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Semenyih Jaya: Restoration of Judicial Power in Land Acquisition Cases

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“The Constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts: ... the third is that no single man or body shall exercise complete sovereign power, but that it shall be distributed among the executive, legislative and judicial branches of government, compendiously expressed in modern terms that we are a government of laws, not of men.”¹

The rule of law is essential in upholding a democratic system of government.² However, the rule of law must be supported by a judicial system which is independent from any extraneous interference, thus emphasising the significance of the doctrine of separation of powers.³ The importance of the fundamental doctrine of separation of powers has time and again been reaffirmed by the courts.⁴

1 *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 (FC) at 188l (left), per Raja Azlan Shah FJ (as his Lordship then was)

2 Syarahan Perdana Integriti 2012 “Rule of Law and Judicial System”, a talk delivered by former Chief Justice Tun Arifin Zakaria, at [54] <http://www.kehakiman.gov.my/sites/default/files/document3/Teks%20Ucapan/CJ%20-%20Integrity%20Speech%20%28NEW%29.pdf>

3 *Ibid*

4 *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135 (FC); *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor & another appeal* [1998] 3 CLJ 85 (CA); *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265 (FC); *PP v Kok Wah Kuan* [2007] 6 CLJ 341 (FC) (“*Kok Wah Kuan*”) (dissenting judgment of Richard Malanjum CJ (Sabah & Sarawak)); *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah* [2007] 5 MLJ 441 (HC); *Gobind Singh Deo v Yang Dipertua, Dewan Rakyat & Ors* [2010] 9 CLJ 449 (HC) and *Re Teoh Heng Han; ex p OCBC Bank (M) Bhd* [2010] 9 CLJ 328 (HC)

Article 121(1) of the Federal Constitution, as originally enacted, states that:

“The judicial power of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law”.

The constitutional crisis in 1988 (often referred to as the 1988 judicial crisis) resulted in an amendment to Article 121(1) of the Constitution,⁵ which many regard as having the effect of subordinating the Judiciary to the Executive, thereby making a mockery of the doctrine of separation of powers and judicial independence in Malaysia.

The words “judicial power” were removed and the amended Article 121(1) of the Constitution came to read as follows:

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

These words were given a narrow construction by the majority decision in *Kok Wah Kuan*:⁶

“[11] After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that ‘judicial power of the Federation’ as the term was understood prior to the amendment vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers ‘judicial powers’, we are perfectly entitled to. But, to what extent such ‘judicial powers’ are vested in the two High Courts depend on what federal law provides,

not on the interpretation the term ‘judicial power’ as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?”⁷

In a dissenting judgment, Richard Malanjum CJ (Sabah & Sarawak) said:

“[37] At any rate I am unable to accede to the proposition that with the amendment of Art. 121(1) of the Federal Constitution (the amendment) the courts in Malaysia can only function in accordance with what have been assigned to them by federal laws...

“[38]... I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law.

“[39] It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal Legislature. In the performance of their function they perform a myriad of roles and interpret and enforce a myriad of laws. Article 121(1) is not, and cannot be, the whole and sole repository of the judicial role in this country...”⁸

These two views on the effect of the amended Article 121(1) of the Constitution came to be considered in a recent Federal Court decision in *Semenyih Jaya*⁹ in the context of section 40D of the Land Acquisition Act 1960 (“the 1960 Act”).

5 Constitution (Amendment) Act 1988 [Act A704], which came into effect on 10 June 1988; Article 121 (Judicial Power of the Federation) and Article 145 (Attorney General) of the Federal Constitution

6 *Supra* n 4

7 *Ibid*, per Abdul Hamid Mohamad PCA delivering the majority judgment at 352, para 11; Ahmad Fairuz CJ, Alauddin Mohd Sheriff CJ (Malaya) and Zaki Tun Azmi FCJ concurred

8 *Kok Wah Kuan*, *supra* n 4 per Richard Malanjum, CJ (Sabah & Sarawak), at 359-360

9 *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526 (FC) (“*Semenyih Jaya*”)

Section 40D of the 1960 Act

The 1960 Act, as originally enacted, provided for a High Court judge, hearing a land reference,¹⁰ to sit with two assessors.¹¹ The judge is bound to record the opinion of each assessor but in cases where the opinion of the assessors differed, the opinion of the judge shall prevail. Effectively, it was the judge who made the determination of adequate compensation.

By an amendment in 1984 to the 1960 Act,¹² the role of assessors in land reference cases was completely removed, and for about 15 years, the High Court judge alone decided the amount of compensation.

In 1998,¹³ a new section 40D was introduced which restored the role of assessors in land reference cases. The section empowers the assessors to decide on the amount of compensation to be awarded arising out of the acquisition and their decision is final and non-appealable.¹⁴ Effectively, the ordinary role of assessors has been broadened by section 40D from being advisors to that of fact finders and adjudicators.¹⁵

Section 40D imposes on the judge a duty to adopt the opinion of the two assessors on the amount of compensation. If the assessors differ in their opinion, the judge is bound to “*elect to concur with the decision of one of the assessors*”. In other words, even in a disagreement between the assessors, the judge has no power to form his own view on the valuation. Therefore, section 40D has effectively usurped the function of a High Court judge and deprived him of his judicial powers on the amount of compensation.

Since then, judges have felt bound and compelled to concur with the opinion of either one or the other of the two assessors.¹⁶ Where the assessors concur on the amount of compensation, the judge has no role but to comply with the computed market value by the assessors.¹⁷

For some 19 years, the courts continued to accept that the judge had no power to decide on the quantum of compensation to be awarded arising out of a compulsory acquisition.

Semenyih Jaya

In April 2017, the Federal Court, in a landmark decision, declared section 40D of the 1960 Act to be unconstitutional. *Semenyih Jaya* involved a revisit of Article 121(1). The Federal Court departed from its earlier majority view in *Kok Wah Kuan* on the construction of Article 121(1) and instead adopted the dissenting view.

The basis of such departure was that the doctrine of Parliamentary supremacy does not apply in Malaysia, where it is the Federal Constitution — and not Parliament — that is supreme:

“The doctrine of Parliamentary supremacy does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of state legislation in Malaysia is limited by the Constitution, and they cannot make any new law they please.”¹⁸

Parliament can only, under certain circumstances, amend the Constitution but certainly cannot by normal legislation limit or remove judicial power. The Constitution affirms the

¹⁰ A land reference is a proceeding where the High Court hears an objection by the landowner seeking higher compensation

¹¹ Section 42 of the 1960 Act (Act No 34 of 1960):

“42. (1) The opinion of each assessor shall be given orally, and shall be recorded in writing by the Judge. (2) In case of a difference of opinion between the Judge and the assessors or either of them upon a question of law or practice, or of usage having the force of law, the opinion of the Judge shall prevail.”

¹² Section 15 of the Land Acquisition (Amendment) Act 1984 [Act A575] which came into effect on 20 January 1984: “15. The principal Act is amended by deleting sections 40, 41, 42 and 46.”

¹³ Land Acquisition (Amendment) Act 1997 [Act A999], which came into effect on 1 March 1998, s 23:

“40D. (1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors. (2) Where the assessors have each arrived at a decision which differs from each other than the judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor. (3) Any decision made under this section is final and there shall be no further appeal to a higher Court on the matter.”

¹⁴ 1960 Act, s 40D(3)

¹⁵ *Semenyih Jaya*, *supra* n 9 at 552, para 49

¹⁶ *Jitender Singh a/l Pagar Singh v PTD Wilayah Persekutuan and another appeal* [2012] 1 MLJ 56 (CA), per Zaleha Zahari JCA at 66, para 26

¹⁷ *Che Som Che Mat v Pentadbir Tanah Daerah Kerian* [2014] 1 CLJ 575 (HC), per Lee Swee Seng J at 589, para 18

¹⁸ *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, per Suffian LP, as cited by Zainun Ali FCJ in *Semenyih Jaya*, *supra* n 9, at 558, para 78

polemic that judicial power is exercisable only by judges sitting in a court of law; and that the judicial process is administered by them and no other.¹⁹ A broad and liberal interpretation of Article 121(1) of the Constitution means the judicial power of the court resides in the judiciary and no other.²⁰

On that premise, the Federal Court in *Semenyih Jaya* went on to hold that:

- By virtue of Article 121(1) of the Constitution, the power to award compensation in land reference proceedings is a judicial power that is vested in the High Court judge sitting in the Land Reference Court.²¹
- Article 121 of the Constitution empowers the High Court with judicial power and such power is meant to be exercised by the members of the judiciary only.²²
- Section 40D(1) and (2) of the 1960 Act which gives such judicial power to assessors who are not members of the judiciary is *ultra vires* Article 121 of the Federal Constitution.²³
- Section 40D(1) and (2) of the 1960 Act ignores the role of judges as defenders of the Constitution and renders the constitutional guarantee of adequate compensation illusory since judges “abdicate” their constitutional role, for the guarantee of adequate compensation is now in the hands of two lay assessors.²⁴

Semenyih Jaya makes it clear that the assessors are merely the advisors whose role is to give an opinion on the valuation to assist the judge in making a determination on adequate compensation:

- The assessors are expected to listen to the proceedings and evaluate the evidence. They may also be required to answer any questions of fact within their competence, consonant with their role as advisors under section 40(2) of the 1960 Act.²⁵
- At the end of the proceedings, the assessors are required to give their opinion in writing²⁶ as to the appropriate amount of compensation to be awarded in a particular case and the role of assessors ends here.²⁷

The judge alone will then deliberate on the issue of quantum of compensation. The judge may give weight to the opinion of the assessors but such opinion is not binding on the judge.²⁸

The Federal Court decision in *Semenyih Jaya* reaffirms the doctrine of separation of power and judicial independency. In so far as restoring the judicial power of the Federation in the courts in relation to section 40D of the 1960 Act is concerned, its effect can be better appreciated as operating prospectively and not retrospectively.²⁹ **LH-AG**

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19 *Semenyih Jaya*, *supra* n 9, at 564, para 114

20 *Ibid*, at 559, para 86

21 *Semenyih Jaya*, *supra* n 9, at 561, para 98

22 *Ibid*, at 562, paras 100-101

23 *Id*, at 563, para 105

24 *Id*, at 564, para 111

25 *Id*, at 565-566, paras 116 to 125

26 1960 Act, s 40C

27 *Semenyih Jaya*, *supra* n 25

28 *Ibid*

29 *Semenyih Jaya*, at 566-567, paras 126 to 134