THE ROLE OF MEDIA IN MAINTAINING THE EQUILIBRIUM OF INTER-BRANCH RELATIONS IN GOVERNMENT

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This paper studies how the role of courts and judges has changed in recent history and examines the effect of these changes on the relationship of judicial independence and judicial accountability. In particular, the constitutional crises in Malaysia and Russia are discussed to demonstrate the political nature of demands for judicial accountability, and how public opinion legitimises an attack on the judiciary. The paper also studies the general characteristics of media and relevant international human rights standards on free expression to understand reaction of the judiciary and the public to the events surrounding the respective crises. It concludes that a society which enjoys free access to information and exchange of ideas can form an informed opinion as to the propriety of an attack on the judiciary, and therefore protect the balance of power among the branches of government.
Key words: judicial independence, judicial accountability, free expression, public opinion, media

INTRODUCTION

This study examines how excessive demands for judicial accountability could compromise judicial independence and create an imbalance in governmental inter-branch relations.[1] Recognising media as a platform for enforcing judicial accountability,[2] this paper analyses how free expression[3] could maintain the balance of power among the branches of government.

Cultural, social and political norms determine the stature of courts and the expected behaviour of judges in society.[4] While both common and civil law traditions view courts as enforcers of the law,[5] the Anglo-American tradition allows judges to participate in policy determination through the exercise of power of judicial review.[6] This power, which refers to the duty of courts to ensure that all governmental acts are consistent with the constitutional mandate,[7] enables courts to review the constitutionality of legislation and administrative actions, and nullify them whenever they are found to be repugnant to the fundamental law.[8]

After the Second World War, new democracies adopted the United States (US) doctrine of constitutional supremacy by expressly including judicial review as a component of judicial power in their constitutions.[9] This phenomenon led to the judicialization of politics or the means by which courts participate or influence policy through constitutional judicial review.[10] It allows judges to "increasingly dominate[11]" what traditionally was the exclusive domain of

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[1] Stephen Burbank, 'Judicial Independence, Judicial Accountability and Intergovernmental Relations' (2007) 95 Georgetown Law Rev 909

[2] Mary L. Volcansek, Elisabetta de Franciscis and Jacqueline Lucien Lafon, *Judicial Misconduct: A Cross-National Comparison* (University Press of Florida 1996)

[3] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 19

[4] Carlo Guarnieri and Patrizia Pederzoli, The Power of Judges: A Comparative Study of Courts and Democracy (OUP 2002)

[5] ibid 69; Volcansek and others (n 2) 3; Diana Kapiszewski, Gordon Silverstein, Robert A. Kagan, 'Introduction' in Diana Kapiszewski, Gordon Silverstein, Robert A. Kagan (eds), *Consequential Courts: Judicial Roles in Global Perspective* (CUP 2013)

[6] Guarnieri and Pederzoli (n 4).

[7] [1803] 5 US 137

[8] ibid

[9] Ran Hirschl, 'The New Constitutionalization and Judicialization of Pure Politics' (2006) 75 Fordham Law Rev 721

[10] ibid 721

[11] ibid; Bjorn Dressel, 'Court and Governance in Asia: Exploring Variations and Effects' (2012) 42 Hong Kong LJ 95

the legislature and executive.[12] Consequently, the exercise of this power is met with resistance.[13] A struggle ensues among the branches of government, especially in emerging democracies, and those courts which aggressively exert their powers usually suffer a backlash which reduces their "freedom of action".[14]

Conflicts among the branches of government are often due to clashes between the majoritarian sentiment and constitutional mandate. Legislators and executives decide policy based on public opinion[15] while judges enforce the law.[16] Whenever law and public opinion clash, the executive and legislature regard countermajoritarian political decisions as misplaced assertions of decisional independence[17] to justify political counterattacks on the judiciary. These counterattacks enable the executive and legislature to interfere with or influence the outcome of judicial proceedings.[18] They are undertaken to neutralise the judiciary and compel it to conform to the agenda of the two other branches. An example of a counterattack is the impeachment of US Supreme Court Justice Samuel Chase.[19] The Jeffersonians impeached Justice Chase several key Republican legislations nullified on judicial review.[20] Congress, however, voted against Justice Chase's removal from office.[21] Other examples of political counterattacks include the enactment of laws limiting the jurisdiction of courts and restraining the judiciary's budget.[22]

Political counterattacks are deemed to contradict the concept of judicial independence. Judicial independence is the "ability of courts and judges to perform their duties free of influence or control by other actors".[23] The United Nations Basic Principles on the Independence of the Judiciary provides that "courts must be resolve matters without any restriction, improper influences, inducements, pressures, threats or interference".[24] However, the constitution intentionally makes the judiciary dependent on the executive and legislature[25] to balance inter-branch relations.[26] For this reason, not all interferences on the judiciary are

[12] Dressel (n 11).
[13] Thomas L. Jipping, 'Legislating from the Bench: The Greatest Threat to Judicial Independence' [2001-2002] 43 S Tex L Rev 141, John C. Knecthle, 'Isn't Every Case Political? Political Questions on the Russian, German, and American High Courts' (2000) 26 Rev Cent & E Eur L 107
[14] Tom Ginsburg, Judicial Review in New Democracies: Constitutional Courts in Asian Cases (CUP 2003)
[15] Jurgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (Studies in Contemporary German Social Thought) (2nd edn, MIT Press 1996) 415
[16] Stephen B. Bright 'Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions' (1997) NYU L Rev 308, 309
[17] Burbank (n 1) 912
[18] John Ferejohn, 'Independent Judges, Dependent Judiciary: Explaining Judicial Independence' (1999) 72 Cal Law Rev 353, 355
[19] Ginsburg (n 14) 1012, 1105-1115/4023; Raoul Berger, *Impeachment: The Constitutional Problems* (4th edn, Harvard 1974) 224-251
[20] Berger (n 19).
[21] ibid
[22] Terri Jennings Peretti, *In Defense of a Political Court* (Princeton 1999)
[23] David S. Law, 'Judicial Independence' (2011) Revisita Forumul Judecatorilor 37; Peter H. Russell, 'Towards a General Theory of Judicial Independence' in Peter H. Russell and David M. O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from around the World* (University Press of Virginia 2001)
[24] 'Basic Principles of Judicial Independence' UNGA Res 40/32 (29 November 1985) and 40/146 (13 December 1985) para 2 and 4, UN ECOSOC, 'Strengthening Basic Principles of Judicial Conduct' ECOSOC 2006/03, International Association of Judicial Independence and World Peace and International Bar Association 'New Delhi Code of Minimum Standards of Judicial Independence' (22 October 1982) para 1 and 2, International Association of Judicial Independence and World Peace International Project of Judicial Independence (Judicial Group on Strengthening Judicial Integrity) 'Mt. Scopus Approved Revised International Standards of Judicial Independence' (19 March 2008) para 2, The Asia Foundation (LAWASIA: The Law Foundation for Asia and the Pacific) 'Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA region' (28 August 1997) para 1in relation to para 8 and 9
[25] Ferejohn (n 18) 356-365
[26] ibid 356

"normatively deplorable"[27] but an objectionable interference cannot be distinguished easily from an allowable one.[28]

What appears to be crucial to the legitimacy of a political counterattack against the court is public support. Either judicial decisions must contradict public opinion or judges must have breached proper judicial behaviour as dictated by social norms.[29] Either perception justifies interference by the executive or legislature in judicial affairs, thus, eliminating the need to determine the legitimacy of a political counterattack.

The public expects courts to be accountable[30] or to exercise "efficiency and transparency"[31] in discharging their functions. The concept of judicial accountability tempers acts deemed as unacceptable decisional independence[32] and behaviour which is inconsistent with social expectations of courts and judges.[33] It guarantees to the public that courts resolved cases without undue interference and in accordance with law. Consequently, demands for judicial accountability have become synonymous with political counterattacks, which could lead to an imbalance of power among the branches of government.[34] The guarantees of judicial independence insufficiently protect courts from excessive interference with their affairs.[35]

This paper takes interest on how the executive and legislature legitimise political counterattacks through calls for judicial accountability. It examines the cases of the Malaysian Supreme Court and Russian Constitutional Court, and compares how their respective heads responded to criticisms in light of the prohibition against judges interviewing directly with media.[36] This study argues that because public opinion validates demands for judicial accountability, free expressionis crucial to maintaining the balance of power among the branches of government. [37] Information disseminated and opinion exchanged freely through an independent and diverse media are the foundations of an enlightened public opinion necessary to keep governmental powers at equilibrium.

THE CASES OF MALAYSIA AND RUSSIA

The Malaysian Supreme Court

The 1988 Malaysian constitutional crisis climaxed with the removal from office of Supreme Court Lord President Tun Salleh Abbas.[38] Tun Salleh was found guilty of misbehaviour[39] for exhibiting "prejudice and bias against the government",[40] but antecedents reveal that he was removed from office to coerce the judiciary to cooperate with Prime Minister Mahathir Mohammad.[41] It must be noted that the Malaysian Supreme Court cited Mahathir in contempt for describing the judiciary as "obtrusive"[42] in an interview with Time Magazine. Mahathir

[27] ibid 355
[28] ibid 356
[29] Peretti (n 22) 135-136
[30] James Michael Scheppele, 'Are We Turning Judges to Politicians' (2005) 38 Loy LA L Rev 1517
[31] Shimon Shetreet and Sophie Turenne, Judges on Trial: The Trial and Independence of the Judiciary and Accountability of the English Judiciary (2nd edn, CUP 2013) 79
[32] Burbank (n 1) 912;
[33] ibid
[34] ibid 913
[35] Law (n 23) 39
[36] Mt. Scopus Revised Standards para 6.1
[37] UNHCR 'General Comment 34: Article 19 Freedom of expression and opinion' (12 September 2011) CCPR/C/GC/34 para 12, 14, 20
[38] AJ Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 Int'l & Comp LQ 57
[39] HP Lee, 'Fragile Bastion Under Siege—The 1988 Convulsion in the Malaysian Judiciary' (1990) 17 Melb U L Rev 386, 396-397 citing FED CONST (MALAYSIA) art 125(3)
[40] ibid 402
[41] ibid 414; Harding (n 38) 71; UNHRC Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council" A/HRC/4/25 para 27
[42] Lee (n 39) 388-395; Harding (n 38) 74-76

made this comment in light of several decisions nullifying executive acts undertaken or ordered by him due to unconstitutionality.[43]

Judicial review in Malaysia evolved as a safety valve against arbitrary administrative actions.[44] Mahathir obviously resented this fact, and being cited for contempt did not stop him from publicly undermining judicial authority in order to neutralise the courts. Unfortunately, the judiciary was caught in the political crossfire that gave rise to the UMNO 11 case.[45] This case gave Mahathir the opportunity to seize the Supreme Court.

The UMNO 11 case involved an intra-party dispute questioning the legality of Mahathir's election as party leader.[46] Supporters of the faction led by Tengku Razaleigh Hamza petitioned the court to nullify the 1987 party election[47] claiming that delegates of 30 unregistered branches of the party voted therein.[48] Allegedly, these agents lacked authority, and their participation in election rendered the process void.[49] After due hearing, the court found that UMNO indeed failed to register these branches with the Registrar of Societies as required by Section 12 of the Societies Act of 1966,[50] and consequently declared these branches "unlawful societies".[51]

The UMNO 11 decision was based on law. Unfortunately, it left Mahathir without a party, and consequently gave the opposition reason to demand for his resignation.[52] While what is crucial for a Malaysian Prime Minister is the confidence of Parliament, not the leadership of a party,[53] Mahathir nonetheless downplayed the significance of the UMNO 11 decision in media by describing it as "a technical matter".[54]

Meanwhile, wary of the escalating tension between the judiciary and executive, Tun Salleh immediately calendared the appeal of the UMNO 11 decision for hearing.[55] He also requested the king to intervene and resolve the power struggle between the executive and judiciary.[56] Unfortunately, Tun Salleh's plan backfired and resulted in his suspension and subsequent removal from office.[57] Noteworthy is the fact that Tun Salleh's request for a public trial was denied.[58] With the proceedings shrouded in mystery, the public cannot form an informed opinion on the sufficiency of the charges and fairness of his trial.

Judges do not command media attention,[59] and are discouraged from responding to media reports or inquiries except in instances where their personal response will avert irreparable damages.[60] Perhaps Tun Salleh should have countered Mahathir earlier. However, Malaysia's restrictive laws on expression precluded him from availing of the exception. The Federal Constitution of Malaysia protects the right to free expression but limits their exercise

[43] Lee (n 39) 390 citing *Lim Kiat Siang v Dato Seri Dr Mahathir Mohamad* (1987) 1 MLJ 383, Harding (n 38) 76
[44] Andrew Harding, 'The Problems and Characteristics of Judicial Review in Malaysia' in Yang Zhong (ed), *Comparative Studies on the Judicial Review System in East and Southeast Asia* (Kluwer Law International 1997)
[45] Harding (n 38) 57-59; Lee (n 39) 394-395 citing *Mohd Noor bin Othman v Mohd Yusuf Jaafar* [1988] 2 MLJ 129
[46] Harding (n 38) 58
[47] ibid
[48] ibid
[49] ibid
[50] ibid
[51] ibid 59
[52] ibid 60
[53] ibid 60-61
[54] ibid 60; Ginsburg (n 14) 935-944/4023
[55] Harding (n 38) 62
[56] ibid 80
[57] ibid; UN Basic Principles para 18 and 19, UNHRC 'Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy' UN Doc A/HRC/11/41 (24 March 2009) para 59
[58] ibid 401; UN Basic Principles para 17-19, New Delhi Standards para 28, Mt. Scopus Revised Standards para 5.2, 5.4
[59] Bright (n 16) 327
[60] Mt. Scopus Revised Standards para 6.2 in relation to 7.7

"in the interest of the security of the Federation".[61] Accordingly, the Internal Security Act 1960 (ISA) authorises the Minister of Home Affairs to issue *motu proprio* detention orders in the presence of satisfactory evidence that detaining a person is necessary to prevent him or her "from acting in any manner prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or the economic life thereof".[62] Moreover, the law expressly disallows judicial review of these orders.[63] Moreover, Mahathir was the Minister of Home Affairs. Perhaps Tun Salleh foresaw that if he openly defended judicial independence, the ISA may be used against him. Such a scenario would have created trouble not only for judiciary, but the state in general. Because of the ISA too, no one defended the court against Mahathir's criticisms.[64]

Prior to the 1988 constitutional crisis, the Malaysian Supreme Court was considered among the most independent of third world states.[65] However, the attack resulted in the evident capture of the judiciary.[66] Not only did the Malaysian Supreme Court play a pivotal role in discrediting opposition leader Anwar Ibrahim,[67] but it also disregarded the orthodox approach to constitutional interpretation in interpreting Article 121(1) of the Malaysian Federal Constitution.[68] In the *Koh Wah Kuan* decision,[69] the Malaysian Supreme Court held that the amendment stripped the two High Courts of their constitutional jurisdiction and their respective jurisdictions and powers shall be determined by federal laws enacted by the concerned legislatures.[70] This interpretation confined itself to the text of the amendment. Consequently, it rejected the separation of powers doctrine.

Clearly, the Malaysian judiciary was captured by the executive[71] and the foregoing decisions prove that they will likely remain to be so.

The Constitutional Court of Russia

Former law professor Valerii Zorkin was the first president of the Russian Constitutional Court.[72] A popular and controversial figure in Russian politics, Zorkin openly and habitually discussed judicial business in media.[73] For this reason, he was criticised for engaging in politics and displaying prejudice.

Zorkin's notoriety began in 1992 when the Constitutional Court was asked to resolve the nature of the Communist Party of the Soviet Union's personality and its properties.[74] The controversial case sought to determine whether the party was an alter ego of the former Soviet Union which used public funds to finance its businesses and purchase property.[75] Zorkin believed that the testimony of the last Soviet president, Mikhail Gorbachev, was integral to the issue.[76] Thus, he issued a subpoena requesting the former president to testify in court.

[61] Mohd Azizuddin Mohd Sani, 'Media Freedom in Malaysia' (2005) 35 3 J Contemp Asia 341, 345-346 citing FED CONST (Malaysia) art 10, s 2
[62] ibid 347 (cited ISA s 8)
[63] ibid
[64] Bright (n 16) 327
[65] Lee (n 39) 414
[66] International Bar Association, ICJ Centre for the Independence of Judges and Lawyers, Union International des Advocats, Commonwealth Lawyer's Association 'Justice in Jeopardy: Malaysia in 2000 (Report of a Mission, 17-27 April 1999)'
[67] ibid 45-54
[68] Richard SK Foo, 'Malaysia— Death of a Separate Constitutional Judicial Power' (2010) Sing J Legal Stud 227, 239
[69] [2001] 1 MLJ 1 (as cited in Foo (n 68)).
[70] ibid 239; IBA and others (n 66) 24
[71] IBA and others (n 66) 63
[72] Ginsburg (n 14) 1185-1216/4023; Knecthle (n 13) 111-117; Kim Lane Scheppele, 'Guardians of the Constitution: Constitutional Court Presidents and the Struggle for the Rule of Law in Post-Soviet Europe' (2006) 154 U Pa L Rev 1759, 1793-1795
[73] Scheppele (n 72) 1798-1800
[74] ibid
[75] ibid
[76] ibid

Gorbachev refused.[77] Consequently, a heated and public exchange of polemics between the two ensued.[78] Zorkin's statements were criticised as "not juridical by any standard".[79]

Meanwhile, relations between the president and parliament degenerated due to Russian president Boris Yeltsin's persistent efforts to amend the constitution to consolidate power in the executive.[80] Zorkin volunteered to mediate a compromise and this suggestion was well received by the two other branches.[81] Yeltsin and Congress of the Peoples' deputies chairperson Ruslan Khusbalatov agreed to maintain status quo.[82] Zorkin was praised for averting a constitutional crisis but was criticised for "bending some lesser laws in the name of greater legality".[83] Zorkin countered that he only did what was necessary to defend the constitutional system.[84]

A few months later, Yeltsin declared a state of emergency and called for a referendum.[85] He did not dissolve parliament but he warned its members against disobeying his decrees.[86] Zorkin publicly denounced Yeltsin's actions,[87] and prejudged the constitutionality of the presidential declarations[88]. He commented in a media interview that Yeltsin's decrees "contained several items, which to put it mildly are not in the constitution and that law on constitutional court".[89] The constitutional court, albeit a divided one, eventually nullified Yeltsin's declarations.[90] Because Zorkin was deemed to have overstepped his authority,[91] the public lost confidence on the Constitutional Court for it had "descended to cheap politics".[92]

Russia, like the former Soviet Union, respected free expression and the people's right to information, and welcomed the presence of foreign press.[93] This liberal framework allowed Zorkin to access media freely which in turn allowed the public to witness personally his behaviour and judge it according to societal norms. Unfortunately, Zorkin failed to "preserve the dignity of his office and the impartiality and independence of the judiciary"[94] in several occasions. Exchanging invectives with a potential witness in a case and commenting on the merits of a pending case knowing that he would eventually among the judges who will decide the controversy are blatant transgressions of the judicial ethics, and not merely societal expectations. Consequently, the public did not question the suspension of the Constitutional Court's operation shortly after declaring a state of emergency[95], thus, guaranteeing the lack of opposition.

Clearly, Zorkin was judged based solely on his actions, and independent of Yeltsin's own transgressions.[96]

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[77] ibid
[78] ibid 1800
[79] ibid
[80] ibid 1803
[81] ibid 1806-1807
[82] ibid 1807-1808
[83] ibid 1807, 1811
[84] ibid 1811
[85] ibid 1812
[86] ibid
[87] ibid 1812-1813
[88] ibid 1813
[89] ibid
[90] ibid 1814-1815
[91] ibid; Mt. Scopus Revised Standards para 16.2, 16.3
[92] ibid 1818
[93] Nicholas Daniloff, 'Will Russia's Free Press Survive?' (1993) 17 Fletcher F World Aff 35, 38-40 (The 1991 Russian Law on the Press prohibited censorship of mass media.)
[94] New Delhi Standards para 41
[95] Scheppele (n 72) 1833; Ginsburg (n 14) 1196/4023
[96] UN Basic Principles para 2 & 4, Beijing Principles para 38

The Constitutional Court eventually reopened but was faced with the challenge of becoming "a bastion against authoritarianism".[97] Interestingly, the Russian Constitutional Court is said to be gradually recovering social relevance by issuing strategic decisions consistent with norms of international law thereby consolidating its political and social influence.[98] Russia also amended laws to balance independence with accountability: government committed to increase budgetary allocations to the judiciary and gave courts greater control over proceedings while imposing term limits on judges and allowing criminal and administrative prosecution.[99] Therefore, judicialization of politics may take place in Russia despite the presence of a strong presidency.[100]

COULD MEDIA BALANCE

Inter-branch Relations?

The freedom of expression enables society to realise "the principles of transparency and accountability".[101] A "free, uncensored and unhindered press or media[102]" enables "free communication of information and ideas about public and political issues between citizens, candidates and elected representatives".[103] For this reason, media is recognised as an informal enforcement mechanism for judicial accountability.[104] But in performing this function, it must respect to judicial independence and exercise restraint in criticising courts.[105]

Media shapes public opinion through "the choices of information and format, in the shape and style of programming and in the effects its diffusion— in agenda setting or the priming and framing of issues".[106] Because it facilitates the dissemination of information and exchange of public opinions, media should be independent of political and social pressures.[107] For this reason, governments which impose excessively restrictive regulatory requirements not only ensure the uniformity of information disseminated to the public, they also inhibit the diversity of considered public opinion.[108] They therefore guarantee the lack of opposition, and prevent the realisation of accountability and transparency in governance. Corollary to this, government can easily silence an uncooperative judiciary.

Public opinion is constructed by filtering various ideas formed at the periphery of society towards the centre of the policy determination.[109] Society builds a unitary, instead of a polarised, public opinion by discussing "various levels of information and broader perspectives based on clearer and more specific definition of issues".[110] Since even a free and diverse media cannot be thoroughly objective,[111] the exchange of information is best facilitated by an independent and diverse media presenting different views.[112] Because entities will cater to

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[97] Scheppele (n 72) 681
[98] Knecthle (n 13) 126, Marie-Elisabetta Baudoin, 'Is the Constitutional Courtthe Last Bastion in Russia Against the Threat of Authoritarianism?' (2006) 58 5 Europe-Asia Studies 679
[99] Peter H. Solomon, 'Putin's Judicial Reform: Making Judges Accountable as well as Independent' (2002) 11 E Eur Const Rev 117
[100] ibid 693-697
[101] GC 34 para 3
[102] ibid para 13
[103] ibid
[104] Volcansek et al (n 2) 41
[105] Mt. Scopus Revised Standard para 6.1.
[106] Habermas (n 15) 373-378; Jurgen Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research' (2006) Communication Theory <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2885.2006.00280.x/pdf> accessed 15 June 2015
[107] Habermas (n 106) 415, 419; UNCHR 'Report of the Special Rapporteur on the Independence of the Judges and Lawyers, Leandro Despouy' UN Doc E/CN.4/2004 (31 December 2003) para 64
[108] Habermas (n 15) 378; Habermas (n 106) 416
[109] Habermas (n 15) 356
[110] Habermas (n 106) 414
[111] Raphael Cohen-Almagor, 'The Limits of Objective Reporting' (2008) 7 (1) Journal of Language and Politics 138, 140
[112] ibid 145, GC 34 para 14

different audiences, the presence of several market players would provide choices to the public.[113] Thus, barring other factors, more people would be able to form an informed public opinion regarding the legitimacy of a demand for judicial accountability.

The current regulatory frameworks of Malaysia and Russia are restrictive. The Malaysian legislature has repealed the ISA in 2012, but enacted the Security Offences (Special Measures) Act (SOSM) which limits the allowable detention period to 28 days, and requires either the filing of criminal case against or the release of the person after the expiration of such period.[114] The legality of the detention within the statutory period is not subject to judicial review.[115] Furthermore, newspaper publication and television networks are subject to strict regulation, and are controlled either by government or the majority political party Barisan.[116] Similarly, in Russia, either state-owned companies or entities friendly with Kremlin operate television and radio networks as well as print outlets.[117] Furthermore, "vague laws on extremism grant the authorities great discretion to crack down on any speech, organisation, or activity that lacks official support".[118] Clearly, the strict regulatory regimes of Malaysia and Russia propagate only pro-government information and silences criticism against the administration.

US studies show that few people are familiar with what courts do, and some sectors remain to question the propriety of judicial participation in policy determination. [119] The debate on whether courts should be allowed to construe (or interpret) the law rather than apply it continues.[120] Courts confront greater trouble with the judicialization of politics. Adopting the doctrine of constitutional supremacy inevitably requires judges to engage in or influence policy determination.

It must be noted that judges become victims of politics when courts engage in policy determination.[121] Proponents of the agency theory believe that judges are accountable as policy agents[122] for their "decisions in individual cases or at least those involving issues of high salience".[123] For instance, they equate imposing the minimum sentence in criminal cases with tolerance for criminal activity and failure to empathise with victims.[124] Criticisms such as this are designed to "attack a judge for the purpose of removing [him] so that a different political party may appoint a replacement".[125]

When the executive and legislature criticise courts, the judiciary is left without recourse. Courts face systemic limitations when accountability is enforced through media. Not only do judges fail to command media attention,[126] but they are also prohibited from discussing or commenting on their pending and resolved cases.[127] Courts therefore need a champion: someone who can "explain the story of the decision in a particular case, put a single ruling a by a judge in a broader perspective of a career and point out the difference between the role of

[113] Cohen-Almagor (n 111)
[114] 'Malaysia: Countries at the Crossroad 2012' (Freedom House, 2013) <https://freedomhouse.org/report/countries-crossroads/2012/malaysia#.VXu0jGDNYdV> accessed 15 June 2015
[115] ibid
[116] ibid
[117] 'Russia: Freedom in the World 2014' (Freedom House 2015) <https://freedomhouse.org/report/freedom-world/2014/russia#.VXu1w2DNau4> accessed 15 June 2015
[118] ibid
[119] Peretti (n 22) 167-170
[120] Kapiweski and others (eds) (n 5) 4-7; Jipping (n 13)
[121] Burbank (n 1) 917
[122] ibid
[123] ibid 913
[124] Bright (n 16) 312-313
[125] ibid, UN Basic Principles para 18 and 19, UNHRC 'Report of the Special Rapporteur on the the independence of judges and lawyers, Leandro Despouy' UN Doc A/HRC/11/41 (24 March 2009) para 59
[126] ibid 327
[127] Mt. Scopus Revised Standard para 16.2, 16. 3

a judge and a legislator or an executive".[128] But, if media is controlled by state or is rigidly regulated, appointing a spokesperson[129] for the judiciary has no value. The spokesperson would either be given limited exposure in media or none at all.

At present, neither the Malaysian Supreme Court nor the Russian Constitutional Court enjoy judicial independence. In Malaysia, "judicial independence is compromised by extensive executive influence".[130] Executive officials do not even need to call judges to let them know their desired outcome of cases is as they already express it in media or through actions taken by the police or the attorney general.[131] Meanwhile, the case of *Kurdeshina v Russia,*[132] which involves a judge who was removed from office for questioning the independence of the Russian judiciary, best illustrates the state of the Russian judiciary.[133] Despite judicial reform, the Russian judiciary "lacks independence from the executive branch, and career advancement is effectively tied to compliance with Kremlin preferences".[134]

Circumstances precluded Tun Salleh from fighting for judicial independence while Zorkin compromised the integrity of the constitution court when he violated societal expectations. Despite this difference, it is clear that the executive had the public on its side when they undertook the political counterattacks. Meanwhile, the present regulatory frameworks of Malaysia and Russia preclude the formation of any sentiment antagonistic to prevailing situation. Without free expression, the public cannot easily question the existing regime or ask for change.

CONCLUSION

This paper examined how demands for judicial accountability could compromise judicial independence in light of the judicialization of politics, and how such calls may result in an imbalance of inter-branch relations. Proceeding from the premise that society remains reluctant to accept judicial participation in policy determination, it was argued that demands for judicial accountability obtain legitimacy through public support. For this reason, free expression is pivotal in facilitating the formation of public opinion based on accurate information and free exchange of ideas, which in turn is necessary to safeguard the balance of power in inter-governmental relations.

The constitutional crises in Malaysia and Russia were examined to illustrate the systemic limitations preventing the judiciary from protecting itself in a battle of publicity, and highlight inadequacy of appointing spokespersons when confronted with a restrictive regulatory framework for media. Moreover, the paper recognised the natural tendency of media to be biased and its ability to influence public opinion. Thus, it highlighted the the importance of the free exchange of information and opinions among individuals to create an enlightened public opinion.

Noting that it remains unclear what judges or courts should be accountable for, the paper asserts the importance of free expression in maintaining equilibrium of inter-branch relations. Public opinion translated into the political power through consent, tolerance or ignorance ultimate determines the balance of power.

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[128] Bright (n 16) 327

[129] Mt. Scopus Revised Standards para 6.2

[130] 'Malaysia: Freedom in World 2014' (Freedom House, 2015) <https://freedomhouse.org/report/freedom-world/2014/malaysia#.VXvOnmDNau4> accessed 13 June 2015

[131] IBA and others (n 66) 64

[132] App No 29492/05 (ECtHR, 14 September 2009) cited in 'Freedom of Expression in Russia as it Relates to Criticism of the Government' (2013) 27 Emory Intl Law Rev 1105

[133] ibid

[134] Freedom House on Russia (n 117); Todd Foglesong 'The Dynamics of Judicial Independence in Russia' in Russell and another (n 22) 63-81