

To:

All members of Parliament, Malaysia.

**Re: FEDERAL COURT HAS ENCROACHED THE JURISDICTION OF PARLIAMENT
(Proposed Amendment of Article 159 of The Federal Constitution)**

I am writing this open letter to all Members of Parliament, Malaysia to bring to their attention that, through its judgments beginning in 2010, the Federal Court had exceeded its jurisdiction, encroached onto the jurisdiction of the Parliament and limited the power of Parliament to amend the Federal Constitution.

This is a very serious matter as it offends the doctrine of separation of powers and parliamentary democracy laid down by the Constitution. It has to be corrected, lest it becomes a permanent feature of our constitutional law.

For this purpose, I am appealing to all members of Parliament to put aside their political differences and vote together for an amendment to Article 159 to restore the powers of Parliament to its original position.

We talk about separation of powers between the Legislature, the Executives and the Judiciary. Very often, we focus on the Executives encroaching on the jurisdiction of the Judiciary. But, do we ever think of the reverse, i.e. the Judiciary encroaching on the jurisdiction of the Executives and the Legislature?

Article 159 provides that certain parts of the Constitution may be amended in a certain way. The power to amend the Constitution is vested in the Parliament. Nowhere does it say that certain parts of the Constitution cannot be amended. Nor does it say that judges may amend the Constitution to the effect that certain provisions of the Constitution cannot be amended by Parliament.

Yet what happened in **Sivarasa Rasiah v Badan Peguam Malaysia & Anor**. [2010] 2 MLJ 333 and **Semenyih Jaya Sdn Bhd v Pentadbir Tanah Hulu Langat (2017) 3 MLJ 561**?

Let me tell the story from the beginning.

In 1973, the Indian Supreme Court decided the case of **Kesavananda Bharati v State of Kerala**, AIR 1973 SC 1461. The court held that Article 368 of the Indian Constitution (on the amendment of the Indian Constitution) does not enable Parliament to alter the basic structure or framework of the Constitution. The effect of that judgment is that certain provisions of the Indian Constitution form the basic structure of the Constitution. The court will decide which provisions of the Constitution form the basic structure of the Constitution on a case by case basis. The court will then use the basic structure principle as the basis of its power to review, and to strike down, amendments to the Constitution enacted by the

Parliament which seeks to alter this basic structure of the Constitution. In other words, the power of the Parliament to amend those parts of the Constitution which, according to a judge or judges, form the basic structure of the Constitution, is removed, by the judge or judges!

That case was decided by a slim majority of 7 to 6. It is said that when the case was decided, the perception by the majority bench that elected representatives could not be trusted to act responsibly, was unprecedented.

Question: If members of Parliament or the Executives think that judges are corrupt, does that give them the power to transfer cases in court to be decided by them?

Following that and similar judgments, lawyers in Malaysia, led by three successive presidents of the Bar Council, namely GTS Sidhu, Raja Aziz Addruse and Param Kumaraswamy tried hard to influence the then Federal Court to adopt the principle.

However, their attempts failed. The Federal Court in **Loh Kooi Choon v The Government of Malaysia** [1977] 2 MLJ 187 rejected it. Tun Suffian (LP) and Wan Suleiman (FJ) wrote separate judgments giving reasons why they were not inclined to follow it.

That judgment was followed by the Federal Court in **Phang Chin Hock v. Public Prosecutor** [1980] 1 MLJ 70.

In 1989, the case was followed by the Singapore High Court in **Teo Soh Lung v Minister for Home Affairs and Ors.** [1989] 2 MLJ 449.

Loh Kooi Choon stood as the law of this country for 33 years. One would have thought that the issue regarding the basic structure of the constitution was settled.

However, that was not to be thanks, in particular, to one man. Towards the end of his career, Gopal Sri Ram JCA was promoted to the Federal Court. He was a member of the panel that decided **Sivarasa Rasiah v Badan Peguam Malaysia & Anor.** [2010] 2 MLJ 333. (I had retired then.) Even though he was the most junior member of the panel, he delivered the judgment of the court.

The issue was whether section 46A(1) of the Legal Profession Act 1976 was unconstitutional. The court, through the judgment of Gopal Sri Ram FCJ held that it was constitutional. I have no problem with that. But I strongly object to the basic structure principle being introduced through that case into this country because:

1. It is not at all necessary for the decision of that case. What was being challenged in that case was the validity of section 46A(1) of the LPA. No one was trying to amend any provision of the Constitution. What was the relevance of the basic structure principle?

2. The **Kesavananda Bharati** case was followed without analysing the case or the circumstances surrounding it. The learned judge either brushed aside or ignored the earlier judgments of the Federal Court which had stood for more than 30 years.
3. (This is more important). The court was usurping the function of Parliament to amend the Constitution. Indeed, even Parliament cannot make such an amendment, because Parliament cannot bind itself from making laws inconsistent with the existing laws, provided the procedure is followed. Otherwise, no law can be amended.

Seven years later, the Federal Court handed down the judgment in the case of **Semenyih Jaya Sdn Bhd v Pentadbir Tanah Hulu Langat** (2017) 3 MLJ 561.

That judgment relied on the judgment of Gopal Sri Ram FCJ in **Sivarasa Rasiah** as the authority for the introduction of the basic structure principle into this country, without any question. It also ignored or missed **Phang Chin Hock** and **Teo Soh Lung**.

As a result, the basic structure principle becomes the law of this country. The effect is that even a single High Court judge, may declare that a particular provision of the Constitution forms the basic structure of the Constitution and therefore cannot be amended by Parliament. On that ground, the judge may declare a law, duly passed by Parliament to amend that particular provision of the Constitution, unconstitutional and therefore null and void.

In so doing, the judge, first, is saying that the article which the Parliament had sought to amend cannot be amended, when Article 159 of the Constitution does not say so, provided the correct procedure is followed.

Secondly, the judge is saying that Parliament has no power at all to amend that particular article when Article 159 does not say so, provided the correct procedure is followed.

Thirdly, the judge has curtailed the powers of Parliament to amend the Constitution by following the said judgments of the Federal Court.

Where do the judges obtain their power from? The Indian Supreme Court!

I object to the introduction of the basic structure principle invented by judges of the Indian Supreme Court on ground of principle and nothing else. We cherish the doctrines of independence of the judiciary, separation of powers, rule of law, Parliamentary democracy and supremacy of the Constitution. Now judges are giving themselves the power to amend or rewrite the Constitution.

I stand by what I had said in my judgments: No judge is a Parliament. If the doctrine of separation of powers were to have any meaning, all the three branches of the government i.e. Legislature, Executive and Judiciary must respect each other's jurisdiction.

I hope our members of Parliament are aware of what has happened and the effects thereof.

What recourse do they have? The answer is to revert to the Constitution. The power to amend the Constitution is vested in the Parliament. In the name of parliamentary democracy and separation of powers, all members of Parliament, whether they are from the government or the opposition, should come together and move a bill to amend the Constitution to the effect that Parliament may amend any part of the Constitution provided that the procedure laid down by the Constitution is followed. The original position should be restored.

For more detailed discussions on this subject, please read my articles and speeches available on my websites, at least, No Judge Is A Parliament (30 03 2018).

Thank you.

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