

Judicial Review of Shariah Criminal Offence in Malaysia

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ABSTRACT

This article examines the role of civil court's judicial review pertaining to the enforcement of shariah criminal offence in Malaysia. The civil court has the power to judicially review the decisions of administrative authorities including any enforcements carried out by government officials and their subordinates whether it is in tandem with law and legislation or not. It assesses the validity of the enforcements and whether the procedural aspect has been legally adhered to. Similarly, the court also has the power to review shariah enforcement actions. Recently, three cases which had been reviewed judicially, namely, the seizure of a book entitled *Allah, Love and Liberty*, the Muslim men cross-dressing cases and the *Kalimah Allah* disputes. In these cases, the shariah enforcement actions have been declared unconstitutional, as they infringed the principles of freedom of expression enshrined under the Malaysian Constitution. The primary objective of this paper is to examine the position and implication of such judicial review over shariah criminal offence enforcements. Additionally, examine whether the civil-law trained judges have the necessary expertise to review the shariah related enforcement actions or not. Finally, repercussions of these reviews to the position of Article 121(1A) of the Federal Constitution of Malaysia are also assessed. This article employs full library research as the main source of data and collection content analysis is applied throughout the discussion.

Keywords: Judicial review, Malaysia, shariah criminal offence

INTRODUCTION

Superior courts have two types of jurisdiction over lower courts or inferior tribunals, appellate and supervisory jurisdictions. In exercising their appellate jurisdiction, the superior courts in hearing appeals against the decision of a lower court can consider the case *denovo*, examine the evidence

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in the light of its own understanding and appreciation, and substitute its own judgment in the place of the judgment of the lower court (Anantaraman, 1994). In explaining what judicial review is, Jemuri Serjan Supreme Court Judge (as he then was) observed: *“It seems to us that it should be treated as trite law that judicial review is not an appeal from a decision but a review of the manner in which the decision was made and the High Court is not entitled on an application for judicial review to consider whether the decision itself, on the merits of the facts, was fair and reasonable”* (ibid). In our daily lives, we are subjected to many administrative decision and enforcements issued by the authorities. Many times, it will result in some infringement of rights and there lies the need for the redressal of our grievances (Jain, 1970). Judicial review as it is widely known and practised, is considered the proper mechanism to redress these infringements. It is concerned with the process of upholding the principle of legitimacy of public law, that the actions of administrative authorities are based on legitimate foundation (Ahmad & Hingun, 1995; Ahmad & Nik Mahmod, 2006; Mokhtar & Alias, 2013).

Halsbury’s Laws of Malaysia (Malayan Law Journal, 2001) concurs and defines judicial review as the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out *quasi-judicial* functions or who are charged with the performance of public acts and duties.

Fordham (1997), speaks of judicial review’s function to curb abuse of executive power. In Malaysia, the power of the High Court to exercise judicial review is stipulated under section 25(2) of the Court of Judicature Act 1964:

(1) Without prejudice to the legality of Article 121 of the Constitution, the High Court shall on the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia day and such other powers as may be vested in it by any written law in force within its local jurisdiction

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercised in accordance with any written law or rules of court relating the same”

Relevant provision in Part I of Schedule 1 of the Court of Judicature Act 1964 highlights further power of the High Court as *“power to issue to any person or authority directions, orders or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose”*.

The application for judicial review is currently regulated by Order 53 of the Rules of Court 2012 which was previously

regulated by Order 53 of the High Court Rules 1980.

The aggrieved party must have a valid grievance to be a successful applicant. Order 53 of the Rules of Court 2012 again reiterates that: “*Any person who is adversely affected by the decision of any public authority shall be entitled to make an application for judicial review. Prior leave of court also has to be obtained.*”

LIMITS OF COURT’S JUDICIAL REVIEW

Woolf, Jowell and Le Sueur (2007, p. 15), leading administrative-law jurists, explained that there is almost no limit to judicial review. Nevertheless, there are some exceptions, for example certain decisions which courts cannot or should not easily engage, mainly limitation of constitutional and institutional capacity. This position can be examined in several jurisdictions. England, for instance, within the perspective of the separation of powers, matters of social and economic policy are vested upon the legislature and not with the judiciary. Therefore, courts avoid interfering in official discretions in pursuit of policy enforcement (Woolf et al., 2007, p. 16). Similarly, it is not for judges to weigh utilitarian calculations of social, economic or political preference (*ibid*). Regarding institutional capacity, there are some decisions which courts are ill equipped to review or are not amenable to the judicial process, such as distribution of resources among competing claims, national security and local councils’ expenditure, which should be determined by other

bodies like the Parliament (Woolf et al., 2007, p. 18). Control of these functions is essentially a matter for administrative and political means (Bradley & Ewing, 1997). Similarly, the limits also applicable to several other jurisdictions such as Australia, Canada, India, New Zealand and South Africa. In fact, these jurisdictions enacted, specific legislations which clearly prevent courts from asserting their review on several decisions (Woolf et al., 2007, p. 25). For instance, the provisions of the Human Rights Act 1998 of England states that no public authority may interfere with the Convention’s rights. In Australia, the Administrative Decisions (Judicial Review) Act 1977 excludes prerogatives, decisions and conduct of the Governor General from being reviewed by courts. Similarly, according to Al Omran, judicial review is set aside under Islamic Law if it infringes the shariah principles (Al Omran, Abualhaj, & Mohd Yusoff, 2015).

JUDICIAL REVIEW OF SHARIAH CASES IN MALAYSIA

Notably in Malaysia, the federal judiciary is vested in the High Court as specified under Article 121(1) of the Federal Constitution.

As the High Court assumes federal status, its jurisdiction covers a wide range of subject matters while Shariah Courts are vested with powers of shariah cases and shariah related matters, as provided under Article 74 and List 11 of the Ninth Schedule of the Federal Constitution. More often than not, jurisdictional conflict arises between Civil and Shariah courts due to the parallel

jurisdictions. This was evidenced in the cases of *Tengku Mariam Tengku Sri Wa Raja v Commissioner for Religious Affairs Terengganu* [1969] 1 MLJ 110; [1970] 1 MLJ 222, *Myriam v Ariff* [1971] 1 MLJ 265, *Ainan bin Mahmud v Syed Abu Bakar* [1939] MLJ 209 and *Nafsiah v Abdul Majid* [1969] 2 MLJ 174. In avoiding this prolonged conflict, the Federal Constitution of Malaysia by a constitutional amendment in 1988, has amended article 121(1) by inserting the present additional clause 1A to the Article, in which the article currently reads as follows:

“(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.”

The effect and implication of this amendment had been debated by legal scholars. Ahmad Ibrahim concluded that one important effect of the amendment is to avoid any conflict between the decisions of shariah court and civil court. Another legal scholar, Syed Jaafar Hussain, concurred with Ahmad Ibrahim (Buang, 1993, p. 11; Hussain, 1993, p. 12).

The case of *Mohd Habibullah vs Faridah Dato Talib* [1992] 2 MLJ 793, was the immediate positive response to the amendment whereby the Supreme Court emphasised that the amendment's objective is to avoid any interference of civil court over shariah cases. On the contrary, Andrew Harding, another legal scholar, is of the opinion that the amendment has not affected the power of civil court to

review shariah cases (Harding, 1996). Nevertheless, despite few conflicting opinions regarding the implication of this amendment, the amendment's objective is to avoid any interference of civil court over decisions of the shariah court. However, the post-amendment period of the article has indicated the jurisdictional conflict still has not been resolved completely. Many shariah related cases within that period had been decided by the civil courts which were devoid of the spirit of the Amendment. Notably, such cases include *Jamaluddin Othman* [1989], *Teoh Eng Huat* [1990], *Ng Wan Chan* [1991], *Tan Sung Mooi* [1994] and *Lim Chan Seng* [1996] which were tried in the civil court and decided accordingly.

RECENT JUDICIAL REVIEW OF SHARIAH CRIMINAL OFFENCES

The recent judicial reviews exercised by the civil courts over shariah criminal offences cases in Malaysia were observed in three decisions, namely, the seizure of book entitled *Allah, Love and Liberty*, the Male Muslim cross-dressing case in the state of Negeri Sembilan and the *Kalimah Allah* case.

Seizure of a Book Contrary to Islamic Teaching, Entitled “*Allah, Love and Liberty in Jabatan Agama Islam Wilayah Persekutuan & Ors. v Berjaya Books Sdn Bhd & Ors.* [2015] 3 MLJ 65

On May, 23rd, 2012 enforcement officials of the Federal Territory of Islamic Religious Department seized several copies of a book entitled, *Allah, Liberty and Love*, which was written by a woman writer, who

was based in Canada. The book which was on sale in a bookstore, *Borders*, was regarded as contrary to the Islamic teaching because it promoted *pluralism, liberalism* and different interpretation of the precepts and tenets of Islam. On May, 29th, The Ministry of Home Affairs declared, both its English and Malay versions, banned in Malaysia. Subsequently, in June 18th, 2012, the bookstore had filed a leave seeking a judicial review from the High Court in a bid to declare that the act of seizure by the officials was invalid and unconstitutional. Meanwhile, the store manager, a Muslim, was charged in the Shariah Court for selling books which were considered an offence under the Shariah Criminal Offences Act 1997 and upon conviction, she is liable to three thousand ringgit fine or imprisonment of up to two years or both. Meanwhile, in June 25th, 2012, the management of the bookstore successfully obtained a leave to challenge the validity of the seizure. They were granted a *certiorari* to set aside the conviction of the sales manager by the Shariah Court previously. They were successfully granted with an order to restraint the officials from further conducting raids on the bookstore. In July 30th, 2012, the religious officials objected, insisting that the restraint order issued by the High Court was akin to interference with the Shariah Court's Order and there was no urgent and special situation for the court to grant such order. The Court allowed the objection to be raised and instead, ordered the bookstore to have the restraint order filed in the Shariah Court. The bookstore subsequently filed an

appeal against the High Court decision to the Court of Appeal and successfully obtained an interim Order to defer further seizure by the officials. In another parallel decision, in March 22nd, 2013, the High Court of Kuala Lumpur granted a *certiorari* to invalidate the officials act of raiding and seizing copies of the book. Aggrieved by the decision, the Islamic Department filed an appeal with the Court of Appeal. However, the Appeal Court affirmed the High Court decision and further made other declaration that the seizure of the book can only be exercised if the Home Affairs Ministry duly declared that the book was an undesirable publication in accordance with the Printing, Presses and Publication Act 1984 provision. On the other note, the Appeal Court further affirmed that High Court had jurisdiction to hear the case as conferred to the court in Article 121 of the Federal Constitution and had the power to interpret the application of the Printing, Presses and Publication Act 1984 over the Islamic Criminal Offences Act 1997.

Male Muslim Cross –dressing Case in *Muhamad Juzaili bin Mohd Khamis & Ors. v State Government of Negeri Sembilan & Ors.*[2015] MLJU 65.

This case concerned the shariah offence of cross-dressing women's attire by a few Muslim men in Negeri Sembilan which was heard in the High Court of Seremban. The plaintiffs, *Muhamad Juzaili bin Mohd Khamis* and several others had filed an application to the Court seeking judicial review of the Shariah enforcement action in convicting them in accordance

to with the provision of section 66 of the Shariah Criminal Enactment 1992 of Negeri Sembilan. The provision criminalises Muslim men wearing the women's attire. The plaintiffs declared this provision was unconstitutional as it contradicted inter alia, with Article 5(1), 8(1), 9(2) and 10(1)(a) of the Federal Constitution which guarantee the citizen to freedom of life and liberty, equality before the law, freedom of movement and freedom of expression. Their application for judicial review, however, was dismissed by the court on October 11th, 2012 and they subsequently filed an appeal to the Court of Appeal against the decision. The appeal was allowed: "We therefore, grant the declaration sought in prayer... that section 66 of the Syariah Criminal Enactment 1992 is void by reason of being inconsistent with the articles above."

Dissatisfied with the decision, the State of Negeri Sembilan filed an appeal to the Federal Court in the subsequent case of *State Government of Negeri Sembilan & Ors. v Muhammad Juzaili Mohd Khamis & Ors.* [2015] 8 CLJ 975. The Federal Court in allowing the appeal stated that the application for declarations sought by the respondents before the High Court by way of judicial review was in fact a challenge to the legislative powers of the State Legislature of Negeri Sembilan. What the respondents wanted was to limit the legislative powers of the State Legislature, by saying that despite its powers to legislate on matters on Islamic law having been given to the State Legislature by article 74 of the Federal Constitution read with List II in the Ninth

Schedule thereof, that legislation must still comply with the provisions on fundamental liberties enshrined in articles 5(1), 8(2), 9(2) and 10(1) of the Federal Constitution. The Court further held that the application for the declarations sought by the respondents were incompetent by reason of substantive procedural non-compliance with clauses 2 and 4 of article 4 of the Federal Constitution, and should have been dismissed by the High Court on the ground that the High Court had no jurisdiction to hear the matter.

Dispute Pertaining to "Kalimah Allah" in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor.* [2010] 2 MLJ 78

In the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Anor.*³¹ The Titular Roman Catholic Archbishop of Kuala Lumpur as the applicant, was granted a publication permit by the first respondent, the Minister of Home Affairs, to publish the *Herald-the Catholic Weekly*. On 8th January, 2009, the applicant received a letter dated 7th January 2009 from the first respondent approving the publication permit for the publication period of 1st January 2009 until 31st December 2009 subject to the condition that the applicant was prohibited from using the word *Allah* in the publication. This was the applicant's application under Order 53 rule 3(1) of the Rules of the High Court 1980 for judicial review of the impugned decision of the first respondent. By way of this application the applicant sought leave for an order of *certiorari* to quash the impugned decision and for an order for stay of the impugned

decision pending the court's determination of the matter, and for various declarations with costs in the cause.

The applicant's grounds for the reliefs of *certiorari* and declaration were premised on the unconstitutional acts and conducts of the Respondents, which were inconsistent with articles 3(1), 10, 11 and 12 of the Federal Constitution, namely that the applicant's right to use the word *Allah* stemmed from the applicant's constitutional rights to freedom of speech and expression and religion and in instructing and educating the Catholic congregation in the Christian religion. In reply to this contention, the first respondent emphasised that it was acting within the four corners of its jurisdiction and had taken into account relevant considerations such as the status of Islam under the Constitution, the various Enactments on control, government policy, public security and safety and religious sensitivity. The respondent also averred that the use of the word *Allah* should be restricted to its use in the Bible as the Bible was not meant for Muslims but only found in the possession or use of Christians in churches. In fact, the action by the Appellant in using the *Kalimah Allah* in their publication was contrary to the fatwa issued earlier and therefore infringed the the shariah criminal provision. The High Court in its reported judgment in December 31st, 2009, allowing the appeal stated that the first respondent in the exercise of its discretion to impose further conditions in the publication permit issued had not taken into account the relevant matters alluded to by the applicant, hence committing an error of

law that warranted judicial interference. The Court further held that pursuant to article 3(1) of the Federal Constitution, Islam is the official religion of the federation but other religions may be practised in peace and harmony in any part of the Federation. As there is no doubt that Christianity is a religion, the question that had to be considered was whether the use of the word *Allah* is a practice of the Christian religion. Whether a practice is or is not an integral part of the religion is not the only factor to be considered and there are other equally important factors. Thus, for these reasons the condition imposed that the applicant was prohibited from using the word *Allah* in its publication. Similarly, the appeal to the Federal Court in *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors.* [2014] 6 CLJ 541, was dismissed by the court.

CIVIL COURT JUDICIAL REVIEW OVER SHARIAH CASES: FUNDAMENTAL REPERCUSSIONS

It is submitted that judicial reviews exercised by the civil courts in the above cases have certain repercussions on Islamic law and the position of Shariah Court in Malaysia. It has mainly reverted the position of Islamic law to its old status. This study pointed to a few interesting findings.

Firstly, the amendment of Article 121(1A) has been enacted not without its purpose. It takes away the jurisdiction of Civil Court over Shariah Courts in matters of Islamic law or Hukum Syarak as seen in the List 11 of the Ninth Schedule of the Federal

Constitution. This has been affirmed by the Supreme Court in the decision of *Faridah Dato Talib's* as above and in several other decisions. The amendment without doubt, be interpreted to prevent the civil court from reviewing shariah cases or shariah related decisions.

Secondly, Islamic Law has been reverted to its inferior position as its subject matters, including enforcement actions, are reviewable judicially by the civil court. It is submitted that the Supreme Court's judicial approach in the case of *Mamat Bin Daud & Ors. v. Government of Malaysia* [1988] 1 MLJ 119 should instead be adopted by the civil court. In this case, the petitioners were charged for an offence under section 298A of the Penal Code for doing an act which is likely to prejudice unity among persons professing the Islamic religion as they were alleged to have acted as unauthorised Bilal, Khatib and Imam at a Friday prayer in Kuala Terengganu without valid appointment. The issue was whether the amended Act 1983, that is section 298A above, ultra vires article 74(1) of the Federal Constitution, since the subject matter of the Islamic legislation is reserved for the State Legislature and therefore beyond the legislative competency of Parliament. It was held by the Supreme Court that in the subject of religion, only states have power to legislate under Articles 74 and 77 of the Federal Constitution. Further, there must be a declaration that Parliament has no power to make law and that section 298A of the Penal Code is invalid and therefore null and void and has no effect. Therefore, in adopting

the principles of this case, despite of the amendment of the federal law, it does not prevail over state's subject matter (matters of Islamic law) of which the jurisdiction lies within the states.

Thirdly, the jurisdiction and powers of Islamic Enforcement Officials in enforcing shariah offences will be restrained as shown in the case of seizure of the book *Allah, Liberty and Love* above. The enforcement, according to the review, requires a condition that the Home Ministry must have banned publications contrary to the Islamic teachings prior to the seizure of the publications.

Fourthly, as it has been elucidated in the case of *Mohd Juzaili Khamis* above, application for judicial review is akin to invalidating shariah criminal offences which is validly enacted by the State Legislatures. This is a serious implication for the shariah law. Finally, civil judges do not have the necessary expertise to determine matters pertaining to Islamic law and related matters. As they are untrained in Islamic law, the power should be vested with the Shariah judges. Therefore, it is just and proper for the civil court judges to recuse themselves from reviewing shariah cases and shariah related cases.

CONCLUSION

It is submitted that relevant laws to be amended in the future to restraint the civil courts from exercising their judicial review over shariah matters such as amendment to the relevant provision of the Court of Judicature Act 1964 and the Court Rules 2012. Alternatively, Shariah court should

be conferred with an exclusive jurisdiction to exercise judicial review pertaining to shariah matters. A special law similar to the Administrative Decisions (Judicial Review) Act 1977, Australia must be enacted to exempt civil court from exercising judicial review over administrative and enforcement decisions of the Islamic authorities. Ultimately, a constitutional amendment similar the amendment of the article 121(1A) has to be incorporated in the Federal Constitution which will take away the power of the High Court to review shariah matters and decisions.

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