HARIS FATHILLAH MOHAMED IBRAHIM & ORS

v.

TAN SRI DATO' SRI HAJI AZAM BAKI & ORS

Federal Court, Putrajaya
Tengku Maimun Tuan Mat CJ, Abang Iskandar Abang Hashim PCA, Mohamad Zabidin Mohd Diah CJM, Nallini Pathmanathan, Vernon Ong Lam Kiat, Harmindar Singh Dhaliwal, Rhodzariah Bujang FCJJ
[Civil Reference No: 06(RS)-4-07-2022(W)]
24 February 2023

***Constitutional Law*:** *Judges — Proceedings against — Criminal investigations against Judges of High Court, Court of Appeal and Federal Court — Whether a serving Judge liable to criminal investigations and prosecution in light of constitutional protections afforded to him under art 125 Federal Constitution — Federal Constitution, arts 4, 125(5), 145(3), Part IX*

This was a constitutional reference filed pursuant to ss 84 and 85 of the Courts of Judicature Act 1964 in the stayed proceedings in an Originating Summons at the High Court. The High Court Judge agreed with the appellants that there were questions of fundamental importance that required answers directly from the Federal Court. The two constitutional questions that were referred to the Federal Court read: (1) whether, having regard to art 4 and Part IX of the Federal Constitution ('FC'), criminal investigation bodies, including but not limited to the Malaysian Anti-Corruption Commission, were only legally permitted to investigate into Judges of the High Court, Court of Appeal and the Federal Court ('Superior Court Judges') that had been suspended pursuant to art 125(5) of the FC; and (2) whether the Public Prosecutor was empowered to institute or conduct any proceedings for an offence against Superior Court Judges pursuant to art 145(3) of the FC, having regard to art 4 and Part IX of the FC. The two questions, in summary, raised the issue of whether a serving Superior Court Judge was liable to criminal investigations and prosecution in light of the constitutional protections afforded to him under art 125 of the FC.

Held (remitting the matter to the High Court):

(1) Article 125 of the FC was only reasonably attracted once a Judge, against whom a criminal complaint was made, was properly investigated. If the investigations turned out to favour the said Judge, then there would be no need for any of the disciplinary actions such as removal or to even involve the Judges' Ethics Committee. The provisions thus, on the facts, implied the very opposite of the appellants' submission. It would appear that investigations must be commenced first before any action might be taken under the two

schemes contained in art 125. Having understood art 125 in this way, and having read it in context with the absence of any express dictate stating otherwise, it was only intended to deal strictly with the disciplinary process and not, as the appellants put it, as a constitutional pre-condition to criminal investigations and prosecution. (paras 47-48)

(2) The Judges Code of Ethics 2009 ('Code') was a specific written document dealing with certain identified items, defining the ethics of a Judge as opposed to a generally envisioned moral or legal code of conduct. The appellants appeared to suggest that 'conduct' or 'misconduct' should also be read widely to mean criminal misconduct. Having regard to the terms of art 125 of the FC and the Code which were specific with no mention of any criminal act, it was not for this Court to add words into it. More importantly, para 12 of the Code provided that 'any complaint against a Judge who was alleged to have committed a breach of any provision of this Code should be made in writing to the Chief Justice of the Federal Court'. Thus, a complaint in writing ought to specifically relate to an identifiable express breach of the Code. All things considered, upon examining art 125, the Judges' Ethics Committee Act 2010 and the Code holistically and in context, these constitutional and sub-constitutional provisions applied only in relation to judicial discipline and ethics and not as a constitutional pre-condition to criminal investigations and/or prosecution. For the foregoing reasons, the appellants' interpretation of art 125, as a whole, was untenable. Therefore, Question 1 was answered in the negative, while the answer to Question 2 was in the affirmative. (paras 56-59)

(3) In conclusion, serving Superior Court Judges were not immune from criminal investigations or prosecution. They did not need to be suspended or removed before they could be investigated or prosecuted. However, because they were serving Judges, criminal investigations against them were subject to a higher standard, in light of the doctrine of judicial independence. If an investigation or prosecution against a serving Judge was found to have been commenced for collateral purposes, the Courts were entitled, when reviewing them, to set them aside or pass any other remedy that counted as suitably moulded relief. As always, the remedy depended on the facts and circumstances of the case. (para 89)

Case(s) referred to:

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 4 MLRA 554 (refd)

SIS Forum (Malaysia) v. Kerajaan Negeri Selangor Majlis Agama Islam Selangor (Intervener) [2022] 3 MLRA 219 (refd)

Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 5 MLRA 1 (refd)

Zaidi Kanapiah v. ASP Khairul Fairoz Rodzuan & Ors And Other Appeals [2021] 4 MLRA 518 (refd)

Legislation referred to:

Courts of Judicature Act 1964, ss 84, 85

Federal Constitution, arts 4(1), 39, 121(1), 125(1), (2), (3), (3A), (3B), (3C), (4), (5), (9), (10), 127, 145(3)

Malaysian Anti-Corruption Commission Act 2009, s 3

Prevention of Crime Act 1959, s 4

Counsel:

For the appellants: Malik Imtiaz (Surendra Ananth, Yvonne Lim, Khoo Suk Chyi & Wong Min Yen with him); M/s Malik Imtiaz Sarwar

For the respondents: Liew Horng Bin; SFC

For the Bar Council (amicus curiae): New Sin Yew (Jacqueline Albert & Sherise Vergis with him); M/s AmerBON

JUDGMENT

Tengku Maimun Tuan Mat CJ:

Introduction

[1] This is a constitutional reference ('Reference') filed pursuant to ss 84 and 85 of the Courts of Judicature Act 1964 ('CJA 1964') in the presently stayed proceedings in Originating Summons No WA-24-24-05/2022 at the High Court in Malaya at Kuala Lumpur ('OS').

[2] The appellants are practising advocates and solicitors of the High Court in Malaya. The 2nd respondent is the Malaysian Anti-Corruption Commission ('MACC') while the 1st respondent is its Chief Commissioner. The 3rd respondent is the Government of Malaysia.

[3] The OS was filed to seek the following declaratory reliefs:

(1) That criminal investigation bodies, including the 2nd respondent (MACC), are not entitled or are otherwise precluded from investigating serving Judges of the High Court, the Court of Appeal and the Federal Court save when they are suspended pursuant to art 125(5), Federal Constitution or removed pursuant to art 125(3); and/or

(2) That the Public Prosecutor is not empowered to institute or conduct any proceedings for an offence against serving Judges of the High Court, Court of Appeal and the Federal Court.

[4] The learned High Court Judge agreed with the appellants that there are questions of fundamental importance that required answers directly from the Federal Court. The two constitutional questions ('Questions') that were referred to the Federal Court read:

"Question 1

Whether, having regard to art 4 and Part IX, Federal Constitution, criminal investigation bodies, including but not limited to the MACC, are only legally permitted to investigate into Judges of the High Court, Court of Appeal and the Federal Court that have been suspended pursuant to art 125(5), Federal Constitution.

Question 2

Whether the Public Prosecutor is empowered to institute or conduct any proceedings for an offence against serving Judges of the High Court, Court of Appeal and the Federal Court pursuant to art 145(3), Federal Constitution, having regard to art 4 and Part IX, Federal Constitution.".

[5] For convenience, we shall in this judgment, refer to the Federal Constitution as 'FC' and unless stated otherwise, any reference to 'Articles' are references to the Articles of the FC. And since Judges of the High Court, Court of Appeal and the Federal Court are all Judges of the Superior Courts established under Part IX of the FC, we shall refer to Judges of the High Court, Court of Appeal and the Federal Court collectively as 'Superior Court Judges'.

Backgrounds Facts

[6] The OS and the ensuing Reference arise out of criminal investigations that were undertaken by the MACC, against a currently serving Judge of the Court of Appeal, Justice Mohd Nazlan bin Mohd Ghazali ('Justice Nazlan').

[7] The brief facts leading up to the present proceedings are as follows.

[8] On 20 April 2022, a blogpost in a website called 'MalaysiaToday' published an article alleging that the MACC was investigating Justice Nazlan for procuring inexplainable wealth. Around 23 April 2022, The Star Newspaper carried a report wherein the 1st respondent confirmed that an investigation had been commenced against Justice Nazlan based on several reports that the MACC had received.

[9] Then, on 28 April 2022, the MACC issued a press statement ('Press Statement') effectively announcing and confirming that they had begun investigations into a Judge. Though his name was not mentioned in the Press Statement, it is apparent that 'the said Judge' mentioned therein was Justice Nazlan. The following words in the opening line of that Press Statement, make it clear:

"THE Malaysian Anti-Corruption Commission (MACC) would like to clarify the issue of the investigation of a judge which was raised by some parties and has received public attention recently.".

[10] The phrases 'raised by some parties' and 'received public attention recently' clearly refer to the reports that mention Justice Nazlan, who at the material time, was the only known Superior Court Judge said to be under investigation.

[11] Most crucially, MACC in that Press Statement, justified its supposed legal basis to investigate Justice Nazlan under s 3 of the Malaysian Anti-Corruption Commission Act 2009 ('MACC Act 2009'), as follows:

> "Regarding the investigation against the said Judge, the MACC received a complaint on 15 March 2022 followed by two more complaints on 23 and 27 April 2022. This investigation is still in its initial phase and is of public interest. It should be clarified that when an investigation is conducted on any individual, it does not mean that the individual has committed an offence...".

[12] Section 3 of the MACC Act 2009, defines 'officer of a public body' as follows:

> "'officer of a public body' means any person who is a member, an officer, an employee or a servant of a public body, and includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and, where the public body is a corporation sole, includes the person who is incorporated as such;".

[13] MACC had subsequently announced that it had completed its investigation and had presented its investigation papers to the Attorney General's Chambers.

[14] It is premised on these facts that the two Questions have arisen. In summary, is a serving Superior Court Judge liable to criminal investigations and prosecution in light of the constitutional protections afforded to him under art 125?

Submissions

[15] Learned Counsel for the appellants, Dato' Malik Imtiaz began his submission by taking the clear position that Superior Court Judges can be investigated by criminal investigative bodies. It is not the appellants' position that the said Judges are totally immune to investigations but rather, it is the manner in which such investigations may be carried out. The foundation for this argument is the doctrine of separation of powers and its twin pillar: judicial independence.

[16] The thrust of learned Counsel's argument is that all and any investigative bodies are under the purview of the Executive branch. Investigations, if sanctioned so easily, tantamount to Executive interference in the Judicial branch. He then refers us to art 125 and advances an interpretation that Judges can only be investigated and prosecuted once the provisions of art 125 have been complied with.

[17] Perhaps it is necessary to reproduce the relevant portions of art 125 on tenure of office as follows:

"Tenure of office and remuneration of judges of Federal Court

125.(1) Subject to the provisions of cls (2) to (5), a judge of the Federal Court shall hold office until he attains the age of sixty-six years or such later time, not being later than six months after he attains that age, as the Yang di-Pertuan Agong may approve.

(2) A judge of the Federal Court may at any time resign his office by writing under his hand addressed to the Yang di-Pertuan Agong but shall not be removed from office except in accordance with the following provisions of this Article.

(3) If the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a judge of the Federal Court ought to be removed on the ground of any breach of any provision of the code of ethics prescribed under cl (3B) or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office, the Yang di-Pertuan Agong shall appoint a tribunal in accordance with cl (4) and refer the representation to it; and may on the recommendation of the tribunal remove the Judge from office.

(3A) Where a judge has committed a breach of any provisions of the code of ethics prescribed under cl (3B) but the Chief Justice is of the opinion that the breach does not warrant the judge being referred to a tribunal appointed under cl (4), the Chief Justice may refer the Judge to a body constituted under federal law to deal with such breach.

(3B) The Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts may, after consulting the Prime Minister, prescribe in writing a code of ethics which shall also include provisions on the procedure to be followed and sanctions which can be imposed other than the removal of a judge from office under cl (3), in relation to a breach of any provision of the code of ethics.

(3C) The code of ethics prescribed under cl (3B) shall be observed by every Judge of the Federal Court and every judicial commissioner.

(4) The tribunal appointed under cl (3) shall consist of not less than five persons who hold or have held office as judge of the Federal Court, the Court of Appeal or a High Court, or, if it appears to the Yang di-Pertuan Agong expedient to make such appointment, persons who hold or have held equivalent office in any other part of the Commonwealth, and shall be presided over by the member first in the following order, namely, the Chief Justice of the Federal Court, the President and the Chief Judges according to their precedence among themselves, and other members according to the order of their appointment to an office qualifying them for membership (the older coming before the younger of two members with appointments of the same date).

(5) Pending any reference and report under cl (3) the Yang di-Pertuan Agong may on the recommendation of the Prime Minister and, in the case of

any other judge after consulting the Chief Justice, suspend a judge of the Federal Court from the exercise of his functions.

...

(9) This Article shall apply to a judge of the Court of Appeal and to a judge of a High Court as it applies to a judge of the Federal Court, except that the Yang di-Pertuan Agong before suspending under cl (5) a judge of the Court of Appeal or a judge of a High Court other than the President of the Court of Appeal or the Chief Judge of a High Court shall consult the President of the Court of Appeal or the Chief Judge of that High Court instead of the Chief Justice of the Federal Court.

(10) The President of the Court of Appeal and the Chief Judges of the High Courts shall be responsible to the Chief Justice of the Federal Court.".

[18] Learned Counsel drew our attention in particular to cls (3) and (5) of art 125 and to the Judges Code of Ethics 2009 ('Code') and the Judges' Ethics Committee Act 2010 ('JECA 2010') as laws that regulate judicial ethics.

[19] He emphasised that the two main methods by which Superior Court Judges are answerable to the law is (1) through tribunalisation and (2) to the Code and the JECA 2010. In essence, learned Counsel for the appellants addressed us on how these methods relate to judicial accountability via a mechanism not run by the Executive unlike the MACC or other criminal bodies such as, for example, the Royal Malaysia Police Force ('RMP'). Learned Counsel submitted that an investigation by the MACC or the RMP into a Judge, or instituting or conducting any proceeding for an offence by the Public Prosecutor against a Judge, would thus involve agencies of the Executive Branch asserting power over a member of the Judiciary, and thus the Judiciary itself. And this may give rise to the possibility of abuse, that is, investigations commenced for a collateral purpose.

[20] The appellants accept that the FC itself does not set out any express stipulations or pre-conditions to the investigation or prosecution of a serving Superior Court Judge. It is not disputed that the most art 125 does is provide for a constitutional mechanism for the removal of a Superior Court Judge from office or a statutory sanction for a statutorily regulated process for judicial discipline (ethics) other than removal from office. Thus, learned Counsel's assertion for a constitutional impediment on criminal investigations against a serving Superior Court Judge is premised on a broad and expansive interpretation of art 125.

[21] This brings us to the argument on interpretation. Learned Counsel took us through the amendment history of art 125. He highlighted the words 'on the ground of misbehaviour' originally appearing in art 125(3) that were deleted and replaced with the words: 'on the ground of any breach of any provision of the code of ethics prescribed under cl (3B) or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office...'. He also highlighted how the amended provisions

established, in addition to the Tribunal, a statutory mechanism for judicial ethics. In this regard, learned Counsel's four points are best stated in his own words, as follows:

> "49. Four key points emerge from the foregoing.
>
> 49.1. Firstly, the substitution of "on the ground of any breach of any provision of the code of ethics prescribed under cl (3B)" for "on the ground of misbehaviour" in art 125(3) by the Amending Act did not shift focus away from "misbehaviour".
>
> 49.2. "Misbehaviour" includes criminal misconduct. As such, the Code must be understood as establishing standards of conduct that apply equally to such misconduct. Paragraphs 25 and 26 above are reiterated.
>
> 49.3. Complaints of breaches of the Code by Judges within the meaning of para 12 of the Code would thus include complaints concerning criminal misconduct.
>
> 49.4. The disciplinary framework under art 125(3) extends to complaints of criminal misconduct, including corruption.".

[22] In other words, it is the appellants' position that the provisions in art 125 read with para 12 of the Code establish a separate complaints mechanism. For ease of reference, para 12 is reproduced below:

> "12. Any complaint against a judge who is alleged to have committed a breach of any provision of this Code shall be made in writing to the Chief Justice of the Federal Court.".

[23] Learned Counsel argues that a Superior Court Judge who is alleged to have misconducted himself ought to be 'investigated' by the Judiciary itself – the Judiciary being the mechanism independent from the Executive. In this regard, learned Counsel contends that the Chief Justice performs an administrative function and not a judicial one. Once the Chief Justice receives a complaint, it is for the Chief Justice to decide what to do with the complaint and act accordingly under the law, that is, to recommend tribunalisation or to trigger the provisions of the Code and JECA 2010. Thus, it is only when either of those provisions are triggered, and the relevant Superior Court Judge is dealt with resulting in removal or suspension, can other Executive bodies step in to take any criminal action.

[24] The respondents strongly oppose the appellants' arguments for the following primary reasons. First, the respondents argue that the position taken by the appellants is to stretch the words of the FC in art 125 beyond their natural meaning and to essentially create a system that is not actually envisioned by it. Second, taking such a position would tantamount to judicial legislation to arrogate unto the Judiciary (generally) and the Chief Justice (specifically) the powers of an investigative body and of the Public Prosecutor. Third, should the Chief Justice or the Judiciary, for the lack of evidence or

any other reason fail or refuse to investigate and sanction a Superior Court Judge, the said Judge would effectively become immune to all form of criminal inquiry and action.

[25] We were also guided by the submissions from *amicus curiae*, the Malaysian Bar. Confining strictly to the Questions, the Bar takes the position that Question 1 should be answered in the affirmative and Question 2 in the negative. In sum, the Bar argues that any criminal investigations into a serving Superior Court Judge is violative of arts 125 and 127.

[26] The Bar argues that reading the Code and the JECA 2010 harmoniously with art 125(3) suggests that all complaints against a Superior Court Judge must be made to the Chief Justice first and upon whom it then becomes incumbent to act. These constitutional and statutory provisions should be read in tandem with the twin concepts of separation of powers and judicial independence to arrive at the conclusion that Superior Court Judges may only be criminally investigated and prosecuted after being suspended or removed.

[27] It must be added, for completeness that the respondents do not dispute the *locus standi* of the appellants to make this challenge. Regardless, we find that the appellants have genuine interest in this matter sufficiently to clothe them with the *locus standi* to mount this case. Not only are they public-spirited citizens seeking elucidation on matters affecting public interests but, as practising advocates and solicitors, they have a direct interest on a matter that affects the independence of the Judiciary.

Analysis/Decision

Article 125 Of The FC — The Judicial Disciplinary Mechanism

[28] We must state at the outset that though this case is centred on the respondents' treatment of Justice Nazlan, our answers to the Questions bear implications that are far wider than the facts of this case. In *SIS Forum (Malaysia) v. Kerajaan Negeri Selangor*; *Majlis Agama Islam Selangor* (*Intervener)* [2022] 3 MLRA 219 ('*SIS Forum*'), this Court had the occasion to explain the difference between constitutional judicial review and statutory judicial review. For all intents and purposes, and this will be elaborated in greater detail later, the present action is in the form of a constitutional judicial review. Having said that, we shall now proceed to examine the Questions referred.

[29] It is our view that both Questions can be taken together as they revolve around the interpretation of art 125. As this concerns constitutional interpretation, we are aware (without having to state the cases) that the usual canons of constitutional construction apply. Of all these canons, perhaps the most important one for the matter at hand is the contextual construction.

[30] It goes without saying that words in the FC must be construed in their proper constitutional context. Both parties accept, and it is plain that the position taken by the appellants is not expressly ordained by the FC in art 125

or anywhere else. It is here that one can appreciate why context is important because the very concept of judicial power, judicial independence and even the mechanism of constitutional judicial review exist by implication.

[31] Undoubtedly, the long list of recent constitutional cases beginning with *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat* A *& Another Case* [2017] 4 MLRA 554 and concluding (most recently) in *Nivesh Nair a/l Mohan v. Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors* [Criminal Appeal No: 05(HC)-7-01/2020(W)] ('*Nivesh Nair*') cement with unquestionable certainty the importance of judicial power and constitutional judicial review envisaged in arts 4(1) and 121(1). Though these powers are not expressly stated, they are clearly implied by design and context for otherwise, the Judiciary is all bark and no bite.

[32] Here, we find it necessary to comment on the importance of implication or the inference of features or powers by implication. It is one thing to add a feature or mechanism by implication and another thing to state that something exists because it is implied by other features. The legal position of judicial power and judicial independence falls within the latter category.

[33] To illustrate this example, a rehash of the judicial understanding of judicial power as implied in art (1) is important in the context of ouster clauses. Article (1) says, in summary, that the FC is supreme and any law inconsistent with it is void to the extent of the inconsistency. An ouster clause is a self-imposed legislative immunity against judicial scrutiny. What happens if a law is unconstitutional but it cannot be challenged because of the ouster clause? Surely, the ouster clause must yield to the supremacy of the FC and not the other way around. And what then if a law or a legal provision (ouster clause or otherwise) is void? Surely there is a forum to address this. The answer lies in Part IX of the FC and art 12(1) wherein they collectively repose the judicial power of the Federation in the Superior Courts. This is how powers or mechanisms are determined to exist by inferring them from design and taking them to their natural conclusion. This is all derived from context.

[34] Context is exactly what the appellants appear to be suggesting in this case. They argue that a certain mechanism exists by implying it, mostly, into art 125. And so, in order to construe art 125 in its proper context, we must first understand the provision for what it actually says in terms of tenure of office. Strictly speaking, the portions on remuneration in art 125 are not relevant to this case.

[35] Prior to the amendments to art 125, it only provided for the removal of Judges via tribunalisation. The amendments changed this by providing for an alternative to removal and by changing the operative words in one ground for removal from 'misbehaviour' to 'breach of the provisions of the code prescribed under cl (3B)'. The biggest change was the constitutional enactment of a 'code' and 'a body constituted under federal law' to deal

with breaches of the code. Thus, post-amendment, there are two recourses available against a so-called recalcitrant Superior Court Judge.

[36] The first method of sanction is removal via tribunalisation. The Yang di-Pertuan Agong ('YDPA') may appoint a tribunal under cl (4) and the said tribunal, after convening and deliberating the cause, makes recommendation to remove the Judge from office. The YDPA may only make such a representation to the tribunal if the Prime Minister first represents to the YDPA to do so or if the Chief Justice, after consulting the Prime Minister, does so. This is so prescribed by cl (3) of art 125.

[37] Under art 125(3) a recommendation by the Prime Minister (or Chief Justice after consulting him) to remove a Superior Court Judge is only permissible on one of two grounds. First, there must have been a breach of any provision of the Code. Or second, on any of the limbs of the general ground of 'inability, infirmity of body or mind or any other cause'. It is Dato' Malik's submission that 'any other cause' includes a criminal complaint.

[38] At this point, we agree with the Bar that there is an anomaly in art 125. When it comes to the removal of Judges, the Prime Minister may recommend it to the YDPA directly without any need to consult the Chief Justice about it. The reverse is not true as the Chief Justice must consult the Prime Minister. And so, if the complaint against a serving Judge is made to the Prime Minister and he does not refer the same to the Chief Justice, the only other alternative is for the Chief Justice to refer the matter to the JEC.

[39] The respondents also make a sound point that whatever may be said about executive interference by criminal investigative bodies in the present case, the fact remains that the Prime Minister is a member of the Executive branch. And under art 39 of the FC, the YDPA is vested with the executive authority of the Federation and as such, any direction from the YDPA amounts to an executive direction.

[40] Put another way, even if we follow the strict letter of art 125, there is a constitutionally sanctioned executive interference in the process of removal of Superior Court Judges.

[41] There is no dispute that judicial independence is a core tenet of the FC. The Questions however, go beyond that and ask whether a serving Superior Court Judge is effectively immune from criminal investigations and prosecution pending his removal or suspension. This indiscriminate and blanket argument effectively extends to any crime theoretically such as murder, rape, robbery, criminal defamation or even corruption. We do not find this to be the intention behind art 125.

[42] The purpose behind art 125 is clear. It was, in the context of this case, crafted to allow for the removal of a Judge upon representations made on certain specific grounds. The Chief Justice is not the Public Prosecutor and

otherwise has no imperative or implied prosecutorial or investigative powers. For example, in a murder charge, the Chief Justice cannot summon eye-witnesses or conduct an independent inquiry without the police. In a corruption case, the Chief Justice cannot verify bank records and question transactions. The written law on this subject, be it the Code, the JECA 2010 or even art 125 are completely silent in this regard.

[43] Further, the proposed process seems entirely perverse. Say a serving Superior Court Judge is accused of a crime such as murder, rape or even corruption, how is evidence to be gathered to separate the wheat from the chaff (spurious allegations from genuine complaints)? And what if the Chief Justice after consulting the Prime Minister recommends tribunalisation or otherwise refers it to the JEC, in the absence of any indication of a crime (as there is no investigation into it), how is the tribunal or the JEC to decide what to do? And, suppose the Judge is suspended or worse still, removed from office, what then if he is acquitted of the charge? The said Judge will then have received provisional punishment, that is removal or suspension, even if the crime had not been committed. That, to us, appears to put the cart before the horse.

[44] Suspension, of course, is a sanction to be imposed on a Judge under para 16 of the Code for a maximum period of one year. But, it is also possible for the YDPA to suspend a Judge under art 125(5) pending a tribunal's inquiry after consulting the Prime Minister and Chief Justice (if the Judge being tribunalised is any other Judge than the Chief Justice). But does constitutional suspension here pave the way for criminal investigations against a Judge who has yet to have his or her fate determined by the tribunal. If that were the case, then the Judge would have to face the repercussions of eventual removal and still be liable to investigations. It can also cause inconsistent decisions between the tribunal and the investigation/possible prosecution if all bodies do not act in sync – which can only be expected given their respective jurisdictions and compositions.

[45] The above also raise the further question, what if the process of tribunalisation is proposed by the Prime Minister against the Chief Justice as the Code does not state how the Chief Justice is to deal with himself if there is a breach of the provisions of the Code.

[46] Having considered all the issues above, it seems that the context of art 125 and the major gaps that the arguments leave do not support the appellants' interpretation of the same. In our view, there are far too many inconsistencies and legislative lacunae to imply into the FC the mechanism proposed by the appellants.

[47] In fact, it is our view that art 125 is only reasonably attracted once a Judge, against whom a criminal complaint is made, is properly investigated. If the investigations turn out to favour the said Judge, then there would be no need for any of the disciplinary actions such as removal or to even involve the JEC. The provisions thus imply the very opposite of the appellants' submission. It

would appear that investigations must be commenced first before any action may be taken under the two schemes contained in art 125.

[48] Having understood art 125 in this way, and having read it in context, it is our view that with the absence of any express dictate stating otherwise, it was only intended to deal strictly with the disciplinary process and not, as the appellants put it, as a constitutional pre-condition to criminal investigations and prosecution.

[49] We are also unable to follow the appellants' interpretation of the words 'any other cause' in art 125(3) as including a criminal complaint − in the way they argue it. As we understand the submission, they argue that since 'any other cause' includes 'criminal complaints' to warrant removal, then removal (or even suspension pending removal) must come first before any criminal investigation can be made. And as such, a Judge cannot be investigated unless first suspended or removed. We disagree. The reason being, this constitutional ground warrants removal, if the Judge is 'unable... for any other cause... properly to discharge the functions of this office'. If the phrase 'any other cause' includes a criminal complaint, then it follows that once a judge is alleged to have committed a crime, it becomes a reason to recommend his removal or otherwise be dealt with by the JEC. A criminal complaint is but a bare allegation and incapable of being 'any other cause' to remove a Judge unless first substantiated. Substantiation, of course, is only possible upon investigations.

[50] To further explain this, hypothetically and as a matter of common sense, if the Prime Minister or Chief Justice (after consulting the Prime Minsiter) for example, recommends to the YDPA to remove a serving Superior Court Judge on the grounds of that Judge having become fully and permanently paralysed (infirmity of body) or medically insane (infirmity of mind) there would be some factual basis for the assertion and upon which further inquiries or deliberations could be made. Hence, if 'any other cause' were to include a criminal complaint, it would have to be a substantiated complaint or a complaint with basis, before any such recommendation for removal or JEC referral can be considered. This, in its own context, belies the appellants' argument that under art 125, a serving Superior Court Judge cannot be investigated pending suspension.

[51] If a crime has been substantiated and the Public Prosecutor deems it worthy of prosecution, then the Judge as a citizen would have to answer for it in Court and at the same time, face the legal consequences to be levied against him under art 125. In such case, it is conceivable that the process can happen in tandem.

[52] We have also examined the provisions of the Code in great detail and we find that reading all the provisions in context, the appellants' interpretation of the provisions of the constitutional mechanism is not tenable for the following reasons.

[53] Firstly, the provision stipulating the Code is art 125(3B) which was cited earlier. It states that the YDPA may after relevant consultations, prescribe in writing, a code which shall also include provisions on procedure to be followed and sanctions which can be imposed other than the removal of a Judge in relation to a breach of any provision of the Code. The substance of the Code is therefore to be determined by the YDPA and there is very little in terms of substantive parameters in art 125(3B).

[54] Secondly, the contents of the Code itself. Paragraph 2 which deals with the application of the Code is clear in that the Code only applies to the personal and judicial conduct of the Judge. Part III of the Code then goes on to stipulate the code of conduct followed by Part IV which deals with the procedure on any breaches of the Code. In examining Part III as a whole, we find that the contents therein apply in a context limited to judicial misconduct. It is specific to a Judge's professional role and where personal limitations are mentioned, they are only mentioned in relation to a Judge's professional role.

[55] All the substantive provisions relating to conduct as found in Part III are stated as follows:

> Paragraph 5 – Upholding the integrity and independence of the judiciary.
>
> Paragraph 6 – Avoiding impropriety and the appearance of impropriety in all judicial activities.
>
> Paragraph 7 – Performing judicial duties fairly and efficiently.
>
> Paragraph 8 – Minimising the risk of conflict with the Judge's judicial obligations while conducting his extra-judicial activities.
>
> Paragraph 9 – Declaration of assets.
>
> Paragraph 10 – Cessation of any connection with the firm
>
> Paragraph 11 – Administrative order or direction.

[56] The Code is thus a specific written document dealing with certain identified items, defining the ethics of a Judge as opposed to a generally envisioned moral or legal code of conduct. The appellants appear to suggest that 'conduct' or 'misconduct' should also be read widely to mean criminal misconduct. Having regard to the terms of art 125 and the Code which are specific with no mention of any criminal act, it is not for us to add words into it in light of the systemic issues identified earlier.

[57] More importantly, para 12 of the Code provides that 'any complaint against a judge who is alleged to have committed a breach of any provision of this Code shall be made in writing to the Chief Justice of the Federal Court.' Thus, a complaint in writing must specifically relate to an identifiable express breach of the Code.

[58] All things considered, upon examining art 125, the JECA 2010 and the Code holistically and in context, it is our view that these constitutional and sub-constitutional provisions apply only in relation to judicial discipline and ethics and not as a constitutional pre-condition to criminal investigations and/or prosecution.

[59] For the foregoing reasons, we find the appellants' interpretation of art 125 as a whole, untenable. We therefore answer the Questions as follows:

> "Question 1
>
> Whether, having regard to art 4 and Part IX, Federal Constitution, criminal investigation bodies, including but not limited to the MACC, are only legally permitted to investigate into Judges of the High Court, Court of Appeal and the Federal Court that have been suspended pursuant to, art 125(5) of the Federal Constitution.
>
> Answer: No.
>
> Question 2
>
> Whether the Public Prosecutor is empowered to institute or conduct any proceedings for an offence against serving Judges of the High Court, Court of Appeal and the Federal Court pursuant to art 145(3) of the Federal Constitution, having regard to art 4 and Part IX, Federal Constitution.
>
> Answer: Yes.".

[60] Having answered the above Questions, we do think that this is not the end of the matter and the effect of this judgment must be clarified as the concerns on judicial independence raised by the appellants are real.

The Effect Of This Judgment

Constitutional And Statutory Judicial Review Generally, And Judicial Independence

[61] It is worth repeating that this is a constitutional reference from the High Court and we have answered the Questions as posed. That, in itself, does not mean that criminal investigative bodies are now in a position to investigate Judges as they like. This is, in effect, a constitutional judicial review seeking to question the scope of powers conferred on the respondents under the FC and not necessarily to challenge the exercise of those powers under the law.

[62] To build upon what was stated in *SIS Forum (supra)*, judicial review in its broadest sense calls upon the Judiciary to examine the exercise of powers. A constitutional judicial review, whether to challenge the validity of legislation or such as in this case, to interpret the FC itself, brings to light the question on how the constitutional provision should be applied. The statutory aspect of judicial review is when the exercise of those powers is questioned and judicial remedy is sought to bring those powers back into the confines of the law. Some

non-limiting examples, to explain their significance, are therefore apposite. In all these upcoming examples, let us consider the cases of X, the hypothetical litigant.

[63] X initiates an action purely to challenge the constitutionality of a legal provision and seeks no other remedy but a declaration of invalidity. Or X files a civil suit seeking only a declaration that a provision of the FC ought to be applied (or not applied) in a certain way – which is the case here. This is purely constitutional judicial review.

[64] In another case, X applies to the relevant governmental ministry/agency for a license or permission to do something. X is denied that license for whatever reason. X is entitled to file a judicial review application seeking a prerogative writ such as *certiorari* or *mandamus*. Or, X is unlawfully detained and files an application for *habeas corpus* to challenge the detention and seek immediate release. Or X disputes with the State authority his right to be alienated a piece of land and so he commences a suit to seek a declaration stating his right as such. These are all examples of purely statutory judicial review.

[65] One good case example of a mixed constitutional and statutory judicial review is in *Zaidi bin Kanapiah v. ASP Khairul Fairoz bin Rodzuan & Ors And Other Appeals* [2021] 4 MLRA 518 ('*Zaidi Kanapiah*') wherein the detenus questioned the constitutionality of s 4 of the Prevention of Crime Act 1959 and sought concomitant *habeas corpus* orders for immediate release on the basis of an unlawful detention premised on an unconstitutional legislation. The legal challenge to the section was in the nature of constitutional review whereas the challenge against the detention itself was statutory in nature.

[66] These examples, when summed up and distilled make the following clear. Constitutional judicial review happens when the Judiciary is called upon to exercise its powers of interpretation of the supreme document, the FC. The challenge is usually, but not always, most seen in cases where the constitutional validity of a provision is impugned. Statutory judicial review seeks to move the Judiciary to review the exercise of powers within their legal limits and if the case warrants it, to issue an effective remedy.

[67] While this case seeks to question the constitutional limits of the respondents and other criminal investigative bodies to investigate Superior Court Judges, our answers to the generic Questions in a constitutional sense are not otherwise a broad sanction for the said bodies to have a free hand in criminal investigations. This observation of ours is borne out by the real and apparent concerns raised by the appellants and the Bar on the significance of separation of powers, the bane of democracy and attacks on the independence of the Judiciary.

Judicial Independence And Legal Limits

[68] The appellants have cited cases on the importance of judicial independence. These cases are trite and need not be repeated. The fact is that while the respondents and other criminal investigative bodies are constitutionally entitled to investigate and the Public Prosecutor to commence criminal proceedings against Superior Court Judges, those powers must be exercised in good faith and only in genuine cases.

[69] Any abuse of those powers such as using them for collateral purposes not only constitutes possible offences such as abuse of power or obstruction of justice, but also constitutes actionable complaints through the Courts' statutory review powers. An apt example of this is the quashing of criminal charges and proceedings initiated by the Public Prosecutor in *Sundra Rajoo al Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 5 MLRA 1 ('*Sundra Rajoo*').

[70] Criminal investigative bodies, whenever they investigate anyone, are bound to comply with the law. The onus on them to comply with the law is even more onerous when it concerns a serving Superior Court Judge because not only are they bound by the said Judge's guarantees of fundamental rights under the FC, due process of the law governing their powers and criminal procedure, but also the prohibition against judicial interference.

[71] Judicial independence is a sacrosanct concept. Judges and the entire judicial process must be free to perform their functions freely and independently to arrive at a just and fair decision. A Judge who decides a case impacted by extraneous considerations ends up making a decision that is not in accordance with the law and the Rule of Law generally. This is all the more jarring if the case in question involves public interest, the very interest that the Judiciary is sworn to uphold as the final beacon of justice.

[72] The fact remains that no matter which way one looks at it, criminal investigative bodies are executive bodies and thus investigations into Judges can amount to judicial interference. This is the case whether the crime alleged is against or tied to a judicial act or an extra-judicial act.

[73] Example of investigations against judicial acts are clear. Let us say a Judge decides a case and the losing party, clearly upset by the decision, alleges that the Judge so decided because he was bribed to do so. Any investigations into such a complaint would clearly affect not just the Judge but also question his decision itself. The pressure exerted, especially when the Executive is itself the plaintiff or defendant is clearly a pressure inimical to judicial independence.

[74] An extra-judicial act is less apparent at first blush but affects judicial independence all the same. Let us assume that a Judge is investigated for murder or rape. The allegation is not necessarily targeted at or tied to one of his or her decisions, but the mere fact of the investigation can affect public confidence in that Judge and by extension, the Judiciary as a whole.

[75] In the two circumstances above, if the Judge is charged and eventually convicted of the offence alleged, it is only in line with the Rule of Law that such a recalcitrant Judge is brought to book. But what about spurious claims and allegations which seek only to reprise a Judge for his otherwise lawful act of deciding a case. This brings us back to our earlier question: how do we separate the wheat from the chaff?

[76] In answer to this question, it appears to us that upon considering the sacrosanct importance of judicial independence in the FC, the FC itself implies a higher standard on criminal investigative bodies when they investigate Judges. Putting it another way, when criminal investigative bodies investigate serving Superior Court Judges, they are not to violate the doctrine of judicial independence. If, for instance, it can be demonstrated that an investigation was conducted for a collateral purpose, then the ill-intended investigation is liable to be completely set aside when judicially reviewed. This concept is merely a natural extension of *Sundra Rajoo (supra)* where this Court has held that even the Public Prosecutor's powers are reviewable in the rarest of rare cases.

[77] We would postulate that in demonstrating the *bona fides* of a criminal investigation, the scheme of the FC, having accepted the Chief Justice as the head of the Judiciary, requires that when investigating a criminal complaint, the relevant criminal investigative body must first consult the Chief Justice before commencing any investigations into the said Judge. This does not mean that the Chief Justice now has the power to sanction or stymie any investigations, rather, simply the right to be informed on what is transpiring with a Judge and hence the Judiciary as a whole.

[78] Practically speaking, there is, in this regard, a partial overlap between art 125 of the FC and the powers to investigate. Once the Chief Justice is notified of a criminal complaint, the Chief Justice may then also decide to take any disciplinary action against the Judge concerned. This also enables the Chief Justice the ability to advise the relevant authorities concerned whether similar complaints have been received by the Judiciary in the past and this helps to verify whether the allegations are purely frivolous in nature or whether they carry some weight. Viewed in this way, the provisions on discipline and ethics (on the one hand) and the powers of criminal investigative bodies (on the other hand) exist on the same plane.

[79] The failure to consult the Chief Justice, even if the Chief Justice is the subject of a criminal complaint, is thus a very strong indication of a lack of *bona fides* in a criminal investigation.

[80] Other indicators of the lack of *bona fides* in an investigation would include the manner in which the investigation is done. As stated earlier, the very notion that a Judge is being investigated is deleterious to the image of the Judiciary as a whole. Thus, the posting of statements or publicising such an investigation is wholly unnecessary unless of course the Judiciary, represented by the Chief Justice, has cleared such publication in the interest of the Judiciary itself.

[81] In this sense, a set of protocols must be followed when a Judge is investigated which includes the following:

(i) The relevant criminal investigative body should first seek leave from the Chief Justice to investigate any Judge. The Chief Justice might know details that the investigative body does not and, in any case, informing the Chief Justice is necessary as a safeguard of judicial independence.

(ii) A criminal investigative body cannot on their own accord publicise or advertise the fact of investigation or the contents of the investigation of a Superior Court Judge without prior approval of the Chief Justice. The Chief Justice might agree to publication if it is in the interest of the Judiciary.

(iii) The entire contents of investigations against a Judge must remain confidential at all times. It must be remembered that complaints are merely that – complaints. They can be entirely true or utterly spurious and calculated at damaging the Judge's credibility or reputation. All things considered, whether the complaint is true or not is beside the point having regard to the fact that the relevant Judge is presumed innocent until proven otherwise. Yet, sometimes even the presumption of innocence is an illusory concept considering that the fact of a Judge being accused of a crime is enough to affect his reputation and the reputation of the Judiciary as a whole.

(iv) The Public Prosecutor too must consult the Chief Justice during the course of giving instructions during investigations and in respect of his decision to prosecute. If there is ample evidence, the Chief Justice too can move to mobilise the ethics and disciplinary measures either under the Code or tribunalisation under art 125.

[82] At all times it must be borne in mind that Judges are considered to be citizens of the highest moral character. They cannot therefore be beyond reproach for if they commit a crime, they are more than liable to answer for it. The very announcement of an investigation into such a Judge is enough in itself to damage the image of the institution he serves. Thus, in the interest of the Judiciary (and not the personal interest of the Judge himself), the preventive and protective measures above ought to be complied with while ensuring that any Judge who has breached the law should answer for his moral and legal turpitude.

[83] Coming back to the present case, as this is a reference application and not the substantive hearing, we refrain from commenting too much on the facts lest we make any factual findings.

[84] That said, on a cursory reading of the facts and upon examining the documentary evidence on record, it is blatant that any investigations commenced against Justice Nazlan were done without regard to judicial independence as none of the above protocols appeared to have been followed. There is no evidence, at least at this stage of the case, that the Chief Justice

was ever consulted. There is no deposition from the respondents to this effect in their affidavits.

[85] Further, the manner in which the investigations were publicised by way of a press statement also does not appear to preserve or lend confidence to the independence of the Judiciary. Though the MACC's Press Statement does not refer to Justice Nazlan by name, contemporaneous media reports which mention Justice Nazlan and the earlier spurious blogpost all do refer to him, which are sufficient to enable any reasonable citizen who reads the Press Statement to deduce or believe that Justice Nazlan was suspected of having committed a crime. That fact in itself can tarnish the image of an independent Judiciary.

[86] In addition, we take note that at the time the Press Statement was issued, there was significant buzz in the media that former Prime Minister, Dato' Sri Najib Razak's final appeal in the SRC International case was soon coming up for hearing before the Federal Court. The former Prime Minister even relied on an argument of supposed bias on the part of Justice Nazlan and his former employment with Maybank as a ground to nullify his conviction. The curious timing of the investigation against Justice Nazlan which was done without consultation with the Judiciary also casts doubt on whether the investigation against Justice Nazlan was *bona fide*.

[87] In this regard, our observations on constitutional judicial review and statutory judicial review are pertinent. The fact that Justice Nazlan was subject to questionable criminal investigation is very much the subject of statutory judicial review where purely administrative remedies may be sought to nullify those investigations. Such an incident does not otherwise call for constitutional adjudication on a blanket issue of whether Judges of the Superior Court are, by the nature of their office, susceptible to criminal investigation and/or prosecution.

[88] In that regard, we have stated our answers to the two constitutional Questions.

Conclusion

[89] In conclusion, we reiterate that serving Superior Court Judges are not immune from criminal investigations or prosecution. They need not be suspended or removed before they can be investigated or prosecuted. However, because they are serving Judges, criminal investigations against them are subject to a higher standard, in light of the doctrine of judicial independence. If an investigation or prosecution against a serving Judge is found to have been commenced for collateral purposes, the Courts are entitled, when reviewing them, to set them aside or pass any other remedy that counts as suitably moulded relief. As always, the remedy depends on the facts and circumstances of the case.

[90] We remit this matter to the High Court so that it can dispose of the substance of this suit, the OS, in accordance with the judgment of this Court or otherwise the law under s 85 of the CJA. There shall be no order as to costs in respect of these proceedings.

The Legal Review

The Definitive Alternative

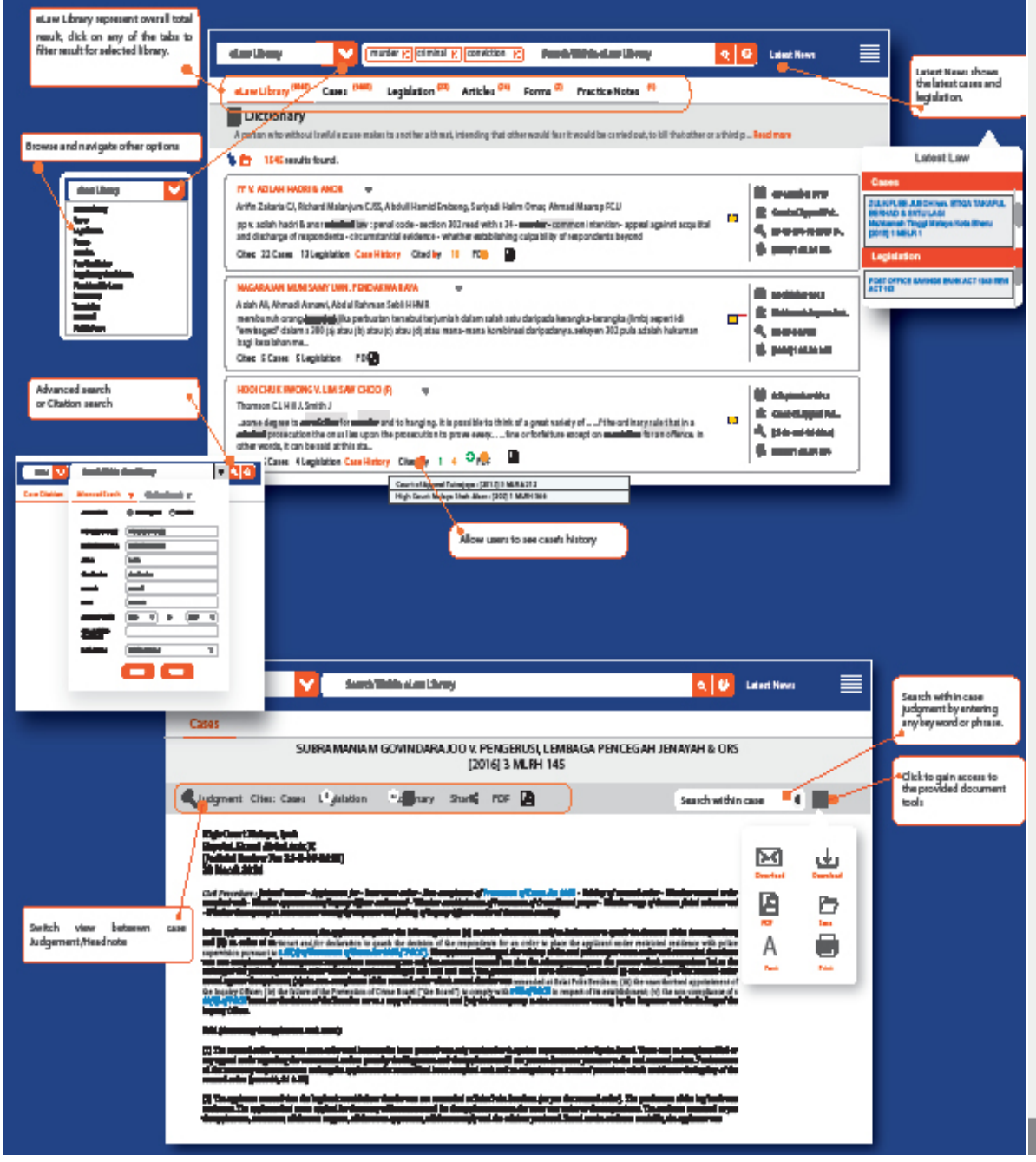
The Legal Review Sdn. Bhd. (961275-P)
B-5-8 Plaza Mont' Kiara,
No. 2 Jalan Mont' Kiara, Mont' Kiara,
50480 Kuala Lumpur, Malaysia
Phone: **+603 2775 7700** Fax: **+603 4108 3337**
www.malaysianlawreview.com

eLaw.my
The Digital Library

Introducing eLaw
Experience the difference today

eLaw.my is Malaysia's largest database of court judgments and legislation, that can be cross-searched and mined by a feature-rich and user-friendly search engine—clearly the most efficient search tool for busy legal professionals like you.

A Snapshot of Highlights

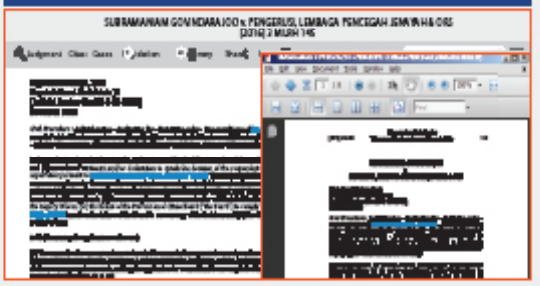


Our Features

Search Engine

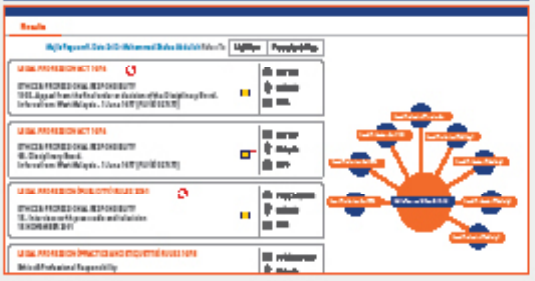
- Easier
- Smarter
- Faster Results.

Judgments Library



eLaw has more than 80,000 judgments from Federal/ Supreme Court, Court of Appeal, High Court, Industrial Court and Syariah Court, dating back to the 1900s.

Find Overruled Cases

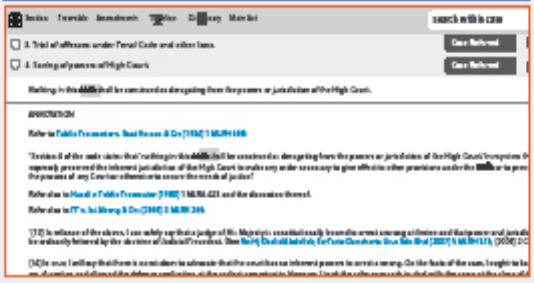


The relationships between referred cases can be viewed via precedent map diagram or a list — e.g. Followed, referred, distinguished or overruled.

Multi-Journal Case Citator

You can extract judgments based on the citations of the various local legal journals.*

Legislation Library



You can cross-reference & print updated Federal and State Legislation including municipal by-laws and view amendments in a timeline format.

Main legislation are also annotated with explanations, cross-references, and cases.

Dictionary/Translator

eLaw has tools such as a law dictionary and a English - Malay translator to assist your research.

Clarification: Please note that eLaw's multi-journal case citator will retrieve the corresponding judgment for you, in the version and format of The Legal Review's publications, with an affixed MLR citation. No other publisher's version of the judgment will be retrieved & exhibited. The printed judgment in pdf from The Legal Review may then be submitted in Court, should you so require.

Please note that The Legal Review Sdn Bhd (is the content provider) and has no other business association with any other publisher.

Start searching today!

www.elaw.my