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THE IMPORTANCE OF CONSTITUTIONALISM IN PUBLIC INSTITUTIONS

Salutation

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Distinguished participants,

Ladies and gentlemen,

Assalamualaikum warahmatullahi wabarakatuh and a very good morning.

1. I would like to begin by thanking the organisers for giving me this privilege of delivering the special address at this prestigious and inaugural Conference. What I wish to express today are entirely my own views and not necessarily reflective of

the position taken by the entire Malaysian Judiciary. I do not wish it to be the case that what I say here will later be used against the Judiciary in arguments.

2. The theme of my special address is primarily to address the issue of the importance of 'Constitutionalism in Public Institutions'. In this sense, the flow of this address is as follows:

- (i) firstly, I shall cursorily highlight what constitutionalism entails;
- (ii) secondly, I will briefly examine how the doctrine of separation of powers is an integral aspect of constitutionalism especially in the context of public institutions; and
- (iii) finally, I will state my views as to why the doctrine of basic structure is so fundamentally necessary in

Malaysia, specifically within the context of the doctrine of separation of powers.

The Concept of Constitutionalism

3. One author by the name of Larry Backer, quoting from various sources, defined 'constitutionalism' to mean as follows:¹

“A constitution without legitimacy is no constitution at all. It is outside the law in the sense that it ought to be respected by the community against which it is applied... Legitimacy is a function of values, which in turn serve as the foundation of constitutionalism.

Constitutionalism thus might be understood as a systematization of thinking about constitutions grounded in the development since the mid 20th century of supranational normative systems against which constitutions are legitimated. Communities of nations can rely on that

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systematization to legitimate, in turn, their actions against non-legitimate governments under principles of international law, or against which the populace can legitimately rebel. Constitutions are distinguished from constitutionalism — the latter serving as a means of evaluating the form, substance, and legitimacy of the former.”

4. James Madison viewed the concept of constitutionalism as being associated with the doctrine of limited government stressing that constitutional government is meaningless on any other basis.²

5. Constitutionalism is not therefore a concept derived from any given Constitution. It is instead the very principle upon which a Constitution is based. The central purpose of constitutionalism is to limit sovereign or government powers, to check and restrain the persons who holds public office and exercise political

² James Madison, *The Federalist No 51*, Jacob E Cook ed (Connecticut: Wesleyan University Press, 1961).

authority. These values are then reflected and enshrined in the Constitution and are expected to live on throughout the ages.

6. To understand constitutionalism and its relevance to Malaysia, it is necessary to begin by emphasising the significant changes which took place when the Federation of Malaya gained its independence on 31 August 1957. On that date, by reason of the Federation of Malaya Agreement 1957, a very large proportion of the sovereign powers of the constituent states passed from these states to the federation, thereby enabling the federation to assume and possess sovereignty.³

7. Likewise, on 16 September 1963, the Borneo States namely Sabah and Sarawak federated with the existing states of the Federation of Malaya and thereafter came to be known as Malaysia. Again, the formation of Malaysia involved a similar transfer of the sovereign powers of these territories to the

³ The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj [1963] 29 MLJ 355.

Federation of Malaysia by virtue of the Malaysia Agreement 1963.

8. While the all-important concept of constitutionalism chiefly recognises and envisages the need for government with power, it is also a concept which is often associated with political theories that government can and should be legally limited in its powers, and that its authority or legitimacy is dependent on its observing these limitations. These theoretical limitations therefore gain legal force when they are stamped with the formal constitutional authority.

9. It is how these sovereign powers are distributed between the federation and the states, and separated between governmental organs, can we realise and appreciate the significance of this doctrine, in shaping the system of government that we adopt for a better future of this country. Whether it be the Federation of Malaya, or as it is now known: the Federation of Malaysia, central to the Federal Constitution

was the understanding that Government would primarily exist in three distinct branches i.e. the Executive, the Legislature and the Judiciary.

10. While constitutionalism connotes in essence limited government or a limitation on government, there are other important aspects of the doctrine which are also considered its essential characteristics or features. These are an independent judiciary and respect for individual rights. The latter in fact seeks to enhance the protection of the fundamental rights of citizens and recognises that citizens of a country should enjoy basic inalienable rights and liberties. Any violation of such inalienable rights and liberties entitles the citizens to seek redress in the court of law. The emphasis placed on fundamental rights is based on the concept that the governed is the source of all governmental authority.

11. But in modern day democratic government, how these important features of constitutionalism get translated into

practice is another pertinent question. The answer lies in the Federal Constitution itself. According to Hilaire Barnett, constitutionalism embraces limitation of power (limited government), separation of powers (checks and balances) and responsible and accountable government.⁴ The constitution should seek to decentralise power instead of concentrating it at one point, and should also seek to impose other restraints and limitations on such power. By way of emphasis, a constitution springs from a belief in limited government.⁵ Hence, governmental powers are both conferred and circumscribed by the Constitution.

12. It is in this context that the discussion on the doctrine of separation of powers becomes relevant.

The Doctrine of Separation of Powers and its Significance

⁴ Hilaire Barnett Constitutional And Administrative Law 5 C London, Cavendish Publishing Limited, 3rd edi, 2000 (1995).

⁵ K.C Wheare, Modern Constitutions (1971).

13. The Federal Constitution is a document drafted by humans for the comprehension of humans – usually decades and sometimes centuries past the Constitution’s creation. In this sense, the final say on its interpretation lies ultimately with the Judiciary. How then is the doctrine of separation of powers understood in this context?

14. Many natural law Philosophers have promoted the idea in their writings throughout the ages. John Locke, one of the most influential philosophers (1632-1704) in the Two Treatises of Government identified the basis of a legitimate government. According to Locke, government gains authority through the consent of the governed. The duty of the government is to protect the rights of the people which he believed to include life, liberty and property. If the government should fail to protect these rights, its citizens would have the right to overthrow the government.

15. Baron de Montesquieu in *The Spirit of the Laws* went further to put forward his belief that a complete separation of sovereign powers into distinct branches of government was necessary.⁶ In other words, there should be a firm demarcation of sovereign power between, on the one hand, the judicial power, and on the other hand, the legislative and the executive powers.⁷

16. The approach to separation of powers the Federal Constitution takes, is of course the one closer in substance to the one envisaged by Sir John Locke. We do not therefore have a complete separation, in the sense Montesquieu envisioned. In fact, most Commonwealth jurisdictions based on the Westminster model of Government recognise some degree of fluidity and fusion between the Executive and Legislature on the one side, and complete separation of the Judiciary on the other. That this is the case was aptly elucidated by Lord Bingham sitting

⁶ *The Spirit of the Laws – Constitutional Law in Malaysia & Singapore*, Second Edition, Kevin YL Tan, Thio Li-ann, page 18.

⁷ *The Judicial Power and Constitutional Government-Convergence and Divergence in the Australian and Malaysia Experience*, HP Lee, *Journal of Malaysia and Comparative Law* [2005] JMCL.

in the Privy Council in appeal from Jamaica. In *DPP of Jamaica v Mollison*, his Lordship observed as follows:⁸

“Whatever overlap there may be under constitutions on the Westminster model between the exercise of executive and legislative powers, the separation between the exercise of judicial powers on the one hand and legislative and executive powers on the other is total or effectively so. Such separation, based on the rule of law, was recently described by Lord Steyn as ‘a characteristic feature of democracies’: R (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837, 890-891, para 50.”

[Emphasis added]

17. Central to the formation of Malaysia and the crucial significance of the separation of powers doctrine is Article 4(1) of the Federal Constitution which expressly stipulates that all laws passed after Merdeka Day shall, if inconsistent with the

⁸ *DPP of Jamaica v Mollison* [2003] 2 AC 411, at page 422 (paragraph 13).

Federal Constitution be void – to the extent of their inconsistency. This is entirely different from the position in the United Kingdom where the paramount unwritten constitutional rule is that Parliament reigns supreme. Here, the Federal Constitution is supreme. It sets out the relevant branches of Government and protects fundamental liberties both enshrined and implied into the text of Part II of the Federal Constitution.

18. To put things into a practical perspective, I consider most apt the following words of Raja Azlan Shah, Ag. CJ (Malaya) (as His Royal Highness then was) who said as follows in the *Sri Lempah* case:

“Every legal power must have legal limits, otherwise there is dictatorship..., 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.”⁹

⁹ Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135.

19. But the position taken by his Lordship is one which continues to resonate not just in Malaysia but also in other countries like the United Kingdom. A most recent example of this is the unanimous 11-judge decision of the United Kingdom Supreme Court in relation to the lawfulness of the Prime Minister's advice to Her Majesty the Queen to prorogue the United Kingdom Parliament. It was argued before their Lords and Ladyships that the Courts ought not to interfere with the decision to prorogue nor with matters leading up to it, because doing so would offend the doctrine of separation of powers. The argument was seemingly premised on the idea that Courts ought not to involve themselves with matters which fall squarely within the purview of the other branches of Government. In strongly rejecting this argument, President Hale had this to say:¹⁰

“[I]f the issue before the court is justiciable, deciding it will not offend against the separation

¹⁰ R (on the application of Miller) v The Prime Minister & Other Appeals [2019] UKSC 41, at paragraph 34.

of powers. **As we have just indicated, the court will be performing its proper function under our constitution.** Indeed, by ensuring that the Government does not use the power of prorogation unlawfully with the effect of preventing Parliament from carrying out its proper functions, **the court will be giving effect to the separation of powers.**”

[Emphasis added]

20. The *Sri Lempah* and *Prorogation* cases are but examples of cases where the Judiciary properly exercised its supervisory powers of judicial review in upholding the basic tenets of constitutionalism in the context of public institutions.

The Basic Structure Doctrine

Ladies and gentlemen,

21. I will now touch upon the basic structure doctrine and its inextricable link to the doctrine of separation of powers specifically – and the concept of constitutionalism generally.

22. The basic structure doctrine mandates that the Courts may strike down laws – even laws amending the Federal Constitution itself (even with the requisite majority) if such amending law purports to destroy or alter a basic feature of the Federal Constitution.

23. The Federal Court in *Loh Kooi Choon v Government of Malaysia*¹¹ originally rejected the general existence of the basic structure doctrine. However, in spite of such rejection, the Court noted that, the Federal Constitution, as the Supreme law of the federation embodied three basic concepts, namely:

- a. the individual has certain fundamental rights upon which not even the government may encroach;
- b. the distribution of sovereign power between the states and the federation; and

¹¹ [1977] 2 MLJ 187.

- c. no single man or body shall exercise complete sovereign power, but it shall be distributed among the executive, legislative and judicial branches.

24. In subsequent cases such as in *Phang Chin Hock v Public Prosecutor*,¹² and *Mark Koding v Public Prosecutor*,¹³ the Federal Court again declined to make an express ruling on the applicability of the doctrine in Malaysia, instead holding that those cases before it were resolvable without placing reliance on it.

25. It was much later in *Sivarasa Rasiah v Jabatan Peguam Negara* that the Federal Court, made some reference to the doctrine and declared it applicable within our legal framework. The Federal Court noted that unless otherwise sanctioned by the Federal Constitution itself, any statute (including one amending the constitution) offending the basic structure may be struck

¹² [1980] 1 MLJ 70.

¹³ [1982] 2 MLJ 120 at page 123.

down on grounds of unconstitutionality should the said Act offend the basic structure.¹⁴ The Federal Court expressly noted that whether any given part of the Federal Constitution forms part of the basic structure is a matter which must be worked out on a case by case basis. It only went to the extent of saying, on the facts, that the rights guaranteed by Part II of the Federal Constitution on fundamental liberties form part of the basic structure of the Federal Constitution.

26. There are perhaps many other portions and provisions of the Federal Constitution which may be said to be a part of the basic structure. However, I do not wish to state on conjecture which parts I think do or do not affirmatively fit that label. Suffice to say, as cautioned by the Court in *Sivarasa*, the matter remains to be tested on a case by case basis. To this extent, we can only see how case law will develop.

¹⁴ [2010] 3 CLJ 507.

27. Reverting to the topic, two recent pronouncements by the Federal Court have affirmatively held that the doctrine of separation of powers is indeed a part and parcel of the basic structure of the Federal Constitution. A corollary to the separation of powers principle is the power of the Courts in judicial review. No Act of Parliament may deprive the Courts of that inherent power. This was what the Federal Court expressly pronounced first in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat*,¹⁵ and next in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals*.¹⁶

28. Both cases effectively dealt with the point that the 1988 constitutional amendment to Article 121 of the Federal Constitution could not remove the judicial power of the Courts – something which is inherent in them. In *Semenyih Jaya*, the argument was that to bind a judge to the decision of two lay

¹⁵ [2017] 3 MLJ 561.

¹⁶ [2018] 1 MLJ 545.

assessors on the factual consideration of quantum of compensation in compulsory land acquisition cases, was an affront to both the rule of law and the doctrine of separation of powers.

29. The point was there made that the relevant law (i.e. the Federal law made by Parliament) effectively bound the judge to consider and invariably adopt the factual opinions of the lay assessors as his own. This view was of course plainly rejected by the Federal Court. It was held, that no law could purport to curtail the judiciary to determine the factum of compensation. Any law which purported to do so was in breach of the Federal Constitution. And, taking it a step further, the Court noted that the constitutional amendment permitting Parliament to do so was in itself inconsistent with the basic structure of the Federal Constitution.

30. The second case of *Indira Gandhi* also cemented the idea that no law may curtail the inherent power of the Courts to

engage in judicial review. The issue there was whether the conversion of the children to Islam without the benefit of their mother's consent was amenable to judicial review. It was argued that the decision of conversion by the relevant Syariah bodies was not amenable to judicial review. Zainun Ali FCJ, in rejecting the argument expressly noted that judicial review, is a concept inherent in constitutional order and that exercising it is not inimical to democracy. Rather, such powers serve to uphold constitutional supremacy.¹⁷

31. The notions expressed in *Indira Gandhi* that the entrenchment of the principle of separation of powers within the basic structure gives true meaning to the core preserve of constitutionalism. The net effect of true separation of powers ensures that there is in existence a system of check and balance. The Judiciary plays a vital role in supervising, so to speak, public institutions and to ensure that each organ does not trespass in any way the limits placed on their powers by the Constitution.

¹⁷ *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545, at paragraph 40.

32. In this vein, the key idea behind the doctrine of separation of powers is the aim to prevent absolutism or the concentration of powers in one arm. Now, because the Executive and the Legislative branches are to some extent fused, and that they determine governmental policy backed by electoral mandate, it becomes the function of the Judiciary to ensure that such powers are exercised in full conformity with the law. This is why an attempt to undermine the strict separation of powers is viewed as an affront to democracy specifically, and to constitutionalism generally.

Ladies and gentlemen,

Conclusion

33. As earlier emphasised, our Parliament, unlike the Parliament of the United Kingdom is not supreme. In fact, no particular branch in this country is superior to the other. Only the

Federal Constitution reigns supreme. When it comes to the role of constitutionalism in the context of public institutions, the Judiciary performs a constitutional function in guarding the constitution, engaging in statutory construction and judicial review.

34. In gist, its role is to ensure that the Constitution is complied with, be it in form or spirit. This constitutional position was authoritatively laid down by the Supreme Court in *Lim Kit Siang v Dato' Seri Dr Mahathir Mohamed*.¹⁸

35. To this end, the independence of the Judiciary is paramount. Joseph Raz on “The Rule of Law and Its Virtue” emphasized that the independence of the judiciary must be guaranteed, the principles of natural justice must be observed if the law is to be able to guide the nation and the courts should have the power to examine the actions of the other branches of

¹⁸ [1987] 1 MLJ 383.

government in order to determine whether they conform with the law.¹⁹

36. The conflict between governmental power and individual liberty is an age-old but foreseeable problem all democratic nations face. Good governance standards dictate that the exercise of this power must be controlled in such a way that it does not interfere with individual rights with impunity.

37. In this regard the court must step in with the view of protecting the legitimate interests of the subjects of the State. In this sense, the doctrine of basic structure and the doctrine of separation of powers housed within it, is a mere restatement of the principle of constitutionalism.

38. That, in my humble view, is the long and short of the importance of constitutionalism in public institutions. The end

¹⁹ Joseph Raz, *The Rule of Law and Its Virtue* (1977) 93 LQR 195, 196.

result is the creation of a responsible government acting within the purview of the Rule of law.

39. Thank you very much for your attention.