SOCIAL JUSTICE: Constitutional Oath, Rule of Law

AND

JUDICIAL REVIEW: Malaysian Chapter

Research paper by:
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Judge Court of Appeal, Malaysia

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- Justice Dr. Marc Splitzkatz
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Edited in 2016 by Dato Mah Weng Kwai. Re-edited in 2019 by Datuk Joy Appukuttan, Arun Kasi, Dinesh Nandrajog *(Advocate & Solicitor, Malaya)*, S. V. Parvin Rathinam Advocate, Chennai, High Court, India.

SOCIAL JUSTICE:
CONSTITUTIONAL OATH, RULE OF LAW AND JUDICIAL REVIEW MALAYSIAN CHAPTER

RESEARCH PAPER BY

JUSTICE DATUK DR. HAJI HAMID SULTAN BIN ABU BACKER

JUDGE, COURT OF APPEAL, MALAYSIA

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Published, Typeset and Sponsored by:

JANAB (M) SDN. BHD.
(Company No. 263810-K)
Law Books Publisher and Distributor

For mailing orders please address to:
No. 207, 2nd Floor, Campbell Complex,
Jalan Dang Wangi, 50100 Kuala Lumpur.
Tel: 603-2698 0076 Fax: 603-2691 5703
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December 1, 2015

REVIEW

Equality, social justice rule of law, judicial review and separation of powers forms part of the basic structure of any Constitution. All these concepts are distinct, yet intimately connected. There can be no rule of law if there is no equality before the law. These would be meaningless if the violation was not subject to judicial review. All these would be redundant if the legislative, executive and judicial powers are vested in one organ. It is the judiciary which has been vested with the most important duty to determine whether there has been transgression of limits by one or the other organs.

The following words of Madon, J. reflect a true picture of the expectation of general society today from the judiciary :

> *"The collective will of the society today wants that if the rich sleep in luxury apartments, the poor should sleep at least with a roof over their head, that if the rich can eat both bread and cakes, the poor should at least eat bread, that if the rich can live in opulence, the poor should at least be able to afford basic comforts of life. If the law is to operate today, so as to secure social justice to all, who else can do it but Judges whose constitutional task is to interpret and apply the law."*

The judiciary has set out to bring about a silent revolution for the purpose of securing socio-economic justice to all.

The urgency of securing socio-economic justice has rightly been pointed out by Justice Chandrachud in Minerva Mills case as under :

"The promise of better tomorrow must be fulfilled today, day after tomorrow, it runs the risk of being conveniently forgotten. Indeed, so many tomorrows have come and gone without a leaf turning that today there is a lurking danger that people will work out their destiny through the compelled cult of their own 'dirty hands'. Words bandied about in marbled halls say much, but fail to achieve as much."

to pray without any access to medical care, all contribute in making a mockery of fundamental rights. Fundamental Rights claim to promote democracy, but in essence detract from this very claim if there are no steps taken in the interests of the impoverished, to prevent misdistribution of wealth and where there is lack of opportunity for the vast majority of the population. It is in this backdrop that the role of the judiciary is very critical.

Julius Stone rightly pointed out :

"It is not given to any generation of men to complete the task of human improvement and redemption, but no generation is free to desist from them."

Rule of law and equality before the law are designed to secure, *inter alia*, justice both social and economic. In this Paper, "Social Justice : Constitutional Oath, Rule of Law & Judicial Review – Malaysian Chapter", Justice Datuk Dr. Haji Hamid Sultan Bin Abu Backer, Judge, Court of Appeal, Malaysia has taken a very vital topic up for discussion, viz. social justice, rule of law and judicial review within the confines of the Constitution. The Paper is reflective of the changing approach of the judiciary to the concept of social justice.

Once upon a time, Judges were not required to go into economics, science and any other such subject. Those were the traditional Judges. But with the expanse and development of law, particularly in human rights jurisprudence, things have changed today. If a Judge knows to balance the concept of "convergence" which is taking place today between constitutional, economic and social concepts, they can serve the society better and render socio-economic justice as enshrined in our Constitution.

From time to time, activist Judges have been developing a new concept of 'natural law' as distinct from the general concept of it. Such a development is inevitable in a welfare society. Denning stressed the need for a new equity. Cardozo pointed out that ethical considerations can no more be excluded from the administration of justice, which is the end and purpose of all civil laws than one can exclude the vital air from his room and live. The concept of social and economic justice is closely linked with ethical principles. Cause of law is the welfare of society. When the welfare of society becomes the aim as against mere individual rights, a new concept of natural law is developed. This concept is based on ethical considerations and it gives rise to the concept of social morality. This social morality aims at making the life of every human being a decent life, thus meeting the objective of social justice.

Judge-jurist Benjamin Cardozo in "The Nature of Judicial Process" has shown the importance of judiciary for social progress. He had emphasised that judges should ensure that social progress and desired change is being carried on without hindrance.

From the sociological jurisprudential perspective, the Supreme Court of India has played an important role in this social transformation, ensuring that access to justice is made available for all through Public Interest Litigation and taking up important issues leading to the policy moulding, with the purpose of striking balance between the interest of society and individuals.

In the Paper, the learned Author has rendered an in-depth analysis on social justice, rule of law and its reasonableness and also on the power of judicial review, all in the Malaysian and Indian context. He has spoken about how constitutional oath jurisprudence can be of assistance to the three pillars to achieve the objectives of social justice and in this regard, has drawn up the similarities between the Malaysian and the Indian Constitutions. He has also given a road map on the way forward in enhancing and building on the concept of social justice.

The learned Author has taken up a comparative study between Parliamentary Supremacy and Constitutional Supremacy and has discussed its shortcomings. While heaping praise on the Indian Constitution which has provided for a free and independent Press, he has commented that not many countries have such subscribed to the idea.

The Paper reflects the meticulous research carried out by the learned Author for analysing the issues threadbare and delving deep into each of the given subjects, and complementing each topic by due reference to specific case laws rendered by Malaysian and Indian Courts of law and other works of legal jurisprudence, for which he deserves all the credit.

I congratulate Justice Datuk Dr. Haji Hamid Sultan Bin Abu Backer for this commendable piece of work, which I am sure would find wide appreciation from all those who are part of the justice delivery system.

(Sanjay Kishan Kaul)

PROFILE :

Justice Sanjay Kishan Kaul first graduated in Economics and then in Law from the University of Delhi in 1982. He commenced his legal career as a lawyer and was elevated to the bench of the High Court at Delhi in 2001. He then leaped to the position as the Chief Justice of Delhi High Court in 2012. He then took responsibility as the Chief Justice of Punjab and Haryana High Court in 2013. He has been serving as the Chief Justice of Madras High Court since 2014. He has delivered numerous notable decisions in the Indian jurisprudence.

Reviewed by:

Justice Dr. Marc Spitzkatz,

High Court Berlin, Germany

Justice Datuk Dr. Haji Hamid Sultan Bin Abu Backer's thoughts on social justice and how it relates to constitutional oath, rule of law and judicial review focus on important issues of constitutionalism. In fact, they deal with one of the crucial points of separation of powers in modern times: the relationship between parliament and judiciary, which is – not so much as the relationship between the other powers and the executive – characterized by blurry borders forcing those who have to decide competence issues to take a precarious tightrope walk. The author is to be congratulated for making it clear right from the beginning that accountability, transparency and good governance are needed from *all* pillars to provide social justice and guarantee a fair and sustainable distribution of wealth, opportunities and privileges such as education, health care, employment and labour rights and others. Arbitrary decisions lead to the contrary. The only way to safely prevent arbitrariness is to subject each and every decision or action of public institutions to (judicial) review, the compliance standard being defined by the requirement of proper purpose and reasonability. Justice Datuk Dr. Haj Hamid Sultan Bin Abu Backer points out that only the principle of constitutional supremacy is suitable to achieve that purpose, as it subjects also legislation to judicial review for compliance with the rules set up by the constitution. From my German rule of law perspective, this is evident since the introduction of the German Basic Law in 1949. Here, basically all state actions are subject to judicial review of a special constitutional court, including legislation and mere action of any kind. All state actions can be checked against the proportionality principle: meaning that it must be justified, suitable and proportional as regards aim and objective on the one hand and effect on legal rights of the citizen on the other hand. That such checks and balances require public institutions to be transparent in decision making is obvious and a positive effect by itself. The tightrope walking judiciary – regardless of whether this task is designated to a specialized constitutional court or the ordinary courts – has to take is to do its review while respecting the separation of powers principle at the same time. To me, it seems important that the courts have to check the requirements

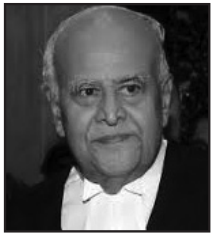
of the proportionality principle without replacing discretion of executive or legislative with their *own* discretion. This might sometimes be difficult, but should be achievable with a good amount of awareness and self-restraint. The author makes the important statement that a court decision quashing a government decision is not automatically in violation of the separation of powers doctrine, as long as it only arrests arbitatriness and does not replace it with the court's own arbitrariness or the court's own discretion. Judicial dynamism instead of judicial activism is an important distinction highlighted by the author which should be a guiding principle for all judges, especially those entrusted with safeguarding the constitution. If there is need for a fourth pillar to safeguard the constitution might very well be an issue dependant on a country's special social and political setup, the same being true for how such a fourth pillar should be designed. In my country Germany, we opted for a constitutional court, flanked by a parliament very well controlled by an informed public and free media. So far, this turned out to be a rather effective mechanism. For other countries, other solutions might be more suitable. Justice Datuk Dr. Haj Hamid Sultan Bin Abu Backer's paper is an important contribution to discuss solutions in making constitutionalism and separation of powers effective in the Malaysian context. It seems to me that this context can be characterized by contradictions having their origin in a colonial past that was followed by changes in the legal and political system not always easy to synchronize with the inherited structures. This includes principles of rule of law, but also the self-conception of the rule of law stakeholders. I am sure the author's thoughts will lead to further fruitful discussions and advancement in the subject matter.

PROFILE :

Dr. Marc Spitzkatz is a judge of the High Court at Berlin, Germany. He has been serving the German judiciary since 2000. He has always had a keen interest in constitutional law. He undertook responsibility as the Director of Rule of Law Programme Asia in 2011 and since then holds that position. He has delivered numerous talks around the world in the area of constitutional law including in Asia.

Reviewed by:

Datuk Seri Gopal Sri Ram



The paper-writer has identified the problem central to the administration of justice in accordance with the rule of law as applicable under a written constitution such as the one we have in Malaysia. The paper correctly points out the perils of applying the concept of the rule of law as understood in England where Parliament is supreme to Malaysia where legislative power is circumscribed by restrictions imposed by the Federal Constitution. It is to be noted that even courts of the United Kingdom have attempted to place restrictions on the untrammeled legislative power of the Parliament there. So, in R v Home Secretary ex parte Pierson [1997] 3 WLR 492 it was held that there is a presumption that the UK Parliament does not legislate contrary to the rule of law.

One must but agree with the writer that the decision in …… v Lim Kit Siang casts a blot upon the whole of our public law and should be jettisoned at the first available opportunity. It is, as the writer has pointed out, the product of applying parliamentary supremacy to a system in which it is absent.

The paper has several highlights. Among these is, first, the injection of a new dimension into the rule of law under the Malaysian Constitution through the fourth pillar theory. Second, there is the proposition that the constitutional oath administered to members of the four pillars of the State incorporates in it the injunction to banish arbitrariness from all forms of State action – whether legislative, executive or judicial. Third, the want of a necessity to resort to the basic structure doctrine as established in India and substituting it with a wider base of constitutional protection.

The writer has produced a thought provoking paper. If the core ideology advanced by the writer is adopted by the courts, the scope of judicial review, now perceived as a disabled creature with a thousand tongues and no teeth, may well be restored to its proper place as an effective check against the exercise of arbitrary power.

PROFILE :

Datuk Seri Gopal Sri Ram was admitted to the Malaysian Bar some 45 years ago in 1970. He appeared before the courts as a renowned practitioner until he was elevated to the bench in 1994. Unlike the norm, his elevation was straight to the Court of Appeal. He is the only practitioner holding this record. He was then elevated as a judge of the Federal Court and retired from there in 2010. Malaysian jurisprudence owes numerous landmark decisions that made significant contribution to the development of Malaysian law to Gopal Sri Ram.

Reviewed by:

Dato' K. C. Vohrah

Justice Datuk Hamid Sultan has written a very thought provoking and well researched paper on Social Justice, Constitutional Oath, Rule of Law and Judicial Review.

Throughout the paper one sees his concern in regard to social justice being provided by the institutions of the State, Parliament, Executive and the Judiciary where the thrust is that the Federal Constitution is supreme, not Parliament. And the paper examines the concept which he advocates - that the Yang di-Pertuan Agong has a role in providing relief under the Constitution and the Rule of Law where there is injustice and transgression on the Rule of Law and Order.

And so the paper deals with constitutional concepts and executive powers in public law. Not in the context of English law where Parliament is considered supreme but in the context of our Federal Constitution where the Constitution is supreme.

My review here will not do justice to the admirable work of the learned author; one really has to read the whole paper to understand the close reasoning as to why he says, in the context of Malaysia, that "(the) Judiciary *per se* is not the weaker arm but the supreme policy arm of the constitution" and that His Majesty's oath of office, pursuant to Article 37 of the Constitution, is the constitutional guardian of the rule of law and order in the country.

The learned author examines how the earlier decisions of our courts just after independence relied on the notion of the supremacy of Parliament rather than that of the supremacy of the Constitution to validate laws or actions of the Executive. And he points out that in even more recent decisions the notion of the supremacy of Parliament has been asserted. One cannot but agree with the author on this analysis. And it is indeed strange that there are still cases (mentioned in the paper) which hold to the view that Parliament is supreme and not the Constitution.

The author's theme is that the Constitution being supreme, the Legislature, the Executive and also the Judiciary cannot make arbitrary decisions. All three institutions (the author calls them the "3 Pillars") will have to respect the Constitution, not so much on the notion of the "Basic Structure Jurisprudence" of India but on the principle of what he calls "Constitutional Oath Jurisprudence" which the author says, in the context of Malaysia, should take into account that the "constitutional oath" of the 3 Pillars of office should be linked to (non) "arbitrariness" and the "rule of law"; that no public law decision maker whether the Legislature, the Executive or the Judiciary is allowed to make any arbitrary decision.

The author relies on the famous quote of Raja Azlan Shah CJ (as his late Highness then was) in the case of *Pengarah Tanah dan Galian v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, for his view,

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 lawAccording to the author, the test propounded by Raja Azlan Shah CJ is "simple and straight forward and it applies to all public decision makers which will include the three pillars". In other words it applies to the courts as well.

In the words of the learned author, "the failure of the courts to strictly follow the test will compromise the concept of accountability, transparency and good governance, thereby compromising the rule of law or worst still make it sterile".

The author then brings in the concept of the "Fourth Pillar" in addition to the 3 Pillars. It is the view of the author that the founding fathers of the Malaysian Constitution were vigilant and they provided a Fourth Pillar, and

in his view the most powerful pillar, to protect the rule of law and order in the country, which is not the case in India. He states, "The Fourth Pillar is none other than their Royal Highnesses (the Rulers) and this is reflected in the constitutional oath of office of the HRH Yang di-Pertuan Agong. To perform the oath, His Majesty is made the Supreme Commander of the Armed Forces with no executive shackles and also placed as the 'Head' of the Armed Forces Council".

His view is the role of the Rulers is not ceremonial in nature as in the case of President of India. He also argues that the judiciary *per se* is not the weaker arm but the supreme policing arm of the constitution and that HRH is placed as the constitutional guardian of the rule of law and of order in the country as is reflected in the oath of office of HRH.

He reproduced the relevant part of the constitutional oath of the Yang di-Pertuan Agong pursuant to art. 37(1) of the Constitution which reads as follows-

...and by virtue of that oath do solemnly and truly declare that We shall justly and faithfully perform (carry out) our duties in the administration of Malaysia in accordance with its laws and Constitution which have been promulgated or which may be promulgated from time to time in the future. Further, We do solemnly and truly declare that We shall at all time protect the Religion of Islam and uphold the rule of law and order in the Country. (emphasis was made by the learned author Hamid Sultan)

The learned author also makes the point that 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.

His continues, "…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. The founding fathers of the Indian constitution in my view arguably were not vigilant to provide any mechanism to arrest a compliant judiciary. In India, it will appear that the "free and independent press" stands as a check and balance to arrest the dilatory conduct of the three

pillars. Not all countries which has subscribed to the constitution has a "free and independent press"".

What the learned Judge and author has advocated is intellectually deep and very far reaching. One definitely has to analyse the various premises he makes on concepts and provisions of the constitution and the conclusions he draws. And he has given some of his thinking in the case of *Nik Noorhafizi bin Nik Ibrahim & Ors v PP* [2014[2 CLJ–

(d) It is pertinent to note that a compliant judiciary or bench cannot stand as a bulwark of liberty. A compliant judiciary or bench is one which does not want to subscribe to its sacrosanct oath, and Rukun Negara and does not believe in Rule of Law and does not want to protect the constitution and abrogates its role by saying that it has no judicial power and paves way for Rule by Law. It is for the public through Parliament or His Royal Highness (HRH), the Rulers, in particular the Yang di-Pertuan Agong (His Majesty) to initiate the steps to arrest the progress of a compliant judiciary and ensure that the judiciary is independent to protect the constitution and sustain the Rule of Law

(e) Our founding fathers have framed the constitution by giving the courts absolute jurisdiction and power to police and adjudicate on legislation as well as executive decisions in the right perspective

The learned Judge then continues, that in essence, if the pillar or pillars fail in their obligation the public are entitled to lodge a "complaint petition" with His Majesty, who is obliged pursuant to the Constitution and Constitutional Oath to independently adjudicate upon the complaint (without any executive shackles) and His Majesty, to ensure order in the country and also as the last bastion within the constitutional framework, is constitutionally bound to consider the problem, assess the consequence, evaluate alternative and if need be, advance the remedy.

Further, the author states that no pillar can abrogate its role and constitutional oath and the judiciary is no exception and "the judiciary without jurisprudence simply cannot say they have no judicial power. All pillars inclusive of constitutional functionaries are answerable to His Majesty more so when a complaint is lodged with His Majesty."

The concept of Constitutional Oath Jurisprudence as stated in *Nik Noorhafizi* and as elaborated upon in the learned Judge's article will have to have the imprimatur of the Federal Court before it can become part of the jurisprudence of our country. The Federal Court would certainly need convincing!

Judicial power is with the courts and notwithstanding the decision of the majority decision of the Federal Court on *PP v Kok Wan Kuan* [2008] 1 MLJ 1 that the Constitution does not recognise the separation of powers as the doctrine is not an express provision of the constitution (!) the dissenting decision of Richard Malanjun, Chief Judge, Sabah & Sarawak needs emphasis, that the Constitutional amendment 121(1) (purportedly taking away the judicial power of the courts) should by no means be read to mean that the doctrine of separation of power and independence of the judiciary are now not the basic features of our Federal Constitution or that the courts have become servile agents of the Federal Acts of Parliament [required] to perform mechanically any command or bidding of a federal law.

The more enlightened view of the lawyers and writers is that the judicial power is still with the Judiciary and if that is so how does one put a tier above the Federal Court and confer the tier with judicial power on the concept of constitutional oath?

And there are many issues to be considered before the concept can gain traction, for example, clearly, whether a law or any act or omission is unlawful under the constitution has to be decided on legal grounds by persons schooled in law and having considerable judicial experience. How does the Yang di-Pertuan Agong decide on issues arising for relief? It is an unchartered sea as yet and one has to take into account contrary winds before the vessel of "Constitutional Oath Jurisprudence" can navigate its way to port.

There obviously needs to be considerable research to be done so. There would need to be deep thinking by jurists on the matter. To be noted is that the author has promised cash prizes for research into "Constitutional Oath Jurisprudence" and that shows how concerned about social justice and how serious and committed he is about making the institutions including the Judiciary comply with the Constitution and for ultimate relief to be

achieved through the Yang di-Pertuan Agong through the Constitutional Oath Jurisprudence.

PROFILE :

Dato' K. C. Vohrah, a retired Court of Appeal judge, graduated in law from the University of Singapore and then earned his master's degree in law from the Free University of Brussels. He was admitted to the Malaysian bar more than 50 years ago in 1964. He was elevated to the bench of the High Court in 1986 and then of the Court of Appeal in 2001. He served as a Commissioner of the Human Rights Commission of Malaysia between 2002 and 2008.

Apart from his service in the judiciary, he also served various departments of the Executive as legal advisor. Such departments includes the Royal Customs and Excise Department and Ministry of Primary Industries. He also served as the Treasury Solicitor. He held numerous key positions in law including as the head of the Advisory Division of the Attorney General's Chamber, Acting Parliamentary Draftsman and Chairman of the Corporate Law Reform Committee.

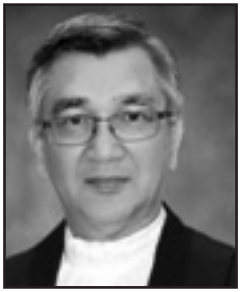
He played a role in many negotiations relating to international loan agreements, including those made between the World Bank and the Asian Development Bank. He was involved in the Law of the Sea Conferences in New York and Geneva as part of the Malaysian Delegation and in numerous conferences in relation to the Tin and Rubber Stock Agreements.

He presently serves as an Adjunct Professor at the College of Law of the University Utara Malaysia and as an External Examiner at the Faculty of Law of the University of Malaya.

A brief introduction of Dato' K. C. Vohrah would not be complete without a mention of numerous landmark decisions which he had occasion to deliver at the benches of the High Court and of the Court of Appeal and of many articles on law and on human rights authored by him. He is also the co-author of Sheridan & Groves, The Constitution of Malaysia, Kuala Lumpur, 5th Ed., Lexis Nexis, 2004 and of Vohrah and Hamid on the Malaysian Penal Code, Kuala Lumpur, Printworks Pub., 2006.

Reviewed by:

Dato' Mohamad Ariff bin Md Yusof



A judge who fashions the law and applies it with a philosophical mind, deserves the honour of being described as a jurist. A judge who ignores philosophy and jurisprudence, on the other hand, is merely a linguistic mechanic with a narrow appreciation of the place of law in society. Justice Datuk Dr. Hamid Sultan belongs to that select band of judges who are deservedly jurists. As a jurist, Justice Dr. Hamid has approached the study and application of constitutional law with intellect, borne out of a passion for the subject. In this paper, which I have had the pleasure to review, he has provided a novel approach to our accepted understanding of the main features of the Federal Constitution of Malaysia. By providing an alternative insight into the role of the HM the Yang di Pertuan Agong and the royalty as a Fourth Pillar of the constitution, and examining the full ramifications of the judicial oath by the very novel categorization of "judicial oath jurisprudence", he has extended the boundaries of our traditional understanding of the Federal Constitution in a dynamic fashion. Whilst some may not agree with these ideas, and they will certainly court scholastic controversy among some quarters, including among his peers, these new ideas deserve attention and merit serious discussion and study among scholars and practitioners of Malaysian constitutional law.

The test of a good judge and indeed a good jurist, is the level of his or her intellectual honesty in laying down and applying the correct law and its underlying principles, to concrete facts of a dispute. Justice Hamid has in this regard been consistent in applying his jurisprudential approach in the many cases he has had occasion to decide. While the idea of the Fourth Pillar may not fit well within the constitutional structure , at least at the federal level, his plea for a jurisprudence based on the judges' oath of office to preserve and protect the Constitution and thereby to uphold the Rule of Law will hopefully resonate well within and beyond the Judiciary. He has reminded us how the UEM case has done a disservice to constitutional jurisprudence in Malaysia, arising from a failure to properly appreciate the special nature and

function of judicial review in a constitutional structure where the doctrine of Parliamentary Sovereignty should not be made to apply, since ours is a system where the Constitution is supreme, not Parliament. While accepting that the province of judges is not to make policy (that being the domain of the other branches of government), it is nevertheless the bounden duty of judges to test the constitutional legality of executive and legislative decisions to preserve the Rule of Law and control abuse of power, based on the simple but resounding formulation that every power has legal limits. Included in these limits on power is the idea of reasonableness and proportionality of governmental action. It is a timely reminder to all those involved in the political process in the largest sense, that it is unwise to uncritically accept the idea that only the executive and the legislature must be allowed to determine what is reasonable for the citizenry, for to do so will demean the ideas of Constitutional Supremacy and the Rule of Law. In the more current language of "good governance", constitutional good governance must include as a major component an independent judiciary with a meaningful judicial review function to control excesses of power.

In this masterly paper, Justice Datuk Dr. Hamid has shown us the path to good governance and transparency, constitutionally–speaking, and calls for further study and research to be conducted on his alternative jurisprudence. This, I believe, will be a quest which will find eager adherents among the legal fraternity.

PROFILE :

Dato' Mohamad Ariff bin Md Yusof is a retired Judge of the Court of Appeal Malaysia. He graduated in law from the University of London and was admitted to Lincoln's Inn in early 1970s. He entered into the legal fraternity as a lecturer and soon leaped to the position as an associate professor at the Law Faculty of University of Malaya. Then he entered legal practice in 1986 and took leave therefrom by mid 1990s when he was appointed as one of the first directors of the then newly formed Securities Commission of Malaysia. In 2008, he was appointed as a Judicial Commissioner of the High Court of Malaya in 2008 and subsequently became a Judge of the High Court and then promoted as a Judge of the Court of Appeal in 2012. Having served the judiciary for seven years and during the service having had the opportunity to deliver numerous landmark decisions, he retired from the judiciary in early 2015.

Reviewed by:

Mr, Steven Thiru

The paper correctly identifies the critical distinction between constitutional democracy and parliamentary democracy. The author observes that the principles of rule of law to be applied in Malaysia must be based on the supremacy of the constitution . This exist in a constitutional democracy . I am not entirely sure that the principles of the rule of law drastically varies in a parliamentary democracy as the essential features are similar irrespective of the type of democracy.

The high water mark of judicial review action against arbitrary administrative decisions was distilled in the landmark case of Sri Lempah Enterprise. I agree that the seminal statement alluded to by the author could be the fount for the vires challenge of all decisions based on the exercise of discretionary powers by the authorities.

Social justice is a concept that is easy to recognize but difficult to definitively determine. The guidelines provided by the author are useful , albeit not exhaustive. There are certain statutes that qualify as beneficient social legislation and here the courts can readily resort to human rights principles to assist marginalized litigants. One example is the Aborginal Peoples Act 1954.

The author correctly observes the difference in interpreting a written constitution and a statute and the failure of our courts at times to appreciate the difference (see Datuk Menteri Othman v. Dato Ombi). The problem, according to the author , lies in the courts applying rule of law concepts based on parliamentary supremacy as opposed to constitutional supremacy. However , in my view the answer is provided by the liberating effect of judicial activism . The basis of such activism is is the written constitution and the salutary notion judges are duty bound to preserve, protect and defend the constitution . In this regard , judges are not subservient to parliament nor usurping the functions of parliament.

The reference to the " Basic Structure Doctrine" " in India that was championed in the celebrated case of Kesavananda Bharati is an interesting way of promoting constitutional rights (particularly the protection of fundamental liberties) in the face of attempts by an executive controlled legislature (in the Westminster fashioned system) to dilute these rights.

The fourth pillar of the constitution in the form of the Rulers is a novel concept and may be justified by the role of a modern constitutional monarchy in a system where it acts as a check and balance on the other organs of government . In this connection , the statement made by the Rulers on the 1MDB investigations is an example of the constitutional role of the Rulers . However , the Rulers are unelected and in a democratic system of government their role can be no more than a check and balance. The Rulers must remain apolitical and outside the arena of dispute .

The doctrine of constitutional oath to strike down the legislative and/ or constitutional amendment where legislature has acted unreasonably or arbitrarily is a possible new ground of challenge in judicial review actions in a constitutional democracy . It could be another weapon in the arsenal of the courts in the face of abuse of power by the administration.

The judiciary must embrace criticism , as part of the price of being an independent body . It will be incorrect to hold that we do not have " well informed lawyers" ", as the Bar is laden with talent both in public and private law. And there are many lawyers who offer critical views based on sound research . For examples , the recent publication of Praxis carries a few articles on the office of the Attorney General under our constitution .

While judges are entitled to expect lawyers appearing before them to be well prepared and well –researched , the quality of judgments , and therefore the quality of justice , cannot be determined solely by the efforts , or the lack of it , of counsel. It is ultimately the duty of the court to dispense justice and with that comes the responsibility of ensuring that judgments are well well-researched.
Finally , I applaud the initiative to set up the scholarship . It is a commendable

effort towards increasing awareness as well as the level of knowledge in the sphere of public law. The Bar will do its utmost to identify a suitable candidate.

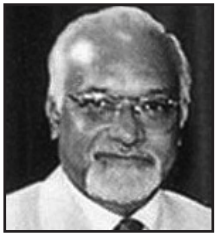
PROFILE :

Steven Thiru is the president of Malaysian Bar and a prominent practicing lawyer. He graduated in law from the University of Leicester in 1990 and earned his master's degree from the University of Malaya. He was admitted to Middle Temple in 1991 and was admitted to the High Court of Malaya as an advocate and solicitor in 1992.

He served the Malaysian Bar in numerous capacities including as secretary and vice president prior to taking responsibility as the president in 2015. His particular areas of interest and practice include administrative law.

Reviewed by:

Mr. S. Theivanthiran



With our beloved country going through hard times, the learned author has hit the nail on the head with this thought provoking article.

The Federal Constitution was devised as the supreme set of laws pursuant to which the Federation of Malaya was to be ruled and governed. The Conference of Rulers and the Government of the Federation of Malaya had approved the contents of the Federal Constitution before ratifying it.

The articles of the Federal Constitution, well thought out as they were, guaranteed the freedom of the Rakyat as a whole and obligated the Government of the day to ensure the same. It placed a check and balance with the Judiciary and the Council of Rulers.

The learned author has emphasized this in his well-thought and well-researched article. The learned author has moved forward and explained the importance of safeguards placed in the constitution through Judiciary and the role of the judges in administering these safeguards.

In explaining the oath taken by Judicial officers he impresses on them the significance of their role in shaping the future of millions of our fellow Malaysians irrespective of colour, creed or religion. Social Justice in mind of the writer is of the paramount concern.

The learned author further elaborates the role of the Yang Di Pertuan Agung and the Council of Rulers as he calls it the role of the Fourth Pillar. The role of the Yang Di Pertuan Agung as this fourth Pillar is illustrated clearly in the article, with particular emphasis on the words of the Great and Solemn Obligation taken by the Yang Di Pertuan Agung when taking his office.

The learned author clearly understands that the words of these Great and Solemn Obligation taken by any official as he is about to take his high office is an obligation that clothes him with the authority to make those decisions

which he is empowered to make. In making those decisions, which he may have an unfettered discretion in doing so, he has to consider a multitude of issues. He has to keep in mind that a paramount consideration must be given to social justice.

PROFILE :

S. Theivanthiran is senior practitioner and an elderly member of the Malaysian Bar. He graduated in law from Singapore and was admitted to the Malaysian Bar some 49 years ago in 1967. He has held numerous important positions in the legal fraternity including as the chairman of the Perak Bar between 1984 and 1985 and as the president of the Malaysian Bar from 1989 to 1991. Both as practitioner and as president of the Malaysian Bar (during the term of his presidency) his interest and involvement in issues touching constitutional law was remarkable.

Reviewed by:

Associate Professor Dr Abdul Rani Bin Kamarudin

Dear Yang Arif, thank you for inviting me to review the paper that you will be presenting. I could agree no more with you that the constitution of Malaysia's is the supreme law of the land with hardly any room for parliamentary supremacy. Even for Parliament (Article 44), the highest order of hierarchy is still vested with HRH, not the Dewan Rakyat (House of Commons) or Dewan Negara (House of Lords). HRH is at the apex of all the wings of power be they the Judiciary, Legislature and the Executive are to apparent to ignore. It is disheartening that despite the provisions being apparent in the Constitution, there are many who obliviously subscribe to the view that HRH is nothing more but ceremonial. The place and functions of HRH is far from ceremonials, rather HRH is Protector and Guardian of the Federation whether in the Executive, Judiciary and the Legislature, the latter's are the administrative and the operational mechanisms of the Federation known as the Federal Government. The grounds among others, are as follows:

Article 32(1) – HRH is the Supreme Head of the Federation who shall take precedence over all person. See also Article 70.

Article 32(2) – HRH's consort, the Raja Permaisuri Agong is next over all other person, hence is the First Lady.

Article 38(4) – Laws affecting the Rulers shall not be passed without the Consent of the Conference of Rulers limiting what parliament can do.

Article 39 – HRH is the executive authority of the Federation limiting what the Executive may wish to do.

Article 41 – HRH is the Supreme Commander of the Armed Forces of the Federation.

Article 40 – HRH is not required to act on advise in all matters from the words 'except as otherwise provided in the Constitution' as one might thought. Circumstances where HRH acts in his discretion [Articles 40(20 & 40(3); 71; 122(1A); 122AA; 122AB; 130].

Article 42 – to grant pardon, reprieve & respite.

Article 55 – HRH may prorogue or dissolve Parliament.

Article 150(3) – HRH may declare emergency.
Article 153(1) – HRH is to safeguards the rights of the Malays and the Natives and the legitimate rights of other communities.

The set-up of the constitution of Malaysia is unique to herself. It is unlike Brunei (monarchy but not being a Federation) or United States (Federation without monarchy) or United Kingdom (quite like Malaysia but not having the Nine Rulers ruling their own respective States and represented in the Federation by HRH) or Singapore (not being a Federation or Monarchy but a Republic).

Oaths required to be taken by the Members of Parliament, Judiciary or Public Servant etc is evidence that allegiance is to the country i.e. HRH and the Malay Rulers. The view that HRH is no more but ceremonials is surprisingly prevalent even among those who read law. As is rightly said by YA:

> *It is extremely disheartening to note that most Malaysian jurists arguably have not realised this distinction and instead argue the role of Rulers is only ceremonial in nature as is the case of the President of India. The Malaysian jurists appear to have been highly influenced by the writings from India, in relation to the role of the President of India.*

Perhaps many are oblivious of the connotation of The Rukun Negara & 7 wasiat Raja[1] that point out that the constitution of Malaysia is distinct and different, and has a lofty place, and is the supreme law for which the judiciary as per their oaths is constitutionally bound to defend it, and for which they too are expected to act according to or within the Constitution in as much as the Executive and the Legislature are bound. The role of the Judiciary is given independent and separate entity to that of the Legislature and Executive. I definitely agree with YA that a compliant Judiciary is not part of the feature in the Constitution of Malaysia which is constitutional supremacy not parliamentary supremacy. There is no such thing as parliamentary supremacy in Malaysia so to speak.

1 http://ww1.utusan.com.my/utusan/info.asp?y=2009&dt=0807&sec=Muka_Hadapan&pg=mh_01.htm

PROFILE :

Associate Professor Dr Abdul Rani Bin Kamarudin is a lecturer in the Department of Legal Practice, Faculty of Laws of International Islamic University Malaysia (IIUM). He obtained his LLB (Hons) and Master in Comparative Laws from IIUM in 1988 & 1990 respectively. He practiced as advocate & solicitor in 1991 & 1992 before joining as an academic staff in IIUM, and has been so since then. He is a registered Shariah Court lawyer for the Federal Territory of Kuala Lumpur. In 1996 - 2000, he pursued his PhD in Exeter, UK, and in 2002, he obtained his doctorate, a comparative study on the control and prevention of dangerous drugs law in UK and Malaysia. He was the first batch of ASLI Fellow, Deputy Dean of Postgraduate of Faculty of Laws of IIUM in 2007, IIUM's second Legal Adviser from 2009-2012, and an accredited Mediator with the Malaysian Mediation Centre under the Malaysian Bar in 2012. Currently, and mainly, he teaches Evidence and criminal Procedure at the undergraduate level, Comparative Penology at the Master level, and supervises PhD in law students, mainly in criminal justice issues. He is also a layman member in the Disciplinary Committee of the Malaysian Bar since 2002, and examiner since 2012 for Certificate of Legal Practice paper under the Malaysian Legal Qualifying Board.

Reviewed by:

Prof Emeritus (Datuk Dr Hj) Shad Saleem Faruqi

In this learned Seminar Paper, Justice (Datuk Dr Haji) Hamid Sultan Bin Abu Backer presents a bold and alternative vision for Malaysia's superior court judges, majority of whom, despite 58 years of independence are still wedded to the English jurisprudence of parliamentary supremacy.

BASIC FEATURES OF THE MALAYSIAN CONSTITUTION

He notes correctly that the Malaysian legal system was founded on constitutional supremacy as in the USA and India and not on parliamentary supremacy as in the UK.

The Constitution has explicit provisions for human rights and limits on the powers of the federal and state executive and legislature. There are several constitutional provisions empowering the courts to indulge in judicial review to keep things on an even keel. Judges are explicitly required to preserve and protect the supreme Constitution.

Inherent in the Constitutional scheme of things are the doctrines of rule of law and separation of powers.

LOFTY CONCEPT OF CONSTITUTIONALISM

The learned judge links constitutionalism with the doctrine of rule of law (p. 2) and with absence of arbitrary powers. He views law as jus and recht and not as lex. His version of the rule of law does not require judges to show absolute subservience to the law of Parliament but only to those laws which are in accordance with the Constitution, which are reasonable and pass the test of proportionality (p. 15) and which promote social justice (p. 11).

He links the rule of law with accountability, transparency and good governance (p. 2, 33, 39). He links it with control over corruption (p. 39).

In several inspired passages he finds connection between constitutional supremacy and social justice (p.2). By 'social justice' he means fair

distribution of wealth, opportunities and privileges subject to the Constitution, education, health care, employment, labour rights and fundamental rights (p.2).

RECOMMENDATIONS

To give life to the Constitution he makes a number of recommendations.

Judicial independence: "A compliant judiciary or bench cannot stand as a bulwark of liberty" (p. 21). In a learned exposition the learned judge links judicial independence with adjudicatory independence, institutional independence and judicial review (p. 42) and provides the constitutional basis for all of these.

Judicial dynamism: The learned judge clearly supports an activist, social justice-minded judiciary (p. 9). In England the rule of law requires the judiciary to be subservient to legislation and to the policy of the Government. But in a country with a supreme Constitution Parliament and the executive must be guided by the Constitution (p. 9).

The learned judge rightly believes that what is shunned in England as judicial activism is a constitutional obligation for judges in Malaysia. One has to look at the significantly different oaths that judges in the two jurisdictions have to take.

On constitutional issues, judicial precedents should play a lesser part (p. 29).

Reject the jurisprudence of parliamentary supremacy: The learned judge rejects parliamentary supremacy in England as a feudalistic concept (p. 12). He calls on Malaysian judges to debunk English cases based on parliamentary supremacy and to seek guidance from India's constitutional jurisprudence.

Strengthen judicial review: In a learned exposition the learned author expounds and compares the principles of judicial review in England and Malaysia. Judicial review is the heart and soul of the constitutional system in Malaysia (p. 18). Its perimeters are far broader in Malaysia than in England (p. 18). In England Acts of Parliament are unchallengeable in a court (save in relation to European Union laws). Executive acts can be challenged on the concept of illegality, irrationality, procedural impropriety, reasonableness and proportionality.

In this context the learned judge notes the double standards in English judicial practice of imposing high standards of proof in private law cases but imposing much lighter standards on the government when in public law cases, government policy is challenged in the English courts (p. 13).

In Malaysia courts can and should go beyond English administrative law grounds to the principle of unconstitutionality.

The learned judge notes with regret that many Malaysian judges feel happier with judicial review of administrative action than with judicial review of legislation which is of course permitted by the Constitution.

In the field of judicial review the learned judge advocates a broader and more liberal concept of locus standi. He is severely critical of Malaysian cases which interpret locus standi narrowly. His masterly and critical analysis of the Malaysian UEM case should inspire lawyers and judges to consign the UEM decision to the dustbin of history.

He disapproves of the tendency to deny relief on the concept of non-justiciability (p. 29). In a bold assertion, he weakens all attempts to exclude judicial review by stating that "any form of restriction to the role of court by Act of Parliament will purely be unconstitutional per se" (p. 28).

Dynamic vision of rule of law: He notes with regret that the version of the rule of law employed by many Malaysian judges is based on the jurisprudence of parliamentary supremacy. It ought to be based on the version related to constitutional supremacy (p. 2). The learned judge also notes the important distinction between 'rule of law' and 'rule by law'.

Constitutional oath jurisprudence: Judges are under a solemn oath to preserve, protect and defend the Constitution (p. 24). This requires them to ensure that no public decision-maker in the three pillars of government makes arbitrary decisions (p. 3). The learned judge enumerated this doctrine of constitutional oath in several cases which he outlines in his learned article (p. 17-18)

Separation of powers: Quashing an arbitrary decision or policy by the executive or the legislature is not a violation of the doctrine of separation of powers but a confirmation of the rule of law and constitutionalism (p. 5).

India's basic structure doctrine: The superior courts of India have checked legislative over-exuberance and entrenched basic constitutional values by inventing the idea that the basic structure of the Constitution cannot be destroyed even by constitutional amendment (p. 7, 12, 40, 43). Regrettably the courts of Malaysia have been reluctant to embrace this doctrine (p. 48). The learned judge therefore recommends that abuse of Parliament's legislative power can be checked and protection of the fundamental structure of the Constitution can be achieved by his theory of "constitutional oath jurisprudence" which is a simpler, Malaysian make and derived from the same fountains as the basic structure jurisprudence of India (p. 44).

Fourth pillar of the Constitution: In a rather innovative interpretation of the Constitution, the learned judge regards Malaysia's King and the Conference of Rulers (consisting of the nine hereditary Rulers of the Malay states) as being the "fourth pillar" of the Constitution and having the ultimate power to protect the Constitution, resolve citizens' grievances against the state (p. 14, 23, 47), shield the judiciary against interference and protect law and order in the country (p. 24).

In traditional constitutional theory the Federal Monarch and his Brother Rulers are regarded as constitutional monarchs with very limited discretionary powers. The learned judge disagrees with this reading of the Constitution and feels that the position of the Malaysian King is unlike that of the President of India who is largely a ceremonial head (p. 15).

Ironically many Malaysians today will agree with him. They are despondent with the fact that all other constitutional institutions and mechanisms in the country including the judiciary have not lived up to their promise of maintaining a check and balance in the country. If Their Majesties, the Rulers, can play the role of a constitutional auditor, that will earn the gratitude of a large section of the population.

Constitutional literacy: Malaysia's largely British trained judiciary is not entirely familiar with the norms of constitutional supremacy. This is indeed true. Most lawyers and judges adroitly evade and avoid constitutional issues. Cases on constitutional disputes are often reduced to Lord Diplock's administrative law issues of illegality, irrationality and procedural impropriety. For this reason, the learned judge concedes, "the outcome of judicial decisions

may not at times be inspiring within a constitutional framework" (p. 51). This is the biggest understatement of his learned essay.

The learned author recommends that all persons involved in the interpretation and application of law - from lawyers to judges to academicians – must undertake further study in the rule of law related to constitutional supremacy as opposed to parliamentary supremacy (p. 7). The learned judge criticises lack of Malaysian legal scholarship in the area of constitutional supremacy. He also takes critics to task for not appreciating the "judicial renaissance for efficiency in clearing the backlog of cases" (p. 51).

Research in social justice: Lawyers, academicians and judges must also explore dimensions of social justice inherent in the Constitution (p. 5).

In sum, the learned judge expresses deep consternation that, barring some scintillating examples, constitutional jurisprudence is still in its infancy in Malaysia. He calls for judicial activism to make the letter and the spirit of the Constitution come alive. He advocates robust judicial independence. He believes that the Constitution provides the foundation of a dynamic concept of rule of law, protection of human rights especially of those from vulnerable communities, safeguards against executive arbitrariness and tremendous potential for social justice. He suggests theories and principles (like 'constitutional oath jurisprudence' and the monarchy as the 'fourth pillar' of the Constitution) to achieve greater constitutionalism in Malaysia. He points to scintillating new directions in constitutional and administrative law and beckons judges to follow them.

PROFILE :

Emeritus Professor Datuk Dr. Shad Saleem Faruqi graduated from Wesleyan University in the United States with a degree in governmental studies at the age of 19. He then earned his degree in law and subsequenly master's degree both with first class honours from Aligarh Muslim University, India. He then obtained his PhD from International Islamic University Malaysia under supervision by the renowned Tan Sri Prof Ahmad bin Ibrahim.

He is an emeritus professor of law who served Universiti Teknologi MARA in various positions since 1971. He held various high positions including as an Assistant Rector between 1996 and 1999 and as the Assistant Vice-

Chancellor from 1999 to 2001. He was also the Legal Advisor from 1996 to 2006 and again from 2010 to now.

He has also served the faculties of law at the International Islamic University Malaysia and at Universiti Kebangsaan Malaysia. He is a visiting professor, honorary legal adviser and holder of the Tun Sambanthan Chair at Universiti Sains Malaysia, Penang. He is also a visiting professor at Universiti Sultan Zainal Abidin (UNiSZA), Terengganu

At the international level, Dr. Shad Faruqi has served as a consultant to many countries including Maldives, Fiji, Timor Leste, Afghanistan Iraq and Sudan, advising them on their constitutional documents. In 1991 as part of Asia Foundation Project, he drafted the constitution of the Republic of Maldives. He was a one-time member and Secretary-General of the Manila-based Congressional Research and Training Services that conducted several institutional efficacy courses for legislators from many third world countries. He has presented seminar papers in the USA, UK, Germany, Iran, Kenya, Sudan, Maldives, India, Singapore, Thailand, Philippines, Hong Kong, Australia and Japan. He has helped to draft several international documents including the Kuala Lumpur Declaration to Criminalize War and a document for the UN on Protection for Places of Worship. He is a sitting Judge on the Kuala Lumpur War Crimes Tribunal. He is an Executive Council member of the Kuala Lumpur-based International Centre for Law and legal Studies.

At the national level, he has been called upon on several occasions to draft national legislation. On behalf of Institut Teknologi MARA he drafted the Institut Teknologi MARA (Amendment) Bill 1996 that was passed as an Act. The Act converted Institut Teknologi MARA into a full-fledged university. At home, he has drafted six pieces of educational legislation.

In 2006 the Minister of Education appointed him Chairman of a Committee to propose amendments to the Universities and University Colleges Act 1972. The Committee's recommendations were adopted and passed as law in 2009. In 2008 he drafted the new 'Apex Constitution' of Universiti Sains Malaysia. In 2010 he was appointed to a committee to review the Universities and University Colleges Act. He is also a member of the Apex University Initiative, a Distinguished Fellow of the Institute of Strategic Studies, and one-time member of the Malaysian Human Rights Commission's Education Sub-Committee.

In 2008, Universiti Sains Malaysia, Malaysia's first "apex university", appointed him as a Visiting Professor. Later he was appointed the Honorary Legal Advisor and the first holder of the Tun Sambanthan Chair. In 2009 UiTM honoured him with the University's first Emeritus Professorship award. In 2009, the Yang di-Pertuan Agong (King) of Malaysia honoured him with the federal title of "Datuk".

Between 1982 and 1985, Dr Shad contributed periodic articles and editorials to the New Straits Times. During 2001 and 2002 he authored a regular weekly column "Facets of Our Constitution" for the Sunday Star. His column "Document of Destiny" appeared in The Sun from 2006 to 2007. Presently he writes a fortnightly column entitled "Reflecting on the Law" for the Star. The constitutional law articles which he has written include the following:

Faruqi, Shad Saleem, 'The Kuala Lumpur War Crimes Commission & War Crimes Tribunal'
Faruqi, Shad Saleem, 'Freedom of religion under the Constitution'
Faruqi, Shad Saleem, 'Understanding Our Basic Rights'

He has authored eight books, namely: (1) Document of Destiny: The Constitution of the Federation of Malaysia; (2) Human Rights, Globalisation and the Asian Economic Crisis; (3) Islam, International Law and the War Against Terrorism; (4) Islam, Democracy and Development; (5) The Bedrock of Our Nation: Our Constitution; (6) Attitude Determines Altitude; (7) Refl¬ecting on Life and The Law; and (8) Pathways to Performance. He also co-authored Media Law and Regulations in Malaysia, and was a co-editor of Decolonising the University: The Emerging Quest for Non-Eurocentric Paradigms.

He has contributed over 350 articles to legal periodicals, anthologies and newspapers and has presented over 300 seminar papers in 15 countries including the US, UK, Australia, Germany and Japan.

SOCIAL JUSTICE: CONSTITUTIONAL OATH, RULE OF LAW AND JUDICIAL REVIEW[1] MALAYSIAN CHAPTER

RESEARCH PAPER BY

JUSTICE DATUK DR. HAJI HAMID SULTAN BIN ABU BACKER

JUDGE, COURT OF APPEAL, MALAYSIA

Honourable Judges, Chairman, Distinguished Jurists,

Ladies and Gentlemen,

It is my pleasure and honour to share my thoughts on Social Justice within a 'Constitutional Framework'. I will also deal with the unchartered waters of law making powers bestowed on the concept called 'Parliamentary Supremacy'.

My views expressed herein are to be taken as my contribution in the journey towards the pursuit and dissemination of knowledge in the public law field of social justice. This paper has a direct nexus to the conference today. It is for the jurists to deliberate on the paper and, if deem unfit, to reject it. On the other hand, if it is found to be of social utility, more research can be done on the subject of 'Constitutional Oath' and the right version of the Rule of Law; the court must be guided to employ within the constitutional framework. Social justice and the constitution have a direct nexus to the Employment Law in Malaysia.

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1 Proposed paper was to be presented at the "First Regional Conference on Current Developments in Employment Law in Malaysia and the Asean Countries" – 13th to 15th January 2016. Editorial support by (i) Gita Radha-Krishna, Faculty of Law, Multimedia University; (ii) V. Saratha Devi, School of Excellence in Law, The Tamil Nadu Dr. Ambedkar Law University; (iii) Shanthi Sendil Kumar, Law Student, Chennai.

At the outset, I must mention that the version of the rule of law which had been employed in many of our decisions relating to social justice and the constitution, has been based on the jurisprudence relating to parliamentary supremacy. The version of rule of law which ought to be applied within our constitutional framework is the version related to constitutional supremacy. In my view, erroneous application of the version of rule of law, arguably, will not inspire confidence in the decision making process in relation to social justice in a country which has subscribed to constitutional supremacy. In addition, in my view the soul of the rule of law relates to accountability, transparency and good governance. Without the soul in place, the rule of law becomes sterile. I must confess that it was only upon reading the recent press statement of HRH Rulers that I realised that the soul of rule of law in the public law field has been compromised as early as three decades ago in the infamous case of ***Government of Malaysia v Lim Kit Siang***[2]. I will elaborate on all these further in my paper.

Social Justice

Social justice in India or Malaysia is related to fair distribution of wealth, opportunities and privileges within a society and it is always, subject to the Constitution. It encompasses many areas or segments like education, health care, employment law, labour rights, etc. Social justice is a protected species pursuant to several articles of the Constitution, in particular those related to fundamental rights. A breach of that right *inter alia* entails public law relief. In the regime of employment law or labour law, there may be other forms of relief such as statutory, contractual, tortious, etc. However, the public law relief is the most important relief to check legislation which is perceived to impinge on good governance relating to industrial jurisprudence and/ or unfavourable policies of the Government or unfavourable executive decisions in this area of law. This paper will attempt to show the way forward to enhance social justice.

Constitutional oath jurisprudence and methodology

I intend to discuss here how the constitutional oath jurisprudence and the right version of the rule of law can assist the executive, legislature and the judiciary (three pillars) as an alternative and/or to complement the 'Basic

2 [1988] 2 MLJ 12

Structure Jurisprudence' and/or similar concepts to enhance social justice. It is also my observation that 'basic structure' jurisprudence is complex in contrast to the constitutional oath jurisprudence which I have advocated. In constitutional oath jurisprudence, the courts role is simply to ensure the public decision maker, i.e. the three pillars do not make any arbitrary decision. It is as simple as that and the lay person will be able to appreciate the reasoning in contrast to basic structure jurisprudence.

I will also limit my discussion to the Malaysian and the Indian Constitution as there are many similarities in both. 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 HRH Raja Azlan Shah in the case of ***Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd***[3] and use that as the test in judicial review matters. That is to say, no public decision maker which will include the executive, 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 it applies to all public decision makers which will include the three pillars. The failure of the courts to strictly follow the test will compromise the concept of accountability, transparency and good governance, thereby compromising the rule of law or worst still make it sterile.

3 [1979] 1 MLJ 135

My view of social justice

In my view, (i) social justice can only be achieved if the right version of the rule of law, appropriate legislative as well as constitutional framework is in place; (ii) even if it is in place, it cannot be achieved unless lawyers, judges and jurists are prepared to appreciate the constitutional meaning of the phrase, rule of law related to parliamentary supremacy and rule of law related to constitutional supremacy, reasonableness, arbitrariness and constitutional oath in the right perspective; (iii) to create greater awareness of social justice and the constitution, the relevant organisations such as universities, the Bar Council, public interest groups, etc. must seriously undertake to provide scholarships to upgrade lawyers, magistrates, sessions court judges, members of the Attorney General's Chambers, etc. to enable them to obtain doctorate in social justice and the constitution, in the hope that the future generation will be committed to uphold the rule of law related to constitutional supremacy and social justice rather than the rule of law related to parliamentary supremacy; (iv) the lack of knowledge leads to the evil of arbitrariness being propagated as part of the concept of reasonableness; (v) when arbitrariness sets into the decision making process of the three pillars, it spawns lawlessness in the constitutional institution and agencies and is a recipe for the creation of a shameless society; (vi) when the courts quash the decision of a public decision maker be it the executive, legislative and/or policy decision of the Government on the grounds of arbitrariness it is not necessarily an infringement of the separation of power doctrine. It only means the decision of the public decision maker does not confirm to the rule of law and the constitution. It does not stop the public decision maker from reviewing its decision taking into consideration the decision of the court whether it is administrative, legislative or policy to adhere to the rule of law and the constitution; (vii) courts do not make decision or substitute the decision for the executive or legislature. Courts function is only to check arbitrariness to sustain rule of law and the constitutional framework; (viii) the collective arbitrariness of the three pillars when it impinges on the rule of law, can only be checked by the Fourth Pillar under the Malaysian constitution; (ix) the executive, legislature, judiciary and lawyers were not trained by the British to administer the written constitution at the time the constitution was formulated. I will explain all these further.

Jurists Have Not Been Adequately Trained by the British To Administer the Written Constitution

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',[4] 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, the British failed to instruct or sufficiently distinguish this separation when the colonies were given independence with a written constitution. India had a problem 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. Malaysia has a problem with the rule of law and administration of the constitution. That problem has been in fact been highlighted by a press statement recently by the Fourth Pillar. That problem in my view can be overcome by creating greater awareness of the constitutional oath jurisprudence to all public decision makers and the court strictly enforcing the jurisprudence in all aspects of public law challenges. In simple terms, the judiciary is only required to arrest arbitrariness and nothing more. Arresting arbitrariness does not mean interfering with the separation of powers doctrine. The distinction is like that of an apple and orange. In addition, when the decision or legislation or constitutional amendment is quashed or struck out, it does not mean the executive or legislature cannot review their decision and/or legislate to conform with the rule of law and the constitution.

4 (2nd Ed), 2012 at p 50

An important impediment in law and jurisprudence to protect social justice as embodied in the constitution under the concept of fundamental rights is that the judges and jurists were never trained to administer the constitution within the norms of constitutional supremacy. The training received from the British which largely continues was the rule of law related to parliamentary supremacy. That does not contribute to nurturing social justice in colonies where the mass 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 but it is actually what was provided in the legislation and/or the common law and the nature of jurisprudence they employ to tackle the problem. If the legislation does not provide for 'social justice', 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 social justice 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 here to meet the legitimate public expectation as per the constitution.

It is disheartening to note that a large majority of jurists here and elsewhere have not taken note of the difference in the oath of office under the constitution when they criticise judicial dynamism as judicial activism.

Different Versions of Rule of Law

The version of rule of law applied in parliamentary and constitutional supremacy nations are not the same. To put it in simple terms:

(a) The doctrine of parliamentary supremacy as practiced in England takes the position parliament knows best what is good for the people. The Judiciary must give effect to parliament's will. Judges take oath to be subservient to the legislation. Judicial activism is not permissible.

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.

(b) 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 social justice. Parliament as well as the executive must uphold the concept of accountability, transparency and good governance as failure to do so will breach the constitutional framework. Judges by oath of office are entrusted to ensure the constitutional framework is not breached. 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. Towards this end, the 'Rukun Negara' was introduced to ensure all the pillars of the Constitution as well as the public are beholden to:

(A) Belief In God;

(B) Loyalty To King And Country;

(C) Supremacy Of The Constitution;

(D) Rule Of Law;

(E) Courtesy And Morality.

What Version of the Rule of Law?

The judiciary has a greater role to play and to sustain the rule of law. The debate now is which version of the rule of law? The rule of law relating to parliamentary or constitutional supremacy? Professor Andrew Harding, in essence, says 'the right version of the rule of law is not applied here'.

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 will turn a desert into an oasis;

ii) the wrong version of the rule of law will turn an oasis to a desert;

iii) the role of the court 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 courts 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 court. 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 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 social 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 applies the rule of law relating to parliamentary supremacy in India or Malaysia, the decision may not be the same as that of another judge who applies the rule of law relating to constitutional supremacy. In relation to social justice, 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 social 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 social justice and the Constitution.

Parliamentary Supremacy

The doctrine of parliamentary supremacy is feudalistic in nature. It rests the power of the sovereign, or the King as the case may be in England, on the parliament. It is just one step near 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 save 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 though such an approach may be illegal or irrational in the 'Wednesbury' sense when employed in a nation which 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 of Malaysia 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 here or in India as per the constitution and in Malaysia particularly the constitutional rule of law endowed to the Fourth Pillar through the oath of office of HRH Yang di Pertuan Agong. The judiciary *per se* is not the weaker arm but the supreme policing arm of the constitution. In my view, HRH is placed as the constitutional guardian of the rule of law and order in the country. This is reflected in the oath of office of HRH. The relevant part of the constitutional oath of His Majesty pursuant to art. 37(1) reads as follows:

> ...and by virtue of that oath do solemnly and truly declare that We shall justly and faithfully perform (carry out) our duties in the administration of Malaysia in accordance with its laws and Constitution which have been promulgated or which may be promulgated from time to time in the future. Further, We do solemnly and truly declare that We shall at all times protect the Religion of Islam and uphold the rule of law and order in the Country. (emphasis added)

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 a dictatorial regime and the demise of the constitution. The founding fathers of the Indian constitution in my view arguably were not vigilant to provide any mechanism to arrest a compliant judiciary. In India, it will appear that the 'free and independent press' stands as a check and balance to arrest the dilatory conduct of the three pillars. Not all countries which has subscribed to the constitution has a 'free and independent press'.

Fourth Pillar

It is amazing to note that the founding fathers of the Malaysian constitution were vigilant and they provided a Fourth Pillar and in my view the most powerful pillar to protect the rule of law and order in the country, which was not the case in India. The Fourth Pillar is none other than their Royal

Highnesses (the Rulers) and this is reflected in the constitutional oath of office of the HRH Yang di Pertuan Agong. To perform the oath, His Majesty is made the Supreme Commander of the Armed Forces with no executive shackles and also placed as the 'Head' of the Armed Forces Council. This is not the case in India.

It is extremely disheartening to note that most Malaysian jurists arguably have not realised this distinction and instead argue the role of Rulers is only ceremonial in nature as is the case of the President of India. The Malaysian jurists appear to have been highly influenced by the writings from India, in relation to the role of the President of India.

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 the decision making process or legislation making process and/or constitutional amending process must not subscribe to arbitrariness. Any jurist who attempts to say reasonableness is not a component of the constitution or the rule of law in my view, will only articulate 'comical jurisprudence', a matter to be shunned. The comical jurisprudence if not checked promptly by the relevant pillars, may lead to the demise of the constitution and/or impinge on social justice.

The judiciary has a constitutional role by oath of office to arrest arbitrariness failing which it has been placed in the hands of the Fourth Pillar, to ensure the country is ruled by rule of law and not rule by law or by any judicial proposition to imply that the judiciary knows best what is good for the country. Such judicial proposition is illegal in the 'Wednesbury' sense, both under the jurisprudence relating to parliamentary as well as constitutional supremacy. Courts cannot legislate; at the most they can give guidance or directions only.

In my view and based on authorities from respectable jurisdictions, under the jurisprudence relating to constitutional supremacy jurisprudence:

(i) executive decision cannot be arbitrary;

(ii) formulation of legislation cannot be arbitrary and the legislation, even if made according to the provision of law and/or 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.

(iv) in the Malaysian context, the legislature, executive and the judiciary cannot make arbitrary decisions as the decisions may be subjected to the scrutiny of the Fourth Pillar which is the supreme pillar and arbiter to maintain the rule of law and order in the country under the Constitution. This is not the case in India if the Judiciary becomes a compliant judiciary as there is no Fourth Pillar to check arbitrariness.

I do not wish to say much in respect of the jurisprudence relating to rule of law save to say that any decision by the executive, legislature or judiciary must not subscribe to the concept of illegality, irrationality and 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. I personally will consider that my proposition of the constitutional oath of office jurisprudence which I had anchored with respectable authorities in the case of ***Nik Noorhafizi bin Nik Ibrahim & Ors v PP***[5] was my greatest contribution towards pursuit and dissemination of knowledge relating to the constitution as well as social justice, so far as a judge. I will invite jurists to read at least four of the judgments which I had penned in the following order to understand and appreciate the paper I have presented today. They are as follows: (i) ***Nik Noorhafizi bin Nik Ibrahim & Ors v PP***[6]; (ii) ***Nik Nazmi bin Nik Ahmad v PP***[7]; (iii) ***Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional***[8]; (iv) ***Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors***[9]***.***

5 [2013] 6 MLJ 660
6 [2014] 2 CLJ 273
7 [2014] 4 CLJ 944
8 [2015] 3 AMR 35
9 [2007]5 MLJ 441

I will now explain the jurisprudence and nexus to constitutional oath, rule of law and judicial review in a simple manner.

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. 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 conform 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.

That is to say, 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 executives' 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 even if the ultra vires doctrine is not applicable; (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.

In the Malaysian context, where the executive or legislature or judiciary makes any arbitrary decision or conduct themselves arbitrarily even in parliament that too by parliamentarians that will be inconsistent with the rule of law, and/or constitutional framework. The English courts have no such powers to intervene in the affairs of parliament and parliamentary practice there is a matter largely of convention. Parliamentary practice based on constitution is subject to rule of law. That is not the case in England. The oath of office of the HRH gives constitutional, judicial power to HRH to arrest any form of breach of rule of law as judicial power to do so is entrenched in the oath of office of HRH. Employment of procedure for that is purely an administrative exercise based on established principles of natural justice. Just because there is no procedure it does not mean the constitutional oath with the constitutional, judicial power was formulated in vain. The constitutional, judicial power of HRH pursuant to the constitutional oath is unique to the Malaysian constitution and such powers have never been exercised in full force from the inception of the constitution save as to the recent press statement of the HRH the Rulers on rule of law. In consequence, there is hardly any literature on the subject in India or globally, though a fair minded jurist having been informed of the difference will concur on the role of the Fourth Pillar.

Rule of Law and Rule by Law

Rule of law is a generic term and in consequence no one yet has been able to define its parameters. For example, there may be presence of rule of law in a communist, socialist, democratic, shariah regime, etc. The real question here is what version of rule of law needs 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 or Rukun Negara. It is one relating to the common sense approach and as Lord Denning often said 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 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 being governed by arbitrary decisions or legislation and/or constitutional amendments. Rule by law is an antithesis to 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. Rule of law paves the way for progress of democratic nations and nips corruption in the bud and rule by law leads to destruction of the nation when by its application corruption sets in. The ultimate result is that it will compromise social justice as corruption often leads to squandering of national assets or its revenue and hits the poor the most. In ***Nik Noorhafizi bin Nik Ibrahim & Ors v PP***[10], the importance of rule of law was emphasised as follows:

> "(d) It is pertinent to note that a compliant judiciary or bench cannot stand as a bulwark of liberty. A compliant judiciary or bench is one which does not want to subscribe to its sacrosanct oath, and Rukun Negara and does not believe in Rule of Law and does not want to protect the constitution and abrogates its role by saying that it has no judicial power and paves way for Rule by Law. It is for the public through Parliament or His Royal Highness (HRH), the Rulers, in particular the Yang Di Pertuan Agong (His Majesty) to initiate the steps to arrest the progress of a compliant judiciary and ensure that the judiciary is independent to protect the constitution and sustain the Rule of Law. A compliant judiciary will directly and/or indirectly promote all form of vice which in all likelihood will destabilise the nation as well as harmony and security. In Lim Kit Siang v. Dato' Seri Dr. Mahathir Mohamad [1987] 1 CLJ 40; [1987] CLJ (Rep) 168; [1987] 1 MLJ 383 the Supreme Court had this to say:

10 [2014] 2 CLJ 273

When we speak of government it must be remembered that this comprises three branches, namely, the legislature, the executive and the judiciary. The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review -- a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action.

(e) Our founding fathers have framed the constitution by giving the courts absolute jurisdiction and power to police and adjudicate on legislation as well as executive decisions in the right perspective. The important distinction is that in UK the court is not empowered to police legislation and declare them as *ultra vires* of their uncodified constitution though by way of interpretation of statute or judicial review they are permitted to declare the decision of executive was in breach of their uncodified constitution, etc; (see Peter Leyland: 2012, *'The Constitution of United Kingdom'*). In addition our founding fathers to protect the constitution and as a further security to ensure the rule of law and order in the country is observed by all parties inclusive of the three pillars have entrusted the force and might of the state exclusively to His Majesty, by entrusting His Majesty as the Supreme Commander of the Armed Forces without any executive shackles as is placed in other countries on the Heads of the country such as UK (Queen) or India (President). In essence, if the pillar or pillars fail in their obligation the public are entitled to lodge a complaint petition with His Majesty, who is obliged pursuant to the Constitution and Constitutional Oath to independently adjudicate upon the complaint (without any executive shackles). And His Majesty to ensure order in the country and also as the last bastion within the constitutional framework is constitutionally bound to consider the problem, assess the consequence, evaluate alternative and if need be advance the remedy. No pillar can abrogate its role and constitutional oath and the judiciary is no exception and the judiciary without jurisprudence simply cannot say they have no judicial power. All pillars inclusive of constitutional functionaries are answerable to His Majesty more so when a complaint is lodged with His Majesty. Thus, our founding fathers of the constitution unlike the Indian Constitution have placed full responsibility in respect of 'Order in the Country' to His Majesty and His Majesty has a supreme role to play in policing the pillars as well as other constitutional functionaries, subject

only to the constitutional framework and limitations. The relevant part of the constitutional oath of His Majesty pursuant to art. 37(1) reads as follows:

...and by virtue of that oath do solemnly and truly declare that We shall justly and faithfully perform (carry out) our duties in the administration of Malaysia in accordance with its laws and Constitution which have been promulgated or which may be promulgated from time to time in the future. Further, we do solemnly and truly declare that We shall at all time protect the Religion of Islam and uphold the rules of law and order in the country. (emphasis added)

Constitutional Oath

In my view, full compliance of constitutional oath of office guarantees rule of law and paves the way for social justice and economic progress. I will give my reasons.

When I was first told that I was going to be appointed as a Judicial Commissioner, I thought it would be an easy job. I was too familiar with the lawyers jest 'My Lord, I am paid to talk and you are paid to listen'. I would have no problem to do so if I were beholden to the jurisprudence of parliamentary supremacy. As a barrister, I was fully appraised with the jurisprudence relating to parliamentary supremacy but not constitutional supremacy. During my studies in England and my practice in Malaysia, I did not come across any writings or jurisprudence based on the constitutional oath of office in the manner I have advocated in my judgments. In fact, I had never taken the trouble to read the schedule in the Constitution which sets out the oath of office of a judge, legislature, executive as well as HRH, before my appointment.

I was first confronted with the oath when I was asked to swear in the name of Almighty to *inter alia* preserve, protect and defend the Constitution. I was petrified, for in my culture it was not an ordinary matter to take an oath in the name of the Almighty. My parents in my early days had repeatedly warned me of the danger of taking an oath. Such a sacrosanct value lies in the oath taken in the name of Almighty in my culture.

After having taken the oath, at the same instant, I felt that a sudden change had come over me. I felt I was different and had to conduct my affairs worthy of my oath.

My first posting was to Kuching, Sarawak, where I had dealt with a number of native customary cases. Native customary rites in Sarawak are different from the law relating to 'customs', etc. in relation to common law. The indigenous people of Sarawak having the strength of nearly 70% of the population of Sarawak were beneficiaries of native customary rights. The statute laws for the continuous enjoyment of their rights are not favourable for them and hence, many cases to challenge the decision based on the grounds the State had encroached their rights came before the court. The case laws were not encouraging until the decision of the Federal Court in the case of ***Superintendent of Land Surveys Miri Division & Anor v Madeli bin Salleh***[11], where some opening for the native rights was recognised.

I realised during the course of hearing the arguments of native customary cases, the jurisprudence relating to parliamentary supremacy was pressured upon the natives by court decisions and the legitimate expectation under the constitution largely was not in place.

The plight of the natives in Sarawak was instrumental for me to do research to find an effective solution and I am glad that I am presenting the paper in Kuching. The answer came when I was inspired to realise there was a distinction between the constitutional oath of English and Malaysian judges. Lawyers in Malaysia, from my observation, have never once pricked the conscience of the bench to show the distinction between the oath of office of a judge in England and Malaysia and demand that judges debunk the English cases based on parliamentary supremacy and provide relief as per oath of office as taken by the judges pursuant to the Constitution.

Now, I will show the differences in the oath of office and the consequential effect in the decisions of court in England and Malaysia with a note that India has similar provision to that of Malaysia.

The oath of the English and Malaysian judges and its consequence in judicial decisions has been dealt by me in the case of ***Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional***[12]. It was an administrative law matter relating to the concept of justiciability. The relevant part reads as follows:

11 [2008] 2 MLJ 677
12 [2015] 3 AMR 35

"[16] The learned judge in that case had also dealt extensively with the concept of justiciability and came to the conclusion that on the facts the application did not merit leave to be granted. I do not propose to repeat the cases dealt in that case save to say:

(i) The issue of justiciability takes a different stage, approach and jurisprudence when contrasted with judicial decisions relating to Parliamentary Supremacy and Constitutional Supremacy;

(ii) The English cases subscribing to the concept of Parliamentary Supremacy by the oath of office of an English judge has given great deference to the Act of Parliament as well as to some executive decision on the grounds of non-justiciability. In England, the courts cannot strike down an Act of Parliament and at the most it can only strike down a subsidiary legislation with exception related to European Union Laws and its applicability in UK. In cases of judicial review, the English courts have provided a restrictive meaning to the concept of justiciability, for example, the House of Lords in CCSU v Minister for the Civil Service [1984] 3 All ER 71 have stated:

"Generally, an issue is regarded as non-justiciable where a court of law or the court process is ill-suited to decide the issue by reason of lack of competence, unsuitability of the legal method, lack of satisfactory criteria for a judicial determination of the dispute at hand, or where constitutional, common or statutory laws expressly or contextually insulate it from judicial determination."

(iii) The restrictive view has nexus to English judges oath of office pursuant to Promissory Oaths Act 1868 of England which 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 illwill. So help me God" (emphasis added).

(iv) The Malaysian Judges' oath of office is entirely different pursuant to article 124 of the Federal Constitution which states:

"1. Oath of Office and Allegiance

"I, ..., having been elected (or appointed) to the office of .....do solemnly swear (or affirm) that I will faithfully discharge the duties of that office to the best of my ability, that I will bear

true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution." (emphasis added)

(v) From the oath of office of an English judge, it is clear that the English judge is beholden to the Act of Parliament and usages of the realm. Their Lordships cannot strike out the Act or refuse to follow the Act. The Act of Parliament can exclude the court's jurisdiction or refuse the court intervention of any act or conduct of the Government on any basis such as privilege, confidentiality, official secret, national security, etc. That is not the case in Malaysia, India or many other jurisdictions where Constitutional Supremacy are in place and where the judges take the oath of office to preserve, protect and defend the Constitution. The Court in Malaysia has a constitutional duty to strike out an Act of Parliament if it infringes on the constitutional framework and more importantly the constitutional guarantees offered in several provision of the Constitution. In the realm of Administrative Law, the courts have a constitutional duty to check all forms of executive decision by way of judicial review when it infringes on the right of public or the Constitution, etc. Any form of restriction to the role of court by Act of Parliament will purely be unconstitutional per se. However, the courts for purpose of good governance of the state have always weighed the restrictions on court's role and given effect to the same on case to case basis and according to the circumstances of the case at that particular time and era. HRH Raja Azlan Shah (AGLP as HRH then was) in the case of Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus [1981] had asserted that when interpreting a constitution, judicial precedent plays a lesser part.

(vi) As per the Federal Constitution, the court is the 'supreme arbiter' of what is right and wrong at any given time. The judgment of court at one era may be ruled to be not binding on another court, though the courts usually take great caution to sustain the concept of binding judicial precedent. Support for the proposition is found in a number of Indian cases as well as Malaysian cases. We do not think it is necessary to set them out here save to say that I have dealt in great detail with the constitutional oath of office of judge in Malaysia, England and India, the difference, the challenge and obligations in relation to the doctrine of separation of powers in a number of cases; to name a few are as follows: (a) Chong Chung Moi @ Christine v The Government of State of Sabah & Ors [2007] 5 MLJ 441; (b) Nik Noorhafizi bin Nik Ibrahim & Ors v PP [2014] 2 CLJ 273; (c) Nik Nazmi bin Nik Ahmad v PP [2014] 4 CLJ 944.

(vii) The jurisprudential approach in the Public Law field in England and Malaysia is like the distinction between an apple and orange. The English approach takes a narrow view on justiciability favouring the Act of Parliament and where possible administrative action as stated by the House of Lords in CCSU's case.

The Malaysia position is much wider as briefly encapsulated in the Federal Court case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2010] 5 CLJ 865. The jurisprudence on justiciability on policy matters where the doctrine of Constitutional Supremacy applies is well articulated by the Indian Supreme Court in the *State of Rajasthan & Ors v Basant Nahata* AIR 2005 SC 3401, where it was stated:

"The contention raised to the effect that this Court would not interfere with the policy decision is again devoid of any merit. A legislative policy must conform to the provisions of the constitutional mandates. Even otherwise a policy decision can be subjected to judicial review. [See Cellular Operators Association of India and Ors. v. Union of India and Ors. MANU/SC/1368/2002 : [2002]SUPP5SCR222 and Clariant International Ltd. and Anr. v. Securities & Exchange Board of India MANU/SC/0694/2004: AIR 2004 SC4236]."

(viii) Unlike in England, the position in Malaysia or India under the doctrine of Constitutional Supremacy is that administrative decision of any kind where there is a public element and any infringement, etc. can be challenged on many grounds inter alia as follows: (i) violation of fundamental rights or breach of any provision of the Federal Constitution; (ii) failure to conform to the statute under which it is made or exceeding the limits to authority conferred by the enabling Act; (iii) repugnant to the laws of the land; (iv) manifest arbitrariness/ unreasonableness and many more. Justice V. Dhanabalan J of the Madras High Court in the case of Srinivasa Institute of Engineering and Technology rep. by its Principal Dr. D. Padmanabhan vs. All India Council for Technical Education (AICTE) 2010(4) CTC 225, has dealt with some of the issues related to the instant matter and the judgment as well as the cases cited in the judgment was useful for considering the issues in this judgment.

(ix) Adjudicators must not be misconceived in accepting English cases in matters of judicial review where public law element and Federal Constitution is involved and must take cognizance that the Federal Constitution stands as the 'Guaranteed Bond of Bill of Rights' to the Malaysian public and to the civilized world (which deals and trades with us), expressing how the constitutional functionaries namely the executive, legislature, and the judiciary inclusive of all state machineries such as the Police, Attorney General, Election Commission, etc. will execute the 'Guaranteed Bond' as per oath of office to maintain the Rule of Law. In this context, the apex court headed by the Chief Justice of Malaysia is entrusted as the 'Supreme Policing Authority' of the Federal Constitution and with the assistance of his brother and sister judges pursuant to the sacrosanct oath of office is duty bound, to ensure that the constitutional functionaries perform according to the oath

of office and the state machinery and its agency subscribe to Rule of Law in all their deeds and action and be always ready to be answerable to the court if there is a complaint by the public that his or her constitutional right has been infringed which will include procedural fairness in all administrative decisions. The legitimate complaint and expectation of the public by constitutional challenge or by way of judicial review cannot be brushed aside on the ground of non-justiciability which is in vogue in England, when the complaint relates to public law element which may have a direct nexus to the Federal Constitution and/or fundamental guarantees provision.

(x) English cases cannot stand as precedent in the instant case for non-justiciability issues for reasons stated earlier. The court when confronted with a complaint of this nature is bound to hear it on merits and provide relief if it warrants so. The right to complain vests with the applicant but whether the relief will be granted is one which relates to the jurisprudence relating rule of law and the Federal Constitution.

(xi) It must be asserted that arbitrariness in any decision making process whether by executive or judiciary is an affront to the Rule of Law and Federal Constitution. In *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, on the issue of complaint relating to arbitrariness, HRH Raja Azlan Shah (CJ Malaya as HRH then was) had anchored the jurisprudence for judicial review in immutable terms by asserting that 'unfettered discretion is a contradiction in terms, and every legal power must have limits, otherwise there is dictatorship. And the courts are the only defence of the liberty of the subject against departmental aggression'.

(xii) Based on the jurisprudential approach taken in Pengarah Tanah dan Galian's case, every complaint of arbitrariness in decision making process of public body, if on the face of record is not frivolous, vexatious or abuse of process of court, need to be granted leave to proceed with the judicial review application on merit.

Now, I will explain what will happen if jurisprudence relating to parliamentary supremacy is applied to meet with constitutional challenges in Malaysia.

The locus classicus case which has compromised public law challenges and/or relief is the majority decision in the case of ***Government of Malaysia v Lim Kit Siang***[13], where, by the application of jurisprudence relating to

13 [1988] 2 MLJ 12

parliamentary supremacy, the court held the respondent, a parliamentarian, had no locus standi to question the granting of largesse by the Government to a nominee company. In addition, the majority went to decide that the courts will not interfere with the policy of the Government. The irony of the case in our judicial history is that a three member panel of the Supreme Court related to the facts of that case had previously granted an interlocutory injunction recognising parliamentarian Lim had locus standi and the subsequent decision in unprecedented manner in law and practice went on to hold that Lim had no locus standi. Lim's case within the parameters of judicial precedent as well as court practice arguably and crudely is seen as an unconstitutional decision delivered by the majority advocating equally an unconstitutional jurisprudence within the constitutional framework. I will explain this further.

Lim's case was related to giving of Government contracts without going through a tender process and/or not giving the tender to the highest bidder, etc. Basically, the issue was one relating to transparency, accountability and good governance which must be seen as the soul of rule of law and the constitution. The minority decision was based on the doctrine of constitutional supremacy where the judges held that the appellant had locus standi. The consequential result of the case led to Malaysian courts, far and large, applying the doctrine of parliamentary supremacy in the decision making process when it relates to substantial policy of the Government. Such an approach did not inspire confidence among the critics though the majority of the judiciary was rightly or wrongly said to be following the rule of law as per judicial precedent. The irony of the decision is that the previous panel and the two dissenting judges, totalling five members of the Supreme Court in all had held Lim had locus standi. However, the three who said that Lim had no locus standi had been followed in subsequent cases based on 'stare decisis' principle. That is to say, the court was observing the rule of law but not based on constitutional supremacy but parliamentary supremacy, that too when the total majority of five members of the two quorums of the Supreme Court had decided arguably based on the rule of law relating to constitutional supremacy, and only three judges had decided by applying the rule of law relating to parliamentary supremacy. Lim's case had plagued the relief relating to social justice and is said to be continuing and is shamelessly impinging the rule of law and the constitution, substantially affecting social justice.

Learned Professor Andrew Harding had summarised, Lim's case as follows:

> "In 1988 the case *of Government of Malaysia* v. *Lim Kit Siang* [1988] 1 MLJ 50, appeared to draw a line under all the developments so far in administrative law in Malaysia, and to say that the law would develop no further. The case was also one of crucial importance politically; it was therefore a real test of the limits of judicial review. For these reasons it is worth considering in some detail.
>
> The Leader of the Opposition, Lim Kit Siang, who was also an MP, a State Assemblyman, a taxpayer and a road user, sued for a declaration that a letter of intent given to a company (UEM), by the Government for the privatization of the construction of Malaysia's North-South Highway was invalid, and for an injunction to restrain UEM from signing any contract pursuant to the letter of intent. His main allegation was that the ministers involved in the Cabinet decision to grant the contract were guilty of criminally corrupt practices, in that they were biased in favour of UEM because it belonged to UMNO. He also alleged that the Government had rejected the tenders of two rival companies which were lower than UEM's, so that the Government had uneconomically committed huge expenditure from public funds.
>
> Lim's motion for an interim injunction, a preliminary issue, was granted by the Supreme Court, sitting in a bench of three judges. The Government applied for the interim injunction to be set aside on the ground of lack of standing, and this application was also heard by the Supreme Court, which, by the narrowest possible margin, three to two, and, exceptionally, overruling its own previous decision in the same case, decided in favour of the Government.
>
> The majority held that, where a statute created a criminal offence but no civil remedy, the AG was the guardian of the public interest and it was he alone who could enforce compliance with the law. No other person could, without the consent of the AG, bring an action of this kind (for an injunction in aid of enforcement of the criminal law) unless some private right of his was being interfered with, or he suffered special damage peculiar to himself. As a politician the respondent's remedy lay with Parliament and the electorate. In the course of their judgments the majority followed the law as laid down by the House of Lords before the statutory reform of English administrative law remedies in 1981, and held that later English developments were inapplicable.
>
> Seah and Abdoolcader SCJJ (dissenting) held that standing was a rule of practice and procedure to be laid down by the judges in the public interest, and was liable to be altered by the judges to suit the changing times. The respondent as an MP had brought the suit *bona fide* alleging Government wrongdoing in the award of the contract to UEM which would result in the illegal spending of billions of dollars. He therefore had a real interest in the subject-matter of the

suit, which was not to enforce the criminal law but was a public-interest suit calling for judicial review of the legality of proposed executive action.

The failure of the majority to develop Malaysian law in this case is unfortunate. The reliance on the AG as the guardian of the public interest is difficult to understand: it is hardly likely that the AG would take such action against his political masters. The identity of the litigant is really an irrelevant issue when the courts consider serious allegations of abuse of power. On the other hand the case was political dynamite: if Lim had succeeded in his getting his claim into court, the credibility of the Government might have been seriously eroded.

Before we conclude too swiftly that this case marks the end of the development of the rules of standing in Malaysia, it is worth noting:

(i) that the case lays down a rule which is very narrow in scope;

(ii) that it is also contrary to the trend of decisions both in Malaysia and in the Commonwealth;

(iii) that the decision is not necessarily correct, as is evidenced by the strong dissenting judgments and the decision overruled;

(iv) that earlier decisions had opened up the standing rules; and

(v) that the case was one which affected the very survival of the government in power."

The learned Professor's critical view on the decision of the Malaysian court in public law in particular administrative law field reads as follows:

"The problem of administrative law, stated earlier in this Chapter, has not been given a clear answer by the Malaysian judiciary. However, one can attempt to estimate the results of their work.

Malaysian Judges clearly feel happier with judicial review of administrative action than with judicial review of legislation. In this respect they reflect faithfully their common-law background. In the absence of supporting control mechanisms within the administration they have effectively constructed a system of judicial review which is becoming a popular vehicle for complaints against the administration. This applies mainly to procedural issues, but the cases are by no means confined to procedural issues. Judicial review applications are now increasing rapidly year on year, as Table 2 shows.

TABLE 2:
JUDICIAL REVIEW CASES, HIGH COURT, KUALA LUMPUR, 1987-94

[source: Registrar, High Court, Kuala Lumpur]

YEAR	REGIST'D	LEAVE	TRIAL	SI
1987	62	56	46	25
1988	77	76	72	41
1989	42	37	25	15
1990	54	42	35	16
1991	52	19	14	0
1992	34	19	17	2
1993	42	14	13	1
1994	87	83	83	25

The statistics indicate very clearly that judicial review shrank to almost a trickle during a very difficult period for the judiciary (1989-93), but the situation in 1994 and resembles that of the pre-1988 period.[120]

At the same time the decisions evince a distaste for involvement in politically charged cases, especially where policies crucial to national development are involved. It is also true that there are inconsistencies of approach. To some extent, however, this is inevitable, given the subjective and variegated nature of judicial review.

Judicial review appears to have survived and flourished in conditions very different from those of England**,** where most of the doctrines developed in Malaysia originated. Given the pace of economic development and the increasing importance and sophistication of regulatory and adjudicative mechanisms in Malaysian government, and the maturity too of the interests and arguments involved in judicial review cases, it seems likely that judicial review will continue to grow, and although that growth will probably continue to be unobtrusive, the value of its effects is, and will continue to be, apparent.

What is perhaps most needed to bolster the judicial developments is a corresponding willingness on the part of the executive and the legislature to respond to public need and create more extra-judicial methods of challenging administrative decisions. Judicial review is a necessary but not sufficient condition for public confidence that the rights of individuals in the administrative process will be properly protected. The present situation resembles a skirmish over the no-man's land between executive and judicial power. A much better situation would be one in which both branches of the state co-operated in building up a

> much more systematic and available process of review of administrative actions according to principles which both regard as legitimate."

The former Federal Court Judge and constitutional jurisprudence expert who was instrumental in anchoring basic structure jurisprudence in our public law field, Justice Gopal Sri Ram in the recent Ahmad Ibrahim Lecture in relation to Lim's case, ranks it at the lowest ebb in the field of the Malaysia public law. The learned jurist had this to say:

> "But once a prima facie case of an abuse of power is shown, for example that the approval for the construction of a road was given in breach of a statute, be it even a penal law, the court is duty bound to make inquiry and apply the appropriate level of intensity of review to determine whether there has been an abuse of power. The failure of the majority judgments in particular the judgment of Salleh Abas LP in Government of Malaysia v Lim Kit Siang [1988] 2 MLJ 12 to recognise this important principle ranks that case as the lowest ebb in the field of Malaysian public law. The dissents of Seah and Abdoolcader SCJJ really point the way forward. The way forward therefore lies in applying the highest level of scrutiny whenever a fundamental right is infringed and whenever an abuse of power by reason of unfairness is brought home. But there is a proviso to this. Those entrusted with the judicial power of the state must act according to established principles of constitutional and administrative law and not display a propensity that shows them to be — to paraphrase Lord Atkin — more pro-executive than the executive. When that happens, the rule of law dies as does the Constitution itself." (Emphasis added.)

The observations of Professor Andrew Harding as well as Justice Gopal Sri Ram, in my view are an understatement. In my view, arguably the decision of the majority in Lim's case reflects the employment of the jurisprudence of parliamentary supremacy in the public law field and in consequence it is not one of the 'lowest ebb' but the decision by the court is tainted with the jurisprudence relating to illegality, irrationality and procedural impropriety as advocated by Lord Diplock in the case of ***Council of Civil Service Unions v Minister for the Civil Service***[14].

Arguably, Lim's case exposes judicial disaster in the administration of justice when by the court's decision the court's door to seek issues related to accountability, transparency and good governance which is the soul of rule of law, was more or less closed by advocating 'locus standi' of the litigant

14 [1985] AC 374

to question the policy of the Government. Professor Andrew Harding was subtle in his observation on the damage done by Lim's decision in the public law field in contrast to the former Federal Court judge, Gopal Sri Ram. To put it bluntly, both the jurists in my view are saying the 'soul' of rule of law is necessary to check corruption by public decision makers to ensure economic success as well as social justice in any democratic nation.

Arguably, the decision in Lim's case in blunt terms has substantially deprived the 'soul' of rule of law and it is now in the hands of jurists to do appropriate research to put back that part of the soul which was lost through Lim's decision to be restored through the judgment of the court by the employment of constitutional supremacy jurisprudence to enhance social justice.

It is disheartening to note that so far there is no research done by jurists or critics to demonstrate the consequence of Lim's judgment which had in actual fact compromised subsequent decisions of the court which had led to the compromise of the concept of transparency, accountability and good governance. This, in my view, has impinged on social justice and rule of law leading to the recent press statement by HRH, Rulers on the rule of law. It is now in the hands of all who are involved in the administration of justice to take steps to correct the shortcomings to sustain the rule of law relating to constitutional supremacy and not parliamentary supremacy.

India

It must be noted that the Indian courts at 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***[15]**;** (ii) ***Sajan Singh v State of Rajasthan***[16]. 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

15 AIR 1951 SC 458
16 AIR 1965 SC 845

are (i) ***I.C. Golaknath v State of Punjab***[17]; (ii) ***Kesavananda Bharathi v State of Kerala***[18]. 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 words parliamentary supremacy jurisprudence were 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

17 AIR 1967 SC 1643
18 [1973] 4 SCC 225

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 is of Indian make is complex as set out by K. Parasaran as well as Justice Dhanapalan. Constitutional oath jurisprudence which is of Malaysian make is simple but it derives its jurisprudential strength from the Indian decision based on basic structure jurisprudence. That is the distinction.

Even though I was trained as a barrister in England, I have great admiration for the Indian judges who have demonstrated world class jurisprudence. They have demonstrated in their judgments that they will preserve, protect and defend the constitution with utmost concern and also with restraint to ensure the doctrine of separation of powers is not impinged. They have also shown judicial dynamism in the public law field to maintain fundamental rights. Their judgments are remarkable. I must confess that it was by reading the Indian judgments over the years of my practice as a lawyer and then as a judge that I gained a deeper insight and appreciation in the application of the judicial principle in criminal, civil, commercial and constitutional law. I am glad that I have read those judgements supportive of social justice and the true meaning of rule of law within a constitutional framework. I will encourage budding lawyers to read more of the Indian judgments to enhance their knowledge of social justice and other areas of the law. Their judgments in my view are second to none and in my view all Malaysian jurists should make the effort to constantly refer to the judgments. That does not mean the judgements from England are less important.

Constitutional Oath of HRH

I have dealt in detail the constitutional oath of HRH and the distinction with the oath of office of the President of India in the case of *Nik Noorhafizi*. The relevant part *inter alia* reads as follows:

> "(f) Basic structure jurisprudence does not permit novice or pathetic interpretation of the Constitution. Basic structure jurisprudence also does not permit parliament to undermine the doctrine of separation of powers between the legislature, the executive and the judiciary by constitutional or legislative amendment. In essence parliament cannot legislate to subject the Superior Courts to be subservient of the executive. And basic structure jurisprudence do not permit the judiciary to abrogate its constitutional role and succumb to

fallacious and/or pathetic argument that parliament has deprived its judicial powers when parliament is not authorised to do so under the constitution. To put it crudely, if not for the basic structure, jurisprudence the Indian Constitution can be converted into nothing more than a scrap paper by unscrupulous parliament.

(i) Under the Indian Constitution, the President of India is subject to executive shackles in relation to the President's role as the executive head of the Government as well as the supreme commander of the defence forces. That is not the case in Malaysia for reasons stated above. Articles 53(1) and (2) of the Indian Constitution reads as follows:

(1) The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. (2) Without prejudice to the generality of the foregoing provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law.

(ii) The oath of office of His Majesty in relation to "Order in the Country" is an independent provision recognising the role of His Majesty when the pillars fail in their sacrosanct oath. The oath of office of His Majesty gives *locus* for the public to petition to His Majesty of any complaints in respect of the pillars or other constitutional functionaries.

(iii) To put it crudely our founding fathers have solely armed His Majesty as the Supreme Commander of armed forces to execute the constitutional oath when necessary, to arrest any threat to the country or constitution by unscrupulous pillars or constitutional functionaries or the public, etc. Such authority and supreme power to the Constitutional Heads is not found in the Indian Constitution or other constitution within the commonwealth. Thus, one may conclude that the founding fathers have provided a dominant role for His Majesty and His Royal Highness, the rulers and not just a ceremonial role as often our book and article writers will project. The pillars must perform according to their constitutional oath failing which upon the complaint of the public, His Majesty is empowered to provide the relief to protect the constitution and sustain order in the country. In this respect it is pertinent to note the oath of office of His Majesty is entirely different from the oath of office of the President of India under the Indian Constitution. And the constitutional obligations also differ.

(iv) If the public have grievance against the legislature or executive or judiciary or any other constitutional functionaries in performing the constitutional role the proper procedure to seek relief under the constitution and rule of

law is to lodge a complaint petition with His Majesty and not by injudicious attack on the web or street, that too without exhausting the constitutional remedies.

(v) Our Federal Constitution is a well planned constitution and is unique in contrast to the Indian Constitution. It has many inbuilt mechanism to check any form of vice which will stand to be a threat to the 'Order of the Country'. As I have said elsewhere all the pillars have a sacrosanct duty and obligation to the public to ensure that one pillar does not undermine the other in whatever manner, because the weakness of the pillars will undermine the stability of the nation and this will ultimately affect the public. Although human can stand on two legs or one, the Federal Constitution needs all the three to stand individually to uphold the constitution and protect the public. This concept of standing separately to protect public interest is often termed as the doctrine of separation of powers. In addition the Federal Constitution has placed a complaint and relief mechanism in the hands of His Majesty to ensure order in the country.

(vi) It is for the judiciary to police and adjudicate on legislation, executive or constitutional functionaries' action or decision. A compliant judiciary or bench which says it has no judicial power has no constitutional status within the framework of the constitution and has to be corrected by due process within the constitutional framework. In consequence a judge is obliged to act pursuant to oath of office and deal with constitutional issues without abrogating his role by saying the court has no judicial power or it's like. (See PP v. Kok Wah Kuan [2007] 6 CLJ 341)."

In addition, it must be noted that Article 137 paves the way for the Armed Forces Council to be headed by HRH and HRH is not referred to as executive head. Article 137(1) reads as follows:

"137. (1) There shall be an Armed Forces Council, which shall be responsible under the general authority of the Yang di-Pertuan Agong for the command, discipline and administration of, and all other matters relating to, the armed forces, other than matters relating to their operational use."

In my view, it is without doubt that the rule of law and order in the country rests finally with HRH pursuant to Article 37, 41, 137, etc. read with the constitutional oath which I had set out earlier.

Constitutional Oath, Basic Structure Jurisprudence and Evolutionary Constitutional Jurisprudence

Basic Structure Jurisprudence was unique and developed by the Indian jurists and judges to protect the Constitution in particular to sustain social justice. Constitutional oath jurisprudence is one of Malaysian make.

I have developed constitutional oath jurisprudence in a number of cases, the gist of it is that the legislature, executive and judiciary have taken an oath of office to preserve, protect and defend the constitution. In consequence, any arbitrary decision by them must be struck down to sustain the rule of law. In the Malaysian context HRH also has been vested with constitutional, judicial power to sustain the rule of law and order in the country.

Basic structure jurisprudence cannot be said to have been accepted in Malaysia as the majority of the decisions relating to core public law issues is addressed through the employment of parliamentary supremacy jurisprudence. However, in the field of Administrative Law, courts are vigilant in employing the doctrine of constitutional supremacy except when it relates to policy of the Government or relates to legislation or constitutional amendment. In such cases, courts are quick to revert to the jurisprudence relating to parliamentary supremacy.

In my view, Malaysia is going through an evolutionary process in respect of rule of law and the constitution as there are a number of judges who are committed to the constitutional supremacy doctrine. This is reflected in the minority decision in Lim's case itself.

A major breakthrough to debunk the locus standi proposition made in Lim's case was recently laid down in the case of ***Malaysia Trade Union Congress & Ors v Menteri Tenaga, Air dan Komunikasi & Anor***[20] where Federal Court had this to say:

> "56. In India, the Indian judicial approach on standing has 'veered towards liberalisation of the locus standi as the courts realise that taking a restrictive view on this question will have many grievances unremedied' (see Principles of Administrative Law, MP Jain & S N Jain, (6th Ed) at p 1994."

As I have already said, Malaysian jurisprudence on the constitution is going through an evolutionary process. The Federal Court in ***Malaysia Trade***

Union Congress case managed to break the self-imposed restraint by the majority in Lim's case which had employed parliamentary supremacy jurisprudence. Similar restraint was also placed by the Indian judges in the cases of ***Shankari Prasad*** and ***Sarjan Singh***. However, that chain was shattered through the decision of ***Golak Nath*** and ***Kesavananda Bharathi*** by the employment of 'Basic Structure Jurisprudence'.

Social Justice and Research

In my view, the answer to social justice cannot be purchased on the streets but it has to be done through pursuit and dissemination of knowledge. The answer to constitutional problems is to create more experts in the subject. It will be helpful if civil societies create at least one hundred scholarships every year to be given to deserving meritorious candidates only to do research on social justice and the constitution.

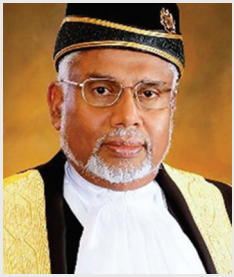
As I said earlier, we are going through an evolutionary process. It has been my observation that in many former British colonies the public select their representatives solely based on 'the strength of their tongue' without verifying their integrity, knowledge and past history, etc. It is not unusual for the public to be short changed by the very representatives they have chosen. This affects social justice as it impinges on the poor. The answer to the problem relating to social justice lies in nurturing a well-informed society and for this purpose the society has to be educated. The society cannot be nurtured through street culture as those who come from the streets may have a dubious formula for rule of law.

I hope and pray that the Malaysian courts through the sacrosanct jurisprudence of constitutional oath will one day be able to debunk the jurisprudence relating to parliamentary supremacy *in toto* and employ the jurisprudence relating to constitutional supremacy to sustain social justice and economic success through a vigilant system of transparency, accountability and good governance.

Thank you.

Justice Datuk Dr. Haji Hamid Sultan bin Abu Backer
Judge, Court of Appeal Malaysia.

JUSTICE DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER
Judge of Court of Appeal Malaysia



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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; Attorney General Chambers, Sri Lanka; Chennai, Ambedkar Law University; DSNLU Visakhapatnam, etc.; Leeds University, England; 'Maison du Barreau de Paris, Paris; EBS University Wiesbaden, Germany and Hong Kong,University. He had also spoken on Arbitration Clause in Islamic Finance Facilities in Doha, Hamad Bin Khalifa University Qatar; He participates in various other activities of Universities such as examiner of PhD thesis, external examiner, Guest Speaker, etc.

He has written about one thousand judgments which cover most areas of the law. He has authored books on various subjects including **Civil Procedure**, **Criminal Procedure**, **Evidence**, **Conveyancing**, **Islamic Banking**, **International and Domestic Arbitration** and on other areas of commercial law. His books are not only widely used as text books in all institutions of higher learning offering law but also by all who are involved in the practice and administration of law in Malaysia.

His doctorate thesis was on Civil Procedure and Justice.

1. Lectured at International Islamic University Malaysia and National University of Malaysia.
2. Presented a Research Paper on Preliminary cross-examination at the Commonwealth Judges Conference in Hong Kong.
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4. Presented a Research Paper on "Islamic Banking Regulatory Authorities in Malaysia: Their Role and Powers" at International Islamic Banking & Finance Law Conference 2015; February 2015.
5. Presented a Research Paper on "Islamic Finance Contracts: Is Economic Justice Possible?" at Law Faculty, University Kebangsaan Malaysia (UKM) May 2015.

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