IN THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

APPEAL NO.: 01(f)-47-11/2013(B)

BETWEEN

SEMENYIH JAYA SDN BHD ... **APPELLANT**

AND

PENTADBIR TANAH DAERAH HULU LANGAT ...**RESPONDENT**

[In the matter of Civil Appeal No: B-01-653-11/2012 in the Court of Appeal of Malaysia At Putrajaya

Between

Semenyih Jaya Sdn Bhd ....Appellant

And

Pentadbir Tanah Daerah Hulu Langat ...Respondent]

WRITTEN SUBMISSION FOR THE MALAYSIAN BAR

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(REF: 10651/SJSB/DMIS/15)

I Preliminaries

1. Counsel for the Malaysian Bar was permitted to appear at the hearing of the appeal herein on 21.05.2015 on a watching brief. This Honourable Court had granted permission to counsel for the Malaysian Bar to submit a written submission pertaining to ***Article 121(1)*** of the ***Federal Constitution*** ("***Constitution***").

2. This written submission sets out the view of the Malaysian Bar in so far as the application of ***Article 121(1)***, ***Constitution*** is concerned. No position is taken on the merits of the appeal.

3. For clarity, the Malaysian Bar adopts the submissions of counsel for the Appellant in so far as ***Article 121(1)***, ***Constitution*** is concerned. In summary, it is the position of counsel for the Appellant that ***Article 121(1)***, ***Constitution*** can be read as supporting the proposition that the High Court, and not the assessors, must be given a determinative role in determining the amount of compensation to be awarded in land acquisition. To that end, the views of the assessors must be understood as only informing or guiding the High Court in arriving at the ultimate determination. The Malaysian Bar support this proposition and further supports the proposition that ***Section 40D(1), Land Acquisition Act 1960*** ("***LAA***") is unconstitutional for it effectively vesting a judicial role and function in the assessors.

4. Further, the Malaysian Bar also supports the contention that ***section 40D(3)*** and the proviso to ***section 49*** of the ***LAA*** should

be read restrictively in the context of the safeguards provided under ***Article 13***, ***Constitution***.

II Alternative point of submission on Article 121(1), Constitution

5. In the event this Honourable Court concludes that ***Article 121(1)***, ***Constitution*** is not infringed by ***section 40D(1), LAA*** by reason of the amendment to ***Article 121(1)*** pursuant to section ***8(a), Constitution (Amendment) Act 1988*** (the "**Amending Act**"), by which the jurisdiction of the High Court was limited to such jurisdiction conferred by or under federal law (the "**1988 Amendment**"), the Malaysian Bar contends that it is necessary for this Honourable Court to consider the constitutionality of the ***Amending Act***.

6. For the reasons set out below, the Malaysian Bar respectfully submits that ***section 8(a)***, ***Amending Act*** was a law that Parliament was not empowered to enact, in so far as it related to the removal of the judicial power from the Judiciary, and the limiting of the jurisdiction of the High Court to such jurisdiction conferred by or under federal law.

A. Background facts

(i) The 1988 Amendment

7. Before the 1988 Amendment, ***Article 121(1)***, ***Constitution*** read:

*"Subject to Clause (2), **the Judicial Power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status**, namely –*

(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;

(c) (Repealed)

and in such inferior courts as may be provided by federal law."

8. The term "judicial power" was defined by the Supreme Court in ***Public Prosecutor v Dato' Yap Peng [1987] 2 MLJ 311***[1]. Eusoffe Abdoolcader, SCJ, in delivering the majority judgment of the court, stated at pp. 317-319:

"Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties. It is virtually impossible to formulate a wholly exhaustive conceptual definition of that

[1] BOA Tab# 6, p.130

term, whether inclusive or exclusive, and as Windeyer J. observed in the High Court of Australia in The Queen v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd [1970] 123 CLR 361 (at page 394): "The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis," and again (at page 396) that it is "really amorphous."

[...]

"I cannot but conclude in the circumstances that there is in fact by the exercise of the power conferred by section 418A on the Public Prosecutor an incursion into the judicial power of the Federation and that any other view would ex necessitate rei result in relegating the provisions of article 121(1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper's will."

9. On 17.03.1988, a bill entitled ***Constitutional (Amendment) Bill 1988***[2] (the "**Bill**') was moved in the House of Representatives by the then Prime Minister, Dato' Seri Dr Mahathir bin Mohammad. Clause 8 of the Bill sought to remove the term "judicial power" from ***Article 121(1), Constitution***[3]. It read:

"Article 121 of the Federal Constitution is amended -

[2] BOA Tab# 4, p.119
[3] BOA Tab# 3, p.114

(a) ***by substituting for the words "Subject to Clause (2) the judicial power of the Federation shall be vested in" at the beginning of Clause (1) the words "There shall be";***

(b) by substituting for the words "and in such inferior courts as may be provided by federal law" at the end of Clause (1) the words "and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law";

(c) by inserting, immediately after Clause (1), the following new Clause (1A):

"(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.";

(d) by substituting for the words "The following jurisdiction shall be vested in" at the beginning of Clause (2) the words "There shall be"; and

(e) by inserting, immediately after the words "Kuala Lumpur," in Clause (2), the words "and the Supreme Court shall have the following jurisdiction,".

10. The intention of Clause 8(a) of the Bill was essentially to remove the inherent jurisdiction of the courts and to put the judiciary at the

mercy of Parliament. This was made clear by the then Prime Minister when presenting the bill. The Prime Minister said[4]:

> *"Perkara itu peruntukan yang menyatakan bahawa Mahkamah Tinggi dan Mahkamah-mahkamah Rendah hendaklah mempunyai bidang kuasa dan kuasa-kuasa sebagaimana yang diberi oleh atau di bawah Undang-undang Persekutuan. Dengan itu, perkara itu tidak lagi akan memberi penekanan pada meletak hak kuasa kehakiman Persekutuan pada mahkamah-mahkamah tetapi akan hanya memperkatakan tentang jenis-jenis mahkamah dan bidangkuasa serta kuasa-kuasanya."*
>
> *[...]*
>
> *"Sebab itu Tuan Yang di-Pertua, kita perlu berpegang kepada undang- ndang yang jelas. Kehakiman dipenuhi dengan manusia biasa yang mempunyai perasaan yang tidak berbeza dengan manusia lain. Jika mereka begitu bebas dan kebebasan ini membawa kepada ketidakadilan, maka hasrat kehakiman tidak akan tercapai . Oleh itu, adalah lebih adil kita berpegang kepada undang-undang yang bertulis yang dibuat mengikut kehendak rakyat dalam sistem demokrasi berparlimen ini. Hakim perlulah menjelaskan di bawah undang-undang mana yang ia membuat hukuman. Budi bicara hakim hendaklah tertakluk kepada undang-undang negara melainkan tidak ada undang-undang negara berkaitan dengan kes berkenaan."*

[4] Penyata Rasmi Parlimen 17.03.1988, pp. 1353-1366. BOA Tab# 1, pp.48- 53

He also made it clear that the amendment was to oust the courts inherent jurisdiction of judicial review:

> *"Sebab itu juga kes yang dahulu tidak pernah disoal oleh mahkamah kerana mematuhi peruntukan undang-undang, tiba-tiba disoal dan didapati salah berasaskan Natural Justice atau Judicial Review yang tidak bertulis.*
>
> *Penggunaan British Common Law secara tidak terhad tanpa mengambil kira kebudayaan dan peradaban yang berlainan antara Britain dan Malaysia, penggunaan hak mahkamah yang tidak bertulis seperti Judical Review, Natural Justice dan lain-lain menjadikan undang-undang yang bertulis tidak berguna lagi dan orang awam serta Kerajaan tidak lagi boleh berpandukan kepada undang-undang apabila bertindak"*

11. The Bill was eventually passed by both Houses of Parliament and came into force on 10.06.1988. With the passing of the Bill, the amended ***Article 121(1), Constitution*** read, and still reads:

> *"(1) There shall be two High Courts of co-ordinate jurisdiction and status, namely –*
>
> *(a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry in Kuala Lumpur; and*

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Borneo and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di- Pertuan Agong may determine;

(c)(Repealed),

and such inferior courts as may be provided by federal law and the ***High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law****."*

(ii) Implications of the 1988 Amendment

12. That the 1988 Amendment had far reaching implications was made clear by Sultan Azlan Shah, former Lord President, , extra-judicially as follows:

"The precise reason for this amendment remains unclear. But the consequences may be severe. With this amendment, it would appear that the judicial power is no longer vested in the courts, and more importantly the High Courts have been stripped of their inherent jurisdiction. Their powers are now only to be derived from any federal law that may be passed by Parliament. The effect of this change may have far-

reaching consequences on the separation of powers doctrine under the Federal Constitution."[5]

13. The concerns of the former Lord President were eventually confirmed by the Federal Court in ***Public Prosecutor v Kok Wah Kuan [2008] 1 MLJ 1*** ("***Koh Wah Kuan***")[6]. Abdul Hamid, the then Lord President of the Court of Appeal concluded at pp. 14-18:

> *"[10] There was thus a definitive declaration that the judicial power of the Federation shall be vested in the two High Courts. So, if a question is asked "Was the judicial power of the Federation vested in the two High Courts?" The answer has to be "yes" because that was what the Constitution provided. Whatever the words "judicial power" mean is a matter of interpretation. Having made the declaration in general terms, the provision went of to say "and the High Courts... shall have jurisdiction and powers as may be conferred by or under federal law." **In other words, if we want to know what are the specific jurisdiction and powers of the two High Courts, we will have to look at the federal law**.*
>
> *[11] **After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that***

[5] Sultan Azlan Shah, "The Role of Constitutional Rulers and the Judiciary Revisited" in Sinnadurai, V (ed), *Constitutional Monarchy, Rule of Law and Good Governance* (Kuala Lumpur: Professional Law Books, 2004) at p. 385. BOA Tab# 2, pp.93-112

[6] BOA Tab# 7, pp.157-160

"judicial power of the Federation" as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers "judicial powers", we are perfectly entitled to. But, to what extent such "judicial powers" are vested in the two High Courts depend on what federal law provides, not on the interpretation of the term "judicial power" as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?"

[...]

[21] Now that the pre-amendment words are no longer there, they simply cannot be used to determine the validity of a provision of a statute. ***The extent of the powers of the courts depends on what is provided in the Constitution. In the case of the two High Courts, they "shall have such jurisdiction and powers as may be conferred by or under federal law." So, we will have to look at the federal law to know the jurisdiction and powers of the courts****. (In the case of the Federal Court and the Court of Appeal, part of their jurisdiction is specifically provided in the Constitution itself - see art. 121(1B) and (2) respectively).*

*[22] **So, even if we say that judicial power still vests in the courts, in law, the nature and extent of the power depends on what the Constitution provides, not what some political thinkers think "judicial power" is.** Federal law provides that the sentence of death shall not be pronounced or recorded against a person who was a child at the time of the commission of the offence. That is the limit of judicial power of the court imposed by law."*

14. Richard Malanjum, FCJ entered a strong dissent. His Lordship stated at pp. 20-21:

*"[37] At any rate I am unable to accede to the proposition that with the amendment of art. 121(1) of the Federal Constitution (the amendment) the Courts in Malaysia can only function in accordance with what have been assigned to them by federal laws. **Accepting such proposition is contrary to the democratic system of government wherein the courts form the third branch of the government and they function to ensure that there is 'check and balance' in the system including the crucial duty to dispense justice according to law for those who come before them**.*

*[38] **The amendment which states that "the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law" should by no means be read to mean that the doctrines of separation of powers and independence of the***

Judiciary are now no more the basic features of our Federal Constitution. *I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.*

[39] ***It must be remembered that the courts, especially the Superior Courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal legislature****. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws."*

15. It is pertinent to note that the argument taken in this submission was never put before the Federal Court in ***Koh Wah Kuan (supra)***.

16. It is equally pertinent that the Judicial Power has, for all purposes and intents, been recognised as a basic feature of the Constitution.

B. Submission

17. In view of the foregoing, it is clear that the 1988 Amendment had the effect of undermining the Judicial Power of the Judiciary, and in that regard had wholly undermined the following additional features of the Constitution:

17.1. the doctrine of separation of powers; and

17.2. independence of the judiciary. It is respectfully submitted that with the removal of Judicial Power from, and the inherent jurisdiction of, the Judiciary, that institution was effectively suborned to Parliament with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Constitution enshrined in ***Article 4(1)***.

18. It is respectfully submitted that Parliament did and does not have power to amend the Constitution to the effect of undermining the features outlined in paragraph 17 above for the reasons that follow.

(i) *Supremacy of the Constitution*

19. ***Article 4(1), Constitution*** provides:

> *"This Constitution is the supreme law of the Federation and* ***any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void***."

20. It is evident that the effect of ***section 8(a), Amending Act*** was to establish Parliamentary supremacy. As noted above, the effect of the section was to suborn the Judiciary to Parliament, the latter being vested by ***section 8(a), Amending Act*** with the power to circumscribe the jurisdiction of the High Court.

21. Further, in practical terms, Parliamentary supremacy has the result of allowing the Executive considerable influence over the matter of the jurisdiction of the High Court. The Executive is formed from the majority of members of the House of Representatives in this way: the person commanding the confidence of such majority is the Prime Minister and it is the Prime Minister who advises the Yang di-Pertuan Agong on the appointment members of Cabinet from that same majority. Understood in this way, it is reasonable to conclude that the Executive holds great influence over the House of Representatives.

22. It is pertinent to note that the apex court has consistently rejected parliamentary supremacy in continuously endorsing the decision of the Federal Court in ***Ah Thian v Government of Malaysia [1976] 2 MLJ 112***[7] in which Tun Suffian, Lord President emphatically stated at p. 113:

> ***"The doctrine of the supremacy of Parliament does not apply in Malaysia****. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please."*

23. It follows therefore that any legislation aimed at establishing Parliamentary supremacy is unconstitutional. ***Section 8(a),***

[7] BOA Tab# 8, p.171

Amending Act was therefore void for being inconsistent with the Constitution within the sense of ***Article 4(1)***.

(ii) *The basic structure doctrine (the "Doctrine")*

24. Further to the foregoing, it is submitted that Parliament does not have the power to enact laws that offend the basic structure of the Constitution.

25. The Doctrine was found to be relevant and applicable by the Federal Court in ***Sivarasa Rasiah v Badan Peguam Malaysia & Another [2010] 2 MLJ 333*** ("***Sivarasa***")[8]. Gopal Sri Ram, FCJ stated at p. 342:

> "***Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution. See Keshavananda Bharati v State of Kerala AIR 1973 SC 1461.***"

[8] BOA Tab# 9, p.201

26. It is pertinent that in ***Sivarasa***, the Federal Court departed from the the decision of the Federal Court in ***Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187*** ("***Loh Kooi Choon***")[9]. In ***Loh Kooi Choon***, the court had in effect concluded that as long as an amendment to the Constitution in effect in the manner required by ***Article 159, Constitution***, that amendment was effectively regardless of its effect in so far as the basic structure of the Constitution was concerned. In ***Sivarasa***, Gopal Sri Ram FCJ stated at pp. 341-342:

> *"[7] The third and final observation is in respect of the sustained submission made on the appellant's behalf that the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that Parliament cannot enact laws (including Acts amending the Constitution) that violate the basic structure.* ***A frontal attack was launched on the following observation of the former Federal Court in Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187*** *:*
>
> > *The question whether the impugned Act is 'harsh and unjust' is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed by the Constitution, for as was said by Lord*

[9] BOA Tab# 10, p.119

Macnaghten in Vacher & Sons Ltd v London Society of Compositors [1913] AC 107 at p 118:

Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

It is the province of the courts to expound the law and 'the law must be taken to be as laid down by the courts, however much their decisions may be criticised by writers of such great distinction — per Roskill LJ in Henry v Geopresco International Ltd [1975] 2 All ER 702 at p 718. Those who find fault with the wisdom or expediency of the impugned Act, and with vexatious interference of fundamental rights, normally must address themselves to the legislature, and not the courts; they have their remedy at the ballot box.

[8] ***It was submitted during argument that reliance on the Vacher's case was misplaced because the remarks were***

there made in the context of a country whose Parliament is supreme. The argument has merit. As Suffian LP said in Ah Thian v Government of Malaysia [1976] 2 MLJ 112 :

> ***The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.***

This earlier view was obviously overlooked by the former Federal Court when it followed Vacher's case*. Indeed it is, for reasons that will become apparent from the discussions later in this judgment, that the courts are very much concerned with issues of whether a law is fair and just when it is tested against art 8(1).*"

27. It is pertinent to note is that the Doctrine has been recognised in Singapore[10], Canada[11] and Australia[12]. The Doctrine has even found some application in the United Kingdom, in which Parliament is supreme. In ***R (Jackson and others) v Attorney General [2006] 1 AC 262***[13] at pp. 302-303:

> *"101 The potential consequences of a decision in favour of the Attorney General are far-reaching.* ***The Attorney***

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[10] ***Mohammad Faizal bin Sabtu v Public Prosecutor [2012] 4 SLR 947*** .BOA Tab# 12, pp.286-319
[11] ***Ontario Public Service Employees' Union v Ontario (Attorney General) [1987] S.C.J. No. 48*** (SC) BOA Tab# 13, pp.320- 350
[12] ***Nationwide News Pty Ltd v Willis (1992) 108 ALR 681*** (High Court). BOA Tab# 14, pp.351- 420
[13] BOA Tab# 11, pp 260- 261

General said at the hearing that the Government might wish to use the 1949 Act to bring about constitutional changes such as altering the composition of the House of Lords. The logic of this proposition is that the procedure of the 1949 Act could be used by the Government to abolish the House of Lords. Strict legalism suggests that the Attorney General may be right. But I am deeply troubled about assenting to the validity of such an exorbitant assertion of government power in our bi-cameral system. It may be that such an issue would test the relative merits of strict legalism and constitutional legal principle in the courts at the most fundamental level.

102 But the implications are much wider. If the Attorney General is right the 1949 Act could also be used to introduce oppressive and wholly undemocratic legislation. For example, it could theoretically be used to abolish judicial review of flagrant abuse of power by a government or even the role of the ordinary courts in standing between the executive and citizens. This is where we may have to come back to the point about the supremacy of Parliament. We do not in the United Kingdom have an uncontrolled constitution as the Attorney General implausibly asserts. In the European context the second Factortame decision [1991] 1 AC 603 made that clear. The settlement contained in the Scotland Act 1998 also point to a divided sovereignty. Moreover, the European Convention on Human Rights as incorporated into our law by the Human Rights Act 1998, created a new legal

order. One must not assimilate the European Convention on Human Rights with multilateral treaties of the traditional type. Instead it is a legal order in which the United Kingdom assumes obligations to protect fundamental rights, not in relation to other states, but towards all individuals within its jurisdiction. ***The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal."***

28. It is respectfully submitted that the features laid down in paragraph 17 above form part of the basic structure of the Constitution

29. In support of this proposition, it is useful to note that in ***Keshavananda Bharati v State of Kerala AIR 1973 SC 1461***[14] ("***Keshavananda***"), Shelat and Grover JJ outlined six features that the majority of the Indian Supreme Court considering as being part of the basic structure of the Indian Constitution. Amongst the six was the ***demarcation of power between the legislature, the executive and the judiciary***. Shelat and Grover JJ said at p. 1603:

> *"The basic structure of the Constitution is not a vague concept and the apprehensions expressed on behalf of the respondents that neither the citizen nor the Parliament would be able to understand it are unfounded. If the historical background, the Preamble, the entire scheme of the Constitution, the relevant provisions thereof including Article 368 are kept in mind there can be no difficulty in discerning that the following can be regarded as the basic elements of the Constitutional structure. (These cannot be catalogued but can only be illustrated).*
>
> *1. The supremacy of the Constitution.*
>
> *2. Republican and **Democratic form of Government** and sovereignty of the country.*
>
> *3. Secular and federal character of the Constitution.*

[14] BOA Tab# 15, pp.423,426-426E

*4. **Demarcation of power between the legislature, the executive and the judiciary**.*

5. The dignity of the individual (secured by the various freedoms and basic rights in Part III and the mandate to build a welfare State contained in Part IV."

30. That the independence of the judiciary and the power of judicial review was corollary to the principle of separation of powers, was also recognised by the Supreme Court in ***Keshavananda (supra)***. The following passages from ***Keshavananda*** are important to note. Shelat and Grover JJ noted at pp. 1589-1590:

> *"**Implied limitations have also been placed upon the legislature which invalidates legislation usurping the judicial power**: See for instance Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality and Ors. (1970) 1 S.C.R. 388 at pp. 392-393 and Municipal Corporation of the City of Ahmedabad Etc. v. New Shorock Spg. and Wvg. Co. Ltd. etc. (1971) 1 S.C.R. 288 at pp. 294-297"*

Their Lordships, in agreeing with the decision of the Privy Council in ***Don John Francis Douglas Liyange v The Queen [1967] 1 AC 259***, went on to conclude at p. 1595;

> *"Don John Francis Douglas Liyange v. The Queen [1967] 1 A.C. 259 is another decision on which strong reliance has been placed on behalf of the petitioners. The Ceylon*

Parliament passed an Act which substantially modified the Criminal Procedure Code inter alia by purporting to legalise an ex-post facto detention for 60 days of any person suspected of having committed an offence against the State. This class of offences for which trial without a jury by three Judges nominated by the Minister for Justice could be ordered was widened and arrest without a warrant for waging war against the Queen could be effected. New minimum penalties for that offence were provided. ***The Privy Council held that the impugned legislation involved a usurpation and infringement by the legislature of judicial powers inconsistent with the written Constitution of Ceylon which, while not in terms vesting judicial functions in the judiciary, manifested an intention to secure in the judiciary a freedom from political, legislative and executive control and in effect left untouched the judicial system established by the Charter of Justice of 1833. The legislation was struck down as void. Their Lordships observed inter alia that powers in case of countries with written Constitutions must be exercised in accordance with the terms of the Constitution from which they were derived. Reference was made to the provisions in the Constitution for appointment of Judges by the Judicial Service Commission and it was pointed out that these provisions manifested an intention to secure in the judiciary a freedom from political, legislative and executive control. It was said that these provisions were wholly appropriate in a Constitution which intended that judicial power shall vest only in the***

judicature. And they would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature.

There seems to be a good deal of substance in the submission of Mr. Palkhivala that the above decision is based on the principle of implied limitations; because otherwise under Section 29(1) of the Ceylon Constitution Act Parliament was competent to make laws for the peace, order and good government of the island subject to the provisions of the Order. Strong observations were made on the true nature and purpose of the impugned enactments and it was said that the alterations made by them in the functions of the judiciary constituted a grave and deliberate incursion in the judicial sphere. The following passage is noteworthy and enlightening:

> ***If such Acts as these were valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges. It is appreciated that the legislature has no such general intention. It was beset by a grave situation and it took grave measures to deal with it, thinking, one must presume, that it had power to do so and was acting rightly. But that consideration is irrelevant, and gives no validity to acts which infringe the Constitution. What is done once, if it be allowed, may be done again and in a lesser crisis and less serious circumstances. And thus judicial***

power may be eroded. Such an erosion is contrary to the clear intention of the Constitution"

Hegde and Mukherjea JJ observed pp. 1625-1626:

> *"Similarly though plenary powers of legislation have been conferred on the Parliament and the State legislatures in respect of the legislative topics allotted to them, yet this Court has opined that by the exercise of that power neither Parliament nor the State legislatures can delegate to other authorities their essential legislative functions nor could they invade on the judicial power. These limitations were spelled out from the nature of the power conferred and from the scheme of the Constitution."*
>
> *[...]*
>
> *"From what has been said above, it is clear that the amending power under Article 368 is also subject to implied limitations. The contention that a power to amend a Constitution cannot be subject to any implied limitation is negatived by the observations of the Judicial Committee in The Bribery Commissioner v. Rana Singhe [1965] A.C. 172. The decision of the Judicial Committee in Liyange's case (supra) held that Ceylon Parliament was incompetent to encroach upon the judicial power also lends support to our conclusion that there can be implied limitations on the amending power."*

On the power of judiciary review, Shelat and Grover JJ noted at pp. 1601-1602:

> *"615. We are unable to see how the power of judicial review makes the judiciary supreme in any sense of the word.* ***This power is of paramount importance in a federal Constitution. Indeed it has been said that the heart and core of a democracy lies in the judicial process****; (per Bose J., in Bidi Supply Co. v. The Union of India [1956] S.C.R"*
>
> *[...]*
>
> ***"There is ample evidence in the Constitution itself to indicate that it creates a system of checks and balances by reason of which powers are so distributed that none of the three organs it sets up can become so predominant as to disable the others from exercising and discharging powers and functions entrusted to them. Though the Constitution does not lay down the principle of separation of powers in all its rigidity as is the case in the United Constitution but it envisages such a separation to a degree as was found in Ranasinghe's case. The judicial review provided expressly in our Constitution by means of Article 226 and 32 is one of the features upon which hinges the system of checks and balances."***

31. The principles laid down in ***Keshavananda*** were reviewed and affirmed by the Supreme Court in ***Indira Nehru Ghandhi v Raj Narain AIR 1975 SC 2299***[15]. The Supreme Court reiterated the sanctity of the doctrine of separation of powers and the exclusivity of judicial power. Khanna, J, in concurring with the majority, held at pp. 2346-2347:

> *"190. A declaration that an order made by a court of law is void is normally part of the judicial function and is not a legislative function.* ***Although there is in the Constitution of India no rigid separation of powers, by and large the spheres of judicial function and legislative function have been demarcated and it is not permissible for the Legislature to encroach upon the judicial sphere. It has accordingly been held that a Legislature while it is entitled to change with retrospective effect the law which formed the basis of the judicial decision, it is not permissible to the Legislature to declare the judgment of the court to be void or not binding*** *(see Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality, Janapada Sabha, Chhindwara v. The Central Provinces Syndicate Ltd., Municipal Corporation of the City of Ahmedabad v. New Shorock Spg. & Wvg. Co. Ltd. and State of Tamil Nadu v. M. Rayappa Gounder)"*

32. The concept of independence of the judiciary is the foundation of the separation of powers principle. The judiciary is entrusted with the task of keeping every organ of the state within the limits of the

[15] BOA Tab# 17, pp.465-466

law. It essentially constitutes the foundation on which rests the edifice of judicial power. The sacrosanct and inviolable nature of this principle within the Constitution was made clear by the Supreme Court in ***Supreme Court Advocates-on-Record Association v Union of India AIR 1994 SC 268***[16]. S. Ratnavel Pandian, J in citing various other decisions, lucidly concluded at pp. 313-315:

> *"Our Constitution is a radiant vibrant organism and under the banner of Sovereign, Socialist, Secular, Democratic Republic, steadily grows spreading the fragrance of its glorious objectives of securing to all citizens: Justice, Social Economic and Political.*
>
> ***For securing the above cherished objectives equally to all citizens irrespective of their religion, race, caste, sex place of birth and the socio-economic chronic inequalities and disadvantages, the Constitution having very high expectations from the judiciary, has placed great and tremendous responsibility, assigned a very important role and conferred jurisdiction of the widest amplitude on the Supreme Court and High Courts, and for ensuring the principle of the 'Rule of Law' which in the words of Bhagwati, J (as the learned Chief Justice then was) "runs through the entire fabric of the Constitution." To say differently, it is the cardinal principle of the Constitution that an independent***

[16] BOA Tab# 18, pp.469-474

judiciary is the most essential characteristic of a free society like ours.

Having regard to the importance of this concept the framers of our Constitution having before them the views of the Federal Court and of the High Court have said in a memorandum:

> *We have assumed that it is recognised on all hands that the independence and integrity of the judiciary in a democratic system of government is of the highest importance and interest not only to the judges but to the citizens at large who may have to seek redress in the last resort in courts of law against any illegal acts or the high-handed exercise of power by the executive... in making the following proposals and suggestions, the paramount importance of securing the fearless functioning of an independence and efficient judiciary has been steadily kept in view. Vide The Framing of India's Constitution Volume IB Page 196 by B. Shiva Rao.*

*In this context, **we may make it clear by borrowing the inimitable words of Justice Krishna Iyer, "Independence of the Judiciary is not genuflexion, nor is it opposition of Government". Vide Mainstream - November 22, 1980 and at one point of time Justice Krishna Iyer characterised this concept as a "Constitutional Religion".***

Indisputably, this concept of independence of judiciary which is inextricably linked and connected with the constitutional process related to the functioning of judiciary is a "fixed-star" in our constitutional consultation and its voice centers round the philosophy of the Constitution. The basic postulate of this concept is to have a more effective judicial system with its full vigour and vitality so as to secure and strengthen the imperative confidence of the people in the administration of justice*. It is only with the object of successfully achieving this principle and salvaging much of the problems concerning the present judicial system, it is inter-alia, contended that in the matter of appointment of Judges to the High Courts and Supreme Court 'primacy' to the opinion of the CJI which is only a facet of this concept, should be accorded so that the independence of judiciary is firmly secured and protected and the hyperbolic executive intrusion to impose its own selectee on the superior judiciary is effectively controlled and curbed.*

Regarding the significance of this principle, Chandrachud, J. (as the learned Chief Justice then was) in Union of India v. Sankal Chand Himatlal Sheth and Anr. (1978) 1 SCR 423: AIR 1977 SC 2328, said that the ***independence of judiciary is the 'cardinal feature' and observed that the judiciary which is to act as a bastion of the rights and freedom of the people is given certain constitutional guarantees to safeguard the independence of judiciary.***

Bhagwati, J (as the learned Chief Justice then was) who led on behalf of the minority observed in the same judgment i.e. Union of India v. Sankal Chand Himatlal Sheth and Anr. (supra) observed:

> *... **the independence of judiciary is a fighting faith of our Constitution. Fearless justice is a cardinal creed of our founding document....** Justice, as pointed out by this Court in Shamsher Singh v. State of Punjab (1975) 1 SCR 814 : AIR 1974 SC 2192, can become "fearless and free only if institutional immunity and autonomy are guaranteed.*

*Again Bhagwati, J in Gupta's case has said in paras 223-224 as follows : **The concept of independence of judiciary is a noble concept which inspires the constitutional scheme and constitutes the foundation on which rests the edifice of our democratic polity. If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective. ... But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence that it is a much wider concept which takes within its weep, independence from many other pressures and***

prejudices. ... .. Judges should be of stern stuff and tough fibre, unbending before power economic or political, and they must uphold the core principle of the rule of law which says, "Be you ever so high, the law is above you". This is the principle of independence of the judiciary which is vital for the establishment of real participatory democracy, maintenance of the rule of law as dynamic concept and delivery of social justice to the vulnerable sections of the community. It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the Constitution.

Fazal Ali, J in his judgment in Gupta's case in para 320 has held : ... ***that independence of judiciary is doubtless a basic structure of the Constitution but the said concept of independence has to be confined within the four corners of the Constitution and cannot be beyond the Constitution****.*

Tulzapurkar, J. in para 634 of his judgment in Gupta's case has pointed out : Such a literal construction is difficult to accept because ***no provision of the Constitution can be interpreted in a manner which will be in conflict with any of the basic features of the Constitution and the cardinal principle of independence of judiciary is one such basic feature; therefore, the construction to be put on the phrase in the article must be consistent with the said principle****.*

*Venkataramih, J. (as the learned Chief Justice then was) in the same case did not go so far but observed that it is "**one of the central values on which our Constitution is based.**" Vide para 1051."*

33. The principles stated in the three case cited above are of relevance to the Malaysian situation. As was reiterated by Suryadi FCJ in ***Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo [2014] 6 MLJ 812***[17] at p. 827:

"[34] It is necessary to add here that a Constitution is a document sui generis and a creation of the genius of its people. It calls for its own rules of interpretation to invoke the principles that animate the constitution. The point was made by the Privy Council in Minister of Home Affairs v. Fisher [1979] 3 All ER 21 and reaffirmed by Raja Azlan Shah CJ (as His Royal Highness then was) in Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98. On this point, the question of construction of the Federal Constitution assumes importance. We start off with the ambulatory approach in the words of Raja Azlan Shah Ag LP (as he then was) in the case of Dato' Menteri Othman Baginda & Anor, which reads:

... In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory

[17] BOA Tab# 19, p.487

interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way - 'with less rigidity and more generosity than other Acts' (see Minister of Home Affairs v. Fisher). A Constitution is sui generis, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in Attorney-General of St Christopher, Nevis and Anguilla v. Reynolds..."

34. The concepts of Judicial Power, judicial independence, and the separation of powers are as important to the Malaysian

constitutional framework as they are in other jurisdictions. There is no basis to say otherwise.

35. This is illustrated by the way in which the Malaysian courts have considered the inherent jurisdiction of the courts to provide judicial review. This is to ensure an effective check and balance system in keeping the executive and legislature within their constitutional limits and upholding the rule of law. The apex court of Malaysia has recognised that the powers of the executive[18] and the legislature[19] are limited by the Constitution. The judiciary acts as the bulwark of the Constitution in ensuring that the powers of the executive and legislature are kept within their intended limit.[20] To that end, judicial review has been recognised as being part of the inherent jurisdiction of the courts. Wan Suleiman, FCJ in delivering the judgment of the Federal Court in ***Lai Cheng Cheong v Sowaratnam [1983] 2 MLJ 113***[21] noted the following passage from Wade with approval at p.116:

> *"We were also referred to a passage in the Fourth Edition of Administrative Law by H.W.R. Wade at pages 36 to 38 which we find most illuminating. The relevant portion is reproduced hereunder:—*
>
> > *"Rights of appeal are always statutory. **Judicial review, on the other hand, is the exercise of the***

[18] ***Ah Thian v. Government of Malaysia [1976] 2 MLJ 112***, p. 113
[19] ***Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135***, p. 148
[20] See ***Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135***, p. 148. BOA Tab# 20, p.504
[21] BOA Tab# 21, pp.491-505

court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to uphold the rule of law. The basis of judicial review, therefore, is common law. This is none the less true because nearly all cases in administrative law arise under some Act of Parliament. Where the court quashes an order made by a minister under some Act, it will normally use its common law power to declare that the Act did not entitle the minister to do what he did.

Where the proceeding is an appeal, some superior court or authority will reconsider the decision of some lower court or authority on its merits. ...

Judicial review is a fundamentally different operation. Instead of substituting its own decision for that of some other body, as happens when an appeal is allowed, the court on review is concerned only with the question whether the act or order under attack should be allowed to stand or not."

III Conclusion

36. The Malaysian Bar respectfully submits that in view of the matters stated above, this Honourable Court should strike down ***section 8(a), Amending Act*** with a view to restoring Judicial Power to the Judiciary with all the attendant implications.

Dated this 20 day of August 2015

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