WHO IS ENCROACHING WHOSE JURISDICTION, PARLIAMENT OR COURTS?

By
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At first, it was the importation from India of the principle of basic structure of the constitution. It was done by one judge in a case where the principle was not at all relevant for the decision of the case. Yet he took the opportunity to introduce it, ignoring two earlier Federal Court judgments which had stood as the law of this country for over thirty years.

In subsequent cases, the younger judges who appeared to be unaware of the three decades old judgments of the Federal Court or whose research officers did not come across the judgments in their "research" and therefore did not bring them to the judges' attention, merely followed (or was it the research officers who drafted the judgment?) the obiter and turned the principle invented by the Indian Supreme Court into the law of this country.

In so doing, the court had usurped the power of Parliament to make law. Nowhere in the Federal Constitution does it say that certain parts of the Constitution cannot be amended. On the other hand, Article 159 very clearly states that Parliament may amend the Constitution provided the procedure for the amendment of the particular part is followed e.g. by a two-thirds majority or a two-thirds majority plus the consent of the Conference of Rulers. The power to amend the Constitution is vested in the Parliament, not the court.

Yet, by adopting the principle of the basic structure of the constitution from the judgment of the Indian Supreme Court, our judges gave themselves the power to effectively amend the Constitution by deciding that Parliament has no power to amend any part of the Constitution which they will decide, on a case by case basis, that it cannot be amended.

In other words, the judges gave themselves the power to strike down any amendment by Parliament of any part of the Constitution which they say forms parts of the basic structure the Constitution and therefore cannot be amended.

The effect is that the judges had themselves amended the Constitution to give themselves the power to decide that certain parts of the Constitution cannot be amended, when the power to amend the Constitution is vested in the Parliament and the Constitution itself allows any part of the Constitution to be amended by Parliament, provided that the procedure is followed.

On appointment, judges took the oath to uphold the Constitution. Yet, they discarded the clear provision of the Constitution and adopted the judgment of the Indian Supreme Court which had been rejected by two judgments of our Federal Court and had stood as law of this country for over thirty years, to decide contrary to the constitutional provision. It is their judgment which is unconstitutional. It is they who had encroached the jurisdiction of Parliament, not vice versa.

Judges talked about separation of powers in their judgments. Yet, they breached that principle to usurp the function of the Parliament to amend the Constitution under the pretext of interpretation.

Where do they get the power from? Answer: The Indian Supreme Court!

For in depth discussion of this issue please read: Not For Judges To Rewrite The Constitution (12 06 2017); No Judge Is a Parliament (30 03 2018); Open letter to all Members of Parliament, Re: Federal Court Has Encroached The Jurisdiction of Parliament (26 07 2019), all are available on http://www.tunabdulhamid.my and https://tunabdulhamid.me

Now we come to the issue of bail which is the subject matter of the press release by the Attorney General on 13th December 2019. (As I am unable to get a copy of the High Court judgment, in fact I was told that no grounds of judgment had been issued yet, I am relying on the Attorney General's press release in writing this article.)

The case involves12 suspects linked to the terrorist group known as the Liberation Tigers of Tamil Eelam ("LTTE"). They were charged under Section 130J of the Penal Code for giving support to LTTE through social media to promote the group to the public, as well as under Section 130JB of the Penal Code for having possession of items related to LTTE.

Sections 130 and 130J(b) of the Penal Code, under which all of them have been charged, are offences to which the Security Offences (Special Measures) Act 2012 ("SOSMA") apply.

Section 13 of SOSMA prohibits the granting of bail from the time of arrest until trial, indeed, even after an acquittal by the trial court pending appeal by prosecution to the apex court.

They challenged the validity of section 13. The High Court allowed their application. In explaining why he did not intend to appeal against the judgment, the Attorney General issued a press release. In the press release, he noted that, "Justice Nazlan in the High Court recognized the principles in the basic structure doctrine and developed in the Indira Gandhi and Semenyih Jaya cases when holding Section 13 of the SOSMA Act as unconstitutional because that section closes the door to judicial application for bail. Thus, access to justice is denied to all accused under SOSMA between charge and their final appeal before the Federal Court…."

Before proceeding any further, let it be clear that I am not saying that Section 13 is good or bad law and whether it should be repealed or not. I am only addressing the issue regarding whose jurisdiction it is to make, amend or repeal the law.

It was the Government of the day then that decided to have that law and caused it to be passed by Parliament. Of course, it was the Attorney General then who drafted the law and advised the Government of its legality.

If there is a change of government and the new government is of the view that that is not a good law to have, then the new Government should decide whether to repeal or amend it. Again, it is the Attorney General who advises the Government on the legal aspect and draft the bill. It is the function of the Parliament to amend or repeal the law.

That is completely within of the jurisdiction of the Parliament to do, not the Court. Of course, the Court may declare a law unconstitutional. However, that is purely a legal matter, if it contravenes the Constitution, not because the new Government, the new Attorney General and the social activists, do not like it. The Court should be neutral, it should decide according to the law for the time being in force even if nobody likes its decision.

Then, it up to the Government of the day to instruct the Attorney General to draft a bill to be passed by Parliament to amend the law.

If the Attorney General himself is of the opinion that a particular law should be made, amended or repealed, he could prepare a bill and convince the Government to have the Parliament to enact it.

That is the system. That is how separation of powers operates. It does not sanction the court to usurp the function of Parliament to effectively amend the law (or the Constitution) through a declaration, just because it is the popular view.

Whether the validity of a declaration that a law is constitutional or not depends on the ground relied on by the judge. If the judge can show that the law contravenes the Constitution, well and good. Here, from the press statement of the Attorney General, it appears that Justice Nazlan recognised the basic structure principle and held that section 13 of SOSMA was unconstitutional because that section closes the door to judicial application for bail.

I do not see how the basic structure principle is of any relevance to the decision of the issue. That principle is relevant if the constitutionality of a law passed by Parliament seeking to amend a provision **of the Constitution**, is challenged. Then, applying that principle, the judge may rule that the provision sought to be amended forms part of the basic structure of the Constitution and, therefore, cannot be amended.

Here, what is being challenged is section 13 of SOSMA, **a federal law**, not the Constitution. All that the judge need to show is that that provision contravenes a particular provision of the Constitution. If so, it is unconstitutional.

It is not shown which provision of the Constitution the law contravened. The only reason given was “because that section closes the door to judicial application for bail.” “…the

court's power to hear and determine bail applications is altogether removed. The issue is whether such removal affects "judicial power", which under the Federal Constitution, vests solely and exclusively in the Judiciary, as the third branch of government.

"6. What the drafters of SOSMA and the 2012 Parliament that enacted the law did not take into account was that the judicial function of the Courts is eroded by virtue of Section 13. Consequently, judicial power is undermined."

That is what the press release says.

Allow me to pause here and state some basic principles:

First, the court is a court of law. Its function is to decide cases in accordance with the law for the time being in force. It is not for judges to decide cases according to the judges', the current Government's, the Attorney General's or the NGOs' idea of justice or what he or they like the law to be.

Secondly, courts were established by law (including the Constitution). Besides what is specifically provided for by the Constitution, courts obtain their jurisdictions from federal law. Judges cannot create jurisdiction for themselves. That is a matter for the Parliament to provide. Article 121(1), inter alia, provides "…and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law."

Article 121 (1B), inter alia, provides, "… and the Court of Appeal shall have the following jurisdiction, that is to say—

(a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and

(b) such other jurisdiction as may be conferred by or under federal law. "

Article 121(2), inter alia, provides "…and the Federal Court shall have the following jurisdiction, that is to say—

(a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;

(b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and

(c) such other jurisdiction as may be conferred by or under federal law."

In other words, besides what is provided for in the Constitution, judges must look to the federal law to determine whether they have jurisdiction on a matter or not. Examples of what is provided by the Constitution are as reproduced above in respect of the Federal Court and the Court of Appeal.

In this case, the learned Judge appears to rely on the principle of separation of powers that it is the court that decides whether bail should be granted or not and since that power is removed from the court, that law is unconstitutional.

In the first place, bail and the types of offences bail may be given or not by the courts, are provided by federal law. The courts obtain their jurisdiction regarding bail from federal law, in particular, the Criminal Procedure Code. How then could it be argued that by removing the courts' power to hear and determine bail applications in respect of a particular type of offences, Parliament has encroached on the jurisdiction of the courts? It was Parliament that gave that jurisdiction and power to the courts.

The reality is, judges are relying on the phrase "judicial power" which had been repealed from Article 121 and extending its meaning to give themselves jurisdiction to encroach onto the jurisdiction of Parliament. (Again, please take note that as early as 8th October 2018, I had written an article "Please Return 'Judicial Powers' To The Courts". It is available on my websites. Who else has done the same? Unfortunately, no one listens. In any event, the phrase will not give judges power to usurp the jurisdiction of Parliament.)

So, while the honourable Members of Parliament are engaged in hurling expletives towards each other, the judges are encroaching the jurisdiction of Parliament, supported by the Attorney General who, in turn, is cheered by human rights' bodies who are only concerned with the result but not the legal reasoning. That is what is happening which Members of Parliament do not seem to realise or to care about.

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