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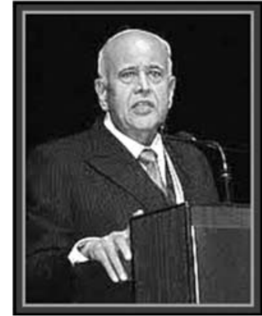
THREE LITTLE INDIAN BOYS

Who rocked the Federal Court!


Datuk Seri Gopal Sri Ram

An uncanny stillness seems to have descended on the higher courts of the land after the retirement of Datuk Seri Gopal Sri Ram in early 2010. The roar from the lion of the Malaysian courts has subsided. Indeed there was a time when lawyers appearing in the Court of Appeal or the Federal Court used to quiver in their bibs at the prospect of addressing a panel comprising of FCJ Sri Ram. Was this because he lacked the judicial temperament expected of a salubrious judge? Or was it just plain indolence on the part of counsel that got the dander of this judge up on many occasions. Ad Rem Editor Biliwi Singh, Selangor Bar Chairman Rajpal Singh and G. Kanarasan set off to find this out in the comfort of the law firm in Kuala Lumpur where he is now a consultant.

The poser was hot on our lips but the answer to it froze our vocal chords. With so many landmark decisions to his credit could he be considered Malaysia's own Lord Thomas Denning?

"The comparison some have drawn between me and Lord Denning is unjust to that great jurist. He was a Judge who had exceptional judicial temperament which I severely lacked. Secondly he was a visionary. I merely applied the law and settled principles," was Datuk Seri Gopal's swift retort.

"My elevation to the Court of Appeal was unexpected. I had a fairly lucrative practice but was asked to take the post to serve the country. While I may not have strengthened the Bench I made a conscious effort not to weaken it. While on the Bench I enjoyed the exposure to a wide variety of work, some of which I was familiar with. It was a huge learning process".

This was from a judge who bore an austere presence in court and made short shrift of counsel who came ill prepared. So what was the judicial temperament that was called for from the man on the Bench? What were the qualities desirable in a judge?

The retired FCJ thought the first requirement was patience coupled with a very sound grasp of the fundamentals. He said the latter was important because there is a tendency from his experience on the Bench, for lawyers to miss the heart of the matter and dwell on irrelevant and collateral issues.

"Further the quality of research into relevant as well as recent authorities is sometimes severely lacking. In short the kind of assistance that a judge in England or Hong Kong or Singapore would receive from the Bar is not available here," he said.

When asked whether this had anything to do with tempers flaring up on the Bench he added, "It should not be. Unfortunately in my case I have been guilty of being intolerant with inadequate advocacy. But that does not mean that a reprimand from time to time should not be called for even from the most patient of judges".

He added: "On whichever side of the Bar table you are on, a strong foundation of the fundamentals is necessary. If this element is absent, characterisation of a problem becomes difficult if not impossible. As a result, a lot of judicial time is wasted or alternatively the matter will be disposed of summarily by reason of the missed appreciation of the applicable principle".

Datuk Seri Gopal illustrated the point by referring to an appeal before him. Once, counsel was arguing an appeal that had to do with the applicability of certain sections of the Civil Law Act but a closer look at the facts revealed that the Act had nothing to do with the problem and that the real issue was whether a counterclaim could be made against a Plaintiff for damages for libel when his claim against the Defendant was for unpaid services. This brought into sharp focus the rule in Ghosh[1] This point has also been applied by Raja Azlan Shah J (as his Royal Highness then was) in the Esso Standard Malaya Bhd.

[1] High Comission for India & Ors. v. Ghosh (1959) 3 W.L.R. 811

case.[2] If counsel had known of this earlier they would have been wiser. But they did not. As a result, very valuable judicial time was wasted in the court below because no one saw the point.

When asked to draw a parallel with his experience whilst at the Bar (in relation to judicial temperament) Datuk Seri Gopal said the Bench at the time had some very fine judges with a sound grasp of the fundamentals and before whom it was a pleasure to appear.

"There were one or two who used to have lawyers for breakfast or for starters before lunch. But they were also very brilliant and were not prepared to tolerate fools. Sometimes personal prejudices overcame legal acumen and when that happened justice usually suffered".

Datuk Seri Gopal said Ong Hock Thye CJ (Malaya) who fell into this category was a brilliant judge. He recalled there was an occasion when he sat with Gill and Ali FJJ's.[3]

"My opponent was my good friend the late Ronnie Khoo who was an excellent facts man. The case concerned an accident on the Telok Intan / Kampar Road. Three Indian boys were walking along the road after school. A motorcycle came along and knocked one of them resulting in the boy's leg being traumatically amputated on the spot. A claim for damages was filed. The case was tried before Pawan Ahmad J at the Ipoh High Court".

The Defendant motorcyclist had lodged a report saying the accident happened when the boys were running across the road. That was inconsistent with the version given by the Plaintiff and his friends. Their evidence was that they had never crossed the road. The evidence of the motorcyclist was critical. He however failed to give evidence despite an adjournment to enable him to attend court.

The trial judge, acting on the evidence led by the Plaintiff, found the Defendant wholly responsible for the accident. The Defendant (in truth the insurance company) appealed. The appeal came before the Federal Court comprising Ong CJ, and Gill and Ali FJJ.

"Ronnie's submission was short. He had hardly got onto his feet when Ong CJ intervened. He said: "Mr. Khoo, you are not saying your client is not to be blamed at all? You are only saying there is contributory negligence and that damages should be apportioned." Ronnie agreed. The CJ then turned to me and said it is now up to you to submit as to why the appeal should not be allowed."

Datuk Seri Gopal said: "In my submission I referred to the evidence of the Plaintiff and his friends which had remained uncontradicted. Before I could proceed any further the CJ said: "Mr. Sri Ram, your case depends on the evidence of three little Indian boys. Little Indian boys are liars. All little Indian boys are liars. I will not listen to what you have to say. As you can see I'm closing my pen and putting it away. Nothing you say will be of any further interest to me."

"I was perplexed as I did not know how to respond to those remarks. So I remained silent trying to think of what to say. It certainly felt like a very long time of pure silence. I observed Gill FJ who was turning all the colours of the rainbow He being the senior man we had to wait for his response. Ali FJ kept leaning to his right to see what Gill FJ was doing. Seeing no response from the senior man, Ali FJ intervened. He asked me: "Mr. Sri Ram do you know why I am here?" said Datuk Seri Gopal.

He continued with the story: "I thought the question rhetorical so I continued to remain silent. There was then a voice like thunder that came from Ali FJ when he repeated the question. I said "No my Lord I do not" He replied "I'm here because I'm paid to be here." He then asked: "Do you know why I'm paid to be here?"

Realising at once it was no longer rhetorical I replied "No my Lord I do not"

He then said" I'm paid to be here to listen to you and write down everything you have to say. Please address me because I'm interested in everything you have to say".

Immediately Gill FJ took the cue and asked Datuk Seri Gopal whether he had finished his argument. "I said that I had not and that I had some portions of the evidence that I needed to address the court on. He said: "Please proceed to address me. I will listen to you."

The argument then went on with the CJ playing no part at all. True to his word he did not write again and just leant back on his chair closed his eyes. At the conclusion of the arguments he leant forward and

[2] Esso Standard Malaya Bhd. v. Southern Cross Airways (Malaysia) Bhd. (1972) M.L.J. 168
[3] Wong Thin Yit v. Mohamed Ali (1971) 2 M.L.J. 175

said that for obvious reasons judgment was reserved. Later three separate judgments were delivered dismissing the appeal with the CJ dissenting. "Although his judgment was against my client there are some pearls in it which show the genius of the man. Unfortunately his personal prejudices cast a shadow on what was otherwise a brilliant career."

Ad Rem posed the question whether this sort of judicial behaviour was rampant way back then to which Datuk Seri Gopal answered it wasn't.

"But with Ong CJ the problem was that he sometimes underestimated counsel. On one occasion he had the late Karam Singh Veriah before him. It was a crowded court. As Karam began to address the Bench, Ong CJ said "shut up you are talking nonsense. This got Karam's goat who then responded: "You shut up and listen to me. That's what you are paid for".

According to Datuk Seri Gopal, Ong CJ sheepishly remained silent for the rest of the day. Needless to say Karam lost his appeal but the point was made. Such incidents will not happen today and if they did, the judge concerned will find himself or herself in very hot water he added.

Datuk Seri Gopal fondly recalled that Ajaib Singh J was one of the cleverest and pleasant judges he had the occasion to appear before. According to him, Ajaib J had a very sharp mind and he could see a point very early in the case.

"In criminal cases he was a very fair judge. Once he was sitting at the Assizes in Seremban, in a murder case in which I was counsel. He specifically directed the jury at the close of the prosecution case that there was no case had been made out against the accused and directed an acquittal. In my recollection no other judge had the courage to do that. One of the more difficult judges was Yong J. He knew little of civil law though his knowledge of the criminal law especially customs and excise law was considerable. He used to pick on lawyers he did not like and make personal comments. We took it in our stride".

Datuk Seri Gopal was of the view that judges who came from the service (like Gill CJ) were very pleasant to appear before. The Malay judges were especially courteous and very learned. Judges appointed from the Bar (almost all of whom were non-Malays) in the early days were rude and discourteous though learned.

"After years in practice I coined two rules. The first was that all Malays make good judges and all non-Malays make bad judges. The second rule was that all judges who came from service made good judges and those from the Bar made bad judges. The only exception to the second rule was Mohd. Zahir J. But he was Malay and came under the first general rule!"

He went on to say, "Today things are very different. Members of the Bar tell me there are far more "user friendly" judges meaning judges who are courteous when dealing with counsel than there were when I was young practitioner."

"Speaking for myself I found it a far more pleasant experience appearing before Tun Abdul Hamid Omar when he was in the High Court or Raja Azlan Shah J. These were judges with the right temperament and who were learned. I must add that from about 1980 onwards, appointees to the Bench from the Bar proved to be excellent judges. There were Edgar Joseph, VC George, Shankar, Peh Swee Chin, Vincent Ng and Jeffrey Tan to name but a few. From the service, judges like Tan Sri Mohd Azmi J, Wan Suleiman FJ and Wan Yahya FCJ were not only courteous but also learned."

Reminiscing on his early days at the bar he told Ad Rem that he started off his career as a criminal practitioner. Lucrative or decent civil work was hard to come by back then. In the late sixties and early seventies, a lawyer gained exposure by taking on a wide variety of work. If counsel took briefs on behalf of debtors in insolvency cases they were frowned upon by the seniors as this sort of work was considered suitable only for those in the lower rungs of the profession. Some senior members of the Bar used to look down on those who appeared in these sorts of cases. The perception today is very different.

"Criminal work was quite exciting in those days. Everything was in English. We had jury trials for capital cases other than those for kidnapping which were tried by a judge sitting with assessors. Advocacy before a jury is different from that before a single judge. Before a jury one had a far more liberal approach to advocacy-

emotive issues could be raised and often were. The difficulty with jury trials was that the jury gave no reasons for their verdict. Everything turned on the judge's direction to the jury. It required a misdirection or non-direction amounting to a misdirection for an appeal to succeed", he said.

In those days he said the Bench was blessed with very experienced judges in the criminal law like Ibrahim Manan J, Syed Othman J, Raja Azlan Shah J, Harun Hashim J, Mohd Azmi J, LC Vohrah J, Syed Agil Barabah J among others. There used to be preliminary inquiries which gave the accused a full account of the case against him. But the volume was low so not much judicial time was expended.

The advantage of having a criminal trial before single judge is that he has to give full reasons for his decision so that if he misapprehends the evidence or misdirects himself on a point of law or of fact a criticism of his approach is easier.

"In those days, the income was very small and those like me who ventured on our own had to take on any and all kinds of work. The disadvantage was that one's practice was all over the place. The advantage was that the exposure was huge. Sometimes I had to address a jury in a murder case in the morning and address the Federal or Supreme Court on a revenue law or a company law or a land law appeal in the afternoon", he recalled.

Nowadays practitioners tend to specialise from very young. Datuk Seri Gopal said he has met lawyers who have not seen a criminal court or indeed been inside a criminal court. Syed Othman J once commented to him that for one to be good "civil lawyer" one must have done criminal work.

"As I grew older in practice I realised how true that was. One of the advantages like learning how to draw inferences or making submissions on issues of fact comes naturally in criminal trial".

The other advantage was that a practitioner would get exposed to constitutional and administrative law. Exposure to public law is essential for every practitioner. What a private law practitioner usually does is to interpret a statute to see if his client's case is covered by it. A public law practitioner first asks the question whether the provision is constitutional. Only then would he move on to apply the statute to the facts before him. This art of testing provisions of law and administrative acts against the constitution opens up a whole new vista to the inquiring mind.

Harking back to the seventies and eighties he said there was a lot of camaraderie between Bench and Bar. There were annual social events where all the judges participated. One could see the human side of the Bench. There were also very learned judges with a great sense of humour.

"There was Tun Azmi who had a superb command of the English language. He was a wordsmith. Tun Suffian who was also a master of the English Language was a marvellous speaker. He had a storehouse of original humour. He was a kind man and learned. I remember once meeting him in the library of the old High Court. He was then a Federal judge. At that time Tan Sri Macintyre whom everyone referred to as "Mac" - a former Federal Court judge - was the President of the Industrial Court. I asked Tun Suffian what point of law he was looking up. Tun replied: "Mac" asked me look up a point for him. He wants to know the meaning of "month". Funny, I always thought I knew what a month was. Now that I have started looking it up I am not sure anymore", Datuk Seri said with a laugh recounting the encounter.

The episode brought more memories flooding back from the recesses of his mind. He recalled how some time after he was elevated to the Bench he received a call from Tun Suffian one day.

"He told me "Sri, you have done a Denning. I would like to buy you lunch at the club". At lunch he told me he liked the judgment I wrote in the Syarikat Kenderaan Melayu Kelantan case[4] and added "but Sri sangat panjanglah! Trim it next time." I told him I would. After that I tried to make a conscious effort to reduce the length of my judgments because I took his advice seriously".

Datuk Seri Gopal said of all the lawyers in his lifetime it was RR Chelliah who made an impression on him most and had an impact on his career.

"He took me on as a junior in one or two of his cases. To be a junior to RR was an honour and an achievement readily recognised by members of the profession and the public alike. Also he was a complete advocate. I have never seen a lawyer as adept as RR in any case. He would take the fact pattern and spin it as it were on his fore finger like a sphere-viewing all aspects of it at the same time. He taught me how to look at every facet of a case. When he explained the facts of a complex case to you it would seem so easy. In other words, he made everything so simple". He said these qualities endeared RR to the Bench with the exception for one judge who was not worth mentioning. The Bench had great respect for RR with much justification. He was never seen to be rude to anyone.

[4] Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers Union (1995) 2 M.L.J. 317

A bemused Datuk Seri Gopal also recalled V.K Palasuntharam who was a legend in his own way.

"He wore a quaint old hat and always addressed the Bench as "Mi Lud" which was the old English way of addressing the Bench in the late 19th and early 20th centuries. He was a hardworking lawyer and could come up with obscure points of law. We used to joke about him and say that he was like Malayan Railways: ran but not always on the track. That is to say some of his arguments used to get derailed in the course of the case. But no one could do research like Pala. In fact there is a tribute to him in a judgment delivered by Shankar J".

The other lawyer that loomed larger than life at the Bar was Raja Aziz Addruse who in Datuk Seri Gopal's opinion is a gifted advocate.

"He has practiced civil, criminal and constitutional law. From the mid-seventies until the late eighties he and I constantly appeared either together or against each other in a number of cases. He has the distinction of having argued some of the most important constitutional cases in this country. Though the Bench was dead against him "or sometimes us" it never stopped him from agitating the point. He is probably the most distinguished Chairman of the Bar Council who has served the profession since its inception".

Datuk Seri Gopal added "in the 1988 crisis he almost single-handedly led the campaign against the attack upon the judiciary and moulded the thinking of many lawyers. I would say that after RR Chelliah, Raja Aziz Addruse is probably the greatest lawyer this country has seen for many years".

He said the present crop of judges on the Bench work very hard. "They certainly work harder than I ever did when I was there. The Chief Justice Tun Zaki Azmi has rightly emphasised we ought to rid ourselves of the backlog. I remember how frustrated I used to feel whilst in practice when cases used to take more than 10 years to come to trial", he stressed

"We lost witnesses or sometimes our clients. Many CJ's talked about doing something about it but it was only Tun Zaki who went down to the ground to get things moving. I remember once in the Court of Appeal we had an interlocutory appeal in which the judge had conducted 18 case managements over a period of five years without fixing a date for trial. The delay was scandalous. Such things do not happen now. Tun Zaki is fortunate to have a very able man to help him in the form of the Chief Judge of Malaya Ariffin Zakaria", he added.

Datuk Seri Gopal Sri Ram was born on 16 August 1943. His father Gopal Ayer who was an Assistant Commissioner for Labour was the only non-British to have been conferred a Member of the British Empire by King George 1.

He received his early education at Batu Road School and the Victoria Institution. For short time after leaving school he taught English and Mathematics but the lure of the law was too strong and in July 1966 he left for England to read law. He was called to the English Bar by Lincoln's Inn in 1969 and was called to the Malaysian Bar in 1970.

When the Court of Appeal was incepted in 1994 Datuk Seri Gopal Sri Ram had the distinction of being the first Court of Appeal Judge to be elevated directly from the Bar.

In 2005 he was made a Bencher of Lincoln's Inn. A Master of the Bench is the highest office a Barrister can reach within his Inn. A Bencher is an appointment for life and is usually bestowed on those who have attained high judicial office or excelled in other areas of public life.

Datuk Seri Gopal said he has known Ariffin from the time he was a cadet magistrate and is a man who means business. Also he is a lawman - someone who is very interested in points of law. That helps.

What however, is worrying is not the early disposal of cases but the risk of hastening the trial to such a degree that injustice may be caused.

"Recently I had a lawyer complain to me that in the course of a criminal trial he wanted to call a witness who was not immediately available. A short adjournment to enable him to call the witness would have cost nothing. It certainly would not have derailed the trial or frustrated it. That request was denied and he was compelled to close his case. It's this type of speed at the expense of justice that concerns me. Of course these are points for appeal. And I know that both the Chief Justice and the Chief Judge are aware of such instances and are keeping a close eye to make sure that justice is not sacrificed".

"Also, this KPI (key performance index) - which in my view is a very wrong standard to apply to the judiciary - has made judges do things they generally would not do. For example, rushing a trial over three days and giving counsel two days to come with a full written argument. There are two more recent examples that I have come across. In one, where trial dates had been given, a pre-hearing case

management was also fixed about a month before the trial. Counsel for both parties appeared at the case management before the judicial commissioner and said that they were happy to inform him that the parties had settled and wished to record terms of settlement. The judicial commissioner however asked counsel to return on the first day of the trial a month later and inform him of the settlement and record terms because if he recorded the terms then and there, this would not count as a disposal; whereas if the matter was recorded as settled on the trial date that would count. In another matter, parties travelled all the way to an out of station High Court to receive judgment. On arrival they were informed by the judge that she was ready with her judgment but would only deliver it the following month because she had already achieved her KPI for the current month and delivering the judgment in question would not add anything to her KPI. This is a ridiculous state of affairs where only numbers seem to matter. The situation has simply got out of hand. From being judges, the present system has made them into just statistics providers. The maxim seems to be: never mind if you produce rot; just produce lots of it. Can you imagine the pressure on the judges? That is why they are resorting to such things as I mentioned. I think that the CJ should scrap this KPI, restore the court sittings to 10am (as they used to be when I first started practice), be strict on postponements and get the judges to produce good judgments written after proper thought. This KPI stuff may work for pen pushers but it is not meant for the judiciary. Judges are in the business of dispensing justice and the only KPI for that is careful and mature oral argument followed by a well considered judgment. No matter how hard you try, you cannot clear the backlog as cases get filed every day. The idea of case management is good provided that the case gets tried within 12 to18 months from filing. But that does not mean that you have to rush the trial. Sometimes important interlocutrices have to be dealt with. And the aggrieved party may appeal as it well entitled to. Case managing interlocutory appeals as happens now will keep the time management tight. But it is unfair to expect judges to behave like automatons and churn out results. Any perceived short term benefit will be out weighed by the long term harm to the physical and mental health of judges and lawyers and adversely affect the justice system as a whole."

Commenting on the on-going debate on the death penalty for capital offences he was of the view that there are some offences for which the death penalty should be made discretionary.

"In the case of murder or drug trafficking or even offences against the Internal Security Act the Bench must be given a wide discretion as to the kind of penalty that should be imposed. In the case of child rape, incest or child dumping cases the death penalty may not be the answered".

In this type of case a very long custodial sentence is called for. He added however that in child dumping cases if the child were to die and the culprits are apprehend the case may well fall within Section 302 or 304 of the Penal Code depending on the circumstances in which the child was dumped.

"I think the death sentence should be preserved as a deterrent. I may well be in the minority in thinking this but from my experience both at the Bar and on the Bench I find that there is a degree of deterrence which the supreme penalty carries with it", Datuk Seri Gopal said.

Touching on the 1988 judicial crisis who many say was the darkest hour in Malaysian judicial history Datuk Seri Gopal said it was a battle between the Lord President Tun Salleh Abas and the then Prime Minister Tun Dr Mahathir Mohamad.

"Unfortunately Tun Salleh when he was Lord President was very reluctant to decide cases against the government in important public law cases. A good example of this is his judgment in Theresa Lim Chin Chin[5] as well as Raja Khalid where the opportunity to revisit and repudiate Liversidge v. Anderson[6] was spurned. The judgment also destroyed the very fabric of the unqualified right to counsel enshrined in Article 5(3) of the constitution".

Datuk Seri Gopal went on to say that Tun Salleh's judgment in Lim Kit Siang v. Government of Malaysia[7] where he denied the Plaintiff standing to seek a declaration on the legality of the privatisation of highways stands as the lowest ebb in the field of Malaysian administrative law. It virtually destroyed the beneficent jurisprudence emanating from the Othman Saat[8] case.

"While doing all this in court he used to attack the Government in public speeches. This is not appropriate for the head of the judiciary as the institution is one arm of the State. In a system of a parliamentary democracy it is an eternal truth that where the elected power comes into conflict with an appointed power or hereditary power the latter has to give way because the former has the will of the people behind it".

[5] Theresa Lim Chin Chin v. Inspector General of Police (1988) 1 M.L.J. 293

[6] Liversidge v. Anderson (1942) AC 206

[7] Lim Kit Siang v. Government of Malaysia (1988) 2 M.L.J. 12

[8] Tan Sri Haji Othman Saat v. Mohamed bin Ismail (1982) 2 M.L.J. 177

He added, "no doubt Salleh Abas was responding to public attacks by the Prime Minister on the judiciary. However public responses to such attacks can only exacerbate the differences. It will not heal wounds or settle misunderstandings. Where there is a problem of this sort it is best resolved by having meetings between the head and members of the Judiciary and the Executive so as to explain to a non-lawyer political head of the Executive the function that the judiciary is performing. When it is done in the quietness and calmness of a meeting room it may well facilitate a proper understanding of the respective roles of the two arms of government".

Acting completely in good faith Tun Salleh confronted the executive and that confrontation produced the unfortunate result it did. When the head of the judiciary cannot work with the head of executive in a system of parliamentary democracy it is futile to ask the head of executive to step down.

"As for the five judges who sat to grant the stay there is no doubt that they acted in the highest traditions of their office but they acted outside the law because under the Courts of Judicature Act it was only the Lord President or the Acting Lord President who could constitute a court. As lawyers we have to follow the law however honourable our intentions maybe", he said of the sacking of the two Supreme Court Judges.

As to whether history will repeat itself he said as a lawyer one does not say it will never happen again but added it was most unlikely a similar scenario would ever occur again.

When Ad Rem broached the perennial subject of what a good and a bad lawyer was, it brought a swift response from the retired judicial great. He made no bones about it when he said that a bad lawyer is one who loses a good case.

"A good case will win it by itself. You have to make a terrible hash of it to lose it. As a judge it is sometimes very frustrating to see a good case being lost because of poor handling. For example the facts may disclose a serious breach of trust entitling the plaintiff to a proprietary claim. But the lawyer may have framed the case in contract and ruined all prospects of success. The Bench can do little. It cannot redraft the pleadings. It cannot arrive at a decision contrary to the pleaded case. It cannot recast the case. So when this happens one is left feeling very frustrated".

But he said there are cases which can be saved. The tragedy there occurs when the Bench does not save the case.

"Take the Beatrice Fernandez[9] case for instance. The facts are notorious. Fernandez was an air stewardess in the employment of MAS. There was a clause in the collective agreement which said if a stewardess got pregnant she would have to leave her employment. She attacked the constitutionality of that clause in that it violated of Article 8(1) of Constitution. That was the wrong target. The correct target was whether a person can contract out of the fundamental rights guaranteed by the Constitution. In other words could she contract out of her fundamental right to equality before the law and the equal protection of the law"?

"The answer is to be found in the penultimate paragraph of the judgement of Ong CJ in Lionel v Government of Malaysia.[10] There the learned CJ said you cannot contract out of the Constitution. Accordingly the court should have declared the relevant clause void and inoperative as she could not contract out of her Article 8(1) rights. At the risk of repetition the wrong target was addressed. The Federal Court could have saved the case by granting leave on the correct question".

"Unfortunately, says Datuk Seri Gopal, the point was missed and Fernandez suffered an injustice. In such a case the Bench cannot say the point was not submitted on. It is a point of law as to how Article 8(1) applied to the facts of the particular case. The erroneous submission by counsel on Article 8(1) did not bind the court or prevent it from holding that the correct point of law was whether Article 8(1) rights could be contracted out of. The failure to adopt the correct approach was disastrous. Moreover wherever possible, the error of a lawyer should not be visited on the head of a client especially if it involves a point of constitutional law.

Datuk Seri Gopal paid a touching tribute to his wife when he said: "Before I conclude, I must mention something important. All that I am and all the good things that have happened in my life are because of one and one person only. And that person is my wife, Chandra. She is a far better person than I have been, am or will ever be. She is also far more learned that I am. The very sad thing is that whilst talking about the human rights of others, I trampled on hers. Had I given her the support she gave me and continues to give me, she would have risen far above me. I dedicate my all to her."

As the interview wound up we were left with the deep impression the crescendo of the roar in the corridors of the courts and the halls of the Palace of Justice may have waned but the reverberations are going to felt for a long time to come.

[9] Beatrice Fernandez v. Malaysian Airlines System (2005) 3 M.L.J. 681

[10] Lionel v. Government of Malaysia (1971) 2 M.L.J. 172

On 10 February 2010 Datuk Seri Gopal Sri Ram addressed a packed audience of lawyers at a seminar themes *Appellate Civil Procedure* organised by the Bar Council. There he lamented how he had sometimes taken pains to conduct etiquette classes in the middle of hearing Appeals but this had net yielded the desired results as new lawyers behaved in exactly the same manner, if not worse. At the outset he expressed his concern that a client should not suffer injustice because of a lawyer's incompetence. Quoting Lord Denning in Doyle v Olby[11] *"We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side", he said and this has always been his guiding philosophy in deciding cases.*

Below are some salient pointers and pitfalls to avoid given by Datuk Seri Gopal which will stand any counsel in good stead:-

- Always maintain good relationships with fellow lawyers. Loyalty to one's client is limited to the one brief but relationships with other lawyers are for the long term.
- Do not take preliminary objections and waste the court's time on technical or procedural points unnecessarily; go to the merits instead.
- For case preparation, master the facts and then master the documents. It is important to make the court understand the case and appreciate the point one is making and to be able to state what a case is about succinctly.
- Strive to be solid in understanding the fundamentals in order to be able to relate the law to the facts and the facts to the law. Knowledge is the most powerful tool and lawyers should start learning the law by reading law books and law reports.
- Study and learn from seniors. There is no substitute for hard work. Do not waste time in any measure that does not improve one's knowledge.
- Cite authorities. There is no need to have many; one or two on the main point(s) is sufficient. The court only needs to be convinced on the main point(s) of the case.
- When drafting the Memorandum of Appeal, draft carefully and widely. Do not address specific points too much. Drafting in general terms will prevent objections being taken.
- Do not repeat document(s) in the Appeal Record.
- At Case Management, do not take orders for default judgment if the senior counsel does not show up, as the defendant will then apply to the Court of Appeal. Instead, get a trial date to save on time and cost.
- If appearing for the respondent and being briefed for the first time, first read the statement of claim or the originating summons, and then read your own pleadings in the court below. If there was a trial, read the notes of evidence before reading the judgment. This way, counsel will form an opinion about what the judgment should be. Only then should he or she read the memorandum of appeal. In some cases counsel will find that the judgment is actually supportable on grounds available on the record on a matter of law other than those the judge had made. In such instances, a respondent's notice should be filed.
- When preparing written submissions, do not write in the first person but in the third person.
- Never ever say "I humbly submit" because advocates are never humble. Advocates are respectful but are forever without humility because they stand tall, being the only profession in this world which has the right or representation. No other profession can represent another human being in court.
- Politeness in court is essential. If counsel has to do something that may give offence to the Bench, he or she should always explain, e.g. if he has to turn his back to the Bench to speak to his junior, he should say "My Lord, may I have a moment to have a word with my junior on a point?" or "May I have your Lordship's permission to turn my back to get a document?" This simple elementary ethics and courtesy expected of every advocate is now sadly lacking in today's advocate.
- Advocates occupy a special position in society, being the only people who have assumed the great power of persuasion, i.e. the power to persuade another human being to a position different from the position that person wants to take. This power of persuasion will he enhanced by the quality of the language used.

- By Biliwi Singh, AdRem, Journal of the Selangor Bar, Vol. 1, 2010

Editor's Note:
Grateful to Selangor Bar's Journal AdRem for permission to publish the article.

[11] Doyle v. Olby (1969)2 QB 158