Singapore Journal of Legal Studies
[September 2025 Online] 1–11

JUDICIAL INDEPENDENCE, THE SEPARATION OF POWERS, AND CRIMINAL INVESTIGATIONS OF JUDGES

Haris Fathillah Bin Mohamed Ibrahim v Tan Sri Dato' Sri Hj Azam Baki [2023] 2 MLJ 296 (Federal Court, Malaysia)

Benjamin Joshua **Ong***

In *Haris Ibrahim*, the Federal Court of Malaysia discussed the legal limits to executive authorities' powers to investigate judges on suspicion of crime. The case is a rare contribution to the jurisprudence on judges' criminal liability at common law, as well as a case study in the challenges of reconciling judicial independence with other principles of the constitutional framework and other actors' roles therein. The Court held that the implied constitutional principle of judicial independence requires that executive authorities follow a "set of protocols" (which the Court formulated) when investigating sitting judges. This was not wrong in principle, but the Court's understanding of the separation of powers did not give sufficient weight to other constitutional principles which require that the executive, too, be able to do its job without being unduly hindered – particularly when that job itself serves to safeguard constitutional values such as judicial accountability.

I. Introduction

Little has been written about the common law[1] limits to judges' criminal (as opposed to civil[2]) liability; it has simply been assumed that "[a] judge can, of course, be made to answer, and in a proper case pay dearly, for any criminal misconduct. Like any other citizen criminal proceedings may be brought against him."[3] Therefore, a

* Assistant Professor of Law, Singapore Management University. I am grateful to Malik Imtiaz Sarwar Advocates & Solicitors, which represented the applicants in *Haris Ibrahim*, for kindly clarifying the status of the case after the Federal Court's decision: see *infra* note 58.

1 On *statutory* immunity, see, *eg*, Craig Burgess, "Criminal immunity: Judicial immunity – right or wrong?" (2006) 31(1) Alt LJ 39 (*cf Fingleton v R* [2005] HCA 34; (2005) 216 ALR 474 at [33]ff).

2 *Sirros v Moore* [1975] QB 118; in Malaysia, *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge, High Court Malaya & Anor* [2008] 2 MLJ 11 (CA, M'sia); *AHQ v Attorney-General and another appeal* [2015] 4 SLR 760; John Murphy, "Rethinking Tortious Immunity for Judicial Acts" (2013) 33(3) LS 455.

3 *Nakhla v McCarthy* [1978] 1 NZLR 291 (CA, NZ), cited in Abimbola Olowofoyeku ed. *Suing Judges: A Study of Judicial Immunity* (Oxford: Clarendon Press, 1993) at 76–77 [Olowofoyeku]. Olowofoyeku at 74–75 appears to state that judges are "general[ly]" immune from prosecution, but this merely means that deciding a case in a certain manner is *per se* not a crime. See also Nancy Amoury Combs, "Redressing Judicial Misbehavior: An Integrated Approach to Judicial Immunity" (2024) 58 UC Davis L Rev 1165 at 1197.

recent decision of the Federal Court of Malaysia (Malaysia's highest court), *Haris Fathillah Mohamed Ibrahim*,[4] is of significance throughout the common law world: it discusses the issue of judges' criminal liability and attendant possible concerns relating to the separation of powers, given the role of executive bodies in administering the criminal law.

Just as a crime by a judge can affect the standing of the judiciary, so can an allegation of crime, especially one made by an executive law enforcement agency. Such an agency could in theory delay or frustrate judicial proceedings through spurious accusations or groundless investigations – for example, as retaliation for a judicial decision against the executive or a person favoured by the executive.

These issues came to the fore shortly after Mohd Nazlan Ghazali J had convicted Najib Razak, Malaysia's former Prime Minister and Minister of Finance, on charges related to corruption. Subsequently, Justice Nazlan was himself investigated by the Malaysian Anti-Corruption Commission ("MACC", or SPRM in Malay).

The investigations ultimately came to nothing, and cast no doubt on Justice Nazlan's standing as a judge nor on the soundness of Najib's conviction (which was upheld on appeal). Moreover, the MACC's investigation of Justice Nazlan could not have been an act of retaliation, since it was the MACC itself who had first investigated Najib for corruption.[5]

Nonetheless, the issue of principle remained: what are the legal limits to the power to investigate a sitting judge? In *Haris Ibrahim*, the Federal Court laid down a "set of protocols" to be followed before a judge of the senior courts is investigated or prosecuted. This, the Court said, was justified by an implied constitutional principle of judicial independence. The Court added that the investigations of Justice Nazlan had taken place "without regard to judicial independence"[6] and with "curious timing" that "cas[t] doubt on whether the investigation against Justice Nazlan was *bona fide*".[7]

There was nothing wrong with the Court's identifying the principle of judicial independence as a fundamental constitutional principle, nor with having devised a "set of protocols" to give effect to this principle. The problem was with *how* the Court sought to do so, given other fundamental constitutional principles such as *executive* independence. This note will argue that there was a better way for the Court to deal with the issue. It is hoped that the analysis in this note will be of some use not only in Malaysia, but also in any legal system which treasures constitutional values such as the separation of powers and the rule of law.

---

4 *Haris Fathillah bin Mohamed Ibrahim & Ors v Tan Sri Dato' Sri Hj Azam bin Baki & Ors* [2023] 2 MLJ 296 (FC, M'sia) [*Haris Ibrahim*].

5 Tun Abdul Hamid Mohamad, "Judiciary Intimidated: The Other View", *Malaysiakini*, 7 May 2022 <https://malaysiakini.com/columns/620439>; Tun Abdul Hamid Mohamad, "Judiciary Intimidated: The Other View" (7 May 2022) <https://www.tunabdulhamid.my/index.php/speech-papers-lectures/item/1044-judiciary-intimidated-the-other-view>.

6 *Haris Ibrahim*, *supra* note 4 at [84].

7 *Haris Ibrahim*, *supra* note 4 at [86].

II. Background to the Case

A. *Najib's Conviction*

Najib's case centres on SRC International ("SRC"), an investment holding company set up by Malaysia's sovereign wealth fund, 1Malaysia Development Berhad ("1MDB"). SRC had been "under the control and direction of [Najib] from day one".[8] Najib used his offices of Prime Minister and Minister for Finance to execute a "plot to misappropriate monies belonging to SRC for his personal benefit and advantage".[9] Accordingly, in August 2020, Justice Nazlan convicted Najib of corruption-related offences. Najib's appeals to the Court of Appeal and Federal Court were dismissed in December 2021 and August 2022 respectively.[10] The Federal Court dismissed a subsequent attempt to re-open the appeal,[11] and the High Court struck out a claim by Najib against the Attorney-General for alleged misconduct in prosecuting him.[12]

B. *The MACC's Investigations of Justice Nazlan*

In February 2022 (while Najib's appeal had been before the Federal Court), the MACC issued a press statement alluding to Justice Nazlan[13] and referring to possible "corruption cases under the MACC Act 2009".[14] The resulting investigation of Justice Nazlan for (in the Federal Court's words) "procuring inexplainable wealth"[15] is the subject of *Haris Ibrahim*.

Further, evidently in early 2023, the MACC reported to the Chief Justice alleged violations by Justice Nazlan of the Judges' Code of Ethics 2009.[16] (It is not entirely

---

8 *Public Prosecutor v Dato' Sri Mohd Najib bin Hj Abd Razak* [2020] 11 MLJ 808 (HC, M'sia) at [332].

9 *Ibid* at [364].

10 *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor* [2022] 1 MLJ 137 (CA, M'sia); *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and other appeals (No 1)* [2022] 5 MLJ 85 (FC, M'sia). The Federal Court dismissed other applications by Najib: *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and other appeals (No 3)* [2022] 5 MLJ 143; *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and other appeals (No 2)* [2022] 5 MLJ 135.

11 *Dato' Sri Mohd Najib bin Hj Abdul Razak v Public Prosecutor* [2023] 3 MLJ 40 (FC, M'sia).

12 *Mohammad Najib bin Tun Hj Abdul Razak v Thomas Thomas @ Mohan a/l K Thomas* [2023] 4 CLJ 553 (HC, M'sia).

13 *Ibid* at [9].

14 Malaysian Anti-Corruption Commission, "The MACC Is Empowered To Investigate Officers Of Public Body", 28 April 2022 <https://www.sprm.gov.my/index.php?page_id=105&contentid=2430&language=en>.

15 *Haris Ibrahim*, *supra* note 4 at [8]–[10].

16 Hidir Reduan Abdul Rashid, "Lawyer confirms Azalina's letter on Nazlan probe, minister keeps mum", *Malaysiakini*, 6 April 2023 <https://www.malaysiakini.com/news/661287>; "MACC found Nazlan conflicted, breached judges' ethics, says Azalina", *Free Malaysia Today*, 6 April 2023 <https://www.freemalaysiatoday.com/category/nation/2023/04/06/macc-found-nazlan-conflicted-breached-judges-ethics-says-azalina/>; "Aide confirms Azalina's letter to Shafee genuine, affirms questions on MACC's probe into Nazlan", *The Star*, 6 April 2023 <https://www.thestar.com.my/news/nation/2023/04/06/aide-confirms-azalina039s-letter-to-shafee-genuine-affirms-questions-on-macc039s-probe-into-nazlan>; Malaysia, Dewan Rakyat, *Penyata Rasmi Parlimen* (23 February 2023) at 148, <https://parlimen.gov.my/files/hindex/pdf/DR-23022023.pdf> (Dato' Sri Azalina Othman Said).

clear whether the MACC had *investigated* these alleged violations, or whether it had merely reported its suspicions to the Chief Justice.[17])

Nothing came of any of this. The MACC concluded that Justice Nazlan had not committed any criminal offence;[18] no other action was taken against Justice Nazlan, who was subsequently elevated to the Court of Appeal. Further, the Federal Court unanimously dismissed an application by Najib to adduce at the appeal stage evidence which allegedly disclosed a "real danger" that Justice Nazlan had been biased.[19]

Najib made much of the fact that Justice Nazlan worked for Maybank when SRC was formed. Maybank had provided advisory services and loans to SRC.[20] But if Najib's contentions were relevant (and correct), and were cause for bias, it would surely be bias in *favour* of, not against, Najib. The Federal Court held that Justice Nazlan's previous employment was simply irrelevant: there was no conflict of interest that tainted the conviction.

III. Rules Governing Judges' Conduct

Criminal law is not the only set of rules governing judges. In Malaysia, if a judge breaches the Judges' Code of Ethics (which is prescribed by senior judges),[21] the Chief Justice may refer the matter to the Judges' Ethics Committee[22] (comprising judges senior to the judge under suspicion[23]), which may admonish or temporarily suspend the judge from office.[24]

In addition, the Prime Minister or the Chief Justice may represent to the Yang di-Pertuan Agong (Malaysia's Head of State, or King) that the judge "ought to be removed" on various grounds – including "any breach of any provision of the code

---

[17] The Malaysian Bar had used the word "investigations", and the Minister had used the Malay word "*siasatan*", but it appears that the MACC did not use that word to describe its views of Justice Nazlan's alleged violations of the Code.

[18] Malaysia, Dewan Negara, *Penyata Rasmi Parlimen* (19 June 2023) at 11, <https://parlimen.gov.my/files/hindex/pdf/DN-19062023.pdf> (Dato' Seri Anwar bin Ibrahim); "MACC clears judge Nazlan", *MalaysiaNow*, 19 June 2023 <https://www.malaysianow.com/news/2023/06/19/macc-clears-judge-nazlan>.

[19] *Dato' Sri Mohd Najib bin Hj Abd Razak v Public Prosecutor and other appeals (No 3)* [2022] 5 MLJ 143 [*Najib*].

[20] V Anbalagan, "So what if Nazlan worked for Maybank, prosecutor asks", *Free Malaysia Today*, 15 August 2022 <https://www.freemalaysiatoday.com/category/nation/2022/08/15/so-what-if-nazlan-worked-for-maybank-prosecutor-asks/>; *Najib*, *supra* note 19 at [7]–[8].

[21] Federal Constitution of Malaysia Art 125(3B) read with Art 40(1A). See Jaclyn L Neo & Helena Whalen-Bridge, "A Judicial Code of Ethics: Regulating Judges and Restoring Public Confidence in Malaysia" in Richard Devlin & Adam Dodek, eds. *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016).

[22] Federal Constitution of Malaysia Art 125(3A); Judges' Code of Ethics 2009 (PU(B) 201/2009) (M'sia) ss 13–14 [Judges' Code of Ethics].

[23] Judges' Ethics Committee Act 2010 (No 703 of 2010) (M'sia) s 2(4) [Judges' Ethics Committee Act].

[24] Judges' Code of Ethics (M'sia) s 16. It is the Committee who decides whether there has been a breach: s 14(3) of the Judges' Code of Ethics (M'sia) read with Art 125(3B) of the Federal Constitution of Malaysia.

of ethics".[25] The allegation will be referred to a tribunal consisting of current or former judges of the superior courts (or equivalent courts in other Commonwealth jurisdictions).[26] On the tribunal's recommendation, the Yang di-Pertuan Agong, acting on the Prime Minister's advice,[27] may remove the judge from office.[28]

Despite these provisions, there remains a role for the ordinary criminal process (that is, so long as one accepts that judges should not be at liberty to commit crimes). Nothing requires that the Judges' Code of Ethics be co-extensive with the criminal law (and it is not). Further, it cannot be – as the Malaysian Bar essentially submitted – that judges are exempt from the criminal law save to the extent that the Code of Ethics happens to be co-extensive with the criminal law. Otherwise, judges would be a law unto themselves[29] given that the content of the Code is the creation of senior judges.[30]

It follows that the institutions in charge of the criminal law *must* have the power to investigate judges, lest the criminal law be toothless. One such institution is the MACC. The MACC's investigation of Justice Nazlan on suspicion of corruption-related offences was well within its statutory remit.[31]

On the other hand, the MACC simply does not have the statutory power to investigate an alleged breach of the Judges' Code of Ethics.[32] To the extent that the MACC had purported to investigate or draw a conclusion on Justice Nazlan's compliance with the Code, it had acted unlawfully. Only the Judges' Ethics Committee can investigate a complaint that the Code has been violated.[33]

Quaere whether, if an investigation into corruption turns up evidence that leads to a suspicion that the Code has been breached, or if such evidence comes into the MACC's hands in some other way, the MACC can *report* that evidence to the Chief Justice: is there some (implied?) rule prohibiting the MACC from using the fruits of a corruption investigation for a collateral purpose?

---

[25] Federal Constitution of Malaysia Art 125(3). The Judges' Code of Ethics (M'sia) replaces the old test of "misbehaviour", on which see Report of the Tribunal Established Under Article 125 (3) and (4) of the Federal Constitution Re: Y A A Tun Dato' Haji Mohamed Salleh Abas, Lord President, Malaysia [1988] 3 MLJ xxxiii at xli; A J Harding, "The 1988 Constitutional Crisis in Malaysia" (1990) 39(1) ICLQ 57; Visu Sinnadurai, "The 1988 Judiciary Crisis and its Aftermath" in Andrew Harding & H P Lee, eds. *Constitutional Landmarks in Malaysia: The First 50 Years 1957-2007* (LexisNexis, 2007); F A Trindade, "The Removal of the Malaysian Judges" (1990) 106 Law Q Rev 51.

[26] Federal Constitution of Malaysia Art 125(4).

[27] Federal Constitution of Malaysia Art 40.

[28] Federal Constitution of Malaysia Art 125(3) read with Art 125(9).

[29] *Haris Ibrahim*, *supra* note 4 at [41].

[30] Federal Constitution of Malaysia Art 125(3B) read with Art 40(1A).

[31] Malaysian Anti-Corruption Commission Act 2009 (No 694 of 2009) (M'sia) s 7 [Malaysian Anti-Corruption Commission Act].

[32] Malaysian Bar, *Resolution Adopted at the Extraordinary General Meeting of the Malaysian Bar* (10 May 2023), <https://www.malaysianbar.org.my/cms/upload_files/document/Resolution%20on%20the%20Independence%20of%20the%20Judiciary%20and%20Upholding%20the%20Rule%20of%20Law.pdf>. The Bar and the MACC were at cross purposes: while the Bar had criticised the MACC's "investigations" into the purported breach of the Judges' Code of Ethics, the MACC's emphasis was that it had the power to investigate judges for "corruption": Adib Povera, "Rosli: Malaysian Bar's claim that MACC not competent in investigating ex-judge is untrue", *New Straits Times*, 6 April 2023 <https://www.nst.com.my/news/nation/2023/04/897042/rosli-malaysian-bars-claim-macc-not-competent-investigating-ex-judge> (*quaere* what "abuse of power" refers to).

[33] Judges' Ethics Committee Act (M'sia) s 4.

IV. The Federal Court's "Protocol" for Investigating and Prosecuting Judges

Rather than simply engaging with the general limits to the powers of executive agencies created by administrative law, the Federal Court in *Haris Ibrahim* appears to have added further limits to the MACC's powers:[34]

> […] a set of protocols must be followed when a judge is investigated which includes the following:
>
> (i) The relevant criminal investigative body should first seek leave from the Chief Justice to investigate any judge. The Chief Justice might know details that the investigative body does not and, in any case, informing the Chief Justice is necessary as a safeguard of judicial independence.
> (ii) A criminal investigative body cannot on their own accord publicise or advertise the fact of investigation or the contents of the investigation of a Superior Court Judge without prior approval of the Chief Justice. The Chief Justice might agree to publication if it is in the interest of the Judiciary.
> (iii) The entire contents of investigations against a judge must remain confidential at all times. It must be remembered that complaints are merely that – complaints. They can be entirely true or utterly spurious and calculated at damaging the judge's credibility or reputation. All things considered, whether the complaint is true or not is beside the point having regard to the fact that the relevant judge is presumed innocent until proven otherwise. Yet, sometimes even the presumption of innocence is an illusory concept considering that the fact of a judge being accused of a crime is enough to affect his reputation and the reputation of the Judiciary as a whole.
> (iv) The Public Prosecutor too must consult the Chief Justice during the course of giving instructions during investigations and in respect of his decision to prosecute. If there is ample evidence, the Chief Justice too can move to mobilise the ethics and disciplinary measures either under the Code or tribunalisation under art. 125.

It is not clear what precisely the "set of protocols" requires. The *chapeau* states that they "must be followed"; the first of the four points merely purports to state what "should" be done, but then pronounces it "necessary". It does not help that the *chapeau* suggests that the four points are non-exhaustive.

Further, the Federal Court stated that the investigating authority only has to "consult the Chief Justice" and that the Chief Justice only has the "right to be informed" but not the "power to sanction or stymie any investigations".[35] Yet the first of the four "protocols" refers to "seek[ing] leave from the Chief Justice", which suggests that the Chief Justice *can* in theory "stymie" an investigation by refusing to grant permission.

Moreover, what are "investigations"? Suppose somebody complains to the MACC in person that a judge has used coded language to ask a lawyer for a bribe

---

[34] *Haris Ibrahim*, *supra* note 4 at [81].
[35] *Ibid* at [77].

during a trial on a certain day. An officer might ask for more details and take a statement. The officer might then check the court's hearing list to see whether that judge was really presiding over the trial in question on that day and whether the lawyer in question was really there. The officer might take a statement from the lawyer, and might or might not disclose to the lawyer that the judge is being investigated. The officer might consult colleagues, and perhaps seek advice from the Attorney-General's Chambers on the meaning of words like "gratification" and "corruptly" in anti-corruption legislation. Officers might be sent to observe the judge's conduct during the rest of the trial from the public gallery. Which, if any, of these steps would count as "investigation"? They are all fact-finding steps, yet they can all take place without the knowledge of the judge in question and without threatening the judge's independence.

Finally, the Federal Court's "set of protocols" does not explain what is to be done when the Chief Justice is the one being investigated.

V. Judicial Independence – and Other Constitutional Principles

One might argue that the ordinary rules of criminal procedure should apply to all suspects, including judges. But the Federal Court considered that judges are in a different position because of the constitutional significance of their office, and referred to an unwritten constitutional principle of judicial independence. The Court, in effect, said: If the judiciary were not independent, it would not, in substance, have the judicial power that the Federal Constitution says it must have; it would be "all bark and no bite".[36]

This principle is not wrong, but it does not translate neatly to the rules that the court formulated. If "bite" means "having effect", then judicial independence is not relevant: one can have effective power without being independent. So the Court must have meant that the court needs to be independent in order to function *as a court*. But this does not decide the issue, for one might as well say that the court needs to be free of corruption – and, therefore, subject to independent anti-corruption investigations – to function as a court; or that the MACC needs to be uninhibited to function as an anti-corruption institution.

Then there is the question of lower courts: why did the Federal Court in *Haris Ibrahim* focus only on the independence of the *senior* courts? There may well be a reason: while all courts should be independent, safeguards of independence are not to be maximised at all costs. (Consider judicial security of tenure for life, which increases the efforts needed to find an appropriate judge. It is acceptable for only judges in higher courts, not lower courts, to have security of tenure for life: lower courts generally deal with cases with which the government would have no incentive to interfere.) On the other hand, there are some things that the principle of judicial independence demands of *any* court, senior or otherwise. *Haris Ibrahim* lacks discussion of these issues.

---

[36] *Haris Ibrahim*, *supra* note 4 at [31].

Finally, the Federal Constitution contains express safeguards of judicial independence, such as judicial security of tenure;[37] security of remuneration;[38] and limited grounds for removal and a stringent removal process.[39] On what basis, one may ask, may the court imply further rules to safeguard judicial independence? Can it not be said that *expressio unius est exclusio alterius*?

There is a more fundamental problem. Judicial independence exists alongside many cornerstones of the constitutional order, including judicial effectiveness and judicial accountability.[40] None of these principles is to be advanced in isolation from the others.

This is especially so when other constitutional actors, such as executive actors (which the Malaysian Federal Constitution also provides for), come into play. Neither the judiciary nor the executive is "higher" than the other; they are co-equal branches of the state, each with "separate and distinct responsibilities" in its "own constitutional territory and institutional space".[41] One may ask: Judicial independence is important, but is executive independence not important too?

Any "scheme of checks and balances involves a degree of mutual supervision between the branches of government and, therefore, a degree of interference by one branch into the functions and tasks of the other".[42] This cuts both ways. Just as investigating authorities cannot hamper the efficacy of the judicial branch by investigating judges without good cause, the courts cannot hamper the efficacy of investigating authorities by rendering their work excessively difficult. Indeed, hampering anti-corruption agencies would diminish the judiciary's independence from corruption.

In short, the Federal Court's judgment could have been premised on a more nuanced understanding of the separation of powers that takes into account the co-equality of the branches of the state, which are ultimately engaged in the "joint enterprise of governing"[43] and not in a necessarily adversarial relationship.[44]

There is another point of principle: Not all executive bodies pose the same sort of potential threat (if any) to judicial independence. An elected government might have the incentive to interfere with judicial independence on populist grounds to stop the

---

37 Federal Constitution of Malaysia Art 125(1).

38 Federal Constitution of Malaysia Art 125(7).

39 Federal Constitution of Malaysia Art 125(3).

40 Dato' Edwin Paramjothy Michael Muniandy, "Tug of War: Executive Bodies' Investigative Powers vs Judicial Independence" [2023] 3 MLJ cii at cix.

41 Sundaresh Menon, The Honourable the Chief Justice, "The Role of the Courts in Our Society – Safeguarding Society", Opening Address at Conversations with the Community (21 September 2023) <https://www.judiciary.gov.sg/news-and-resources/news/news-details/conversations-with-the-community-21st-september-2023> at [4], [11]; see also Swati Jhaveri, "Localising Administrative Law in Singapore: Embracing Inter-branch Equality" (2017) 29 SAcLJ 828.

42 Aileen Kavanagh, "The Constitutional Separation of Powers" in David Dyzenhaus & Malcolm Thorburn, eds. *Philosophical Foundations of Constitutional Law* (Oxford, United Kingdom: OUP, 2016) 221 at 222.

43 *Ibid* at 235.

44 See also Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, "The Rule of Law, the Executive and the Judiciary", 31st Sultan Azlan Shah Law Lecture in Visu Sinnadurai, ed. *The Sultan Azlan Shah Law Lectures III: Politics and the Judiciary, Executive Power & The Limits of Law* (RNS Publications, 2021) at 376–377.

courts from striking down executive action or legislation for unconstitutionality. But the MACC is not elected and has a circumscribed mandate. The Federal Court ought to have considered what specific threats to judicial independence the MACC posed.

One possibility is that a publicised investigation may shake public confidence in the judiciary.[45] But if the public has reason to suspect corruption, then an investigation can *increase* confidence in the judiciary – either by weeding out what is indeed corruption or clearing the judge's name.

It is also possible that a judge's knowledge that he is under investigation could affect how he decides cases. But even if the judge knows (which is not necessarily the case), it matters what the precise risk is. For example, if a judge has been accused of taking bribes from *prosecutors* to convict people, that might not affect the judge's decisions in civil cases.

VI. Giving Effect to the Constitutional Principles

The court's creating its "set of protocols" was not wrong in principle. It is not impermissible judicial legislation; it is an interpretation of the Malaysian Anti-Corruption Commission Act ("MACC Act") that seeks to prevent statutory investigative powers from being exercised in a manner that unconstitutionally threatens judicial independence. Yet one wonders whether the case, at base, was simply a matter of orthodox, well-established administrative law. These may have furnished a more satisfactory basis for the "set of protocols" than a bare appeal to judicial independence.

For example: The Federal Court rightly stated that the powers to investigate or prosecute must be used "in good faith and only in genuine cases",[46] and cannot be used for a "collateral purpose". That arguably misses the point. Executive bodies cannot do *anything* for a collateral purpose; nothing about this is specific to judges[47] or to investigations.

Or consider the court's statement that the Chief Justice should be consulted as she "might know details that the investigative body does not". That is true, but simply an instance of the general point that when investigating *anybody*, a failure to pursue *any* relevant and obviously known leads can make the investigation unlawful.

We can go beyond administrative law. Consider the Federal Court's statement that "[t]he entire contents of investigations against a judge must remain confidential at all times".[48] There is already a body of law that deals with the underlying reasons for this rule – namely, the law on contempt of court. The real question, then, is whether concerns about the publicity of complaints against judges are an instance of concerns about the publicity of complaints against *anybody*.[49]

---

45 *Haris Ibrahim*, *supra* note 4 at [74].

46 *Ibid* at [68]–[69].

47 As the court suggested it was: *ibid* at [76].

48 *Ibid* at [81(ii)]–[81(iii)].

49 Consider, for example, the privacy interests of a person under criminal investigation: *Bloomberg LP v ZXC* [2022] AC 1158; [2022] UKSC 5; *cf* N A Moreham, "Police Investigations: Confidential (Perhaps) but Not Private" (2019) 11 JML 142. This is not to say that either set of views may neatly be transposed into the context of *Haris Ibrahim*, *supra* note 4; the point is simply that the issue need not be framed as one specific to judicial independence.

This point is important because the MACC Act itself seeks to protect confidentiality:[50] it provides that reports to the MACC "shall be kept secret", subject to certain exceptions. So the conversation ought to centre, not on the need for confidentiality *per se*, but rather, on the legal limits to the power to break confidentiality[51] and the roles of the Public Prosecutor and senior MACC officers as safeguards against injudicious publicity.

One might argue that all this is not enough to secure judicial independence. One might draw an analogy with Parliamentary privilege:[52] while Members of Parliament should not be criminals, so great (it is thought) is the possibility of prosecutorial interference with freedom of speech in Parliament that there should be no less than blanket immunity from prosecution for alleged offences committed within Parliament, waivable only by Parliament. If this is constitutionally acceptable, why should the Chief Justice's leave not similarly be required to investigate a judge?

The analogy is problematic. The law on Parliamentary privilege developed at a time before the jurisprudence on legal limits to the power to prosecute evolved. Moreover, the wrath of voters at the ballot-box is the ultimate check against Parliament's unduly frustrating criminal investigations by refusing to waive privilege; there is no such check in the case of the judiciary. Most importantly, Parliamentary immunity exists to preserve the freedom of speech in Parliament, which is why it extends only to acts done in the course of "speech and debate" and "proceedings" in Parliament[53] (the "core or essential business of Parliament").[54] After all, it is in such business where the proper limits of acceptable free speech are less clear, so the law gives the benefit of the doubt to Parliament.[55] But Parliamentary privilege does not impede prosecution for, say, corruption[56] – which is clearly unlawful, and whose unlawfulness has nothing to do with exercises of political judgment made by MPs in their work – any more than it prevents prosecution for stealing money in the Parliament building.[57]

Similarly, while judges should have immunity in respect of judicial decision-making (in which the executive might have the incentive to meddle), this should not extend to acts like corruption which are unequivocally wrong and unrelated to the judiciary's core functions. It is not as though what is allegedly corruption can ever be in reality a legitimate exercise of judicial power, any more than stealing money can be in reality an exercise of legislative power. To the extent that the risk of executive harassment of judges remains, this can be managed by fashioning rules checking against executive harassment of *anybody*.

---

[50] On the executive's constitutional role in defending judicial independence and the appearance thereof, see also, for example, Graham Gee, "Do Lord Chancellors defend judicial independence?", *UK Constitutional Law Association*, 18 August 2014 <https://ukconstitutionallaw.org/2014/08/18/graham-gee-do-lord-chancellors-defend-judicial-independence/>.

[51] Malaysian Anti-Corruption Commission Act (M'sia) s 29(4).

[52] I am grateful to an anonymous reviewer for this point, and for a reference to N W Barber, "Self-Defence for Institutions" (2013) 72(3) Cambridge LJ 558 (on constitutional "self-defence mechanisms").

[53] Houses of Parliament (Privileges and Powers) Act 1952 (No 15 of 1952) (M'sia) s 3.

[54] *R v Chaytor* [2011] 1 AC 684; [2010] UKSC 52 at [47], [62] [*Chaytor*].

[55] That said, in Malaysia, see Art 63(4) of the Federal Constitution of Malaysia and *Mark Koding v Public Prosecutor* [1982] 2 MLJ 120 (FC).

[56] *Chaytor*, *supra* note 54 at [42].

[57] *Ibid* at [121].

VII. Conclusion

The Federal Court's task was only to answer abstract questions of law, and not to decide whether the MACC's investigation of Justice Nazlan was lawful; that was for the High Court to decide in light of the Federal Court's judgment.[58] Yet one can see why the Federal Court saw fit to comment, even if obliquely, on the lawfulness of the investigation.

What is less clear is why the Court suggested that because the investigation had not been lawful, the MACC *must* have acted *mala fide*[59] by not following the "protocol" which – like many common-law rules – applied retrospectively. Acting *mala fide* connotes dishonesty or recklessness as to one's lawfulness; it is hard to see how these may be made out merely because someone has not complied with rules of which they could not have been aware. Perhaps the Federal Court should have stopped at giving a declaratory judgment with prospective effect, without going further to comment on the MACC's conduct in this particular case.

Haris Ibrahim is a welcome development in the jurisprudence on judicial independence, both in Malaysia and beyond. However, the decision unfortunately gives the impression that the need for judicial independence warrants a carve-out from the general law relating to the state's anti-corruption powers. Worse, certain parts of the decision may be weaponised by those who seek to portray the courts as hostile to other branches of the state,[60] or to strain relations with other various parts of the justice system (*eg*, the Bar). While the court was right to anxiously defend judicial independence, its decision struggles with how judicial independence interacts with other constitutional principles and other actors' roles therein – a struggle all legal systems must face.

---

[58] *Haris Ibrahim*, *supra* note 4 at [90]. That said, the High Court did not have the opportunity to pronounce on this matter because (as Malik Imtiaz Sarwar Advocates & Solicitors, which represented the applicants, kindly informed the writer) the applicants withdrew their application after the Federal Court handed down its decision which addressed the underlying matters of constitutional principle.

[59] *Ibid* at [79].

[60] Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at [29].