being reinstated, but Salleh refused. See "The End of a Legal Battle," *Asiaweek*, Aug. 19, 1988, p. 19.

134. See *New Straits Times*, June 22, 1988.

135. Letter of the Prime Minister to the King, May 25, 1988, cited in Tribunal Report, supra note 110, vol. II, annexure 4.

of not performing their duties properly and implying that there had been interference by the government with judicial independence.[136]

Allegation 2 charged the Lord President with giving a speech on January 12, 1988 that contained "several statements discrediting the Government and thereby sought to undermine public confidence" in the government. According to the allegation, Salleh had accused the government of undermining the independence of the judiciary, imputing that the government was ignoring the important role of the judiciary by not allowing it to have a say in the allocation of funds, and ridiculing the government by alleging that the government did not trust the judges.[137]

Allegation 3 charged that the Lord President improperly issued an order that a case be adjourned *sine die*, that is, without a set date for a future hearing.[138]

Allegation 4 related specifically to the judges' March 1987 letter to the Rulers. The allegation criticized the letter because it said it was written "on behalf of myself [Salleh] and all the Judges of the country," when "all of the judges" were not consulted nor had given their approval. The allegation charged that the King had interpreted the letter as calling for action against the Prime Minister, thus affecting the "good relations between the Malay Rulers and the Government" and rendering Salleh "unfit to continue" as Lord President. Lastly, the allegation asserted that the Lord President had "admitted" in the letter to the King that the statements made about the judges had left him "mentally disturbed to such an extent" that he was "no longer able to properly discharge [his] functions as Lord President."[139]

Allegation 5 concerned events after Salleh's suspension. The Attorney General defended this, stating that article 125 does "not forbid any further representation to be made.... [I]t depends if the said judge further misbehaves himself."[140] Salleh was charged with giving an interview to the British Broadcasting Corporation (BBC) on May 29, 1988, which was reported in the Singapore *Straits Times*, that contained "untruths" calculated to politicize

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136. See Tribunal Report, supra note 110, pp. 18-20.

137. *Id.* pp. 20-23.

138. The case concerned a Buddhist man whose minor daughter had converted to Islam. Teoh Eng Huat v. Kadhi Pasir Mas, Civil Appeal No. 220 of 1986. The parent, alleging that he had not consented to the conversion, appealed a High Court ruling to the Supreme Court.

139. See Tribunal Report, supra note 110, pp. 23-25.

140. "Judges in the firing line," *Far Eastern Economic Review*, July 14, 1988, p. 11 (ellipsis in original).

his dispute with the government and to "further discredit" the government.[141] Citing Salleh's letter of May 28 in which he withdrew his offer of early retirement, the charge stated: "Your conduct as such cannot but raise doubts as to your ability to make a firm decision and act upon it which is required of a judge." Allegation 5 also charged that matters raised by Salleh about the tribunal, such as his request for a public hearing and the tribunal's composition, were "calculated to turn the subject of [the Lord President's] early retirement into a political issue."[142]

The Lawyers Committee concludes that even if the five allegations are true, they do not provide a basis for finding misconduct sufficient to justify dismissal under international standards on judicial independence. International law, evidenced by the UN Basic Principles on the Independence of the Judiciary, protects freedom of expression by judges so long as it is consistent with the dignity of their office,[143] and permits the removal of judges only for "reasons of incapacity or misbehavior that renders them unfit to discharge their dutes."[144] The government's allegations fail to satisfy these standards. Coupled with Prime Minister Mahathir's criticisms of the judiciary and legislative initiatives he has taken that diminish the scope of the courts' jurisdiction, the allegations should be viewed as part of the Mahathir government's effort to undermine judicial independence in Malaysia.

C. The Salleh Tribunal

On June 13, 1988, a six-member tribunal (the Tribunal) was named to hear the government's allegations against the Lord President. Included in the Tribunal were acting Lord President Hamid (who by constitutional provision was named chair), the Chief Justice of Borneo, two retired judges, a Chief Justice from Sri Lanka and a Supreme Court judge from Singapore.[145] According to

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141. See BBC World Service, May 30, 1988, reprinted in Tribunal Report, supra note 110, vol. V, annexure 4.

142. Tribunal Report, supra note 110, pp. 25-28.

143. UN Basic Principles, supra note 3, principle 8.

144. *Id.*, principle 18.

145. The Tribunal members were: Chief Justice Abdul Hamid, High Court of Malaya; Chief Justice Tan Sri Lee Hun Hoe, High Court of Borneo; Judge Tan Sri Abdul Aziz Zain, Federal Court, retired; Judge Tan Sri Mohammed Zahir, High Court, retired; Chief Justice Ranasinghe, Sri Lanka; Justice Sinnathuray, Supreme Court, Singapore. For background on the members of the Salleh Tribunal, see "The king's bench," *Far Eastern Economic Review*, June 23, 1988, p. 22.

the Attorney General, the Prime Minister submitted these names to the King, who consented to them.[146]

The Lord President, as well as the Bar Council of Malaysia, the opposition DAP and others raised objections to the suitability of the Tribunal members to judge the Lord President. It was argued that most of the Tribunal members were lower in judicial standing than the Lord President or had conflicts of interest. The most glaring conflict cited was the fact that the person likely to replace a dismissed Salleh was Chief Justice Hamid, who was chairing the Tribunal. Furthermore, Hamid was at the March 25 meeting of Kuala Lumpur judges and thus a participant in the events in question.[147] Prime Minister Mahathir defended the composition of the Tribunal, asserting: "We cannot satisfy everybody. There is no such thing as people choosing their own judges."[148]

Salleh's attorneys, in addition to challenging the composition of the Tribunal, asked that the proceedings be public and that Anthony Lester, a British Queen's Counsel who had been granted permission to represent the Lord President, be given additional time for preparation.[149] The Tribunal refused both requests.[150]

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146. Constitution, art. 125(3) states in part: "[T]he Yang di-Pertuan Agong [King] shall appoint a tribunal in accordance with clause 4 and refer the representation to it. Constitution, art. 125(4) states:

    The said tribunal shall consist of not less than five persons who hold or have held office of judges of the Federal Court or a High Court, or before Malaysia Day held office as judge of the Supreme Court or, if it appears to the Yang di-Pertuan Agong expedient to make such appointment, persons who hold or have held equivalent office in other parts of the Commonwealth, and shall be presided over by the member first in the following order, namely the Lord President of the Federal Court, the Chief Justice according to precedence among themselves, and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of the two members with appointments of the same date).

147. See Press Release of Malaysian Bar Council, June 17, 1988. The Bar Council also objected, *inter alia*, to the participation of Mohammed Zair, who as the Speaker of the House of Representatives, would be sitting in judgment on the head of the judiciary; and to the appointment of Abdul Aziz Zain, a former judge and current businessman who currently had a suit pending in the High Court of Penang in which there were allegations of fraud. Only the Supreme Court judge from Singapore was felt to be of equal rank to Lord President Salleh, and thus the only person judicially fit to try him for misconduct. *Id.*

    Abdul Hamid, in a press statement, defended his participation in the Tribunal, asserting that it would be disloyal to the King for him not to sit. See New Straits Times, June 20, 1988.

148. *The Star*, June 19, 1988.

149. See *New Straits Times*, June 20, 1988.

150. Tribunal Report, supra note 110, pp. 17-18.

The Constitution of Malaysia provides only a skeletal description of the process for the removal of judges.[151] It does not spell out, for instance, whether the tribunal is to be an investigative body only or whether it is supposed to render a decision to be carried out at the discretion of the King.[152] The Tribunal drafted its own Rules of Procedure consisting of nine basic rules.[153] According to the Tribunal, the procedures adopted were made "with regard to the requirements of natural justice" and consisted of "general and broad principles which would, in all the circumstances, be fair."[154]

According to the rules of procedure adopted by the Tribunal, the Attorney General was "to assist the court," a statement that implies an impartial role in the proceedings.[155] While the Tribunal treated the Attorney General as if he were only "assisting" an investigation, he clearly acted as a prosecutor. The Tribunal only examined evidence presented to it by the Attorney General, who attempted to make the best case for the government. The Tribunal accepted no outside evidence nor did it make an attempt to thoroughly examine the witnesses. Only four witnesses testified, only one of whom was personally

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151. Constitution, art. 125.

152. See generally, Ariff Yusof, "The Nature of the Tribunal -- Investigative or Adversarial: Procedure and Evidence, Adequacy, Standard of Proof, Right to Counsel and Right to A Public Hearing," from the Seminar on the Independence of the Judiciary, Nov. 4-5, 1988, Kuala Lumpur [hereinafter Ariff Yusof.]

153. The Rules of Procedure adopted by the Tribunal were:

1. *sitting* – the tribunal shall sit at such time, date and venue as it may decide.
2. *quorum* -- not less than 5 members shall form the quorum.
3. *proceedings* -- proceedings shall be in camera.
4. *continuation of proceedings* -- the non-presence of a member (through illness or any other cause) shall not affect proceedings provided that the remaining members shall not be less than 5 in number.
5. *the Attorney-General* – the Attorney-General shall assist the tribunal.
6. *right to counsel* – application for representation may be made to the tribunal and the tribunal may consider such application on its merits.
7. *enquiry* -- proceedings of the tribunal is [sic] not a trial but an enquiry on the reference and the tribunal shall not apply the strict rules of evidence under the Evidence Act.
8. *submission* -- submissions may be made after all the facts have been presented to the tribunal.
9. *report* -- at the conclusion of the proceedings the tribunal shall submit a report of the enquiry and whatever recommendations it may wish to make to His Majesty the Yang di-Pertuan Agong.

154. Tribunal Report, supra note 110, pp. 17-18.

155. *Id.* p. 18.

involved in the events in question. Nevertheless, acting Lord President Hamid claimed the Tribunal's role was "clearly investigative in nature."[156]

One commentator criticized the Rules of Procedure for lacking:

> the requisite level of clarity and general fairness which should correspond with the high constitutional importance of the matter of dismissal of judges.... [O]n the important matters of right to counsel, the right to be adjudged by one's peers, the order of speeches and submissions, the right to call witnesses who should be compelled to attend, the right of the last word and the right to an unbiased and impartial tribunal, the Rules of Procedure are manifestly inadequate.[157]

The commencement of the Tribunal proceedings was delayed because of several procedural motions submitted to the High Court and, eventually, the Supreme Court. The Supreme Court's resulting stay of the proceedings of the Tribunal prompted Mahathir's suspension of five Supreme Court judges and the establishment of a second tribunal.

On June 28, the day before the Tribunal began its hearings, Salleh filed an application in the High Court at Kuala Lumpur to stop the proceedings. At the commencement of the Tribunal on June 29, attorneys for Salleh, who was not present, moved that the Tribunal be postponed until after the High Court ruled on their objections, which was to be on July 1.[158] The Tribunal denied the motion.[159]

The following day, Salleh's lawyers set out his objections to the procedures and composition of the Tribunal, then withdrew permanently from the hearing. The Tribunal heard the arguments of the Attorney General and four government witnesses in support of the allegations. The hearing was concluded that day and deliberations were set to begin.[160]

On July 1, Justice Yusoff Mohamed of the High Court, the judge originally scheduled to hear Salleh's application to stop the Tribunal, pleaded illness and excused himself from the hearing. Justice Ajaib Singh, selected by acting Lord

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156. *The Star*, June 28, 1988.

157. See Ariff Yusof, supra note 152, p. 7.

158. Salleh was represented before the Tribunal by Raja Aziz Addruse, the President of the Bar Council, and C.V. Das.

159. The Tribunal stated that no sufficient grounds had been presented for ordering a postponement, and that they intended to proceed. See Tribunal Report, supra note 110, p. 29. At this point Salleh's counsel walked out of the hearing. The Tribunal gave Salleh until the following day to appear for the hearing, otherwise the Tribunal would proceed without him.

160. See *The Star*, June 30, 1988.

President Hamid, presided over the motion. After hearing arguments by Salleh's attorneys requesting a stay of the Tribunal, he adjourned the case until the next day to decide whether the Attorney General should appear.

On Saturday morning, July 2, many lawyers gathered at the High Court to hear Justice Ajaib's decision on the stay request. The judge stated that because he needed a clarification of certain facts from the Attorney General, a decision on the stay was postponed until July 4. Lawyers for Salleh asked for an interim stay until July 4 that would prevent the Tribunal from submitting its recommendation to the King, but this was also refused. According to a lawyer present, Justice Ajaib sighed after the session was adjourned. "I wish I could be with you," he reportedly said.[161]

Shortly after noon on July 2, Salleh took his case to the Supreme Court. He was fearful that the Tribunal would issue its recommendation to the King before the High Court ruled on the matter. As is discussed in detail in Part IX below, five Supreme Court judges convened an emergency session and granted a temporary stay to prevent the Tribunal from issuing its recommendations. On July 5, on the recommendation of acting Lord President Hamid and Prime Minister Mahathir, the King suspended the five judges for alleged "gross misbehavior." A second tribunal (the Second Tribunal) was ordered to be convened by the Prime Minister. On July 8, Justice Ajaib denied Salleh's petition seeking to stop the Salleh Tribunal on the grounds that the formation of the Tribunal was within the strictures of Article 125 of the Constitution and its composition was proper.[162]

On July 22, a five-judge bench of the Supreme Court set aside the temporary stay of the Supreme Court prohibiting the Tribunal from submitting its report to the King. With six of the ten Supreme Court judges suspended and two others involved in the Salleh Tribunal, three High Court judges had to be temporarily elevated to the Supreme Court by acting Lord President Hamid to hear the application. Salleh objected to the panel on the grounds that acting Lord President Hamid, as chairman of the Tribunal and thus an interested party, should not choose the panel. In a unanimous decision, the court held that since the "tribunal is a body which investigates and does not decide," it should not be prevented from carrying out its constitutional duties.[163]

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161. Lawyers Committee for Human Rights interview, Oct. 24, 1988.

162. Salleh v. Tan Sri Dato Abdul Hamid bin Omar et al., July 8, 1988. Justice Ajaib issued a press statement on July 13 saying that he had made his decision on the basis of "facts and law" and "without any favor or ill-will against any party." He went on to state that his order was "not yet the end of the matter.... The final decision will be made by the Supreme Court in due course." Press Statement of Justice Ajaib, July 13, 1988.

163. See "No more options," *Far Eastern Economic Review*, Aug. 4, 1988, p. 17.

On July 31, the Report of the Tribunal was sent to the King.[164] On August 6, 1988, the government announced that the King had removed Lord President Salleh on the Tribunal's unanimous recommendation, but that Salleh retained his pension.[165]

The composition and procedures of the constitutionally-mandated tribunal convened by the government to investigate allegations of misconduct against Lord President Salleh raise serious doubts about the Tribunal's impartiality: Although the Tribunal was formally chosen by the King, the Prime Minister actually named the members, even though it was he who had made the allegations. The composition of the Tribunal included judges lower in seniority than the Lord President who could directly benefit from the Lord President's dismissal or who were participants in events leading up to his suspension. The hearings were closed although the Lord President had requested them to be public and the Tribunal publicly released its report. The Tribunal claimed to be an investigatory body, but the adversarial nature of the hearings and the prosecutorial approach adopted by the Attorney General were clearly those of a trial proceeding.

D. The Ruling of the Tribunal

While the Tribunal's 52-page ruling on the allegations against Lord President Salleh seeks to justify the government's accusations, it instead raises further concerns about the impartiality of the Tribunal, particularly in light of previously noted concerns about the Tribunal's composition and procedures.

Allegations 1 and 2 concerned public statements by the Lord President that were allegedly critical of the government and that allegedly sought to undermine the public's confidence in the government. In reaching its decision on on these two charges, the Tribunal read the speeches in question and heard the testimony of two government officials. The Director-General of Fisheries testified that on two occasions in late 1987, Salleh had come to his office with his son to discuss deep sea fishing as a prospective business. He admitted that Salleh did not pressure him for a license, but felt awkward about having Salleh in his office.[166] The Deputy Director of Budget testified that with respect

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164. See Tribunal Report, supra note 110, p. 52. The Tribunal Report had been completed on July 7.

165. See Kuala Lumpur Domestic Service, Aug. 6, 1989, reprinted in FBIS, Aug. 8, 1988, p. 36.

166. See Tribunal Report, supra note 110, p. 32. One view of this testimony is that Attorney General Talib tried to show that Salleh was acting in contravention of his stated views that people in power should not use their positions for personal gain. At the time of the judgment, his son's application was still awaiting approval. See "Judgement Week," *Far Eastern Economic Review*, Aug. 18, 1988, p. 23.

to the budget, the judiciary was not given a low priority in terms of funding and staffing.[167]

In its Report, the Tribunal concluded that the evidence of the two witnesses "quite clearly show[s]" that the allegations made by Salleh in his speeches -- that government officers do not perform their duties properly and that the judiciary had been unfairly treated in the budgetary process -- were not substantiated, and, on the contrary, were "most unfair and improper."[168]

In a public statement in defense of his actions, Salleh denied that he had been critical of the government. He noted that the Tribunal did not examine the Prime Minister's speeches, though they "must surely be very relevant for determining whether or not I had overstepped my bounds as the holder of the office of Lord President." He continued: "It was after all in defense of the Judiciary and the Judges, and to clear misconceptions of the functions of Judges created by these attacks of the Prime Minister that I had made the speech. I would have failed in my duty as Lord President had I not acted as I did."[169]

The Tribunal devoted considerable attention to one of the sub-charges in Allegation 2, that Salleh gave a speech on January 12, 1988 in which he allegedly promoted Islamic law in Malaysia. Examining only an excerpt of the speech, the Tribunal concluded that his statement had caused "not only uneasiness but also fear and doubt in the minds of those who profess a religion other than Islam" or who do not subscribe to his views, and was thus "unbecoming a member of a judiciary in a country such as Malaysia."[170]

A reading of the passage in question shows that the Tribunal took the remarks of the Lord President out of context, deleting a crucial sentence at the beginning of the passage in question. In the edited passage, Salleh appears to praise Islamic law, but a reading of the entire passage indicates clearly that he does not do so.[171]

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167. See Tribunal Report, supra note 110, pp. 32-33.

168. *Id.* pp. 36-37.

169. Tun Salleh Abas, "A Man Wronged," *Aliran Monthly*, no. 6, 1988, p. 26.

170. Tribunal Report, supra note 110, pp. 37-41.

171. In the speech cited, Salleh had spoken of the law and the Constitution and how their language "can never be divorced from the need of interpretation." He goes on to say that: "interpretation of the cold words of codified law becomes a matter of paramount importance in order to breathe life into them for the need of adjudication of the moment.... No better illustration can be found with regard to interpretation as part and parcel of the law than the Islamic legal system." The speech then discusses the importance of interpretation, whether with respect to divine or secular law and is the passage cited by the Tribunal. Islamic law is merely cited as an example of the need for interpretation, not as the preferred system for Malaysia. See speech of Tun Salleh Abas, Jan. 12, 1988, reprinted in *Malayan Law Journal*, March 25, 1988, p. *xxxii*.

Allegation 3 concerned the case adjourned *sine die*. According to the Tribunal, the Lord President had "departed from the usual practice" by adjourning the case indefinitely and concluded that this "discriminatory treatment meted out" by the Lord President was "deliberately done for extraneous considerations."[172] The Tribunal did not state what these considerations were, although the Tribunal appeared to emphasize that Salleh was improperly supporting Islam in his legal decisions.[173]

Salleh, in his statement after the Tribunal's decision, argued that under the circumstances -- the appellant had not yet received leave to appeal from the High Court -- it was normal to adjourn the hearing without setting a definite date and that the courts grant such adjournments frequently.[174]

Allegation 4 concerned the March 25 letter to the Rulers. The Tribunal concluded that Salleh's claim in the letter that it came from "all the judges" in the country was an "untruth." The Tribunal continued: "This was not a mistake or an accidental slip... since as Lord President he knew full well that the number of judges in Kuala Lumpur [where the judges at the meeting were from] is less than half the number of judges in the country." Salleh did this, according to the Tribunal, to ensure that what he submitted would carry greater weight. Even if it were proper for the Lord President to have written the letter, he "should have presented the facts to [the King] in good faith and frankness instead of basing his representations on certain facts which were untrue."[175] Thus, the letter was likely to "give rise to at least some degree of unpleasantness" among the Rulers, the executive and the judiciary.[176]

Allegation 5 concerned Salleh's May 29 statements to the BBC after his suspension. The Tribunal decided that the "crucial matter" in this allegation was whether the Lord President was correct to tell the BBC that he had been unjustly removed for his handling of the UMNO cases. The accuracy of the Lord President's statement relied, according to the Tribunal, on what had been said at the May 27 meeting between the Prime Minister and the Lord Presi-

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172. See Tribunal Report, supra note 110, pp. 42-43.

173. This view is buttressed by the fact that the court merged its decision in Allegation 3 with the sub-charge in Allegation 2 regarding the January 12, 1988 speech.

174. According to Salleh, an adjournment *sine die* permits either of the parties at a later time to request that the court fix a specific date. He noted that since the adjournment in the case at issue, neither party had asked for the appeal to be restored. Tun Salleh Abas, "A Man Wronged," *Aliran Monthly*, no. 6, 1988, pp. 27-28.

175. Tribunal Report, supra note 110, pp. 44-46.

176. *Id.* at 46. According to Salleh, Chief Justice Hamid, who presided over the Tribunal, was at the meeting of the judges and never raised objections to sending the letter. Press Statement of Salleh, Aug. 15, 1988.

dent. The Chief Secretary to the Government testified before the Tribunal th
he could not recall whether the Prime Minister had referred to the UMN
cases during the meeting. The Chief Secretary also said there was no mentio
of it in the notebook that he used to jot down the conversation.[177] Without ev
asking to examine the Chief Secretary's notebook, the Tribunal concluded tha
there was "no evidence that any reference whatsoever was made to the UMN
cases" at the May 27 meeting. Therefore, Salleh's BBC statement was found t
have been made "with a view to politicizing the issue of his suspension and t
gain public sympathy for himself."[178]

As the basis for making its recommendation to the King, the Tribunal ap
plied article 125(3) of the Constitution, which states that a Federal Court judg
may be "removed on the ground of misbehaviour or inability, from infirmity o
body and mind or any other cause, properly to discharge the functions of hi
office." The Tribunal adopted a "broad definition" of misbehavior that include
"unlawful conduct or immoral conduct such as bribery, corruption, acts don
with improper motives relating to the office of a judge which would affect th
due administration of justice or which would shake the confidence of the publi
in a judge."[179]

The Tribunal unanimously concluded that on the basis of the allegations se
out by the Prime Minister, the Lord President was guilty of both misbehavio
and "any other cause" that rendered him "unfit to discharge properly" the
function of the Lord President of Malaysia.[180] The Tribunal recommended to
the King that Salleh be removed from office both as a judge and as the Lord
President.[181]

As a final note, the Tribunal regretted the Lord President's decision not to
appear at the hearing "[e]ven though every reasonable opportunity was afforded
him." The Tribunal contended that it had to rely only on the "unchallenged and
uncontradicted material placed before us," and that had the Tribunal received
a "plausible explanation" from the Lord President, "our decision may well have
been different."[182]

The impact of the decision was quickly felt in the legal community. Former
Bar Council President Param Cumaraswamy stated: "What is very glaring is

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177. For a transcript of this exchange, see Tribunal Report, supra note 110, vol. IV, pp. 19-20.

178. *Id.* pp. 47-48.

179. *Id.* p. 49.

180. *Id.*

181. *Id.* pp. 50-51.

182. *Id.* p. 51.

that we have now awakened to the reality there there is no security of tenure for judges, especially a Lord President."[183] Another lawyer concluded after Salleh's dismissal that the government had only to "chop off the head" to teach the rest a lesson: "From now on, the judiciary will be cowed."[184]

The Lawyers Committee concludes that the Tribunal's analysis, in light of its composition and procedures followed, demonstrates that the Tribunal was not an impartial body. The Tribunal distorted the meaning of evidence presented and ignored other pertinent information, including, for example, the Tribunal's analysis of the January 12 speech, the judges' letter to the King and Salleh's statements to the BBC. The Lord President's affidavit, submitted to the tribunal with extensive appendices, is neither discussed nor included in the Tribunal Report. The Tribunal also failed to adequately examine the witnesses produced, yet drew broad conclusions from their limited statements. Only four witnesses testified before the Tribunal. Also, the Tribunal adopted a standard of misconduct so broad as to justify the removal of any judge willing to exercise his or her right to freedom of expression. In sum, the Tribunal did not articulate adequate grounds for concluding that Lord President Salleh was unfit for holding office. The Tribunal admitted that its recommendation might have been different had Salleh agreed to appear, an alarming admission given the severity of the charges and the Tribunal's purported role as a fact-finding, not a prosecutorial, body.[185]

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183. "Objections Overruled," *Far Eastern Economic Review*, July 21, 1988, p. 12.

184. "Judgement Week," *Far Eastern Economic Review*, Aug. 18, 1988, p. 23.

185. Geoffrey Robertson, Q. C. noted: "In a matter of such gravity, to acknowledge that the man found guilty of misbehaviour may well be innocent is an approach which exhibits a deplorable disregard for proper legal standards of proof." *London Observer*, Aug. 28, 1988.

IX. THE CASE AGAINST THE FIVE JUDGES

On July 5, 1988, a month before the Salleh Tribunal handed down its ruling, acting Lord President Hamid, with the approval of the Prime Minister, made allegations of misbehavior against five members of the Supreme Court. A second tribunal (the Second Tribunal) was convened and hearings were conducted on these charges. In October 1988, two of the judges were dismissed; the other three were reinstated. The charges brought by the government and the Second Tribunal's decision is further evidence that the government acted to undermine judicial independence in Malaysia.

A. Prelude to the Second Tribunal

As set out in the previous section, the July 2 decision of the High Court to again postpone its ruling on Salleh's motion seeking a stay of the Tribunal's proceedings led Salleh to seek interlocutory relief in the Supreme Court. That day, five Supreme Court judges convened an emergency sitting of the Court. Among them were Judge Tan Sri Haji Wan Suleiman, who had postponed a scheduled sitting of a three-judge Supreme Court panel in Kota Bharu, and Judge Datuk George Seah, who joined Judge Suleiman in Kuala Lumpur in expectation of an emergency sitting. The other three judges participating were: Judge Tan Sri Azmi Kamaruddin, Judge Tan Sri Eusoffe Abdoolcader and Judge Tan Sri Wan Hamzah Mohamed Salleh.[186]

Four Supreme Court judges were not present for the emergency sitting, most notably acting Lord President Hamid. According to Judge Suleiman and the other judges participating, Hamid was not notified because as the head of the Salleh Tribunal, he was an interested party in the proceedings.[187] Hamid nonetheless learned of the special sitting and told the chief registrar to keep the

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186. See In the Matter of a Reference Under Article 125(3) and (4) of the Federal Constitution and in the Matter of Y.A. Tan Sri Wan Suleiman bin Pawan Teh, et al., Sept. 23, 1988 [hereinafter Second Tribunal Report], p. 88.

187. See *id.*, p. 98. Testified Suleiman, "I could not very well ask him 'whether I can sit in Kuala Lumpur to decide on this matter between you and Tun Salleh.' Could I?" *Id.*

courtroom from being used and the Supreme Court seal locked away. He also told the court staff not to participate in the hearing.[188]

Despite Hamid's actions, the five judges gained access to the courtroom and, after hearing the arguments of Salleh's counsel, issued an interim stay enjoining the Salleh Tribunal from submitting a recommendation to the King pending a hearing on the merits. The order was signed by Judge Suleiman as "Presiding Judge," the most senior judge in the absence of the Lord President.[189]

Acting Lord President Hamid wrote to the King on July 5, 1988, complaining of "gross misbehavior" by the five judges. Backed by a letter of consent from the Prime Minister, he called for the removal of the five judges from the bench.[190] That day the King ordered the suspension of the five judges and, as was done in the Salleh case, created a tribunal to investigate the allegations.

B. The Allegations

The accusations against the five judges indicated that the Mahathir government was not concerned with genuine misconduct by the court, but sought to punish the judges for actions adverse to the government. The government charged the five judges with convening a session of the Supreme Court without the permission or knowledge of the acting Lord President and with hearing an application still under review by the High Court. Judge Suleiman was also charged with failing to attend the Kota Bharu sitting of the Supreme Court "without reasonable cause,"[191] and with directing Supreme Court Judges Seah and Harun not to attend the sitting "without good and valid reasons."[192] Judge

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188. See *id.* pp. 71-72; see also, "A divided judgement," *Far Eastern Economic Review*, Oct. 20, 1988, p. 14. Judge Harun, the third member of the Kota Bharu panel with judges Suleiman and Seah, decided to remain there after telephoning acting Lord President Hamid and being told to stay in Kota Bharu. See Second Tribunal Report, supra note 186, p. 105. Judge Hashim, who was in Kuala Lumpur, declined to take part in the sitting. When four Supreme Court judges asked Judge Hashim to be part of a possible special sitting, he declined, saying they were staging a "revolution." *Id.* p. 106.

189. After the acting Lord President, the next most senior judge was the Chief Justice of Borneo, who was also a respondent in the Salleh proceedings and thus was not asked to participate in the special sitting. The registrars present duly sealed the order of the special sitting.

190. See Second Tribunal Report, supra note 186, p. 2. Article 125(3) of the Constitution permits allegations of misbehavior to be filed by either the Prime Minister or the Lord President after consultation with the Prime Minister.

191. *Id.* p. 77.

192. *Id.* p. 78.

Seah was also charged with "failing to perform his duties" at the Kota Bharu hearing scheduled for July 2.[193]

In response to their suspension, the five judges issued a joint statement saying that their actions were in accordance with the law:

> If we had refused to sit on the urgent representation made to us, we would have failed in our duty as judges in our oath to uphold the Constitution and administer justice.... We had to act as we did, and this was primarily on the basis and in view of the fact that the acting Lord President as the first respondent in the proceedings was wholly disqualified from having anything to do with the convening of the session of the Supreme Court that morning.[194]

On August 12, the King, on recommendation of the Prime Minister, appointed six judges to the Second Tribunal. Its members included Supreme Court judge Tan Sri Hashim Yeop Sani, three high court judges, a Supreme Court judge from Sri Lanka and a high court judge from Singapore.[195] Judge Hashim stepped down from the Tribunal after attorneys for the five suspended judges argued that he was a member of the Supreme Court bench that had set aside the judge's stay of the Salleh Tribunal and thus was an interested party. Judge Hashim said he stepped down "to dispel even the remotest appearance of impartiality."[196]

The Second Tribunal, like the Salleh Tribunal, refused the respondents' request for a public hearing.[197] The Second Tribunal also denied the requests from the Malaysian Bar Council and international lawyers organizations to have outside observers watch the proceedings.[198] While the Salleh proceedings had lasted less than two days, the Second Tribunal heard evidence for fifteen. Unlike the earlier tribunal, the respondents participated in the hearing, each represented by his own counsel. On September 26, 1988, after a week's

193. *Id.* p. 123.

194. *The Star*, July 7, 1988.

195. The Second Tribunal judges were: Judge Mark Damian Hugh Fernando, Supreme Court of Sri Lanka; Judge Datuk Edgar Joseph, Jr. High Court of Malaya; Justice P. Coomaraswamy, High Court of Singapore; Judge Datuk Haji Mohamad Eusoff Chin, High Court of Malaya; and Judge Dato' Lamin Haji Mohamed Yunus, High Court of Malaya.

196. *The Star*, Aug. 2, 1988.

197. The Second Tribunal stated that the hearing was closed because witnesses could not be granted immunity, subjecting them to possible civil suits for defamation. Also, it lacked the powers to cite for contempt, making a closed hearing necessary to avoid "the risk of sensationalism, distortion and controversy which might have obscured the real issues." Second Tribunal Report, supra note 186, p. 7.

198. *Id.* pp. 7-8. The international lawyers organizations were LAWASIA and the International Bar Council/Association.

deliberations, the Tribunal submitted its recommendations to the King.

C. The Second Tribunal's Ruling

The Second Tribunal recommended to the King that Judges Suleiman and Seah be dismissed and that the remaining three judges be reinstated. The Tribunal concluded that although it was improper for the judges to have convened the emergency sitting of the Supreme Court, the law was so ambiguous that the action did not constitute misbehavior. However, Suleiman and Seah had committed misbehavior by improperly failing to attend a scheduled sitting of the Kota Bharu court in order to attend the emergency sitting.

It is the view of the Lawyers Committee that the findings of the Second Tribunal, on their face, do not support a finding of misbehavior sufficient to justify the serious penalty of removal. Moreover, the members of the Second Tribunal were effectively chosen by the Prime Minister, although formally named by the King. As in the Salleh proceedings, this raises, at the least, an appearance of impropriety that puts the findings of the tribunal into doubt.

The common charges against each of the five judges were improper action by convening without notifying the acting Lord President and improper action by hearing a case still under review by a lower court. On these charges, the Tribunal held that the allegations had not been established.[199] The Tribunal found that the failure of the judges to inform the acting Lord President of the hearing lacked an "improper motive" because it was "not unreasonable" of them to conclude that the law permitted his exclusion because he was an interested party to the dispute.[200] Thus, while the judges were deemed to have acted without jurisdiction because the sitting was unlawful,[201] there was an insufficient basis for finding judicial misbehavior.[202] Secondly, the Second Tribunal ruled

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199. *Id.* p. 70.

200. *Id.* p. 48.

201. *Id.* p. 69.

202. *Id.* p. 73. The discussion focussed on the Courts of the Judicature Act, 1964, sec. 9(1), which provides: "Whenever during any period, owing to illness or absence from Malaysia *or any other cause*, the Lord President is unable to... perform the duties of his office... the duties shall be performed by the Judge of the Supreme Court having precedence next after him who is present in Malaysia and able to act" [emphasis added]. Cited in Second Tribunal Report, supra note 186, p. 42. The five judges argued that the possible bias of the acting Lord President as an interested party in Salleh's dismissal should be construed as "any other cause" as provided in section 9(1) of the Courts of the Judicature Act. The Second Tribunal determined that while this was a misreading of the statute, there was sufficient ambiguity to make their conclusion "not unreasonable." *Id.* pp. 48 & 73. Thus, misbehavior was not established "beyond reasonable doubt." *Id.* p. 74. The Second Tribunal also ruled out a conspiracy or prior agreement on the part of the five judges to convene without the acting Lord President, which would have also constituted misbehavior. See *id.* pp. 55-60.

that because of the urgency of the matter, the judges did not act improperly by immediately hearing Salleh's application while it was still before the lower court.[203]

Two allegations were brought solely against Judge Suleiman. The first was that he stayed away from the Supreme Court sitting in Kota Bharu without reasonable cause. The second was that he improperly directed the two other judges on the Kota Bharu panel, Judges Seah and Harun, to leave the sitting.[204]

The Second Tribunal determined that Judge Suleiman did not have the authority to cancel the panel in Kota Bharu.[205] It held that under the Courts of Judicature Act, it was "clearly wrong" for a Presiding Judge to cancel, postpone or adjourn a sitting of the court before a commencement of a sitting."[206] In this case, the sitting never actually convened and so the Presiding Judge, had no power to cancel it.[207] The Second Tribunal determined that Judge Suleiman had "no excuse" for not contacting acting Lord President Hamid and asking to be excused from the Kota Bharu panel to convene a sitting in Kuala Lumpur.[208]

The second issue regarding Judge Suleiman was whether his decision to cancel the panel constituted "misbehavior." The Second Tribunal found that his

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203. See *id.* pp. 62-70.

204. See *id.* pp. 77-88.

205. *Id.* p. 112.

206. See *id.* pp. 116-120. The Courts of Judicature Act, sec. 39(2), states that the "Lord President may cancel or postpone any sitting of the Court." Section 38(2) says that "[i]n the absence of the Lord President the senior member of the Court shall preside." See Courts of Judicature Act (1964), secs. 38 & 39, reprinted in Second Tribunal Report, supra note 186, p. 49. The Tribunal found that a judge other than the Lord President can preside only if the judges convene and the Lord President is absent. See Second Tribunal Report, supra note 186, p. 50.

207. See *id.* p. 51. The Bar Council argued that the Courts of the Judicature Act, sec. 9(i), empowers the senior-most judge when the Lord President is absent. In the Bar Council's view, the law is ambiguous as to whether Courts of the Judicature Act, sec. 9(i) applies under sections 38 and 39, allowing the senior judge to cancel or adjourn a hearing in the Lord President's absence. See Press Statement of the Bar Council, October 9, 1988. While the Second Tribunal did not accept this argument in this context, it did cite this ambiguity as a basis for dismissing the general charges against the judges for convening in Kuala Lumpur. The Tribunal dismissed as being without factual basis testimony from former Lord President Tun Mohammed Suffian Hashim that it was common practice for presiding judges to cancel or postpone sittings of the court. Second Tribunal Report, supra note 186, p. 54. The Second Tribunal sought to distinguish between a sitting's being cancelled, postponed and adjourned, only the last of which was deemed permissible. *Id.* pp. 116-120.

208. *Id.* p. 119.

cancellation of his flight from Kuala Lumpur to Kota Bharu, where the panel was scheduled for the following day, was made with an "improper motive." His intention, concluded the Second Tribunal, was that he was "monitoring" Tun Salleh's motion before the High Court in anticipation of a possible appeal. In the view of the Second Tribunal, this was "totally inexcusable especially in view of his status as a Judge of the Supreme Court."[209]

While noting Judge Suleiman's "hitherto untarnished record as a Judge of the Superior Courts of this country for more than twenty years," the Second Tribunal recommended, with one dissent, that his misbehavior was "so serious as to attract the exceptional penalty of removal." But it urged that he should retain his full pension rights.[210]

An additional charge was also brought against Judge George Seah for withdrawing from the Kota Bharu sitting on the instructions of Judge Suleiman. The Second Tribunal concluded that he had acted improperly because he had been notified by Judge Harun, also in Kota Bharu, that acting Lord President Hamid had directed Judge Suleiman to remain in Kota Bharu. Judge Seah had contended that he did not personally confer with Hamid because Hamid was a respondent in Tun Salleh's application for a stay.[211]

The Second Tribunal, with two dissents, found Judge Seah's actions to be "remarkable," concluding that "it is manifestly clear that there was, on these facts, a clear abdication of responsibility and a flagrant disregard of an explicit directive from the acting head of the Judiciary."[212] There was "no reasonable cause" for his absence from the Kota Bharu sitting.[213] The Second Tribunal held that his misbehavior was sufficently serious to recommend his removal to the King: "To hold otherwise," stated the Tribunal "would mean the end of all judicial discipline in the courts of this country -- a prospect so alarming that it

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209. *Id.* pp. 114-15. The Second Tribunal sought to contrast this behavior with earlier actions not deemed misbehavior: participating in the judges' meetings of March 25 and May 27. *Id.* p. 113. The Tribunal found it "difficult to resist the inevitable inference that [Judge Suleiman] was indeed actuated by an improper motive." *Id.* p. 114. His assertion that he could cancel the sitting was not based on an "honest belief." *Id.* p. 117. Writes attorney Hariram Jayaram: If absenting themselves "was misbehavior, there would be no judges spared. Court sittings are postponed regularly although counsel come ready with witnesses to go on with the cases." Hariram Jayaram, Security of Tenure of Judges, from Seminar on the Independence of the Judiciary, Kuala Lumpur, Nov. 4-5, 1988, p. 7.

210. See Second Tribunal, supra note 186, pp. 121-22.

211. *Id.* pp. 123-26.

212. *Id.* p. 126.

213. *Id.*

must at all costs never happen again."[214] As with Judge Suleiman, it was recommended that Judge Seah retain his pension rights.[215]

One member of the Second Tribunal, not identified, dissented from the recommendations to remove Judges Suleiman and Seah. According to the dissent, even if Judge Suleiman had been guilty of misbehavior, removal was not justified. It was argued that Judge Suleiman's record as judge, along with the legal precedents cited and the effect of Judge Suleiman's actions, did not warrant dismissal.[216] In Judge Seah's case, the dissent found no improper motive established by the Tribunal.[217]

The Lawyers Committee finds the mere fact that the Second Tribunal recommended the reinstatement of three of the judges does not prove that it was an impartial panel. Two of the three judges reinstated were scheduled to retire within the year, and so would not be involved in many future decisions. "The Tribunal," said one lawyer, "had to deliver a couple of heads at least."[218]

On October 4, 1988, the King accepted the recommendations of the Second Tribunal and ordered Judges Suleiman and Seah dismissed. The three other Supreme Court Judges were reinstated. After announcing the King's decision to the press, Attorney General Abu Talib expressed relief that "the whole episode is over."[219]

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214. *Id.* p. 131.

215 *Id.* p. 132.

216. *Id.* p. 122.

217. *Id.* pp. 133-36. Another member of the Second Tribunal concluded that Judge Seah's actions amounted to misbehavior, but were not sufficient for removal from office. *Id.* p. 129.

218. Lawyers Committee for Human Rights interview, Oct. 22, 1988.

219. *New Straits Times*, Oct. 7, 1988.

X. THE POST-TRIBUNAL JUDICIARY

The question of judicial independence did not end with the dismissals of the three judges. The important cases that preceded Lord President Salleh's suspension have since been decided in the government's favor. Mahathir appointees who played a role in the suspensions of the judges have filled the empty positions on the Supreme Court. The government has taken actions against the Bar Council that appear to threaten its role as an independent monitor of government activities. There have been further restrictions on judicial review of the ISA. In sum, in Malaysia one can no longer presume an independent judiciary in matters of political importance.

A. The Court Reconvenes

The Supreme Court's adjudication of the UMNO 11 and Karpal Singh appeals under acting Lord President Hamid perhaps reflected the new state of the Malaysian judiciary. On July 19, 1988, while Salleh awaited the decision of the Tribunal and before the Second Tribunal had convened, a Supreme Court panel consisting of acting Lord President Hamid and Judges Harun and Hashim ruled in favor of the government in the *Karpal Singh* case.[220]

Citing *Raja Khalid*, the court ruled that the allegations of fact against Karpal Singh were not open to legal challenge and that the High Court had erred by looking into the cause of his detention. According to the court, the basis for an ISA detention "is something which exists solely in the mind of the Minister of Home Affairs [i.e. Prime Minister Mahathir] and that he alone can decide and it is not subject to challenge or judicial review unless it can be shown *that he does not hold the opinion which he professes to hold*."[221] Karpal Singh

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220. See Minister for Home Affairs, Malaysia & Anor v. Karpal Singh, [1988] 3 M.L.J. 29.

221. *Id.* pp. 31-32 (emphasis added). That is, the High Court had applied an "objective," rather than the prescribed "subjective" test. See *Raja Khalid*, [1988] 1 M.L.J. 182; for a full discussion of the legal basis of preventive detention in Malaysia, see "Habeas Corpus and Preventive Detention in Malaysia and Singapore," 25 M.L.R. 324 (1983).

remained in detention under the ISA until he was conditionally released on January 26, 1989.

On August 8, 1988 the Supreme Court ruled unanimously that the UMNO 11's efforts to revive the old UMNO were unlawful. The decision was written by acting Lord President Hamid, the Chief Justice of Malaya who had replaced Lord President Salleh after the latter's suspension. Hamid had reduced the panel from the nine judges originally set by Lord President Salleh shortly before his suspension, to five judges. Because the Supreme Court was left with only three judges able to hear the case, the panel included two High Court judges selected by Hamid. The Court set aside Justice Harun's February 1988 finding that UMNO as an organization had become unlawful during the period before the 1987 election because of the unregistered branches. Harun had left open the possibility that the way to restore UMNO's lawful status would be for those elected in the 1984 party election to hold new elections. The Supreme Court decision made the original UMNO defunct as an organization, eliminating this possibility.[222] From this point on, control of UMNO shifted from the courts to the political arena.[223]

The government has lost one Supreme Court decision since the suspensions of the judges. In a habeas corpus petition heard in October 1988, the High Court ordered the release of ISA detainee Jamaluddin Othman, who had been arrested for his alleged involvement in a plan to propagate Christianity among Malays. The court ruled that the ISA could not be used to restrict the freedom of religion.[224] In February 1989, the Supreme Court upheld the decision, deciding that one could not be detained under the ISA for professing and practicing one's religion unless the actions "go well beyond" what was "normal" and threaten national security.[225] The opinion, relying on the Raja Khalid decision, does not appear to be a significant restriction on the use of the ISA.

In March 1989 the Supreme Court rejected the habeas corpus applications of DAP member of Parliament P. Patto and Chinese educator Dr. Tuang Pik

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222. See "Judgement Week," *Far Eastern Economic Review*, Aug. 18, 1989, p. 22. Admitted the attorney for the UMNO 11: "The court battle to legalize the original UMNO is over." *The Star*, Aug. 10, 1988.

223. A number of lawsuits concerning UMNO (Baru)'s legal status and assets continue, however. See e.g. *New Straits Times*, Oct. 27, 1988 (newspapers restrained from using term UMNO (Baru) and must use UMNO); *The Star*, Dec. 12, 1988 (on the sale of UMNO assets); *New Straits Times*, Jan. 20, 1989 (UMNO 11 suit to restrain UMNO (Baru) from giving the public the impression that it and the deregistered UMNO are the same).

224. See *New Straits Times*, Oct. 7, 1988. The Constitution at article 11(1) allows a person to profess, practice and, subject to article 11(4), propagate his religion.

225. *The Star*, Feb. 25, 1989.

King on the grounds that they were no longer in detention. Their counsel had argued that the petitions were valid because although the two were physically released from detention, they were still bound to control and supervision under the conditions of their release.[226]

On June 23, 1989, Prime Minister Mahathir introduced amendments to the ISA that removed from judicial review all actions and decisions by the executive in exercising its powers under the act. As a result, the courts are only able to rule on whether the executive complied with the procedural requirements set out in the act when ordering a detention.[227] In support of the amendments, Mahathir told Parliament that, "We will not be able to govern if all our decisions are subject to judicial review." The bill passed Parliament on June 26 with the backing of the Barisan Nasional.[228] According to Bar Council president S. Theivanthiran, "There is no longer any check against abuse of power by the executive."[229]

B. The Government and the Bar

There are indications that the government is seeking to pressure the Malaysian bar from speaking out on issues concerning the judiciary. The Malaysian Bar Council has played a leading role in providing support for the judiciary. It had publicly raised objections to the composition of and procedures followed by the two tribunals. Acting in his individual capacity, its then president, Raja Aziz Addruse represented the Lord President before the Salleh tribunal and in court. In 1988, interest in the plight of the Supreme Court judges was widespread among the bar's membership. When an emergency meeting of the Bar Council was called for July 9, 1988, four days after the suspension of the five judges, more than 1000 of the Bar's 2500 members, forty percent of the lawyers in Malaysia, turned out for the meeting.

As a result of the meeting, the Bar Council issued a statement charging that acting Lord President Hamid had "interfered in the administration of justice and had committed contempt of court" in recommending to the King that the five Supreme Court judges be suspended. The statement called for the

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226. See *The Star*, March 8, 1989. The High Court in Penang had rejected Karpal Singh's habeas corpus petition on similar grounds. See *New Straits Times*, Jan. 31, 1989.

227. Bernama, June 23, 1989, reprinted in FBIS, June 26, 1989, p. 36.

228. Hong Kong AFP, June 26, 1989, reprinted in FBIS, June 27, 1989, pp. 36-37. Mahathir said the ISA would be used against those inciting racial violence: "If we have no peace we have no democracy." *Id.*

229. See "Appeal no more," *Far Eastern Economic Review*, July 6, 1989, p. 19.

reinstatement of the judges and for Hamid to resign. All members of the legal community were urged to stand firm in the face of the affront to the independence of the judiciary.[230] "Lawyers aren't always so emotional," said a lawyer from Kuala Lumpur at the time, "but they feel that on this case depends the independence of the judiciary."[231]

The government appeared ready to take action against the bar for its public criticisms of Hamid. Two days after the Bar Council meeting, the government gave the Council's Selangor and Federal Territory chapter three weeks to move out of its office in a government-owned building.[232] On July 14, 1988 roughly 50 members of UMNO (Baru) Youth conducted a march from the Kuala Lumpur courthouse where the Supreme Court was sitting to the Bar Council office. Although the protest was peaceful, the demonstrators shouted and waved placards bearing the words "Traitor Lawyers" and "Traitor Bar" and some attempted to get into the Bar Council building. The demonstrators were assumed to have had the support of their leader, Datuk Najib Tun Razak, the Minister for Youth and Sports. Najib's assistant told the *Far Eastern Economic Review* that the UMNO (Baru) Youth wing was protesting against the Bar Council's call for the resignation of Hamid and the reinstatement of the five judges. He believed that the lawyers' demands were a slur on the sovereignty of the King.[233]

The government also responded to the bar's actions in several statements to the press. Said Education Minister Anwar Ibrahim, "This is something we expected. When was the last time the Bar Council or the lawyers as a group supported a government action? They have never supported the government

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230. *The Star*, July 10, 1988. Criticism of the government's actions was not limited to the bar. Social reform groups, such as Aliran, have been particularly critical. See e.g. "Judiciary in Crisis," *Aliran Monthly*, no. 5, 1988. The Sultan of Perak, Azlan Shah, a former Lord President, is said to have been among the Rulers unhappy with Mahathir's treatment of the judges. See "A Most Radical Measure," *Far Eastern Economic Review*, April 14, 1988. Azlan's criticism may have delayed his ascension to the throne on April 26, 1989 although he was expected to be King according to Malaysia's rotational system. See Bernama, April 26, 1989, reprinted in FBIS, April 26, 1989, p. 50; see generally "A judge as king," *Far Eastern Economic Review*, Jan. 26, 1989, p. 20.

231. "A Blitz of Legal Manoeuvres," *Asiaweek*, July 22, 1988, p. 22. Not all lawyers objected to Salleh's dismissal and the censure of Hamid: The Malaysian Muslim Lawyers' Association, with a small but vocal membership of a dozen lawyers, criticized the call for his resignation as showing "utter disrespect to Tan Sri Hamid as head of the judiciary." See *New Straits Times*, Oct. 14, 1988. For another dissenting view from the bar, see Shakuntala Devi Sharma, "Who Started It All," from Seminar on the Independence of the Judiciary, Kuala Lumpur, Nov. 4-5, 1988.

232. See "Objections overruled," *Far Eastern Economic Review*, July 21, 1988, p. 12.

233. See "Boo-boys against the bar," *Far Eastern Economic Review*, July 28, 1988.

on any issue."[234] Penang State Executive Councillor Ibrahim Saad felt that the lawyers' response was a result of their training, a complaint previously raised by others in the executive branch: "The legal system is probably the last remnant of a colonial mentality," he said. "The judges and lawyers are all English-educated and out of line with changing local aspirations."[235]

Acting Lord President Hamid dismissed the contentions against him. He said that in the future the two Chief Justices would scrutinize the character of any person wanting to practice law. This needed to be done, he said, "in view of recent developments which has [sic] called into question the behavior, character and personal integrity of some lawyers." He added that "it is the responsibility of the Chief Justice to ensure that lawyers do not possess unbecoming behavior."[236]

There is apprehension among members of the legal community that the government has now turned its attention to restricting the bar. In October 1988, Prime Minister Mahathir criticized the Bar Council for its involvement in the judges affair. He said that he was concerned that there was a backlog of 300,000 cases before the courts and that the bar should be addressing this issue. In his view, the Bar Council itself was one of the reasons for the backlog: "When there is a hearing, the council members ask for a postponement because they want to attend parliamentary or state assembly sittings. They give more attention to their political role."[237] Perhaps referring to the Bar Council's no-confidence vote against acting Lord President Hamid, the Prime Minister said that the Bar Council "directed its members to be in court to boo judges. This is the type of lawyers we have in Malaysia now."[238]

In April 1989, the Bar Council and ex-Judge Suleiman filed an action for contempt of court against Hamid, who by this time has been formally elevated to Lord President. It charged Hamid with attempting to block the July 2, 1988 emergency sitting of the Supreme Court. On April 30, the court denied the application, primarily on the grounds that the July 1988 sitting was not lawful, as only the Lord President can convene a sitting.[239] On May 18, the Attorney General filed a suit seeking contempt of court charges against Manjeet Singh,

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234. "A Blitz of Legal Manoeuvres," *Asiaweek*, July 22, 1988, p. 22.

235. *Id.*

236. *The Star*, Aug. 14, 1988. In October 1988, the Bar Council renewed the call for Hamid's resignation, saying that he had attempted to block the July 2 sitting of the Supreme Court. See Statement of Bar Council, Oct. 9, 1988.

237. *New Straits Times*, Oct. 31, 1988.

238. *Id.*

239. See "Out of Order," *Far Eastern Economic Review*, May 11, 1989.

the Secretary of the Bar Council, on the basis of statements in his affidavit submitted in the case against Hamid. In December 1989, the applications of 315 lawyers -- including many past chairmen of the Bar Council -- to be joined as parties to the contempt proceedings were also adjourned indefinitely by the Supreme Court. To date, a hearing on the substantive charges has not been held.

C. The Future of Judicial Independence

On November 11, 1988, the Conference of Rulers approved Prime Minister Mahathir's appointment of Abdul Hamid as Lord President.[240] Effective January 1, 1989, High Court judges Ajaib Singh, who had heard Salleh's petition for a stay of the Tribunal, and Datuk Gunn Chit Tuan were elevated to the Supreme Court.241 On January 27, 1989, Hamid's position as Chief Justice of Malaya was filled by Supreme Court Judge Hashim, who the previous August had stepped down as chairman from the Second Tribunal.[242]

In January 1989, Hamid announced that a committee would be established to prepare a draft code of ethics for judges and to hear complaints of judicial misconduct. The committee was to be comprised of the Lord President and the Chief Justices of Malaya and Borneo.[243] To date, there have been no further public announcements concerning this code of ethics.

Prime Minister Mahathir has defended the decisions of the tribunals and, by implication, the charges brought against the judges. In September 1988, before the Council of Foreign Relations in New York, he stated: "The latest supposed evidence cited as proof that Malaysia is coming towards a dictatorship is the dismissal by the King of the Lord President." He continued:

> The Malaysian Government has no power to remove a judge. Only judges sitting as a Tribunal can recommend the removal of a judge to the King.... It is ridiculous to suggest that eminent judges, particularly from foreign countries, would allow their names to be besmirched in order to promote the interest of a Prime Minister of a foreign country.[244]

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240. See Bernama, Nov. 19, 1988, reprinted in FBIS, Nov. 21, 1988, p. 27.

241. *New Straits Times*, Jan. 1, 1989.

242. Bernama, Jan. 28, 1989, reprinted in FBIS, Jan. 28, 1989, p. 25.

243. *The Star*, Jan. 29, 1989.

244. Speech by Prime Minister Mahathir before the Council on Foreign Relations (New York), Sept. 30, 1988, as released by the Embassy of Malaysia. Attorney General Talib denied charges that the suspensions of the judges would have a deleterious effect on the judiciary in Malaysia. "The business of the court will continue," he affirmed. "The process of law will go on." See "A Blitz of Legal Manoeuvres," *Asiaweek*, July 22, 1988, p. 22.

The Mahathir government's actions against the judiciary are likely to have far ranging effects on the rule of law in Malaysia. Before mid-1988, the judiciary was able to provide a limited, but important, check on the power of the executive branch. Today, the restraint on government power provided by an independent judiciary is effectively eliminated. Stated social activist Chandra Muzaffar: "The Parliament, the judiciary and the royalty have been forced to surrender their powers gradually to the executive, which has emerged as the dominant group to which everything else in the country is subservient."[245]

245. See "A Blitz of Legal Manoeuvres," Asiaweek, July 22, 1988, p. 22.

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