malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

Harun SCJ conducted a thorough examination of the events of 1988 and concluded that the Lord President had not been in contempt because the special sitting was unlawful; he held that the Resondent's criticisms were defamatory; the Bar may well have been in contempt for stirring up publicity about events but it was not on trial; but the Respondent was not in contempt because the Lord President had not been acting in his judicial capacity. (Why the "mere abuse" he found had occurred did not fall into the first class of contempt in *R v Gray* is anybody's guess; but perhaps it needs to be remembered that this was the judge who in 1987 declared the Prime Minister's political party, UNMO, an illegal organisation and who subsequently was supported by the Bar in the face of vigorous political attack. It is perhaps ironic that he received the honour Tan Sri on the King's birthday which fell during this trial.)

Comment:

The "muddle" is to be found in:

1. The difficulty in characterising the alleged contempt as falling into one or other or both of the classes identified in *R v Gray*;
2. The uncertainty over the mental element or intention required for either or both classes;
3. The basis for finding a relevant guilty intention;
4. The conflict over whether or not justification could be a defence;
5. The doubt about whether the offended judge must have been acting in a judicial capacity - and what that means.

Overshadowing the propositions advanced in all judgments is an even more sinister feature: the "local circumstances" held (without more) to require "a stricter view of matters pertaining to the dignity of the court "(in the words of Yusoff SCJ). The qualification comes from section 3 of the *Civil Law Act*, 1956 which applied to Malaysia the common law of England as it was on 7 April, 1956 "subject to such qualifications as local circumstances render necessary". The phrase seems to have been regarded by the Court as giving it licence to make up its own mind, without evidence or argument, about:

1. what local circumstances are relevant;
2. how they are to be interpreted; and
3. what influence they will have on the application of the common law.

In fact, they (whatever they were) were regarded as requiring an even greater restriction on free speech - guaranteed under the Constitution - than contempt law already imposed.

Questions:

What action, if any, will the Attorney-General now take against the Malaysian Bar, or against Manjeet Singh Dhillon, its Vice-President?

What do the judgments (and the manner of their preparation and delivery) say about the independence of the judiciary in Malaysia?

What do the judgments say about the future of the rule of law in Malaysia? Just what are the "local circumstances" in Malaysia?

How secure is the future and the independence of the Malaysian Bar?

We should watch for the answers. ❑

Resiling with (Some) Dignity

"The language of the Selective Service Act can be interpreted consistently with this history of our international contentions. I think the decision of the Court today does so. Failure of the Attorney General's opinion to consider the matter in this light is difficult to explain in view of the fact that he personally had urged this history upon this Court in arguing Perkins v. Elg, 307 US 25 83 L ed 1320 59 S Ct 884. Its details may be found in the briefs and their cited sources. It would be charitable to assume that neither the nominal addressee nor the nominal author of the opinion read it. That, I do not doubt, explains Mr. Stimson's acceptance of an answer so inadequate to his questions. But no such confession and avoidance can excuse the then Attorney General.

Precedent, however, is not lacking for ways by which a judge may recede from a prior opinion that has proven untenable and perhaps misled others. See Chief Justice Taney, License Cases (US) 5 How 504, 12 . L ed 256, recanting views he had pressed upon the court as Attorney General of Maryland in Brown v. Maryland (US) 12 Wheat 419, 6 L ed 678. Baron Bramwell extricated himself from a somewhat similar embarrassment by saying, "The matter does not appear to me now as it appears to have appeared to me then." Andrews v. Styrap (Eng) 26 LT NS 704, 706. And Mr. Justice Story, accounting for his contradiction of his own former opinion, quite properly put the matter: "My own error, however, can furnish no ground for its being adopted by this Court ... " United States v. Gooding (US) 12 Wheat 460, 478, 6 L ed 693, 699. Perhaps Dr Johnson really went to the heart of the matter in his dictionary - "Ignorance, sir, ignorance." But an escape less self-depreciating was taken by Lord Westbury, who, it is said, rebuffed a barrister's reliance upon an earlier opinion of his Lordship: "I can only say that I am amazed that a man of my intelligence should have been guilty of giving such an opinion." If there are any other ways of gracefully and good naturedly surrendering former views to a better considered position, I invoke them all." ❑

(Justice Jackson concurring in McGrath v. Kristensen (1950) 340 US 176-178)