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CIVIL AND SYARIAH COURTS IN MALAYSIA: CONFLICT OF JURISDICTIONS.

By

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Background

The coming of Islam to Malaysia about the 14th century saw the introduction of Islamic law in this country. Islamic law became the law of the land until sometime after the arrival of the British in the 18th century. Of course, during that period there were no syariah courts as we know them today.

The British introduced the courts based on their model with judges and lawyers trained in the common law of England. The common law of England (and the English rules of equity), introduced through legislation and the courts, became the principal law of the land.

It was these courts, administering the common law of England and the English rules of equity, with some modifications at times, that were entrenched as "The Judiciary" in the Federal Constitution. They are now commonly called the "civil courts" in contrast with the "syariah courts".

As they are now, the civil courts, from the highest, consist of the Federal Court, the Court of Appeal, the High Court of Malaya and the High Court of Sabah and Sarawak, the Sessions Court and the Magistrate's Court. They are "federal courts" i.e. they are established by federal laws, manned by judges and officers appointed by the Federal Government (I am avoiding the technical details regarding their appointments), transferable throughout the country.

Malaysia, being a Federation, the Constitution provides for the legislative lists of the Federation and the States. List I of the Ninth Schedule of the Federal Constitution is the "Federal List" containing matters over which the Federal Parliament may make laws. List II is the State List containing matters over which the State Legislatures (there are 13 of them) and the Federal Parliament in respect only of the Federal Territories, may make laws, all of which, in this paper, will be referred to as "State Legislatures". In this paper I will only refer to the enactments of the State of Penang as representative of the laws of all other States and the Federal Territories.

I will mention some of the matters included in the two Lists, in particular those that had given and may give rise to conflict of jurisdiction between the two systems of courts.

Some of the matters included in Paragraph 4 of List I (**Federal List**) are:

"4. **Civil and criminal law** and procedure and the administration of justice, including-

(a) Constitution and organisation of all courts other the Syariah Courts;
(b)Jurisdiction and powers of all such courts;
©…….
(d)……
(e) Subject to paragraph (ii), the following:
(i) Contract; partnership, agency and other special contracts; master and servant; inns and inn-keepers; actionable wrongs; property and its transfer and hypothecation, except land; bona vacantia; equity and trusts; marriage, divorce and legitimacy; married women's property and status; **interpretation of federal law**; negotiable instruments; statutory declarations; arbitration; mercantile law; registration of businesses and business names; age of majority; infants and minors; adoption; **succession, testate and intestate**; **probate and letters of administration**; bankruptcy and insolvency; oaths and affirmations; limitation; reciprocal enforcement of judgments and orders; the law of evidence;
(ii)the matters mentioned in paragraph (i) **do not include Islamic personal law relating to** marriage, divorce, guardianship, maintenance, adoption, legitimacy, family law, gifts or **succession, testate and intestate**;
(f) ……
(g)……
(h) Creation of offences in respect of any of the matters included in the Federal List or dealt with by federal law;
(i)…….
(j)…….
(k) **Ascertainment of Islamic law and other personal laws for purposes of federal law**; and
(l) **Betting** and lotteries."

Paragraph 1 of List II (**State List**) provides:

"1. Except with respect to the Federal Territories of Kuala Lumpur and Labuan, **Islamic law** and personal and family law of persons professing the religion of Islam, **including Islamic law relating to succession, testate and intestate**, betrothal, marriage, divorce,

> dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; **Wakafs** and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operating wholly within the State; Malay customs; Zakat, Fitrah and Baitulmal or similar Islamic religious revenue; mosques or any Islamic public places of worship, **creation and punishment of offences** by persons professing the religion of Islam **against precepts of that religion, except in regard to matters included in the Federal List**; the constitution, organisation and procedure of **Syariah courts**, which shall have jurisdiction **only** over persons professing the religion of Islam and in respect **only of ANY** of the matters included in this paragraph**,** but shall **not** have jurisdiction in respect of offences except in so far as conferred by federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine and Malay custom." (Emphasis added)

It was under this last-mentioned paragraph that State Legislatures made laws (called "Enactments") creating the syariah courts in their respective States. The Administration of Muslim Law Enactment 1959 (Penang), for example, established the syariah courts in the State of Penang, from the highest, the Appeal Committee, the Court of the Kathi Besar (Chief Kathi) and the Court of a Kathi. In 1993 they were replaced by, from the highest, the Syariah Court of Appeal, the Syariah High Court and the Syariah Subordinate Court.

Regarding the jurisdiction of the courts, as an example, the Penang Enactment of 1959 provided the jurisdiction of the Court of the Kathi Besar as follows:

> "(a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under this Enactment, and may impose any punishment therefore provided;
> (b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties profess thew Muslim religion and which relate to:
> (i) betrothal, marriage, divorce, nullity of marriage, judicial separation, or nushuz;
> (ii) any disposition of, or claim to property arising out of any of the matters set out in sub-paragraph (I) of this paragraph;
> (i) maintenance of dependence, legitimacy, guardianship or custody of infants;
> (ii) division inter vivos of se-pencarian property;
> (iii) wakaf or nazr; or

(vi) other matters in respect of which jurisdiction is conferred by any written law:"

Under the 1993 Enactment (Penang), the jurisdiction of the Syariah High Court (successor to the Court of the Kathi Besar) are as follows:

"48. (1) A Syariah High Court shall have jurisdiction throughout the State of Penang and shall be presided over by a Syariah Judge.

(2) A Syariah High Court shall –

(a) in its criminal jurisdiction , try any offence committed by a Muslim and punishable under this Enactment or under any other written law prescribing offences against precepts of religion of Islam for the time being in force, and may impose any punishment provided therefor;

(b) in its civil jurisdiction, hear and determine all actions and proceedings in which all the parties are Muslims and which relate to –

(i) betrothal, marriage, ruju', divorce, nullity of marriage (fasakh), nusyuz or judicial separation (faraq) or other matters relating to the relationship between husband and wife;

(ii) any disposition of , or claim to, property arising out of any of the matters set out in subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (hadhanah) of infants;

(iv) the division of, or claims to, harta sepencarian;

(v) will or death-bed gifts (marad-al-maut) of a deceased Muslim;

(vi) gifts inter vivos, or settlements made without adequate consideration in money or money's worth, by a Muslim;

(vii) wakaf or nazar;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled; or

(x) other matters in respect of which jurisdiction is conferred by any written law.".

The early laws, called the Administration of Muslim Law Enactments, were "all-in-one" Enactments. The Administration of Muslim Law Enactment of the State of Penang, enacted in 1959, contained provisions for the establishment of the Muslim

Religious Council, the establishment of the syariah courts including provisions regarding evidence and procedure, financial provisions, mosques, marriage and divorce, maintenance of dependants, converts, offences and a few general provisions.

However, things have changed over the years. The all-in-one Enactment had given way to various Enactments. Examples from the State of Penang are the Administration of Islamic Religious Affairs Enactment 1993, Islamic Family Law Enactment 1985, Syariah Criminal Offences Enactment 1996, Syariah Criminal Procedure Enactment 1996, Syariah Evidence Enactment 1996 and the Syariah Civil Procedure Enactment 1999.

It is to be noted that the provisions of the Syariah Civil Procedure, the Syariah Criminal Procedure and the Syariah Evidence Enactments are adopted from the respective laws in use in the civil courts, with necessary modifications. It is also interesting to note that in recent years even the names of the courts, the manner of addressing the judges and their dress on the bench have been adopted from those of the civil court. New court complexes house both the civil and the syariah courts under the same roof. Some Muslim civil court judges sit in the Syariah Courts of Appeal with Syariah Appeal Court Judges, complementing each other. Civil court judges are often invited to speak at seminars meant for syariah court judges.

In short the two systems have become closer to each other than never before. But, conflicts of jurisdictions between the two courts have also become more apparent.

Conflicts in Civil Jurisdictions

Dissatisfactions with decisions of the civil courts were heard since early 1970s. In Commissioner of Religious Affairs v. Tengku Mariam (1970)1 M.L.J. 220 (1), the Federal Court held that civil courts were not bound by the gazetted "fatwa" of the Mufti of Trengganu and followed Privy Council Judgmnents to hold that the wakaf in question was void.

(It should be noted, however, that 23 years later, in G. Rethinasamy v. Majlis Agama Islam Pulau Pinang (1993)2 M.L.J. 166 (2) **had** the High Court followed the ruling of the Syariah Committee (i.e. the Fatwa Committee) of the First Defendant, the Defendants would have lost the case. That is because the Syariah Committee had given a ruling in favour of the Plaintiff purely on the facts as presented by the Plaintiff to the Committee. The Committee failed to consider whether the land was wakaf land. The High Court found that the land was wakaf land, that the ruling was made on a wrong assumption of facts and gave judgment for the Defendants.)

In the case of Myriam v. Mohamed Ariff (1971) 1 M.L.J. 265(3) Abdul Hamid J.(as he then was and my name sake) decided that the High Court had jurisdiction in a Muslim custody case. Of course, prior to the establishment of the Syariah Courts,

the High Court had such jurisdiction. But, after the establishment of the syariah courts, custody of Muslims are within the jurisdiction of the syariah courts.

To overcome such conflict, Article 121 of the Federal Constitution was amended. A new Clause 121(1A) was inserted, effective from 10th. June 1988. It reads:

> "(1A) The courts referred to in Clause (1) (i.e. the High Courts – added) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts."

Professor Ahmad Ibrahim explained the reason for the amendment in his article "The Amendment of Article 121 of the Federal Constitution: Its Effect on the Administration of Islamic Law." (1989) 2 M.L.J. xvii as follows:

> "The important effect of the amendment is to avoid for the future any conflict between the decisions of the Syariah Courts and the Civil Courts which had occurred in a number of cases. For example, in Myriam v. Ariff…."

In Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia (1999) 1 M.L.J. 266 (4), Gopal Sri Ram JCA delivering the judgment of the Court of Appeal, said:

> "Having examined the Hansard of the Dewan Rakyat, we find support for the conclusion that the limited purpose of Act A704/88 was to prevent the High Court from exercising its powers of judicial review over decisions of a syariah court."

However, hardly three years after the amendment was introduced, Edgar Joseph Jr. J. (as he then was), in Shahamin Faizul Kung bin Abdullah v. Asma bt. Haji Junus (1991) 3 C.L.J. 2220 (5), reverted to the old position. The learned Judge in this case said, inter alia:

> "My research into the authorities (not cited to the court) compels me to the conclusion although the Administration of Muslim Law Enactmene,1959, Penang does expressly confer general civil jurisdiction on the Court of a Kathi Besar to hear and determine proceedings where the parties profess the Muslim religion and which relate, inter alia, to the guardianship or custody of infants, such jurisdiction is not exclusive."

However, two years later, Shahamin(5) was overruled by the Supreme Court in Mohamed Habibullah bin Mahmood v. Faridah bte. Dato' Talib (1992) 2 M.L.J. 793(6). The Supreme Court reaffirmed that the effect of the amendment was that

matters within the jurisdiction of the syariah court were outside the jurisdiction of the civil courts.

When that judgment was delivered, most people seemed to have thought that the problem was finally over, forgetting that, even though it was a judgment of the Supreme Court of Malaysia, the case was decided under the law then in force in the Federal Territory and that the laws of other States might or might not be in pari materia with the law of the Federal Territory. The civil court still has to decide whether the matter before it is or is not within the jurisdiction of the syariah court and therefore within or outside its jurisdiction.

How does one determine whether a matter is or is not within the jurisdiction of the syariah court ? In Habibullah (6), Harun Hashim SCJ wrote:

> "I am therefore of the opinion that when there is a challenge to jurisdiction (as here) the correct approach is to first see whether the Syariah Court has jurisdiction and not whether the State Legislature has power to enact the law conferring jurisdiction on the Syariah Court."

However, in 1998, Abdul Kadir Sulaiman J.(as he then was) in Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur (1998)1 M.L.J. 681 (7) took the view that the Court should look at the State List (List II, Ninth Schedule of the Federal Constitution) to see whether the syariah court has jurisdiction over a matter or not. In other words, so long as a matter is provided in the State List, the syariah court has jurisdiction over it, even if the state legislature has not made law on the matter. In Abdul Shaik bin Md. Ibrahim v. Hussein bin Ibrahim (1999) 5 M.L.J. 618 (8) I had, with greatest respect, expressed the view that this approach was contrary to what had been said by the Supreme Court in Habibullah (6).

However, as I understand it, the Federal Court in Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (1999) 1 M.L.J. 489(9) has settled this issue. Mohamed Dzaiddin SCJ delivering the judgment of the Federal Court, inter alia, said:

> "…..whilst we agree with the approach adopted by Abdul Hamid J. following Habibullah, that when there is a challenge to jurisdiction the correct approach is to look at the State Enactments to see whether or not the syariah court have been expressly conferred jurisdiction on a given matter…."

At about the same time as Habibullah (6) was decided (1992), the Supreme Court also decided the case of Majlis Agama Islam Pulau Pinang v.Isa Abdul Rahman (1992) 2 M.L.J. 244 (10). In that case, the Supreme Court actually considered the remedies prayed for. In that case, the subject matter of the suit was wakaf. Wakaf

is within the jurisdiction of the syariah court. Both parties were Muslims (accepting that the Muslim Religious Counsel is "a Muslim"). The suit was filed in the High Court. Jurisdiction of the High Court was challenged. The Supreme Court held that the High Court had jurisdiction over the case. The reason given was that since the Administration of Muslim Law Enactment 1959 (Penang) did not provide for the remedy of injunction the syariah court did not have jurisdiction to issue an order of injunction prayed for in the suit. The remedy of injunction was provided by the Specific Relief Act 1950 and the rules were to be found in the Rules of the High Court 1980 which power was given to the High Court to issue. Therefore the claim for a perpetual injunction in that case could only be heard by the High Court.

In Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang (1996) 3 C.L.J. 231 (11) I had, with greatest respect to the Supreme Court, pointed out that this approach could lead to an undesirable result: a party may by including a prayer for a remedy not available in the syariah court remove a matter the subject matter of which is clearly within the jurisdiction of the syariah court, to the High Court.

In 1994 Wan Adnan Ismail J. (as he then was) decided in the case of Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor. (1994) 2 C.L.J. 107 (12). Again it was an apostasy case. Again jurisdiction was in issue. The learned Judge (as he then was), inter alia, referred the the Fatwa issued by the Fatwa Committee in determining whether the syariah court had jurisdiction over the matter. The learned Judge (as he then was said), inter alia, said:

> "Section 25 of the Kedah Mahkamah Syariah Enactment 1983 provides:
>
> > "25(1) Any provision or interpretation of any provision in the Enactment which is inconsistent with Hukum syarak shall be void to the extent of the inconsistency.
> >
> > (2) In the event of a lacuna or in the absence of any matter not expressly provided for by the Enactment the Court shall apply Hukum Syarak"
>
> Section 21 provides the civil jurisdiction of a Syariah Court in Kedah. It is not mentioned in the section that the Court has the jurisdiction to make a declaration on the status of a Muslim who had renounced the religion of Islam. Hukum Syarak will therefore apply. The Fatwa Committee in giving the Fatwa followed Hukum Syarak (see s. 38 of the Enactment). According to the fatwa a Muslim who renounced the Islamic faith continues to remain in Islam until a Syariah Court makes a declaration that he has become a "murtad". The Syariah Court must necessarily have the jurisdiction. The Court can assume the jurisdiction under s. 25 quoted above."

For my comment on this approach, see Lim Chan Seng (11).

However, as I understand the subsequent judgment of the Federal Court in Soon Singh (9), particularly the passage that I have quoted earlier, the matter is now settled: look at the State Enactment to see whether the syariah court has been conferred with jurisdiction over a particular matter or not. That is because, the fact that the matter is enumerated in he State List, by itself does not confer jurisdiction on the syariah court. That List is a Legislative List, meaning that the State Legislature may make law over such matters, e.g. establishing the syariah court and conferring it with the jurisdiction over **"any"** of the matters provided in the List. Until the State Legislature makes law establishing the syariah court, the syariah court does not exist. We also see in every enactment establishing the syariah courts, from the beginning, specific provisions were made regarding the jurisdictions of such courts. Over the years new matters taken from the List were added. What is the necessity of making specific provisions if all the matters enumerated in the State List are already within the jurisdictions of the syariah courts?

But, it would be wrong to think that the problems over jurisdictions are over. The subject matter may be within the jurisdiction of the syariah court. **But, what if one of the parties is not a Muslim?** Bear in mind that the syariah court has no jurisdiction over non-Muslims and that Malaysia is a multi-religious country. Where can he go?

One example is the case of Dalip Kaur d/o Gurbux Singh v. Ketua Polis Daerah (O.C.P.D.) Balai Polis Daerah Bukit Mertajam, Pulau Pinang,High Court Penang Originating Summons No. 24-795-91 (13). The Plaintiff was a non-Muslim. Her son had become a Muslim. He died a violent death. His body was in the mortuary. Her claim for her son's body was refused by the police on the ground that the son was a Muslim when he died. She sued the police for a declaration that her son had before his death renounced the religion of Islam.

At the trial before me, I asked the learned State Legal Advisor whether he was objecting to the jurisdiction of the High Court over the matter. He said, "No". So the trial proceeded on the basis that the High Court had jurisdiction over the case. I decided that the son died a Muslim. The Plaintiff appealed to the then Supreme Court. The Supreme Court dismissed the appeal and confirmed my decision - see (1992)1 M.L.J. 1.(14) Two judgments were written, one by Hashim Yeop Sani, the then Chief Justice, Malaya with whom Harun Hashim SCJ agreed. The other was written by Mohamed Yusoff Mohamed SCJ. The learned Chief Justice, Malaya considered the case on merits and concluded:

> "As an appellate court we would not like to interfere with the findings of fact of the trial judge who saw and heard the witnesses and made an assessment on the credibility and weight

> of the evidence before him. He did not misdirect himself in law or in fact."

Mohamed Yusoff Mohamed SCJ wrote another judgment. He began by saying that he had had the advantage of reading the judgment of the Chief Justice, Malaya and that he would come to the same conclusion in dismissing the appeal but for different reasons. The learned Judge then said:

> "The present question, in my view, cannot be determined by a simple application of facts as has been found by the learned Judicial Commissioner on the basis of veracity and relevancy of evidence according to civil law. Such a serious issue would, to my mind, need consideration by eminent jurists who are properly qualified in the field of Islamic jurisprudence.
>
> In this view it is imperative that the determination of the question in issue requires substantial consideration of the Islamic law by relevant jurists qualified to do so. The only forum qualified to do so is the Syariah Court."

No one can disagree with what the learned Judge says. Unfortunately, that passage had often been quoted out of context as authority that the Supreme Court had in that case decided that the civil courts had no jurisdiction over apostasy cases.

We must remember that, first, that is a minority judgment. The other two Judges decided the appeal on merits. If they were of the view that the civil court had no jurisdiction, they could not have decided on the merits of the case confirming my judgment declaring that the deceased died a Muslim. If the High Court had no jurisdiction on the matter, the Supreme Court too had no jurisdiction as both were civil courts. If they were of the view that the High Court had no jurisdiction they should have quashed my decision on the ground that I had neither jurisdiction nor power to make the order that I made.

Coming back to Mohamed Yusoff Mohamed's judgment. If he was of the view that the civil court had no jurisdiction over the matter, then he too could not dismiss the appeal the effect of which was to confirm my order. He should have quashed my order.

However, now, on the question of apostasy and, at least, where all the parties to the suit are Muslims, the issue appears to have been settled by the Federal Court in Soon Singh's (9) case. The Federal Court, clearly wanting to solve the problem in favour of the syariah court, said:

> "From the analysis of the State Enactments, it is clear that all State courts with jurisdiction to deal with conversion **to** Islam. On the other

> hand, only some State Enactments expressly confer jurisdiction on the Syariah courts to deal with conversion **out** of Islam. In this regard, we share the view of Hashim Yeop A. Sani CJ (Malaya) in Dalip Kaur p.7 that "clear provisions should be incorporated in all State Enactments to void difficulties of interpretation by the civil courts" particularly in view of the new cl. (1A) of art. 121 of the Constitution which as from 10th June 1988 had taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah courts. Be that as it may, in our opinion, **the jurisdiction of the Syariah courts to deal with the conversion out of Islam**, **although not expressly provided in the State Enactments can be read into them by implication derived from the provisions concerning conversion into Islam."** (Emphasis provided).

It must be noted that in Soon Singh's (9) case, the plaintiff himself was the person who had converted to Islam and wanted to convert out of Islam. He was deemed to be still a Muslim until he had obtained an order that he was no longer a Muslim. So, he could file another application in the syariah court. What if the plaintiff is a non-Muslim, like Dalip Kaur?(14)

We shall now move on the another area of conflict. It is where **in one case there are issues which are within the jurisdiction of the civil courts and there are also issues which are within the jurisdiction of the syariah court**. A very good example is the case of G. Rethinasamy v. Majlis Agama Islam, Pulau Pinang (1993) 2 M.L.J. 166 (2).

The Plaintiff was a non-Muslim. He filed a suit against the Defendants in the High Court claiming vacant possession of a portion of the land registered in his name as owner. On that portion stood part of a mosque and Muslim burial ground. He alleged that the First Defendant had agreed to demolish that part of the mosque and vacate the land but had refused to do so. He also alleged that he was the registered owner of the land and had an indefeasible title to it. He prayed for a declaration that that he was the registered owner of the land and for vacant possession.

The Defendant raised defences of estoppel, adverse possession and wakaf.

We can see clearly that the Plaintiff was right in filing the suit in the High Court. As far as the Plaintiff was concerned the subject matter of his claim and his causes of action were within the jurisdiction of the High Court. Indeed, as a non-Muslim he could not file a suit in the syariah court. The Defendants too had raised defences which were clearly within the jurisdiction of the High Court. But, the Defendands had also raised the defence of Wakaf. Wakaf was within the jurisdiction of the syariah court.

The issue of jurisdiction was not raised by either party, for obvious reason: where else could they have their dispute adjudicated? However, in my judgment I did touch on it.

What should the court do in the circumstances? Should the court tell the Plaintiff that since a defence of wakaf had been raised he should go and file a suit in the syariah court? He would say, "I can't do that. I am not a Muslim." Further, he would say, "The problem is not my doing. The subject matter of my suit and my causes of action are within the jurisdiction of the this court. It is the Defendants who have raised the defence of wakaf which is outside the jurisdiction of this court. If this court has no jurisdiction to entertain that defence, that defence should be struck out."

To that the Defendants would reply, rightly too: "That is not fair. We are being deprived of a valid defence."

Should the court tell the Defendants that they should go to the syariah court and file a suit asking for a declaration that the disputed part of the land was a wakaf land? The Plaintiff would say, "That is not fair. I can't go there and defend myself." Indeed, both parties would say, "What about the other issues? Issues of estoppel, adverse possession and indefeasibility of title are issues for the civil court to decide. Besides, there will be two judgments from two different courts in the same case. The two courts may make two conflicting findings of facts, if not law!

Anyway, in that case I heard the case and decided on all the issues. Appeal to the Court of Appeal was withdrawn after it was argued for a few hours. So, rightly or wrongly my judgment stands.

The case of Jumaaton dan Raja Delila v. Raja Hizaruddin JH (1419)H Jld.XII Bhg. II, 201(15) deserves special mention. It is a judgment of the Syariah Court of Appeal, Federal Territory, Kuala Lumpur.

One Raja Nong Chik, a Muslim, died leaving 12 beneficiaries and a considerable amount of property. The beneficiaries applied for the Letter of Administration in the High Court. By consent, the High Court made an order appointing the Public Trustees Berhad as an administrator for a period of four months of the estate of Raja Nong Chik in respect of the undisputed assets, with some conditions.

Subsequently an application was made by two of the beneficiaries to the Syariah High Court, praying for declarations that:

(a) certain shares registered in the name of the Respondent at the time of death of the deceased was held on behalf of the deceased and formed part of the estate of the deceased;

(b) that all shares, dividends, bonus shares or rights issues received by the respondent in respect of the shares since the death of the deceased was held on behalf of the deceased and formed part of the deceased's estate;
(c) That all the beneficiaries of the deceased's estate were entitled to their respective shares of those assets in accordance with the "faraid".

The case was decided on two preliminary issues:
(a) whether the Applicants had the locus standi to make the application;
(b) whether the syariah court had the jurisdiction to entertain the application.

Both the Syariah High Court and the Syariah Court of Appeal answered both questions in the negative i.e. the Applicants had no locus standi and that the syariah court had no jurisdiction.

On the first issue, it is interesting to note that the Syariah Court Appeal relied heavily on judgments of the civil courts including that of the House of Lords of England.

On the second issue, which is more relevant to present discussion, the Syariah Court of Appeal referred to the provisions of the List I (Federal List) and List II (State List.) List I (Federal List) provides, inter alia:

> "….succession, testate and intestate; probate and letters of administrations;……"

List II (State List) provides, inter alia:

> "….Islamic law relating to succession, testate and intestate….".(of person professing the religion of Islam and both parties in this case were Muslims).

The court held that since "probate and letters of administration" was in the Federal List and not in the State List, State Legislatures had no power to make laws regarding probate and letters of administration. Further, since "succession' (distribution of estate) involved the granting of probate or letters of administration which was within the civil court to grant, the syariah court had no jurisdiction over the matter in spite of the provisions in the State List and the Administration of Islamic Law (Federal Territories) Act 1993.

It must be noted that section 46 of the Administration of Islamic Law (Federal Territories) Act 1993 provides, inter alia:

"46.(1) ….
(2) A Syariah High Court shall-
(a) ……..

(b) in its civil jurisdiction, hear and determine all actions and in proceedings in which all parties are Muslims and which relate to –

……..

(viii) division and inheritance of testate or intestate property;

(ix) the determination of persons entitled to share in the estate of a deceased Muslim or of the shares to which such persons are respectively entitled;"

Section 50 of the same Act provides:

"50. If in the course of any proceedings relating to the administration or distribution of the estate of a deceased Muslim, any court or authority, other than the Syariah High Court or a Syariah Subordinate Court, is under the duty to determine the persons entitled to share in the estate, or the shares to which such persons are respectively entitled, the **Syariah Court may**, on the request of such court or authority, or **on the application of any person claiming to be a beneficiary** or his representative and on payment by him of the prescribed fee, **certify the facts found by it and its opinion as to the persons who are entitled to share in the estate and as to the shares to which they are respectively entitled."**

I would have thought that the question of which court has the jurisdiction to grant probate or letters of administration is of no relevance to the application before the syariah court. The application before the syariah court was **not** for the distribution of the estate, but only for declarations whether the said shares formed part of the estate of the deceased and whether the beneficiaries were entitled to them and in what proportion, according to "faraid". Are the questions "Are the shares part of the estate of the deceased?", "Are the beneficiaries entitled to them and if they are in what proportion according to "faraid"?" not questions of "Islamic law relating to succession"? All that the syariah court was asked to do was to decide those issues according to Islamic law. After the issues are decided, the parties will go back to the High Court to get an order of distribution in accordance with the ruling of the syariah court. Do these issues not fall within the provisions of section 46(2)(ix) and section 50 of the Act? Of course, it is different if the application is for an order of distribution of the estate under section 46(2)(b)(viii). Then, the grant of Letter of Administration becomes necessary.

It is ironical that in that case the Syariah Court of Appeal decided the issue of locus standi relying on Civil law authorities in spite of the provision in the Act but, at the same time, said that it had no jurisdiction to decide issues of Islamic law relating to succession.

Conflicts in Criminal Jurisdictions

At the time when the Constitution was drafted, the Penal Code, adopted from the Indian Penal Code was long in force. Criminal offences under the Code or other laws were administered by the civil courts. The "criminal offences" created by the early Administration of Muslim Law Enactment (I am using the Penang State Enactment as my reference) were confined to offences outside the purview of the Penal Code and other Federal laws. So, there was no conflict of jurisdiction.

However, in 1996 the Syariah Criminal Offences (State of Penang) 1996 (Again, I am using the Penang Enactment as my reference. Enactments in other States and the Federal Territory Act contain similar provisions.) introduced new offences e.g. gambling, incest, prostitution, muncikari (defined as "a person who acts as a procurer between a female person for any purpose which is contrary to Islamic Law"), liwat (defined as "sexual relations between male persons"), musahaqah (defined as "sexual relations between female persons") and indecent acts in public place.

At least some of these offences, to a certain extent, appear to overlap with offences already in existence in the Penal Code and other federal laws. "Liwat", for example, appears to overlap with "sexual intercourse against the order of nature" and "outrages on decency"(sections 377A and 377D of the Penal Code, respectively), "muncikari" and "indecent acts in public place" with "outrages on decency" (section 377D of the Penal Code which includes "procures or attempts to procure") and "gambling" with "gaming in common gaming house" and "gaming in public" (sections 6 and 7 respectively of the Common Gaming Houses Act 1953 (Act 289).

(It should be pointed out that the Penal Code too had undergone changes over the years. For, example, what was "unnatural offence" (section 377) was in 1989 split into "buggery with an animal" (section 377) and "carnal intercourse against the order of nature" (section 377A))

These new offences (provided by the State Enactments) were made after the introduction of Article 121(1A) of the Federal Constitution. So, it was inevitable that a conflict would one day arise. And, it did arise in the case of Sukma Darmawan (4).

In that case, the appellant was charged with an offence of gross indecency under section 377D of the Penal Code in the Sessions Court. He pleaded guilty and was convicted and sentenced to six months imprisonment. Subsequently, he applied for an order of habeas corpus in the High Court. He argued that it was the syariah court that had jurisdiction over his case, not the Sessions Court. His application was dismissed by the High Court. His appeal to the Court of Appeal was also dismissed. Gopal Sri Ram JCA, delivering the judgment of the Court of Appeal, inter alia, said:

> "Accordingly, in the light of the authorities we have referred to earlier in this judgment, we have come to the conclusion that the expression "jurisdiction of the syariah courts" refers to " the exclusive jurisdiction" of those courts. In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code (FMS Cap 45) and the Act (Syariah Criminal Offences (Federal Territories) Act 1997 – added), then the courts referred to in art 121 (1) (the Civil Courts – added) will have jurisdiction to try such an offence . It is only in respect of offences under the Act that a syariah court may have exclusive jurisdiction . For example, the offence of adultery which is prescribed as an offence under the Act has no equivalent in the Penal Code (FMS Cap 45) or other federal criminal statutes. So if a person professing the religion of Islam commits adultery, then he or she may be tried only in a syariah court…..
>
> We also note that the offence defined by s 377D of the Penal Code (FMS Cap 45) is much wider than the offence of "liwat" under the Act. This reinforces the view we take in regard to the interpretation that art 121(1A) should receive. It is no doubt true that the prosecution used the term "meliwat" to describe the actus reus committed by the appellant in the statement of facts in support of the charge. But the use of that expression did not take the case out of the jurisdiction of the sessions court. For it must be borne in mind that the sessions court was not dealing with an offence of "liwat" under the Act. It was merely dealing with an offence of gross indecency under s 377D of the Penal Code (FMS Cap 45)."

I wonder, what the answer would have been had the issue whether the offence of "liwat " under the Act was ultra vires the Federal Constitution to the extent that it overlapped with an offence under the Federal Law, the Penal Code, a "criminal law" contained in the Federal List, been referred to the Federal Court for determination. Under Article 128 of the Federal Constitution, the Federal Court has the exclusive jurisdiction to determine "any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws."

What are the solutions?

In **criminal matters**, it is a matter of drawing the line between what are Federal matters and what are State matters i.e. interpretation of the Lists. Besides referring the issue of validity of the law to the Federal Court under Article 128 of the Federal Constitution, the judgment of the Court of Appeal in Sukma Dermawan (4) may provide the solution.

There are calls to interpret the words “Islamic Law” in the State List more widely, to include all of the Syariah. That, if done, will definitely give rise to more conflicts. It is true that the term “Islamic law” is used in the State List but the same List also provides in respect of creation and punishment of offences: “creation and punishment of offences by persons professing the religion of Islam against precepts of that religion, **except in regard to matters included in the Federal List”.**

In **civil matters**, the problem is more complex. We have seen that even if a matter falls under the jurisdiction of the syariah court, one of the parties may be a non-Muslim over whom the syariah court has no jurisdiction. We have seen that in one case there may be issues that fall within the jurisdiction of the syariah court as well as issues falling under the jurisdiction of the civil court. Which court is to decide such cases?

I have, in the case of Lim Chan Seng (11) (repeated in Abdul Shaik bin Md. Ibrahim (8) ventured to make two suggestions. One is that such cases be heard by the civil court sitting with a syariah court judge. The syariah court judge decides the Islamic law issues which decision binds the civil court judge. The civil court judge decides all other issues and the case.

The alternative is to unify the civil and the syariah courts at all levels. It also means federalising the syariah courts. People qualified in civil law as well as people qualified in Islamic law are appointed judges of the same court at all levels. Islamic law cases, civil or criminal, are heard by judges qualified in Islamic law . Non-Islamic law cases are heard by judges qualified in civil law. If, in a case there are issues involving both laws, two judges should sit, one from each discipline. The judge with Islamic law qualification decides issues of Islamic law. The judge with civil law qualification decides the other issues. The final judgment, the judgment of the court, is given by both of them, jointly. (This second suggestion may also help to solve a host of other problems (personnel, administrative, enforcement etc.) faced by the syariah courts. It would require a separate paper to discuss this suggestion alone.)

I must admit that it is easier said than done. But that should not stop us from discussing it. There may be other and better ideas.

List of cases referred

(1) Commissioner for Religious Affairs v. Tengku Mariam (1970) 1 M.L.J. 220 (F.C.)

(2) G. Rethinasamy v. Majlis Agama Islam Pulau Pinang (1993) 2 M. L. J. 166 (H.C.)

(3) Myriam v. Mohamed Ariff (1971) 1 M.L.J. 265 (H.C.)

(4) Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia (1999) 1. M.L.J. 266 (C.A.)

(5) Shahamin Faizul Kung bin Abdullah v. Asma bt. Hj. Junus (1991) 3 C.L.J.2220 (H.C.)

(6) Mohamed Habibullah bin Mahmood v. Faridah bte. Dato' Talib (1992) 2 M.L.J. 793 (S.C.)

(7) Md. Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur (1998) 1 M.L.J. 681 (H.C.)

(8) Abdul Shaik bin Md. Ibrahim v. Hussein bin Ibrahim (1999) 5 M.L.J. 618 (H.C.)

(9) Soon Singh a/l/ Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (1999) 1 M.L.J. 489 (F.C.)

(10) Majlis Agama Islam Pulau Pinang v. Isa Abdul Rahman (1992) 2. M.L.J.244 (S.C.)

(11) Lim Chan Seng v. Pengarah Jabatan Agama Islam Pulau Pinang (1996) 3 C.L.J. 231 (H.C.)

(12)Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (Perkim) Kedah & Anor. (1994) 2 C.L.J. 107)

(13)DalipKaur w/o Gurbux Singh v. Ketua Polis Daerah Bukit Mertakjam, Pulau Pinang. High Court, Penang O.S. No. 24-795-91

(14) Dalip Kaur w/o Gurbux Singh v. Ketua Polis Daerah Bukit Mertajam, Pulau Pinang (1992) 1 M.L.J. 1

(15) Jumaaton dan Raja Delila v. Raja Hizaruddin JH (1419) H Jld.XII Bhg. II, 201.