

## **Explanatory Statement**

### **Foreword**

The purpose of this proposed Amendment to Article 121 of the Federal Constitution is to affirm the doctrine of separation of powers and to ensure that the sovereignty of the judicial arm of government is inextricably infused within the basic structure of the Constitution.

#### **1. Malaysia and the elements of a constitutional democracy**

- 1.1 Malaysia is a constitutional democracy. The integral elements of every constitutional democracy are the separation of its sovereign authority between different arms of Government and the vesting of powers in each arm of Government to check or oversee the exercise of the authority of the other arms. These elements are referred to as the doctrine of separation of powers and the system of check and balance.
- 1.2 The doctrine of separation of powers provides that executive power will be exercised by a body separate from the legislative authority, both of which would be separate from judicial authority.
- 1.3 The system of check and balance allows the three bodies to oversee the exercise of authority vested in each other to prevent abuse. Such check and balance is essential to the health of a constitutional democracy, to uphold and safeguard the rights of the citizens, and to ensure that all acts undertaken within Malaysia are consistent with the Federal Constitution.
- 1.4 Malaya in 1957 was founded on the doctrine of separation of powers and the system of check and balance, which were encapsulated in the distribution of sovereign authority and division of powers between the Executive, Legislature and Judiciary under the Federal Constitution enacted at its independence in 1957 in amongst others, Article 39 (executive authority), Article 66 (legislative authority) and Article 121 (judicial power).<sup>1</sup>
- 1.5 The separation of the exercise of judicial powers from the Legislature and Executive and the vesting of judicial power in the Judiciary which allowed it to act as an efficient check and balance on the other arms of Government, are fundamental to the rule of law. The preservation of this separation of powers and system of check and balance is essential to the functionality and survival of our constitutional democracy.

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<sup>1</sup> A.L.R. Joseph, *The Doctrine of Separation of Powers Survives in Malaysia*, [2007] Singapore Journal of Legal Studies 380-395, at 381.

## 2. Article 121(1) prior to 1988

2.1 Prior to 1988, Article 121(1) of the Federal Constitution provided as follows:

*Subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status, namely—*

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

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

*(c) (Repealed),*

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

2.2 While it is impossible to formulate an exhaustive definition of the term, ‘judicial power’ has been broadly defined as follows:

(a) The power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.<sup>2</sup>

(b) The power to examine the questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties.<sup>3</sup>

2.3 Given that the Federation’s judicial power was expressly vested in the High Court, it was indisputable that the High Court had supervisory jurisdiction over all inferior tribunals. In its exercise of its supervisory jurisdiction, the High Court has the right to conduct judicial review “over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties.”<sup>4</sup>

<sup>2</sup> Griffith CJ in *Huddart, Parker and Co Proprietary Ltd v. Moorehead* [1908] 8 CLR 330, cited with approval by the Privy Council in *Shell Co. of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275 and referred to in *PP v Dato’ Yap Peng* [1987] 2 MLJ 311.

<sup>3</sup> *PP v Dato’ Yap Peng* [1987] 2 MLJ 311

<sup>4</sup> *Halsbury’s Laws of England*, 4<sup>th</sup> ed., vol. 37 (London: Butterworths, 2001) at 432, para. 567.

2.4 Equally important, with the express vesting of judicial power in the High Court under Article 121(1), it was indisputable that the High Court retained an inherent jurisdiction over and above any express jurisdiction conferred by statutory law. Inherent jurisdiction refers to the “common law powers of the court, which are residuary or reserve powers and a separate and distinct source of jurisdiction from the statutory powers of the court.”<sup>5</sup> This is by far the most important aspect of judicial power. The High Court’s powers are not limited only to those granted to it by federal laws passed by Parliament; rather, it can assume jurisdiction over matters even where no statute has conferred jurisdiction on it.

2.5 In summary, judicial power enables the court, amongst others:

- (a) to judicially review any and all matters, including the exercise of state powers;
- (b) to make and develop common law;
- (c) to do justice as the case requires: and
- (d) to ascertain the rights of litigants wherever there is a lacuna in the law.

### 3. The 1988 amendment to Article 121(1) and its impact

3.1 On 10 June 1988, Article 121(1) was amended to remove the words “the judicial power of the Federation shall be vested in two High Courts” from that Article, thus deleting the provision that the judicial power of the Federation vested in the Judiciary. Instead, it was stipulated that “the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law”.

3.2 The amended Article 121(1) reads:

*There shall be two High Courts of co-ordinate jurisdiction and status, namely—*

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

*(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry*

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<sup>5</sup> *R. Rama Chandran v. The Industrial Court of Malaysia* [1997] 1 M.L.J. 145.

*at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;*

*(c) (Repealed),*

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

- 3.3 The removal of the phrase “the judicial power of the Federation shall be vested in two High Courts” and the inclusion of the phrase “the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law” have caused confusion in the Judiciary,<sup>6</sup> the Executive<sup>7</sup> and the general public as having divested the courts of judicial power, leaving them with only such powers as are given by Parliament. Professor Emeritus Datuk Dr Shad Saleem Faruqi, in his column entitled **Reflecting on the Law** in *The Star* on 16 April 2008 summed up the situation as follows:

*The amendment to Article 121(1) has created the wrong perception that the Malaysian Executive wishes to silence the Judiciary. All Judges feel humiliated. Some have accepted their truncated role as mere agents of Parliament and not as independent pillars of the Federal Constitution. Others insist that their review powers are intact. There is division within the ranks.*

- 3.4 The confusion generated by the 1988 amendment to Article 121(1) has created the belief or proliferated the misconception by some quarters that:
- (a) the courts are powerless to address issues and do justice wherever there is a lacuna in the law;
  - (b) the courts are confined to merely interpreting and implementing acts of Parliament;
  - (c) the courts are no longer able to make and develop common law;
  - (d) the courts are deprived of their inherent jurisdiction, along with their inherent right to exercise judicial review over the decisions of public bodies and Executive functions.

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<sup>6</sup> Abdul Hamid Mohamad PCA (as he then was) in *PP v Kok Wah Kuan* [2007] 6 CLJ 341; *MBf Holdings Berhad & Anor. v. Houg Hai Kong & 2 Ors* [1993] 3 C.L.J. 373; *Petaling Tin Bhd. v. Lee Kian Chan & Ors* [1992] 3 C.L.J. (Rep) 270.

<sup>7</sup> ‘Federal Court has declared doctrine does not exist in constitution, says Govt’ *The Star Online*, 12 March 2011.

3.5 All of the above has brought about the perception that the Judiciary is subservient to the Executive, and this has led to a serious deterioration in public confidence in the Judiciary. It is also inevitable that investor confidence would also be affected if investors are of the view that the Judiciary is not able to do justice as best as it could.

3.6 However, judicial power is a power that Malaysia, as a sovereign state, must possess in order to “decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property”, and such power must therefore be vested in an arm of Government in order that it can be exercised. As the Federation of Malaysia is a constitutional democracy in which the doctrine of separation of powers is inherent, the overriding judicial power of the Federation must and continues to be vested in the Judiciary, for it has not been and cannot be vested in either the Executive or the Legislature. In recent judicial decisions, a number of eminent Judges have held that the 1988 amendment to Article 121(1) does not or cannot have the effect of divesting the courts of the judicial power of the Federation.<sup>8</sup>

#### **4. The proposed amendment – substantial restoration of Article 121(1) to its pre-1988 position**

4.1 It is against this background of prevailing confusion and misconception that the amendment to the existing Article 121(1) of the Federal Constitution is being proposed.

4.2 The proposed amendment is to:

- (a) remove the words “There shall be” at the beginning of the Clause and to insert in its place the words “The judicial power of the Federation shall be vested in”; and
- (b) delete the words “the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law” appearing at the end of the Clause.

4.3 The purpose of the amendment is to:

- (a) Reaffirm the principle of separation of powers and the sovereignty of the Judiciary;

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<sup>8</sup> Gopal Sri Ram JCA (as he then was) in *Kok Wah Kuan v PP* [2007] 4 CLJ 454; Richard Malanjum CJ (Sabah & Sarawak) in *PP v Kok Wah Kuan* [2007] 6 CLJ 341; Heliliah Mohd Yusof FCJ in *Dato’ Seri Anwar Ibrahim v PP* [2010] 7 CLJ 397.

- (b) Dispel any notion that the court does not possess judicial power and inherent jurisdiction;
  - (c) Avoid further confusion as to the inherent jurisdiction of the courts to make orders as the justice of the case requires; and
  - (d) Avoid conflicting judicial decisions.
- 4.4 The proposed amendment would also give effect to one of the recommendations of the **Royal Commission of Enquiry on the Video Clip Recording Images of a Person Purported to be an Advocate and Solicitor Speaking on the Telephone on Matters Regarding the Appointment of Judges** (popularly known as the 'Lingam Royal Commission'). In its report dated 9 May 2008, the Royal Commission recommended that Article 121(1) of the Federal Constitution be re-amended to its original form "so that the Judiciary is free once again to live up to the highest expectations of society for all time. There will be no room for concern on the judicial power issue."
- 4.5 The proposed amendment to Article 121(1) to its pre-1988 position however, does not make any changes to the remaining Clauses of Article 121.