Majority of Federal Court in Maria Chin Abdullah's case May Have Misdirected Themselves (with All Due Respect)

By Puthan Perumal (Advocate and Solicitor)

In the recent Federal Court decision of *Maria Chin Abdullah vs Ketua Pengarah Imigresen & Another (01(F)-5-03/2019(W)* dated 12 Jan 2021, it was held by the majority (4 to 3):

> *"[254] In the upshot, I hold that sections 59 and 59A of the Immigration Act are not void for being inconsistent with Article 4(1) read with Article 121(1) of the Federal Constitution.* ***The limitation of the court's review power by section 59A of the Immigration Act falls squarely within the power of Parliament to legislate pursuant to the power conferred on it by Article 121(1) of the Federal Constitution*** *and is not in breach of the doctrine of separation of powers, which cannot in any event prevail over the written constitution*."

What this simply means is that Parliament apparently can make laws ousting the judicial power of the Courts because of the following words that appear in Article 121(1) of the Federal Constitution:

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

If my reading is correct, I think the Federal Court is essentially saying this: because the Federal Constitution itself is stating that Parliament is the body giving power to the courts, therefore Parliament can take away that power from the courts. To put it in another way, if the Federal Constitution says Parliament can give courts its jurisdiction, it must necessarily also be saying that Parliament can take away its jurisdiction.

This is where, in my humble opinion the majority of the Federal Court may have made an error. They fell into error because of the approach taken in the earlier paragraphs where the wrong question was asked.

At paragraph 23, 24 and 25, the majority held:

> *"[23] Question 3 reflects the underlying basis for this court's obiter observations in Semenyih Jaya and Indira Gandhi — that judicial power had been "removed" by the 1988 amendment to Article 121(1) of the Federal Constitution and that such removal of judicial power impinges on the doctrine of separation of powers and consequently any law passed by Parliament that ousts or circumscribes judicial power is void**. One such law is section 59A of the Immigration Act, which ousts the power of the High Courts to judicially review the substantive decision of the decision maker, in this case the decision by the Director General of Immigration to impose the travel ban on the appellant**.*
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> *[24] On the face of it, **the observations in the two cases appear to give the impression that being in breach of the doctrine of separation of powers, Article 121(1) of the Federal Constitution is unconstitutional and has no force of law to confer on Parliament the power to enact ouster clauses** such as section 59A of the Immigration Act.*

> *[25] The decisions* ***could be misinterpreted to mean that Article 121(1) of the Federal Constitution must bow to the doctrine of separation of powers****. That could not have been what this court intended to say in the two cases."*

With all due respect to the majority, a reading of the case of *Semenyih Jaya* and *Indra Gandhi* does not give any impression whatsoever that Article 121(1) of the Federal Constitution is unconstitutional for bowing to the doctrine of separation of powers.

The Federal Court in *Indra Gandhi* said this:

> ***"[79]*** *Thus we come to the crux of the matter at hand. As the issue in this case concerns the interpretation of art 121(1A), in particular whether the clause has the effect of granting exclusive jurisdiction on the Syariah Court in all matters of Islamic Law including those relating to judicial review, a close scrutiny of the same is in order.*
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> ***[80]*** *In this regard, the Canadian approach offers a useful guide. A good starting point would be to take the position that art 121(1A) must not be interpreted in isolation, but read together with other provisions such as art 121(1) and against the backdrop of the principles underpinning the Constitution.*
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> ***[91]*** *Therefore, viewed in its proper constitutional context, the effect of art 121(1A) on the jurisdiction of the civil courts is apparent. Article 121(1A) should not be dismembered and then interpreted literally and in isolation of, but construed together with, art 121(1), for a construction consistent with the smooth working of the system (see Sukma Darmawan).*
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> ***[92]*** *Thus the amendment inserting cl (1A) in art 121 does not oust the jurisdiction of the civil courts nor does it confer judicial power on the Syariah Courts. More importantly, Parliament does not have the power to make any constitutional amendment to give such an effect; it would be invalid, if not downright repugnant, to the notion of judicial power inherent in the basic structure of the constitution."*

Essentially*, Indra Gandhi* says that the amendment adding Article 121(1A) cannot oust the jurisdiction of the civil courts which stems from Article 121(1) of the Federal Constitution. With all due respect, nowhere does it give the slightest impression that Article 121(1) is unconstitutional for bowing to the doctrine of separation of powers. All that it is basically saying

is that Parliament cannot take away the power and jurisdiction of the civil courts, which is given by Article 121(1) of the Federal Constitution.

The Federal Court in *Semenyih Jaya* states:

> ***"[71]*** *An astute observation on 'judicial power' was made by Eusoffe Abdoolcader SCJ in the majority judgment of Public Prosecutor v Dato' Yap Peng [1987] 2 MLJ 311, where His Lordship said that:*
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> > *… Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to the right and liabilities of one or more parties …*
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> ***[105]*** *We are of the view that the discharge of judicial power by non-qualified persons (and not by judges or judicial officers) or non-judicial personages render the said exercise ultra vires art 121 of the Federal Constitution."*

Essentially, *Semenyih Jaya* says that any Act of Parliament giving the judicial power to any one apart from judges or judicial officers, is *ultra vires* Article 121(1) of the Federal Constitution. With all due respect, nowhere does it give the slightest impression that Article 121(1) is unconstitutional for bowing to the doctrine of separation of powers. All that it is basically saying is that Parliament cannot take away the judicial power from the judiciary, which is given by Article 121(1) of the Federal Constitution.

On this wrong footing and, with all due respect, perhaps the wrong understanding of *Semenyih Jaya* and *Indra Gandhi*, the majority went on to essentially hold that Article 121(1) of the Federal Constitution has the force of law to confer on Parliament the power to enact ouster clauses such as section 59A of the Immigration Act which ousts the power of the High Courts to judicially review the substantive decision of the Director General of Immigration to impose the travel ban.

With all due respect, the majority of the Federal Court in this Maria Chin Abdullah's case had misdirected themselves when questioning the constitutionality of Article 121(1) of the Federal Constitution vis-à-vis the doctrine of separation of powers. This is because the constitutionality of Article 121(1) was never in question in the first place.

There is no correlation whatsoever between the doctrine of separation of powers and Article 121(1) of the Federal Constitution in terms of which takes precedence or has dominance over the other. The correct view is that they go hand in hand.

The basic structure doctrine is the guiding principle when it comes to checking the laws passed by Parliament pursuant to Article 121(1)of the Federal Constitution. In other words, Parliament cannot pass laws that limit or take way judicial powers given by Article 121(1) of the Federal Constitution.

Article 4(1) of the Federal Constitution provides for the supremacy of the Federal Constitution as explained by Suffian LP (sitting alone) in the Federal Court case of *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112, at 113, as follows:

> "*The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please.*"

To conclude, it is humbly submitted that the majority fell into error when they formed the view that Article 121(1) of the Federal Constitution confers powers on Parliament to make laws that take away the very inherent powers of the judiciary through courts, which is given to the judiciary through courts by the very Article 121(1) itself.

Going by that logic, there is nothing to stop Parliament from passing a law that confers zero powers to the courts.

This is where the view of the Chief Justice Tengku Maimun, albeit the minority, is of importance and should have been adopted:

> *[80] The two judgments aforementioned have held that judicial review cannot be excluded by any Act of Parliament* ***and these two judgments have been approved and followed by a 9-member Bench in Alma Nudo****. The principles pertaining to judicial power propounded in Semenyih Jaya and Indira Gandhi have also been applied in Peguam Negara Malaysia v Chin Chee Kow and another appeal [2019] 3 MLJ 444. In JRI Resources Sdn Bhd v Kuwait Finance House (M) (Bhd) (President of Association of Islamic Banking Institutions Malaysia & Anor, Interveners) [2019] 3 MLJ 561, the majority emphasised that it had "no reservations in accepting the proposition of law expounded in the Semenyih Jaya case.".*
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> *[81] Going by the principles that have been elucidated up to this point****, it is clear that the supremacy of the FC in Article 4(1) and its corollary device of judicial power are basic features of the FC****. Accordingly, the power of the Court to scrutinise State action whether legislative, executive or otherwise, cannot be excluded. This in*

itself should be a good enough answer to the respondents' second argument that section 59A can be justified without a definitive ruling on the validity of ouster clauses because it allows for challenges 'in regard to any question relating to the compliance with any procedural requirement of the Act'.

[82] To accede to the submission of learned ***SFC would mean that Courts can only scrutinise what Parliament allows to be scrutinised. There is no alternative but to reject the submission because it is reminiscent of Parliamentary supremacy****. Under Article 4(1), all laws are subject to the FC. And, as garnered from the FC's legislative history, the intendment of Article 4(1) was to cover all acts whether legislative, executive, quasi-legislative, quasi-judicial, etc. We cannot therefore, in the presence of a written constitution declaring itself to be the highest source of law, adopt the English method of resolving the legality of ouster clauses simply on the basis of statutory construction much in the way the respondents suggest.*

[83] Accordingly, section 59A of Act 155 must be assessed from the larger angle on ***whether ouster clauses are, as a whole, constitutionally valid in light of Article 4(1).*** *This is especially so in the context of the respondents' argument that remedies can be restricted at the discretion of Parliament. The argument will naturally fail if it is found that remedies are an integral aspect of judicial review against which there can be no ouster – whether constitutionally or statutorily evoked*

The correct question to ask, as stated by Chief Justice Tengku Maimun, was whether ouster clauses are valid in light of Article 4(1) of the Federal Constitution.

Unfortunately, the wrong question was asked by the majority, ie whether Article 121(1) of the Federal Constitution was unconstitutional being in breach of the doctrine of separation of powers.

Apples and oranges.

I stand corrected.