FATHUL BARI MAT JAHYA & ANOR
v.
MAJLIS AGAMA ISLAM NEGERI SEMBILAN & ORS
[2012] 1 CLJ (Sya)
A Commentary
By
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I assume that readers have read the judgment reproduced above before starting to read this commentary. That saves me from reproducing the facts, the issues and the decision of the Court in the limited space given to me.

I welcome the fact that the petitioners' solicitors had filed the petition in the Federal Court and had not raised the issue in the Syariah Court for the determination by that Court. It means that they were aware of and had clearly understood the provision of Article 128(1) (a) of the Federal Constitution.

While this judgment reaffirms the jurisdiction of the Federal Court in a matter arising under Article 128 and reminding that "*the decision of this court on the issue is therefore binding on all courts in the country including the Syariah Court",* it is also important to remind everyone that interpretation of the Constitution is a matter for the Civil Court and not the Syariah Court - see Latifah bte Mat Zin v. Rosmawati bte Sharibun & Anor [2007] 5 CLJ 253 (FC); Abdul Kahar Ahmad v Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners) (2008) 1 CLJ (SYA) 1.(FC).

I say this because, issue of Syariah Court jurisdiction had been raised in the Syariah Court and decided by that court and, in so doing, that court had interpreted the provision of the State List. – see Jumaaton Awang & Satu Lagi lwn. Raja Hizaruddin Nong Chik [2004] CLJ (Sya) 100 and my comments on it in Abdul Kahar Ahmad v Kerajaan Negeri Selangor Darul Ehsan; Kerajaan Malaysia & Anor (Interveners) (2008) 1 CLJ (SYA) 1 (FC).

In challenging the validity and constitutionality of section 53 of the Syariah Criminal (Negeri Sembilan) Enactment 1992 (the Enactment), the petitioners argued that the section was invalid for breaching Article 74(2) and Item 1, Ninth Schedule (State List) of the Federal Constitution ('the Constitution'). Secondly, the petitioners also argued that since section 53 did not fall within the realm of Item 1 of the State List, the Syariah Court had no jurisdiction to try the offence.

The determination of the validity of section 53 calls for the interpretation of the word "precepts" (of the religion of Islam) in the State List and the phrase "with respect to" (any of the matters enumerated in the State List), in Article 74(2).

The first point to be made here is that the case will have to be decided on the interpretation of the two provisions and not in accordance with any opinion of Syariah scholars on the meaning of the translation of the word "precept" and "with respect to" in Malay or Arabic. On that score, the court was completely right in referring to Sulaiman Takrib v. Kerajaan Negeri Terengganu; Kerajaan Malaysia (Intervener) &

Other Cases [2009] 2 CLJ 54 FC and other cases, local and foreign, on the principles of interpretation of the Constitution in coming to its conclusion.

That does not mean that reference to the Hadith and opinions of Syariah scholars on the meaning of precepts of the religion of Islam as understood in Syariah, is out of place. That helps the Court to understand what the phrase means, according to Syariah and come to its decision of the case. Even though the expert witnesses differed on the question whether the offence falls within the meaning of the precepts of the religion of Islam, they agreed that the phrase covers the three areas of *aqidah, syariah* and *akhlaq*. They also agreed that the teaching of Islam has to be regulated to prevent deviant teachings. That makes it easy for the Court to conclude that *"the requirement of tauliah is just a mechanism to achieve this purpose."*

Actually, it is not necessary to decide whether the requirement of a *tauliah* is a Syariah offence or not. The Constitution does not talk about creation and punishment of Syariah offences, but *"creation and punishment of offences by persons professing the religion of Islam against precepts of that religion"*. Once the Court decides what precept of the religion of Islam means, it could straight away consider whether the said offence is "with respect" to it. It does not have to worry about the effect of the Hadith, the different opinions of the Syariah scholars and the Muftis, whether there is such an offence in Syariah or whether it is purely administrative in nature or to delve into the issue of *maslahah* (public interest) which falls within the concept of *Siyasah Syari'yyah*.

Regarding the Hadith, one does not have to be a Syariah scholar to understand the effect of it. After all, it is only a matter of drawing an inference from the facts. It does not involve the understanding of an Arabic or Syariah term.

To me, from the facts, that Hadith says no more than the Prophet (p.b.u.h,) being satisfied that Muaz Bin Jabal had sufficient knowledge of Islam, permitted him to teach about the religion. It cannot be read to mean that every companion must obtain the Prophet's (p.b.u.h.) approval or permission before he could teach about Islam. The Hadith is not an authority for making a ruling that, according to Syariah, a *tauliah* must first be obtained from the Ruler of the day before a person may teach about Islam.

In any event, having concluded that the *"the term precepts of Islam must be accorded a wide and liberal meaning"; "that the phrase 'with respect to' appearing in art. 74(1) and (2) of the Federal Constitution.....is an expression of wide import"*, the Court went on to rule:

'The purpose of this provision is clear, that is to protect the integrity of the aqidah (belief), syariah (law) and akhlak (morality) which constitutes the precepts of Islam. The requirement is necessary to ensure that only a person who is qualified to teach the religion is allowed to do so. This is a measure to stop the spread of deviant teachings among Muslims which is an offence under s. 52 of the Enactment. It is commonly accepted that deviant teachings is an offence against the precepts of Islam. Therefore, the respondents contend that, by necessary implication, the teaching of Islam without a tauliah could similarly be construed as an offence against the precepts of Islam. In our judgment, there is merit in the respondents' contention."

The Court accepted the view expressed by the respondents *"that s. 53 of the Enactment It is an order or direction made by Ulil Amri (Arabic term referring to the Government) and for so long as the order or direction is not contrary to Al-Quran or As-Sunnah and is not an order or direction to engage in maksiat (vice), it is obligatory upon Muslims to abide by such order or direction. Obedience to such order or direction constitutes a precept of Islam."*

The Court finally concluded, *"In our judgment, the requirement of tauliah for the purpose of protecting the public interest (maslahah) falls within the concept of Siyasah Syari'yyah. Such order and direction are made not merely to prevent deviant teachings, but also to maintain order and prevent any division in the community.....*

On the contrary, we are of the view that it is necessary in this day and age for the authority to regulate the teachings or preaching of the religion in order to control, if not eliminate, deviant teachings. The integrity of the religion needs to be safeguarded at all cost. That is what s. 53 of the Enactment purports to do."

Perhaps, without realising it, the Court was not looking backward as the respondents' counsel and expert witnesses did to see whether there was such an offence in the Qur'an and Hadith, but it was looking forward to see whether it was within the ambit of Syariah for the Government of the day to create such an offence in order "*to control, if not eliminate, deviant teachings"* which affect the precept of the religion of Islam. The procedure is, as provided by the Federal Constitution, for the State Legislative Assembly to legislate the law. There is nothing un-Islamic about it.

That is what it should be and that is the way the Syariah develops. Many people seem to think that Syariah remained, or should remain, static the moment the Prophet (p.b.u.h.) died as it was already "complete". The truth is, like any law, it had, indeed it has to develop in order to be relevant at all time. The most glaring example is what is happening in the field of Islamic banking, finance and *takaful*. In Malaysia, we have seen procedural laws that were used in the Civil Court, with some modifications, being adopted as "Syariah" procedural laws for use in the Syariah Courts.

In this respect, perhaps we should take note that the Federal Constitution, written in English by common law Judges, uses the term "Islamic Law" which is clearly wider than the term "Syariah". It clearly includes the legal opinions of the jurists. (*fiqh*). The Malay translation, done by common law lawyers, without the aid of Syariah scholars, uses the term "Hukum Syarak" which, as commonly understood in Malaysia, makes no distinction between Syariah and *fiqh*. Both are included. So, the Court is fully justified in developing the Syariah to suit the current need in order to protect the *"integrity of the religion."* Should anyone fear that it might go too far, the Constitution provides the limit: "*except in regard to matters included in the Federal List;"* Criminal law is a good example.

It is heartening to see our highest court has taken the approach that Syariah is a living law and that Syariah is made for human beings and not the reverse. Hence, any law that is not un-Islamic is Islamic.

The decision of the Court on the validity and constitutionality of section 53 automatically disposed of the challenge to the jurisdiction of the Syariah Court to try the offence and nothing more need be said.

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