SPEECH BY

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"JUDICIAL INDEPENDENCE AND PARLIAMENTARY SOVEREIGNTY – A COLOSSI OF ROADS?"

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INTRODUCTION

[1] I would like to begin by sincerely thanking the Commonwealth Lawyers Association (CLA) for inviting me to share Malaysia's perspective on the topic of "*Judicial Independence and Parliamentary Sovereignty – A Colossi of Roads?*" on the occasion of the 24th Commonwealth Law Conference. It is a distinct honour and privilege of mine to partake in this plenary panel alongside such esteemed members of the Judiciary and the legal profession.

[2] I would also like to take this opportunity to commend the CLA for its outstanding efforts in organising this biennial conference, which continues to serve as a vital platform for legal dialogue and collaboration across the

Commonwealth. It provides an important forum for us to reflect on the evolving challenges faced by the Judiciary and the legal profession, and on our shared responsibility in upholding the Rule of Law.

[3] The invitation letter that I received for this event included a pertinent descriptor for this session. I must say that the concerns raised within it fully resonate with my own concerns regarding the role of the Judiciary (on the one side) and the role of Parliament and its elected officials (on the other).

[4] In most jurisdictions, including many Commonwealth jurisdictions such as Malaysia, judges are appointed and not elected. This is for good reason in that justice is beyond the political process. An independent Judiciary exists for the primary purpose of doing justice unimpeded by any external or internal factors that do not concern the law and the facts. The Judiciary is motivated only by the need to uphold the Rule of Law.

[5] Elections on the other hand are of central importance in any democracy as each elected representative carries with him or her the will and mandate of the People.

[6] Judges and elected representative separately comprise two sides of the same coin which is that both sides exist to serve the People in different capacities. A nation cannot function without each of these, primarily the Legislature, from which the Executive branch also draws its mandate.

[7] But like a marriage where both a husband and wife comprise a single marital unit, there are bound to be tensions between the two separate entities that collectively comprise the single marital unit. And,

like how tensions between a husband and wife can cause tensions in the family, the inherent tension that sometimes exists between the Legislature and the Judiciary can lead to severe repercussions to the nation within which they exist.

[8] In this speech, I will not touch upon the importance of doctrine of separation of powers or the need for an independent Judiciary. These matters are taken as obvious as they are sacrosanct. Instead, I would like to highlight the Malaysian experience on the topic.

CONSTITUTIONAL SUPREMACY

[9] Unlike many written constitutions, the Federal Constitution of Malaysia did not emerge from the aftermath of a bloody revolution or upheaval against colonial rule. Rather, it was the product of careful negotiation and consensus among key stakeholders, including the Malay rulers, political leaders and representatives of the nation's multiracial communities.

[10] The essence of the Federal Constitution is enshrined in Article 4(1), which states that the Federal Constitution is the supreme law of the Federation of Malaysia and any law passed after *Merdeka* (Independence) Day which is inconsistent with the Federal Constitution shall, to the extent of the inconsistency, be void.

[11] The significance of Article 4(1) lies in its two distinct limbs. The first limb expressly declares that the Federal Constitution is supreme, establishing beyond doubt that Malaysia is a nation governed by constitutional supremacy rather than parliamentary sovereignty. This

principle was unequivocally affirmed in the seminal case of *Ah Thian*,[1] where Suffian LP said:

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

[12] That said, the mere existence of a written constitution does not, in itself, guarantee that constitutionalism prevails in practice. A constitution may contain fine words ensuring guarantees on fundamental rights or delineating separation of powers between the three branches of government, but these principles hold meaning only if they are consistently upheld and applied.

[13] Constitutional supremacy in Malaysia is enforced through the second limb of Article 4(1) which provides for any law that falls outside the purview of the Federal Constitution, to be declared void. With this provision, the Federal Constitution is not reduced to a mere statement of ideals, but its supremacy ensured particularly in the face of legislative enactments or executive actions that contravene its provisions. And it is the Judiciary that serves as a device through which the provisions of the Federal Constitution are upheld and its supremacy, maintained.

Judicial Power

[14] Having established that the Federal Constitution is supreme, I will consider the establishment of an entirely independent judiciary. The

[1] *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112.

history on this is too long and intricate to cover in a single session. So, please forgive me if I share with you a truncated version.

[15] Essentially, prior to 1988, Article 121(1) of the Federal Constitution specifically endorsed the establishment of two High Courts that were vested with the judicial power of the Federation. This naturally would extend to the appellate courts which have jurisdiction over the High Courts. All these Courts are known collectively as the Superior Courts. Thus, by design, the Superior Courts were vested with the judicial power of the Federation.

[16] Around the time before 1988, reports were rife that the then Government led by a certain Prime Minister was unhappy with the fact that the Judiciary was making decisions that invalidated decisions of that Government. A crisis unfolded when several key judicial decisions were perceived as unfavourable to the government of the day.[2] In other words, the Government felt pressure from a Judiciary that was doing its job.

[17] In the short version of the story, the then Prime Minister mobilised a constitutionally appointed tribunal to remove the then Lord President (equivalent to the Chief Justice presently), Tun Salleh Abas. His removal also saw the suspension and eventual removal of other revered Judges who had attempted to support him in his bid to challenge his removal and any Executive-led attempts to tamper with the judicial system.

[18] Parliament then passed a law in 1988 vide Act A704 amending Article 121(1) of the Federal Constitution particularly to remove any

[2] *JP Berthelsen v Director General of Immigration, Malaysia & Ors* [1987] 1 MLJ 134; *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12; *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; *Mohd Noor bin Othman & Ors v Mohd Yusof Jaafar & Ors* [1988] 2 MLJ 129.

'vesting' of judicial power in the Superior Courts. By that amendment, the jurisdiction of such Courts shall only be to the extent determined by federal law i.e. laws passed by Parliament.

[19] In a decision known as *Kok Wah Kuan*,[3] the majority of the Federal Court held that the 1988 amendment to Article 121(1) effectively watered down the judicial power of the Superior Courts.

[20] Thus, we in Malaysia too have seen our share of unconstitutional incursions into the Judiciary spurred by tense relationships between the Legislature and Executive on the one side and the Judiciary on the other.

[21] Since 1988, the Judiciary has been blighted by views that it has lost its independence, its vigour and perhaps even its legal or moral authority to decide cases and there have been a few scandals that followed the sordid events of 1988.

[22] Perhaps matters in Malaysia are made 'worse' because we have a supremacy clause in Article 4(1) that positively requires the Superior Courts to invalidate unconstitutional legislation and by its design mandates judicial review over any unlawful State action. What this means is that sometimes politicians individually and those who make up the Government collectively do not understand the implications of such judicial powers and view them as a threat when the judicial powers actually should be viewed as a fortress against tyranny, oppression and absolute power, which most certainly corrupts absolutely.

[3] *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1.

THE RECLAMATION OF JUDICIAL POWER

[23] Despite the harrowing events of the 1988 crisis, the Malaysian Judiciary has reclaimed its independence and has restored itself as the only independent defender of the Federal Constitution. In so doing, we have been mindful to uphold judicial power only to the extent of what the Federal Constitution allows and nothing more. We have advocated respect for Parliamentary authority to the extent that such authority is constitutionally valid and recognised.

[24] This began sometime in 2017 with the trilogy of cases known as *Semenyih Jaya*,[4] *Indira Gandhi*,[5] and *Alma Nudo*.[6] These cases departed from *Kok Wah Kuan*. They held that when reading the amended Article 121(1) in light of Article 4(1), judicial power remains vested in the Courts and such power cannot be whittled away by constitutional amendment.

[25] Legal reform however, takes time. Even after the trilogy of cases, the Judiciary had to slowly move away from outdated methods of analysis that are based on English principles of administrative law that are not entirely applicable in Malaysia. For instance, ouster clauses were once argued and decided on the basis of old English administrative law cases such as the *Wednesbury* principle,[7] and *Anisminic Ltd v The Foreign Compensation Commission & Another* [1969] 2 AC 147 on the types of errors that can be examined in spite of ouster clauses. These English

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[4] *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561 ('Semenyih Jaya').

[5] *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545 ('Indira Gandhi').

[6] *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4 MLJ 1 ('Alma Nudo').

[7] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

cases are of little assistance because in Malaysia Parliament is not sovereign or supreme.

[26] Recognising this, and in line with the trilogy of cases, the Federal Court, in two landmark rulings — *Nivesh Nair*[8] and *Dhinesh Tanaphll*[9] — shifted away from the old English approach by declaring outright that ouster clauses are legally invalid and unconstitutional. There was, in other words, no need to skirt around the issue of interpreting the ouster clause and whether the clause itself excluded review in any way.

[27] The Federal Court held that preventing judicial oversight of executive power through ouster clauses amounts to an incursion into judicial power and, therefore, violates among others Article 4(1). Accordingly, the ouster clauses in question in those cases were struck down as void. It is now firmly established that ouster clauses — no matter how broadly or strategically framed — can ever oust, diminish or exclude judicial power and its vehicle of judicial review.

[28] The power of the courts to invalidate ouster clauses does not, in any way, give rise to judicial supremacy or advocate judicial activism. The exercise of a judicial power to strike down legislation, even legislation that seeks to make amendments inimical to the Federal Constitution is a fundamental aspect of the Federal Constitution itself.

[29] To illustrate the point, I can do no better than quote from the former Lord President Tun Suffian who remarked:[10]

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[8] *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [Case No: 05(HC)-7-01/2020(W)], decided on 25 April 2022] ('Nivesh Nair').

[9] *Dhinesh Tanaphll v Lembaga Pencegahan Jenayah & Ors* [2022] 3 MLJ 356 ('Dhinesh Tanaphll').

[10] Tunku Sofiah Jewa, Salleh Buang and Yaacob Hussain Merican (eds), *Tun Mohamed Suffian's An Introduction to the Constitution of Malaysia* (3rd edn, Pacifica Publications, 2007) at page 18.

> "If Parliament is not supreme and its laws may be invalidated by the Courts, are the Courts then supreme? The answer is yes and no - the Courts are supreme in some ways but not in others. They are supreme in the sense that they have the right - indeed the duty - to invalidate Acts enacted outside Parliament's power, or Acts that are within Parliament's power but inconsistent with the Constitution. But they are not supreme as regards Acts that are within Parliament's power and are consistent with the Constitution. .".

[30] The Judiciary, like the other branches of government, remains subject to the Federal Constitution. The doctrine of separation of powers ensures that it does not encroach upon the functions and duties of its co-equal branches. This principle is reflected in the long-standing judicial recognition of doctrines such as non-justiciability and the presumption of constitutionality, which collectively define the limits of judicial intervention in legislative matters.

[31] A recent example of the Judiciary not transgressing its domain is the decision in *Lai Hen Beng v Public Prosecutor*.[11] There, the Federal Court was tasked with determining the constitutionality of section 498 of the Penal Code, which criminalised the enticement of a married woman away from her husband. The provision was found to be discriminatory solely on the grounds of gender, in contravention of Article 8(2) of the Federal Constitution, and was accordingly declared unconstitutional.

[32] In its ruling, while the Federal Court characterized section 498 of the Penal Code as an outdated and regressive provision, rooted in a bygone Victorian-era mindset that viewed women as the property of their husbands, it did not decide on the point of desirability of legislation. The court emphasised that its role was confined to determining whether the

[11] [2024] 1 MLJ 225.

law was constitutionally valid, rather than whether it was desirable from a policy perspective. Anachronism, by itself, does not render a law unconstitutional. The Judiciary could not engage in judicial legislation or reformation by substituting its own policy preferences for those of Parliament.

[33] And thus, what every person including politicians in Malaysia should understand is that these powers of the courts are a necessary feature of a nation that practices constitutional supremacy. The exercise of such powers not just protects and preserves democracy but guarantees its continued existence. I would therefore urge such parties not to be afraid of them and seek to curtail them, but to uphold them.

CONSTITUTIONAL SAFEGUARDS OF JUDICIAL INDEPENDENCE

[34] The ability of the Judiciary to function independently — free from legislative and executive pressures — is an indelible facet of constitutional democracy. And a fundamental safeguard of an independent Judiciary lies in the process governing judicial appointments. Article 122B of the Federal Constitution sets out the process of consultation among the Prime Minister, the top judges, the King and the Conference of Rulers before any judicial appointment is made. However, these constitutional provisions were deemed insufficient.

[35] As such, this constitutional framework was further bolstered by the Judicial Appointments Commission (JAC), which was established under the Judicial Appointments Commission Act 2009.

[36] The JAC serves as an institutional safeguard to enhance the transparency, integrity and merit-based selection of candidates for judicial office. While appointments ultimately remain a prerogative exercised by the Prime Minister within the constitutional structure, the JAC plays a pivotal role in identifying and assessing candidates through a structured and rigorous evaluation process including assessing integrity, competence, experience and industriousness; ensuring that only the most qualified individuals are selected for judicial office.

[37] Of late, there have been proposals to amend the Judicial Appointments Commission Act 2009 and the Federal Constitution to remove the role of the Prime Minister in the appointment of judges. Such changes in my view, would reinforce the impartiality of the selection process, ensuring that judicial appointments remain firmly grounded on merit and free from any perception of political influence.

[38] There are other express provisions in the Federal Constitution to safeguard judicial independence such as the security of tenure; financial security; power to punish for contempt any person who interferes with the administration of justice or undermines the dignity and independence of the courts; and restriction against discussion on the conduct of judges in Parliament (see Articles 125(1), 125(7), 126 and 127 respectively),

[39] Beyond its express provisions, the Federal Constitution also embodies implied protections for judicial independence. This principle was affirmed by the Federal Court in *Haris Fathillah*,[12] which considered whether criminal investigative bodies can investigate serving superior

[12] *Haris Fathillah bin Mohamed Ibrahim & Ors v Tan Sri Dato' Sri Hj Azam bin Baki & Ors* [2023] 2 MLJ 296 ('Haris Fathillah').

court judges. The Federal Court held that while superior court judges are not immune from criminal investigations, such inquiries must adhere to a higher standard to safeguard judicial independence. Given the sacrosanct role of judicial independence within the constitutional framework, the court found that the Federal Constitution itself implies additional safeguards in such investigations. Accordingly, it was held that criminal investigative bodies must adhere to a prescribed set of protocols when investigating a judge to prevent undue interference with the Judiciary.

[40] While constitutional safeguards provide a strong foundation for judicial independence, history such as the 1988 crisis and other scandals have shown that institutional protections are not always sufficient to shield the Judiciary from external pressures.

[41] The resulting friction between the Executive and the Judiciary culminated in an unprecedented event — the removal of the then Lord President, the late Tun Salleh Abbas, and the suspension of five Supreme Court judges, two of whom were later dismissed.

[42] The 1988 crisis dealt a severe blow to judicial independence and public confidence in the Judiciary. It cast a long shadow over the institution, fuelling concerns about political interference in judicial affairs.

[43] The process of restoring its credibility required more than institutional reforms; it demanded a steadfast commitment to rebuilding trust — both within the legal community and among the public at large.

[44] Through perseverance and collective efforts, the Malaysian Judiciary has reaffirmed its standing as a truly independent institution,

steadfast in its constitutionally-ordained oath to protect, preserve and defend the Federal Constitution. This progress is reflected in Malaysia's notable improvements across all major Rule of Law and judicial independence indices in recent years.[13]

[45] This effort is not the Judiciary's alone but from all stakeholders involved in the administration of justice. When the Judiciary enjoys support from key institutions such as the Bar Council, it strengthens judicial resolve and bolsters judicial independence. In this regard, the Commonwealth Lawyers Association (CLA) recently issued a statement dated 19 March 2025 calling on all parties to uphold judicial independence and to specifically respect the process of judicial appointments.[14] I express my heartfelt gratitude to the CLA for such show of support.

CONCLUSION

[46] In closing, it is essential to reaffirm that the Malaysian system is founded not on parliamentary sovereignty, but on constitutional supremacy. At all times, the Federal Constitution stands as the highest authority, establishing the framework within which all branches of government — the Legislature, the Executive and the Judiciary — must operate. No single branch is supreme in its own right; rather, each derives its legitimacy and powers from the Federal Constitution itself.

[47] Within this framework, the unequivocal role of the Judiciary is to uphold the supremacy of the Federal Constitution by ensuring that

[13] World Justice Project Rule of Law Index <https://worldjusticeproject.org/rule-of-law-index/> accessed 16 March 2025.

[14] https://www.commonwealthlawyers.com/statement/cla-statement-on-the-resolution-by-the-malaysian-bar-regarding-the-independence-of-the-judiciary/

parliamentary and executive power remain within their constitutional limits. This duty demands that judges adjudicate cases with absolute independence, impartiality and integrity, without yielding to fear or favour. They must stand resolute in the face of adversity, undeterred by criticism or external pressures. Judicial independence is not an end in itself but a paramount means to ensure that the Rule of Law prevails within the constitutional framework.

[48] At the same time, a constructive and balanced relationship between the Judiciary and the other branches of government is essential to preserving judicial independence while respecting the democratic mandate of Parliament. This relationship is not a contest for supremacy but a partnership in governance — one founded not just on mutual respect but on a clear understanding of our respective constitutional roles. While our functions remain distinct, both institutions ultimately serve the same fundamental purpose of safeguarding constitutional democracy and protecting the fundamental rights of citizens.

Thank you.