CONSTITUTIONAL OATH, RULE OF LAW AND JUDICIAL REVIEW[1]: AN ALTERNATIVE APPROACH TO BASIC STRUCTURE JURISPRUDENCE[2]

BY

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Constitutional Oath

It is my pleasure and honour to share my thoughts in the first of my lecture series at DSNLU on the jurisprudence called 'Constitutional Oath', which I have advocated in a number of my judgments.[3] It employs a simple methodology within the basic principles of rule of law to strike down arbitrary decisions of not only the executive but also the legislature. It paves the way for an alternative approach to 'Basic Structure Jurisprudence'.

To appreciate this paper in its proper perspective, I have set out some basic principles and/or methodology that include the Oath of Office of the English judge.

First, judicial review in England which practices Parliamentary Supremacy means, a review of the decision of the executive, etc. and to a smaller extent, a review of subsidiary legislation and not legislation *per se*. The jurisprudence employed in the

[1] My first lecture series at DSNLU to be delivered on 21-9-2016. The paper is dedicated to the law students and faculty members of DSNLU. Copyright @ Hamid Sultan bin Abu Backer with consent to all to be published in law and related journals, etc.

[2] The Constitution of Malaysia and India has many similarities and this has been discussed by our former Lord President, Tun Mohd Suffian bin Hashim in His Lordship's Lecture series in India. [See Tun Mohamed Suffian, Malaysia and India – Shared Experience in the Law, V.V. Chitaley Memorial Lecture, Nagpur, All India Reporter Ltd., 1980].

[3] See (i) *Nik Noorhafizi bin Nik Ibrahim & Ors v PP* [2014] 2 CLJ 273; (ii) *Nik Nazmi bin Nik Ahmad v PP* [2014] 4 CLJ 944; (iii) *Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] 3 AMR 35; (iv) *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007]5 MLJ 441.

review process relates to the concept of illegality, irrationality, procedural impropriety and to a small extent proportionality as well as reasonableness.[4]

Judicial review in a country which is governed by a written Constitution like Malaysia (and India) means the review of: (a) executive decision(s); (b) legislation(s); (c) constitutional amendment(s); (d) policy decision(s). The jurisprudence employed in the review process is not limited to that of England.

The judges Oath of Office in England is to be subservient to the legislation. The Oath of Office of a judge as well as members of the legislature in countries which practices Constitutional Supremacy is to be subservient to the written Constitution of that country.

The English judges' Oath of Office is prescribed in the Promissory Oaths Act 1868 that reads as follows:

Form of judicial oath.

"The oath in this Act referred to as the judicial oath shall be in the form following, that is to say:

> *I do swear that I will well and truly serve our Sovereign Lady Queen… in the office of, and I will do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will. So help me God"* (emphasis added).

I do not propose to set out the Oath of Office of a judge and members of the legislature in our (the Malaysian) jurisdiction, save to say that their oath in essence is to Preserve, Protect And Defend the Constitution. What I would like to say is the Oath of Office of a judge in England which practices Parliamentary Supremacy is

[4] See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

dissimilar and consequently the application of English principles relating to judicial review may not be the same in all cases.

I will also not articulate what the Rule of Law means, save to say that arbitrariness in the decision making process will impinge on the Rule of Law as well as the constitutional oath to make the decision ultra vires to the written Constitution. Arbitrariness in the decision making process will not pass the acid test of reasonableness which is a component of the Rule of Law.

Constitutional Oath Jurisprudence And Methodology

In this paper, I intend to discuss the manner in which constitutional oath jurisprudence and the right version of the rule of law can assist the executive, the legislature and the judiciary (three pillars) in the decision making process as an alternative and/or to complement the 'Basic Structure Jurisprudence' to sustain the Rule of Law in a country governed by a written Constitution. It is also my observation that 'basic structure' jurisprudence is complex in contrast to constitutional oath jurisprudence which I have advocated. Under constitutional oath jurisprudence, the courts' primarily role is to ensure the public decision maker, i.e. the three pillars do not make any arbitrary decision. It is that simple and straight forward and even enables the lay person(s) to appreciate the reasoning in contrast to basic structure jurisprudence.

I have developed the jurisprudence and methodology by linking the Oath of Office of the three pillars to the concept of arbitrariness and Rule of Law in reliance of the famous quote of a renowned Malaysian judge and jurist, His Royal Highness (HRH) Raja (Sultan) Azlan Shah in the case of ***Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd*** **[1979] 1 MLJ 135** and use that as the test in judicial review matters. That is to say, no public decision maker, which includes the executive, the legislature and the judiciary is allowed to make any arbitrary decision. That quote of HRH Raja Azlan Shah reads as follows:

> "Unfettered discretion is a contradiction in terms. ..... Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen: so that the courts can see that these great powers and influence are exercised in accordance with law."

The test propounded by HRH Raja Azlan Shah is simple and straight forward and in my view it applies to all public decision makers, which will include the three pillars. The failure of the courts to strictly follow this test will in my view, compromise the concept of accountability, transparency and good governance, thereby compromising the Rule of Law or worst, make it sterile.

To appreciate the constitutional oath jurisprudence, one need to note the difference between the oath of a judge in England where the judge employs Parliamentary Supremacy jurisprudence to sustain the Rule of Law and the Oath of a judge in countries like ours where the judge is required to employ Constitutional Supremacy jurisprudence to sustain the Rule of Law.

One also needs to appreciate that the Rule of Law relating to Parliamentary Supremacy is different and/or distinguishable from that of the rule of relating to Constitutional Supremacy. When judges employ both the Parliamentary and Constitutional Supremacy jurisprudence in the decision making process, it often results in convoluted jurisprudence and/or judgments. There is no shortage of such

judgments in countries which practices Constitutional Supremacy. In my view, such judgments have arisen as a consequence of a lack of appreciation of:

(i) Concepts of Parliamentary and Constitutional Supremacy;
(ii) Rule of law relating to Parliamentary and Constitutional Supremacy;
(iii) The difference in the oaths of judges:
    a. in a country like England which practices Parliamentary Supremacy; and
    b. in countries with written Constitution which practices Constitutional Supremacy.
(iv) Courts relying on judgments which have not applied the right version of the rule of law.

Jurists Have Not Been Adequately Trained By The British To Administer The Written Constitution

An important impediment in law and jurisprudence to protect fundamental rights as embodied in a constitution like ours is that the judges and jurists are not trained to administer the constitution within the norms of Constitutional Supremacy at the time of Independence. The training received from the British which largely continues, was the rule of law related to Parliamentary Supremacy. That does not contribute to nurturing fundamental rights in colonies where the masses are 'uninformed' as opposed to informed members of the public. For example, it is doubtful whether unjust laws and unjust decisions will find a place in England where the society is largely well informed. The same may not be the case in colonies once administered by the British. In fact, there was a different set of legislation employed by the British in England as opposed to that in the colonies though the administration of the judicial principle appeared to be the same. That is to say, it is not how the English judges decide, rather it is premised on what was provided in the legislation and/or the common law and the nature of jurisprudence they employ to resolve/overcome the problem. If the legislation does not provide for fundamental rights, then the English judges by judicial activism cannot do so. That is their conventional limit. Though

judicial activism is shunned in England, as the judges are by oath of office subservient to the legislation, on the contrary 'Judicial Dynamism' is expected of judges in a country with a written Constitution to protect fundamental rights within the constitutional framework; more so when they have taken an oath to preserve, protect and defend the constitution. What is shunned in England as judicial activism is a constitutional obligation for judges in a country having a written constitution like ours to meet the legitimate public expectation as per the constitution.

The vast majority of jurists have not taken note of the difference in the Oath of Office under the constitution when they criticise judicial dynamism as judicial activism.

The distinction, concept, jurisdiction and power of courts in the regime of Parliamentary Supremacy and Constitutional Supremacy was eloquently summarised by the learned author, Peter Leyland, in his book 'The Constitution of the United Kingdom', (2nd Ed), 2012 at p 50 and I quote as follows:

> "A further crucially important point about legal sovereignty which will be relevant in relation to many issues under discussion in this book is that this principle determines the relationship between Parliament and the courts. It means that although the courts have an interpretative function in regard to the application of legislation, it is Parliament, and not the courts, which has the final word in determining the law. This is markedly different from most codified constitutions. For example, in the United States, the Supreme Court held in *Marbury v Madison* (1803) 1 Cranch 137, that it could determine whether laws passed by Congress and the President were in conformity with the constitution, permitting judicial review of constitutional powers. The situation in the United States is that ultimately there is judicial rather than legislative supremacy. (Emphasis added.)

Notwithstanding the above distinction, in my view the British failed to instruct or sufficiently distinguish this separation when the colonies were given independence with a written Constitution. India had a problem in the early days when they applied the rule of law relating to Parliamentary Supremacy to administer the constitution. They have overcome that glitch by introducing the 'basic structure jurisprudence' as part of the Rule of Law.

India

It must be noted that the Indian courts in the early part after independence employed the jurisprudence relating to Parliamentary Supremacy to deal with constitutional issues. This is reflected in at least two decisions, namely: (i) ***Shankari Prasad Singh Deo v Union of India*** **AIR 1951 SC 458;** (ii) ***Sajan Singh v State of Rajasthan*** **AIR 1965 SC 845**. That progress was arrested by the employment of Constitutional Supremacy jurisprudence, which is reflected in two cases and subsequently followed in a number of other cases. The two important cases are (i) ***I.C. Golaknath v State of Punjab*** **AIR 1967 SC 1643**; (ii) ***Kesavananda Bharathi v State of Kerala*** **[1973] 4 SCC 225**. These two cases led to the launch of 'basic structure' jurisprudence by the Indian jurists as well as the judges, a concept which was not in vogue in the commonwealth then. Basic structure jurisprudence, which the court gave force to, was consistent with the oath of office of the judiciary and was done, notwithstanding the fact that the then distinguished, The Right Honourable Prime Minister of India, Jawaharlal Nehru, who was a barrister himself, was of the view that Parliamentary Supremacy jurisprudence must be employed by the courts. Though the word Parliamentary Supremacy jurisprudence was not mentioned by the renowned Prime Minister, learned author Dhanapalan (2015) at page 27 captures what he had said and that part reads as follows:

> "Speaking on the Draft Constitution, Jawaharlal Nehru had said in the Constituent Assembly' that the policy of the abolition of big estates is not a new policy but one that was laid down by the National Congress

> years ago. "So far as we are concerned, we, who are connected with the Congress, shall, naturally give effect to that pledge completely and no legal subtlety, no change, is going to come in our way". He had further stated that within limits, no Judge and no Supreme Court will be allowed to constitute themselves into a third chamber; no Supreme Court or no judiciary will sit in judgment over the sovereign will of the Parliament which represents the will of the entire community; if we go wrong here and there, they can point it out; but in the ultimate analysis, where the future of the community is concerned, no judiciary must be in the way. According to Jawaharlal Nehru, the ultimatum is that the whole Constitution is a creature of Parliament."

At this juncture, I must say that those who are involved in the study, practice and administration of constitutional and/or administrative law must take note that their research will not be complete if they have not had the opportunity to read the excellent book penned by Justice Dhanapalan, a retired judge of Madras High Court, titled 'Basic Structure Jurisprudence' which I had mentioned earlier.

I do not wish to set out what basic structure literally means, save to draw attention to what a well-known Senior Advocate in India and a constitutional law expert, K. Parasaran, in his Foreword to the book had said; and also the paragraph where Justice Dhanapalan had summarised the concept at page 30 respectively.

At page v and vi, learned Senior Advocate Parasaran says:

> "The basic structure, inter alia, comprehends supremacy of the Constitution, federalism (quasi-federal), democracy, separation of powers, judicial independence comprising of (a adjudicatory independence, (b) institutional independence and judicial review. The basic features are inextricably intertwined forming an integral whole. No basic feature can be disturbed by the exercise of the power of

amendment or by exercise of judicial power of interpretation. None of the provisions of the Constitution can be so interpreted as to conflict with any of the basic features of the Constitution. Any amendment made which conflict with any of the basic features of the Constitution will be rendered unconstitutional. When a judgment of the Supreme Court, conflicts with any basic feature of the Constitution, the amending power being a constituent power can reverse the said judgment. The 24th Amendment reversed the law declared in Golaknath case on the interpretation of Article 13. The validity of the said amendment was upheld in Kesavananda Bharati case. It is in contrast to the plenary power of the Parliament. If an Act of Parliament reverses a judgment of court and usurp the judicial power or intermeddle with it by a plenary power, it will be unconstitutional. The invalidity or any defect in the enactment pointed out in the judgment has to be removed, the Act made retrospective and a validating provision inserted, if a judgment is to be neutralized. This principle does not apply to constitutional amendments. The validity of a constitutional amendment can be tested only on the touchstone of basic features."

At page 30, Justice Dhanapalan says:

"There is no hard and fast rule for determining the basic structure of the Constitution. Different Judges keep different views regarding the theory of basic structure. But, at one point, they have similar view that Parliament has no power to destroy, alter or emasculate the 'basic structure' or 'framework' of the Constitution. If the historical background, the Preamble, the entire scheme of the Constitution and the relevant provisions thereof including Article 368 are kept in mind, then, there can be no difficulty in determining what are the basic elements of the basic structure of the Constitution. These words apply

> with greater force to the doctrine of basic structure, because the federal and democratic structure of the Constitution, the separation of powers and the secular character of our State are very much more definite than either negligence or natural justice. So, for the protection of welfare State, fundamental rights, unity and integrity of the nation, sovereign democratic republic and for liberty of thought, expression, belief, faith and worship, independence of judiciary are mandatory. None is above Constitution, including Parliament and Judiciary."

As I said earlier, basic structure jurisprudence which originates from India is complex as adumbrated by Senior Advocate K. Parasaran as well as Justice Dhanapalan. Constitutional oath jurisprudence which originates from Malaysian is simple but it derives its jurisprudential strength from the Indian decisions based on the basic structure jurisprudence.

Role of the Judiciary in Judicial Review

In simple terms based on the constitutional oath jurisprudence, the judiciary is only required to arrest arbitrariness and nothing more. Arresting arbitrariness does not mean interfering with the doctrine of separation of powers. The distinction is unlike comparing apples and oranges but that of marble and pumpkin. In addition, when the executive decision or legislation, or constitutional amendment is quashed or struck out, it does not mean that the executive or the legislature cannot review their decision and/or legislate to conform with the Rule of Law and the constitution.

Different Versions of the Rule of Law

The version of the rule of law applied in Parliamentary and Constitutional Supremacy nations are not the same. Simply put:

(i) The doctrine of Parliamentary Supremacy as practiced in England takes the position that parliament in its wisdom knows what is best for the people. The Judiciary must give effect to parliament's will. Judges take an oath to be subservient to the legislation. Judicial activism is not permissible. The rule of law requires the judiciary to be subservient to the legislation and show deference to the policy of the Government. Parliament and/or executive by policy can choose not to uphold the concept of accountability, transparency and good governance. The courts cannot go against the will of parliament and must give great deference to the policy of the Government. The principles of stare decisis must be strictly followed.

(ii) The doctrine of Constitutional Supremacy takes the position that parliament must be guided by the constitution. The Judiciary must make sure that parliament legislates according to the constitutional framework and all its agencies administer the legislation according to the rule of law related to Constitutional Supremacy. For this purpose the judiciary takes an oath to preserve, protect and defend the constitution. Judges are expected by the public to demonstrate 'judicial dynamism' to protect the constitution as well as protect fundamental rights. Parliament as well as the executive must uphold the concept of accountability, transparency and good governance as failure to do so will breach (violate) the constitutional framework. Judges by oath of office are entrusted to ensure the constitutional framework is not breached. The rule of law requires the judiciary to be subservient to the constitution and condone policy of the government, provided it does not breach the constitutional framework or the doctrine of accountability, transparency and good governance. The principles relating to stare decisis plays a lesser role when dealing with issues relating to the Constitution and public law relief.[5]

[5] See *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29.

What Version of the Rule of Law?

The judiciary has a greater role to play and to sustain the rule of law. The argument now is which version of the rule of law? The rule of law relating to Parliamentary or Constitutional Supremacy?

It is important to appreciate the right version of the rule of law and its administration plays an important role to rest a successful nation. I will explain this in lay terms as follows:

(i) the right version of the rule of law can turn a desert into an oasis;
(ii) the wrong version of the rule of law can turn an oasis to a desert;
(iii) the role of the courts under the constitution is to apply the right version of the rule of law to ensure that an oasis is not turned to a desert;
(iv) under the constitution, the court's role is not to turn a desert into an oasis. That role to turn a desert into an oasis rests with the other pillars and not the courts. The courts role is limited, to that extent. These separate roles are often referred to as separation of powers. However, when the courts' decision paves the way for an oasis to be turned into a desert that may be referred to as fusion of powers. Fusion of powers is an anathema to the constitutional framework and will impinge on fundamental rights and justice.

The jurisprudence involved in administration of justice in both of these concepts namely parliamentary and Constitutional Supremacy is not one and the same. That is to say, when a judge or coram applies the rule of law relating to Parliamentary Supremacy in a country governed by a written Constitution, the decision may not be the same as that of another judge or coram who applies the rule of law relating to Constitutional Supremacy. In relation to fundamental rights, a decision based on

Parliamentary Supremacy may not inspire confidence on the affected populace when there is a legitimate expectation that the judiciary by its oath of office would act to protect the fundamental rights provided under the constitution. This dilemma was felt in India in the early post-independence days when the courts were relying on the rule of law relating to Parliamentary Supremacy in interpreting the legislation and/or the constitution. Subsequently, the Indian judges in my view realised the shortcomings and inadequate jurisprudence to administer the constitution and to overcome that, they came out with an innovative jurisprudence called the 'Basic Structure' jurisprudence to ensure parliament does not interfere with the constitutional framework and also to sustain fundamental rights to uphold justice. Basic structure jurisprudence is well documented by Justice V. Dhanapalan (retired), Judge of the High Court of Madras in his recent book titled 'Basic Structure of the Indian Constitution – An Overview" (2015). It is a must read for all jurists who are committed to justice and the Constitution.

Parliamentary Supremacy

The doctrine of Parliamentary Supremacy is feudalistic in nature. It vests the power of the sovereign, or the Queen as the case may be in England, in parliament. It is just one step closer to dictatorship when the majority of the elected members of parliament become self-serving and the role of the court even in that instance is to serve self-serving legislation and not the public. In consequence, English judges cannot strike down legislation even if parliament enacts unjust laws or compromises its sovereignty by treaties and/or sells off its territory to other states or private persons, etc. by way of legislation or through executive giving out largesse to nominees. If an issue is raised in court, the judges in England there may just say it's the policy of the Government and that they are not adequately equipped to interfere. When it relates to private rights, the English judiciary would receive 'expert evidence' if necessary, on the issue which would not be the case for public law relief. It will appear that they employ double standards of reasoning in public and private law field. However, such an approach is an accepted norm and justified within the framework

of Parliamentary Supremacy and the oath of office of an English judge, though such an approach may be illegal or irrational in the 'Wednesbury' sense when employed in a nation that has subscribed to Constitutional Supremacy.

Constitutional Supremacy

In the regime of Parliamentary Supremacy, the public will have no recourse when the majority of the parliamentarians abuse the system as there are no checks and balances on the might of parliament in that system. In consequence, the founding fathers of the Indian constitution as well as the Malaysian constitution, rejected the concept of Parliamentary Supremacy and accepted the doctrine of Constitutional Supremacy like that of the US, and ensured by the constitutional oath of office of the legislature, executive and the judiciary, that they are beholden to preserve, protect and defend the constitution. The judiciary was entrusted as the supreme policeman as well as the judge of the constitution to supervise all the constitutional functionaries to ensure that the Rule of Law which is an essential jurisprudence to protect the constitution is maintained. The Government under the constitutional framework means all the pillars as each and every pillar has a specific role to play to preserve, protect and defend the constitution. That is not the case in England and the judiciary is the weaker arm of the Government and has no role to play in governing the nation *per se* save to be subservient to parliament and ensure the Rule of Law is sustained. That is not the case in countries where the constitution is the Supreme Law of the land and the judiciary *per se* is not the weaker arm but the supreme policing arm of the constitution.

The shortcoming of the doctrine of Constitutional Supremacy is that if the judiciary becomes a compliant judiciary and fails to uphold the jurisprudence relating to Constitutional Supremacy and leans towards Parliamentary Supremacy, then the protection to the public would be lost and it will result in a step nearer to dictatorship. Once the protection to the public is lost, then there is no 'separation of powers' which is integral to Constitutional Supremacy. The result would be 'fusion of powers'

reflective of dictatorial regime and the demise of the constitution. In my view, a 'free and independent press' stands as a check and balance to arrest the dilatory conduct of the three pillars in countries which is governed by a written Constitution. Not all countries which has subscribed to the constitution has a 'free and independent press'.

Rule of Law and Reasonableness

One of the important facets of rule of law is the keyword 'reasonableness'. This word runs through all forms of executive decisions, legislation and the constitution. The antithesis and/or anathema to rule of law is arbitrariness. Any form of arbitrariness in decision making process or legislation making process and/or constitutional amending process must not subscribe to arbitrariness.

In my view and based on authorities from respectable jurisdiction, under the jurisprudence relating to Constitutional Supremacy and oath of office:

(i) executive decision cannot be arbitrary;

(ii) formulation of legislation cannot be arbitrary and the legislation, even if made according to the provision of the law and/or the constitution, must pass the strict test of reasonableness and proportionality, failing which it will be caught by the doctrine of arbitrariness as per decided cases;

(iii) Constitutional amendment cannot be arbitrarily done. Even if the constitutional amendment is valid, it must pass the strict acid test of reasonableness and proportionality.

I do not wish to say much in respect of the jurisprudence relating to the Rule of Law save to say that any decision by the executive, legislature or judiciary must not subscribe to the concept of illegality, irrationality, procedural impropriety. The decision must also pass the test of reasonableness and proportionality as advocated

in many of the English as well as the Indian cases. On my part, I have dealt with the concepts in detail in more than ten judgments in particular the jurisprudence relating to constitutional oath of office. They are as follows: (i) ***Nik Noorhafizi bin Nik Ibrahim & Ors v PP*** **[2014] 2 CLJ 273**; (ii) ***Nik Nazmi bin Nik Ahmad v PP*** **[2014] 4 CLJ 944**; (iii) ***Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional*** **[2015] 3 AMR 35**; (iv) ***Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors*** **[2007]5 MLJ 441.**

Judicial Review

Judicial review is the process where legislative and executive actions are reviewed by the judiciary upon a complaint of the public that his or their rights have been infringed by the legislature and/or executive or inferior tribunal, etc. The judicial review parameters of the court within the jurisprudence of Parliamentary Supremacy are limited. For example, it is trite that English judges cannot review a legislation and strike it down wholly or partly unless it is a subsidiary legislation. English judges can review any form of executive decision but will be slow in doing so if it is related to policy of the Government.

Judicial review parameters of the court under the doctrine of Constitutional Supremacy are wide. The judiciary is empowered to review (a) executive decision; (b) legislation; (c) any constitutional amendments; (d) any policy decision. The methodology they can employ in any of the review process is principally based on the jurisprudence that the executive and/or legislative decisions must be confined to the constitutional framework and the decision making process must not be arbitrary. For example, if a legislation or constitutional amendment or policy, violates the constitutional framework, it will be struck down as of right based on the ultra vires doctrine. If the ultra vires doctrine is not applicable, the court may employ the concept relating to illegality, irrationality, procedural impropriety, reasonableness and

proportionality to check the decision making process of the executive. However, where it relates to legislative decisions concerning legislature and/or constitutional amendment, the court in India applies the doctrine of basic structure jurisprudence to strike down the legislation and/or constitutional amendment. What the courts have not done is to apply the constitutional oath doctrine to strike down the legislative and/or constitutional amendment if the legislature has been found to have acted arbitrarily.

In my view, the court, to sustain the rule of law cannot allow arbitrariness to creep in any executive or legislative or constitutional amendment or policy making process. In essence, under the doctrine of constitutional oath the legislature or executive or judiciary cannot make any arbitrary decision. For example, (i) if the executive's decision is arbitrary, it ought to be quashed; (ii) if it is shown that the legislative action in enacting the legislation or the constitutional amendment was arbitrary, it ought to be struck down; (iii) if the policy formulated is arbitrary it may be struck down. That is to say, arbitrariness makes the decision of the executive and/or legislative action a nullity *ab initio*. An ultra vires act of the executive or legislature *viz-a-viz* the constitution makes the whole decision or legislation or constitutional amendment or policy illegal. On a similar tone, in consequence of the oath of office, any arbitrary decision of any of the three pillars will in my view be ultra vires the constitution.

Rule of Law and Rule by Law

Rule of Law is a generic term and in consequence no one has yet been able to define its parameters. For example, there may be presence of rule of law in a communist, socialist, democratic, Syariah regime, etc. The real question here is what version of rule of law need to be applied to administer a written Constitution. One important aspect on the selection process is that any principles of law which does not promote transparency, accountability and good governance and if also the application of that principle, leads to endemic corruption, cannot be the rule of law

envisaged in the Constitution. It is one relating to common sense approach and as Lord Denning often says if common sense is not applied in the administration of justice, it would not lead to justice or words to that effect.

I do not wish to elaborate on the parameters of the Rule of Law save to say it is now an accepted norm that law as per the constitutional framework should govern a nation, as opposed to governed by arbitrary decisions or legislation and/or constitutional amendments. Rule by law is an antithesis to the Rule of Law and is now seen as anathema in democratic country more so in countries which are subject to a constitutional framework when the decision of the executive, legislature and the judiciary is tainted with arbitrariness. The line may appear to be thin but the distinction is like that of comparing a marble to the size of a pumpkin and the distinction is not like an apple to an orange. The Rule of Law paves the way for the progress of democratic nations and nips corruption in the bud, while rule by law leads to destruction of the nation that allows corruption to set in. The ultimate result is that it will compromise fundamental rights as corruption often leads to squandering of national assets or its revenue and hits the poor the most.

In **Nik Nazmi bin Nik Ahmad v PP [2014] 4 CLJ 944**, I have expressed my views of on the subject as follows,

> “In essence, in the name of 'security of the Federation' or 'public order' the legislature cannot enact provisions which will impinge on the constitutional framework without fulfilling the strict criteria set out in the constitution. The courts are obliged to ensure the law promulgated are not enacted on illusory threat of 'public order' or 'security of the Federation' by speculation or surmise, etc.; to change the character of rule of law to rule by law. In this respect the court has a sacrosanct role to play to **balance the state as well as public interest** within the framework of constitutional jurisprudence as applied in civilised nation, which are not subject to authoritarian rule. The courts' task in doing so

is no easy task but when done within jurisprudence it promotes and enhances democratic values which will ensure peace, prosperity and harmony to the state and bring great economic success to the public. And it will also anchor public confidence in judicial determination (emphasis added)."

Conclusion

Constitutional principles in almost all countries are evolutionary in nature and may change from time to time. In jest, I like to say that 'Judges are appointed to preserve, protect and defend the constitution. And Lawyers are just not paid to talk but *inter alia* to do proper research for clients as well as the country, without fear or favour to uphold justice'. On a serious note, it is my judgment that more research need to be done on the constitutional oath jurisprudence. I have dedicated this paper to the law students of DSNLU, Visakhapatnam, India, hoping that the constitutional oath jurisprudence which I have advocated will be picked up by the students as well as Indian jurists and judges to preserve, protect and defend the Constitution. I do wish that the jurisprudence which I am attempting to export to India will be developed and refined in India to arrest arbitrary decisions and uphold the Rule of Law.

I hope and pray that during my life time, my publications will provoke jurists to do appropriate research to bring about jurisprudential renaissance based on constitutional oath to preserve, protect and defend the constitution and ensure the pillars do employ the rule of law relating to Constitutional Supremacy which I believe will truly promote justice. I believe by this paper and by its publication, I have shown the way forward, consistent with written Constitutions.

Thank you.

Justice Datuk Dr. Haji Hamid Sultan Bin Abu Backer

Judge, Court of Appeal Malaysia.[6]

[6] Judge of Court of Appeal Malaysia. He is an Honorary Visiting Professor of Damodaran Sanjivayya National Law University, Visakhapatnam, India; a barrister and a fellow of the Chartered Institute of Arbitrators. He is a graduate in Economics and also an honours and master degree holder from University of London in Insurance, Shipping and Syariah Law. He also holds post graduate diplomas in Islamic Banking and Finance and also in Syariah Law and Practice from International Islamic University Malaysia. He was a member of the Malaysian Bar Council for more than 6 years and has served as Chairman in various committees. He has been invited as a visiting Scholar of University of Sheffield in United Kingdom, and had spoken on Enforcement of Foreign Arbitral Awards in England at Chartered Institute of Arbitrators, London as well as City University of London; and also participates in various other activities of Universities such as examiner of PhD thesis, external examiner, Guest Speaker, etc. He has written on various subjects, inclusive of Civil Procedure, Criminal Procedure, Evidence, Conveyancing, Islamic Banking, International and Domestic Arbitration and many more areas on commercial law. His books grace the libraries of law firms and the chamber of judges. His books are not only used as text books in all institutions of higher learning offering law, but also used by all who are involved in the practice and administration of law in Malaysia. His doctorate thesis was on Civil Procedure and Justice. He has written about one thousand judgments which cover most areas of the law.