Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another case – A Landmark in Constitutional and Land Acquisition Laws

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I. INTRODUCTION

For close to 30 years, the Malaysian judiciary has lived under the shadows of the 1988 amendment that removed the phrase "judicial power of the Federation" from Article 121 of the Federal Constitution.[1] This legislative blow struck at the very heart of the principles of separation of powers and the independence of the judiciary in Malaysia. The Federal Court in 2007 even explicitly acknowledged the inferiority of the Courts from amongst the three organs of government in light of the amendment.[2]

However, in 2017 the Federal Court courageously and emphatically turned the tide on what was deemed a foregone conclusion. In unanimous fashion, the apex bench in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another case*[3] (Semenyih Jaya Judgment) recognised the basic structure doctrine and proceeded to decide that the 1988 amendment cannot take away sacrosanct constitutional concepts such as separation of powers and judicial independence.

In deciding so, the Federal Court struck down section 40D of the Land Acquisition Act 1960 (LAA), which essentially provides that the Court has no choice but to decide on the value of land acquired from the amount provided by the two assessors. This decision reaffirmed that 'judicial power' rests in the Courts alone and cannot be delegated to third parties by the legislature. The 'fall' of section 40D of the LAA has substantially reformulated the role of assessors in land reference proceedings.

Whilst this is a landmark case on constitutional law, many parties often overlook how it is also ground-breaking in the area of land acquisition law. For the first time ever, the Federal Court expanded the scope of "market value" in land acquisition to include loss of business. This ruling opens the door to the multifarious scenarios where loss of business can occur in calculating the value of acquired land, which will largely benefit business owners. In so doing, the Federal Court sought to give the full effect to the right to property under Article 13(1) of the Federal Constitution.

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1 Constitution (Amendment) Act 1988.

2 *Kok Wah Kuan v PP* [2007] 4 CLJ 454.

3 [2017] 3 MLJ 561.

II. FACTS

There were two cases which were heard and decided together in this decision. In Appeal No. 01(f)-47-11 of 2013(B), the appellant, Semenyih Jaya Sdn Bhd, was granted leave to appeal against the decision of the Court of Appeal. In Reference No. 06-3-05 of 2013(B), the applicants, Amitabha Guha and Parul Rani Paul, referred several questions to the Federal Court. Both parties were dissatisfied with the land administrator's award on the amount of compensation for their land.

The factual circumstances relating to Semenyih Jaya Sdn Bhd were more pronounced because the questions for leave relate directly to the scope of 'market value' in land acquisition. The award granted by the land administrator and the High Court to Semenyih Jaya Sdn Bhd comprised of - (i) market value of the land at RM17,627,400.00; (ii) consequential loss at RM3,234,881.75 being loss suffered from termination of the project namely piling works, building works, and others; and (iii) severance and injurious affection at RM1,160,020.00.[4]

Nonetheless, Semenyih Jaya Sdn Bhd's complaint was that such award had failed to take into account that it had already embarked on the commercial development of the land. As the Federal Court summarised:

> Earthworks and piling works had commenced. The Appellant had entered into 57 sale and purchase agreements with third party buyers of the factory units being built. It had collected the 10% deposit and had expended funds for the development works. However the acquisition had extinguished the Appellant's ongoing business on the land. The Appellant lost the profits that was in the course of making at the time of acquisition.[5]

There were six questions of law posed by Semenyih Jaya Sdn Bhd, which include issues such as the right of appeal. This case note does not seek to analyse all the issues discussed in the judgment, but focuses on two issues reflected in the following questions of law raised to the Federal Court:

(i) whether the amended section 40D is constitutionally valid in providing for a conclusive determination by the assessors (as opposed to the judge) as to the amount of compensation in the face of Article 121 of the Federal Constitution that contemplates that the judicial power of the courts should be exercised by judges only;
(ii) whether the safeguard of 'adequate compensation' in Article 13(2) of the Federal Constitution is met where the land administrator refuses to take account of the development value or profit value of the land acquired where the subject land at the time of acquisition is already being commercially developed for profit.

The questions of law posed by Amithaba Guha & Parul Rani Paul directly overlap with the above and will not be repeated herein.

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4 *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another* [2017] 3 MLJ 561 at p. 612.

5 *Ibid.* at pp. 612-613.

III. REASONING OF THE COURT

A. The Constitutionality of Section 40D of the LAA & Judicial Power Post-1988

The Court began by tracing the colourful history of amendments to the LAA. Before 1984, subsections 42(2) and (3) of the LAA provided that while assessors had a key role in advising the judge, it was the judge who possessed the judicial power to decide on the amount of compensation to be paid in respect of the land acquired. In 1984, subsections 40-42 of the LAA were deleted, therefore removing the role of the assessors in the land reference court. However, in 1997, the role of assessors became relevant again via the Land Acquisition (Amendment) Act 1997, but the 'sea-change to matters' was found in section 40D of the LAA which empowers assessors to decide on the amount of compensation to be awarded arising out of the acquisition.[6]

The Federal Court recognised that such an amendment imposes upon the judge a duty to adopt the opinion of the two assessors or either one of them, but he or she cannot come to a valuation different from that of the assessors. Such relegation of power of judges in land reference proceedings is aptly described by the Federal Court:

> Wherefore now stands the judge? It would appear that he sits by the sideline and dutifully anoints the assessors' decision…Section 40D of the Act therefore effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it.[7]

In that context, the Federal Court felt it necessary to embark on what 'judicial power' meant and whether it remained exclusive with the judiciary. There were three important points to note from this analysis of the Federal Court.

First, it broke new ground when it declared that judicial power belongs exclusively to the courts. It recognised that on *Merdeka* Day[8], Article 121 of the Federal Constitution equipped the courts with the necessary powers to fulfil their function as the Superior Courts of Malaysia. However, vide the Constitution (Amendment) Act 1988 (Act A704), the words 'judicial power' do not form part of Article 121 anymore. This culminated in the controversial majority decision of the Federal Court in *PP v Kok Wah Kuan*, whereby Abdul Hamid PCA (as he then was) decided that, in light of Act A704:

> to what extent such 'judicial powers' are vested in the two High Courts depends on what federal law provides, not on the interpretation the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment.[9]

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6 *Ibid.* at p. 583.

7 *Ibid.* at p. 585-586.

8 The Bahasa Malaysia word for Independence.

9 *Supra* n 2, at pp.14-15.

Nonetheless, the Federal Court in this case refused to follow the "narrow interpretation"[10] of the majority in *PP v Kok Wah Kuan* and instead adopted the dissent of Richard Malanjum CJSS. It is worth reproducing part of Richard Malanjum CJSS's inspiring dissent therein:

> I do not think that as a result of the amendment our courts have now become servile agents of a federal Act of Parliament and that the courts are now only to perform mechanically any command or bidding of a federal law. It must be remembered that the courts, especially the superior courts of this country, are a separate and independent pillar of the Federal Constitution and not mere agents of the federal legislature.[11]

Second, the Federal Court reaffirmed the importance of – (i) the doctrine of separation of powers and (ii) independence of the judiciary, declaring that Act A704 impinges on these two fundamental features of the Federal Constitution. The Federal Court resoundingly rejected the supremacy of the two other government organs through Act A704, holding that it has "suborned the judiciary to parliament"[12] and has allowed "the executive a fair amount of influence over the matter of the jurisdiction of the High Court."[13]

In this respect, the main thrust of the Semenyih Jaya Judgment is encapsulated in the following paragraph:

> The judiciary is entrusted with keeping every organ and institution of the state within its legal boundary. Concomitantly the concept of independence of the judiciary is the foundation of the principle of separation of powers. This is essentially the basis upon which rests the edifice of judicial power.[14]

Third, the Federal Court has reassured that the basic structure doctrine is very much alive in Malaysia. In doing so, it endorsed a list of cases on the subject matter, notably the pronouncement of Gopal Sri Ram FCJ in the case of *Sivarasa Rasiah v Badan Peguam Malaysia*,[15] *Liyanage v The Queen*[16] and *Keshavananda Bharati v State of Kerala*.[17]

With regard to judicial power as being part of the basic structure of our constitution, the Federal Court made itself very clear:

> Thus given the strong observations made on the true nature and purpose of the impugned enactment, any alterations made in the judicial functions would tantamount to a grave and deliberate incursion in the judicial sphere…The important

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10 *Supra* n 3, at p.589.
11 *Supra* n 2, at p.21.
12 *Supra* n 3, at p. 591.
13 *Ibid.*
14 *Ibid.* at p. 593.
15 [2010] 2 MLJ 333.
16 [1967] 1 AC 259.
17 AIR 1973 SC 146.

> concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.[18]

The Federal Court thereafter held that section 40D of the LAA has the effect of discharging judicial power to non-qualified persons, rendering it *ultra vires* Article 121 of the Federal Constitution.

An interesting aspect of this decision is that the Federal Court proceeded to discuss a proposed new section 40D of the LAA, which would take into account:

(i) any objection as against the amount of compensation awarded by the land administration would continue to be determined by a judge sitting in a land reference court;
(ii) the assessors are expected to listen to the proceedings and evaluate the evidence and also be required to answer any questions of fact within their competence;
(iii) at the end of the proceedings, they are required to give their opinion as to the appropriate amount of compensation to be awarded in a particular case; and
(iv) it is then for the judge and the judge alone to deliberate on the issue of quantum before him, after taking into account all the issues.[19]

It is important to note that the Federal Court applied the doctrine of prospective overruling.[20] This means that all cases determined before this Judgment on 20 April 2017 will not be disturbed, and this decision will only bind pending cases.

B. The Principle of Business Compensation in Assessing Market Value of Land

To reiterate the facts of the case abovementioned, the lower courts were not willing to compensate Semenyih Jaya Sdn Bhd on the loss of profits it suffered from the commercial development of the acquired land.

(i) The Principle of "Equivalence"

The Federal Court began by examining the First Schedule of the LAA, which lists down the various principles to be applied in determining the amount of compensation. There are six heads of compensation which are enumerated in paragraph 2 of the First Schedule to the LAA. One of the heads of compensation is 'market value', which is generally based on comparable sales in the vicinity of the acquired land and the condition of the land having regard to the existence of any buildings, improvements to the land and any encumbrances and restrictions in the title.[21] The issue herein is whether compensation for 'loss of business' can be allowed under the LAA.

The Federal Court adopted a liberal interpretation of the term 'adequate compensation' guaranteed towards citizens deprived of their property under Article 13(2)

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18 *Supra* n3 at pp. 592-593.
19 *Ibid.* at p. 599.
20 *Ibid.* at pp. 600-601.
21 *Ibid.* at p. 615.

of the Federal Constitution. It endorsed the principle of 'equivalence' in Malaysian land acquisition law and held that 'market value' must therefore satisfy the test of "a full and fair money equivalent or just equivalent of the property acquired".[22]

In that context, the Federal Court accepted the principle of 'business compensation' pronounced in the Privy Council case of *Director of Buildings and Lands v Shun Fung Ironworks Ltd*[23] (Shun Fung Ironworks) in the assessment of market value. The general principle governing business compensation is that any loss assessed must not be too remote and is the natural and reasonable consequence of the acquisition.

The principle of business compensation is applicable in two scenarios – each with its own methodology and formula, as follows.

(a) Relocation Basis

Business compensation is assessed on a Relocation Basis if the business is capable of being relocated. The formula to calculate the Relocation Basis is summarised from the judgment as follows:

Relocation Basis = Incidental Costs of Relocating the Business To a New Place + Loss of Profits (to be assessed for the reasonable time it takes to relocate, factored with the obligation of the claimant to ensure losses are kept to a minimum).[24]

(b) Extinguishment Basis

Business compensation is assessed on an Extinguishment Basis if the business is practically incapable of being relocated. The Federal Court held that the Extinguishment Basis is the claimant's "loss of business" to be incorporated in the profit value of the land. The judgment emphasised that "loss of business" does not by itself form an item of consequential loss, but is incorporated in the assessment of 'market value' of the land under paragraph 2(a) of the First Schedule in the LAA.

The Federal Court proceeded to give several examples on what such 'loss of business' entails, such as buildings and other improvements to the land acquired, for the reduction in value of any land retained as a result of acquisition and for any consequential losses to the livelihoods of the owners and occupants.[25]

On a final note, the Federal Court held that compensation based on the Relocation Basis should, generally, not exceed the Extinguishment Basis – but this is not to be applied rigidly in all cases and the opposite may occur, as in Shun Fung Ironworks.

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22 *Ibid.* at p. 613.

23 [1995] 2 AC 111.

24 *Supra* n 3 at p. 615.

25 *Ibid.* at p. 617.

IV. LEGAL ANALYSIS

A. Heralding a New Age of Public Law

(i) Statutory Encumbrances on Judicial Power – Valid No More?

With the advent of the Semenyih Jaya Judgment, this means the opinions/findings of external bodies or individuals which play a role in determining a case cannot be binding on the courts. Obviously, legislative provisions couched in the same mandatory fashion as section 40D of the LAA could very well be argued as unconstitutional.

One such legislative provision can be found in the scheme of the Central Bank of Malaysia Act 2009. The Central Bank of Malaysia (Bank) may establish a *Shariah* Advisory Council, whose function is to *inter alia* advise the Bank on any *Shariah* issue relating to Islamic financial business, the activities or transactions of the Bank.[26] Pursuant to section 56 of the Central Bank of Malaysia Act 2009, where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a *Shariah* matter, the court or the arbitrator shall either take into consideration any published rulings of the *Shariah* Advisory Council or refer such question to the *Shariah* Advisory Council for its ruling. The controversial provision can be found in the subsequent section 57 of the Central Bank of Malaysia Act 2009, which stipulates that any ruling made by the *Shariah* Advisory Council is binding upon a court of law:

> Any ruling made by the *Shariah* Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56.

The constitutionality of the abovementioned provision was directly challenged in the 2011 case of *Mohd Alias Ibrahim v RHB Bank Bhd & Anor*,[27] where Zawawi Salleh J ruled that he was bound by the decision in *PP v Kok Wah Kuan* and that it was constitutional. This was also brought up at the Court of Appeal in *Tan Sri Abdul Khalid Ibrahim v Bank Islam Berhad*,[28] where it was held:

> On the issue as to whether there is any usurpation by the SAC of the powers and jurisdiction of the Courts, we need only to examine Part IX which provides for the Judiciary and the functions, powers and jurisdiction of the Courts. Under this Part, Article 121(1) vests the judicial powers of the Federation in the Courts in such manner as may be conferred by or under federal law. So long as Parliament in its wisdom enacts laws for this subject matter, our Courts shall be competent to perform the functions, or to exercise the powers and jurisdiction conferred thereunder.

Since the Semenyih Jaya judgment has offered a judicially empowering interpretation of Article 121(1) of the Federal Constitution and has departed from *PP v Kok Wah*

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[26] Central Bank of Malaysia Act 2009, sections 51 & 52.

[27] [2011] 4 CLJ 654.

[28] [2012] 1 LNS 634.

Kuan,[29] the basis in which *Mohd Alias Ibrahim* and *Tan Sri Khalid Ibrahim* were reached crumbles. The constitutionality of section 57 of the Central Bank of Malaysia Act 2009 is very much open to challenge.

(ii) Ousting Ouster Clauses

The Semenyih Jaya judgment also immediately brings into question the viability of ouster clauses, which are replete in multiple Malaysian statutes. These ouster clauses are the epitome of legislative straightjacketing that paralyses the court's independence & undermines the separation of powers – which are condemned in the Semenyih Jaya judgment.

Prior to the Semenyih Jaya judgment, the Malaysian position on ouster clauses was uncertain. On one hand, there have been many apex court pronouncements that ouster clauses cannot preclude judicial intervention when there is an error of law in the *Anisminic* sense. In the 1997 Federal Court case of *R Rama Chandran v The Industrial Court Of Malaysia & Anor*,[30] despite the ouster clause of the Industrial Relations Act, it was held that courts can intervene in appropriate cases, "all for the cause of justice". In 2008, Tun Arifin Zakaria FCJ (as he then was) in *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd*[31] conclusively held that: "the position now is that the courts in the Commonwealth, Malaysia including, have moved away from the traditionalist approach that the crown can do no wrong". As recent as 2008-2009, the Federal Courts in *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar A/L Varatharaju Naidu & Attorney-General Malaysia (Intervener)*[32] and *Yang Dipertua, Dewan Rakyat & Ors v Gobind Singh Deo*[33] have clearly held that ouster clauses in Articles 72 and 63 of the Federal Constitution respectively cannot prevent courts from reviewing decisions of the State Legislative Assemblies & the House of Representatives which are made amongst others, outside jurisdiction or which are tainted by gross illegality, irrationality, non-compliance with rules of natural justice.

Yet, there have also been contrary views on ouster clauses coming from the apex court throughout the years. In the case of *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan*,[34] the Federal Court referred to the ouster clause contained in section 59A of the Immigration Act 1959 and held as follows:

> Judicial review under the section is defined to include proceedings commenced by way of an application, writ or any other suit or action mentioned in para (2) of section 59A. By deliberately spelling out that there shall be no judicial review by the court of any act or decision of the minister or the decision maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act.

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29 [2007] 5 MLJ 174.
30 [1997] 1 MLJ 145.
31 [2008] 4 MLJ 641.
32 [2009] 4 MLJ 24 at p. 58.
33 [2014] 6 MLJ 812 at p. 826.
34 [2002] 3 MLJ 72.

Similarly in *Kerajaan Malaysia & Ors v Nasharuddin Nasir,*[35] section 8B of the Internal Security Act 1960 came into question. The Federal Court held that it was meant to combat subversive actions prejudicial to public order and national security, falling squarely within Article 149(1) of the Federal Constitution and therefore constitutional.

Curiously, both the Court of Appeal in *Ambiga a/p Sreenevasan v Director of Immigration, Sabah, Noor Alam Khan bin A Wahid Khan & Ors*[36] (delivered on 7th June 2017) and *Pua Kiam Wee v Ketua Pengarah Imigresen Malaysia & Anor*[37] (delivered on 5 July 2017) made no reference at all to the Semenyih Jaya decision which was delivered on 20th April 2017. They went on to uphold Parliament's intention of ousting judicial review of the Courts in immigration matters beyond procedural non-compliance.

Any discussion on ouster clauses would also be incomplete without reference to the equality provision in Article 8 of the Federal Constitution, which states that "all persons are equal before the law and entitled to the equal protection of the law". If one is entitled to equal protection of the law, it follows that one's access to the Courts to uphold one's rights under the law should be protected too.

Nonetheless, Malaysian courts have in the past been reluctant to interpret Article 8 to house any fundamental or unalienable right to access to justice. In *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)*,[38] the Federal Court departed from the Court of Appeal decision which held that access to justice is a fundamental liberty; it framed access to justice as a "general right" instead. The Federal Court also held that Article 8(1) should be read with Article 121(1) harmoniously – the latter confers power on Parliament to set up an institutionalised mechanism with power and jurisdiction to determine the extent and manner in which the former should be exercised. It was also apparent that the Federal Court interpreted the right to access to justice in Article 8(1) under the restrictive approach pre-Semenyih Jaya:

> The corollary is that the manner and extent of the exercise of the right of access to justice is subject to and circumscribed by the jurisdiction and powers of the court as provided by federal law. As a matter of fact whenever a law is passed either enlarging or curtailing the jurisdiction and powers of the courts it has a direct bearing on the right of access to justice. The right is determined by the justiciability of a matter. If a matter is not justiciable there is no right of access to justice in respect of that matter. Thus, Parliament can enact a federal law pursuant to the authority conferred by art 121(1) to remove or restrict the jurisdiction and power of the court.

It is submitted that the Semenyih Jaya judgment should dispel all doubts that the Judiciary can never be stripped of its supervisory jurisdiction to determine the constitutionality of legislation and executive decisions via ouster clauses. Concomitantly, the Semenyih Jaya judgment would also result in any legislative attempt to curb a citizen's access to justice to the Courts to be void and shed new light on how Article 8(1) should be interpreted.

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35 [2004] 1 CLJ 81.

36 [2017] MLJU 770.

37 [2017] MLJU 902.

38 [2004] 2 MLJ 257.

Whilst it is doubtful that a frontal attack on the constitutionality of ouster clauses can succeed, Courts should – at the very least – be aware that ouster clauses cannot immunise public bodies which have committed an error of law in the *Anisminic* sense. To decide otherwise would certainly conflict with the spirit of the Semenyih Jaya judgment and relegate the role of the judiciary to the abyss once again. Practitioners will have to utilise this reinvigorating decision to the fullest extent to herald in a new age of public law.

(iii) Cementing the Basic Structure of the Constitution

The concept of the basic structure doctrine has strong roots in India, culminating in the landmark case of *Keshavananda Bharati v State of Kerala*.[39] The first Malaysian case to decide on this is *Loh Kooi Choon v Government of Malaysia*,[40] which concerns an alteration of Article 5(4) of the Federal Constitution. When confronted with the basic structure doctrine argument, Raja Azlan Shah FCJ held:

> There have also been strong arguments in support of a doctrine of implied restrictions on the power of constitutional amendment. A short answer to the fallacy of this doctrine is that it concedes to the court a more potent power of constitutional amendment through judicial legislation than the organ formally and clearly chosen by the Constitution for the exercise of the amending power.

In *Phang Chin Hock v Public Prosecutor*,[41] Suffian LP in effect accepted Raja Azlan Shah FCJ's pronouncement in *Loh Kooi Choon* and impliedly rejected the basic structure doctrine. Suffian LP distinguished the Malaysian Constitution from its Indian counterpart – stating that the latter was drafted by a Constituent Assembly and has an express preamble, whereas the Malaysian Constitution was ready-made when the British left and there was no preamble.

It was not until the 2010 Federal Court case of *Sivarasa Rasiah v Badan Peguam Malaysia*[42] that the basic structure doctrine witnessed its stunning revival in Malaysian jurisprudence.[43] Gopal Sri Ram FCJ held:

> 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. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. 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.

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39 *Supra* n 13.

40 [1977] 2 MLJ 187.

41 [1980] 1 MLJ 70.

42 *Supra* n 15.

43 See also *Muhammad Hilman bin Idham v Kerajaan Malaysia & Ors* [2011] 6 MLJ 507.

Whilst many have attempted to water down Gopal Sri Ram FCJ's abovementioned pronouncement as *obiter dicta*, the Semenyih Jaya judgment reaffirms that the basic structure doctrine is very much alive in Malaysian jurisprudence and that the Legislature cannot amend fundamental provisions of the nation's blueprint as it wishes. This development is crucial, as history has shown how ruling parties with two thirds majority would stop at no end to amend the Federal Constitution, often to its own political advantage.

B. The Future Landscape of Land Acquisition Law

In so far as land reference proceedings are concerned, the Chief Judge of Malaya took note of the Semenyih Jaya Judgment and issued a practice direction on how land reference proceedings are to be conducted thereon.[44] This practice direction is presumably meant to govern the role of assessors pending legislative intervention to insert a new section 40D of the LAA. It essentially reproduces the proposal on the role of assessors in the Semenyih Jaya Judgment, as elaborated above.

On the issue of business compensation, one cannot be faulted for exaggeration in stating that it is imperative for the case of Shung Fung Ironworks to be read side-by-side with the Semenyih Jaya Judgment. The former not only gives a deeper illustration to the nuances of several important issues, but may also contain several qualifications and reservations of the principles pronounced in the latter which are not expressly stipulated in the Semenyih Jaya Judgment.

For example, in assessing compensation based on the Relocation Basis, Shun Fung Ironworks explicitly held that one must first fulfil three elements - (i) that the business was capable of being relocated; (ii) that he intended to relocate, and (iii) that a reasonable businessman would do so.[45]

As for the Extinguishment Basis, Shun Fung Ironworks further illustrates that 'loss of business' is prima facie measured by what it termed as the "value of the business as a going concern".[46] In this respect, the Privy Council in Shun Fung Ironworks recognised that the compensation must include goodwill and the present value of a stream of profits expected over a period of years.[47] In assessing the present value of a stream of profits over a period of years, Shun Fung Ironworks held that the following must be taken into account - (i) the amount of the profits;(ii) the dates when they are expected to materialise; and (iii) the discount rate applied[48] (the factors in determining discount rate are discussed in detail in Shun Fung Ironworks).

A principle promulgated in Shun Fung Ironworks which is most conspicuously absent in the Semenyih Jaya Judgment is that loss of profits in the "shadow period" can be compensated.[49] Essentially, the "shadow period" is between the date which the State indicated its intention to the claimant for acquisition and the date of actual acquisition. In

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44 Arahan Amalan Hakim Besar Malaya Bil 1 Tahun 2017.

45 *Supra* n21, at p.128-130.

46 *Ibid.* at p.125.

47 *Ibid.* at p.132.

48 *Ibid.*

49 *Ibid.* at p.135.

that period, news of the threat of acquisition could discourage customers from entering into long-term contracts with the claimant. Business would slow down considerably. The date of actual acquisition could materialise only a few years later. In the meantime, the claimant inevitably suffers what the Privy Council deems as a "slow asphyxiation".[50] The Privy Council felt it was unfair for a business owner to suffer these losses without compensation and decided that a claim for losses in the "shadow period" will not fail, provided it arose in anticipation of acquisition and because of the threat which the acquisition presented.[51]

Even though the Semenyih Jaya Judgment had not explicitly adopted all the principles enumerated in Shun Fung Ironworks (such as the "value of the business as a going concern" and the loss of profits in the "shadow period"), its clear endorsement of the same cannot be ignored and land acquisition practitioners must be fully versed with Shun Fung Ironworks.

[50] *Ibid.*

[51] *Ibid.* at p.137.

Arbitration in Asia: What does the future hold?

Peter Godwin*

International arbitration is now widely accepted in Asia as the preferred form of dispute resolution in cross border transactions. Gone (mainly) are the days when arbitration was seen as a new process of which clients should be suspicious.

These days arbitration is part of the mainstream of dispute resolution as evidenced by the number of lawyers in the region making their living from arbitration. It is easy to forget how quickly the arbitration scene has developed in Asia and consequently, in many cases, how steep the learning curve has been and here I am just talking about for the lawyers. For the clients, in many cases, the curve remains steep, as happily for them, most have less exposure.

All of this leads to a situation where at a high level Asia now looks to the outside world to be a place of sophistication in arbitration terms which is destined to be a growing arbitration market for the foreseeable future. However, is that correct? Scratch the surface and unsurprisingly, one discovers that the level of expertise, whether at client, counsel or arbitrator level varies enormously. This leads to a situation whereby:

- The common misconceptions around arbitration being quick, cheap and confidential are still commonly heard;
- The real advantages of arbitration are overlooked and/or undermined where commercial compromise is allowed to trump the law; and
- Emerging arbitration markets with small local bars can be vulnerable to the influence of one or more dominant players. Ambitious counsel seeking to develop market leading positions in relatively new arbitration markets are picking up some bad habits and sadly Asia is starting to produce its very own 'guerillas' in unlikely places.

I. DEALING FIRST WITH THE MISCONCEPTIONS

Firstly, speed – whether arbitration is quicker than litigation will depend upon what you are comparing it with but I would suggest that if you compare obtaining an arbitral award to obtaining a first instance judgment in most courts, arbitration will rarely be quicker and will often be slower. There will be exceptions and the position changes if you factor in appeals but, as a general rule, I would suggest that choosing arbitration because you believe it will be quicker than litigation is rarely correct.

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