The Trilogy of Malaysian Constitutional Law

Case No. 1 : Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case

Federal Court reasserts independence of the Judiciary

by

Vijay Raj

Section 40D – Struck Down

The Federal Court has, in its recent decision in **Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case** [2017] 5 CLJ 526, unanimously struck down section 40D of the Land Acquisition Act 1960 ("Act") for being *ultra vires* the Federal Constitution.

Both appeals concerned a challenge to the constitutionality of certain provisions of the Act, including section 40D. One was an appeal by the landowner against a decision of the Court of Appeal and the other, a reference by the Court of Appeal of constitutional questions that arose in the course of an appeal for determination by the Federal Court.

In one of the appeals, the appellant also challenged the Court of Appeal's decision not to recognise its claim for loss of profit as a result of the extinguishment of the business carried out by the appellant on the land that was acquired.

Section 40D, which was introduced by way of an amendment to the Act in 1998, empowered the two valuers (commonly referred to as assessors) who assist a High Court Judge in a Land Reference, to determine the amount of compensation that ought to be awarded in respect of a land acquisition. It reads as follows:

> *"(1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.*
>
> *(2) Where the assessors have each arrived at a decision which differs from each other then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.*
>
> *(3) Any decision made under this section is final and there shall be no further appeal to a higher Court on the matter."*

The Federal Court held that, by virtue of section 40D, a High Court Judge in a Land Reference could not award compensation which differed from the amount decided by the assessors, and if the assessors themselves differed on the amount, the High Court Judge could only concur with one of them. Tan Sri Datuk Zainun Ali, FCJ, who delivered the judgment of the Federal Court commented:

''Wherefore now stands the Judge? It would appear that he sits by the sideline and dutifully anoints the assessors' decision."

Judicial power of the Federation

In striking down the provision, the Federal Court held that it is not possible for Parliament to pass laws that have the effect of diluting the exercise of judicial power by the Judiciary because the Federal Constitution vests that power in the Judiciary. The Federal Court described the concept of judicial power as follows:

"*Judicial power is the power every sovereign State must of necessity have, to decide controversies between its subjects or between itself and its subjects, whether the rights related to life, liberty or property ...*"

Prior to the introduction of section 40D in 1998, there had been a period of time, that is until 1984, when it was not objectionable for judges in Land References to sit with assessors to determine compensation for compulsory acquisitions of land. Those sittings were however held pursuant to older provisions of the Act that were repealed in 1984, and although the assessors played a vital role thereunder in giving advice regarding the amount of compensation which ought to be awarded, the decision on the amount of compensation would ultimately be arrived at by the judges.

Check and Balance

The Federal Court took the view that the placement of judicial power in the Judiciary represents an important feature of our democratic system of government because it is the judicial branch of government which is tasked with the duty of checking and balancing the powers vested in the other two branches of government, namely the legislative branch represented by Parliament, and the executive branch represented by the Prime Minister and his Cabinet.

It should go without saying that the judicial branch of government can only be effective as a check and balance if it is independent of legislative and executive influences. Law students learn very early on that the need for an independent judiciary and an effective system of checks and balances is of utmost importance and that that need, forms an integral part of the doctrine of separation of powers which modern democracies aspire to implement.

Although the doctrine and its requirements may seem obvious, the matter however had not been clear-cut in the context of our Judiciary due to an amendment to the Federal Constitution in 1988. The amendment in question was carried out by Act A704 which deleted the reference to the vesting of the judicial power of the Federation in the courts from Article 121(1) of the Constitution. However, according to the Federal Court, the words "judicial power" continued to remain in the marginal note to the said Article, and they currently appear in the shoulder note thereof as reflected in the current, reprinted, version of the Federal Constitution. The Federal Court then stated:

"*Thus it is clear to us that the 1988 amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution:*

(i) The doctrine of separation of powers; and

(ii) The independence of the Judiciary.

With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution …"

Basic fabric cannot be altered

The matters stated above formed the setting for what is perhaps the most important aspect of the Federal Court's judgment – which is their Lordships' view that it is not permissible for Parliament to amend the basic structure of the Federal Constitution even if the proposed amendment is passed by both Houses of Parliament with a two-thirds majority.

Specifically, the Federal Court said that Parliament does not have power to make amendments to the Federal Constitution that had the effect of undermining the independence of the Judiciary and the doctrine of separation of powers, both of which are basic features of our Constitution. According to Tan Sri Datuk Zainun Ali, FCJ:

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

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

Consequentially this has the unfortunate effect of allowing the executive a fair amount of influence over the matter of the jurisdiction of the High Court."

Her Ladyship referred to various decisions where the apex court had rejected the notion of Parliamentary supremacy and in particular to **Sivarasa Rasiah v Badan Peguam Malaysia & Anor** [2010] 2 MLJ 333, 342 where Gopal Sri Ram FCJ said:

"… 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."

Prospective effect of the decision

The Federal Court however clarified that their declaration of the unconstitutionality of section 40D will carry only a prospective effect. In other words, it will not be possible for completed Land Reference cases to be reopened by former landowners, although an exception was made for cases pending at the appellate stage to be revisited if the application of section 40D may have caused prejudice to the appellants therein.

Business loss

Turning their attention thereafter to the facts of the appeal before them, the Federal Court held that the Land Administrator and the High Court failed to award compensation for the extinguishment of the business that had been undertaken on the land by the Appellant at the time of acquisition and consequently, the case was remitted to the High Court for a determination of the appropriate amount of compensation that ought to be awarded on that ground.

Ordering compensation to be paid for the extinguishment of business due to an acquisition of land is itself significant because the First Schedule of the Act, which lays down the principles relating to the determination of compensation in land acquisitions, does not expressly provide for such compensation. However, the Federal Court held that that head of compensation is permissible as it ought to be considered part of the "market value" of the land which had been acquired.

Conclusion

The importance of **Semenyih Jaya** lies not in the mere fact that the apex court struck down section 40D of the Act. It is a landmark case in Malaysian constitutional law as it makes it clear that the Federal Constitution contains certain entrenched provisions that even Parliament cannot amend with a two-thirds majority, including for example, those that have the effect of undermining the doctrine of separation of powers and the independence of the Judiciary.

This decision has received widespread praise from members of the legal fraternity and the academia as it affirms the importance of an independent judiciary and the doctrine of separation of powers in forming the bedrock of a truly democratic system of government.

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Case No. 2 : Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals

Unilateral Conversion in Malaysia – Back from the Brink

by

Trevor Jason Mark Padasian

Introduction

Monday, 29 January 2018, was a momentous day. On that day, the Federal Court ("FC") set aside the unilateral conversion to Islam of three children in the long-running case of **Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals** [2018] 1 MLJ 545 ("FC Indira Gandhi"). In doing so, the FC reaffirmed that the jurisdiction of the civil courts was not ousted by Article 121(1A) of the Federal Constitution ("Constitution").

In terms of constitutional law as well as family law, a great deal was at stake. First, was the question of erosion of the judicial power and independence of the civil High Courts; and second, the right of a parent to determine the religion of his or her child or children.

FC Indira Gandhi was just one in a rash of cases involving an inevitable mix of constitutional conundrum and the unilateral conversion to Islam of children by their converting fathers without the consent of their mothers, namely, **Subashini a/p Rajasingam v Saravan a/l Thangathoray** [2007] 2 MLJ 705 (FC), **Shamala Sathiyaseelan v Dr Jeyaganesh C Mogarajah** [2011] 1 CLJ 568 (FC) and **Viran a/l Nagapan v Deepa a/p Subramaniam and other appeals** [2016] 1 MLJ 585 (FC).

Events leading up to the Decision

Indira Gandhi a/p Mutho ("Indira"), the appellant, married Patmanathan a/l Krishnan, the 6th respondent, in 1993. Their marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 ("LRA"). After nearly 16 years of marriage, Patmanathan converted to Islam on 11 March 2009 and changed his name to Muhammad Riduan bin Abdullah ("Riduan"). He left the family home with their youngest child, Prasana Diksa ("Prasana") shortly thereafter. Their two elder children, Tevi Darsiny and Karan Dinish, continued to reside with Indira. Indira discovered sometime in April 2009 that the Pengarah Jabatan Agama Islam Perak had issued three certificates of conversion to Islam of her three children. The Syariah Court had granted custody of the children to Riduan on 3 April 2009.

What the High Court decided

On 9 June 2009, Indira applied to the Ipoh High Court ("HC") by way of an application for judicial review for an order of *certiorari* to quash the certificates of conversion on the ground that their issuance by the Registrar of Muallafs was *ultra vires* and illegal. On 25 July 2013, the learned Judicial Commissioner, in addition to finding that the HC had exclusive jurisdiction to hear the judicial review application to the exclusion of the Syariah Court, held that the Registrar of Muallafs had not complied with the requirements of the relevant provisions of the Administration of the Religion of Islam (Perak) Enactment 2004 ("Perak Enactment") and quashed the certificates of conversion (see **Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors** [2013] 5 MLJ 552).

In the meantime, Riduan refused to surrender the children to Indira despite the HC having granted Indira full custody of the three children on 11 March 2010. On 30 May 2014, Indira successfully obtained a committal order to commit Riduan to prison until the delivery of Prasana to her. Indira also filed a petition for divorce on grounds of Riduan's conversion to Islam under section 51 of the LRA.

What the Court of Appeal decided

However, on appeal by Riduan, the Court of Appeal ("CA") by majority reversed the HC's decision on 30 December 2015 (**Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals** [2016] 4 MLJ 455). The majority held that that the HC had no power to question the decision of the Registrar of Muallafs or to consider the registrar's compliance with the relevant requirements of the Perak Enactment. The fact that a person had been registered in the Register of Muallafs as stated in the certificates of conversion was proof that the conversion process had been carried out to the satisfaction of the registrar.

Appeal to the Federal Court

The FC granted leave to Indira to appeal against the CA's decision on three questions of law. The respondents in the three appeals, which were heard together, were the Director of the Perak Islamic Religious Affairs Department, the Registrar of Muallafs, the Perak Government, the Education Ministry, the Government of Malaysia and Riduan.

The First Leave Question

The first leave question was whether the High Court has exclusive and inherent jurisdiction to review the actions of a public authority like the Registrar of Muallafs.

The FC unequivocally answered this question in the affirmative. In summary, under Article 121(1) of the Constitution, judicial power is vested exclusively in the civil High Courts. The jurisdiction and powers of the courts are not confined to federal law. Such judicial power, in particular, the power of judicial review, is an essential feature of the basic structure of the Constitution. Features in the basic structure of the Constitution cannot be abrogated by Parliament by way of constitutional amendment.

Significantly, such judicial power may not be removed from the High Courts and may not be conferred upon bodies other than the High Courts unless such bodies comply with the safeguards provided in Part IX of the Constitution to ensure their independence.

The FC cited a seminal case, **Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case** [2017] 3 MLJ 561, which had last year "*put beyond the shadow of doubt that judicial power vested exclusively in the High Courts by virtue of Article 121(1)*".

On the other hand, the jurisdiction of the Syariah Court to determine a subject matter of a dispute must be expressly conferred by the state legislation. The FC held that there was no doubt that section 50(3) of the Perak Enactment expressly confers jurisdiction on the Syariah Courts. However, section 50(3)(b)(x) which was relied upon did not confer jurisdiction on the Syariah Court to issue a declaration that a person has converted to Islam. Instead, that provision confers jurisdiction on the Syariah Court to issue a declaration that "*a person is no longer Muslim*". The FC pointed out that this provision would be applicable in a case where a person renounces his Islamic faith. The issue to be decided in the instant appeals concerned the validity of the certificates of conversion issued by the Registrar of Muallafs in respect of the children's conversion to Islam. If the FC found that such certificate was invalid, it would only mean that the said person had never at any time been a Muslim. Thus, the question of the person being "*no longer a Muslim*" does not arise.

Limits of Jurisdiction of Syariah Courts

Surveying the jurisprudence of the Constitution, the FC was of the view that the Constitution, being founded on the Westminster model constitution, is premised on certain underlying principles which include the separation of powers, the rule of law and the protection of minorities. Being part of the basic structure of the Constitution, these principles cannot be abrogated or removed. The FC reiterated that the judicial power of the civil courts is inherent in the basic structure of the Constitution. The power conferred on the Syariah Courts pursuant to Article 121(1A) must be interpreted against these foundational principles.

To determine whether Article 121(1A) has the effect of granting jurisdiction to the Syariah Courts in judicial review applications to the exclusion of the civil courts, the FC adopted the two-part test from the Canadian courts (**MacMillan Bloedel Ltd v Simpson** [1995] 4 SCR 725), namely:

(a) Stage 1: Grant of jurisdiction to inferior court

The principle here is that the jurisdiction of a superior court cannot be vested in a body not constituted in accordance with the provisions that protect the independence of its judges.

Applying this test, the FC held that judicial power cannot be vested in the Syariah Courts which are not "superior courts" within the meaning of Part IX of the Constitution with all its constitutional provisions safeguarding the independence of judges.

(b) Stage 2: Ousting of core jurisdiction of superior court

The principle that underpins this test is that the essential historical functions cannot be removed from the superior courts and granted to other adjudicative bodies if the resulting transfer contravenes the constitution.

> Applying this test, the FC held that judicial power is part of the core or inherent jurisdiction of the civil courts being "superior courts" within the meaning of Part IX of the Constitution.

The FC, answering the first leave question in the affirmative, concluded that the power to review the decision of the Registrar of Muallafs, being an executive body, rested solely with the civil courts and not the Syariah Courts.

In answering the first leave question, Zainun Ali FCJ emphasised that that the determination of the present appeals "*did not involve the interpretation of any Islamic personal law and practice, but rather with the more prosaic questions as to the legality and constitutionality of administrative action taken by the Registrar (of Muallafs).*"

The Second Leave Question

The second leave question was whether a child of a marriage registered under the LRA who has not attained the age of 18 years must comply with both sections 96(1) and 106(b) of the Perak Enactment before the Registrar of Muallafs may register the child's conversion to Islam.

Section 96(1) of the Perak Enactment provides that in order for a conversion of a person to Islam to be valid, the person converting must utter in reasonably intelligible Arabic the two clauses of the Affirmation of Faith. In addition, at the time of uttering the two clauses, the person must be aware of the meaning of the clauses and must utter them based on the person's own free will. Section 106(b) of the same enactment provides that a person below the age of 18 may convert if he is of sound mind and his parent or guardian consents in writing to his conversion.

The FC answered the second leave question in the affirmative and held that the requirements in sections 96 and 106 are mandatory and must be complied with. It found that the children of Indira and Riduan did not utter the two clauses of the Affirmation of Faith and were not present before the Registrar of Muallafs before the certificates of conversion were issued. As the mandatory statutory requirements were not fulfilled, the Registrar of Muallafs had no jurisdiction to issue the certificates of conversion. The lack of jurisdiction by the Registrar of Muallafs therefore rendered the certificates issued a nullity.

The FC then considered whether section 101(2) of the Perak Enactment, which provides that a certificate of conversion to Islam shall be conclusive proof of the facts stated in the certificate of conversion, had the effect of excluding the HC's power to review the issuance of those certificates. This argument was rejected by the FC. First, the FC held that the court's supervisory jurisdiction to determine the legality of an administrative action (i.e. the issue of the certificates of conversion) by the Registrar of Muallaf could not be excluded even by an express ouster clause (**Anisminic Ltd v The Foreign Compensation Commission and Another** [1969] 2 AC 147 (HL)).

Further, and in any event, the FC opined that the language of section 101(2) did not purport to oust judicial review. The provision merely states that the certificate of conversion is conclusive proof of the facts stated therein, that is, that the person named in the certificate has been converted to the religion of Islam, and his name has been entered in the Register of Muallafs. In the present appeals, the fact of the conversion or

the registration of Indira's children was not challenged – what was challenged was the legality of the conversion and registration.

The Third Leave Question

The third leave question considered whether the mother and father (if both are surviving) of a child of a civil marriage must consent before a certificate of conversion to Islam could be issued in respect of the child.

According to the FC, this issue involves the interpretation of the expression "parent" in Article 12(4) of the Constitution. The FC cited Articles 12(3) and 12(4) of the Constitution which provide:

"*(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.*

(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his ***parent*** *or guardian.*" (*Emphasis added*)

The FC also considered the national language (Bahasa Malaysia) translation of Article 12(4) was differently worded thus:

"*(4) Bagi maksud Fasal (3) agama seseorang yang di bawah umur lapan belas tahun hendaklah ditetapkan oleh ibu* ***atau*** *bapanya atau penjaganya.*" (*Emphasis added*)

In view of the inconsistency between the Bahasa Malaysia and English versions of Article 12(4), it was contended that the Bahasa Malaysia version prevailed over the English version pursuant to Article 160B of the Constitution which provides, *inter alia*, that the Yang di-Pertuan Agong may prescribe a translated text in Bahasa Malaysia to be the authoritative version. However, the FC agreed with the HC that since the requisite prescription of the national language version by the Yang di-Pertuan Agong under Article 160B had not been effected, the authoritative version is the English version.

The FC then referred to the Eleventh Schedule to the Constitution (read together with Article 160(1)) which provides that, in interpreting the Constitution, "*words in the singular include the plural, and words in the plural include the singular*". The FC explained that the reason "parent" is used in Article 12(4) is to provide for a situation where the child has only one parent, i.e. a single parent situation. Where both parents exist, the Eleventh Schedule is to be relied on, that is the plural form of the word, i.e. "**parents**" is to be used and accordingly, the decision on the religion of a child is to be decided by both parents.

Finally, the FC upheld the equality of parental rights in respect of an infant (which is defined to include any child who has not attained the age of majority) as embodied in *inter alia* sections 5 and 11 of the Guardianship of Infants Act 1961 ("GIA") which provides that "*a mother shall have the same rights and authority as the law allows to a father*" in relation to the custody or upbringing of an infant and that the court "*shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be*". The FC held that the GIA would still apply to the children of Indira and Riduan notwithstanding the latter's conversion to Islam as conversion does not absolve a person of antecedent obligations.

Both parents' consent was therefore necessary before the certificates of conversion to Islam could be issued and the FC answered the third leave question in the affirmative.

In light of its answers to the leave questions, the FC allowed Indira's appeal. At the same time, the FC also ordered the majority decision of the CA to be set aside and affirmed the decision and orders of the HC.

Prospective effect

In a rare development in Malaysian jurisprudence, the FC applied the doctrine of prospective ruling and ruled that its decision in **FC Indira Gandhi** is to have prospective effect. This means that the decision will not affect decisions made by the courts prior to the date of the FC's judgment, i.e. 29 January 2018.

Comments

The **FC Indira Gandhi** decision has been rightly commended for its sound judgment and cogent analysis of the complex constitutional and family law issues of the case. The decision has brought some judicial certainty to this hitherto troubled area of jurisprudence. The FC's interpretation of Articles 121(1) and 121(1A) of the Constitution clearly demonstrates the jurisdictional limits of the Syariah Courts and the supremacy of the civil High Courts. Its interpretation of Article 12(4) of the Constitution and sections 5 and 11 of the GIA removes any doubt that the consent of both parents is required before a certificate of conversion can be issued, except in a single-parent situation.

However, as an apex court, a future panel of the FC has the power to, and may depart from, the reasoning and judgment of **FC Indira Gandhi**. It is therefore imperative that Parliament reintroduce Clause 7 which had at the last moment been withdrawn from the Law Reform (Marriage and Divorce)(Amendment) Bill 2016 that was passed to amend the LRA in August 2017. Clause 7, which sought to introduce a new section 88A into the LRA, had provided:

"*Where a party to a marriage has converted to Islam, the religion of any child of the marriage shall remain as the religion of the parties to the marriage prior to the conversion, except where both parties to the marriage agree to a conversion of the child to Islam, subject always to the wishes of the child where he or she has attained the age of eighteen years.*"

Arising from **FC Indira Gandhi**, it has been reported that the Government may consider reintroducing Clause 7 (Star Online, 30 January 2018). It remains to be seen whether the Government has the political will to make this a reality.

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Case No. 3 : Alma Nudo Atenza v Public Prosecutor and another appeal

Striking down the Double Presumption

by

Kok Chee Kheong

The case of **Alma Nudo Atenza v Public Prosecutor and another appeal** [2019] 4 MLJ 1 concerned two appeals under the Dangerous Drugs Act 1952 ("DDA").

The appellants were tried in separate cases for the offence of drug trafficking under section 39B of the DDA. In both cases, the prosecution applied the presumption in subsection 37(d) together with that under subsection 37(da) of the DDA to establish a prima facie case of 'possession and knowledge' and 'trafficking' on the part of each accused. As the High Court was satisfied that the accused had failed to rebut the presumptions, they were each convicted and sentenced to death. The appeals by the accused to the Court of Appeal were dismissed. Thus the matter came before the Federal Court.

The common issue before the Malaysian apex court was the constitutionality of section 37A of the DDA on grounds that it (i) contravenes the principle of separation of powers in the Federal Constitution ("FC"); and (ii) violates articles 5 and 8 of the FC.

The relevant provisions of the DDA

Section 37A was inserted into the DDA with effect from 15 February 2014. It reads:

"Notwithstanding anything under any written law or rule of law, a presumption may be applied under this Part in addition to or in conjunction with any other presumption provided under this Part or any other written law."

Section 37 of the DDA lists out a number of presumptions, of which subsections 37(d) and 37(da) provide as follows:

"In all proceedings under this Act or any regulation made thereunder—

...

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

...

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

...

(ix) 40 grammes or more in weight of cocaine;

...

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

...

otherwise than in accordance with the authority of this Act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug;'"[1]

Section 37A was introduced into the DDA to permit the presumption in subsection 37(d) to be applied together with the presumption in subsection 37(da) against an accused after the Federal Court held in **Muhammed bin Hassan v Public Prosecutor** [1998] 2 MLJ 273 that the presumption of possession under subsection 37(d) could not be used to invoke the presumption of trafficking under subsection 37(da) due to the distinction between the words '**deemed**' in subsection 37(d) and '**found**' in subsection 37(da) as the former arises by operation of law without the need to prove how a particular state of affairs is arrived at, whereas the latter connotes a finding made by a court after trial. The Federal Court in **Muhammed Hassan** went on to hold that using the presumption of possession in subsection 37(d) to invoke the presumption of trafficking in subsection 37(da) was harsh, oppressive and impermissible.

The decision of the Federal Court

The challenge based on separation of powers

The appellants submission on this ground may be summarised as follows:

- under article 74(1) of the FC, Parliament is empowered only to make laws;
- under article 121(1) of the FC, judicial power is vested exclusively in the courts;
- in **Muhammed bin Hassan**, the Federal Court declared that using the presumption of possession to invoke the presumption of trafficking under section 37 of the DDA was harsh, oppressive and thus impermissible;
- that once the Federal Court had exercised judicial power on the matter, Parliament could not interfere with the exercise by amending the DDA to legalise what had been declared illegal; and
- that by enacting section 37A to overrule the decision of **Muhammed bin Hassan**, Parliament had exercised the judicial power of declaring law.

According to Tan Sri Richard Malanjum CJ, constitutions based on the Westminster model are founded on the underlying principle of separation of powers. Citing Lord Diplock in **Hinds v The Queen** [1977] AC 195 (PC), the learned Chief Justice added that while the FC does not expressly delineate the separation of powers, the principle is taken for granted as a constitutional fundamental and the absence of express words in the FC prohibiting the exercise of a particular power by a different branch of government does not imply that it is permitted.

His Lordship observed that the Federal Court had on several occasions recognised that the principle of separation of powers, and the power of the ordinary courts to review the legality of state action, are sacrosanct and form part of the basic structure of the FC (**Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case** [2017] 3 MLJ 561 at para 90; **Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals** [2018] 1 MLJ 545 at paras 48 and 90).

The Federal Court held that the authorities cited by the appellants, namely **ST Sadiq v State of Kerala** [2015] 4 SCC 400, **Indira Nehru Gandhi v Shri Raj Narain** [1975] 2 SCC 159, and **Medical Council of India v State of Kerala** (Writ Petition (C) No 178 & 231 of 2018), did not support the appellants' submission that any amendment to a law that has been interpreted by a court is an impermissible encroachment into judicial power. On the contrary, the Federal Court was of the view that these cases recognise the power of the legislature to amend a law which formed the basis of a court's decision. The effect of such an amendment is not to overrule the decision of the court in that case, but to alter the legal foundation on which the judgment is founded.

Tan Sri Malanjum added that the proposition put forward by the appellant would have the effect of insulating a law from any change by Parliament once it has been interpreted by the court. This would in effect mean that Parliament is prohibited not only from correcting defects in the law pointed out by the court, but from amending the law for the future once it has been applied by the court. Such a far-reaching impact would constitute a significant fetter on the legislative power of Parliament and upset the check and balance mechanism integral to a constitutional system based on the separation of powers.

In the above premise, the Federal Court dismissed the first ground of challenge by the appellants.

The challenge based on articles 5 and 8

Before proceeding to address this ground of challenge, the learned Chief Justice laid down the principles that must be borne in mind in interpreting any constitutional provisions such as articles 5 and 8 of the FC:

- firstly, that a constitution is *sui generis*, governed by interpretive principles of its own;

- secondly, that the constitutional provisions should be interpreted generously and liberally, not rigidly or pedantically (**Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus** [1981] 1 MLJ 29); and

- thirdly, that the courts are duty bound to adopt a prismatic approach when interpreting the fundamental rights guaranteed under the FC, in order to reveal the spectrum of constituent rights submerged in each article (**Lee Kwan Woh v Public Prosecutor** [2009] 5 MLJ 301 at para 8).

Article 5: ''in accordance with law''

Article 5(1) of the FC reads, "*No person shall be deprived of his life or personal liberty save in accordance with law.*"

"Law" as defined in article 160(2) of the FC read with section 66 of the Interpretation Acts 1948 and 1967 includes the common law of England; the latter includes the concept of rule of law. Therefore the expression "law" in article 5(1) and in other fundamental liberties provisions in the FC must be in tandem with the concept of rule of law and not rule by law (**Lee Kwan Woh** at para 16; **Sivarasa Rasiah v Badan Peguam Malaysia & Anor** [2010] 2 MLJ 333 at para 17).

The learned Chief Justice added that in a system based on the rule of law, "law" must among other requirements, "*be fair and just and not merely any enacted law however arbitrary, unfair or unjust it may be. Otherwise that would be rule by law.*"

In the context of criminal law, the Federal Court reiterated that article 5(1) of the FC enshrines an accused's right to receive a fair trial by an impartial tribunal and to have a just decision based on the facts (**Lee Kwan Woh** at para 18).

Whilst acknowledging that the phrase "in accordance with law" in article 5(1) includes the fundamental principle of presumption of innocence, the Federal Court recognised that there are situations where it is sensible to allow certain exceptions, for instance, a shift of the onus of proof to the defence for certain elements of an offence where such elements may only be known to the accused. In such an event, a degree of flexibility is required to strike a balance between the public interest and the right of an accused person and "*this is where the doctrine of proportionality under article 8(1) becomes engaged.*"

Article 8: The doctrine of proportionality

Article 8(1) of the FC stipulates that "*All persons are equal before the law and entitled to the equal protection of the law.*"

According to the Federal Court, article 8(1) guarantees fairness in all forms of state action. It ensures any state action (legislative, administrative or judicial) is objectively fair and houses within it, the doctrine of proportionality which is the test to be used when determining whether any form of state action is arbitrary or excessive when it is asserted that a fundamental right has been infringed (**Lee Kwan Woh** at para 12).

Citing **Sivarasa Rasiah** at para 30:

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

In light of the above authorities, the Federal Court rejected the appellants' contention that the right of an accused to be presumed innocent until proven guilty is not subject to the doctrine of proportionality as being unsupported by authority and without basis.

The constitutionality of section 37A

Tan Sri Malanjum CJ reiterated that the Federal Court in **Muhammed bin Hassan** had held that based on the clear and unequivocal meaning of the statutory wording, 'deemed possession' under subsection 37(d) cannot be equated to 'found possession' so as to invoke the presumption of trafficking under subsection 37(da). As such, despite the insertion of section 37A, the wording of subsections 37(d) and 37(da) does not permit the concurrent application of both the said presumptions in a drug trafficking offence. The Federal Court further said that even if Parliament had amended the wording of subsection 37(da) in accordance with the judgment in **Mohammed Hassan**, the fundamental question of constitutionality remains.

Nature of presumptions

After clarifying that presumptions can be categorised into presumptions of law and presumptions of fact, the Federal Court held that the operation of the two presumptions in subsections 37(d) and 37(da) is as follows:

(a) once the prosecution proves that an accused had custody and control of a thing containing a dangerous drug, the accused is presumed to have possession and knowledge of the drug under subsection 37(d). The 'deemed possession', presumed by virtue of subsection 37(d), is then used to invoke a further presumption of trafficking under subsection 37(da), if the quantity of the drug involved exceeds the statutory weight limit;

(b) section 37A thus permits a 'presumption upon a presumption'; and

(c) as such, for a charge of drug trafficking, all that is required of the prosecution to establish a prima facie case is to prove custody and control on the part of the accused and the weight of the drug. The legal burden then shifts to the accused to disprove the presumptions of possession and knowledge (subsection 37(d)) and trafficking (subsection 37(da)) on a balance of probabilities.

The Federal Court referred to the Canadian case of **R v Whyte** (1988) 51 DLR 4th 481, 493, where Dickson CJ said:

"*The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists. When that possibility exists, there is a breach of the presumption of innocence … If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.*"

The Federal Court then held that for the aforesaid reasons, section 37A *prima facie* violates the presumption of innocence since it permits an accused to be convicted while a reasonable doubt may exist.

Proportionality and section 37A

Their Lordships then proceeded to consider whether the incursion into the presumption of innocence under article 5(1) satisfies the requirement of proportionality housed in article 8(1) by applying the three-staged test expounded in **Sivarasa Rasiah**.

First stage: Whether there is a sufficiently important objective to justify the right to the presumption of innocence

The objective of the legislature in inserting section 37A is to overcome the problem of the prosecution failing to prove trafficking as defined in the DDA. The Federal Court recognised that drug trafficking is a major problem in Malaysia. As securing convictions of drug traffickers is one of the ways to curb this problem, it can be considered a sufficiently important objective and one that is substantial and pressing.

Second stage: Whether the means designed by Parliament has a rational nexus with the objective it is intended to meet

The Federal Court reiterated that the effect of section 37A is to shift the burden of proof to an accused on the main elements of possession, knowledge, and trafficking, provided that the prosecution establishes first the relevant basic facts. The Federal Court was of the view that it was at least arguable that the resulting ease of securing convictions is rationally connected to the aim of curbing the vice of drug trafficking.

Third stage: Assessment of proportionality

In assessing proportionality, their Lordships emphasised that any restriction of fundamental rights does not only require a legitimate objective but must be proportionate to the importance of the right at stake.

The presumptions under subsections 37(d) and 37(da) relate to the three central and essential elements of the offence of drug trafficking, namely, possession of a drug, knowledge of the drug, and trafficking. The effect of the presumptions is that once the essential ingredients of the offence are presumed, the accused is placed under a legal burden to rebut the presumptions on a balance of probabilities. In their Lordships' view, this is a grave erosion to the presumption of innocence housed in article 5(1) of the FC.

Their Lordships added that the most severe effect, tantamount to being harsh and oppressive, arising from the application of a 'presumption upon a presumption' is that the presumed element of possession under subsection 37(d) is used to invoke the presumption of trafficking under subsection 37(da) without considering that subsection 37(da) requires not a 'deemed' possession, but a '**found**' possession which entails an affirmative finding of possession based on adduced evidence to invoke the presumption of trafficking. This constitutes a grave departure from the general rule that the prosecution is required to prove the guilt of an accused beyond a reasonable doubt.

The application of the 'double presumptions' under the two subsections also gives rise to a real risk that an accused may be convicted of drug trafficking in circumstances where a significant reasonable doubt remains as to the main elements of the offence. In such circumstance, it cannot be said that the responsibility remains primarily on the prosecution to prove the guilt of the accused beyond a reasonable doubt.

Based on the factors above—the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and the cumulative effect of the two presumptions — the Federal Court considered that section 37A constitutes a most substantial departure from the general rule, which cannot be justified and is disproportionate to the legislative objective it serves. In view of the seriousness of the offence and the punishment it entails, their Lordships found the severe incursion into the right of the accused under article 5(1) is disproportionate to the aim of curbing crime, and hence, fails to satisfy the requirement of proportionality housed under article 8(1) of the FC.

Accordingly, the Federal Court held section 37A of the DDA to be unconstitutional for violating article 5(1) read with article 8(1) of the FC. The Federal Court quashed the convictions of the accused and substituted them with convictions of possession under section 12(1) of the DDA which is punishable with life imprisonment or for a term of not less than five years and with whipping of not less than ten strokes under section 39A(2) of the DDA.

Comments

From a constitutional law perspective, **Alma Nudo Atenza** is noteworthy decision. First, it affirms the underlying principles of separation of powers and the basic structure of the FC that had previously been expounded by our apex court in **Semenyih Jaya** and **Indira Gandhi a/p Mutho**. The recognition by the Federal Court of the right of Parliament to amend a law to alter the legal foundation on which a judgment has been founded has added credence to the doctrine of separation of powers expounded by the Federal Court in the earlier cases.

Second, it is undoubtedly an outstanding example of the application of the prismatic approach in interpreting the fundamental rights provisions in the FC. By adopting this approach, the Federal Court has elicited the constituent rights that are embedded in the impugned provisions.

Third, the Federal Court has laid down in detail the guiding principles on the issues that a court should consider when it is alleged that a fundamental right of a person under the FC has been infringed.

[1] The presumption in sub-paragraph (xvi) of subsection 37(da) of the DDA was applied against the accused in the first appeal as a bag belonging to her was found to contain 2,556.4 grammes of methamphetamine, whilst the presumption in sub-paragraph (ix) of the same subsection was applied against the accused in the second appeal as a bag belonging to her was found to contain 693.4 grammes of cocaine.