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# REMOVAL OF JUDGES - THE AUSTRALIAN EXPERIENCE

> "[I]t behoves those who know the history of the judiciary, the nature of its functions and the perils of disturbing essentials, to alert those who would change things about the fragile and precious nature of the institution involved. Parliamentary democracy and an independent judiciary safeguarding the rule of law are the twin pillars of Australian constitutional life. They provide a brilliant symbiosis which has generally served the community well. It would be a great misfortune if, through legislative indifference and Executive over-enthusiasm, the critical balance provided by the judicial branch of government were significantly impaired."
>
> The Hon. Justice M.D. Kirby (1990)
> 13 *UNSWLaw Journal* 187, at p. 211

## I. INTRODUCTION

THE crisis which convulsed the Malaysian judiciary in 1988 is well documented.[1] The removal of the Lord President[2] and two other senior judges[3] of the Supreme Court of Malaysia provoked an international outcry. These judges were removed by the purported operation of a special mechanism provided in Article 125(4) of the Malaysian Constitution. If the Prime Minister, or the Lord President after consulting the Prime Minister, represents to the King that a judge of the Supreme Court ought to be removed, the King shall appoint a tribunal and refer the representation to it, and may on the recommendations of the tribunal remove the judge from office.[4] In other

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1 See, *e.g.*, R.H. Hickling, [1989] *Public Law* 20; F.A. Trindade, (1990) 106 L.Q.R. 51; A. Harding, (1990) 39 I.C.L.Q. 57; H.P. Lee, (1990) 17 M.U.L.R. 386; H.P. Lee, (1990) 15 *Bulletin of the Australian Society of Legal Philosophy* 43; Tun Salleh Abas, *The Role of the Independent Judiciary* (The Sir John Foster Gallaway Memorial Lecture) (1989). The crisis also spawned a number of books: Tun Salleh Abas with K. Das, *May Day for Justice* (1989); Peter Aldridge Williams, *Judicial Misconduct* (1990); Raja Aziz Addruse, *Conduct Unbecoming* (1990); K. Das, *Questionable Conduct* (1990).

2 *Report of the Tribunal Established under Article 125(3) of the Federal Constitution: Re: Y.A.A. Tun Dato' Hj. Mohamed Salleh Abas* (1988).

3 Tan Sri Wan Suleiman and Datuk George Seah were dismissed. Three other suspended Supreme Court judges were reinstated.

4 The removal must be based on the prescribed "ground of misbehaviour or of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office."

words, the Malaysian Constitution provides for a "tribunal" mechanism for the removal of the judges of the Supreme Court of Malaysia.[5]

In his article "The Removal of the Malaysian Judges",[6] Professor F.A. Trindade said:

> The choice and composition of the two Tribunals, the procedures followed by them (particularly by the Tun Salleh Tribunal) and the broad definition of judicial 'misbehaviour' adopted by those Tribunals might well have left those judges who have been removed with the distinct feeling that these matters should be spelt out in greater detail and that Article in its present form is not the safeguard for judges that it was intended to be. This constitutional provision needs to be looked at again by those concerned with constitutional matters in Malaysia.[7]

It is instructive at this point to highlight the salient features of the "Tun Salleh Tribunal" which have evoked widespread condemnation.[8] Objections were taken against the composition of the tribunal and its rules of procedure but to no avail. Regarding its composition, the tribunal was chaired by Tan Sri (now Tun) Abdul Hamid who was then the Chief Justice (Malaya). The other members were: Tan Sri Lee Hun Hoe (Chief Justice, Borneo); Ranasinghe C.J. (Chief Justice of Sri Lanka); Sinnathuray J. (a Judge of the Singapore Supreme Court); Tan Sri Abdul Aziz (a retired Judge of the then Federal Court of Malaysia); and Tan Sri Mohd. Zahir (a retired Judge of the High Court of Malaya).

Abdul Hamid C.J. clearly should not have accepted appointment as the chairman of the tribunal. As Chief Justice of the High Court of Malaya he was generally regarded as "next in line" for the Lord President's post: thus he was an interested party and, indeed, on 10 November 1988, was

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5 The tribunal must consist of not less than five persons who hold or have held office as judge of the Supreme Court or a High Court or who hold or have held equivalent office in any other part of the Commonwealth. The tribunal is to be presided over by the member first in the following order, namely, "the Lord President of the Supreme Court, the Chief Justices according to their 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 two members with appointment of the same date)": Article 125(4) of the Malaysian Constitution.

6 (1990) 106 L.Q.R. 51.

7 *Ibid.*, p. 85.

8 For example, see: Justice Kirby, "Malaysia - the Judiciary and the Rule of Law" (1988) 41 *International Commission of Jurists Review* 40; (1988) *Australian Law News*, August, 12-16; [1988] *New Zealand Law Journal* 217-218; Resolution adopted by the International Commission of Jurists at its meeting in Caracas, Venezuela, on 20 January 1989 (reproduced in [1989] 1 *Malayan Law Journal* cxxii); *Malaysia: Assault on the Judiciary* (a report by the Lawyers Committee for Human Rights, New York, 1990).

appointed the Lord President. Moreover, he had participated in the conference of the 20 judges on 25 March 1988 which resulted in the letter to the King of Malaysia, which in turn appeared to trigger off the removal exercise.[9] The appointments of Tan Sri Abdul Aziz and Tan Sri Mohd. Zahir were controversial too. The former had sat on the Federal (now Supreme) Court Bench some 17 years earlier, but was now a businessman and practising lawyer. It was disclosed by Tun Salleh that Tan Sri Abdul Aziz was a litigant (with several others) with two suits against him in connection with the sale of houses pending at the High Court at the time. Tan Sri Mohd. Zahir had upon retirement after eight years on the High Court Bench been appointed Speaker of the Lower House of the Malaysian Parliament, an appointment which rendered him beholden to the Mahathir government. Apart from this, Tan Sri Zahir made no move to stop the Prime Minister when he attacked the judiciary in Parliament, an attack clearly in violation of Article 127 of the Malaysian Constitution which prohibited discussion of the conduct of a judge of the Supreme Court or a High Court "except on a substantive motion of which notice has been given by not less than one quarter of the total number of the members of that House".

Another perceived deficiency was that there was a failure to appoint to the tribunal members who were of an equivalent standing to Tun Salleh.[10] The Malaysian Bar Council "had brought to the notice of the Government that there were available two retired Lord Presidents, at least one retired Chief Justice and a number of retired Supreme Court judges who could have been appointed."[11] It must be stressed that the judges constituting the tribunal were chosen by the Prime Minister; the King formally appointed them. The disconcerting feature was that the Prime Minister was also Tun Salleh's accuser.

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9 Tan Sri Abdul Hamid later tried to justify his acceptance of appointment as the chairman of the tribunal by saying that he could not disobey a "Royal command"; to do so, he declared, would be an act of disloyalty. Such a justification must come as a startling revelation to every Malaysian who knows that the 1957 "Independence" Constitution brought into being a constitutional monarchy, not an absolute one. This justification was undermined when Tan Sri Hashim Yeop who was appointed the chairman of the second tribunal withdrew from the tribunal in the face of arguments based on the appearance of a real likelihood of bias.

10 The only member of the tribunal who was of equivalent status to Tun Salleh was Ranasinghe C.J., the Chief Justice of Sri Lanka. The Malaysian Constitution embodies the principle that no public servant "shall be dismissed or reduced in rank by an authority subordinate to that which, at the time of the dismissal or reduction, has power to appoint a member of that service of equal rank": Article 135(1) of the Malaysian Constitution. Surely, this principle must, *a fortiori,* apply by necessary implication to members of the judiciary.

11 "A Report by the Bar Council on the Report of the Tribunal Established in Respect of Tun Mohamed Salleh Abas" (1988) INSAF (Journal of the Malaysian Bar), Vol. XX, No. 5, 30, 32.

Other aspects of concern included the rejection by the tribunal of Tun Salleh's application for a public hearing and the refusal by the tribunal of his application for adjournment to enable his counsel (Mr Anthony Lester, QC) to appear before the tribunal. The tribunal was only prepared to adjourn the commencement of its hearings for a mere two days. The published report of the tribunal contained so many deficiencies that it was described by Mr Geoffrey Robertson, a Queen's Counsel, as one of "the most despicable documents in modern history".[12]

The deposed Lord President, Tun Salleh, has questioned the efficacy of the tribunal mechanism in Article 125 of the Malaysian Constitution:

> Looking back at our recent Malaysian experience, I am convinced more than ever that removal by Parliamentary address provides a better safeguard for judges despite being an apparent anachronism, provided that there is a reasonably free press.[13]

Is a "parliamentary address" mechanism necessarily the most appropriate system which would ensure that removal of judges would not compromise or destroy the independence of the judiciary? If certain developments in Australia are anything to go by, then the faith in the parliamentary address mechanism is certainly misplaced. The Australian experience is particularly instructive for section 72(ii) of the Commonwealth Constitution provides that federal judges *(i.e.,* justices of the High Court and of the other courts created by the Commonwealth Parliament) "[s]hall not be removed except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity."

It was through the operation of section 72(ii) that steps were taken to effect the removal of Justice Lionel Murphy of the High Court of Australia, a saga which ended with the tragic death of the judge on 21 October 1986.

The aim of this article is to look at the various events which constituted the "Murphy saga" and to reflect on the lessons, if any, which can be learnt from this episode in Australian legal history.[14]

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12 "Justice Hangs in the Balance" *The Observer,* 28 August 1988.

13 Tun Salleh Abas, *The Role of the Independent Judiciary,* pp. 46-47.

14 The Murphy saga was only one (although the most controversial) of a number of notorious cases which have strained the notion of judicial independence in Australia in recent times. For a review of these cases see M.D. Kirby, "Judicial Independence in Australia Reaches a Moment of Truth" (1990) 13 *UNSW Law Journal* 187. For a very detailed account involving Justice Staples and the reconstitution of the National Industrial Relations Tribunal, see M.D. Kirby, "The Removal of Justice Staples - Contrived Nonsense or Matter of Principle" (1990) 6 *Australian Bar Review* 1.

## II. JUSTICE LIONEL MURPHY

Just like the Tun Salleh saga, the Murphy saga had its own political dimension. To appreciate the political context it is necessary to advert briefly to some aspects of Murphy's career. He was born in 1922, admitted to the Melbourne bar in 1958, was appointed Queen's Counsel in New South Wales in 1960, and took silk in Victoria in 1961. In 1962, Murphy was elected to the Senate, the Upper House of the Australian Parliament. In 1967 he became the leader of the Australian Labor Party Opposition in that House. When the Whitlam Government won the election in 1972, Murphy became the federal Attorney-General and Minister for Customs and Excise. He was appointed to the High Court on 10 February 1975. Undoubtedly, Murphy had a controversial political career prior to his appointment to the High Court. The late eminent historian, Professor Manning Clark, described him as "one of the few judges of the High Court of Australia who has left his mark on the history of this country."[15] Justice Michael Kirby, President of the Court of Appeal of New South Wales, noted that whilst Murphy's "warm, generous spirited and optimistic personality" attracted many friends of like conviction, he also had his "enemies, critics and denigrators too".[16]

## III. THE MURPHY SAGA

The Murphy saga began on 2 February 1984. It ended with his death on 21 October 1986. On 2 February 1984, *The Age* published the first of a series of three articles which were eventually to embroil Murphy in unprecedented controversy.[17] These articles were based on telephone conversations of a Sydney solicitor, Morgan Ryan, which were taped illegally by the New South Wales ("N.S.W.") police. It was claimed that Murphy's voice was identifiable as one of those in the tapes.[18]

On 3 February 1984, the then Attorney-General, Senator Gareth Evans, contacted the Special Minister of State, requesting him to arrange for a police investigation of the material. Evans also handed the material to a senior officer of the Australian Federal Police. On the same day, the Special Minister of State informed Evans that he had asked the Australian Federal Police to investigate the material with a view to determining whether Federal offences had been committed.[19]

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15 Foreword to Jean & Richard Ely (ed.), *Lionel Murphy: The Rule of Law* (1986).

16 Foreword to J.A. Scutt (ed.), *Lionel Murphy: A Radical Judge* (1987), p. 4.

17 "Secret Tapes of Judge", *The Age*, 2 February 1984, p. 1. For a critique of this first article, see G. Sturgess, "Murphy and the Media" in J.A. Scutt, *op. cit.*, p. 215.

18 See, M. Wilkinson, "Big Shots Bugged", *National Times*, November 25 - December 1 1983, p. 3 where the newspaper claimed that they had reports giving "fascinating insights into the relation between a lawyer, an organised crime figure, police and a judge".

19 G. Evans, "Ministerial Statement", *Senate Hansard*, 28 February 1984, p. 22.

This move prompted suggestions by some, notably Chipp of the Australian Democrats and Durack of the Australian Liberal Party, that the Federal Police investigation would be confined to the circumstances in which they were made and not extended to their contents.[20] To rebut these allegations, the following day Evans issued a statement that the Australian Federal Police had been asked to investigate fully and report upon all aspects of the matter, including the possible commission of any Federal offences revealed by the contents of the tapes.

A preliminary report by the Commissioner of Police was given to Evans on 13 February 1984. On the same day, Temby, who was then the Director of Public Prosecutions designate and President of the Law Council of Australia, was appointed to advise on what offences against Federal law appeared to be disclosed and what further inquiries should be made. The Opposition and some sections of the media questioned whether Temby was the most appropriate person for Evans to approach for an opinion.[21] It was argued strongly that it would have been better had Evans gone to a lawyer without any political affiliations. Another criticism by the Opposition was that Temby was not given all the information available to Evans.[22] The main criticism of the appointment of Temby, however, related to the time given to Temby to deal with the material.[23] Temby was given 524 pages of transcript on 13 February. He gave his opinion to the Attorney-General on 15 February.

This tremendous speed was attributed to the fact that on 18 February 1984 by-elections would be held in N.S.W.[24] This argument was somewhat reinforced by the fact that the Federal Parliament would not be sitting until 28 February.

Temby concluded that the content of the material, if authentic, could not support any conclusion that the judge had been guilty of criminal misconduct, nor could it support a conclusion that there had been "misbehaviour" within the meaning of section 72 of the Constitution.[25]

In a public statement released on 17 February the Government announced that a special prosecutor would be appointed to supervise further investigations.[26] The Government recommended Temby for appointment as special prosecutor. His task would be to supervise a joint investigative team, consisting of selected police officers from the Australian Federal Police and the N.S.W. Police Force and would be charged with bringing prosecutions for any breaches of Federal law.

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20 "Durack Calls for Wider Police Study of Material", *The Age,* 4 February 1984, p. 1.
21 *Senate Hansard, 6* March 1984, p. 451.
22 *Ibid.*
23 ***Ibid.***, p. 456.
24 ***Ibid.***, p. 450.
25 I. Temby, "Opinion", *Senate Hansard,* 28 February 1984, p. 30.
26 Reproduced in *The Age,* 18 February 1984, p. 16.

Predictably, the Opposition, *The Age* and other newspapers questioned whether a task force was adequate to deal with the matter, given the limited powers of the police.[27] They, instead, suggested that "an inquiry with the wider powers of a Royal Commission might have some chance of bringing the people involved to justice".[28] In the same public statement Evans revealed that on 15 February he had interviewed Murphy. This again attracted strong criticism.[29] Overall, the main criticism of the Government was that it had not shown total detachment and that it had been contemptuous of Parliament.[30]

The Solicitor-General, Griffith, was asked to write an opinion on the meaning of the word "misbehaviour".[31] Dissatisfaction was expressed with aspects of the analysis and with the conclusion reached by Griffith.[32] Not surprisingly, shortly after, the Liberals and Democrats called for a Joint Select Committee to inquire into and report upon the conduct of the judge referred to in the tapes.[33]

Despite the Government's opposition,[34] the Senate Select Committee on the Conduct of a Judge was formed on 18 March 1984. The members were Tate, Bolkus, Chipp, Crowley, Durack and Lewis.[35] The Committee was appointed to inquire and report upon: (a) whether any or all of the tapes were genuine, authentic and (b) if so, whether the conduct of the judge constituted misbehaviour or incapacity which would amount to sufficient grounds for removal from office pursuant to section 72(ii).

The main allegation against Murphy was that he had asked Briese, Chief Stipendiary Magistrate of N.S.W., "what about my little mate?" in an attempt to influence and with the intention of influencing the due and

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27 See "Durack Statement", *The Age*, 18 February 1984, p. 16 and Editorial Opinion, "Tapes Require a Royal Commission", *The Age*, 23 February 1984, p. 13.

28 *Senate Hansard*, 6 March 1984, p. 451. A Royal Commission was eventually established and headed by Mr Justice Stewart. On 1 May 1986, the "Report of the Royal Commission of Inquiry into Alleged Telephone Interceptions" was tabled in the N.S.W. Parliament.

29 *Ibid.* Evans interviewed Murphy again on 24 February 1984.

30 See "Durack Statement", *The Age*, 18 February 1984, p. 16 and M. Wilkinson and N. Mercer, "Phone Taps: The Net Widens", *National Times*, 10-16 February 1984, p. 5.

31 Griffith was formally requested to furnish the written opinion on 20 February 1984. Griffith's opinion was dated 24 February 1984. "In the Matter of Section 72 of the Constitution", *Senate Hansard*, 28 February 1984, pp. 32-36.

32 See, Durack, "Parliament and Judiciary", *The Age*, 19 March 1984, p. 13; "Interpretation and Determination of Judicial 'Misbehaviour' under section 72 of the Commonwealth Constitution" (Current Topic) (1984) 58 *A.L.J.* 309.

33 See *Senate Hansard*, 8 March 1984, p. 626. See also, W. Bacon, "The Judge and the Phone Taps: What the Issues Are", *National Times*, 17-23 February 1984, p. 3.

34 See G. Evans, "Ministerial Statement", *Senate Hansard*, 8 March 1984, p. 652.

35 Senator Tate (Labor, Tasmania); Senator Bolkus (Labor, South Australia); Senator Crowley (Labor, South Australia); Shadow Attorney-General, Senator Durack (Victoria); Senator Lewis (Liberal, Victoria) and the leader of the Australian Democrats, Senator Chipp.

ordinary course of justice in relation to the committal proceedings against Morgan Ryan.[36]

On 24 August 1984, the Committee made no conclusive finding on Murphy's behaviour. Tate, Bolkus and Crowley could not satisfy themselves that certain crucial words were in fact uttered by the judge, or alternatively, were unable to draw an inference that the judge intended to influence the outcome of proceedings against Ryan by the uttering of such words.[37] Chipp, Durack and Lewis came to the opposite conclusion.[38]

Temby, as the Director of Public Prosecutions, and head of the joint task force, decided not to lay charges against Murphy. In fact, in his report, Temby concluded that there was nothing to warrant the laying of any charges for Federal offences.[39]

It hardly needs to be said that these conclusions did not satisfy the media, the Opposition and other critics.[40] Therefore, another attempt was made: anew Senate inquiry, called a Senate Select Committee on Allegations Concerning a Judge was announced by the Government on 6 September 1984.[41]

The members of the Committee were Tate, Lewis, Haines and Bolkus, and two former judges, Wickham and Connor, who served as commissioners assisting the inquiry. In October 1984 a second allegation was made against Murphy, namely, that he had tried to influence Judge Flannery of the N.S.W. District Court, the judge hearing the Ryan case.[42]

The evidence in support of the accusation was that Murphy had invited Flannery and his wife to dinner and that, at the dinner, Flannery was asked by his host whether he had seen a recent High Court decision. He replied that he had but that he could not remember what it decided. Murphy thereupon gave him that information. Murphy's account of the case does not appear in any way to have been false or misleading. This second allegation gave

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36 See Appendix 5 of Senate Select Committee on the Conduct of a Judge, Report to the Senate, August 1984, Parliamentary Paper No. 168/1984. Ryan had been charged with forgery and conspiracy to commit forgery.

37 *Ibid.*, pp. 26-28. They thus concluded that Murphy's conduct could not amount to "misbehaviour" under s. 72.

38 *Ibid.*, pp. 28-37. While Chipp indicated that it was impossible to reach a conclusion without hearing evidence from Murphy, his view on the evidence available to the Committee was that an adverse finding could reasonably be made against Murphy.

39 I. Temby, "Special Prosecutor's Report on *The Age* materials", *Senate Hansard*, 21 August 1984, pp. 55-58.

40 See, Editorial Opinion, "Time for Tapes to be Unravelled", *The Age*, 27 August 1984, p. 13; Michelle Grattan, "Problem that will not fizzle out", *The Age*, 27 August 1984, p. 13 and "Dilemma on Murphy", *The Age*, 28 August 1984, p. 1.

41 See, *Senate Hansard*, 6 September 1984, pp. 584-593.

42 See, D. Marr and W. Bacon, "The Murphy Affair: Judge Versus Judge", *National Times*, 5-11 October 1984, pp. 3 and 4.

the media and the Opposition more impetus in their attacks on Murphy and the Government's handling of the affair.[43]

On 31 October 1984, the report of the Committee was published.[44] Three of the four members of the Committee, including its Labor Chairman and Commissioner Wickham, found against Murphy. Only the second government committee member, Bolkus, and Commissioner Connor exonerated Murphy. Both Bolkus and Connor did not find on the facts as found by them, either beyond a reasonable doubt or on the balance of probabilities, that Murphy attempted to influence or had the intention of influencing the due and ordinary course of justice in relation to the Ryan committal proceedings. Consequently, they concluded that the conduct of Murphy could not amount to "misbehaviour" within the meaning of section 72 of the Constitution.[45]

The specific views of the majority members and Commissioner Wickham were as follows: Tate and Haines found that "on the balance of probabilities" Murphy had sought to influence the course of justice in relation to the case against Ryan. Lewis and Wickham said the finding was beyond "reasonable doubt". Tate, Lewis, Haines and Wickham concluded that the conduct of Murphy could amount to misbehaviour under section 72.[46]

This decision prompted the judge to stand aside from the High Court to challenge the finding. *The Age* and the Opposition strongly argued that this was the appropriate thing to do.[47]

On 13 December 1984, Temby decided to lay charges against Murphy of attempting to pervert the course of justice in the Morgan Ryan committal hearing and trial. On 26 April he was committed for trial on the two charges of having attempted to influence Briese and Flannery.

On 5 July 1985, the charge of having attempted to pervert the course of justice in relation to the charges against Ryan of forgery and conspiracy to commit forgery that were to be tried before Flannery was rejected by the jury. Murphy was, however, convicted upon the charge of attempting to pervert the course of justice in relation to the committal proceedings against Ryan.[48] Murphy was sentenced to imprisonment for eighteen months

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43 See, W. Bacon, "How Judge Flannery Tipped the Balance", *National Times*, 9-15 November 1984, p. 8 and Editorial, "Bowen's Outburst was Misdirected", *The Age*, 11 October 1984, p. 13.

44 Senate Select Committee on Allegations Concerning a Judge, Report to the Senate, October 1984, Parliamentary Paper No. 271/1984.

45 *Ibid.*, pp. 36-39. Commissioner Connor did, however, indicate that if the word "misbehaviour" extended to mere "impropriety" then there could be "misbehaviour" under s. 72.

46 *Ibid.*

47 See, *e.g.*, Editorial, "Mr Justice Murphy should Resign", *The Age*, 1 November 1984, p. 13.

48 Cantor J.'s summing-up to the jury began on Tuesday, 2 July, continued through Wednesday and ended on Thursday 4 July.

with a minimum of 10 months.[49] On 28 November 1985, the New South Wales Court of Appeal quashed Murphy's conviction and ordered a retrial.[50]

On 28 April 1986, in the trial presided by Justice Hunt, Murphy was acquitted on the charge of having attempted to pervert the course of justice. On 2 May 1986, Temby confirmed that he had rejected advice to prosecute Murphy on other matters arising from allegations of a former Federal policeman, Don Thomas."

On 6 May 1986, the Chief Justice of the High Court, Gibbs C.J., said that the High Court would not inquire into Murphy's conduct.[52] The next day the Federal Government set up a Parliamentary Commission of Inquiry.[53]

On 27 June 1986, the High Court rejected allegations of bias against one of the Commissioners and deferred decision on the "validity" or legality of the Commission.[54] On 28 July 1986, following the public revelation that he had cancer, Murphy withdrew his challenge to the validity of the Commission.

On 1 August 1986, what can be described as a "public brawl" took place between Murphy and Gibbs. Gibbs C.J. issued a public statement in which he indicated that he regarded it as undesirable that Murphy should return to sit on the Bench. This was because the Commission had not yet made its report and, in his view, it was essential that "the integrity and reputation of any justice of this Court be seen to be beyond question".[55] To this, Murphy responded, by pointing out, that Gibbs C.J.'s statement "would inevitably provoke an intense public controversy involving you, me and the Court".[56] The subsequent events confirmed the accuracy of Murphy's prediction.[57] Murphy also accused Gibbs C.J. of undermining the independence of the judiciary.

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49 On 3 September 1985.

50 See *R.* v. *Murphy* (1985) 63 A.L.R. 53. The Court's decision turned on principles of evidence law and on the correctness of the trial judge's directions.

51 D. Marr and W. Bacon, "Temby Rejects Advice to Charge Murphy Again", the *National Times,* 2-8 May 1986, p. 5.

52 Gibbs C.J.'s statement was reproduced in *The Age, 1* May 1986, p. 1.

53 *Parliamentary Commission of Inquiry Act* 1986 (Cth).

54 *Murphy* \. *Lush and Others* (1986) 65 A.L.R. 651. Murphy had applied to the High Court for an interlocutory injunction directed to the members of the Parliamentary Commission of Inquiry. The basis of Murphy's application was that the *Parliamentary Commission of Inquiry Act* 1986 (Cth) was unconstitutional and that one of the Commissioners, Mr Wells, was disqualified by reason of remarks he had made in 1984 on judicial behaviour. The High Court rejected the claim that Wells should be disqualified and indicated that while there were serious questions to be determined as to the validity of the Act, the balance of convenience required that the injunction sought should be refused. The question of the validity of the Act and the Commission would be determined at a later time.

55 Reproduced in *The Age, 2* August 1986, p. 5.

56 *Ibid.*

57 See, C. Howard, "The Integrity of his Office is Paramount", *The Age,* 2 August 1986, p. 5 and M. Grattan, "Tough Fighter Refuses to Bow Out with a Whimper", *The Age,* 2 August 1986, p. 1.

Murphy did return to sit on the Bench of the High Court but not for long as he died of cancer on 21 October 1986.

In summation, the process of investigating the allegations against Murphy was protracted: the allegations became the subject of a Federal Police investigation, a joint Federal-N.S.W. police task force inquiry, two Senate Standing Committee investigations, a Royal Commission of Inquiry, two criminal trial proceedings, an appeal before the Court of Appeal, challenges before the High Court and a Federal Government-appointed Commission of judges. The following observations of Justice McGarvie of the Supreme Court of Victoria are apt:

> When, on the first occasion of modern time in the country, the machinery designed in an earlier era to determine whether a judge ought to be removed, was put into operation in the case of Mr Justice Murphy, it was found quite inadequate to cope with the conditions of today. In a contested case, with political undertones, the traditional parliamentary procedures were unable in any satisfactory way to ascertain what had occurred or whether what had occurred could warrant removal. It was a good illustration of a system which apparently worked in earlier times, but is ineffective in the conditions of today.[58]

Gibbs C.J. also found the parliamentary address mechanism unsatisfactory:

> The procedure for removal by an address of both Houses of Parliament is not without deficiencies, some of which are shared by the procedure of impeachment. Whether proceedings are commenced, and their ultimate result, may be determined by purely political considerations. An address may be moved, or impeachment proceedings commenced, for the purpose of getting rid of a judge whose ideas and attitudes are regarded as unacceptable - that, however, has not been the experience in Australia. On the other hand, the very gravity of the procedure may provide a disincentive to its use, and political considerations may add strength to that disincentive. A House of Parliament or the Senate is not the most suitable body for finding the facts in a complex and contested case, although it is true that a committee of the House or Senate may be constituted for the purpose. There are no legal means of ensuring that a judge will not continue to sit while the proceedings remain unresolved. In any case, the procedure is hardly a satisfactory one

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58 Mr. Justice R.E. McGarvie, "The Foundations of Judicial Independence in a Modern Democracy" (paper delivered at the Australian Bar Association Conference, Darwin, 8 July 1990), p. 12.

for dealing with the position of a judge who is suffering from mental deterioration.[59]

## IV. LEARNING THE LESSONS

The lessons from the Murphy saga have not been lost on the Australian Constitutional Commission.[60] In its Final Report, the Commission noted that Parliament was not a suitable body to determine the facts that are alleged to constitute misbehaviour or incapacity; that a committee of a House or a joint committee of both Houses can easily give rise to allegations of political partisanship, as happened in the case of the two Senate Select Committees reporting on Justice Murphy.[61] Hence the *Parliamentary Commission of Inquiry Act* 1986 (Cth) was passed to provide for the creation of a Parliamentary Commission to deal with the allegations against Murphy. Three retired Supreme Court judges were appointed to the Commission by resolution of both Houses.

The Advisory Committee in formulating its recommendations to the Constitutional Commission was influenced by the submission of the Constitutional Committee of the Law Council of Australia. It was noted that the principle that judges should be removed on an address of both Houses of Parliament "is an important part of our British constitutional tradition going back to the *Act of Settlement* 1701" and that the importance of this principle "led inevitably to the view that the Constitution should not provide for a fact-finding tribunal".[62] It was argued by the Committee that if a tribunal determined whether particular facts warranted removal, Parliament would be required to accept that view or reject it, and so engage in controversy with the judiciary generally. Consequently, Parliamentary responsibility would be undermined.

The Advisory Committee thus recommended that two aspects of the matter should be distinguished:

(a) the question of what are the facts and whether they are capable of amounting to misbehaviour or incapacity warranting removal, and

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59 H. Gibbs, "The Appointment and Removal of Judges" (1987) 17 F.L. Rev. 141, p. 147.

60 The Constitutional Commission was established by the Hawke Labor Government in 1985 to review the Australian Constitution which has been in operation since 1 January 1901. The Commission which submitted its Final Report in 1988 was assisted by five advisory committees.

61 Constitutional Commission, *Final Report* (A.G.P.S., 1988), vol.1, at p. 404.

62 *Ibid.*, p. 404.

(b) whether the facts so found do constitute misbehaviour or incapacity warranting removal, and, if so, whether there should be an address to the Governor-General.[63]

The first question would be for the tribunal and the second for the Houses of Parliament.

The Constitutional Commission endorsed the recommendations of the Advisory Committee on the Australian Judicial System. The Commission recommended that the Constitution should be altered to provide as follows:

(i) that there be a Judicial Tribunal established by the Parliament to determine whether facts established by it are capable of amounting to proved misbehaviour or incapacity warranting removal of a judge; and that the Tribunal should consist of persons who are judges of a federal court (other than the High Court) or of the Supreme Court of a State or a Territory;

(ii) that an address under section 72 of the Constitution shall not be made unless:

... the Judicial Tribunal has reported that the facts are capable of amounting to misbehaviour or incapacity warranting removal, and the address of each House is made no later than the next session after the report of the Tribunal.[64]

The recommendations basically combine the "tribunal" and the "parliamentary address" mechanisms into one. The Commission views the scheme as "an appropriate division of functions between the tribunal and Parliament and an effective reconciliation of political responsibility, on the one hand, and fair and efficient fact-finding on the other."[65]

The Constitutional Commission said:

> We do not consider that democratic theory is breached by requiring an impartial body of persons trained for the purpose, to determine facts relating to individual behaviour or capacity. The independence of the judiciary from political control is itself an important element of a democratic society, and the proposals of the Advisory Committee strengthen that principle. At the same time those recommendations

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63 *Ibid.*, p. 405.
64 *Ibid.*, p. 402.
65 *Ibid.*, p. 405.

> give to the Parliament full scope to exercise its political responsibilities and also ensure that proceedings before the Tribunal cannot begin unless the matter is referred to it by the Attorney-General or other appropriate Minister.[66]

The recommendations of the Constitutional Commission provide an unsatisfactory compromise. In our view, they still contain the potential for controversy in the context of a removal with political undertones. What happens if Parliament ignores the tribunal's finding that the facts are capable of amounting to misbehaviour? Surely, preserving the integrity of the judiciary through a "neutral" tribunal is far more important than the issue of the political responsibility of Parliament.[67] Moreover, if Parliament decides that the facts do not establish "misbehaviour" or "incapacity" the public will probably regard it as a decision which has been based solely on the political interests of the relevant parties and not on the merits of the case, whether or not that is in fact the case, for the simple reason that Parliament's conclusion will be regarded as being contrary to the earlier decision made by a group of independent and politically-neutral experts, the tribunal. It is doubtful whether the public will accept that there is a "real" difference between a decision as to whether facts are "capable" of amounting to misbehaviour or incapacity warranting removal, on the one hand, and a decision as to whether the same facts "do" constitute misbehaviour or incapacity warranting removal, on the other. What confidence will there be in a judge who has been allowed to continue his/her tenure under such circumstances?

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66 *Ibid.*

67 In the Australian States (except for New South Wales - see note 68), the removal of a State judge is effected through the parliamentary address mechanism (upon the address of both houses of the legislature, except in the case of Queensland where the Parliament is unicameral, upon the address of the Legislative Assembly). Nevertheless, in relation to the removal of Mr Justice Vasta of the Supreme Court of Queensland, a Commission of Inquiry was established pursuant to the *Parliamentary (Judges) Commission of Inquiry Act* 1988 (Qld) (an ad hoc piece of legislation). The Commission (comprising three retired judges), in its recommendation to the Queensland Parliament, advised that the judge should be removed from office. When the Parliament was convened to deal with the report, it voted in favour of Mr Justice Vasta's removal. This incident should not be treated as clear proof that a combined tribunal/parliamentary address mechanism is the ideal vehicle for the removal of a judge. Despite the endorsement of such a mechanism for all the States by the Constitutional Commission, it is submitted that the Vasta affair lacked the volatile political undercurrents which prevailed in the Salleh and the Murphy sagas. On the Vasta affair see: M.H. McLelland, "Disciplining Australian Judges" (1990) 64 A.L.J. 388, at pp. 399-401; M.D. Kirby, *op. cit.* ("Judicial Independence etc."), at pp. 200-202. The Commission also inquired into the behaviour of District Court, Judge Pratt, but concluded that his behaviour did not warrant his removal from office. For details of the allegations in relation to Vasta and Pratt, see respectively the First Report and Second Report of the Parliamentary Judges Commission of Inquiry (1989).

It is submitted that the tribunal system is still the preferred mode of removal.[68] The unhappy experience in Malaysia with the tribunal system must be observed in the context of a system where the Rule of Law does not command the same level of deference as obtained in Australia. The much criticised manipulation of the tribunal system in the Salleh saga if it had happened in Australia would have attracted so much condemnation that the Government would have been forced to retreat on the issue.[69]

However, the lessons from the Salleh saga should not be ignored. Justice McGarvie said:

> It is very important, however, that for the future there be in each jurisdiction legislation providing for the constitution of the judicial tribunal in a self-operating way which would not allow the Government of the day or the parliamentary majority to appoint to the tribunal in a particular case those thought likely to favour the view of those appointing them.... The Malaysian experience also points up the importance of having basic procedural and evidentiary provisions prescribed beforehand and not leaving each Tribunal to decide for itself. Some provisions should also be made for the judges' costs.[70]

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68 However, a version of a combined tribunal/parliamentary address mechanism was adopted in New South Wales. The *Judicial Officers Act* 1986 (NSW) provides for the creation of a Judicial Commission to which complaints can be directed by any person "about a matter that concerns or may concern the ability or behaviour of a judicial officer". A complaint which has not been summarily dismissed by the Commission and which has been classified by it as serious must be referred to a "Conduct Division". The Conduct Division consists of one or more panels of three judges, one of whom may be a retired judge. The Conduct Division's report is to be laid before Parliament as soon as practicable and if the report sets out the opinion of the Conduct Division that a matter could justify parliamentary consideration of the removal of the judge, the Governor may remove the judge from office on the address of both Houses of Parliament. The New South Wales system (based loosely on the Californian system) has generated considerable unease and controversy. For more details on this system see: V. Morabito, "Removal and Disciplining of Judges - Recent Developments in Australia" (Unpublished Honours thesis, Monash University, 1988); S. Shetreet, "The Limits of Judicial Accountability: A Hard Look at the *Judicial Officers Act* 1986" 10 *UNSW Law Journal* 4; J. Goldring, "The Judicial Officers Bill - Politicians and Judges - a Major Overreaction" (1986) 11 *Legal Service Bulletin* 275; Sir Anthony Mason, "The State of the Australian Judicature" (1987) 61 A.L.J. 681; Sir Harry Gibbs, "Who Judges the Judges" (1987) 61 L.I.J. 814; Australian Judicial System, Report of the Advisory Committee to the Constitutional Commission (1987) at pp. 88-91; "Public Statement" issued by the judges of the Supreme Court of NSW on 30 September 1986 and reproduced in the *Sydney Morning Herald,* 1 October 1986, at p. 21; McGarvie, *op. cit.*; M.H. McLelland, *op. cit.,* pp. 389-394; Thomas, *Judicial Ethics in Australia* (1988), p. 91.

69 Tun Salleh's caveat of a "reasonably free press" is a vital requirement regardless of whatever system is adopted. The irony is that in the Tun Salleh saga the Malaysian press was regarded as too servile whilst in the Murphy saga, some quarters condemned the Australian press for "ever-new heights of distortion, carelessness, and self-justification". See Gary Sturgess, "Murphy and the Media" in J. A. Scutt, *Lionel Murphy - A Radical Judge,* at p. 211.

70 Mr. Justice R.E. McGarvie, *op. cit.*, 14.

The Constitutional Commission was of the view (unlike the Advisory Committee) that the qualifications of members of the Judicial Tribunal should be prescribed in the Constitution. It also was of the view that the size of the Tribunal, the method of rotation, the period of service and procedural matters should be left to legislation.[71]

If the tribunal system had been in operation in Australia, the Australian public would have been spared the agony of witnessing the protracted Murphy saga.[72]

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71 *Final Report*, p. 406.

72 It may well be that the potential for political bickering over the removal of a judge can be diminished by improving the appointment process. All federal judges in Australia are appointed by the Governor-General in Council, that is by the Federal Government. However, the Constitutional Commission recommended that no alteration should be made to the Constitution relating to the appointment of federal judges. For a more extensive discussion, see *Final Report* pp. 398-402. For arguments in support of the establishment of a Judicial Commission to advise the Government on judicial appointments, see G. Winterton, "Appointment of Federal Judges in Australia" (1987) 16 *Melbourne University Law Review* 185.

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