IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO: B-05(LLB)-449-09/2018

BETWEEN

PUBLIC PROSECUTOR … APPELLANT

AND

ALUMA MARK CHINONSO (NEGERIAN) … RESPONDENT
[PASSPORT NO. A-01577005]

HEARD TOGETHER

IN THE COURT OF APPEAL OF MALAYSIA

(APPELLATE JURISDICTION)

CRIMINAL APPEAL NO: B-05(M)-453-09/2018

BETWEEN

ANYIM DANIEL IKECHUKWU … APPELLANT

AND

PUBLIC PROSECUTOR … RESPONDENT

[IN THE HIGH COURT OF MALAYA AT SHAH ALAM
IN THE STATE OF SELANGOR DARUL EHSAN
IN THE MATTER OF CRIMINAL TRIAL NO: 45A-31-04/2016

BETWEEN

PUBLIC PROSECUTOR

AND

1. **ANYIM DANIEL IKECHUKWU**
2. **ALUMA MARK CHINONSO]**

CORAM:

Hamid Sultan Bin Abu Backer, JCA
Rhodzariah binti Bujang, JCA
Hadhariah binti Syed Ismail, JCA

Hamid Sultan Bin Abu Backer, JCA (Delivering Supporting Judgment of the Court)

GROUNDS OF JUDGMENT

[1] The 2nd appellant (1st accused/Anyim Daniel Ikechukwu) appeals against the conviction and sentence of death in relation to a charge against him under section 39B of the Dangerous Drugs Act 1950 (DDA 1950). The Public Prosecutor also appeals against the decision of the High Court which acquitted and discharged the 2nd accused (Aluma Mark Chinonso) jointly charged with the 2nd appellant. The learned trial judge had relied heavily on the Privy Council's decision of *Ong Ah Chuan v. Public Prosecutor* [1981] 1 MLJ 64, and many other cases following from that to convict the 1st. accused.

Preliminaries

[2] The learned counsel for the 2nd appellant's submission though impressive did not fully address the developing jurisprudence related to constitutionalism in Malaysia through the following cases, namely:- (i) *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat and another case* [2017] 3 MLJ 561; (ii) *Indira Gandhi a/p Mutho v. Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 546; *Alma Nudo Attenza v. Public Prosecutor and another appeal* [2019] 4 MLJ 1 (referred to as the 'Three Cases'), and the impact on the decision of cases like *Ong Ah Chuan*, etc. which is anchored upon the presumption in the nature of legal fiction in breach of Articles 5 and 8 of the Federal Constitution. It is extremely important for lawyers and judges to appreciate the concept of judicial power and basic structure jurisprudence advocated in the 'Three Cases', which in ordinary terms overrules a number of the apex court's decisions. It is also important to understand the constitutional oath jurisprudence to appreciate the wide parameters of judicial power of the court. Judicial power is vested on the judge upon taking oath of office and its scope is as per oath of office itself. For example, in England the judges are subservient to legislation and as a result their judicial power is limited. In Malaysia, on the other hand the judges are subservient to the Constitution and as a result of their oath of office the judicial power is borderless save that it must be exercised with deference to 'separation of powers' doctrine. It must be emphasized that positive exercise of judicial power according to the rule of law will enhance judicial integrity; and negative exercise of judicial power will destroy the

public confidence in the judiciary. I will elaborate this in great detail in this judgment for the benefit of the accused. It is also important to appreciate that parliament by not placing the statutory presumption under section 114 of the Evidence Act 1950 (EA 1950), they have raised higher burden of proof to rebut possession or trafficking on the balance of probabilities as opposed to a lesser evidential burden under sections 103 and 106 (EA 1950), thereby demonstrating that the said presumption is harsh and oppressive against the accused.

[3] It must be noted that under the current jurisprudence, after the 'Three Cases' presumption which gives a direction to the court to decide and/or is not in favour of the accused will impinge on judicial power of the court and Articles 5 and 8 of the Federal Constitution. Similarly, orders of detention, remand, sentencing inclusive of death penalty which does not give a discretion to the court will impinge on judicial power as well as the provisions related to fundamental liberties in part II of the Federal Constitution. It will also impinge on the separation of powers concept where the executive, legislative and judiciary (Three Pillars) have taken an oath to preserve, protect and defend the Constitution. This will not be the case where the judges have taken oath to be subservient to parliament as opposed to the Constitution.

Constitutional Soul

[4] To put it mildly, 'oath of office' gives a constitutional soul to the judge to conduct judicial affairs in a judicious manner, and that soul for a judge only leaves upon resignation, retirement or upon death in office. The oath of office also vests on the judge the power called judicial power. The parameters of the judicial power is also spelt out in the oath itself. In England, it is subservient to parliament. In Malaysia, it is subservient to the Constitution. I am not sure at this point of time the 'form' of oath of office of members of the Privy Council and whether they were aware of the oath of office of the 'Three Pillars' in a constitutional framework such as Malaysia, Singapore and/or India, etc. This is a pressing issue for constitutional experts and jurists to look into before justifying the correctness of Privy Council opinions related to a country which enjoys Constitutional Supremacy as opposed to Parliamentary Supremacy! (See 'Judiciary as the Principal Guardians of The Rule of Law' – International Law Conference of The Malaysian Bar, 2018 – google; [2018] 1 LNS (A) 1xxxiv).

Overruled

[5] The three decisions of the apex court, namely – *Semenyih Jaya, Indira Gandhi* and *Alma*, outrightly confirms that the rule of law in interpreting the Constitution is based on constitutional supremacy. The net effect of the decision is that it overrule's a number of judgments of the apex court in the past, related to decisions on Articles 4, 10, 149, 150, 151 and 159, etc. which

were interpreted as per rule of law related to parliamentary supremacy, thereby violating the protection related to fundamental liberties, in particular Articles 5 and 8.

Pardon and Apology

[6] Privy Council decisions arising from Malaysia may be jurisprudentially flawed if the members of the Privy Council were not appraised of the 'oath of office' of the 'Three Pillars of the Constitution. If so, many of the decisions of the Privy Council which led to the loss of life, may arguably have to be given a posthumous pardon or at least an apology from the sovereign head of the commonwealth or its office. [See *R v. Secretary of State For Home Department – ex parte Bently* [1994] QB 349; *Rookes v. Barnard* [1964] AC 1129]. For example, judges have legal immunity in the discharge of judicial duties as set out in section 14 of the Courts of Judicature Act 1964, which states:-

> "14. (1) No Judge or other person acting judicially shall be liable to be sued in any civil court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of."

However, that does not mean that the judges or judiciary as a whole cannot tender apology in cases where miscarriage of justice has occurred. For example, in *Alma Nudo's* case the apex court have struck down double

presumption. However, there are many who have been hanged by the misconceived exercise of judicial power. The English Criminal Appeal Act 1995, deals with issues related to Pardon and Criminal Justice Act 1988 compensation for miscarriage of justice. Compensation related to miscarriage of justice is possible; and whether under *Rookes v. Barnard* principle it is permissible is a matter which needs some consideration in the future. In Malaysia, the court can recommend to exercise prerogative of mercy where miscarriage of justice has occurred as a result of court's decision. [See Article 42 of the Federal Constitution]. Quite recently, the Government itself had extended apology for tribunalisation of Tun Salleh Abas and 5 other Supreme Court judges by compensating them, on Government's own motion. It could have been equally done by the exercise of judicial power if the miscarriage of justice was in breach of the Federal Constitution.

Legal Fiction, Presumption and Intrusion on Judicial Power

[7] In essence, whether the legal fiction: (a) in the name of presumption after the decision of the 'Three Cases' is good in law to pass the sentence of death penalty; or (b) should the charge of trafficking be reduced to possession only; or (c) whether the court should strike out provision related to presumption which reverses the burden of proof on the accused; or (d) whether the court should in all provisions related to presumption which impinges on the concept of 'innocence'; in favour of the accused must be read into the Act, the words: "The court may presume…" similar to section

114 of EA 1950 to uphold the Constitution as well as separation of powers doctrine as opposed to striking down the provision and similarly to matters related to detention, remand, sentencing as well as capital punishment; are matters which I will deal further in this judgment.

[8] To put it mildly, when it comes to presumption, detention, remand, sentencing, inclusive of death penalty, parliament could not have intended to remove or impinge on the judicial power of the court inconsistent with the oath of office of the Three Pillars inclusive of separation of power doctrine in a country where constitution is supreme.

[9] The distinction between legal fiction and legal presumption can be explained as follows:

(a) Legal fiction in the name of presumption to help the prosecution is unconstitutional under our constitutional framework. Such legal fiction may be permissible in a parliamentary supremacy regime such as in England. However, the English courts have been extremely careful in dealing with legal fiction and for that purpose has placed a number of caveats to help the accused to have a trial according to rule of law as opposed to rule by law. This was explained in great detail by the House of Lords in Warren v. Metropolitan Police Commissioner [1969] 2 AC 256.

(b) A legal presumption on facts or law is one which is meant to assist the court to decide the issue fairly and justly at the sole discretion of the court

without intrusion into the judicial power of the court. Such presumption when it is vested in the court as opposed to in favour of the prosecution, it is jurisprudentially valid law under the constitution as explained in Alma Nudo's case and many decisions in India.

[10] Impingement on judicial power also takes place when judges are told what to do to convict and sentence a person in mandatory terms without providing the discretion to the court. When judicial power will be impinged was explained in the harshest manner by His Lordship Abdoolcader FCJ in *PP v. Dato' Yap Peng* [1987] 2 MLJ 311 (Dato' Yap's case), as follows:

> "In my view the provisions of section 418A are both a legislative and executive intromission into the judicial power of the Federation. It is a legislative incursion to facilitate executive intrusion, and the Deputy in answer to a question I put to him had perforce to agree that in the context of subsection (3) of section 418A judicial power would amount to 'doing what you are told to do'." [Emphasis added].

[11] His Lordship usage of the word 'intromission' to describe in a forceful and unprecedented manner the act of intrusion of executive as well as parliament's attempt to invade judicial power may have been necessary to strike a point of great public importance to preserve, protect and defend the constitution as well as to ensure fundamental liberties provisions are not diluted. In principle, it will also apply to the judiciary when by judgments or orders of courts, the constitution and/or fundamental rights are diluted;

or by abusive exercise of contempt powers the court on the frolic of its own silence the media, critics as well as lawyers.

[12] Silencing media, critics and lawyers have long been made redundant in England. It is important for all to take cognizance that the media as well as Malaysian Bar with the NGOs etc. are the invisible pillars of the constitution to protect the decay and abuse of the Constitution as well as fundamental rights. In essence, democracy will collapse if freedom of speech and expression under the constitution is grossly violated by the three pillars and the judiciary fails to stop executive and legislative intrusion in the judicial powers of the court as well as fundamental rights of the public inclusive of the Constitution.

[13] To put it mildly, it is indeed true that the judiciary is the supreme policeman of the constitution and that policing is done by judicial review, either by application or the courts own motion. After the 'Three Cases', it is now jurisprudentially fortifying to observe that the dilution of fundamental rights of the public and the constitutional framework was not the consequence of the intrusion of executive and legislature alone; it is now shown to be the result of the negative employment of judicial power. I will explain this further in this judgment.

Instant Case

[14] In the instant case, in addition to the issue related to Constitution as well as the law, there were some facts which were not adequately argued before us. The facts are as follows:-

(i) The learned trial judge had relied on section 2 of the Dangerous Drug Act 1952, sections 37(d) and also 37(da) in his deliberations which says:

> "Section 2:
> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, Dangerous Drugs 11 transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act."

Trafficking as defined in section 2 also have elements related to presumption. Courts have been careful not to take the definition on face value to support the prosecution case on trafficking. In *Mohamed Yazri bin Minhat v. Public Prosecutor* [2003] 2 CLJ 65, Gopal Sri Ram JCA observed:-

> "To summarize, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is a

trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into."

In the instant case, the submissions were not clear on the point whether he had knowledge of the drug and whether he was moving the drugs for a transaction with knowledge.

Section 37(d):

(d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug;

This provision and also section 37(da) removes the judicial power of the court when contrasted with presumptions in EA 1950.

Section 37(da) - Presumption:

In all proceedings under this Act or any regulation made thereunder -

(da) any person who is found in possession of—

(xvi) 50 grammes or more in weight of Methamphetamine;

…otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug."

In this case, the drugs came from China via a courier company and the police having got the information negotiated with the courier company to follow with their delivery personnel to deliver the drug to a person named Steve Rico to whom the parcel was addressed to. The police got the information that drugs would be sent by courier to International Logistic Yonex in Puchong for Steve Rico. The police then planned a covert operation by posing as the lorry attendant to deliver the said consignment. The address on the delivery order could not be located, thus, the police called Steve Rico's number and Steve Rico asked the police to wait by the roadside. Both the accused came. The 1st accused signed the delivery order. All the boxes were placed in the Honda City car driven by the 1st accused and the Honda Accord car driven by 2nd accused. When both the accused were about to leave, the police raided both cars. Both the accused claimed they had no knowledge that there were drugs in the boxes and that they were helping a friend named Steve Rico. The High Court convicted the 1st accused on the inference he tried to escape during the raid while 2nd accused was acquitted on the ground he did not attempt to escape.

(ii) The drugs indeed was not delivered to Steve Rico – the person with mobile No. 010-2168251. It was delivered to the two accused who were subsequently charged and 1st accused (Aluma Mark Chinoso) was released after defence was called.

(iii) Steve Rico was never called as a witness. After the arrest and one week later, there was evidence to suggest that he called to find out about the drugs.

(iv) The 2nd appellant's argument on section 114(g) as well as Alcontara Notice in the form of delivery order which had Steve Rico's name and phone number need to be given proper consideration as parties submission on these points were not adequate in my view, taking into consideration the petition of appeal, to make a positive decision on these issues in favour of the 2nd appellant.

Grounds

[15] On the facts, the petition of appeal and the submissions, I take the view that it will not be proper to disagree with my coram members to confirm conviction and sentence, though my decision would have been otherwise, if the appellants have adequately addressed my concern. My reasons *inter alia* are as follows:-

(a) Under the Federal Constitution read with Courts of Judicature Act 1964, the Court of Appeal is not the final decision maker in relation to a capital offence. In essence, it holds a sort of an advisory function only. Being an advisory in nature, it would not be prudent to write a dissenting judgment in a case where issues of law have not been

properly ventilated. It will be more appropriate to give considered views which may help the 2nd appellant to succeed in the final appeal wholly and/or partly.

(b) In view of the recent Federal Court decisions stated above, it becomes a constitutional duty of the judge as per oath to set out the law which will assist the 2nd accused as per the rule of law and as envisaged by Articles 5 and 8 of the Federal Constitution and also for the courts below to take cognizance of the scope and the development of law in drug cases as well as other cases.

Evolutionary Jurisprudence

[16] It is without doubt that the 'Three Cases' are the benchmark in the evolutionary jurisprudence of the constitution in Malaysia, which attempts to ensure a caveat on executive as well as parliamentary intrusion into fundamental liberties as well as the application of rule of law based on constitutional supremacy framework though it has taken 60 years or more for the apex court to take strong cognizance of the jurisprudence notwithstanding it has been consistently argued by counsel as well as judges; inclusive of several articles and books. Indeed there is no shortage of efforts placed by our jurists to get the jurisprudence correct in respect of the constitutional supremacy jurisprudence.

Constitutionalism

[17] It is important to appreciate whether it is in England, Malaysia or India that constitutionalism is an evolutionary jurisprudence and is not a judicial law making process in competition to parliament. In England, the conservative jurisprudence was that parliament is supreme and judges must give effect to the law, however, harsh or oppressive the legislation may be. The English judges also shunned away on matters related to non-justiciable issues. Things have changed in the last few decades and the courts have now shown much flexibility in entertaining judicial review on matters which were once thought to be non-justiciable. In addition, in recognition of the fundamental rights, as stated in the Universal Declaration of Human Rights 1948 (UDHR) which is largely reflected in the European Convention on Human Rights (ECHR) as well as their recent Human Rights Act 1998, the courts have given more recognition to fundamental rights issues even when interpreting the statutes. Thus, the English judges' oath of office to be subservient to legislation has now taken a different dimension to also safe guard the fundamental rights of the public and also issues which may infringe on public right and legitimate expectation by venturing into judicial review of issues related to prerogative rights crown privilege, etc. [See *Duport Steel Ltd and others v. Sirs and Others* [1980] 1 All ER 529 (HL); *Thoburn v. Sunderland City Council* [2002] EWHC 195; *M v. Home Office* [1994] 1 AC 377; *R v. Secretary of State for the Home Department, ex parte Anderson* [2003] 1 AC 837].

Lady Hale – Oath of Office

[18] In the recent decision of proroguing parliament in the *Brexit* issue where Her Ladyship Hale, the President of the Supreme Court wrote the leading judgment, there were some comments on the judgment by some learned jurists taking the position that the courts must recognize the separation of powers doctrine and ought not to encroach in areas related to prerogatives of these nature. [See *Miller v. Prime Minister* [2019] UKSC 41]. Though, the Supreme Court's decision does not anchor on oath of office, Lady Hale in one of the recent interviews with the media, recognized the oath jurisprudence and part of the report (27-12-2019 – www.independent.co.uk) reads as follows:-

> "Lady Hale warns government against US-style 'politicisation' of court appointments"
>
> 'We don't want to be politicised,' says outgoing Supreme Court president – who also condemns 'unfortunate' press attacks on top judges'.
>
> The outgoing president of the Supreme Court has warned against any attempt by the government to "politicise" the appointment of judges."
>
> Lady Hale, one of the country's most senior judges, defended the independence of the judiciary amid fears Boris Johnson's government could push for the political appointment of top judges.
>
> "We don't want to be politicised," said Baroness Hale of Richmond, who retires next month. "We don't decide political questions, we decide legal questions. And in any event, parliament always has the last word."
>
> Lady Hale also criticised recent attacks on the judiciary by the press – including the notorious headline in The Daily Mail branding three senior judges "enemies of the people".

> She said: "They're unfortunate. We have a free press and if the press wants to attack us, that's fine. But we have to continue to do the job according to our judicial oaths … we certainly do not pay any attention to attacks of that nature."
>
> In the immediate aftermath of the Supreme Court ruling on the prorogation of parliament as "unlawful", the attorney general Geoffrey Cox said it could be time for "parliamentary scrutiny" of judicial appointments."

Yes! Constitutional Oath of Office

[19] Before I deal with issues related to the 'Three Cases' and the case of *Ong Ah Chuan* and other cases, I will deal with the 'Constitutional Oath of Office' jurisprudence and its importance for the executive, legislature and judiciary to ensure the fundamental liberties of the public is not whittled down.

[20] For the benefit of the public, I have to be candid to say that during my law studies in England, nothing was mentioned of Oath of Office and its importance in the law schools or text books; and when I was a practitioner, again nothing was mentioned in case laws here or in India or in the text books. I first came to know its importance when I took my oath of office as a Judicial Commissioner in the year 2007. I was shocked at the responsibility entrusted on me. In my religion as well as my Tamil and Indian culture, taking an oath and not complying with it is unacceptable. After some enquiries, I came to realize that the oath of office is the only constitutional contract of appointment and other issues related to judges' remuneration was covered by Judges' Remuneration Act 1971.

[21] Yes! The Constitutional Oath Jurisprudence which originates from Malaysia and articulated over 30 or 40 judgments of the High Court and the Court of Appeal, inclusive of a booklet titled "Social Justice: Constitutional Oath, Rule of Law and Judicial Review, Malaysian Chapter", is the key to understanding the development of constitutionalism to justify that it originates from oath of office under the constitution itself. It also has positive reviews from judges and jurists from India, Germany and Malaysia who are renowned constitutional experts. [See www.janablegal.com]

[22] The executive, legislature and judiciary take an oath to preserve, protect and defend the Constitution. In simple language it means the executive as well as parliament will not legislate or amend the Constitution to impinge on the fundamental rights of the public or tinker with the constitutional framework against the interest of the public. The judiciary's role as per the oath is to ensure that the executive or parliament do not impinge on the fundamental rights of the public as well as tinker the constitutional framework against the interest of the public. The constitutional contract gives the constitutional legitimacy for the jurisprudence of constitutional supremacy and the rule of law related to it to be applied in interpreting the Constitution and/or legislation which impinges on the fundamental liberties of the public, etc. In mark contrast is the oath of office of the English judge who take an oath to be subservient to legislation. Because of the English judges' oath, the doctrine of parliamentary sovereignty or parliamentary supremacy arises followed by the rule of law related to parliamentary supremacy.

[23] Before the 'Three Cases' mentioned earlier, by relying on the English and the Privy Council, decisions; the Malaysian courts have impinged on the fundamental liberties of the subject which had led to unlawful detention as well as imprisonment and death penalty in many cases.

[24] To put it mildly, applying parliamentary supremacy jurisprudence to interpret Articles such as 4, 10, 149, 150, 151 and 159, etc.; of the Federal Constitution in violation of the fundamental liberties clause in particular Articles 5 and 8 of the Constitution will technically place the public as 'naked fakir' at the mercy of the executive. It will also follow that the rule of law will collapse and an economic oasis is more likely to become an economic desert and it will also create a shameless society. I will explain further in my judgment.

Basic Structure Jurisprudence

[25] It is important to note that the basic structure jurisprudence does not originate from the constitution and in consequence the apex courts in cases like *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 and *Phang Chin Hock v. PP* [1980] 1 MLJ 70, had rejected the basic structure jurisprudence openly. If constitutional oath jurisprudence has been canvassed before them, they may not have done so and they would have to jurisprudentially accept the basic structure jurisprudence which facilitates the oath of office jurisprudence. Cases like *Tan Tek Seng @ Tan Chee Meng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 2 CLJ 771 by the Court of Appeal had

emphasized that the source of any constitutional argument should also originate from the constitution itself. It is unfortunate that jurists and/or book writers in England, India or Malaysia have not developed the constitutional oath jurisprudence and the related rule of law attached to the oath of office. If judges sitting in the Privy Council have been appraised of the oath jurisprudence and the rule of law attached to it inclusive of our apex court after independence then it is very unlikely that the courts would have given significant consideration to the rule of law related to parliamentary supremacy and they would have developed the rule of law related to the constitutional supremacy. For example, take the case of presumption, now the Federal Court has ruled that double presumption is bad in law and the question of presumption itself has been kept open for argument in *Alma Nudo's* case. There are many who have been hanged on the basis of presumption or double presumption and the judicial precedent is related to the decision of the Privy Council in *Ong Ah Chuan* and many more. In addition, many of our constitutional provisions have been whittled by the application of the parliamentary supremacy jurisprudence by the decisions of the Privy Council which had been meticulously followed by our apex court, in violation of the fundamental liberties. I will explain further in my judgment.

Constitutional Contract

[26] Constitutionalism under our constitutional framework is that the executives, legislature and the judiciary take an oath to preserve, protect and

defend the Constitution. The oath is not a constitutional bluff, but it is a constitutional contract of the highest nature to protect the public and read with the Rukun Negara, it puts religious, moral, ethical values to the highest standard with allegiance to the Yang di Pertuan Agong and not to any individual person who was instrumental in the appointment, etc. Thus, absolute independence as well as the requirement to act professionally as per the oath with full allegiance to the Yang di Pertuan Agong is mandatory. Thus, basically it means the executive and legislature will not act or legislate to whittle down the constitutional framework in favour of the public or destroy the fundamental liberties or intrude on fundamental liberties or impinge on judicial powers of the court in violation of separation of powers doctrine, based on constitutional supremacy framework. The judiciary is expected to police the executive and legislature to ensure the constitution is not amended or destroyed against the interest of the public and the fundamental liberties provision are not made illusionary by way of legislation, which are harsh and oppressive and are inimical to UDHR as legislated and incorporated under the Suhakam Act 1999, etc. as well as entrenched in Articles 5, 8, etc. of the Federal Constitution.

Rule of Law for Public and the 'Three Pillars'

[27] Indeed there are two types of the rule of law. One is for the public and the other is for the executive, legislature and the judiciary. This has been explained in many of the judgments and has also been crystalised in a booklet as stated above.

[28] The rule of law advocated by Aristotle, Dicey Lord Bingham, etc. are essentially related to the public having access to justice. The constitutional oath jurisprudence advocates the rule of law related to executives, legislature and the judiciary. The distinction is not one of an apple and orange but marble to pumpkin. The English, Indian, Malaysian inclusive of Singaporean writers and jurists to my knowledge, have not picked up these points. The rule of law in England is anchored on parliamentary supremacy and judges can do very little as Lady Hale points out that parliament is the ultimate decider. Under the constitutional supremacy doctrine, the courts are final arbiter of issues related to the constitution of fundamental liberties, as affirmed positively in the 'Three Cases'. The Indian Courts have developed the basic structure jurisprudence to justify the protection of executive and parliamentary intrusion to whittle down the constitutional framework or the fundamental right provisions under the constitution. It would have been jurisprudentially fortifying if they had anchored the basic structure jurisprudence by mentioning the constitutional oath and in such case there cannot be any criticism that the judges are high-handed or activists. It is simply for this reason that it will be easier for the public who are literate, semi-literate or illiterate to understand that the courts' decision on basic structure jurisprudence is to stop executive as well as parliamentary encroachment related to fundamental rights of the public as per their oath of office and not through the process of judicial activism.

Constitutional Oath

[29] Constitutional oath jurisprudence advocates that there is also a rule of law for the executive, legislature and the judiciary. They must act as per oath of office. They must not make arbitrary decisions and the decisions must be reasonable and proportionate (to the problem at hand) and always subject to accountability, transparency and good governance. 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 generally takes the position that parliament knows best what is good for the public. 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 that 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.

Rukun Negara

[30] 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; and (e) Courtesy and Morality.

With the introduction of Rukun Negara, not only the rule of law advocated by Aristotle, Dicey, Bentham, Lord Bingham, etc. are relevant but also the rule of law related to courtesy and morality as per religious value as well as philosophers of Asian community such as 'Thiruvalluvar of Tamil Nadu India' as well as 'Confucius' of China, etc. have now been made relevant.

Test for Constitutional Interpretation

[31] Whether a judgment related to the interpretation of the Constitution was done based on the parliamentary supremacy or constitutional supremacy jurisprudence can be identified by invoking the oath of office jurisprudence test. Few example will suffice to explain notwithstanding those judgments themselves may have mixed proposition related to parliamentary as well as constitutional supremacy with the net result leaning towards parliamentary supremacy. There are many starting from the English and the Privy Council's decisions. Some of them are as follows:-

(a) In *Vacher & Sons Ltd v. London Society of Compositor* [1913] AC 107, Lord Macnaghten observed:-

> "Some people may think the policy of the Act unwise and even dangerous to the community. Some may think it at variance with principles which have long been held sacred. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. It is, I apprehend, as unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature."

[See *James v. The Commonwealth of Australia* [1936] AC 578; *The Queen v. Burah* 3 App Cs 889; *Re Central Provinces & Berar Sales of Motor Spirit 7 Lubricants Taxation Act* AIR [1931] FC].

This case which was relied upon heavily in the Federal Court in *Loh Kooi Choon* demonstrates the oath of office of an English judge i.e. to be subservient to parliament.

(b) The decision of the Federal Court in *Loh Kooi Choon* it was *inter alia* held:-

> "Parliament can alter the entrenched provisions of Article 5(4) to remove the provision relating to the production before a Magistrate of any arrested person under the Restricted Residence Enactment as long as the process of constitutional amendment as laid down in Article 159(3) is complied with. When that is done it becomes an integral part of the Constitution; it is the supreme law, and accordingly it cannot be said to be at variance with itself."

The decision reflects the doctrine of parliamentary supremacy similar to the decision of the Indian Supreme Court in *Shankari Prasad Singh Dee v. Union of India and State of Bihar* [1952] SCR 89 and *Sajan Singh v. State of Rajasthan* [1965] 1 SCR 933. The judgment also rejected the basic structure jurisprudence.

(c) In *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112, the Federal Court stated that the doctrine of supremacy of

parliament does not apply in Malaysia. However, in *Phang Chin Hock*, it held:-

"Parliament have power to make constitutional amendments that are inconsistent with the Constitution. In construing Article 4(1) and Article 159 the rule of harmonious construction requires the court to give effect to both provisions."

The position taken by the Federal Court is consistent with the parliamentary supremacy jurisprudence and had endorsed cases like *Shankari Prasad, Sajan Singh* and rejected *Kesavananda Barathi v. State of Kerala* [1973] SCR 1, which advocates constitutional supremacy. [See *Lange v. Australian Broadcasting Corporation* [1977] 189 CLR 520; *Dewan Undangan Negeri Kelantan & Anor v. Nordin bin Salleh & Anor* [1992] 1 MLJ 697].

(d) In *Ong Ah Chuan,* the Privy Council rejected the appellant's argument that statutory presumption under section 15 of the Misuse of Drugs Act is unconstitutional. The Privy Council on this point observed:-

"The appellants' argument may be stated shortly. This statutory presumption, it is said, is in conflict with what their counsel termed the "presumption of innocence"; this is a fundamental human right protected by the Constitution and cannot be limited or diminished by any Act of Parliament which has not been passed by the majority of votes necessary

under Article 5 for an amendment to the Constitution. The "presumption of innocence", it is contended, although nowhere expressly referred to in the Constitution, is imported into it by Article 9(1) which provides "9(1) No person shall be deprived of his life or personal liberty save in accordance with law." and by Article 12(1) which provides - "12(1) All persons are equal before the law and entitled to the equal protection of the law."

The Privy Council did not consider that the statutory presumption impinges on judicial power of the court in a constitutional supremacy framework. The nature of the presumption was as follows:-

"15. Any person who is proved or presumed to have had in his possession more than—

(a) …

(b) …

(c) 2 grammes of diamorphine (heroin) contained in any controlled drug; or

(d) …

shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein."

In addition, the Privy Council took the view that mandatory death penalty is lawful. On this point, the Privy Council observed:

> "In their Lordships' view there is nothing unconstitutional in the provision for a mandatory death penalty for trafficking in significant quantities of heroin and morphine. The minimum quantity that attracts the death penalty is so high as to rule out the notion that it is the kind of crime that might be committed by a good samaritan out of the kindness of his heart as was suggested in the course of argument. But if by any chance it were to happen, the prerogative of mercy is available to mitigate the rigidity of the law and is the long-established constitutional way of doing so in Singapore as in England.
>
> In the instant cases the law required that sentences of death should be imposed. There is no substance in the contention that this requirement of the law is inconsistent with the Constitution. The appeals must be dismissed."

[32] Both the positions taken by the Privy Council are consistent with the jurisprudence related to parliamentary supremacy. However, in a constitutional supremacy framework the legislature by oath of office cannot tie the hands of the judiciary in issues dealing with detention remand, sentencing and death penalty. That will impinge on judicial power as the judiciary under the constitutional framework is assigned to be the supreme policeman of the executive and legislature. Thus, the separation of doctrine as practiced in the *Westminster* model is different under the Malaysian constitutional framework. The understanding of the framework could only be appreciated if the members of the Privy Council had been appraised on the oath of office of executive, legislature and the judiciary of Singapore which is similar to ours. Without appreciation of the oath of office

jurisprudence, the decision making process will be flawed. Under the Westminster model, the judiciary is not the supreme policeman of the executive and the legislature and on the contrary they are subservient to parliament. The difference in jurisprudence is like distinguishing a vegetarian from a non-vegetarian.

[33] It is important to note that the oath of office of executive, legislature and judiciary in Singapore is similar to that of Malaysia. Further, the Evidence Act is also similar. As per the oath for parliament to introduce presumption to impinge on the presumption of innocence and dispel the salutary burden of proof as held in *Woolmington v. DPP* [1935] UKHL 1 and to create a higher burden to rebut possession as well as trafficking: in the Malaysian context as well as per the current jurisprudence, will indeed be harsh and oppressive to the accused. It will also impinge directly on the judicial power of the court. Likewise, it will impinge on Articles 5 and 8 of the Federal Constitution. In addition, it may be in breach of oath of office of legislature to introduce such harsh and oppressive presumption. It may also be in breach of oath of office for the judiciary to rule it as valid law. The Singapore equivalent to Malaysian section 114 of EA 1950 is section 116 and that section does not impinge on judicial power or presumption of innocence as it places the responsibility to deal with presumption at the discretion of the court. The said section 116 of Singapore Evidence Act read as follows:-

> "116. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human

conduct, and public and private business, in their relation to the facts of the particular case.

The court may presume -

(*a*) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;

(*b*) that an accomplice is unworthy of credit and his evidence needs to be treated with caution;

…….. "

[34] It is unfortunate that there was no argument placed before the Privy Council to say that Legislature as per their oath of office had imposed harsh and oppressive presumption for at least three reasons:- (i) it impinges on judicial power of the court to independently assess on the issue of presumption of possession as well as trafficking; (ii) it also impinges on the presumption of innocence, thereby depriving the accused the common law protection anchored in *Woolmington v. DPP,* on burden of proof; (iii) if the presumption has been placed in section 116 of the Singapore Evidence Act, which is similar to Malaysia's section 114, the accused will only have an evidential burden to rebut possession as well as trafficking; which is a lesser burden than the legal burden to rebut possession as well as trafficking. Section 15 is not a proportionate response to the problem in hand, as per the oath of office the legislature in the Malaysian context and the development of law.

[35] To put it mildly, the question is whether section 15, presumption in *Ong Ah Chuan's* case when contrasted with section 116 of the Singapore Evidence Act will pass the test of reasonableness as per Articles 4, 9 and 12 of the Singapore Constitution?; whether such provision is 'right, just and fair' and not arbitrary, fanciful or oppressive as advocated by the Supreme Court of India in the case of *Smt. Maneka Gandhi v. Union of India* AIR 1978 SC 597 and many more cases on similar jurisprudence? In essence, that is to say, after having taken an oath to preserve, protect and defend the constitution, is it permissible under the current jurisprudence to dilute the fundamental rights of the subject?

"THREE CASES"

[36] In *Semenyih Jaya* the appellant's counsel was Datuk Dr. Cyrus Das, a well-known constitutional expert and authority on the subject having written books and articles in the subject and very importantly had managed to convince the Federal Court to accept some of the propositions which were lingering around for few decades without endorsement by the apex courts. The *Semenyih Jaya's* decision has far reaching effect in the interpretation of the constitution, the scope of judicial power, and the employment of basic structure jurisprudence which were rejected in the cases like *Loh Kooi Choon, Phang*, etc.

[37] It is important to note that although *Indira Gandhi's* case which in the essence is not related to constitutional amendment, the court has gone in great detail to explain the judicial review powers of the court relying on the judgments related to basic structure jurisprudence in greater depth than the *Semenyih Jaya's* case. Reading the *Semenyih Jaya* with *Indira Gandhi* will in actual fact demonstrate that our constitutional jurisprudence have changed extensively in the last two years. If *Semenyih Jaya* drew a path for constitutionalism, *Indira Gandhi's* case had built a clear road for constitutionalism to flourish in dealing with various issues related to judicial power, fundamental rights as well as constitutional framework.

[38] In *Alma Nudo*, the learned counsel for the appellant was Datuk Seri Gopal Sri Ram, a former Federal Court judge and renowned jurist in constitutional law and many other areas of the law. Many of the proposition which the learned counsel advocated as a lawyer, judge and counsel had been magnanimously accepted by the Federal Court in one document. The decision in *Alma Nudo* combines all the principles stated in both cases (*Semenyih Jaya* and *Indira* Gandhi) and it also had dealt with double presumption and death penalty in extenso; so much so that one express highway on constitutionalism has been established.

[39] In *Semenyih Jaya* the Federal court held and/or observed:-

> "(a) The judicial power of the court resided in the Judiciary and no other as was explicit in art 121(1) of the Constitution. The discharge of judicial power by

non-qualified persons (and not by judges or judicial officers) or non-judicial personages rendered the said exercise ultra vires art 121 of the Constitution.

(b) Judicial power is best described in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311; [1987] 1 CLJ 550, as being the power vested in the court to adjudicate on civil and criminal matters brought to it.

(c) The majority decision of the Federal Court in *Kok Wah Kuan* (FC) appears to have given a narrow interpretation of art 121(1) of the Federal Constitution. It held that art 121(1) of the Federal Constitution merely declares that the High Courts 'shall have such jurisdiction and powers as may be conferred by or under federal law'.

(d) The narrow compass within which the Federal Court in *Kok Wah Kuan* above approached art 121(1) of the Federal Constitution suggests that the provision merely identifies the *sources* from which the High Courts derive their jurisdiction, namely from federal law. Whilst it is correct to say that the powers of the High Courts to adjudicate legal disputes are those which have been conferred by federal laws, in our view the legal implication of art 121(1) extends well beyond that. In this connection, there is a general acceptance that the Federal Constitution has to be interpreted organically and with less rigidity.

(e) Thus it is clear to us that the 1988 Amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution:

(i) the doctrine of separation of powers; and

(ii) the independence of the Judiciary.

(f) With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to parliament, with the implication that parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution enshrined in art 4(1).

(g) It is worthwhile reiterating that parliament does not have power to amend the Federal Constitution to the effect of undermining the features as stated in (i) and (ii) above for the following reasons:

> "The effect of sub-s 8(a) of the amending Act A704 appeared to establish Parliamentary supremacy; this consequentially suborned the Judiciary to Parliament, where by virtue of the amendment, Parliament has the power to circumscribe the jurisdiction of the High Court."

(h) In the past, the apex court has consistently rejected parliamentary supremacy. [See *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112].

(i) And again in another case, that of *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, the Federal Court speaking through Gopal Sri Ram FCJ said at p 342 that:

> … Further it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution that offends the basic structure may be struck down as unconstitutional. … Suffice to say that the rights guaranteed by Part II which are enforceable in the

courts form part of the basic structure of the Federal Constitution. See *Keshavananda Bharati v State of Kerala* AIR 1973 SC 1461.

(j) *Sivarasa* made a clear departure from an earlier Federal Court decision *[2017] 3 MLJ 561 at 592*of *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, which in effect concluded that as long as an amendment to the Federal Constitution is effected in the manner required by art 159 of the Federal Constitution, that amendment was effective regardless of its effect insofar as the basic structure of the Constitution was concerned.

(k) Thus, *Sivarasa* made a frontal attack on *Loh Kooi Choon* where the Federal Court in *Sivarasa* tersely observed that:

> … the fundamental rights guaranteed under Part II is part of the basic structure of the Constitution and that *Parliament cannot enact laws (including Act amending the Constitution) that violate the basic structure*. (Emphasis added.)

(l) The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.

(m) The concepts above have been juxtaposed time and again in our judicial determination of issues in judicial reviews. Thus an effective check and balance mechanism is in place to ensure that the Executive and the Legislature act within their constitutional limits and that they uphold the rule of law. The Malaysian apex court had prescribed that the powers of the Executive and the Legislature are limited by the Constitution and that the Judiciary acts as a bulwark of the Constitution in ensuring that the powers

of the Executive and the Legislature are to be kept within their intended limit (see *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135)."

[40] In *Indira Gandhi*, the apex court held and/or observed as follows:-

"(a) A constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles.

(b) The foundational principles of a constitution shape its basic structure. In Canada, the Supreme Court recognised the rule of law and constitutionalism as fundamental principles underlying their constitution.

(c) The Supreme Court of Canada took pains to emphasise the protection of minority rights as a principle inherent in the constitutional system.

(d) Another principle which underlies constitutions based on the Westminster model, is the separation of powers between the branches of government. This was recognised in this country in earlier cases. In the Singapore High Court case of *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163, Chan Sek Keong CJ said:

> … Likewise under the Singapore Constitution, the sovereign power of Singapore is shared among the trinity of constitutional organs, viz, the Legislature (comprising the President of Singapore and the Singapore Parliament), the Executive (the Singapore government) and the Judiciary (the judges of the Supreme Court and the Subordinate Courts). The principle of separation of powers, whether

conceived as a sharing or a division of sovereign power between three organs of state, is therefore part of the basic structure of the Singapore Constitution.

(e) Inherent in these foundational principles is the role of the Judiciary as the ultimate arbiter of the lawfulness of state action. The power of the courts is a natural and necessary corollary of the rule of law. In many jurisdictions this was made clear. In Malaysia, in the seminal decision of the Federal Court in *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, Raja Azlan Shah Ag CJ (as his Royal Highness then was) expressed in a passage which has remained inviolable, that:

> … 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 a 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 court [2018] 1 MLJ 545 at 564to intervene. The courts are the only defence of the liberty of the subject against departmental aggression* … (Emphasis added.)

(f) It is notable that the central role of the Judiciary to uphold the rule of law is accepted even in the UK, where the political system is one of parliamentary supremacy in the absence of a written constitution. In *R (on the application of Miller and another) v Secretary of State for Exiting the European Union* [2017] 1 All ER 593; [2017] UKSC 5, the UK Supreme Court examined a series of historical statutes of 'particular importance' and held at para [42]:

> "The independence of the Judiciary was formally recognised in these statutes. In the broadest sense, the role of the Judiciary is to uphold and further the rule of law; more particularly, judges impartially identify and apply the law in every case brought before the courts. That is why and how these proceedings are being decided."

(g) The role of the Judiciary in the interpretation of statutes was also recognised as fundamental by the House of Lords in the case of *R (on the application of Jackson and others) v Attorney General* [2005] 4 All ER 1253; [2005] UKHL 56. The ambit of the court's power in this regard is considered not subservient to but of equal importance as the sovereignty of parliament (at para [51]):

> "This question of statutory interpretation is properly cognizable by a court of law even though it relates to the legislative process. Statutes create law. *The proper interpretation of a statute is a matter for the courts, not Parliament. This principle is as fundamental in this country's constitution as the principle that Parliament has exclusive cognizance (jurisdiction) over its own affairs*." (Emphasis added.)

(h) It bears emphasis that the Judiciary's exercise of power in accordance with its proper constitutional role does not in any way constitute judicial supremacy. As stated by the Court of Appeal in Singapore in *Tan Seet Eng v Attorney-General and another matter* [2015] SGCA 59.

(i) On the same note, it is also worth stressing that the role of the Judiciary in upholding constitutionalism and the rule of law is in no way inimical to democratic government. The Canadian Supreme Court held in *Reference re Secession of Quebec*.

(j) The basic structure of a constitution is 'intrinsic to, and arises from, the very nature of a constitution'. The fundamental underlying principles and the role of the Judiciary as outlined above form part of the basic structure of the constitution, being 'something fundamental and essential to the political system that is established thereunder' (per Sundaresh Menon CJ in *Yong Vui Kong v Public Prosecutor* [2015] SGCA 11]. It is well settled that features of the basic structure cannot be abrogated or removed by a constitutional amendment (see *Kesavananda Bharati v State of Kerala And Anor* AIR 1973 SC 1461).

(k) Further, as a feature intrinsic to and inherent in the constitutional order itself, these principles are accorded supreme status as against any inconsistent laws, in a political system based on constitutional supremacy. Article 4(1) of the Federal Constitution provides that the Constitution is 'the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'. This provision is in *pari materia* with art 4 of the Singapore Constitution, which was analysed by Chan Sek Keong CJ in *Mohammad Faizal*.

> "This Constitution is the supreme law of the Republic of Singapore and any law enacted by the legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.
>
> It should be noted that art 4 of the Singapore Constitution states that any law inconsistent with this Constitution, as opposed to any law inconsistent with any provision of this Constitution is void. The

> specific form of words used in art 4 reinforces the principle that the Singapore parliament may not enact a law, and the Singapore government may not do an act, which is inconsistent with the principle of separation of powers to the extent to which that principle is embodied in the Singapore Constitution."

(l) In fact so intrinsic is the role of the Judiciary to the constitutional order that it has been characterised as an unalterable 'political fact'.

(m) The notion of the court's role, and the power of judicial review as the bulwark against unconstitutional legislation or unlawful action is echoed in the pithy remarks of Salleh Abas LP in *Lim Kit Siang v Dato Seri Dr Mahathir Mohamad* [1987] 1 MLJ 383 (at pp 386-387):

> The courts have a constitutional function to perform and they are the guardians 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.

(n) That judicial power is vested exclusively in the Judiciary is implicit in the very structure of a Westminster model constitution itself, whether or not such vesting is expressly stated (*Hinds and others v The Queen; Director of Public Prosecutions v Jackson; Attorney General of Jamaica (intervener)* [1977] AC 195 (at p 213)). Referring to the provisions on the appointment and removal of judges in the Constitution of Ceylon, the Privy Council held in *Liyanage v R* [1967] 1 AC 259 (at p 287):

> Those provisions manifest an intention to secure in the Judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a Constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the Executive or the Legislature. The Constitution's silence as to the vesting of judicial power is consistent with its remaining, where it had lain for more than a century, in the hands of the judicature.

(o) In particular, the power of judicial review is essential to the constitutional role of the courts, and inherent in the basic structure of the Constitution. It cannot be abrogated or altered by parliament by way of a constitutional amendment. In the landmark case of *Kesavananda Bharati* the Supreme Court of India found the power of judicial review to be indispensable in a Constitution that is federal in character.

(p) In *Minerva Mills Ltd And Ors v Union of India (UOI) And Ors* AIR 1980 SC 1789, such an amendment was held to be invalid as a 'transparent case of transgression of the limitations on the amending power'. The Indian

Supreme Court articulated the central importance of judicial review in robust terms worth reproducing in full:

> The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. *I am of the view that if there is one feature [2018] 1 MLJ 545 at 570 of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution* …
>
> *But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution*. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of sub-version of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. (Emphasis added.)

(q) Indeed even the absence of a written constitution in the United Kingdom has not deterred the House of Lords from observing the importance of judicial review as a constitutional fundamental. Per Lord Steyn in *R (on the application of Jackson and others) v Attorney General* [2005] 4 All ER 1253; [2005] UKHL 56:

> In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

(r) Both *Attorney-General of Commonwealth for Australia v R and Boilermakers' Society of Australia* [1957] AC 288 and *Hinds and others v The Queen; Director of Public Prosecutions v Jackson; Attorney General of Jamaica (intervener)* [1977] AC 195 concerned the creation of new courts to exercise judicial functions. In *Attorney-General of Commonwealth for Australia*, the Commonwealth Court of Conciliation and Arbitration was established pursuant to an act of Parliament and conferred with arbitral and judicial functions. The Privy Council held that the act was in contravention of the Constitution of the Commonwealth of Australia. As forcefully elucidated by Viscount Simmonds (at pp 313-314):

> *… it would make a mockery of the Constitution to establish a body of persons for the exercise of non-judicial functions, to call that body a court and upon the footing that it is a court vest in it judicial power*. In *Alexander*'s case, which has already been referred to, Griffith CJ once and for all established this proposition in words that have not perhaps always been sufficiently regarded: 'it is impossible', he said, 'under the Constitution to confer such functions (ie judicial functions) upon any body other than a court, nor can the difficulty be avoided by designing a body, which is not in its essential character a court, by that name, or by calling the functions by another

name. In short, any attempt to vest any part of the judicial power of the Commonwealth in any body other than a court is entirely ineffective'. And in the same case the words came from Barton J.5: 'Whether persons were judges, whether tribunals were courts, and whether they exercised what is now called judicial power, depended and depends on substance and not on mere name'. (Emphasis added.)

(s) The conferment of judicial functions on bodies other than courts, thus understood, is an incursion into the judicial power of the federation. As colourfully described by Abdoolcader SCJ in *Public Prosecutor v Dato' Yap Peng* [1987] 2 MLJ 311:

> … any other view would *ex necessitate rei* result in relegating the provisions of art 121(1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper's will.

(t) It would be instructive to now distill the principles as have been illustrated above:

"(a) under art 121(1) of the Federal Constitution, judicial power is vested exclusively in the civil High Courts. The jurisdiction and powers of the courts cannot be confined to federal law. The courts will continually and inevitably be engaged in the interpretation and enforcement of all laws that operate in this country and any other source of law recognised by our legal system;

(b) judicial power in particular the power of judicial review, is an essential feature of the basic structure of the Constitution;

(c) features in the basic structure of the Constitution cannot be abrogated by Parliament by way of constitutional amendment;

(d) judicial power may not be removed from the High Courts; and

(e) judicial power may not be conferred upon bodies other than the High Courts, unless such bodies comply with the safeguards provided in Part IX of the Constitution to ensure their independence."

[41] In *Alma Nudo,* the apex court held and/or observed *inter alia* the following:-

"(1) Section 37A was unconstitutional for violating art 5(1) read with art 8(1) of the Federal Constitution and was hereby struck down (see para 151).

(2) Section 37A had the effect that once the prosecution proved that an accused had custody and control of a thing containing a dangerous drug, the accused was presumed to have possession and knowledge of the drug under s 37(d). That 'deemed possession' was then used to invoke a further *[2019] 4 MLJ 1 at 3*presumption of trafficking under s 37(da) if the quantity of the drug exceeded the statutory weight limit. Section 37A thus permitted a 'presumption upon a presumption'. As such, for a charge of drug trafficking all that was required of the prosecution to establish a prima facie case was to prove custody and control on the part of the accused and the weight of the drug. The legal burden then shifted to the accused to disprove the presumptions of possession and knowledge and trafficking on a balance of probabilities. Hence, s 37A prima facie violated the presumption of innocence since it permitted an accused to be convicted while a reasonable doubt as to his guilt might have existed.

(3) The accused did not bear merely an evidential burden to rebut the presumptions under ss 37(d) and (da) but had a legal burden to do so on a balance of probabilities. This was a grave erosion to the presumption of innocence housed in art 5(1) of the Federal Constitution. But the most severe effect, tantamount to being harsh and oppressive, that arose from the application of a 'presumption upon a presumption' was that the presumed element of possession under s 37(d) was used to invoke the presumption of trafficking under s 37(da) without any consideration that the element of possession in s 37(da) required a 'found' possession and not a 'deemed' possession. The phrase 'any person who is found in possession of' entailed an affirmative finding of possession based on adduced evidence as was held in *Mohammed bin Hassan*.

(4) Section 37A was legislated to facilitate the invocation of the two presumptions, yet there was no amendment to the wordings in s 37(da), in particular, the word 'found' therein. As such, the view of the Federal Court on the word 'found' in *Muhammed bin Hassan* was still valid. It was held in that case that based on the clear and unequivocal meaning of the statutory wordings, 'deemed possession' under s 37(d) could not be equated to 'found possession' so as to invoke the presumption of trafficking under s 37(da). Despite the enactment of s 37A, a plain reading of the words in sub-s (d) and (da) of s 37 did not permit the concurrent application of both the presumptions in the prosecution of a drug trafficking offence. To invoke the presumption of trafficking founded not on proof of possession but on presumed possession based on proof of mere custody and control of anything that contained a dangerous drug constituted a grave and unjustified departure from the general rule that the prosecution was required to prove the guilt of the accused beyond a reasonable doubt. It gave rise to a real risk that an accused might be convicted of drug trafficking

in circumstances where a significant reasonable doubt remained as to the main elements of the offence.

(5) Section 37A was disproportionate to the legislative objective it served. It was far from clear that the objective of securing the convictions of drug traffickers could not be achieved through other means less damaging to the accused's fundamental right under art 5 of the Federal Constitution. In the light of the seriousness of the offence and the punishment it entailed, the unacceptably severe incursion into the right of the accused under art 5(1) was disproportionate to the aim of curbing crime and hence failed to satisfy the requirement of proportionality housed under art 8(1) of the Federal Constitution.

(6) Since the trial judges in the two appeals herein had invoked both the presumptions to find the appellants guilty of trafficking, their convictions and sentences under s 39B of the DDA were quashed. As there was no challenge to the use of a single presumption in these appeals, the invocation of s 37(d) by the trial judges did not cause any miscarriage of justice to the detriment of the appellants. This court had no reasonable doubt as to the guilt of the appellants for possession of the drugs based on the evidence adduced; accordingly, the appellants were convicted for possession of the drugs under s 12(1) of the DDA and punishable under s 39A(2) of the DDA.

(7) The appellants' challenge to the constitutionality of s 37A based on the doctrine of separation of powers failed.

(8) The separation of powers between the Legislature, the Executive, and the Judiciary is a hallmark of a modern democratic State.

[See *The State v Khoyratty* at para 29; *DPP v Mollison (No 2)* [2003] UKPC 6 at para 13; *R (on the application of Anderson) v Secretary of State for the Home Department* [2002] UKHL 46 at para 50]. Lord Steyn in *The State v Khoyratty* at para 12 succinctly said this:

> The idea of a democracy involves a number of different concepts. The first is that the people must decide who should govern them. Secondly, there is the principle that fundamental rights should be protected by an impartial and independent judiciary. Thirdly, in order to achieve a reconciliation between the inevitable tensions between these ideas, a separation of powers between the legislature, the executive, and the judiciary is necessary.

(9) Thus, the separation of powers is not just a matter of administrative efficiency. At its core is the need for a check and balance mechanism to avoid the risk of abuse when power is concentrated in the same hands.

(10) In fact courts can prevent Parliament from destroying the 'basic structure' of the FC (see *Sivarasa Rasiah* at para 20). And while the FC does not specifically explicate the doctrine of basic structure, what the doctrine signifies is that a parliamentary enactment is open to scrutiny not only for clear-cut violation of the FC but also for violation of the doctrines or principles that constitute the constitutional foundation.

(11) The importance of the right to life under art 5 cannot be over-emphasised. In relation to the rights to life and dignity the South African Constitutional Court in *State v Makwanyane* [1995] 1 LRC 269 at para 84 states:

> Together they are the source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the twin rights of life and dignity. These twin rights are the essential content of all rights under the Constitution. Take them away, and all other rights cease.

(12) Since the right to life is 'the most fundamental of human rights', the basis of any state action which may put this right at risk 'must surely call for the most anxious scrutiny' (per Lord Bridge in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 at p 531). The courts' role is given added weight where the right to life is at stake.

(13) 'Law', as defined in art 160(2) of the FC read with s 66 of the Interpretation Acts 1948 and 1967, includes the common law of England. The concept of rule of law forms part of the common law of England. The 'law' in art 5(1) and in other fundamental liberties provisions in the FC must therefore be in tandem with the concept of rule of law and NOT rule by law.

(14) It has been remarked that the phrase 'rule of law' has become meaningless thanks to ideological abuse and general over-use. It is perhaps opportune and necessary for us to outline what is generally meant by the rule of law.

(15) A central tenet of the rule of law is the equal subjection of all persons to the ordinary law. People should be ruled by the law and be able to be guided by it. Thus, the law must be capable of being obeyed.

(16) 'Law' must therefore satisfy certain basic requirements, namely:

(a) it should be clear;

(b) sufficiently stable;

(c) generally prospective;

(d) of general application;

(e) administered by an independent judiciary; and

(f) the principles of natural justice and the right to a fair trial are observed.

(17) These requirements of 'law' in a system based on the rule of law are by no means exhaustive. While the precise procedural and substantive content of the rule of law remains the subject of much academic debate, there is a broad acceptance of the principles above as the minimum requirements of the rule of law.

(18) It is therefore clear that the 'law' in the proviso 'save in accordance with law' does not mean just any law validly enacted by parliament. It does not authorise parliament to enact any legislation under art 5(1) contrary to the rule of law. While the phrase 'in accordance with law' requires specific and explicit law that provides for the deprivation of life or personal liberty (see *In Re Mohamad Ezam bin Mohd Nor* [2001] 3 MLJ 372), nevertheless such law must also be one that is fair and just and not merely any enacted law however arbitrary, unfair, or unjust it may be. Otherwise that would be rule by law.

(19) The 'law' thereof also refers to a system of law that incorporates the fundamental rules of natural justice that formed part and parcel of the common law of England. And to be relevant in this country such common law must be in operation at the commencement of the FC. Further, any system of law worthy of being called just must be founded on fundamental values. 'The law must be related to the … fundamental assessments of

human values and the purposes of society'. As persuasively argued by Lord Bingham, the rule of law requires that fundamental rights be protected. It is also taken for granted that the 'law' alluded to would not flout those fundamental rules.

(20) It has been declared as well by this court that the fundamental principle of presumption of innocence, long recognised at common law, is included in the phrase 'in accordance with law'. Indeed the presumption of innocence is a 'hallowed principle lying at the very heart of criminal law', referable and integral to the right to life, liberty, and security. The famous statement of Viscount Sankey LC in *Woolmington v Director of Public Prosecutions* [1935] AC 462 at p 481 is regularly quoted as a starting point in affirming the principle:

> Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt *subject to what I have already said as to the defence of insanity and subject also to any statutory exception[2019] 4 MLJ 1 at 36…* No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. (Emphasis added.)

(21) It is pertinent to note that Viscount Sankey's proviso of 'any statutory exception' was pronounced in the context of a legal system based on parliamentary sovereignty. Whereas in our jurisdiction a provision of law, although it may be in the form of a proviso, is not rendered constitutionally valid if it 'would subvert the very purpose of the entrenchment of the presumption of innocence' in the FC. As such, in determining its

constitutionality the substantive effect of a statutory exception must be considered.

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(23) Yet at the same time it must also be taken into account that despite the fundamental importance of the presumption of innocence, there are situations where it is clearly sensible and reasonable to allow certain exceptions. For instance, a shift on onus of proof to the defence for certain elements of an offence where such elements may only known to the accused. But it is not to say that in such instance the prosecution is relieved of its burden to establish the guilt of an accused beyond reasonable doubt. In other words, it is widely recognised that the presumption of innocence is subject to implied limitations. A degree of flexibility is therefore required to strike a balance between the public interest and the right of an accused person.

(24) In *State v Coetzee* [1997] 2 LRC 593 the South African Constitutional Court speaking through Sachs J provided clear justification on the need to do the balancing enquiry between safeguarding the constitutional rights of an individual from being 'convicted and subjected to ignominy' and heavy sentence and 'the maintenance of public confidence in the enduring

integrity and security of the legal system'. Reference to the prevalence and severity of a certain crime therefore does not add anything new or special to the balancing exercise. The perniciousness of the offence is one of the givens, against which the presumption of innocence is pitted from the beginning, not a new element to be put into scales as part of the justificatory balancing exercise. If this were not so, the ubiquity and ugliness argument could be used in relation to murder, rape, car-jerking, housebreaking, drug-smuggling, corruption … the list is unfortunately almost endless, and nothing would be left of the presumption of innocence, save, perhaps, for its relics status as a doughty defender of rights in the most trival of cases'.

(25) Hence, this is where the doctrine of proportionality under art 8(1) becomes engaged.

(26) But before we deal with art 8(1) in relation to the proportionality test it is perhaps apposite to note here that in *Muhammed bin Hassan* this court held that to read the presumption of possession in sub-s 37(d) 'into s 37 (da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but *would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused*.' (Emphasis added.)

Article 8 and the doctrine of proportionality

(27) When interpreting other provisions in the FC the courts must do so in light of the humanising and all-pervading provision of art 8(1). Article 8(1) guarantees fairness in all forms of state action. The essence of the article was aptly summarised in *Lee Kwan Who* at para 12:

The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

(28) In other words, art 8(1) imports the principle of substantive proportionality. 'Not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved'. The doctrine of proportionality housed in art 8(1) was lucidly articulated in *Sivarasa Rasiah* at para 30:

> … all forms of state action — whether legislative or executive — that infringe a fundamental right must (a) have an objective that is sufficiently important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

(29) Accordingly, when any state action is challenged as violating a fundamental right, such as the right to life or personal liberty under arts 5(1) and 8(1) will at once be engaged such that the action must meet the test of proportionality. This is the point at which arts 5(1) and 8(1) interact.

(30) This approach is consistent with that adopted in other Commonwealth jurisdictions. Proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations include the nature of the right, the purpose for which the right is limited, the extent and efficacy of the limitation, and whether the desired end could reasonably be achieved through other means less damaging to the right in question.

(31) The United Kingdom position based on the leading cases of *R v Lambert* [2001] UKHL 37, *R v Johnstone* [2003] UKHL 28, and *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 All ER 237 was helpfully distilled in *Gan Boon Aun* at para 46 as thus:

(a) presumptions of fact or of law operate in every legal system;

(b) it is open to states to define the constituent elements of an offence, even to exclude the requirement of mens rea;

(c) when a section is silent as to mens rea, there is a presumption that mens rea is an essential ingredient: The more serious the crime, the less readily will that presumption be displaced;

(d) the overriding concern is that a trial should be fair: The presumption of innocence is a fundamental right directed to that end;

(e) *there is no prohibition against presumptions in principle, but the principle of proportiona.*

(32) The doctrine of proportionality was likewise implicit in the Hong Kong approach to statutory presumptions in criminal law. Referring to statutory exceptions to the presumption of innocence, the Privy Council explained in *Lee Kwong-Kut* at pp 969-970:

> Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which article 11(1) enshrines. *The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important.* However what will be decisive will be the substance and reality of the *[2019] 4 MLJ 1 at 39*language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v United States* (1969) 23 LEd 2d 57, 82, 'it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend'. (Emphasis added.)

(33) Useful guidance can also be gleaned from the case of *R v Oakes*. The Canadian Supreme Court held that, in general, 'a provision which requires an accused to disprove on a balance of probabilities the existence of a

presumed fact, which is an important element of the offence in question, violates the presumption of innocence'.

(34) Be that as it may, a provision which violates the presumption of innocence may still be upheld if it is a reasonable limit, prescribed by law and demonstrably justified in a free and democratic society. In this exercise, the Canadian Supreme Court in *R v Oakes* elaborated on the two central criteria that must be satisfied, at paras 69-70:

> (a) the objective must be of sufficient importance to warrant overriding a constitutionally protected right. The objective must relate to pressing and substantial concerns; and
> (b) the means chosen to achieve the objective must be reasonable and demonstrably justified, in that:
>
> > (i) the measure must be rationally connected to the objective;
> > (ii) the right in question must be impaired as little as possible; and
> > (iii) the effect of the measure must be proportionate to the objective.

(35) It is clear therefore from the local and foreign authorities above that the presumption of innocence is by no means absolute. However, as discussed above, derogations or limits to the prosecution's duty to prove an accused's guilt beyond a reasonable doubt are carefully circumscribed by reference to some form of proportionality test. We consider that the application of the proportionality test in this context strikes the appropriate balance between the competing interests of an accused and the state (see *Gan Boon Aun*).

(36) It is notable that the doctrine of proportionality and the all-pervading nature of art 8 form part of the common law of Malaysia, developed by our courts based on a prismatic interpretation of the FC without recourse to case law relating to the European Convention of Human Rights. As such we are therefore of the view that the appellants' assertion that art 5 confers an absolute right upon an accused to be presumed innocent until proven guilty and not subject to the doctrine of proportionality while disregarding art 8, is unsupported by authority and without basis.

(37) To summarise, the following principles may be discerned from the above authorities:

(a) art 5(1) embodies the presumption of innocence, which places upon the prosecution a duty to prove the guilt of the accused beyond a reasonable doubt;

(b) the presumption of innocence is not absolute. A balance must be struck between the public interest and the right of an accused — art 8(1);

(c) a statutory presumption in a criminal law, which places upon an accused the burden of disproving a presumed fact, must satisfy the test of proportionality under art 8(1). The substance and effect of the presumption must be reasonable and not greater than necessary;

(d) the test of proportionality comprises three stages:

(i) there must be a sufficiently important objective to justify in limiting the right in question;

(ii) the measure designed must have a rational nexus with the objective; and

(iii) the measure used which infringes the right asserted must be proportionate to the objective;

(e) factors relevant to the proportionality assessment include, but are not limited to, the following:

(i) whether the presumption relates to an essential or important ingredient of the offence;

(ii) opportunity for rebuttal and the standard required to disprove the presumption; and

(iii) the difficulty for the prosecution to prove the presumed fact;

(f) a significant departure from the presumption of innocence would call for a more onerous justification.

(38) Having struck down s 37A of the DDA the question now is to determine the position of the appellants. The learned trial judges in these two appeals invoked both the presumptions in finding the guilt of the appellants. Since there was no challenge to the use of a single presumption in these appeals we are of the view that the invocation of sub-s 37(d) by the learned trial judges did not cause any miscarriage of justice to the detriment of the appellants.

(39) Hence, we hereby quash the convictions and sentences of both the appellants under s 39B of the DDA. As we have no reasonable doubt on the guilt of the appellants for possession of the drugs based on the evidence adduced we hereby substitute their respective convictions to one of possession under s 12(1) and punishable under s 39A(2) of the DDA.

Judicial Power

[42] The 'Three Cases' impinge on many of the Privy Council's decisions which had in principle employed parliamentary supremacy jurisprudence to interpret the Constitution related to constitutional supremacy and/or was very economic in the interpretation of the constitution when contrasted with supreme court decisions from India. The net effect of judicial power argument with the basic structure jurisprudence, in essence may amount to –

(1) Executive detention will be in breach of judicial power as Article 5 of the Constitution requires a person arrested to be brought before the Magistrate. Only a Sub-Court or High Court can issue a remand order. If charged, it is for the court to sentence upon trial. It is obligatory as per the oath of office for the judge to strike down oppressive legislations or provisions as was done in the case of *Nik Nazmi bin Nik Ahmad v. PP* [2014] 4 MLJ 157, by the unanimous decision of the Court of Appeal.

(2) In *Alma Nudo's* case, the apex court recognizes not only the right to life but also human dignity as part of Article 5. Thus, by exercise of judicial power, the court is obliged to protect by *suo motto* orders when such rights are said to be infringed on, in harsh and oppressive manner by the enforcement agencies. To put it mildly, it is the constitutional responsibility of the courts by exercising judicial power to ensure that the arrest or remand

orders are not unreasonable and are proportionate to the problem in issue. Police remand etc. for investigation is meant for core criminal offences of violent nature and not one related to public in exercising the fundamental rights of the Federal Constitution under Article 10 and/or other provisions of the law.

(3) Judicial power also requires the judiciary to facilitate the rule of law. The law of this country is not that for every complaint of a purported offence the person accused or witness must be arrested, that too after office hours and remanded in police custody and subsequently remanded by an order of the magistrate and that too in offences related to Article 10 of the Federal Constitution and freedom of speech (will also demonstrate that it is not a violent offence). [See *Teoh Meng Kee v. PP* [2014] 7 CLJ 1034]. These are often referred to as violation of fundamental rights in the harshest and oppressive manner which the judiciary as per oath of office as well as judicial power are obliged to arrest at *limine*. Failure to do so will be a dereliction of duty under the Federal Constitution.

(4) Judicial power also means the judiciary must ensure that the Magistrates too do not give orders in breach of rule of law; and for that purpose they should be properly trained not to issue remand orders which are perceived to be oppressive against

members of the public exercising their constitutional rights and executive using oppressive laws to silence them. The arrest, according to law has stringent test and will be dereliction of judicial power if it is not promptly acted upon, if there is a complaint it is being abused.

(5) Judicial power also means that it is for the courts to uphold the rule of law as well as basic principles of human dignity, equality and freedom. Any laws which impinges on and have oppressive provision for arrest and immediate detention and is being used mala fide against citizen who should not be at the first instant be victim of the police custody, has to be checked aggressively by the judiciary and in cases of urgency and complaint to the judge who has jurisdiction to the administrative area of the court, the judge must be alerted through the President of the Malaysian Bar or Senior Counsel with a certificate that it is indeed an abusive exercise and the grounds thereof. Judicial power as per oath requires the judge even if it is in the middle of the night, to direct the detaining authority to produce the person and inquire as to the justification to place the person under police custody as opposed to police bail.

(6) Judicial power also means that upon complaint, it is the duty of the judge as per oath to visit remand centers, prisons, detention centers, etc. to ensure that the rule of law as well as the detainees

or prisoners are taken care, with the employment of human dignity.

(7) Judicial power also means that issues of remand, imprisonment, death penalty, etc. comes within the judicial powers of the court within the framework of the constitution. Where judges are subservient to legislation, parliament may have a say on how the judicial power must be exercised by substantive provision. However, under the Malaysian Constitution, these are matters for the judges to decide as per their discretion on case by case basis taking into consideration the separation of powers doctrine. Thus, parliament could impose death penalty but must leave it to the discretion of the court. Judges are not judicial executioners to put into effect the will of parliament (as said by His Lordship Abdoolcader FCJ in His Lordship's own words in *Dato' Yap's* case). That may be the case where judges take an oath to be subservient to parliament. In this respect, it must be noted that the doctrine of unreasonableness is giving way to the doctrine of proportionality to save parliamentary intrusion of judicial power of the court.

(8) Judicial power also means the court can stay any criminal proceedings if it is demonstrated that it was an abuse of process. This power is a recognized exception to Attorney General power's to prosecute. It is well established that the courts' have

a duty to ensure that the executive do not abuse their power in any decision making process. In such instances, it could also stay prosecution of an offence on the grounds of abuse of process. For example, in *R v. Horseferry* [1994] AC 42 (HL), it was said that if the accused had been brought back to the United Kingdom in violation of extradition process (in this case he was kidnapped) and in breach of the international law, the court can refuse to try and could stay the prosecution as abuse of process.

(9) Judicial power also means that the court can issue contempt proceedings against executives and/or its agencies for failing to comply with order of court, pursuant to Article 126 of the Federal Constitution. In *M v. Home Office* [1994] 1 AC 377, a foreigner who sought asylum was refused. He filed an application for leave to the Court of Appeal. The trial judge had taken note that the counsel for the Home Secretary had given an undertaking that he will not be deported while the application was being considered. Subsequently, when the judge come to know that he has been removed from the jurisdiction, he ordered the Secretary of State to organize his return to the jurisdiction. However, the Secretary of State did not facilitate the order in reliance of legal advice that the order had been made without jurisdiction in that it was a mandatory interim injunction against an officer of the crown. The House of Lords held:- (i) the Secretary of State is not entitled to claim the crown immunity and an action can be

brought against him personally for a tort committed or authorized by him; (ii) an injunction can be granted against him; (iii) the crown itself could not be found in contempt, but a government department or minister could; (iv) the Secretary of State for Home Department was in contempt, but since he had acted on advice, it would not be proper to find him personally in contempt of court. Lord Templeman opined that the argument that there is no power to enforce the law by injunction or contempt proceedings against a minister in his official capacity would, if upheld, establish the proposition that the executive obey the law as a matter of grace and not as a matter of necessity, a proposition which would reverse the result of the Civil War.

(10) Judicial power also means the court must give effect to human rights issues read with UDHR 1948, read with Human Rights Act 1999 of Malaysia as well as the Federal Constitution. The UK position is that the treaty obligations under the European Convention on Human Rights must be given recognition. That convention itself is an endorsement of Universal Declaration of Human Rights 1948. The courts in UK in interpreting legislation have moved into protecting fundamental liberties. [See *Sunday Times v. United Kingdom* [1974] AC 273; *A v. Secretary of State for the Home Department* [2005] 2 AC 68].

(11) Judicial power also means that court should not admit evidence obtained by torture inclusive of abusive interrogatory measures after office hours which are inhuman and degrading. In recognizing Human Rights principles, the UK courts have refused to admit evidence obtained by torture even when it was done outside UK. For example, the House of Lords in *A v. Secretary of State For The Home Department (No. 2)* took the view that the principles of the common law, standing alone, compelled the exclusion of third party torture evidence as unreliable, unfair, offensive to ordinary standards of humanity and decency and incompatible with the principles which should animate a tribunal seeking to administer justice.

(12) Judicial power also means that the court must read into legislation which has nexus to fundamental liberties to ensure rights under the constitution as well as Human Rights Act 1999 is not breached. (a) In interpreting statutes, courts in UK have ventured into reading Human Rights provision into the Act. For example, in *R v. A (No.)* [2001] 2 WLR 1546, section 41 of the Youth Justice and Criminal Evidence Act 1999 was read together with the Human Rights Act 1998 to give effect in a way that was compatible with fair trial guaranteed under Article 6 of the European Communities Human Rights provision; (b) In *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557, the House of Lords took the position that the words 'spouse' should include homosexual

partners so that it does not infringe the European Convention on Human Rights. This may not be the position in Malaysia within our constitutional framework as well as Rukun Negara.

(13) Judicial power also means that the court has to remedy instances of injustice, mistrial, convictions, etc. if it is subsequently found to be unconstitutional. In *R v. Secretary R v. Secretary of State for the Home Department Ex p. Bentley* [1994] QB 349] – a family member of a man hanged for murder sought judicial review against the refusal of posthumous pardon by the Home Secretary, a subject related to prerogative. It was argued by the applicant that the Home Secretary had failed to recognize that the prerogative of mercy was capable of being exercised in many different ways. The court held: (a) the prerogative of mercy was reviewable and the court's powers could not be ousted by simply invoking the work 'prerogative'; (b) prerogative of mercy is a flexible power which was now a safeguard against mistakes; (c) the grant of conditional pardon would be an acknowledgement by the state that a mistake had been made; (d) the court would invite the Home Secretary to look again at the case. There is now authority to suggest that the prerogative related to powers of remission of sentencing can be invoked to deal with issues of fairness of sentencing. [See *R v. Secretary of State for the Home Department Ex p. Quinn* [2001] ACD 258].

(14) Judicial power also means that the court should not refuse to render justice to the accused on the ground that the executive claim that national security is involved. The court must in camera examine the papers and evidence to rule that indeed national security is involved. There is authority to suggest the courts judicial power will not be declined just because the minister said that national security was involved. [See *R v. Secretary For The Home Department Ex p. Ruddock* [1987] 1 WLR 1482].

(15) Judicial power also means that the court on its own motion should give protection to whistle blowers on case by case basis to ensure accountability is maintained at the highest level and is not concealed arbitrarily by Official Secrets Act, Banking Act, etc. In *D v. National Society for the Prevention of Cruelty To Children* [1978] AC 171, the House of Lords held that persons who gave information about child abuse, should remain anonymous as the source need to be protected as a matter of public interest.

(16) Judicial powers can be impinged on by judges themselves by encouraging writing of judgments in template format and usage of e-sentencing for sentencing which are monotonous and administrative in nature with no proper judicial appreciation. Sentencing is one of the most important exercise of judicial power and is extremely complicated in jurisprudence and has

much human element involved in it. It is just comical in jurisprudence to say it can be achieved via e-sentencing. Both the recommendation of using templates as well as employment of e- sentencing as well as practice impinges on judicial powers. In this respect, I had the benefit of reading the Indian Supreme court's decision of *Noor Aga v. State of Punjab & Anor* [2008] 16 SCC 417 [9th July 2008] – a drug case. The case discusses issues related to law on presumption, inference, legal fiction, burden of proof, a total scrutiny of facts in all aspects and refusal to accept evidence of top Indian Custom Officers and reversing the decision of the Sessions Court and the High Court in convicting the accused pursuant to the Narcotic Drugs and Psychotropic Substances Act 1985, a case equivalent to our Dangerous Drugs Act 1952, and concluding as follows:-

"1. The provisions of Sections 35 and 54 are not ultra vires the Constitution of India.

2. However, procedural requirements laid down therein are required to be strictly complied with.

3. There are a large number of discrepancies in the treatment and disposal of the physical evidence. There are contradictions in the statements of official witnesses. Non-examination of independent witnesses and the nature of confession and the circumstances of the recording of such confession do not lead to the conclusion of the appellant's guilt.

4. Finding on the discrepancies although if individually examined may not be fatal to the case of the prosecution but if cumulative view of the scenario is taken, the prosecution's case must be held to be lacking in credibility.

5. The fact of recovery has not been proved beyond all reasonable doubt which is required to be established before the doctrine of reverse burden is applied. Recoveries have not been made as per the procedure established by law.

6. The investigation of the case was not fair.

We, therefore, are of the opinion that the impugned judgment cannot be sustained which is set aside accordingly.

Before, however, parting with this judgment, we would like to place emphasis on the necessity of disposal of such cases as quickly as possible. The High Courts should be well advised to device ways and means for stopping recurrence of such a case where a person undergoes entire sentence before he gets an opportunity of hearing before this Court.

The appeal is allowed with the aforementioned observations."

(17) In the Indian case of *Noor Aga*, the accused was a crew member of Ariana Afghan Airlines. When he arrived at the airport, he presented himself for customs clearance as he was carrying a carton containing grapes. The cardboard walls of the said carton were said to have two layers. Suspicions were raised however as there was concealment in between the layers. The layers of the walls of the carton were thereafter separated, wherefrom 22

packets of polythene containing brown powder were allegedly recovered, of which upon subsequent investigations, were found to be heroin.

(18) The Sessions Court Trial Judge in convicting the accused and sentencing him to 10 years imprisonment relied entirely on the state's testimony and evidence given by the Customs lnspector (complainant and investigating officer), Superintendent Customs lnspector (a gazzeted officer), Customs Department Inspector (who dealt with the deposited sample), Deputy Commissioner Inspector (custodian of the case property), and the Inspector in charge of the evidence room.

(19) The Supreme Court scrutinised very thoroughly the judicial appreciation given by the Sessions Court and High Court to the facts and evidence of this case, and disagreed entirely with their findings. The Supreme Court in reversing the conviction of the trial Court held, *inter alia*, that the prosecution's testimony and evidence given by the respective officers were unreliable for the following reasons:-

(i) The cardboard carton was not produced in court being allegedly missing. No convincing explanation was rendered in that behalf by any of the prosecution's witnesses;

(i) The inference drawn by the trial Court was only on the basis of a mere assertion of the witnesses that the cardboard carton wherefrom the contraband was allegedly recovered as the one which had been in possession of the accused without any corroboration as regards the purported "apparent practice of crew members carrying their own luggage" and there being no identification marks on the same. No material in this behalf had been produced by the prosecution. No witness had spoken of the purported practice. No explanation had been given as to what happened to the container. Its absence significantly undermines the case of the prosecution. It reduces the evidentiary value of the statements made by the witnesses referring to the fact of recovery of the contraband therefrom;

(iii) Omission on the part of the prosecution to produce evidence in this behalf must be linked with second important piece of physical evidence that the bulk quantity of heroin allegedly recovered indisputably has also not been produced in court;

(iv) The prosecution contended that the same had been destroyed. However, on what authority it was done is not clear. Even no notice had been given to the accused before such alleged destruction. The High Court in its judgment purported to have relied upon an assertion made by the prosecution with regard to prevalence of a purported general practice adopted by the Customs Department to obtain a certificate in terms of the said provision prior to destruction of case property. However, taking recourse to the purported general practice adopted by the Customs Department is not envisaged in regard to

prosecution under the Act. Additionally, no such general practice had been spoken of by any witness;

(v) The High Court proceeded on the basis that non-production of physical evidence is not fatal to the prosecution case but the fact remains that a cumulative view with respect to the discrepancies in physical evidence creates an overarching inference which dents the credibility of the prosecution;

(vi) Physical evidence relating to three samples taken from the bulk amount of heroin was also not produced. Even if it was accepted for the sake of argument that the bulk quantity was destroyed, the samples were essential to be produced and proved as primary evidence for the purpose of establishing the fact of recovery of heroin. No explanation had been offered in this regard;

(vii) The High Court had also opined that the physical evidence was in safe custody. Such an inference was drawn on the basis that the seals were intact but what was not noticed by the High Court was that there were gaping flaws in the treatment, disposal and production of the physical evidence by the officers.

(20) The Supreme Court stated that provisions of the Narcotic Drugs and Psychotropic Substances Act 1985 ("NDPS Act") imposing the reverse burden must not only be required to be strictly complied with but must also be subject to proof of some basic

facts as envisaged under the relevant statute in question. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. In this case, the initial burden was never discharged by the prosecution and thus, the reverse burden doesn't even arise.

(21) The above case was cited with approval recently by the Indian Supreme Court in the case of *Hanif Khan @ Annu Khan v Central Bureau of Narcotics* where it was held that notwithstanding the prosecution under the Narcotic Drugs and Psychotropic Substances Act 1985 ("NDPS Act") carries a reverse burden of proof with regard to the culpable mental state of the accused in that the accused is presumed to be guilty consequent to recovery of contraband from him, the prosecution is still not absolved from first establishing a prima facie case.

(22) In that case, contraband of opium was seized from the accused. A sample of the seized contraband was extracted to be sent for examination and confirmation of its substance. The seal of the extracted seized sample was never tampered with but the signatures of the accused and independent witnesses on the seizure memo appeared to be abnormally apart than usual. The independent witnesses had further confirmed that they were never present at the time of search and seizure.

(23) Following from this, the Supreme Court found that there was no credible evidence that the seized sample produced related to the very same contraband stated to have been seized from the accused. As such, this created a serious doubt with regard to the veracity of allegations made by the prosecution. The Supreme Court thus found that the prosecution had not discharged their initial burden.

(24) The Supreme Court went on further to add that because there is a reverse burden of proof, the prosecution shall be put to a stricter test for compliance with statutory provisions. If at any stage, the accused is able to create a reasonable doubt, as a part of his defence, to rebut the presumption of his guilt, the benefit will naturally have to go to him.

(25) Any reasonable mind reading the above judgments will not say it is a template judgment. Template judgment are an affront to judicial power and oath of office of a judge. In a jury trial in England, it is well known that the juries are triers of fact and it is entirely their obligation to convict and/or acquit as it deem appropriate. It is not unusual to hear that they take great effort to deliberate on the matter with different views, etc. inclusive of taking into account the rampancy of the crime and deciding whether he or she should or should not be convicted of the offence on case by case basis. [See *Thamby bin Osman & ors v. Rex*

[1952] 18 MLJ CCA]. Equal responsibility lies on the trial court and thereafter by the appellate court to go and revisit each and every fact and just not rely on the totality of prosecution version to believe the story as gospel truth more so in this time and era where value system is highly compromised. The Court of Appeal in *Majlis Peguam Malaysia v. Norsiah Ali* [2020] 4 CLJ 149 on this issue, had this to say:-

"(i) Learned counsel for the appellant had placed an idealistic and scientific submission related to social order and humanity. A conscientious judge, administering criminal or quasi criminal jurisdiction, in an environment of purported compromised integrity in all institutions and social life itself has greater task to evaluate the pros and cons of sentencing and its effect on the person, family, public purse, etc. Idealistic and scientific submission and sentence may be good in a community of rational people, unbiased adjudicators inclusive of tribunal or disciplinary boards, lawyers, etc and also when the motion is moved fairly and justly with no element of purported fixing, etc. From the daily reading of news, these ideals are indeed absent and in consequence a conscientious judge has to take into many relevant consideration primarily based on the person who had been found guilty and as far as practical move towards a rehabilitative form of punishment as first consideration and, only where the circumstance warrant, harsher punishment should be considered and imposed. This aspect of rehabilitative punishment is now a norm in most civilised countries and is also reflected under the Legal Profession Act 1976 and a number of cases related to it.

(ii) As a starting point, it must be observed that the sentencing is the most difficult part of the judicial duty to a conscientious judge who has to take into consideration the accused's interest, inclusive of his family, public interest and more so, the fact when custodial sentence imposed will impinge on the state coffers and also the quality of humanity provision and safeguard in a depleted financial environment, which may not meet with humanitarian standards, etc.

Example 1: Ahmad steals a bread and Kassim steals a diamond necklace. Both being a non-violent crime. Is custodial sentence proper for both the case? Should it be a rehabilitative sentence for both or at least for Ahmad?

Example 2: Ahmad and Kassim returned to the owner what they stole. Is custodial sentence proper for both the cases or should it be rehabilitative in nature, on humanitarian grounds, as well as to save public purse.

(iii) The two examples that we have stated above, have relevance to this case and the questions posed by learned counsel for the appellant. We must concede that the jurisprudence as to sentencing has been a harsh dictate by legislation as well as courts in cases related to criminal and/or *quasi* -criminal offence, notwithstanding there are many unhappy humanitarian issues related to custodial sentence, so much so that now there is an attempt to amend the law to treat drug users as psychological patient *inter alia* to reduce the overcrowding in prison as well as to provide basic facilities to prisoners which is currently inadequate as per the media reports.

(iv) The Bar Council by attempting to push for harsh sentence misses the humanitarian aspect. The Disciplinary Board's order to provide the harshest sentence to an advocate on the present fact and to seek perfect idealism in a society of purported compromised values are also not realistic. To put it mildly, it is true that the rule of law will collapse in an environment of endemic liars, thieves, kleptocrats, etc. Does that mean the judge should impose the harshest punishment? Case law does not suggest that *per se*. (See *Leken Gerik (M) v. PP [2007] 8 CLJ 158 (HC)*; *Iszam Kamal Ismail v. Prestij Bestari Sdn Bhd, Majlis Peguam Malaysia (Intervener) [2017] 10 CLJ 417*)."

(26) Presumption itself must not be an attempt to take the judicial conscience of the judge as well as judicial power of the court to properly evaluate the facts and credibility of the witness as well as the probative weight to be given to evidence of one person's word against another in a criminal case related to drugs as it is a weak evidence with low probative value.

(27) Accepting evidence on the face value for purpose of template judgment and scrutinizing the evidence of the prosecution are two different roles. The first is an administrative exercise and the second is an exercise of judicial power to ascertain the truth to protect the accused from unfair and oppressive evidence against him as required by the law and the Federal Constitution. For every piece of evidence of the prosecution, the question of some form of corroboration must be in the mind of the judge

which could be produced or possibly done in this time and era of modern technology to justify that judicial power has been exercised. Simply inferring guilt because the arresting officer says he ran upon confronted is a piece of evidence which is harsh and oppressive against the accused, where court can currently take judicial notice that the environment in all levels of our institution and public life consists of people who are extremely economic of truth and have no respect for Constitution or Rukun Negara.

(28) If the wording of presumption forces the judge to accept it to convict, it will impinge on judicial power. However, if the wording of the presumption gives a discretion to act on the statutory presumption, it will not impinge on judicial powers. To put it in another way, parliament cannot positively legislate a presumption in violation of Articles 5 and 8 in breach of rule of innocence, enjoyed by the accused from the days of *Woolmington v. DPP* and continuing under the common law even after the birth of the constitution. Once, the constitution comes into effect, the oath of office of the executive, legislature and judiciary requires the public right not to be encroached on, in breach of Articles 5 and 8, etc. by intruding on the judicial power of the court to decide on the matter of presumption.

(29) It is not part of judicial power for an appellate court to search for evidence in favour of the prosecution to make out a case against the accused and convict. However, if the evidence has been tendered in court and taken up in submission by the prosecution so that the accused would have an opportunity to rebut to the submission then it would be proper to take into consideration by the apex court and decide as deem fit. Such an approach is consistent with the generic phrase, 'justice according to due process of law' and it also means there was a fair opportunity given to the accused to rebut on the submission both at the prosecution as well as defence stage. It is well established that justice encompasses a fair trial. Fair trial at the appeal stage also means that the prosecution will not extend a submission which was not duly placed before the trial court, as the role of the prosecution is to prosecute and not persecute at the trial stage as well as appellate stage. In essence, in an adversarial system it will not be fair to allow the prosecution to improve their case by fresh submission which was not placed before the trial court. The Criminal Procedure Code in section 422, does not cover such unfairness. In *Mraz v. The Queen* [1955] 93 CLR 493, a decision of New South Wales, Fullagar J opined:-

"It is very well established that the proviso to s. 6(1) does not mean that a convicted person, on an appeal under the act, must show that he ought not to have been convicted of anything. It ought to be read and it has in fact

always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried."

(30) Judicial power means many more than what has been stated above. It is for judges to develop them based on the jurisprudence advocated in the 'Three Cases'.

Negative Employment of Judicial Power

[43] The dilution of the constitutional framework as well as fundamental liberties and the emergence of oppressive laws inclusive of the shortcomings in the administration of justice is well documented in the seminal work titled 'Constitutional Landmarks in Malaysia (2007), with contribution of renowned constitutional jurists, namely:- (a) Tan Sri Rais Yatim; (b) Prof. Andrew J. Harding; (c) Tan Sri Visu Sinnadurai; (d) Datuk Dr. Cyrus Das; (e) Datuk Mahadev Shanker; (f) Prof Dr. Abdul Aziz Bari; (g) Dr. R.R. Sethu; (h) Prof. Dr. Li-ann Thio; (i) Dr. Kevin Y.L. Tan; (j) Prof. Dr. Johan Shamsudin Sabarudin; (k) Prof. Dr. Victor V. Ramraj; (l) Prof. Jesse Wu Min Aun; (m)

Dr. Poh Lin Tan; (n) Prof. H.P. Lee; (o) Prof. Dr. Khairil Azmi Mokhtar; (p) Dr. Reuban Ratna Balasubramaniam; (q) Phillip T.N. Koh. The book has documented negative employment of judicial power by the judiciary as well as executive and legislative intrusion on fundamental liberties as well as constitutional framework in breach of oath of office.

[44] It is important to note that the Federal Court in *Dato' Yap's* case, by majority upheld position that judicial power was vested in the court and His Lordship Abdoolcader went into umbrage with words such as 'intromission' to show the distaste of the court when there was executive encroachment on the judicial power of the court. Subsequently, parliament in 1988 went to amend the Constitution to imply that the judicial power is subject to Federal law. However, courts in most of the decisions subsequent to the amendment continued to exercise the judicial power and finally in the *Semenyih Jaya's* case, the Federal Court settled the issue on the debate that parliament has deprived the court of judicial power in a forceful manner. The umbrage of words by His Lordship Abdoolcader in respect of intrusion in *Dato' Yap's* case of judicial power were as follows:-

> "In my view the provisions of section 418A are both a legislative and executive intromission into the judicial power of the Federation. It is a legislative incursion to facilitate executive intrusion, and the Deputy in answer to a question I put to him had perforce to agree that in the context of subsection (3) of section 418A judicial power would amount to 'doing what you are told to do.' The provisions of section 418A specifically apply to any particular case triable by and pending before a subordinate court and the referential application of the provisions of

section 417(3)(b) and (4) by subsection (3) of section 418A clearly refutes the submission put forward for the Public Prosecutor both before us and in the Court below that his power is not limitless and cannot be exercised if the trial before the subordinate Court has commenced and that he can only exercise his power to issue a certificate under subsection (1) of that section if no witnesses have been called or examined and that therefore the section does not offend article 121(1). An invalid legislative interference acts on pending judicial proceedings, either directly or indirectly by executive action arrogating to itself functions proper to the courts, and usurps or obtrudes on the judicial process. If the Public Prosecutor desires to choose the forum of trial of criminal proceedings under his powers under article 145(3), it is open to him to do so under sections 138, 177 or 417 of the Code but his power of choice cannot supersede the judicial power exercisable by virtue of the statutory provisions in the Code I have referred to.

I cannot but conclude in the circumstances that there is in fact by the exercise of the power conferred by section 418A on the Public Prosecutor an incursion into the judicial power of the Federation and that any other view would *ex necessitate rei* result in relegating the provisions of article 121(1) vesting the judicial power of the Federation in the curial entities specified to no more than a teasing illusion, like a munificent bequest in a pauper's will. The power of the Public Prosecutor under section 418A is uncanalized, unconfined and vagrant. The Deputy however assures us that this power will only be exercised reasonably. Now this is exactly what happened in *Attorney-General v Brown [1920] 1 KB 773* usually called the 'Pyrogallic Acid Case,' in which to complaints about the tremendous breadth of the authority contended for by the Government in the matter of statutory authorisation for the importation of goods, Sir Gordon Hewart, who was the Attorney General at that time, arguing for the Crown, put (at page 779) what has since become the stock of those who see no danger in Executive power being left uncontrolled (and this is quite ironic in view of his subsequent condemnation of

similar apologists): "The Government could be relied upon to see that the power was reasonably exercised." Sankey J., however, had no difficulty in holding the Executive action illegal, and he pointed out (at page 791) that the Crown's argument that the Executive could be trusted begs the question, for the court could concern itself only with the bare issue of the possession of the claimed power, and not whether it would be reasonably exercised." [Emphasis added].

[45] Renowned Prof. Tan Sri Visu Sinnadurai who was also a former senior judge, in the 'Constitutional Landmarks in Malaysia (2007)' Lexis Nexis titled 'The 1988 Judiciary Crisis and its Aftermath', had documented extensively the conduct of the executive as well as the judiciary which has put the administration of justice into disrepute. At page 175 says:-

"In 2000, The International Bar Association (IBA).The Centre for the Independence of Judges and Lawyers of the International Commission of Jurists (CIJL), The Commonwealth Lawyers' Association (CLA) and The Union Internationale des Avocats (UIA) sent a joint mission to Malaysia 'following reports that the independence of the judiciary was under threat and that lawyers were facing difficulties in carrying out their work freely and independently'. The joint mission's findings and recommendations were published in the report entitled '*Justice In Jeopardy: Malaysia 2000*'. Some of these findings are summarised in the subsequent Report of the Geneva-based International Commission of Jurists Report on Malaysia in 2002, entitled *Malaysia - Attacks on Justice 20027* It concluded that the powerful executive in Malaysia had not acted with due regard for the essential elements of a free and democratic society based on the rule of law. The report examined the relationship between the executive, the Bar Council and the judiciary and found that in politically and economically sensitive cases the

judiciary was not independent. It found that the autonomy of the Bar had been threatened by the government and that the relationship between the Bar and judiciary was strained. It noted that in politically sensitive defamation cases, awards of damages were so great that they stifled free speech and expression. It also noted that the use of contempt proceedings against practising lawyers constituted a serious threat to their ability to render services freely." [Emphasis added].

[46] It is important for every judge to read this chapter to ensure by their conduct that they do not put the administration of justice in disrepute. In essence, the judicial power must not be abused by invoking contempt powers against critics and media; as independent press is bulwark of accountability, transparency and good governance of the rule of law for democracy to survive. English judges take no attempt to victimize persons who are said to have scandalized or purportedly scandalized the court. As Lady Hale said: "We have a free press and if the press wants to attack us, that's fine. But we have to continue to do the job according to our judicial oaths … we certainly do not pay any attention to attacks of that nature."

[47] It is also important to note that as advocated in *Alma Nudo's* case by endorsing Lord Bingham's 'pearls' of rule of law, as well as that of other jurists:- the 'Law' of contempt must therefore satisfy certain basic requirements, namely: (a) it should be clear; (b) sufficiently stable; (c) generally prospective; (d) of general application; (e) administered by an independent judiciary; and (f) the principles of natural justice and the right to a fair trial are observed. Thus, the contempt power of courts except for

contempt of court itself as well as orders of courts, must be legislated under Article 10 of the Federal Constitution before it can be exercised within the constitutional framework. Giving extended meaning to Article 126 against member of public and applying contempt powers will be in breach of Articles 5, 8 and 10 of the Constitution and also the Human Right Convention 1948 as well as the Suhakam Act and may stand as gross and oppressive use of judicial power. This area of law was discussed in the decision of the Court of Appeal in *Pegawai Pengurus Pilihanraya v. Streram Sinnasamy & ors* [2019] 1 LNS 589, where it was observed:-

At page 7 para 4:

> "[4] Contempt jurisdiction will be best understood if one can appreciate the spirit and intent of rule of law as well as the constitutional framework of executive, legislature and the judiciary which is premised on oath of office, to preserve, protect and defend the Constitution. This oath materially means each and every pillar is bound to act according to civilized concept of reasonableness, proportionality, accountability, transparency, good governance and none will act arbitrarily and the judiciary will not create laws as opposed to interpretation of the statutes and the Constitution. All these ensure that some of the common law cases on contempt does not rule us from its graves."

At page 8 para 6:

> "[6] English judges have repeatedly said that contempt jurisdiction is not in any way meant for the court to shield its own conduct or wrongdoings, from being exposed or its arbitrary exercise of powers to be questioned or buried, and/or rules of natural justice to be breached. Such an approach will also be inconsistent

with the spirit and intent of the Federal Constitution which is premised on democratic principles anchored based on rule of law which in simple terms must subscribe to accountability, transparency and good governance. If these premises are perceived in the proper perspective, it will be easier to deal with this area of jurisprudence which is archaic and complicated over decisions of courts that are inconsistent with the rule of law and the Federal Constitution. Public perception of self-serving judgments in the area of contempt may immediately meet with resistance from the public as well as stakeholders of justice. Such perception will undermine the public confidence in the judiciary for years to come and will also stand as a black mark in the history related to judgments as well as the judges. To avoid such perception, English judges have narrowed down the scope of contempt to bare minimum and have always applied the strict test to assess the gravity of the act or conduct to find contempt."

At page 23-24 para 33:

"[33] It must also be noted that it will be jurisprudentially a misconceived proposition to accept common law cases of contempt in respect of procedure as part of our judicial precedent when the law of contempt in England do not consider provisions like Articles 5, 8, 10 and 126, etc. inclusive of other statutory provisions and disciplinary procedures, etc.; which were not part of the English law when archaic jurisprudence of contempt was developed. The Constitutional provisions make it unconstitutional to summarily move any form of contempt application without giving appropriate opportunity to the purported contemnor for the matter to be dealt with according to due process of law where the judge is the prosecutor, jury, judge as well as may be a witness in cases of contempt in the face of court. An onerous duty of such nature if exercised must be done with courtesy and fairness without extending the scope of Article 126 of the

> Constitution, failing which it will lead to public condemnation and/or ridicule and will place the administration of justice in disrepute by judges themselves. To put it mildly, it is not a trigger-happy jurisdiction and if exercised arbitrarily as well as subjectively, it becomes sinful in nature when custodial sentence are ordered without full appreciation of rule of law and due process. In consequence the English Courts are extremely slow in invoking the jurisdiction." [Emphasis added].

[48] It is important for judges themselves to take note of this aspect of judicial power and must not bring further shame to the judicial institution by arbitrary exercise of judicial power, in breach of rule of law. No amount of justification in a judgment justifying caging media persons or advocates for contempt or attempted contempt for scandalizing court in this time and era will enhance the image of judiciary in exercising its judicial power. Such judgments will be perceived to be one of the lowest ebb in the evolutionary jurisprudence related to constitutionalism as documented in the 'Constitutional Landmarks (2007)'.

[49] It is extremely important to note that the judicial power under the oath of office is meant to enhance 'Justice'. Judicial power cannot be employed to abuse the constitutional framework as seen in many cases and documented by international jurist in 'Justice in Jeopardy' Malaysia 2002 and the Geneva based International Commission of Jurists Report on Malaysia in 2002 entitled "Malaysia – Attacks on Justice'.

Ong Ah Chuan, Presumption, Sentencing and Death Penalty

[50] The Privy Council's decision in *Ong Ah Chuan*, arising from appeal originating from Singapore is always cited in drug offences in Malaysia. It is also cited in other cases like that related to detention orders by executive, sentencing and death penalty cases. The decision in *Ong Ah Chuan* on presumption and sentencing was instrumental for imprisonment and death penalty where many were hanged in Malaysia and Singapore and probably in other parts of the commonwealth countries.

[51] In *Ong Ah Chuan*, the Privy Council confirmed the conviction and sentence of death ordered by the High Court as well as the appellate division of the Supreme Court of Singapore.

[52] The Privy Council opined presumption under the Act is permissible and does not infringe on the Singapore version of our Articles 5 and 8. It went on to sustain statutory presumption notwithstanding the executive, legislature and the judiciary in Singapore also take an oath to preserve, protect and defend the Constitution as in Malaysia.

[53] As explained earlier, it is indeed clear that not all forms of presumption will pass the test of constitutionality and very importantly within our constitutional framework any presumption dictated by parliament which impinges on judicial power of the court will have to be struck down or the court reading the section must read into it the following words 'The court

may at its discretion' (or its like). It is important to appreciate that while interpreting a statute the court must strictly give effect to the intention of parliament by the application of common law cannons of interpretation to be read with section 17A of the Interpretation Act which deals with purposive approach. However, where a statute is related to some elements of the Constitution, be it in penal statutes or commercial statutes or its hybrid, the rules of interpretation differs. This proposition is also acknowledged in *Alma Nudo's* case.

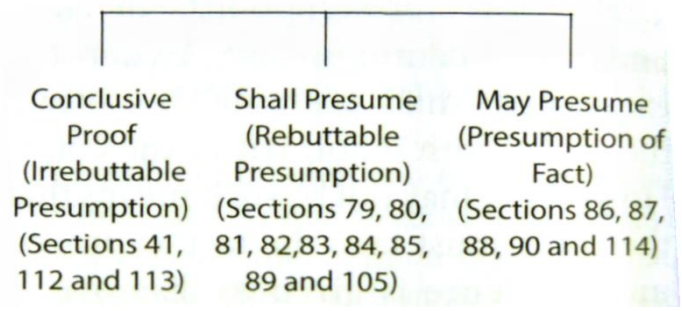
[54] To put it mildly, in the Malaysian context, the section 15 in *Ong Ah Chuan* or section 37(d) or 37(da) of DDA 1952, in the absence of judicial power; presumption is a legal fiction which will not satisfy the constitutional test of law as set out in *Alma Nudo's* case. However, if it has been in section 116 of the Singapore Evidence Act or 114 of the Malaysia Evidence Act which in the assessment of evidence of possession and/or trafficking vest the judicial power on the court then it will pass the constitutional test of law as explained in *Alma Nudo's* case. In a country which is subject to parliamentary supremacy, it may be perfectly legal to hang a person on legal fiction. However, in a country which enjoys constitutional supremacy, it will offend Articles related to fundamental liberties. The distinction in jurisprudence is not one of an apple and orange but marble to pumpkin. One is Rule by Law and the other is Rule of Law.

Permissible and Non Permissible Presumption

[55] To understand permissible and non-permissible presumption and/or legal fiction, it is best to refer to the works of Sir James Fitzjames Stephen, the Master Architect of the Indian Evidence Act who codified the uncodified English Law on Evidence, which has been adopted in Singapore as well as Malaysia. The brilliant jurist even at that time in 18th century was aware that in providing for presumption, the judicial power of the courts should not be impinged. And the great jurist when incorporating about 167 sections of the Indian Evidence Act had ensured all presumptions are to be dealt with at the discretion of the court. The relevant section 4 under EA 1950 reads as follows:-

> "**Presumption**
>
> 4. (1) Whenever it is provided by this Act that the court may presume a fact, it may either regard the fact as proved unless and until it is disproved, or may call for proof of it.
>
> (2) Whenever it is directed by this Act that the court shall presume a fact, it shall regard the fact as proved unless and until it is disproved.
>
> (3) When one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it."

[56] All presumptions stated in section 4 will not impinge on judicial power of the court. Authors and book writers have divided the presumption into three categories, namely - may presume, shall presume and conclusive proof. The one related to conclusive proof is often referred to as irrebuttable presumption for the purpose of learning but in fact it is not in relation to judicial power. A flow chart on presumption under the Act will help to understand the relevant sections:-



[57] Section 41 relates to judgment of courts to be conclusive proof but it does not tie the hands of the court to reject the evidence if it is proved to be forged, etc. Thus, in that sense it is not irrebuttable.

[58] Section 112 deals with birth during marriage as conclusive proof but it is also rebuttable as the section itself provides for the methodology to challenge it.

[59] Section 113 presumption that a boy under 13 years old cannot commit rape but this presumption has nothing to do with judicial power as it is to stop the prosecution from initiating a charge of rape against a boy under the age.

[60] The Act itself does not define presumption. However, Sir Fitzjames Stephen in his seminal work 'Digest on Evidence' defines presumption to mean:-

> "A rule of law that court and judges shall draw a particular inference from a particular fact or from a particular evidence, unless and until the truth of such disproved."

[See pages 115 to 120 - Janab's Key to The Law of Evidence, Advocacy and Professional Ethics, (5th edn) Revised by Dato' Mah Weng Kwai, Arun Kasi and Datuk Joy Appukuttan].

[61] Thus, the learned jurist Sir James anchors on the rule of law and not by 'Rule By Law'. Our section 37(d) or 37(da) may not impinge on the rule of law or face criticism if it has been placed under section 114 of EA 1950 which read as follows:

> "114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

> The court may presume— (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession; (b) that an accomplice is unworthy of credit unless he is corroborated in material particulars."

[62] As it stands, presumption under the DDA 1950 impinges on judicial power as advocated by the 'Three Cases'. The 'Three Cases' which had not identified the scope of judicial power is now a subject which is open to the courts to deal with it from time to time and based on the facts. Relying on *Ong Ah Chuan's* decision on presumption to convict and order death penalty is a jurisprudential flaw which can only be cured authoritatively by the apex court. Notwithstanding the statutory presumption court can exercise its judicial power to find possession as well as trafficking if the evidence is satisfactory and credible and meets the burden of proof as required by the law. This has been what 'Juries in Jury Trial' have been doing for centuries and to say that judges cannot perform the task is indeed comical.

[63] On similar reasoning, the judicial power of the court should not be impinged on by legislature in relation to detention, remand, sentencing as well as capital punishment. These under our constitution comes within the judicial power of the court. The legislature can set out the sentence inclusive of death penalty as a guideline but cannot impose for mandatory imposition as can be done within the regime of parliamentary supremacy. In essence, death penalty may be legal but it must be the court which must decide on

the issue, taking into consideration all principles of sentencing as well as the proportionality principle. By applying the jurisprudence of *Ong Ah Chuan*, which is unique to parliamentary supremacy many have lost their lives not only in Malaysia and Singapore but also many countries in the commonwealth.

[64] One simple solution to remedy is to read into the Act for presumption or sentence to be 'at the discretion of the court'. Support for the proposition is found in many cases in England itself when the courts had to deal with human right issues. Some of them have been cited above.

[65] With all the oppressive laws in breach of the constitutional framework, we have not in the past 60 years become a better society. This would not have happened if the constitutional oath of office is treated as sacrosanct and followed by the executive, legislature and the judiciary.

[66] With all the jurisprudence now available as opposed to few decades ago, relying on judgments where judges have taken oath of office to be subservient to legislation and applying it to the interpretation of the constitution is one which may fall under the concept of dereliction of duty of a judge.

[67] Presumption in the nature of legal fiction which does not give a discretion to the court is not based on the rule of law but one related to the rule by law. In *Alma's* case, the apex court when dealing with Article 5 went

to hold 'the law must be one that is fair and just and not merely any enacted law, however, arbitrary, unfair or unjust, it may be. Otherwise that would be rule by law.

[68] To put it mildly, sections 37(d) or 37(da) presumption is an open goal post for the prosecution to kick the ball in. However, by saying the 'court may at its discretion'; you have the judge to stand as a goal keeper to ensure that true protection is given to the accused in support of Articles 5 and 8 of the Constitution. Thus, a presumption which does not place the discretion on the court, impinges on judicial power; besides the legislation is also not proportionate to the problem in hand within our constitutional framework taking into consideration EA 1950. With a judicial goal keeper, the prosecution need to have a higher skill to kick the ball in and that skill under the rule of law is what we call the evidential skill of placing evidence of high probative force, to prove the case beyond reasonable doubt.

Conclusion

[69] Whether my explanation on legal fiction and legal presumption is correct needs to be debated by jurists, lawyers and courts in further cases. In addition, if inference is the main ground in a judgment to justify taking the life of a person, that jurisprudence must indeed be harsh and oppressive after the 'Three Cases'. [See *Haw Tua Tau v. Public Prosecutor & Other Cases* [1981] 1 CLJ 11]. It needs a lot of learning as well as experience to make such a statement in the light of the Privy Council's decision that one can be found

in possession and/or trafficking based on the said statutory presumption as well as hanged notwithstanding for both, the judicial power has not been truly vested in court. In my view, the only judge in the Malaysian context who appears to have realized the sin of executive and/or parliamentary intrusion of judicial power was Abdoolcader FCJ (The Legal Lion of The Commonwealth). In contrast to my words, such as 'naked fakir' which has its origin to some extend from England itself; it is indeed very mild to describe executive and parliamentary encroachment of fundamental rights and constitutional framework with the support of negative exercise of judicial power by the judiciary. In consequence, there was justification in umbrage of words which was not parliamentary in nature to have been used in the case of *Dato' Yap*. Judicial independence will only be installed if such courage is demonstrated by judges in the judgment. Thus, the role of a judge in Malaysia to stand up to His oath of office is not an easy task; and it is also reflected in *Lady Hale's* statement.

[70] To put it extremely soft and mild, after the 'Three Cases'; it is now also the constitutional responsibility coupled with judicial power for judges to put into practice what was preached by the apex court.

[71] I am sad and depressed to pen this judgment to document the failure to understand and appreciate the oath of office and judicial power, as well as constitutional framework which has led to loss of life as well as liberty and immense hardship to affected families in cases related to presumption and the absolute reliance on the Privy Council's decision of *Ong Ah Chuan*

and many more not only in drug cases but also other cases. In any event, as per my constitutional oath, I have planted the seed of renaissance for the apex court to reap the fruits by ensuring the rule of law is paramount for the deprivation of life and liberty and it cannot be simply done by recognizing rule by law which impinges on judicial power at the expense of the accused. In my considered view, all those aggrieved may also be in a position to at least seek some form of relief and/or at least an apology if my reasoning in relation to presumption and sentencing in this judgment is jurisprudentially correct.

[72] As I stated before, it would not be proper to disagree with my coram members to confirm conviction and sentence, though I felt otherwise for reasons stated above. Therefore the appeal of the 1st accused (Anyim Daniel Ikechukwu) against his conviction and sentence and that of the Public Prosecutor against the acquittal of the 2nd accused (Aluma Mark Chinonso) are both dismissed.

Dated: 17 June, 2020

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

Note: Grounds of Judgment subject to correction of error and editorial adjustment etc.

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