

**“HISHAMUDIN YUNUS:**  
**CELEBRATING JUDICIAL INDEPENDENCE”**  
**SPECIAL ADDRESS**

**By:**

**The Right Honourable Chief Justice**

**Of The Federal Court Of Malaysia**

**Tan Sri Datuk Seri Panglima Richard Malanjum**

**Delivered On**

**8 November 2018 At The Hilton, Kuala Lumpur**

**In Conjunction With The 25<sup>th</sup> Anniversary Of**

**Messrs. Lee Hishammuddin Allen & Gledhill**

**Salutation:**

1. Salam sejahtera.
2. Menghadap Kebawah Duli Yang Maha Mulia ('DYMM') Yang di-Pertuan Besar Negeri Sembilan Darul Khusus, Tuanku Muhriz Ibni Almarhum Tuanku Munawir.
3. Ampun Tuanku, beribu-ribu ampun, sembah patik mohon diampun.
4. Patik menjunjung setinggi-tinggi kasih atas sudi perkenan DYMM Tuanku berangkat mencemar Duli ke Majlis yang mulia ini. Sesungguhnya keberangkatan DYMM Tuanku telah menyerikan lagi majlis pada hari ini.
5. Ampun Tuanku, patik seterusnya memohon limpah perkenan DYMM Tuanku untuk meneruskan ucapan patik dalam Bahasa Inggeris.

- i. Yang Amat Mulia Tunku Besar Seri Menanti, Tunku Ali Redhauddin Ibni Tuanku Muhriz;
- ii. YB Dato' Mohammad Ariff Bin Md Yusoff, Speaker of Dewan Rakyat;
- iii. The Right Honourable the President of the Court of Appeal, Chief Judge of Malaya and Chief Judge of Sabah and Sarawak;
- iv. Honourable Judges;
- v. Your Excellencies High Commissioners and Ambassadors;
- vi. The Honourable Chairman of the Election Commission;
- vii. The Honourable Chairman of Securities Commission;
- viii. Yang Amat Mulia Tunku Zain Al'Abidin Ibni Tuanku Mukhriz;
- ix. President of Malaysian Bar, members of the Bar;
- x. Distinguished guests, ladies and gentlemen.

6. It is indeed a great privilege for us this afternoon to be accorded the presence of DYMM Tuanku Muhriz. It is a testament of the importance of this occasion, that is the launching of a book that radiates the true spirit and one of the elements of justice, namely judicial independence. As such I can do no better than echo what was said by DYMM Tuanku in the Foreword of this book entitled: '**Celebrating Judicial Independence**'. Its contents are not merely the compilation of learned judgments of Dato' Seri Hishamudin Yunus or Hisham as he is fondly known. It is how the legal principles in those judgments have been explained and proved relevant in our daily lives by the various contributors. For that Hisham and the contributors deserve an applause.
7. I must also first thank Messrs. Lee Hishammuddin Allen & Gledhill for inviting me to deliver this special address. Congratulations are in order for its 25<sup>th</sup> anniversary and signified by the launching of this book.
8. Before indulging into the concept of judicial independence, it is only fitting that I should first speak of the person himself that is Hisham. Do not be misled by the quiet and shy nature of the

person. To Hisham his principle is: ‘Let justice be done though the heavens fall’. And indeed sadly, the heavens were often shielded from Hisham while with the Judiciary. But of late, the heavens are smiling on him unimpeded. Better late than never!

9. Hisham in one media interview was asked: ‘[w]hat is the most important foundation stone for a judiciary to mete justice in a democracy?’<sup>1</sup> His answer was simple and quick: ‘*a truly independent judiciary*’.
  
10. And to Hisham ‘the existence of dissenting judgments is one of the hallmarks of an independent judiciary.’<sup>2</sup> To him ‘it is the moral and constitutional duty of a judge to dissent if he strongly feels that he does not agree with the majority decision. He has no option. It would be dishonest of him if he were to just go along with the majority decision, in spite of his conviction, just for the sake of convenience or expediency.’<sup>3</sup> Hisham walked the talk in the case of **North East Plantations Sdn Bhd v**

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<sup>1</sup> Shaila Khoshy and M. Mageswari, ‘One must consider the spirit of the law’ *The Star Online*, 20 September 2015  
<<https://www.thestar.com.my/news/nation/2015/09/20/1988-assault-on-our-judiciary-was-a-judicial-nightmare/>>

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid*

**Pentadbir Tanah Daerah Dungun & Anor**,<sup>4</sup> when he dissented and said this:

*'I cannot allow the court to be a mere helpless bystander where an act of injustice stares you in the face.'*

11. What then is judicial independence? As simply put in the **Brexit** case,<sup>5</sup> it means 'the Judiciary is to uphold and further the rule of law; more particularly, judges impartially identify and apply the law in every case brought before the courts.'
  
12. In our country, notwithstanding Article 121(1) and its pontification by the majority judgment in **Public Prosecutor v Kok Wah Kuan**<sup>6</sup> (with the minority voice firmly ignored for protesting that judicial independence is vital for the survival of democracy) today it has finally been accepted by our Federal Court in the cases of **Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat**<sup>7</sup> and **Indira Gandhi a/p Mutho v**

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<sup>4</sup> [2011] 2 CLJ 392.

<sup>5</sup> *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, at paragraph 42.

<sup>6</sup> [2007] 5 MLJ 174

<sup>7</sup> [2018] 1 MLJ 545.

**Pengarah Jabatan Agama Islam Perak & Ors**<sup>8</sup> that judicial independence is part and parcel of the basic structure of our Federal Constitution.

13. And as rightly pointed out by Hisham in the preface of this book judicial independence includes freedom from external and internal influences. That is why it must be well understood by all, including the governors and the governed, that superior court judges in this country are not civil servants. They are appointed by DYMM the Yang Di-Pertuan Agong and paid salaries from the Consolidated Fund. Given therefore that standing, in their judicial performance judges should never be ‘more executive-minded than the executive’.<sup>9</sup>

14. Before the advent of the internet and its by-products such as the social media I would think that the life of a judge was quite relaxed. It was not easy to make viral any negative comment on a judgment or behaviour of a judge or to discuss the outcome of a case before the delivery of judgment. Today it is no longer possible for judges to be completely insulated from

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<sup>8</sup> [2017] 3 MLJ 561.

<sup>9</sup> Per Lord Atkin in *Liversidge v Anderson and Another* [1941] 3 All ER 338, at page 361.

external opinions, comments and remarks on cases they may be deliberating. So it is therefore up to individual judges to resist and desist the effects of these external influences upon them before making their judgments.

15. Take the case of Hisham himself. In his preface, he recounts that he faced external pressure when he decided **Abdul Ghani Haroon v Ketua Polis Negara & Another**.<sup>10</sup> After granting *habeas corpus* to two Internal Security Act ('ISA') detainees he further ordered that they were not to be re-arrested within 24 hours of their release. This caused members of the Executive to publicly lambast his decision. But Hisham was not moved. Such was the mental strength and moral stand of the man that the Judiciary must be independent. Promotion was not in the equation.
16. Hisham reminds us of the late Justice HR Khanna of the Supreme Court of India who stood against the onslaught by the administration of Indira Gandhi during the Emergency period of India. While the majority of the Supreme Court held that a detainee could not avail himself of the remedy of *habeas*

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<sup>10</sup> [2001] 3 CLJ 606.

*corpus* during the emergency, Justice Khanna dissented. That of course denied Justice Khanna of the Chief Justiceship of India and led him to resign. But he did not care and today his name is worth mentioning, something which would not have been if he simply went along with the majority.<sup>11</sup>

17. Judicial independence also involves independence from one's colleagues. It would be very unfortunate when judicial majorities muzzle or attempt to muzzle the minorities. And if the minorities then remain silent on the pretext of maintaining judicial harmony that would be the end of judicial independence.<sup>12</sup>

18. Another factor, which may be an external or internal threat to judicial independence is greed. When greed knocks at the door of the chambers of a judge, justice and judicial independence fly out of the window. It is therefore important for judges never to entertain the knock. For one day it might be the knock of MACC.

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<sup>11</sup> Additional District Magistrate, Jabalpur vs. S. S. Shukla Etc. (1976) AIR 1207

<sup>12</sup> Dyson Heydon, *Threats to Judicial Independence – The Enemy Within*, Lecture delivered on 23 January 2012.  
<[https://d17g388r7gqnd8.cloudfront.net/2017/08/lecture\\_dyson.pdf](https://d17g388r7gqnd8.cloudfront.net/2017/08/lecture_dyson.pdf)>.

19. In celebrating judicial independence, it must not be overlooked that it could also be abused for ulterior motives. A judge may invoke his right to judicial independence in not performing his duty or not keeping to his schedules. A judge may even ignore the administrative instructions of his superior on account of judicial independence. Worse still, he may ignore the concept of *stare decisis* or binding precedent.
20. But of course decisions of the higher courts should not be blindly followed by the lower courts for some may be completely wrong and unlawful. That was what Hisham did in the case of **Dato' V Kanagalingam v David Samuels & Ors.**<sup>13</sup> In refusing to follow the decision of the Federal Court which he viewed as having been improperly constituted thus resulting in its purported orders issued invalidly, he ruled that the law was as propounded by the Court of Appeal. As such the defamation claim by the plaintiff was held to be baseless.
21. Hence, to whether judicial independence is utilised and defended properly by a judge reverts to the issue of appointing the right person to the Bench. Pick the wrong person and

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<sup>13</sup> [2006] 3 CLJ 909.

judicial independence may become his or her tool rather than a shield. The Indian judiciary experienced it in the Justice Karnan episode.<sup>14</sup>

22. In the name of judicial powers and independence Justice Karnan of the Calcutta High Court literally went on a rampage against his colleagues, issued contempt proceedings against the Chief Justice of the Madras High Court and accused the Justices of the Indian Supreme Court for corruption in his letter to the Prime Minister, Narendra Modi. He ignored his transfer order to another High Court. He also managed to evade arrest for contempt of court for a while. But, ran as he did, Justice Karnan was ultimately apprehended and locked up in prison finally bringing the embarrassing episode to an end.

23. Thus, having briefly discussed above the concept of judicial independence I would say that in the final analysis for the concept to thrive, a judge must have the sense of justice and common sense to begin with when dispensing justice. If he is a

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<sup>14</sup> Prabhash K Dutta, 'Curious Case of Justice Karnan: A History of Controversies and Mystery' *India Today*, 1 May 2017 <<https://www.indiatoday.in/india/story/justice-cs-karnan-calcutta-high-court-supreme-court-974613-2017-05-01>>.

robotic minded person oblivious of his environment and its realities, then the concept becomes meaningless.

24. Thank you for listening.
25. Ampun Tuanku, patik sekali lagi, menjunjung setinggi-tinggi kasih atas sudi perkenan DYMM Tuanku berangkat mencemar Duli ke majlis yang mulia ini.
26. Sesungguhnya keberangkatan DYMM Tuanku akan menjadi kenangan yang terindah buat patik sekalian.
27. Patik sekalian mendoakan semoga DYMM Tuanku dan DYMM Tunku Ampuan Besar Negeri Sembilan Darul Khusus, Tuanku Aishah Rohani binti Almarhum Tengku Besar Mahmud, serta putera-putera sentiasa dikurniakan Tuhan dengan kesejahteraan dan dilanjutkan usia zaman pemerintahan di atas takhta kerajaan Negeri Sembilan dengan adil serta kebijaksanaan.
28. Menjunjung kasih Tuanku.