IN THE FEDERAL COURT OF MALAYSIA

(ORIGINAL JURISDICTION)

CASE NO: BKA-3-11/2019 (W)

Between

...Petitioner

And

1. Kerajaan Negeri Selangor
2. Majlis Agama Islam Selangor …Respondents

CORAM:

Tengku Maimun binti Tuan Mat, CJ

Rohana binti Yusof, PCA

Azahar bin Mohamed, CJM

Abang Iskandar bin Abang Hashim, CJSS

Mohd Zawawi bin Salleh, FCJ

Nallini Pathmanathan, FCJ

Vernon Ong Lam Kiat, FCJ

Zabariah binti Mohd Yusof, FCJ

Hasnah binti Dato' Mohammed Hashim, FCJ

JUDGMENT OF ZABARIAH MOHD YUSOF, FCJ

[1] I have read the judgment of the learned CJ and learned CJM and I agree with the conclusion in both of the judgments that the existence of

the preclusion clause serves to restrict the States Legislature from enacting laws on these subjects which, remain within the domain of Parliament to regulate and enact within the general design provided for by the FC. As a result we grant prayer (1) of the amended petition.

[2] However, with regards to paragraph 64 of the grounds of the learned CJ, with the greatest of respect, I have some reservations to the said paragraph.

[3] Firstly, on the 2nd sentence of the said paragraph which states that in view of "the judgments of this Court in ***Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case*** [2017] 3 MLJ 561 and ***Indira Ghandi a/p Mutho v Pengarah Jabatan Agama Islam Perak and Ors and other appeals*** [2018] 1 MLJ 545, in all cases, the civil Superior Courts retain **supervisory jurisdiction** which is **inherent** in their function under Articles 4(1) and 121(1) of the FC……."

[4] The application of Articles 4(1) and 121(1) of the Federation Constitution (FC) was addressed in the majority judgment of ***Rovin Joty & 5 others v Lembaga Pencegahan Jenayah and 4 Others*** (Criminal Appeals No: 05(HC)(303, 304, 305, 307, 308-12/2019(B) and 05(HC)-7-01/2020(W)) which was delivered on 19.2.2021, where it was held that powers of the courts (be it original jurisdiction or supervisory jurisdiction), is derived from Article 121(1), not Article 4(1) as stated in the said sentence. The application of Article 4(1) was also addressed in the majority judgment of ***Maria Chin Abdullah v Ketua Pengarah Imigresen & Menteri Dalam Negeri*** [2021] 2 CLJ 579. Article 4(1) is a declaratory provision on the supremacy of FC as the law of the Federation and the rest of Article 4 deals with the manner of challenging any law which is

inconsistent with the FC or the incompetency of the relevant legislature in enacting any particular law. Article 121(1) is the provision that deals with judicial power of the courts which includes supervisory jurisdiction. Article 121(1) expressly provides that the jurisdiction and powers of the courts is conferred by federal law.

[5] In relation to the same 2nd sentence, mention must also be made of the "inherent powers" of the courts although the said sentence mentioned "…*inherent in their function under Article 4(1)…".* Inherent powers of the courts are not provided under Article 4(1) of the FC, but are provided under O 92 r 4 of Rules of Court 2012, Rules 137 of the Rules of the Federal Court 1995 and section 25 of the Courts of Judicature Act 1964. Such provision for inherent powers of the courts does not confer new jurisdiction. Such inherent powers are general powers which are subjected to the existing jurisdiction as provided under the FC, the Courts of Judicature Act 1964 and other relevant special statutes applicable to any given case, e.g. POCA, SOSMA and Dangerous Drugs Act 1974 to name a few (***Rovin Joty & 5 others)***. As held in ***Abdul Ghaffar Md Amin v Ibrahim Yusof & Anor*** [2008] 5 CLJ 1 which relates to Rule 137 of the Rules of the Federal Court 1995 in relation to the rights of appeal, it was held by this court in the said case that:

> "(1) Rule 137 of the Rules of the Federal Court cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the FC as spelt out under the Federal Constitution, the CJA 1964 and other statutes…It is not within the jurisdiction of the courts to create appeals when the statute does not provide or…..permit. That is the intention of the legislature, and it is incumbent upon this court to give effect to it."

Hence, supervisory jurisdiction of the courts, entails appellate and revisionary jurisdiction, which is provided in Articles 121(1), 121(1B), 121(2) of the FC, Courts of Judicature Act 1964 and federal law, not Article 4(1).

[6] In respect to the last sentence of paragraph 64 in the said judgment, which implies that if the jurisdiction is not excluded in the law, then the jurisdiction is there, by the words "*Thus, unless their jurisdiction is clearly excluded by virtue of subject matter under Article 121(1A) the question that the civil Superior Courts have no jurisdiction does not arise.".* Jurisdiction of the courts must be provided by the law/statutes. If it is not provided, then the jurisdiction is not there. Caution must be exercised here in interpreting the issue of jurisdiction in relation to Article 121(1A) as such. What was held in ***Indira Ghandi a/p Mutho***, is that Article 121(1A) did not prevent civil courts from continuing to exercise jurisdiction in determining matters under federal law, notwithstanding the conversion of a party to Islam. In ***Indira Ghandi a/p Mutho,*** it involves a couple where the husband has converted to Islam whereas the wife did not, which means that she had no locus to appear before the Syariah Courts and that Syariah Court did not have jurisdiction over her. Hence, it was held that Article 121(1A) does not constitute a blanket exclusion of the jurisdiction of civil courts whenever a matter relating to Islamic law arises. One needs to understand what was held in the context of the facts of the case.

[7] ***Semenyih Jaya*** indirectly acknowledged that the jurisdiction of courts is provided by the law when it held that the jurisdiction of the Court of Appeal to hear appeals from the High Court should be exercised **by reference to the Courts of Judicature Act 1964**:

"[5] The unconstitutionality of s 40D of the LAA was only because of the decision-making process, i.e. the determination of the amount of compensation by the assessors. The provision limiting appeal in s 40D(3) was a separate and distinct issue. Section 40D(3) was a finality clause which declared any decision made under s 40D to be final. It did not contribute to the invalidity of section 40D. **To hold otherwise would be contrary to s 68(1)(d) of the Courts of Judicature Act 1964 …. The law recognized the Legislature's power to enact laws limiting appeals by declaring the finality of a High Court Order.** On the other hand, the ouster of the right of appeal in respect of an award of compensation under the proviso to s 49(1) of the LAA had to be narrowly and strictly construed to give meaning to the constitutional protection afforded to a person's right to his property. The proviso to s 49(1) was not a complete questions of compensation. The bar to appeal was limited to issues of fact on ground of quantum of compensation. An Aggrieved party had the right to appeal against the decision of the High Court on questions of law (see paras 136-137, 139, 148 and 155).

[6] **The proviso to s 49(1) of the LAA was not ultra vires art 121(1B) of the Constitution. The latter was a general provision empowering the Court of Appeal to hear appeals from the High Court. The jurisdiction of the Court of Appeal to hear appeals from the High Court should be exercised by reference to the CJA. The bar to appeal against the amount of compensation awarded by the High Court as contained in the proviso to s 49(1) operated within the framework of s 68(1) of the CJA (see para 165)."**

[8] Apart from the aforesaid, I agree with the final conclusion of both the judgments of the learned CJ and CJM.

Signed:
Zabariah Mohd Yusof
Judge of the Federal Court
Putrajaya
Dated: 25.2.2021

COUNSEL

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